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United Nations Office on Drugs and Crime

The United Nations Convention against Corruption

# Reporting on Corruption

## A Resource Tool for Governments and Journalists

United Nations Office on Drugs and Crime
Vienna

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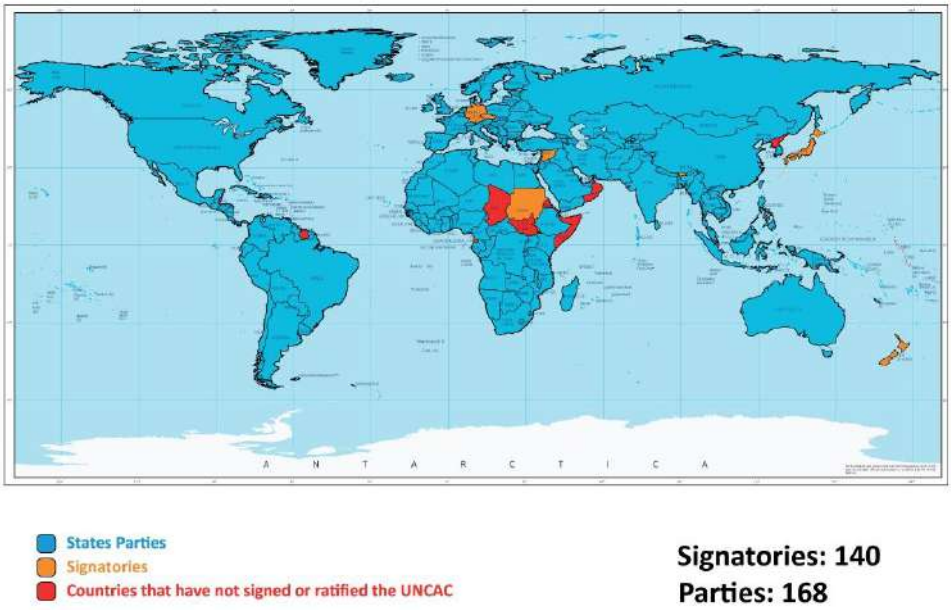
# Contents

# PREFACE

The United Nations Convention against Corruption (UNCAC, or the Convention) is the only universal, legally-binding anti-corruption instrument.[1] It embodies innovative and globally accepted anti-corruption standards applicable to both the public and private sectors and provides a comprehensive approach to preventing and combating corruption. The Convention is a remarkable international achievement, which bears witness to the global extent of the problem of corruption.

As of 1 October 2013, UNCAC has been ratified by 168 Parties, and is steadily approaching universal ratification. Countries that are not yet parties to the Convention have been called upon or encouraged to ratify or accede to it at all major fora, including the General Assembly, the Group of 8 (G8) and the Group of 20 (G20). The United Nations Office on Drugs and Crime (UNODC) is the guardian of UNCAC and has been entrusted with its advancement and implementation.




With UNCAC, corruption has been redefined as a problem which exists in and concerns every country around the world. Efforts to prevent and combat corruption are now an obligation under international law.

UNCAC emphasizes the simple fact that corruption – or the risk of corruption – impacts all sectors of society. Therefore, the participation of all sectors of society is essential to prevent and fight corruption efficiently and effectively, to support international cooperation and

[1] Other anti-corruption instruments have either regional or specific thematic scope. A compilation of these instruments can be found in the Compendium of International Legal Instruments on Corruption (Second edition). http://www.unodc.org/documents/corruption/publications_compendium_e.pdf

technical assistance, and to promote integrity and accountability in the management of public affairs and public property.

## Potential of UNCAC and the review mechanism

A peer review mechanism on the implementation of UNCAC has been in place since 2009 to foster exchange between States parties, inspire reform processes and support States in moving forward in their fight against corruption. States are encouraged to undertake broad consultations at the national level with all relevant stakeholders, including the private sector and civil society, during the self-assessment stage of the review, and during the country visit of the peer reviewers.[2]

Whilst the review mechanism respects the confidentiality of the process, States parties are encouraged to exercise their sovereign right to publish their country review report or part thereof. The increasing number of reports and self-assessments which are made available by States parties on the country profile pages of UNODC[3] is a testimonial to the growing trust in and the added value of the review mechanism. The country profile pages comprise all review-related information pertaining to the country in question, as well as links to the UNODC Tools and Resources for Anti-Corruption Knowledge (TRACK) Portal and the Legal Library through which the relevant national legislation can be accessed.

Some States parties have even started to assess their implementation of UNCAC outside of the official review process by conducting gap analyses as a basis for informed policy decisions and law reforms.

This positive trend merits recognition and is an encouraging starting point for the second review cycle, which will address the implementation of chapters II and V of the Convention.

In chapter II of UNCAC, article 13 calls for States parties to take appropriate measures to promote the active participation of individuals and groups outside the public sector in anti-corruption efforts, in particular in the prevention of corruption, the fight against corruption and in increasing public awareness about its existence, causes and the threat it poses.

***Article 13. Participation of society***

*1. Each State Party shall take appropriate measures, within its means and in accordance with fundamental principles of its domestic law, to promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, in the prevention of and the fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption. This participation should be strengthened by such measures as: (…)*

[2] Terms of Reference of the Mechanism for the Review of Implementation of UNCAC, para. 28 and 30. http://www.unodc.org/unodc/en/treaties/CAC/IRG.html

[3] Reports of several countries, including Bulgaria, Brunei Darussalam, Chile, Finland, France, Georgia, Kuwait, Morocco, Spain, Switzerland, South Africa, United Kingdom, and Ukraine as well as self-assessments of Brazil, Bangladesh, Botswana, Colombia, Portugal, Rwanda, Tanzania and the United States are accessible online. http://www.unodc.org/unodc/en/treaties/CAC/country-profile/index.html

*(d) Respecting, promoting and protecting the freedom to seek, receive, publish and disseminate information concerning corruption. That freedom may be subject to certain restrictions, but these shall only be such as are provided for by law and are necessary:*

*(i) For respect of the rights or reputations of others;*

*(ii) For the protection of national security or ordre public or of public health or morals.*

The Conference of the States Parties to the United Nations Convention against Corruption and its Intergovernmental Working Group on Prevention have recurrently requested UNODC to collect information on good practices for promoting responsible and professional reporting on corruption for journalists.[4] The Working Group has also noted the possibility of other future work to promote responsible, professional and safe reporting in accordance with article 13 of the Convention, in particular paragraph 1 (d) of this article, and the respective laws of the States parties.[5] In its resolution 4/3, the Conference of the States Parties took note of UNODC's efforts to gather information on good practices in promoting responsible and professional reporting by journalists on corruption, and requested it to further collect and disseminate such information.

This Resource Tool[6] has been developed in line with these requests and in broad consultation with all relevant stakeholders, including governments, journalists and intergovernmental as well as non-governmental organizations.

The Tool complements multiple anti-corruption efforts by the United Nations, other international organizations, non-governmental organizations, and the public and private sector worldwide in the area of reporting on corruption. It is designed to examine and highlight good practices – both in the journalism profession and in legislation promoting broader freedoms of opinion and expression – that can support United Nations Member States in their anti-corruption efforts.

Nothing in its contents should be understood as limiting or preventing States parties and other relevant stakeholders to go beyond the standard of the Convention in their efforts to promote its purposes, specifically in the area of prevention of corruption, including integrity, accountability and proper management of public affairs and public property.

[4] Conference of the States Parties to the United Nations Convention against Corruption, resolution 3/2 of 2009, and resolution 4/3 of 2011. http://www.unodc.org/unodc/en/treaties/CAC/CAC-COSP-session3-resolutions.html; http://www.unodc.org/unodc/en/treaties/CAC/CAC-COSP-session4-resolutions.html

[5] Intergovernmental Working Group on Prevention, December 2010. http://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup4/2010-December-13-15/V1058778e.pdf

[6] This Resource Tool is henceforth referred to as Resource Tool or Tool throughout.

# INTRODUCTION

# I. Introduction

Corruption has evolved into a very sophisticated phenomenon. A local incident gains an international dimension as money moves across borders with a mere click of a button. Companies with an office in one country can be a cover for illicit operations around the globe, individuals can camouflage assets under many complex layers – the list is endless.

This is precisely why the need for strong investigative reporting becomes even greater. UNCAC is an acknowledgement not only of the scope of public and private corruption, but also of the global resolve to address it through preventive measures, including transparency and active public involvement, as well as through criminalization, law enforcement and international cooperation.

UNCAC reinforces the belief that States are best served when more information of public interest is made available to more people.[7] It provides for States parties to allow and encourage free and open dissemination of information and discourse, with the understanding that anti-corruption efforts flourish best with the help of an informed citizenry.

Examples of transparency are seen in virtually every region of the world. Fuelled by modern technology, access to public records has increased substantially in both the number of documents available and in the methods of delivering the information. According to the Centre for Law and Democracy's Right to Information Index, of the top 20 right of access to information laws worldwide, 18 were written and implemented since 2000.[8] Governments in many countries, such as Brazil,[9] Kenya,[10] and Georgia,[11] have established online portals, making public procurement records, local business filings and other vital information open and free to the public.

> Access to public information is increasing around the globe, but attacks on journalists and a free press persist.

Providing such information in a meaningful way and with regularity is a challenging and often expensive task. However, society is the ultimate beneficiary, and along with it, confidence in government grows. States embarking on such projects often find themselves in need of substantial technical expertise, and are advised to use successful programmes around the world for guidance.

[7] Including in articles 10 and 13 of UNCAC.

[8] Centre for Law and Democracy RTI Global Index, 2013. http://www.law-democracy.org/live/wp-content/uploads/2012/08/RTI-Chart.pdf

[9] Transparency Portal and Brazil National Open Data Portal. http://www.portaldatransparencia.gov.br ; http://dados.gov.br/

[10] Kenya National Data Portal. https://opendata.go.ke/vision

[11] Ministry of Justice of Georgia, Business and Property Records Portal. http://www.napr.gov.ge/?lng=eng

Unfortunately, this growing embrace of the freedoms of opinion and expression including the right of access to information[12] has not coincided with better and safer conditions for journalists and a free press. According to a report by the Secretary-General of the United Nations Educational, Scientific and Cultural Organization (UNESCO), 127 journalists were killed doing their jobs in the period 2011-2012. Most of the victims were "journalists reporting on local conflicts, corruption and other illegal activities, and many of these attacks were perpetrated by police and security personnel, militia, as well as non-state actors, such as organized crime groups".[13]

A 2013 Freedom House report found that "less than 14 per cent of the world's people – or roughly one in six – live in countries where coverage of political news is robust, the safety of journalists is guaranteed, state intrusion in media affairs is minimal, and the press is not subject to onerous legal or economic pressures".[14]

In the past five years, there have been significant declines in many countries, "suggesting that attempts to restrict press freedom are widespread and challenges to expanding media diversity and access to information remain considerable".[15]

Furthermore, journalists are routinely targeted by attackers with impunity in many parts of the world, according to the Committee to Protect Journalists. Half of all the journalists killed in 2012 covered politics or investigated matters of corruption.[16]

Despite such dangers, reporting on corruption continues undeterred, making a valuable contribution to the betterment of society. In Mexico, determined journalists have used the country's progressive public records laws to expose bribery allegations against an

[12] In this Resource Tool, the terms "freedoms of opinion and expression" and "right of access to information" are used. These terms reflect the General Comment No. 34 of the Human Rights Committee according to which the freedoms of opinion and expression embrace the right of access to information. http://www2.ohchr.org/english/bodies/hrc/docs/CCPR-C-GC-34.doc
Thus, when freedoms of opinion and expression is used, it is meant to include the right of access to information. Other human rights bodies share this opinion. The first international tribunal to recognize the right of access to information as a human right was the Inter-American Court of Human Rights in Claude Reyes vs Chile. Article 13 (1) (d) of UNCAC underpins international human rights instruments and its formulation is closely aligned to article 19 of the Universal Declaration of Human Rights and article 19 of the International Covenant on Civil and Political Rights. Further details about this issue are highlighted in various chapters of the report. Some other common terms are freedom of information and access to information, which will be used in case of direct quotes.

[13] UNESCO, "The Safety of Journalists and the Dangers of Impunity, Report by the Director-General,'' 23 March, 2012. http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CI/CI/images/Themes/Freedom_of_expression/Safety_Report_by%20DG_2012.pdf Also: Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, para. 93. http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G12/137/87/PDF/G1213787.pdf?OpenElement

[14] Freedom House, "Freedom of the Press 2013''. http://www.freedomhouse.org/report/freedom-press/freedom-press-2013

[15] Freedom House, "Freedom of the Press 2013''. http://www.freedomhouse.org/report/freedom-press/freedom-press-2013

[16] Committee to Protect Journalists Special Report 2013, "Getting Away With Murder''. http://www.cpj.org/reports/2013/05/impunity-index-getting-away-with-murder.php

international corporation.[17] Investigative journalists all over the world increasingly use state business registries, stock exchange records and other public documents to expose webs of offshore transactions that enable corruption and deprive governments of badly needed funds.

At the same time, trust in the media has been challenged in recent years, with journalists in India, Pakistan, Romania, the United Kingdom, and many other countries accused of blackmail, extortion, telephone hacking, bribery, and more. Such cases have had an impact on the public's trust in the ability of journalists to serve them, and the truth.

Ethical lapses are sometimes used to justify reactionary laws and other measures that can, even when earnestly intended to protect the public, diminish the essential freedom of opinion and expression and be too short-sighted.

In the Media Self-Regulation Guidebook published by the Organization for Security and Co-operation in Europe (OSCE), it is highlighted that "quality and self-regulation must not be treated by governments as preconditions to granting full freedom; on the contrary, ethical journalism can only develop in an atmosphere of guaranteed freedom. Journalists' self-restraint must be preceded and accompanied by governmental self-restraint in handling of media".[18] This is an important pointer that should be kept in mind whilst encouraging ethics and accountability in investigative journalism.

Press councils and citizen complaint boards are welcome examples of industry self-regulation, but ultimately, accountability has to begin at the individual level, i.e. with journalists themselves.

More eyes are watching than ever before, a sign of how much the world has changed since UNCAC entered into force at the end of 2005. Mobile devices such as smartphones that did not even exist at that point are now used routinely to help expose corrupt actors with video and camera shots that spread rapidly around the world. Investigative reports shared through Twitter, Facebook and other social media are used to galvanize the public in protest against blatant corruption.[19]

What has not changed however, is the need for investigative reporting to make sense of this flow of information, dig further and provide context and details to an informed citizenry.

This Tool showcases examples of the finest investigative reporting on corruption, and explains how the stories were produced. It highlights legal frameworks and good government practices that could serve as sources of inspiration or models for States seeking to unleash the tremendous potential of investigative reporting in their fight against corruption. It strives to

[17] New York Times, "WAL-MART ABROAD: How a retail giant fuelled growth with bribes,'' 21 April 2012. David Barstown and Alejandra Xanic von Bertrab, http://www.nytimes.com/2012/04/22/business/at-wal-mart-in-mexico-a-bribe-inquiry-silenced.html?pagewanted=all&_r=0 More details are presented in a case example in chapter VIII of this Tool.

[18] http://www.osce.org/fom/31497

[19] As affirmed by the resolution A/HRC/RES/20/8 adopted by the Human Rights Council on 16 July 2012 on the promotion, protection and enjoyment of human rights on the Internet, "the same rights that people have offline must also be protected online, in particular freedom of expression".

encourage investigative reporting on corruption, its causes, the challenges faced by specific groups – such as women, children or marginalized groups – or sectors and on anti-corruption efforts of the government.

Preparation of this Tool included interviews with dozens of investigative journalists, editors, governmental experts, scholars, attorneys and law enforcement officers. More than 40 international experts from over 20 countries across the globe gathered in Vienna to further discuss the topic, and their valued opinions are included throughout. The experts stressed the need for guidance, while warning that there is no "one size fits all" solution to this complex issue. What works at the largest and best-funded Western media organizations cannot be applied in countries where journalists make poverty wages and struggle in extremely difficult circumstances in pursuit of a story. Therefore, the ideas in these pages should be adapted and used by local journalists and lawmakers to fit the needs of their societies whilst respecting essential principles. States parties as well as all relevant stakeholders are invited to continue to collect and disseminate information on the subject, specifically on cases relating to corruption.

This Tool is not a true how-to manual, although it offers detailed suggestions from leading journalists on innovative ways to use a vast and growing trove of public records and independent media networks. The flood of information in today's inter-connected world creates an opportunity for journalists focused on corruption, and this document provides advice for extracting that information and explaining what it means to the public.

It also places great emphasis on the need for ethics, accountability and accuracy that distinguish professional investigative reporting from an increasing number of online and social media sites that often publish information without the depth and context such efforts require. Most of the measures outlined have been long practiced and taught by respected journalists and academics. This document also takes a step further, introducing innovative suggestions, such as standardizing computer records across nations, enlisting lawyers to work pro-bono with journalists, and increasing the use of cross-border journalism networks and evidence-based activism.

In the best circumstances, quality investigative reporting alerts the public to dangers and wrongdoings, prompting swift action by governments and law enforcement.

***Case example: Croatia – Working towards the same goal; Investigative journalism leads to police investigation***

In November 2012, Croatian authorities arrested dozens of people in a wide-ranging bribery probe involving prescription medications, and announced that 350 physicians remained under suspicion. Pharmaceutical salesmen, doctors and other public health officials were among those detained or investigated in a scheme which involved payments of millions of Euros in bribes to doctors who in turn prescribed medicines produced by the company in question to an unwitting public, even when other medicines would have been more effective.

The arrests exposed a problem of great importance to the health and welfare of the Croatian people as prosecutors and other officials made clear when announcing the charges. The announcement was also distinctive, in that law enforcement agencies clearly noted the important role that journalism played in the outcome.

"Journalist Natasa Skaricic first discovered (the bribery), which subsequently led to an investigation into this case,'' said Vuk Djuricic, a spokesman for Croatia's Office for the Prevention of Corruption and Organized Crime, ensuring that the public knew of the importance of investigative reporting and openly acknowledged the positive relationship between police and journalists.

*Sources: Reuters, "Croatia arrests pharma staff, doctors in bribery case," November 2012; SETimes.com, November 2012*
http://www.reuters.com/article/2012/11/12/croatia-pharmaceuticals-bribery-idUSL5E8MCAXF20121112

# INVESTIGATIVE JOURNALISM

# II. Investigative journalism

Governments around the world are actively engaged in the implementation of UNCAC. The related efforts are generating momentum within and outside government for more access to public records.

This access has become a valuable tool for bloggers, social media pundits, tweeters and others who disseminate information - sometimes for their own purposes - with little regard for the facts and often without the filter of traditional media outlets. The increasing prevalence of social media repeatedly leads to questions of how to define a journalist, possible registration of journalists and into a broader discussion on free press, as well as the need for and requirements of self-regulation.

There is no universal definition of what makes a journalist. However, the all-pervasive presence of the Internet and its effects on the media landscape have led to attempts at clarification. As part of a thorough and wide-ranging report, the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression in 2012, said "a definition of journalists includes all media workers and support staff, as well as community media workers and so-called 'citizen journalists' when they momentarily play that role".[20]

While there are challenges in defining who is a journalist,[21] it is easier and more useful to define an act of investigative journalism and what is required to support ethical and professional investigative journalism.

The focus on the task of investigative journalism also reflects the spirit of human rights law and article 13 of UNCAC, as both promote the freedoms of opinion and expression of society at large and not only of a specific group.

The Technical Guide to UNCAC notes that States parties should take a broad view of what comprises society and representative associations with whom they should engage. There should be a broad view and understanding of society, comprising non-governmental organizations (NGOs), trade unions, mass media, faith-based organizations etc.[22]

[20] United Nations General Assembly, Human Rights Council, 4 June 2012, "Report of the Special Rapporteur'' [A/CHR/20/17].
http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-17_en.pdf
See also the older definition of the Council of Europe's Committee of Ministers, Recommendation No. R (2000) 7. However it should be noted that this recommendation was made before social media services such as Twitter were created and before blogging and citizen journalism increased extra-proportionally.
http://www.coe.int/t/dghl/standardsetting/media/Doc/CM/Rec%282000%29007&ExpMem_en.asp#TopOfPage

[21] For ease of reading, a person tasked with investigative journalism is referred to as a journalist throughout this Tool.

[22] Technical Guide to the United Nations Convention against Corruption, UNODC 2009, page 62.

Investigative journalism holds the potential to function as the eyes and ears of citizens. Engaging in this task can mean a number of things – from attending public meetings for which citizens have no time, to uncovering documents or examining suspicious financial dealings, as well as exposing problems of tainted food and medication supplies and many other issues of vital public importance.

In this context, Paul Radu, a journalist based in Romania and Executive Director of the Organized Crime and Corruption Reporting Project, applies the term "evidence-based activism'' in which community leaders use professional investigative journalism on corruption as a basis to inform the public and spark discussion.

That type of in-depth research and analysis requires a combination of specialized training, skills and commitment to the profession.

So what is investigative journalism? Elements including *in-depth research and analysis that uncovers facts and information of public importance, and that is published or broadcast to the public* have been used to define investigative journalism in various forms for decades and are accepted by media outlets and independent watchdog organizations worldwide.

> The fight against corruption has expanded as more people access public information and share their findings in the blink of an eye. While such citizen journalism efforts can be useful, they are at best a complement and not a substitute, for professional investigative journalism.

However, they might be a bit too simplistic. Investigative reporting on corruption is time-consuming, and relies heavily on property records, company business registers, asset declarations and a range of other documents that are increasingly available to the public. The best investigative journalists take a very critical approach to their own work, questioning the accuracy of all documents, the motives of sources, and overall fairness of the report. They do not just ask sources what they know, they ask how the sources came to know it.

"Investigative journalists in some respects are kind of the Special Forces of journalism," says David Kaplan, Director of the Global Investigative Journalism Network. "They are better trained, they go after tougher targets, and their stories and investigations tend to be more complex."[23]

Defining investigative journalism becomes even more complicated in a changing world of technology, bloggers, citizen journalists and online news portals. These untrained advocates

[23] Mr. Kaplan's presentation to the Center for International Media Assistance, Washington, D.C., 16 January 2013.

may have uncovered corruption and effected change in their countries, but often use methods that fall far below professional standards.

Additionally, the Internet and evolving public records laws have enabled ordinary citizens to access documents just as easily as experienced investigative journalists. In his controversial and much discussed blog, David Winer, a visiting scholar at the New York University School of Journalism, argues that investigative journalism is becoming "obsolete" because anyone could obtain records, report the news and distribute their work.[24]

The difficulty with this argument is that it underestimates the care and skill required of true investigative journalism. Reporting on corruption is much more than gathering records, writing a news story and getting it out to the public.

"Instead of saying journalism is obsolete, I would rather say it is evolving and expanding," writes Toronto-based journalist Matthew Ingram. "What does it consist of now? Most of the things it used to, as well as some new ones: building connections with your reader community is a journalistic skill."[25] Ingram argued that this new flood of online journalists will create abuses as well as ethical and legal lapses, but that those types of issues are as old as investigative journalism, pointing to the hacking case in the United Kingdom as one of the most recent examples.

The changing media landscape has been well received in many parts of the world. China has seen an explosion of online portals and personal websites devoted exclusively to exposing corrupt public officials. In one example, activists swarmed into a private dinner held by a communist party official and filmed an extravagant feast of poisonous pufferfish and expensive wine, along with the official's desperate pleas to cover up the transgressions.[26] Within hours, the video was online and circulating rapidly on Chinese social media sites.

In another instance, a local salesman who also served as an amateur corruption watchdog in his region circulated photographs of a local party leader wearing five different luxury watches over a series of public gatherings. The blogger had spent years identifying what he called corrupt practices. The official Chinese news agency, Xinhua, even published an article about the case, entitled, "China's craze for online anti-corruption".[27] The response in both cases was swift and positive from the public and Government alike, and was praised by the news agency. The party officials were fired immediately. The episodes are a reminder of the public's role in the fight against corruption, and again underscores the vital role of public participation, as outlined in article 13 of UNCAC.

[24] David Winer Blog, 2 September 2011. http://scripting.com/stories/2011/09/02/mikeArringtonIsTheFutureOf.html

[25] Matthew Ingram, "Is journalism as we know it becoming obsolete," 11 September 2011. http://gigaom.com/2011/09/02/is-journalism-as-we-know-it-becoming-obsolete/

[26] Guardian, United Kingdom, "Chinese official sacked after citizen journalist exposes extravagant banquet", 25 April 2013. http://m.guardian.co.uk/world/2013/apr/25/china-official-sacked-extravagant-banquet

[27] Guardian, United Kingdom, "Chinese citizen journalists finding the mouse is mightier than the pen'', 11 April 2013. http://m.guardian.co.uk/world/2013/apr/16/china-anti-corruption-blogging-weibo-citizen-journalism

Ethical investigative journalists, in contrast, begin their investigations with incidents such as these, but they do not publish initial findings or tantalizing clues under any circumstances. In the above-mentioned examples, professional journalists would look for patterns of corruption among the politicians and their associates and probe possible explanations for the accumulated wealth (inheritance, investments etc.). Investigative journalists search property and business records for other holdings, and in this case, would have talked to sources to establish a pattern of behaviour – whether this incident was the norm, or isolated in nature.

Investigative journalists would also examine the government's policies to explore whether public measures were actually helping to curb corruption. They would research the property and wealth of all local leaders, to give their reports context and balance.

However, this does not diminish the role of citizen journalists, advocates for good governance, anti-corruption NGOs or countless others who gather and share information on corruption. Their role can be regarded as complementary to that of investigative journalists, and they can become an important resource for traditional journalists who should cultivate these activists and concerned citizens as part of an overall investigative strategy.

The bottom line is that diverse forms of journalism, including citizen journalism, adhoc websites and self-styled journalism, are here to stay. Journalism associations and networks need to understand and embrace this reality, and are encouraged to persuade the different players that following standards and gaining trust will ultimately benefit society more than salacious exposés.

While investigative journalists use many methods to do their work, all professionals follow accepted principles and norms. The Investigative Journalism Manual, published by the Forum for African Investigative Journalists (FAIR), concludes that journalists, media academics and commentators all agree on certain aspects of investigative journalism:

- *Thoroughly investigating an issue or topic.* An investigative story goes far beyond the basics to broaden a reader's understanding of an event, subject or condition plaguing a society.

- *The topic is of public interest.* Public interest means different things to different people, and the onus of deciding what is most important to their communities ultimately lies with local journalists and editors. That is especially true in the context of media development and the growing influence of foreign advisors, who bring an outsider's perspective that may not always capture the needs and interests of local populations.

- *Investigative reporting is a process.* In-depth journalism never provides an instant story. It goes through recognized stages of planning and reporting, and has to work to accepted standards of accuracy and evidence.

- *The information is original, and based on a journalist's initiative and verifiable findings.* A tip, leak or anonymously mailed document is not investigative journalism.

Those and similar sources of information are intriguing and can make journalists aware of previously unknown material. They can provide a roadmap for further reporting, and they can sometimes lead to outstanding investigative stories.

- *Investigative reporting should produce new information or put together previously available information in a new way to reveal its significance.*

- *Investigative reporting should be multi-sourced*. Single-source stories are almost never acceptable in any form of journalism, and that is especially true when reporting on complex issues of great import.[28]

Great investigative journalism on corruption exposes links between businesses, public officials and/or organized crime, and explains how those ties negatively impact on the public, human rights and development issue.

When court systems, hospitals, social services organizations or schools fail the public, the best investigative journalists ask "why?" Investigating those types of problems is difficult, in part because they are not easily quantifiable. To expose systemic corruption, investigative journalists must understand how those systems are supposed to work, and identify where the problems lie.

The following example of a major investigative project highlights the depth and thoroughness needed for ethical investigative journalism.

[28] FAIR "Investigative Journalism Manual'' http://fairreporters.net/ij-manuals/ (the titles and the bullet *in italics* added).

***Case example: Mexico - Information requests and investigative journalism discover gaps in law enforcement and data analysis***

In January 2012, the Mexican Attorney-General's Office released a report saying that 47,515 people were murdered between 2006 and 2012. According to the official explanation, the victims and killers almost always worked in the drug trade, and the greater, law-abiding community was not in any great danger. However, a journalist whose attention was caught by these numbers, knew from her experience that the victims also included children and fellow journalists. Local police commanders told her, on the record, that they did not investigate most shootings, particularly those with automatic weapons, because the fight against organized crime was the duty of the Federal Government. Federal law enforcement officers in turn said that since homicide was not included in the federal law on organized crime, they did not always investigate those crimes either.

The journalist had enough information for a good story, and many journalists would have taken the information, quoted all the officials, interviewed families of some victims, and written an article. However, despite the attention such a story would have attracted, it would not have been investigative journalism. At first glance, the story seems to meet many elements of investigative journalism outlined in the FAIR manual mentioned previously: The story contained information that had never been reported, and it was of a great public import. The journalist had used multiple sources and could have documented the approximate number of murders in the region over several years.

The journalist was not able to verify the information independently. While she had the statements of the two separate law enforcement agencies, she had no context and no public records to prove or disprove the claims. Furthermore, she could not have answered the question that had initiated her investigation: Are the murder victims mostly drug dealers and criminals, or has the violence spilled into the greater community?

Before beginning an investigation, journalists create a list of questions they need answered. The list will grow and evolve as new information is uncovered, but good journalists use their original questions as a touchstone that keeps them from wandering too far off topic during investigations that can continue for many months. In this case, the questions were: Who were the victims? Were the official explanations accurate? Was there corruption with the police, prosecutor's office or judiciary? The journalist also needed to address the issue raised in her interviews with local and federal law enforcement officials: Was anybody investigating and bringing the murderers to justice?

Before filing requests for information with the police and courts, the journalist compiled data from the available sources, beginning with police and court press releases over several years. Together with a colleague, she examined hundreds of press releases, searching for patterns and clues, as well as names, ages and other information on the victims. She discovered that most of the victims were young and had nothing to do with drugs.

According to the journalists working in the country, Mexico has excellent public records laws, with a strong history of compliance. However, even the best laws are not effective if journalists do not ask the right questions. They need to know what they need, to ask the right questions to get it, and also what kind of information is already available. In this case, the journalist had to investigate three branches of government: law enforcement, executive and judicial. She knew that the Government produced monthly reports of murders, and began with requesting all of them from 2008 until 2010. As there were no computer records available and the reports arrived in hard copy, the journalist compiled her own database, which finally included more than 1,000 names.

To determine what percentage of the cases had led to arrest and conviction, the journalist filed a series of requests with the judiciary and police. In addition to conviction rates, she wanted to find out what the police had done to solve murders. Getting information from the judiciary proved challenging because the courts had only one person handling the request, and no public information officer. While the person could not provide the journalist with the information she was looking for, she advised her how she could to get the records and how to make the request.

The journalist's approach underscores a fundamental rule of good investigative reporting: a request for information should not only be filed by fax, e-mail, telephone call or mail. It is much more efficient to talk to the appropriate officials directly, explaining what information is needed, and ask them how to frame the request. After gathering and analyzing all the information, the journalist concluded that nearly all cases had remained unsolved, and only two per cent of them had been investigated. Subsequent reporting by the journalist and her colleagues revealed that much of the failure had been deliberate, designed by police and prosecutors working for the drug cartels.

The specific and verifiable nature of the journalist's work attracted international attention. The International Center for Journalists (ICFJ) awarded her the prestigious Knight Award, noting her accomplishments. "She found that most of the victims were teens and young people from the poorest neighborhoods - and not drug cartel members as the officials claimed", ICFJ wrote in announcing her prize. Her analysis showed that 98 per cent of the victims were unarmed and 97 per cent of the killings were unsolved.

*Source: ICFJ website, http://www.icfj.org/awards-0 ; New York Times, "Mexico Updates Drug War Death Toll", 11 January 2012, http://www.nytimes.com/2012/01/12/world/americas/mexico-updates-drug-war-death-toll-but-critics-dispute-data.html*

This and many other examples demonstrate the importance of slow but steady and methodical investigation, and the need to understand and use public records. Investigations by journalists and news organizations around the world are worth pointing out not only for their findings, but for their ability to provoke broad public reaction through highlighting the problems. Public involvement is at the heart of article 13 of UNCAC, calling on States "to promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, in the prevention of and the fight against corruption …". This provision recognizes that the fight against corruption will not be won by legislation and law enforcement alone, but by entire communities understanding the depth of the problem and joining forces to combat it.

## The threshold question

The question as to when a story is ready to be published depends on various factors. Generally, journalists should publish only when they have good faith, and reasonable belief in the report's accuracy. In some countries, reasonableness is elevated to a legal obligation, for example in the context of a defamation action (see further details in chapter IV.B).

With regard to the special protection afforded to journalists, the European Court of Human Rights stated:

> "the safeguard afforded by article 10 to journalists in relation to reporting on issues of general interest is subject to the provision that they are acting in good faith in order to

> provide accurate and reliable information in accordance with the ethics of journalism".[29]

Even where a statement of fact on a matter of public concern has been shown to be false, defendants should benefit from a defence of 'reasonable publication' in the context of a defamation case. This defence applies, as its name suggests, if *it was reasonable for a person in the position of the defendent to have disseminated the material in the manner and form he or she did*. A rule of this type is necessary to protect the ability of the media to carry out their task of informing the public effectively.[30]

For the media, *acting in accordance with accepted professional standards* (for example, those defined in a code of conduct) should normally satisfy the reasonableness test. For example in Austrian jurisprudence, proper research, checking of the source's reliability and obtaining a statement from the person affected will normally constitute a defence to a defamation action. The European Court of Human Rights has recently emphasized that if the national courts applied an overly rigorous approach when examining the professional conduct of journalists, they could be unduly deterred from discharging their function of keeping the public informed. The European Court of Human Rights noted that this is especially important in relation to journalism on corruption. The courts had, therefore, to take into account the likely impact of their rulings not only on the individual cases before them but also on the media in general.

Finally, journalists should not be held liable for reporting, citing or reproducing the *statements of others*, so long as these statements have news value, the journalist refrains from endorsing them and if the original statements are assumed to be reliable and the journalist believes them to be true. The European Court of Human Rights has underlined the need for such an exemption:

> "Punishment of a journalist for assisting in the dissemination of statements made by another person ... would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so … A general requirement for journalists systematically and formally to distance themselves from the content of a quotation that might insult

[29] See, among other authorities, *Bladet Tromsø and Stensaas v. Norway*, European Court of Human Rights, 20 May 1999, para. 65; *Kasabova v. Bulgaria*, European Court of Human Rights, 19 April 2011, para. 63.

[30] While the reasonableness standard is generally understood globally, there are different approaches taken at the national level. In the United States, the doctrine of "actual malice" is used instead of the reasonableness standard. Because it shifts the burden of proof, the plaintiff is required to show that the defendant (e.g. the journalist) made the statement with "knowledge that it was false or with reckless disregard of whether it was false or not". This standard would offer greater protection than the reasonableness standard outlined above. See: Russel L. Weaver, "The Right to Speak Ill - Defamation, Reputation and Free Speech", Carolina Academic Press.

> or provoke others or damage their reputation is not reconcilable with the press' role of providing information on current events, opinions and ideas."[31]

This rule can be applied to official reports. The press should normally be entitled, when contributing to public debate on matters of legitimate concern, to rely on the content of official reports without having to undertake independent research. Otherwise, the vital public-watchdog role of the press may be undermined.[32]

This rule also applies to a journalist citing another journalist. The journalist quoting published statements usually cannot be held responsible for their veracity.

***Case example: Defamation and quoting others - Judgment in the case of Thoma v. Luxembourg***

The applicant in the *Thoma v. Luxembourg* case was a radio journalist who had been found liable after quoting from a newspaper article which alleged that of all the forestry officials in Luxembourg, only one was not corrupt. The European Court of Human Rights in finding that the applicant's right to free expression had been unjustly infringed, also took into account that the applicant had consistently taken the precaution of mentioning that he was beginning a quotation and of citing the author, and that in addition he had described the entire article as "strongly worded". He had also asked a third party, a woodlands owner, whether he thought that the allegations were true.

Source: *Thoma v. Luxembourg*, European Court of Human Rights, 29 March 2001, para. 62
http://echr.ketse.com/doc/38432.97-en-20010329/view/

[31] *Thoma v. Luxembourg*, European Court of Human Rights, 29 March 2001, para. 62. See also *Jersild v. Denmark*, European Court of Human Rights, 23 September 1994, para. 35.

[32] In case of *Colombani and Others v. France*, European Court of Human Rights, 25 June 2002, para. 65, the Court noted that: "The safeguard afforded by article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism. See also *Goodwin v. The United Kingdom*, European Court of Human Rights, 27 March 1996, para. 39, and *Fressoz and Roire v. France*, European Court of Human Rights, 21 January 1999, para. 54.

# RESPECTING, PROMOTING AND PROTECTING THE FREEDOM OF JOURNALISTS TO REPORT ON ACTS OF CORRUPTION

# III. Respecting, promoting and protecting the freedom of journalists to report on acts of corruption

For ethical and professional journalism to fulfil its vital role in the fight against corruption, States should offer protection for those seeking to uncover and publish information of public importance. Article 13 of UNCAC, with its call for greater transparency and public involvement in the fight against corruption, provides the tools needed for such efforts to succeed. This section explains article 13 of the Convention, particularly with respect to the right of information, a free press and the rights of those who would expose corruption, even at their own peril.

## A. Article 13 (1) (d) of UNCAC and international human rights instruments

> Article 13 of UNCAC reflects and supports international human rights instruments, specifically in regard to the freedoms of opinion and expression. Examples of legislation and jurisprudence are equally applicable and should guide the implementation of UNCAC.

Article 13, paragraph 1 (d) of UNCAC requires States parties to *respect, promote and protect* the freedoms of expression and opinion in relation to corruption as an effective anti-corruption measure. In doing so, it reflects the broader aim of article 13 and UNCAC to ensure that all elements of society are able to play a role and have their voice heard in the fight against corruption.[33]

The provision reflects and supports the human rights obligations that States parties are already subject to under other human rights instruments. According to the Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Corruption (Travaux Préparatoires):

> "The intention behind the paragraph 1 (d) is to stress those obligations which States parties have already undertaken in various international instruments concerning

[33] Preamble to UNCAC; Technical Guide to the United Nations Convention against Corruption, UNODC 2009, pages 62 and 63.

> human rights to which they are parties and should not in any way be taken as modifying these obligations."[34]

Hence, article 13 of UNCAC should be read in conjunction with international human rights instruments on the freedoms of opinion and expression. Legislation and jurisprudence, which is discussed in this Tool, is often based on these human rights instruments, most of which have been in force for much longer than UNCAC. As article 13 reflects and supports international instruments concerning human rights, these examples are equally applicable to cases concerning corruption issues and should guide the implementation of UNCAC.

From this perspective, the most relevant international instruments are:

### The Universal Declaration of Human Rights (UDHR or the Universal Declaration)

The Universal Declaration was adopted unanimously by the General Assembly on 10 December 1948. It is the most important elaboration of human rights obligations set forth in the United Nations Charter. Besides being widely viewed as a statement of principle at the time of adoption, it has acquired increasing legal significance over the decades.

Article 19 of the Universal Declaration proclaims the right to freedom of expression, which includes freedom "*to seek, receive and impart information and ideas through any media and regardless of frontiers"*. This right is limited by article 29, which permits restrictions *"solely for the purpose of securing ... 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"*. Moreover, the rights set forth in the Universal Declaration *"may in no case be exercised contrary to the purposes and principles of the United Nations"*.

### The International Covenant on Civil and Political Rights (ICCPR or the Covenant)

The International Covenant is an elaboration of the civil and political rights set forth in the Universal Declaration. The Human Rights Committee is a body of experts which monitors compliance with the ICCPR and determines individual complaints against governments which have ratified the ICCPR's First Optional Protocol. As of 1 October 2013, 167 countries had ratified or acceded to the Covenant.[35]

Article 19 provides for the right to freedom of opinion, expression and information. Paragraph 1 asserts the absolute "*right to hold opinions without interference"*. The Covenant permits no exception or restriction to this right.[36]

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[34] Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Corruption, UNODC 2010, page 145.

[35] The most recent ratification was by Guinea-Bissau on 1 November 2010.
List of States that have ratified UNCAC but not the ICCPR: 14 States (Bhutan, Brunei Darussalam, Cook Islands, Estonia, Fiji, Malaysia, Marshall Islands, Micronesia (Federated States of), Myanmar, Qatar, Saudi Arabia, Singapore, Solomon Islands and the United Arab Emirates) and the European Union.

[36] Human Rights Committee, General Comment No. 10: Freedom of expression (Art. 19): 06/29/1983 http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/2bb2f14bf558182ac12563ed0048df17?Opendocument

Paragraph 2 sets out the positive content of freedom of expression: namely, the "*freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."* Paragraph 2, unlike paragraph 1, may be subjected to restrictions as set forth in paragraph 3. In a general comment concerning article 19, the Human Rights Committee emphasized the three requirements imposed by paragraph 3 with which any restriction must comply:

> "[W]hen a State party imposes certain restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself. Paragraph 3 lays down conditions and it is only subject to these conditions that restrictions may be imposed: the restrictions must be 'provided by law'; they may only be imposed for one of the purposes set out in sub-paragraphs (a) and (b) of paragraph 3; and they must be justified as 'necessary' for that State party for one of those purposes."[37]

In addition to these instruments, a number of regional human rights instruments may be relevant: the ***African Charter on Human and Peoples' Rights***, the ***American Convention on Human Rights***, the ***European Convention on Human Rights***, and the ***Charter of Fundamental Rights of the European Union***. Details of these instruments including important differences which might be of relevance in conjunction with article 13 of UNCAC are set out in Annex I and also addressed in the subsequent chapters of the Tool.

## B. Measures to protect the anonymity of sources

### Anonymity as part of the freedoms of opinion and expression

Any measure to promote investigative reporting on corruption should begin with the premise that journalist have a right and an obligation to protect the confidentiality of their sources. The right is not absolute and journalists should bear the need for exceptions in mind.

Anonymous sources of information and an informed public are of vital importance to investigative journalism. Sometimes, investigative stories begin with tips and leaks of documents from sources who have information of vital public importance but are rightly fearful for their jobs or even their lives if their identity is made public. More often, journalists have already started investigative work and then identify new or additional sources who can provide vital context and accuracy to the story.

In the same way that criminal investigations are often triggered by so-called whistle-blowers[38] or reports of victims and witnesses, investigative journalism relies on sources to

[37] Idem.

[38] The Convention uses the term "reporting persons" which was deemed preferable to the term "whistle-blowers" which is a colloquialism that cannot be accurately and precisely translated into many languages.

come forward with information. A core principle of UNCAC is the creation of a space in which individuals and groups within and outside the public sector feel free to report on (alleged) corruption, and to disclose and communicate their experiences, expertise or knowledge about corruption.

When citizens come forward with information of a secret or highly sensitive nature, they do so because they believe such information – relating for example to corruption, poor governance or the activities of organized criminal groups – should be made known to the general public, to expose wrongdoing or to stimulate public debate on the subject. Anonymity is often a precondition for the source's willingness to speak, out of fear of retaliation if his or her name were made public. In corruption cases particularly, because of their complexity and secrecy, such indications have proved to be necessary and useful.

The classical way to protect the sources of information relating to corruption or other crime is the journalist's right to guarantee the source's anonymity.[39] There is little dispute that *on the whole sources named by journalists are preferable to anonymous ones.* If the source is known, it is easier to assess his or her credibility, motives and, indeed, existence. It is also less difficult for those affected by a wrongful disclosure (such as a malicious attack on a person's reputation or the publication of a business secret) to clear their name or to seek compensation. Nevertheless, international courts and mechanisms have been mindful that *much important information would never reach the public if journalists were unable to guarantee confidentiality to their sources. Even when the journalist knows his sources, he must normally be able to protect them from public disclosure.*

[39] A famous instance of the use of an anonymous source is the series of articles by Washington Post journalists Bob Woodward and Carl Bernstein which uncovered the Watergate Scandal, ultimately leading to the resignation of the then US President Richard Nixon. Woodward and Bernstein relied extensively on information provided by someone known to the world only under the nickname "Deep Throat." Only in 2005 did W. Mark Felt, who at the time had been serving as Associate Director of the United States Federal Bureau of Investigation, reveal that he was "Deep Throat".

***Case example: Confirmation of the right to protect sources unless overriding requirements justify revelation - Judgment in the case of Goodwin v. United Kingdom***

In the seminal case of *Goodwin v. United Kingdom*, the European Court of Human Rights ruled that an attempt to force a journalist to reveal his source for a news story violated his right to receive and impart information, and hence the right to freedom of expression. The Court considered that orders to disclose sources reduce the flow of information, to the detriment of democracy and are, therefore, only justifiable in very exceptional cases:

"Protection of journalistic sources is one of the basic conditions for press freedom. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result, the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to for the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, *such a measure cannot be compatible* with article 10 of the European Convention of Human Rights (ECHR) *unless it is justified by an overriding requirement* in the public interest. Such overriding interest may be referred to, for example, if the source is either guilty of a very serious crime or must be used as a key witness against someone who has committed such a crime."

Source: *Goodwin v. the United Kingdom*, 27 March 1996, par. 39. http://echr.ketse.com/doc/17488.90-en-19960327/

In the wake of *Goodwin*, the Council of Europe's Committee of Ministers issued a Recommendation to its Member states on how to implement the protection of sources in their domestic legislation.[40] In a more recent Recommendation No. 1950 (2011), the Council of Europe's Parliamentary Assembly specifically invites journalists and their organizations to ensure, through self-regulation, that sources are not disclosed.[41]

The right of journalists to protect the confidentiality of their sources has also been widely recognized by other international bodies, including the Inter-American Commission of Human Rights (IACHR)[42], the African Commission on Human and People's Rights (ACHPR)[43], and the European Parliament. The OSCE Member states stated, in the Concluding Document of their 1986-1989 Vienna Follow-Up Meeting: "[J]ournalists ... are free to seek access to and maintain contacts with public and private sources of information and their need for professional confidentiality is respected".[44]

[40] Recommendation No. R (2000) 7 of the Committee of Ministers to Member states on the right of journalists not to disclose their sources of information. http://www.coe.int/t/dghl/standardsetting/media/Doc/CM/Rec%282000%29007&ExpMem_en.asp#TopOfPage

[41] Parliamentary Assembly Recommendation No. 1950 (2011) The protection of journalists sources. http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta11/EREC1950.htm
See also the Reply to this recommendation adopted by the Committee of Ministers on 18 January 2012 at the 1131st meeting of the Ministers' Deputies. https://wcd.coe.int/ViewDoc.jsp?id=1898421&Site=CM

[42] The Declaration of Principles on Freedom of Expression adopted by the IACHR states: "Every social communicator has the right to keep his/her source of information, notes, personal and professional archives confidential."

[43] In Africa, the ACHPR has adopted a Declaration of Principles on Freedom of Expression in Africa which includes a right to protection of sources under Principle XV.

[44] Concluding Document of the 1986 Vienna Meeting of Representatives of the Participating States of the Conference of Security and Co-operation in Europe. http://www.osce.org/mc/16262

The European Court of Human Rights has recently made further decisions concerning protection of the identity of sources. The actual wording of article 10 of ECHR does not mention sources or recognize the protection of journalistic sources specifically.[45] Case law from the 1990s and 2000s has, however, stressed that the protection of sources is included in the protection under article 10.

***Case example: Search of home and workplace - Judgment in the case of Tillack v. Belgium***

In the case of *Tillack v. Belgium,* the European Court of Human Rights concluded that a search of a journalist's home and workplace had amounted to interference with his right to freedom of expression. The court held that *the source of information enjoys the same protection as the journalist's freedom of expression. The measures to identify the source must be based in law, they must pursue a legitimate aim, and they must be necessary in a democratic society.* The Court emphasized that a journalist's right not to reveal her or his source could not be considered a mere privilege to be granted or taken away depending on the lawfulness or unlawfulness of their source, but was part and parcel of the right to information and to be treated with utmost caution.

The applicant was a journalist who had published two articles based on information from confidential documents from the European Anti-Fraud Office (OLAF). Suspecting the journalist of having bribed a civil servant by paying him in exchange for confidential information, OLAF opened an investigation. The journalist's home and workplace were searched. Among other things, two computers, four mobile phones and 16 crates of papers were seized. Although the Government pointed out that the search was granted in order to investigate the suspected taking and giving bribes, the Court noted that at the time when the searches took place, their purpose was to identify the source of the information from OLAF and therefore linked to the protection of journalistic sources.

*Source: Tillack v. Belgium*, European Court of Human Rights, 27 November 2007.
http://echr.ketse.com/doc/20477.05-en-20071127/

Parallel to the protection against surveillance of journalists or search and seizure of their computers which will reveal confidential sources of information, Internet service providers and telecommunication companies should also not be obliged to disclose information which may lead to the identification of journalists' sources.[46]

[45] "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."

[46] http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta11/EREC1950.htm

***Case example: Surveillance of journalists and surrender of leaked documents - Judgment in the Telegraaf-Case***

Surveillance of journalists was also at issue in the case of *Telegraaf Media Nederland Landelijke Media B.V. and Others v. The Netherlands* (*Telegraaf-Case*). The Court was of the opinion that the telephone tapping and surveillance of two journalists by the Netherlands security and intelligence services lacked sufficient legal basis. The law did not provide sufficient safeguards in relation to the use of powers of surveillance against journalists in order to discover their sources. Further, an order to surrender leaked documents belonging to the security and intelligence services was considered a violation of the journalists' rights as guaranteed by article 10 of ECHR. According to the Court, there was no "overriding requirement in the public interest" justifying the order to surrender the documents.

The case concerned the actions taken by the domestic authorities against two journalists of a national daily newspaper after they published articles about the Netherlands secret service AIVD suggesting that highly secret information had been leaked to the criminal circuit, and specifically to the drugs mafia. The journalists were ordered by the National Police International Investigation Department to surrender documents pertaining to the secret services' activities. The two journalists had also been subject to telephone tapping and observation by AIVD agents. According to the domestic courts, the order to surrender the documents, the telephone tapping and observations were necessary and proportionate to reveal the leaked files. The AIVD resorted to the use of special powers not to establish the identity of the journalists' sources of information, but solely to identify the AIVD staff member who had leaked the documents. The European Court disagreed with the argument of the Government of the Netherlands disputing the journalists' position that the protection of journalistic sources was at stake.

Source: *Telegraaf Media Nederland Landelijke Media B.V. and Others v. The Netherlands,* European Court of Human Rights, 22 November 2012.

## Protection of whistle-blowers against unjustified treatment

Article 33 of UNCAC is also relevant. The article is intended to protect those individuals who come forward with factual information concerning corruption against any unjustified treatment if the report has been made in good faith and on reasonable grounds. This applies even if it is not detailed enough to constitute evidence in the legal sense of the term.

It is necessary to keep in mind that article 33 of UNCAC focuses on the protection of the whistle-blower him/herself and not on the protection of the source, which applies to the third party or intermediary who receives the information. Furthermore, it only regulates cases in which reports are made to competent authorities[47] who are in a position to take up investigations and retaliatory measures.

However, from the perspective of a whistle-blower, the need for protection remains regardless of whether he/she reveals corruption to competent authorities or to a journalist. This similarity is also pointed out by the Technical Guide to UNCAC, as journalists publish

[47] Article 8, paragraph 4 of UNCAC is drafted in a similar way by asking States parties to consider establishing measures and systems to facilitate the reporting by public officials of acts of corruption to *appropriate authorities*, when such acts come to their notice in the performance of their functions.

stories within the same criteria as stated by the article. Given the importance of promoting the general willingness of the public to report corruption, "States parties may bear in mind that until the level of confidence among the public reaches sufficiently high levels, reporting may occur outside established procedures".[48]

***Case example: Protection of a whistle-blower who leaked documents to the press - Judgment in the case of Guja v. Moldova***

The European Court of Human Rights delivered a judgment concerning the position of a whistle-blower who leaked two letters to the press and was subsequently dismissed. The Court held that the divulgence of the internal documents to the press was protected by article 10 of ECHR. Given the particular circumstances of the case, external reporting, even to a newspaper, could be justified, as the case concerned the pressure exerted by a high-ranking politician on pending criminal cases. The court held that *the public interest* in the provision of information on undue pressure and wrongdoing within the Prosecutor's Office *is so important in a democratic society, that it outweighs the interest in maintaining public confidence* in the Prosecutor General's Office.

The applicant, Mr. Iacob Guja, was Head of the Press Department of the Moldovan Prosecutor General's Office, before he was dismissed on the grounds that he had handed over two secret letters to a newspaper. Mr. Guja initiated a civil action against the Prosecutor General's Office seeking reinstatement, but this action was unsuccessful. Relying on article 10 of ECHR, he complained to the European Court of Human Rights about his dismissal.

The Court, being of the opinion that Mr. Guja had acted in good faith, noted that it was the *heaviest sanction possible (dismissal) that had been imposed on the whistle-blower*. The sanction not only had negative repercussions on his career, but could *also have a serious chilling effect on other employees* from the Prosecutor's Office *and discourage them from reporting any misconduct.*

*Source: Guja v. Moldova*, European Court of Human Rights, 12 February 2008.
http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-85016#{"itemid":["001-85016"]}

## Subjects to the right to protect sources

Journalists are normally those most affected by the right to protect the confidentiality of sources. Nevertheless, that right can sometimes be validly invoked by people who would not normally identify themselves as journalists. As the ruling of the European Court of Human Rights in the *Goodwin* case[49] illustrates, the purpose of the right is to ensure that sources are not deterred from conveying important information to the public through a middleman. The middleman is also entitled to invoke the right to protect his or her sources. In most cases, this role is played by a "traditional" journalist in the service of a mass media outlet; but there is no reason to apply a different rule when the middleman is someone else whose profession involves collecting and disseminating information, such as an NGO activist or academic commentator.

[48] Technical Guide to the United Nations Convention against Corruption, UNODC 2009, pages 106.
[49] See page 26 of this Tool.

In their efforts to define the right to protect sources, some international bodies such as the IACHR have opted to avoid the term "journalist"[50] entirely. Other bodies have chosen a very wide definition of "journalist", covering anyone who serves as a conduit of information to the public, regardless of whether they would normally be perceived as journalists. Some domestic laws adopt a more limited definition, covering only "traditional" journalists. Finally, in addition to "non-traditional" journalists, international law also entitles persons who assist journalists in their work to invoke the right.[51]

Like the freedoms of opinion and expression from which it is derived, the right to maintain confidentiality of sources is not an absolute one: in certain narrowly-defined circumstances, it may be subject to some limitations.[52] For example, in Europe, the guidance from the Council of Europe and the case law from the European Court of Human Rights can be summarized as follows.[53]

A journalist should only be ordered to disclose the identity of a source if there is an overriding requirement in the public interest, and *the circumstances are of a vital nature.* The Council of Europe's Parliamentary Assembly's Recommendation No. 1950 (2011) reiterates that "disclosure should be limited to exceptional circumstances where vital public or individual interests are at stake and can be convincingly established. (…) If sources are protected against any disclosure under national law, their disclosure must not be requested".

Further, the Recommendation highlights that this also applies to sources from within the police or judicial authorities. Where such provision of information to journalists is illegal, police and judicial authorities must pursue internal investigations instead of asking journalists to disclose their sources. Moreover, in paragraph three of the Recommendation, the Council notes with concern violations of the protection of sources "which are more frequent in member states without clear legislation".[54] This observation substantiates the assumed important role of clear regulations by law.

[50] The Declaration of Principles on Freedom of Expression adopted by the IACHR states: "Every social communicator has the right to keep his/her source of information, notes, personal and professional archives confidential."

[51] Principle 2 of the above-cited Council of Europe Recommendation states: "Other persons who, by their professional relations with journalists, acquire knowledge of information identifying a source through the collection, editorial processing or dissemination of this information, should equally be protected under the principles established herein." In other words, the right to withhold a source's identity belongs not only to the "middleman", but also to others collaborating with him or her.

[52] See, to this effect, *Ernst and Others v. Belgium*, European Court of Human Rights, 15 July 2003. The protection of sources cannot be relied upon to cover up offences committed by journalists and to grant them immunity from prosecution; see *Fressoz and Roire v. France*, European Court of Human Rights, 21 January 1999, para. 52 and 55, according to which "the press must not go beyond certain limits and must obey the criminal law and act in accordance with professional ethics".

[53] Principles 3-5 of the 2000 Council of Europe Recommendation elaborate extensively on the application of the three-part test to the protection of sources, in particular the necessity part of the test. The 2002 Declaration of Principles on Freedom of Expression in Africa echoes the main points of the Council of Europe Recommendation.

[54] http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta11/EREC1950.htm

Even when there is a strong public interest in uncovering the identity of a source, the vital function of the protection of sources in a democracy should not be overlooked. In fact, the arguments against disclosure are often strongest precisely when those in favour are also strong. In some cases, the more important the interest violated, the more important it will be to protect the sources. For example, if the source has disclosed a major corruption case with wide-ranging impact, there is a strong case for having the source serve as a key witness in the trial.

As a general principle, it must be assumed that a broad protection of sources will lead to more revelations of hidden matters than if the protection is limited or not given at all. Even if the individual circumstances of the case would be in favour of disclosure, the wider social interest in the continued confidence of sources to come forward with their information may often take precedence.

In a joint declaration on defamation of religions, and anti-terrorism and anti-extremism legislation, the United Nations Special Rapporteur on Freedom of Opinion and Expression, the 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 Special Rapporteur on Freedom of Expression and Access to Information said the following: "Normal rules on the protection of confidentiality of journalists' sources of information – including that this should be overridden only by court order on the basis that access to the source is necessary to protect an overriding public interest or private right that cannot be protected by other means – should apply in the context of anti-terrorist actions as at other times."[55]

In sum, *the basic principle that there is a right to protect sources has strong foundations in international law*. Many States have adopted legislation with the purpose of implementing this right. Often, however, such legislation falls short of international standards in this area, because it is either too narrow in its understanding of who is the holder of this right (e.g. a journalist) or too broad in its definition of exceptions to the right.

[55] http://www.oas.org/en/iachr/expression/showarticle.asp?artID=735&lID=1

***Elements to be considered***

- How is the protection of sources regulated?
- Does legislation which regulates the protection of sources exist?
- Does the protection also apply to activities and equipment through which the source may be identified, such as monitoring telephone calls or seizing computers?
- Does the protection also include other people who may be in a position to identify the source, such as camera operators, handlers or drivers?
- Is the protection of sources absolute?
- If the protection is not absolute, are the circumstances in which journalists may be required to disclose their sources set out clearly and simply in the law?

  *Note: The circumstances should be very limited and could involve situations where the identity of the source is needed to prosecute or defend a serious criminal offence and there is no other reasonable way of obtaining the information to effect the prosecution or defence.*

  *The disclosure of a source's identity should not be ordered in the context of a defamation case (more detail on defamation are elaborated in chapter IV.B.).*

- Do these standards also apply in cases where the relevant authorities claim that source disclosure is necessary because the source is suspected of committing a crime?
- Can disclosure only be ordered at the request of an individual or body with a direct, legitimate interest, who has demonstrably exhausted all reasonable alternative measures to protect that interest?
- Can the disclosure only be ordered by a judge?
- Does the interest in disclosure always need to be balanced against the harm of ordering disclosure to freedom of expression and the aim of combating corruption (balance of interests)?

  *Note: If disclosure is ordered, the extent of a disclosure should be limited as far as possible, for example just being provided to the persons seeking disclosure instead of to the general public.*

- Are sanctions ordered by a court against a journalist who refuses to disclose the identity of a source subject to appeal to a higher court?

## C. The right of access to information

Increasingly, right of access to information laws[56] provide journalists with an essential tool in the collection and publication of newsworthy information. Employed in parallel with a transparent system of public administration and so-called "proactive" disclosure[57], right of access to information legislation provides the media and the public the broad opportunity to request specific pieces of information which can potentially reveal acts of corruption.

This section will first discuss the issue of proactive disclosure by highlighting further relevant articles of UNCAC and by showcasing examples of implementation. Subsequently, right of access to information legislation will be discussed as a relevant measure for the effective implementation of article 13(1) (d) of UNCAC including some good practice examples from a range of national jurisdictions.

Article 13(1) (d) of UNCAC which covers the wider issues of the freedoms of opinion and expression in relation to corruption issues is reinforced by sub-paragraph (b) which requires that States parties specifically ensure "*that the public has effective access to information*". The focus on the effectiveness of access and the process will also be discussed in more detail in this section.

### 1. Availability of data and information (proactive disclosure)

Media reporting on corruption relies on the availability of data and information. States parties are increasingly sharing data and information using modern technology.

There are various ways by which States can respect, promote and facilitate the provision of information as defined in article 13 (1) (d) of UNCAC. Data can be made available proactively through transparent public administration and reporting as well as by provision of specific information upon request.

Providing a right of access to information and being open about how the governments work is a crucial step to facilitate effectiveness of the work of journalists as partners in preventing and fighting corruption. Awareness-raising initiatives should include information about the data which is made available to the public and how it can be accessed.

[56] These types of laws are referred to using different terminology and the terms "access to information laws", "freedom of information laws" and "right to information laws" are also used. Unless specific laws are quoted, this Tool will use the terminology "right of access to information laws" in reference to the United Nations Human Rights Commission which speaks of the "right to access of information (see footnote 11).

[57] Examples of measures taken by States parties to strengthen transparency of public administration through proactive disclosure as required by UNCAC and how journalists can use such information are highlighted and discussed in chapter III.C.1. of this Tool. In many cases, proactive disclosure requirements form part of modern access to information laws. An example is Scotland's Freedom of Information Act, 2002.

In regard to public reporting or "proactive disclosure", several articles of UNCAC request States parties to enhance transparency in public administration.

> ***Article 10: Public reporting***
>
> *Taking into account the need to combat corruption, each State Party shall, in accordance with the fundamental principles of its domestic law, take such measures as may be necessary to enhance transparency in its public administration, including with regard to its organization, functioning and decision-making processes, where appropriate. Such measures may include, inter alia:*
>
> *(a) Adopting procedures or regulations allowing members of the general public to obtain, where appropriate, information on the organization, functioning and decision-making processes of its public administration and, with due regard for the protection of privacy and personal data, on decisions and legal acts that concern members of the public;*
> *(b) Simplifying administrative procedures, where appropriate, in order to facilitate public access to the competent decision-making authorities; and*
> *(c) Publishing information, which may include periodic reports on the risks of corruption in its public administration.*

Article 10 of UNCAC is intended to ensure that citizens understand the workings of public administration, and have information on the decisions and decision-making processes of public officials and on the risk of corruption. Transparency enables citizens to review what the administration is doing on their behalf and enhances their trust in public institutions.

As pointed out in the Technical Guide to UNCAC, States parties seeking to increase transparency and accessibility in public administration may wish to conduct a review of existing regulations and the impact of new legislation, consulting with civil society and legal entites, such as professional associations. Reviews should, in particular, cover the public's right of access to information, including how comprehensive, understandable and readily available information is.[58]

The principal objective of article 10 of UNCAC is to *make decision-making more efficient, transparent and accountable* so that the public administration can be more open and responsive to the needs and aspirations of the society they serve. Central to achieving this aim is that the public is provided with effective access to decision-making processes and decision-makers. One tool that has been successfully employed by countries is the development of interactive websites, booklets and other media that clearly explain the functions and services of each section of public administration, how they are accessed, what forms and other documentation are needed and the processes of decision-making, from the issues of licensing to procurement.[59] Ministries and departments should make widespread use of electronic

[58] Technical Guide to the United Nations Convention against Corruption, UNODC 2009, page 43.
[59] See also article 9 of UNCAC.

media in disseminating general information and procedures.[60] They should ensure that the information is concise and up to date.

Any ministry or government department with decision-making authority should have a clear policy on the making, recording and publication of those decisions. This policy should apply particularly for day-to-day operational and management decisions. It should be clear enough to allow the public to know broadly where to go for action or decisions, what documentation is required to process requests, who is responsible for which decisions, how they can be contacted, what information about the process is available, and to whom they might appeal in the event of a disputed decision.

Any official who has custody of a document or any other material to which the public is entitled to have access and who intentionally obstructs such access, should be deemed to have committed an offence under the code of conduct[61] or other applicable regulations or laws.

It is recommended that all public organizations report periodically on the threats of corruption and on the anti-corruption prevention measures they have undertaken to mitigate the risk of corruption.

***Case example:***

In Scotland, the Freedom of Information Act 2002 requires Scottish public authorities to proactively publish information. In particular, each authority must produce a Publication Scheme which has been approved by the Scottish Information Commissioner. In the first few years, this meant hundreds of schemes, of variable quality, being submitted. In response, a Model Scheme was developed which describes classes of information which should be disclosed, providing a high degree of proactive openness and making it easy for authorities to comply with the law.

Source: http://www.itspublicknowledge.info/ScottishPublicAuthorities/PublicationSchemes/PublicationSchemesModelPublicationSchemes.asp.

## The use of e-government

The use of e-government enables journalists and public alike to have equal access to information. Public entities should also consider the creation of *official websites accessible to the public*, designate persons to be responsible for the dissemination of public interest information and use e-government, e-procurement,[62] e-administration systems and tools to

[60] The United Kingdom has, for example, recently decided to move all Government departments to the same URL. www.gov.uk

[61] See article 8 of UNCAC.

[62] Examples of e-procurement can be found in Brazil, Georgia and Mexico in a presentation on the system entitled "Everyone sees Everything". http://procurement.gov.ge/index.php?lang_id=ENG&sec_id=8&info_id=1020 More general information on http://procurement.gov.ge/files/_data/geo/publication/CSPA_Georgia__rapid_development_and_low_cost_model.ppsx.

simplify administrative procedures.[63] However, despite the advantages of information technology, it has to be noted that e-government is only a tool and not an end in itself. If processes and behaviour need to be reviewed and changed in order to reduce the risk of corruption, the mere creation of information technology solutions will not suffice.

### Asset declarations (article 8, paragraph 5 of UNCAC) [64]

An ever-growing number of countries have adopted ethics and anti-corruption laws that require public officials to declare their assets and income and, increasingly, the assets and income of their spouses and dependent children. The officials who are required to declare, and the amount of detail required vary significantly from country to country. While the requirement to declare income and assets is generally imposed by anti-corruption laws, they do not require that all of the declared information be made public. Some laws require disclosure only to a public agency.

The principal goal of income and asset disclosure systems is to combat corruption by detecting illicit enrichment and by identifying potential or actual conflicts between the professional duties and personal interests of public officials. In a growing number of cases, information published in asset declarations has led to the exposure of substantial illicit enrichment. Several countries with detailed disclosure requirements have experienced a decline in corruption.[65] There is now a growing trend towards requiring financial disclosure by government officials, including publication of asset declarations, in order to combat corruption, foster public confidence in government, and encourage foreign investment.[66]

States have demonstrated an increasingly innovative use of information technology in the submission, processing and publication of asset declarations. The use of technology has led to a significant increase in the accuracy of the data provided by individuals and a drastic reduction in the costs of operating such systems in many instances. In Argentina, an electronic system for the submission of asset declaration forms was developed in 2000.[67] The level of compliance with declaration requirements has gone from 67 per cent to 96 per cent while the cost of processing and analysing requests has dropped from US$70 per form to only US$8 per form. The system brought more conflict of interest cases to light and financial disclosure requests were made by the media, NGOs and public officials. In addition, the use of electronic submission has enabled the Argentinean Government to make some asset

[63] For instance, in Kenya, innovative applications in mobile technology have implemented open Government solutions and established hotlines for reporting of corruption.

[64] Good practices and initiatives in the area of asset declaration systems reported by Member States to UNCAC are summarized in the Prevention Working Group report CAC/COSP/WG.4/2012/3. http://www.unodc.org/unodc/en/corruption/WG-Prevention/financial-disclosure-declaration-of-assets.html.

[65] Such as Latvia.

[66] The Financial Law Library of the World Bank contains information on declaration systems in over 160 countries. http://publicofficialsfinancialdisclosure.worldbank.org/. See also http://blogs.worldbank.org/psd/why-do-financial-disclosure-systems-matter-for-corruption.

[67] Income and Asset Declarations: Tools and Trade-offs, pages 52-53. http://www.unodc.org/documents/corruption/Publications/StAR/StAR_Publication_-_Income_and_Asset_Declarations.pdf

declarations available online, an approach that has been adopted in a number of other countries including Georgia.

Furthermore, there is a strong international trend towards requiring disclosure regarding the remuneration of directors and executives of both publicly traded, non-state affiliated companies as well as for state-owned enterprises. For instance, the Organisation for Economic Co-operation and Development (OECD) Principles of Corporate Governance call for the disclosure of compensation to individual board members and key executives, termination and retirement provisions and any specific facility or in-kind remuneration provided to management.[68] The European Union (EU) is also working on a model set of disclosure requirements for companies in the EU.

### Information about funding of political parties and candidates (article 7, paragraph 3 of UNCAC)

The public's right of access to information on financing of political parties, candidates and campaigns is widely considered to be essential to the integrity of democratic electoral processes. A comprehensive survey of relevant laws and regulations found that of the 111 countries surveyed, 60 countries required political parties and/or their donors to disclose campaign contributions and other sources of income.[69] With a few exceptions, the information disclosed by the party, usually to a specialized government agency, can be freely accessed by the general public. In some of these countries, right to access of information laws can be used to access this data; in others, election laws regulate these issues.

Disclosure of party finances, including campaign spending and contributions, serves the important goals of protecting the integrity of the electoral process and enabling voters to make informed choices. Some regional organizations have adopted disclosure policies in this area, such as the Council of Europe's Committee of Ministers Recommendation on Common Rules against Corruption in the Funding of Political Parties and Electoral Campaigns which states that political parties should be required to make their account or a summary thereof including records of received donations and all campaign expenditures public on a regular basis.[70] The EU has adopted similar disclosure conditionality for EU political parties seeking EU funding.[71]

Courts in a number of countries have granted citizens the right to access information about political party finances and other election-related information, sometimes in the absence of any explicit statutory scheme. Courts have also ordered disclosure of information about campaign contributions; bank account information of a political party, where there was

[68] OECD Principles of Corporate Governance.
http://www.oecd.org/corporate/ca/corporategovernanceprinciples/31557724.pdf
See also the OECD Guidelines on Corporate Governance of State-Owned Enterprises.
http://www.oecd.org/corporate/ca/corporategovernanceofstate-ownedenterprises/34803211.pdf

[69] International Institute for Democracy and Electoral Assistance (IDEA), 2003.

[70] Recommendation Rec (2003)4. https://wcd.coe.int/ViewDoc.jsp?id=2183

[71] Regulation (EC) No. 2004/2003 on the Regulations Governing Political Parties At European Level and the Rules Regarding their Funding, adopted by the European Parliament and the Council on 4 November, 2003.

unequivocal evidence that it had misused private funds; the background of candidates, including their assets and any pending criminal investigations; the management and use of any public funds; the salary and other income of political party leaders; and the terms of an agreement made by parties to form a coalition government.

***Elements to be considered***

- States are encouraged to put in place robust systems for both proactive and reactive (i.e. responding to requests for access to information) transparency. Robust proactive disclosure is an efficient way of reducing the burden of dealing with requests. If information is made publicly available on a proactive basis, it is not necessary to make a specific request for it, which makes the process far more efficient since it takes far longer to process a request than to upload information. There are various recent good examples on how data can be made available proactively to the media and general public.
- Is there a system for proactive disclosure in place?
- If public bodies or departments are obliged to report periodically, how is this monitored?
- What measures are taken to strengthen transparency in public administration?
- Is information shared in regard to the organization, functioning and decision-making processes of its public administration, decisions and legal acts that concern members of the public and the risk of corruption?
- Does this information answer, amongst others, the following questions:
  - ✓ What functions does the ministry or department perform?
  - ✓ Which processes does it carry out?
  - ✓ Which of its processes, systems and procedures are susceptible to fraud and corruption?
  - ✓ What are the internal and external risks likely to be?
  - ✓ What are the appropriate key anti-fraud and corruption preventive measures in place?
  - ✓ How are they assessed in practice?

## 2. The right of access to information upon request

According to the Human Rights Committee, the right of access to information under article 19 (2) of ICCPR includes the right of everyone, including the media, to have access to information held by public bodies, as well as the right of the general public to receive media output. The Committee underlines that the realization of these functions is not limited to the media or professional journalists, and that they can also be exercised by public associations or private individuals.[72]

> Access to information is a right of all people, including journalists. It encompasses the right of the public to receive media output.

The Council of Europe Convention on Access to Official Documents of 27 November 2008 was the first multilateral treaty to affirm and articulate an enforceable, general right of access to information that can be exercised by all persons, with no need to demonstrate a particular interest in the information requested.[73]

***Right of Access to Information Laws: A Brief History***

As of August 2013, at least 95 countries had nationwide laws establishing the right of and procedures for the public to request and receive government-held information.

The first right of access to information law was enacted by Sweden in 1766, largely motivated by the Parliament's interest in access to information held by the King. Finland was the next to adopt, in 1951, followed by the United States, which enacted its first law in 1966, and Norway, which passed its laws in 1970. The fall of the Berlin Wall and the rapid growth of civil society groups demanding access to information – about the environment, public health impacts of accidents and government policies, draft legislation, mal-administration, and corruption – gave impetus to the next wave of enactments. Between 1992 and 2006, 25 countries in Central and Eastern Europe and the former Soviet Union passed right of access to information laws and worldwide, 13 new laws have been adopted since 2010.

Despite this positive trend, only around one-half of the countries in the world have adopted right of access to information laws so far, including many States parties to UNCAC.

The right of access to official information is currently protected by the constitutions of some 60 countries. At least 52 of these expressly guarantee a "right" to "information" or "documents" , or else impose an obligation on the government to make information available

[72] *Nurbek Toktakunov v. Kyrgyzstan*, communication No. 1470/2006, Views adopted 28 March 2011), para 7.4.; Human Rights Committee, Nurbek Toktakunov v. Kyrgyzstan (Fn 98) "[…] the right to freedom of thought and expression includes the protection of the right of access to State-held information, which also clearly includes the two dimensions, individual and social".

[73] This Convention, which can be considered as the most developed international convention concerning right of access to information laws, has yet to be widely ratified. As of January 2013, the Convention had 14 signatories and six parties.

to the public. Almost all of these countries also have laws that elaborate and implement the right of access to information.[74]

Many countries include a general principle guaranteeing equality in the application of the law in their constitutions. This principle is generally implemented through a provision stating that requests for information do not need to specify the reasons for the request, in order to ensure against potential discrimination. In some countries such as India and Mexico, *requests may even be made anonymously* in order to prevent any discrimination between requestors.[75]

Various guidance material on access to information legislation is available online. The OAS has developed a model law together with an implementation guide to assist in making the law work in practice.[76] The ACHPR finalized and formally adopted the Model Law on Access to Information for Africa in 2012.[77]

An analysis by region was recently published by the Freedom of Information Advocates Network.[78] This study emphasizes the need to enshrine the right to access of information in law and to strengthen the implementation in practice. Effective implementation remains a challenge, and, in some regions, is strongly linked to poor records management, low levels of proactive disclosure, weak oversight and low levels of awareness and demand.

***Lessons learnt from the Members of Parliament (MPs) expense scandal in the United Kingdom***

The United Kingdom's Freedom of Information Act (FOIA) was passed in 2000 and came into force in 2005.

The Members of Parliament (MPs) of the House of Commons (HoC) often need two homes: one in their constituency and one in central London near Parliament. They are entitled to expenses in connection with the cost of running two homes. In 2005 and 2006, three journalists applied to the House of Commons under FOIA for information about the expense claims of various MPs. They wanted access to full information, with relevant documentation and not just the total amount of the claims.

The HoC authorities refused disclosure on the grounds that it would breach the privacy rights of the MPs. They relied on a specific exemption in the FOIA, relating to the disclosure of personal information about individuals and argued that the requested information related to the MPs' home and family life. Eventually, the journalists won their case: the Tribunal decision was issued in February 2008 and the High Court decision was given in May 2008.

[74] http://www.right2info.org/access-to-information-laws

[75] Other similar examples include Australia, Canada, Hungary, Ireland, South Africa and the United States where reasons for a request may not be demanded. In the United Kingdom, a request can be made on behalf of someone else without revealing who is interested in the information.

[76] http://www.oas.org/dil/access_to_information_model_law.htm

[77] http://www.achpr.org/files/news/2013/04/d84/model_law.pdf.

[78] Global Right to Information Update - An Analysis by Region (July 2013). http://www.access-info.org/documents/Access_Docs/FOIAnet/global_right_to_information_update_28-8-2013.pdf

As a result, the authorities at the HoC prepared to publish a substantial amount of information about the expense claims of all MPs – not just those in relation to whom the request was made. Around April 2009, before the information was published, it was leaked to the press. A huge database was leaked – containing 4 million separate individual items of information. The consequences of the scandal included the following: a number of Ministers stood down; various MPs did not stand for re-election in 2010; the MPs expense system was reformed; criminal charges were brought against seven individuals; and there was severe damage to reputation of Parliament and to the public perception of politicians.

**The expense scandal suggests six lessons to be learned:**

- Right of access to information legislation is needed even in transparent administrations. Regular proactive publication of information by public authorities is helpful, but insufficient on its own. The HoC had a publication scheme and it regularly and voluntarily disclosed a limited amount of information about MPs' expense claims.

- The immediacy and appropriateness of a first line response within the public authority. The HoC was widely criticised as obstructive for its response to the request. History demonstrates the need for strong FOI officers who need time to do their job, training, and support from the top down.

- The importance of a regulator able to make binding orders compelling disclosure. Journalists in this case could complain to the Information Commissioner – the independent statutory FOI regulator. Complaining to the regulator was straightforward, and cost-free. But there were long delays in the Information Commissioner making his decision, due to lack of resources. The regulator needs to be properly resourced and funded to avoid delays and to work efficiently.

- The importance of having a right of appeal to a tribunal or to Court. The case initially went to a tribunal and there was no risk of the requestors having to bear unreasonable costs.

- The crucial cost factor. The role of legal expertise and representation is crucial. One of the journalists was represented pro bono (i.e. without charging any fee, acting for the public good) by a leading lawyer. This kind of assistance might also be possible in other States.

- Finally, the need for well-drafted, balanced substantive FOI legislation. The FOIA gives a general right of access to recorded information held by public authorities but then allows for exceptions. There is an exception for personal data (i.e. protecting individuals' privacy rights) reflecting the data protection framework in the United Kingdom and the EU. But, crucially, the way that this exemption worked enabled a balance to be struck between public and private interests in disclosure. The tribunal found that the public interest favouring disclosure outweighed any privacy interest of individual MPs.

*Source: Timothy Pitt-Payne, Barrister – Presentation at the Expert Group Meeting in Vienna (10-12 April 2013)*

## Scope of right of access to information laws

Early access to information laws granted access to information and documents from specific government bodies such as state and municipal administration and excluded access to information from other bodies (e.g. the courts, the police and the military forces).

In more recent legislation, these sorts of exclusions are narrower. Under international standards, no public body should generally be excluded from access to information; instead, exceptions should be based on the specific content of the requested information or document. In this vein, right of access to information policies and laws should begin from the principle

that *all information should be accessible* and only then *specify on which limited grounds access could be restricted or denied*.

Most modern access to information laws cover all public authorities, as well as information held by any authority which performs a public function or provides a public service, even if it is formally private in nature.

It is worth noting however, that most access to information laws do not cover information that is held by purely private sector entities. In light of the increasing use of the private sector to carry out activities that were previously reserved for government, this limitation could have serious implications. As a result, information that would previously have been covered under access to information legislation could now be outside its scope.

It is worth noting that the definition of a public official in article 2 of UNCAC is very broad and includes "*any person who performs a public function or provides a public serv*ice". By analogy, this suggests that States parties should, in principle, include any persons or companies who carry out public functions or services (e.g. private sector entities which operate as contractors and fulfill a public service) within the scope of their access to information or other relevant laws.

Under most access to information laws, *trade secrets and competitively sensitive confidential business information of private and public enterprises* can be withheld. Such an exception is justified only insofar as it aims to prevent unfair competitive advantages or disadvantages arising from access requests. In a number of countries, however, commercial exceptions have been used to withhold information which, once released, exposed irregularities in the public procurement process or other forms of wrongdoing.[79] Right2INFO.org[80] recommends that the commercial secrets exception should be formulated in terms of the specific harm it seeks to avoid, namely unfair changes to a competitive position, while making it clear that basic information relating to public procurement will be open. For instance, one effective solution would be to limit the exception to protecting "the legitimate competitive interests of a public or private entity, insofar as this is compatible with the need for public scrutiny of procurement processes".

In some countries, *documents under preparation* or *documents prepared during the internal preparation or examination of a matter* are excluded from the coverage of right of access to information laws or other disclosure requirements. The purpose of excluding such documents is to avoid preparatory negotiations from becoming public in the middle of complex discussions. Some argue that the internal preparation, negotiations or examination of a matter would not be documented if they were included in the right of access to information. Although this is a legitimate concern, it can be dealt with on a case-by-case basis rather than through a general narrowing of the regime's scope of coverage.

[79] See also page 62 of this Tool.

[80] Right2INFO.org is a collaborative effort to provide relevant materials concerning the current state of the public's right to information held by public bodies and entities that perform public functions or operate with public funds.

On the whole, it is better practice to not close all documents under preparation to the public categorically. Instead, individual documents under preparation or parts of them could be disclosed after a harm balancing, for example to protect the free and frank provision of advice within government. Often, there is a strong case for making such documents available for public discussion and providing sufficient time to consider them before finalizing.

Dealing with unfinished documents under the regime of exceptions (rather than as an automatic exclusion from the scope of coverage) ensures that the public authority seeking to withhold the document in question must carefully assess the potential harm caused by disclosure vs an overriding public interest, and must justify their decision in writing. The principles of overriding public interest in disclosure and the obligation to give written reasons for refusal are applicable to all exceptions.

The general disclosure of documents under preparation also contributes to "enhancing the transparency of and promoting the contribution of the public to decision-making processes" as provided for by article 13, paragraph 1 (a) of UNCAC. In a similar way, public authorities should enable the right of individuals to observe open meetings of representative bodies, read and copy documents, and strengthen proactive disclosure.

### Processing of requests

In order to support the realization of the right of access to information as reflected in article 13 (1) (b) of UNCAC, States parties need to ensure that the process established under the right to access of information laws is effective in its actual implementation and use.

A review of documents at the international and national levels as well as case examples, suggests several key criteria that should be considered to ensure effectiveness, namely: a) awareness, b) cost, c) timely processing of requests, d) complaint mechanisms, e) form of documentation, and f) enforcement.

**a) Awareness:** Awareness raising should address both the demand and the supply side of information. States should take measures to ensure that the public is informed about the right of access to information and the process by which the right can be exercised. Good practice can be found in countries such as Mexico and Brazil, where requests can be lodged with a central body, which would then forward the request to the appropriate public authority (thereby limiting situations where individuals submit requests to the wrong body). Another example is the United Kingdom where most public bodies now have a front page button on their websites marked "freedom of information" which takes users to a dedicated section on how to make a request.

Public officials must also be informed about the legal situation and this process. If a request is made to a public official, this person should be in a position to direct the requester to the competent person/authority or to forward the request directly. Many States have designated public information officers within government bodies. Even if a State does not create such a position, the function should be clearly allocated to an officer who is responsible for the handling of requests and is empowered to take the necessary decisions.

***Case example: Brazil's access to information initiative***

The Brazilian Access to Information Law entered into force in May 2012. Broad disclosure is guaranteed. The scope of exceptions is limited and defined by law.

The processes are set to facilitate effective access to information. The e-SIC, Electronic System for Information Request, developed and hosted by the Office of the Comptroller-General, centralizes the requests and appeals lodged by citizens within Federal Executive Branch bodies. Citizens themselves can select the relevant public body that may answer the request. In addition, public servants that operate the system can also forward requests to other public bodies.

The requests for information are processed rapidly and an independent review of any refusals is available. Access to information is free.

The statistics show that nearly 80,000 requests were filed during the first year the legislation was in force. Only approximately 10 per cent of the requests were denied. The average response time was 11 days. The number of requests registered by journalists was only about 5 per cent of those received.

As the system is still new, it is possible that these numbers might change over time, as citizens and journalists become more familiar with it. Data monitoring and analysis should be used to support the further implementation.

*Source:* Ms. Gisele Maeda Mendanha and Ms. Cibelle Vieira, Office of the Comptroller-General (CGU), Brazil – Presentation at the UNODC Expert Group Meeting (10-12 April 2013)
http://www.acessoainformacao.gov.br/acessoainformacaogov/
http://www.cgu.gov.br/acessoainformacao/materiais-interesse/CartilhaAcessoaInformacao.pdf

**b) Costs:** Information ought to be provided for free unless the law prescribes the application of direct expenses. The law should only allow for limited costs to be imposed. Unreasonable costs tend to prevent users from seeking to access information and thus governments should ensure that if fees are required, they are reasonable. If it is not possible to provide services free of cost, then governments should seek to recover only the actual costs of reproducing and sending the information.[81] The costs of administering the system should not be borne by those persons seeking information. Waivers of applicable fees should be possible, e.g. in cases of information needed for research, or in order to exercise the rights and freedoms of the person or if the person making the request does not have the financial capacity to cover the expenses. The World Bank Institute in its publication on Proactive Transparency notes that although additional charges are "[an] opportunity to generate additional revenue for the administration", "it is questionable in the right-to-information era".[82]

**c) Timely processing of requests**: In its recently adopted General Comment No. 34, the Human Rights Committee points out that States parties should place government information of public interest in the public domain and ensure easy, prompt, effective and practical access

[81] See amongst others, OECD Recommendation of the Council for Enhanced Access and More Effective Use of Public Sector Information which talks about marginal costs of maintenance, and distribution. Last modified June 17, 2008. Accessed June 28, 2013. http://www.oecd.org/internet/ieconomy/40826024.pdf

[82] World Bank Institute, "Proactive Transparency: The future of the right to information?" page 29. http://siteresources.worldbank.org/EXTGOVACC/Resources/DarbishireProactiveTransparency.pdf

to such information. "The procedures should provide for the timely processing of requests for information according to clear rules that are compatible with the Covenant".[83]

There should be clear rules about the form in which the request has to be made (e.g. in writing and/or orally), who is responsible for the processing of the request and the time-frame in which a request should be answered. Furthermore, when refusing access to information, government authorities should be obliged to indicate the reasons for this decision in writing. In relation to *restrictions to right of access to information*, a basic principle behind most legislation is that *the burden of proof falls on the body that has received the request for information*, not on the person asking for it. The person making the request does not usually have to provide an explanation for their actions, but if the information is not disclosed, a valid reason for the refusal has to be provided. This will be elaborated in more detail in the next chapter.

**d) Complaint mechanisms:** Any denial should be subject to review by means of appeal.[84] This is necessary to ensure that the law is applied consistently and not arbitrarily. The appeal process should be regulated and facilitated in an effective manner with clear responsibilities, procedures and timelines. Depending on the regulations in the access of information law and the institutional set-up, the appeal may first be heard by someone in the higher management of the institution from which information is sought. However, it is advisable to provide for a higher level of appeal in front of an independent administrative oversight body. Experience has demonstrated that a dedicated specialized body is a viable option.

As a last resort, the requester should be able to take the matter to court, which can pass a judgement binding on both parties.

**e) Form of documentation:** The OAS recommends, for instance, that information should be "understandable".[85] While raw data and information should be made available, there might also be the need to harmonize data collection and to present data in more user-friendly forms. Investigative journalists might need to collaborate with technical experts in order to analyse raw data and highly technical information.

Harmonized, standardized and accurate data collection is also connected with the broader issue of simplified administrative procedures (briefly discussed here) in relation to access to information. Complex administrative procedures may result in unclear responsibilities and delays. Different procedures from different institutions which are not harmonized, conflicting or outdated could have similar negative effects. These kinds of complexities also impact on the collection of data and increase the risk of manipulation, fraud and corruption.

It should be pointed out that several States still face challenges in the area of record management, be it in paper or electronic format. As reiterated by the United Nations Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression in a joint declaration,

[83] Human Rights Committee, General Comment No. 34, UN Doc. CCPR/C/GC/34 http://www2.ohchr.org/english/bodies/hrc/docs/CCPR-C-GC-34.doc
[84] Human Rights Committee, General Comment No. 34, UN Doc. CCPR/C/GC/34, paras. 18 to 19.
[85] http://www.oas.org/cji/eng/CJI-RES_147_LXXIII-O-08_eng.pdf

"Public authorities should be required to meet minimum record management standards. Systems should be put in place to promote higher standards over time."[86] This is an important aspect which should be considered in administrative reform plans. The impact of record management on anti-corruption and broader human rights should not be underestimated.

**f) Enforcement**: The right of access to information regime should also include sanctions. In case of non-compliance with a request for information, a mechanism should be in place to sanction responsible officers, for example by imposing a fine. Sanctions might also be considered where information is not delivered in time or where other procedural rules are disregarded.

***Elements to be considered***

- Is there legislation that provides for and regulates the right of access to information?
- Is the right given to everyone without discrimination (for example by providing that no reasons are required for a request or allowing for the possibility of anonymous requests)?
- Does the government conduct public awareness campaigns and training programmes to ensure that citizens, government officials, judges and journalists understand the right of access to information laws and policies and how they are administered?
- Is there, in principle, an assumption that all information is publicly accessible, unless it is excluded by law for the protection of a legitimate aim?
- How wide is the scope of access? (Are documents under preparation covered? Are government e-mails and other communications included?)
- Is information from all public officers and pubic bodies, including state-owned enterprises and private bodies which operate with public funding or perform public functions, covered by the right of access?
- Does the law include clear and simple procedures for the making and processing of requests, including setting out clear and reasonably short timelines for responding to requests?
- How can requests be made? Can they be made through the Internet or mobile phones? Can the requested information be provided in this way?
- If a request for information is rejected, is the state agency required to respond with reasons in writing? Is it necessary to cite the legal exemption that is being relied on to reject the request?
- Are fees charged for requests for information? How are any such costs regulated?
- Do requesters have a right to appeal refusals to disclose information or other alleged breaches of the law?
- Are appeals handled by an independent oversight body?
- Can appeals be filed before the courts?

[86] http://www.osce.org/fom/38632

# GROUNDS FOR RESTRICTIONS ON THE FREEDOM OF JOURNALISTS TO SEEK INFORMATION AND REPORT ON ACTS OF CORRUPTION

# IV. Grounds for restrictions on the freedom of journalists to seek information and report on acts of corruption

## A. Freedom of expression as the main principle

The main principle that is reflected in article 13 (1) (d) of UNCAC is that States shall respect, promote and protect the freedom to seek, receive, publish and disseminate information concerning corruption. This right is usually referred to as the freedom of expression, and it should be noted that the right encompasses the different elements set out in article 13 (1) (d) of seeking, receiving, publishing and disseminating the information. This right exists for all individuals, whether the person is a citizen or a journalist.

The freedom of expression may, however, be subject to exceptions if the exercise of this right conflicts in a clear manner with other individuals' rights or the vital interests of the society. Sub-paragraphs (i) and (ii) of article 13 (1) (d) of UNCAC set out the limited list of legitimate grounds for restricting the freedom of expression, which mirror the grounds set out in key human rights instruments.

In 2009, the United Nations Human Rights Council stressed the fundamental importance of combating corruption, and called on Member States to refrain from imposing restrictions on the freedom of expression which go beyond those limited grounds, including restrictions relating to the discussion of government policies and political debate, reporting on human rights, government activities and corruption in government (…).[87]

Since the restrictions to the freedom of expression set out in article 13 of UNCAC are identical to those found in human rights law, they should be applied using the same standard three-part test as is used in human rights law. This test is set out directly in international law and has been reaffirmed repeatedly by international courts. It was also reiterated by the Special Rapporteur in his report in 2011 that any limitation to the right to freedom of expression must pass this test.[88] This means, for example, that the test is applicable in cases where a public body refuses the right of access to information to financial information of relevance in regard to corruption, as well as in any other situation which restricts the freedom of expression, such as legal limitations on critical reporting by journalists.

The standard three-part test is as follows:

[87] Resolution adopted by the Human Rights Council, [A/HRC/RES12/16]. http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/G09/166/90/PDF/G0916690.pdf?OpenElement

[88] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, para. 24. [A/HRC/17/27]. http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf

First, the restriction on the freedom of expression must be provided for by an unambiguous law which is clear and accessible to everyone.[89] The law must meet standards of clarity and precision so that people can foresee the consequences of their actions (principles of predictability and transparency). Vague laws have a "chilling effect" and inhibit discussion on matters of public concern. They create a situation of uncertainty about what is permitted, resulting in people choosing to distance themselves from any controversial topic for fear that it may be illegal, even if it is not. States parties should assure conceptual clarity of their legislation and collect and disemminate information such as jurisprudence regarding its interpretation.

Second, there must be *a legitimate aim* to limit the freedom of expression. The list of legitimate aims is *not open-ended*. They are provided for in article 13 (1) (d) (i) and (ii) of UNCAC: "…respect for the rights and reputations of others, and protection of national security or ordre public or of public health or morals". This list is exhaustive. The aim must be legitimate in purpose and effect. It is not enough for a provision to have an incidental effect on one of the legitimate aims. If the provision was mainly created for another reason and not for the protection of an aim as defined in article 13 (1) (d) (i) or (ii) of UNCAC, it will not pass this part of the test and the restriction should not be upheld.

Third, the restriction must respect the principles of necessity and proportionality. Any limitation on the freedom of expression must be truly *necessary* to reach the desired objective. Even if a limitation is in accordance with a clear law and serves a legitimate aim, it will only pass the test if it is necessary for the protection of that legitimate aim. In the great majority of cases where international courts have found national laws to be impermissible limitations on the right to freedom of expression, it was because they were not deemed to be necessary.

To meet the necessity standard, a government must be acting in response to a pressing social need, not merely for reasons of convenience. On a scale between what is "useful" and what is "indispensable", the "necessary" standard should be seen as being close to "indispensable" and does not have the flexibility of terms such as "reasonable" or "desirable".[90] This approach is underpinned by the high importance given to freedom of expression, including to prevent and fight against corruption.

The restriction must also be *proportionate* and impair free expression as little as possible. *The principle of proportionality* considers the competing interests of different groups at hand *and aims to limit any excessive* burdens on the individual it affected. Thus, measures should not be broad and untargeted. Wherever possible, a government should always use the least disruptive action to accomplish its objective. For example, shutting down a newspaper for defamation is excessive; a retraction or a moderate fine would offer the victim of defamation adequate protection.

[89] The restriction could be contained in an administrative, civil or criminal law, or in a constitution.
[90] Handyside v. United Kingdom, 7 December 1976, Application No. 5493/72, 1 EHRR 737, para. 48.

Some countries have adopted a stricter standard designed to be even more protective of free speech at the national level. In the United States, for example, rather than using the term "proportionality", the courts ask whether the restriction is the "least restrictive means possible" for accomplishing a compelling or overriding governmental interest.

When assessing the necessity and proportionality of the restriction, its time and scope should be kept in mind. Certain information might only need to be restricted for a limited period. Secondly, in case of documents which contain restricted as well as unrestricted information, the right to access or publication should be given in regard to the unrestricted parts of the documents instead of refusing to disclose the entirety of the document (principle of divisibility). The other element of the proportionality test relates to the impact of the measure. In other words, the harm that measure causes to freedom of expression must not outweigh its benefits. For example, a limitation that provides only partial protection to someone's reputation but seriously undermines free expression would be seen as disproportionate.

In this context, the Technical Guide to UNCAC states "while those subject to allegations may have recourse to the courts against malicious or inaccurate stories, States parties should ensure that their legislative or constitutional framework positively supports the freedom to collect, publish and distribute information and that the laws on defamation, State security and libel are not so onerous, costly or restrictive as to favour one party over another".[91]

In principle, the different interests which are at stake should be balanced very carefully, depending on social priorities and the public interest. The United Nations Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression jointly declared:

> "The right of access should be subject to a narrow, carefully tailored system of exceptions to protect overriding public and private interests, including privacy. Exceptions should apply only where there is a risk of substantial harm to the protected interest and where that harm is greater than the overall public interest in having access to the information. The burden should be on the public authority seeking to deny access to show that the information falls within the scope of the system of exceptions."[92]

If the risk of harm is assessed, the nature of the prejudice (including its likelihood and magnitude) might need to be considered.

Furthermore, in cases of alleged corruption and matters concerning the prevention and fight against corruption, the balancing of rights should reflect the paramount importance States have given to the anti-corruption agenda. Investigative journalism and the freedom of expression demand the most careful balancing of rights.

[91] *Technical Guide to the United Nations Convention against Corruption*, UNODC 2009, page 63.
[92] http://www.oas.org/en/iachr/expression/showarticle.asp?artID=319&lID=1

## B. Rights and reputations of others

The protection of rights and reputations of others can qualify as a legitimate aim for restricting the freedom of expression in regard to corruption. The term "rights of others" includes rights of persons individually or as part of a group.

Details on the protection of reputation from unwarranted attacks are mainly regulated in national defamation laws. There is little dispute that defamation laws can serve a legitimate purpose and it is recognized internationally as valid grounds for restricting the freedom of expression. It should be kept in mind, that the protection of an individual's privacy, family, home or correspondence against arbitrary or unlawful interference and the protection of an individual's honour and dignity against unlawful attacks are also based on international human rights instruments such as article 12 UDHR and article 17 ICCPR.[93]

Due to the protected interests at stake, defamation laws need to lay the groundwork for striking a proper balance between protecting an individual against false statements which cause damage to their reputation and limiting infringements of the freedom of expression. Nearly all countries have some form of protection from defamation, although it can have different names such as libel, calumny, slander, insult, *desacato* or *lese majeste*.

Defamation is defined both as a criminal offence and civil wrong in various countries. In other words, a person can either be prosecuted by the State or be sued for compensation by the affected person.[94] The form and content of defamation laws differ across the world. Some States have specific defamation statutes, others have articles in more general laws, such as criminal and civil codes which apply in defamation cases. Depending on the region and legal tradition, some States might not have stand-alone civil defamation legislation, other countries might not have or have abolished criminal defamation laws.

In some States, the differing severity between spoken defamation (slander) and written defamation (libel), the latter of which usually also includes radio and television, is reflected in different rules governing these two types of expression.

Jurisdictions resolve the tension between an individual's reputation and the freedom of expression in different ways, including by determining where the burden of proof lies for different aspects when such allegations are made.

[93] Similar protection is also guaranteed under other international human rights instruments such as article 8 of ECHR which guarantees a right to respect for privacy and family life.

[94] It should be noted that there can be further variations, also within a State. For example, in the United States, defamation is generally limited to the living. However, there are ten states (Colorado, Idaho, Georgia, Kansas, Louisiana, Nevada, North Dakota, Oklahoma, Utah and Washington) that have criminal statutes regarding defamation of the dead.

## 1. Defamation as a criminal offence

Criminal defamation laws may end up being problematic from the point of view of free expression. The OSCE has published a database on criminal and civil defamation provisions.[95] Criminal defamation laws can lead to the imposition of sanctions such as a prison sentence, suspension of the right to practice journalism or a fine. Even if they are applied with moderation, criminal defamation laws still cast a long shadow: the possibility of being arrested by the police, held in detention and subjected to a criminal trial will be in the back of the mind of a journalist when deciding whether to expose, for example, a case of high-level corruption.

The Human Rights Committee, the Office of the High Commissioner for Human Rights (OCHCR) and the OSCE have recognized the threat posed by criminal defamation laws to the freedom of expression and have recommended that they should be abolished.[96] The Special Rapporteur on Freedom of Expression and Access to Information in Africa called upon States to repeal criminal defamation laws[97] and the Special Rapporteurs of the United Nations, OSCE and OAS stated that "Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws."[98]

The Human Rights Committee has expressed its concern several times over the misuse of criminal defamation laws in concrete cases, recommending a thorough reform in countries as wide-ranging as Azerbaijan, Cameroon and Norway. The abolition of criminal defamation laws by a number of countries such as East Timor, Georgia, Ghana, Mexico, New Zealand, Sri Lanka and the United Kingdom, can be noted.

The European Court of Human Rights has declined to rule that criminal defamation laws are, by definition, a violation of the right to freedom of expression. At the same time, it has never upheld a prison sentence or other serious sanctions applied under such a law and paid specific attention to the requirement of proportionality and modest sanctions. [99]

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[95] http://www.osce.org/fom/41958. ARTICLE 19, a free expression advocacy group, has also published global maps charting the existence of criminal defamation law as well as civil defamation law across the globe, highlighting countries that have special protections for political leaders or functionaries of the state. http://www.article19.org/defamation/map.html .

[96] Human Rights Committee, General Comment No. 34: States parties should consider the decriminalization of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty. It is impermissible for a State party to indict a person for criminal defamation but then not to proceed to trial expeditiously – such a practice has a distressing effect that may unduly restrict the exercise of freedom of expression of the person concerned and others.

[97] http://www.achpr.org/sessions/48th/resolutions/169/

[98] The 2002 Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression. http://www.oas.org/en/iachr/expression/showarticle.asp?artID=87&lID=1.

[99] Tammer vs Estonia, 6 February 2001.
http://www.iidh.ed.cr/comunidades/libertadexpresion/docs/le_europeo/tammer%20vs%20estonia%202001.htm

As regards the details of criminal defamation cases, differences exist and some countries, although they still have criminal defamation law, have not operationalized the law in years. However, the mere existence of criminal defamation laws and the possibility of imprisonment or high fines, is sufficient to affect journalists and the freedom of expression.

In some countries, the prosecutor only has to prove that a statement has been made and that it has caused harm to a person's reputation to establish the crime. In the next step it is assessed if a defence, such as truth, is applicable (see below). In other countries, the prosecutor, in order to win his case, has to give full proof that the journalist has not been telling the truth in his news coverage.

Various defences are possible in defamation cases. Proof of ***truth*** ought to be a complete defence to an allegation of defamation.[100]

Another typical defence to defamation is that the statement is an ***opinion***, meaning a statement which cannot be shown to be true or false or which is clearly not intended as a statement of fact (for example because it is rhetoric, satire or simply a joke). An opinion cannot be considered an unwarranted attack on someone's reputation, since it can by definition not be proven true or false.[101] The holding of an opinion should never be criminalized.[102]

Many jurisdictions give greater leeway to opinions than false statements of fact. If the allegedly defamatory assertion is an expression of opinion rather than a statement of fact, defamation claims should not be allowed because opinions are inherently not falsifiable.[103] However, this is not always the case in national criminal defamation legislation.[104] Often, criminal defamation covers not only false communication but also other intentional communication which induces disparaging or hostile opinions against a person. The offence might be referred to differently.

It is especially in these cases that the most important restriction to criminal defamation laws comes from ***the necessity test***. According to the well-established case law of the European Court of Human Rights, the test of necessity in a democratic society requires the Court to determine whether the punishment which restricted the freedom of expression corresponded to a "pressing social need", whether it was proportionate to the legitimate aim of protecting

[100] Public disclosure of private facts is related to defamation. It arises where one person reveals information that is not of public concern and the release of which would offend a reasonable person. Unlike with libel, truth is not a defence for invasion of privacy. See below "Privacy" in chapter IV.B.3. of this Tool.

[101] One of the major tests to distinguish whether a statement is fact or opinion is whether the statement can be proved true or false in a court of law. If the statement can be proved true or false, then, on that basis, the case will be heard as a defamation case.

[102] Human Rights Committee, General Comment No. 34, UN Doc. CCPR/C/GC/34 http://www2.ohchr.org/english/bodies/hrc/docs/CCPR-C-GC-34.doc

[103] However, some jurisdictions decline to recognize any legal distinction between fact and opinion. The United States Supreme Court, in particular, has ruled that the First Amendment does not require recognition of an opinion privilege. *Milkovich v. Lorain Journal Co*., 497 U.S. 1 (1990).

[104] In *Lingens v. Austria*, European Court of Human Rights, 8 July 1986, the journalist had accused the Chancellor of Austria of opportunism and immorality. His being convicted of defamation was a violation of article 10 of ECHR.

reputation and rights of others and whether the reasons given by the national authorities to justify it were relevant and sufficient.[105]

An important factor for the Court's determination is the essential function of the press in a democratic society. Although the press must respect certain boundaries, such as the rights and reputation of others, its duty is nevertheless to impart information and ideas on all matters of public interest. By reason of these "duties and responsibilities", the press needs to act in good faith and on an accurate factual basis and provide reliable and precise information in accordance with the ethics of journalism.[106] Not only does the press have the task of imparting such information and ideas, the public has a right to receive them. Otherwise, the press would be unable to play its vital role of "public watchdog". [107]

Many times the necessity test is applied to political discussion and discussion concerning politicians and other public figures. The European Court of Human Rights has, however, ruled that discussion about ***all matters of legitimate public concern*** is entitled to the full protection of the right to freedom of expression and that "there is no warrant ... for distinguishing ... between political discussion and discussion of other matters of public concern".[108] The Court has expressly found information about the activities and possible wrongdoing of the security services,[109] criticism of the police department,[110] and a published opinion alleging a court's lack of impartiality[111] to all be of legitimate public interest.

The principle of the European Court of Human Rights is clear. Penalties against the press for publishing information concerning matters of public interest are unacceptable except "in the narrowest of circumstances" owing to their likelihood of "deterring journalists from contributing to public discussion of issues affecting the life of the community".[112] According to the Court in *Lingens v. Austria* and multiple other cases, this is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb.

Criminal defamation legislation primarily protects natural persons.[113] Many States do not allow ***public bodies*** to sue for defamation under any circumstances, both because of the danger to freedom of expression and because public bodies are not seen as having a "reputation" entitled to protection. As abstract entities without a profit motive, they lack an emotional or financial interest in preventing damage to their good name. Moreover, it seems

[105] See *The Sunday Times v. the United Kingdom (no. 1),* European Court of Human Rights, 26 April 1979, para. 62 and *Bladet Tromsø and Stensaas v. Norway,* European Court of Human Rights, 20 May 1999, para. 58.

[106] See *Fressoz and Roire v. France,* European Court of Human Rights, 21 January 1999, para. 52-54.

[107] See *Thorgeir Thorgeirson v. Iceland,* European Court of Human Rights, 25 June 1992, para. 63.

[108] *Thorgeirson v. Iceland,* European Court of Human Rights, 14 March 1990, para. 64.

[109] *The Observer and Guardian v. the United Kingdom (Spycatcher case),* European Court of Human Rights, 26 November 1991.

[110] *Thorgeirson v. Iceland,* European Court of Human Rights, 14 March 1990.

[111] *Barfod v. Denmark,* European Court of Human Rights, 22 February 1989.

[112] *Lingens v. Austria,* European Court of Human Rights, 8 July 1986, para. 44.

[113] However, in some countries legal persons can also be seen as rights holder i.e. in civil defamation cases. In the United Kingdom, for example, a civil defamation case involving a legal body that trades for profit can be brought to court if the defamatory statement has caused or is likely to cause serious financial loss.

improper for government to spend public money on defamation suits to defend its own reputation.

***Case example: Balancing public order and a Government's reputation - Judgment in the case of Castells v. Spain***

In *Castells v. Spain*, the European Court of Human Rights held: "The dominant position which the Government occupies makes it *necessary for it to display restraint in resorting to criminal proceedings*, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media."

An important factor in the Court's decision was the volatile situation in Spain at the time of the applicant's conviction for libel. Castells had published an article suggesting that the Government as a whole was behind the killings of separatist Basque dissidents. According to the applicant, it appeared from the judgment that the objective of his conviction had been to safeguard public order as much as to protect the Government's reputation.

In its assessment of the case, the Court found that "the limits of permissible criticism are wider with regard to the Government than in relation to a private citizen, or even a politician. In a democratic system, the actions or omissions of the Government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion". Furthermore, the Court pointed out that States were permitted "to adopt, in their capacity as guarantors of public order, measures, even of a criminal law nature, intended to react appropriately and without excess to defamatory accusations devoid of foundation or formulated in bad faith".

Source: *Castells v. Spain*, European Court of Human Rights, 23 April 1992.
http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57772#{"itemid":["001-57772"]}

***Public officials*** occupy an intermediary position between ordinary members of the public and public bodies. They are subject to a wider margin of criticism than ordinary members of the public but, in contrast to public bodies, they are entitled to sue when defamed in their private capacity. In general, the more senior the public servant, the more criticism he or she may be expected to tolerate, with senior politicians at the top of the scale.

***Case examples: Criticism of politicians***

***Judgment in the case of Oberschlick v. Austria (No. 2)***

After Jörg Haider, leader of the Austrian Freedom Party, had delivered a speech praising Austrian soldiers who had fought in the *Wehrmacht* and SS or *Schutzstaffel* during the Second World War, a newspaper ran an article titled "P.S.: 'idiot,' not 'Nazi'." The European Court of Human Rights ruled in the case of *Oberschlick v. Austria* that the use of the word "idiot" to describe Haider did not overstep the boundaries of what should be permissible in a democracy:

"A politician inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must display a greater degree of tolerance, especially when he himself makes public statements that are susceptible of criticism. He is certainly entitled to have his reputation protected, even when he is not acting in his private capacity. But the requirements of that protection have to be weighed against the interests of open discussion of political issues, since exceptions to freedom of expression must be interpreted narrowly."

Source: *Oberschlick v. Austria (No. 2),* European Court of Human Rights, 1 July 1997, para. 29.

***Judgment in the case of Lingens v. Austria***

In the case of *Lingens v. Austria*, the European Court of Human Rights explained the rationale for permitting harsh criticism of public officials. The case revolved around the conviction for criminal defamation of a journalist who had published two articles in which he accused the Austrian Chancellor, Bruno Kreisky, of protecting former Nazi SS or *Schutzstaffel* officers for political reasons. Observing that it is detrimental to democracy to allow politicians to sue the media for defamation as a way of suppressing criticism, the Court held:

"The limits of acceptable criticism are ... wider as regards a politician as such than as regards a private individual. Unlike the latter, *the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance.*"

Source: *Lingens v. Austria*, European Court of Human Rights, 8 July 1986, para. 42; *Oberschlick v. Austria (no. 2),* European Court of Human Rights, 1 July 1997, para. 29; *Mamère v. France*, European Court of Human Rights, 7 November 2006, para. 27; *Kwiecień*, European Court of Human Rights, 9 January 2007, para. 47; and *Jucha and Żak v. Poland*, European Court of Human Rights, 23 October 2012, para. 40.

## 2. Civil defamation laws

Because they do not involve the criminal justice machinery of a State, civil defamation laws may have a less discouraging effect on freedom of expression than criminal laws. This will only be the case, however, if the law is formulated in such a way that it (a) is not prone to abuse from governmental or other sources; (b) ensures that those sued are able to mount a proper defence; and (c) introduces proportionate sanctions including reasonable limits to the amount of compensation that may be awarded.

To receive compensation in a libel or slander suit, the plaintiff must show evidence of four elements: that the defendant conveyed a defamatory message; that the material was published; that the plaintiff could be identified as the person referred to in the defamatory material; and that the plaintiff suffered some injury to his or her reputation as a result of the communication.

As regards civil defamation claims of the government, public bodies and public officials, the same arguments as elaborated in the criminal defamation section are valid in civil defamation cases.

The defences are rather similar in criminal defamation and civil defamation laws. In common law, in a civil defamation case the defamatory statement can be presumed to be false, unless the defendant can prove its truth on the balance of probabilities. However, in cases involving ***matters of public interest or public concern***, the burden of proof is on the plaintiff who then has to demonstrate the falsehood of the statement in the same way as the prosecutor in criminal defamation systems.

***Case example: Speech on matters of public concern - Judgment in the case of Philadelphia Newspapers, Inc. v. Hepps***

In *Philadelphia Newspapers, Inc. v. Hepps*, the United States Supreme Court decided that the burden of proof rests with the plaintiff in defamation concerning matters of public concern:

"There will always be instances when the fact-finding process will be unable to resolve conclusively whether the speech is true or false; it is in those cases that the burden of proof is dispositive. …

This dilemma stems from the fact that the allocation of the burden of proof will determine liability for some speech that is true and some that is false, but all of such speech is unknowably true or false. … *To ensure that true speech on matters of public concern is not deterred, […] we hold that the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern."*

Source: *Philadelphia Newspapers, Inv. v. Hepps*, 475 U.S. 767 (1986).

***Case example: Matters of public concern and the actual malice standard - Judgment in the case of New York Times Co. v. Sullivan***

The direction of libel law changed dramatically in the United States with the decision in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). The plaintiff, a police official, had claimed that false allegations about him were published in the New York Times, and he sued the newspaper for libel. For the first time, it was established that for a public official (or other legitimate public figure) to win a libel case, the statement must have been published *knowing it to be false or with reckless disregard to its truth, also known as actual malice*.

The United States Supreme Court overruled a State court in Alabama that had found The New York Times guilty of libel for printing an advertisement that criticized Alabama officials for mistreating student civil rights activists. Even though some of what The New York Times printed was false, the Court ruled in its favour, saying that libel of a public official requires proof of actual malice, which was defined as a "knowing or reckless disregard for the truth".

Also in *Snyder v. Phelps et al.* the United States Supreme Court confirmed that "matters of public concern" should attract maximal protection even at the cost of individual's privacy.

Sources: *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and *Snyder v. Phelps et al,* 562 U.S. (2011).

In the United States,[114] since Sullivan, a public official or other person who has voluntarily assumed a position in the public eye must prove that a libelous statement "was made with 'actual malice' – that is, with knowledge that it was false or with reckless disregard to whether it was false or not". The actual malice standard does not require any ill will on the part of the defendant. Rather, it merely requires the defendant to be aware that the statement is false or very likely false. This corresponds to the intentionality requirement of criminal defamation.

[114] In the United States, as well as in many other countries, no criminal defamation law exists at the national level. However, a limited number of American states have such laws.

Since Sullivan, the question of who is a public official has often come up in United States cases. In Rosenblatt v. Baer, [115] the Court found that a non-elected official "among the hierarchy of government employees who have, or appear to have, **substantial responsibility for, or control over, the conduct of public affairs"** was a public official within the meaning of Sullivan. Eventually, Sullivan's actual malice requirement was extended to include defendants who are accused of defaming public figures who are not government officials. In the associated cases of Curtis Publishing Co. v. Butts and Associated Press v. Walker,[116] the Court held that a football coach at the University of Georgia and a retired Army general were similar to public officials in that they enjoyed a high degree of prominence and access to the mass media that allowed them to influence policy and to counter criticisms leveled against them.

As mentioned in the first paragraph of this section, also in regard to civil defamation laws, a number of aspects should be looked at to limit its possible discouraging effect on the freedom of expression in general.

Like any restriction on freedom of expression, remedies for defamatory statements must also be necessary and proportionate. It is the responsibility of the authorities to establish a regime of remedies for defamatory statements which, while redressing the harm to reputation, does not exert a chilling effect on legitimate statements.

Traditionally, the usual remedy for defamation has been financial compensation although other remedies should also be considered.[117] The ***level of damages*** awarded for defamation cases has been subject to sustained criticism from judges and academics. Legislation should consider establishing clear criteria for determining the amount of awards or ceilings for cases in which monetary awards are necessary to redress financial harm.

Moreover, in many cases, the costs of defending a defamation action far exceed the level of damages that are awarded. States can adopt a number of rules to limit this possibility, such as procedures for rapid disposition of such cases, along with costs awarded against the plaintiff if he loses the case.

[115] *Rosenblatt v. Baer*, 383 U.S. 75 (1966). Similarly, in *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971), the Court found that a candidate for public office fell within the category of public officials who must prove actual malice in order to recover.

[116] *Associated Press v. Walker*, 389 U.S. 28 (1967) and *Curtis Publishing Company v. Butts*, 388 U.S. 130 (1967).

[117] Such measures could be an order to issue a correction or reply, or to publish the judgment finding the statements to be defamatory.

***Case example: Debilitating effect of civil damages in defamation cases - Judgment in the case of Tuşalp v. Turkey***

In the European Court of Human Rights case of *Tuşalp v. Turkey*, the fact that the proceedings were civil rather than criminal in nature did not affect the Court's considerations, since "the amount of compensation which the applicant was ordered to pay, together with the publishing company, was significant and that such sums could deter others from criticizing public officials and limit the free flow of information and ideas".

In this case, the Prime Minister of Turkey had brought a civil action for compensation against a journalist and the publishing company on the ground that certain remarks in the published article constituted an attack on his personal rights. The journalist had implied among other things that the Prime Minister was connected to corruption. According to the Court, "although it must not overstep certain bounds, particularly in respect of the reputation and rights of others, its [the media's] duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest".

Sources: *Tuşalp v. Turkey*, European Court of Human Rights, 21 February 2012.; *Cihan Öztürk v. Turkey*, European Court of Human Rights, 9 June 2009, para. 33. See also *Tolstoy Miloslavsky v. United Kingdom,* European Court of Human Rights, 13 July 1995.

A variety of effective ***alternative remedies*** exist, such as an order to issue a correction or a reply of the plaintiff, or to publish the judgment finding the statements to be defamatory. Such alternative remedies are more freedom-of-speech-friendly and could be prioritized. Where monetary awards are necessary to redress financial harm, the law should specify clear criteria for determining the size of awards.

In many respects, independent self-regulatory regimes[118] can balance individual rights and the freedom of expression in an appropriate way. The most recent example is the *Levenson Inquiry* from the United Kingdom. Following the press abuse of wire and telephone tapping, the inquiry recommended the establishment of an independent self-regulatory body which would be governed by an independent Board, the members of which would be appointed in a genuinely open, transparent and independent way, without any influence from the Government. The inquiry concluded that the Board should have the power to hear and decide on complaints about breach of the standards code of the press, that it could direct "appropriate remedial action for breach of standards and the publication of corrections and apologies" and that it should not have the power to prevent publication of any material by anyone, at any time.[119]

[118] Self-regulation mechanisms are discussed in more detail in chapter V.B.

[119] Sources: The Levenson Inquiry. An Inquiry into the Culture, Practices and Ethics of the Press. Report. The Right Honourable Lord Justice Levenson. November 2012. London : Thew Stationery Office 2012. See http://www.levesoninquiry.org.uk/. The report was published on 29 November 2012; Recommendations nr. 15 and 17.

***Elements to be considered***

- The best way to prevent the chilling effect to corruption journalism is that the law and jurisprudence on restrictions to freedom of expression is clear and predictable. In case of "broad" terminology, the jurisprudence should give extensive guidance that enable journalists to do their work without fear of being punished or being ordered to pay substantial damages in a court of law.
- States parties should consider repealing criminal defamation rules.
- Are the punishments and remedies for defamation proportionate to the harm done by the defamatory statement?
- Does the law specify clear criteria for determining the amount of monetary awards when they are necessary to redress financial harm?
- Are alternative remedies considered if they are less intrusive but still effective?
- Is proof of the truth of a statement a full defence to a claim of defamation?
- Is proof that a statement is an opinion a full defence to a claim of defamation?
- Are public bodies prevented from bringing defamation cases in their own names?
- Are public officials expected to tolerate a higher degree of criticism than ordinary citizens?

## 3. Other rights

Apart from defamation, an individual confronted with truthful revelations about his/her private life may have a separate claim for protection of his or her right to privacy.

*Privacy* means that an individual may insulate certain information about himself or herself from media coverage even if it is true. In the United States, privacy rights are often referred to as *the right to be left alone*. When something is private to a person, it usually means there is something about it that is considered inherently special or personally sensitive.

The right not to be subjected to unsanctioned invasion of privacy is part of many countries' civil privacy laws, and, in serious cases, criminal laws. In some countries, individual privacy may conflict with freedom of speech and some laws may require the public disclosure of information which would be considered private in other countries and cultures. Most cultures recognize the ability of individuals to withhold certain parts of their personal information from wider society. Unlike with defamation, truth is not a defence in a case of invasion of privacy.

*Financial privacy*, in which information about a person's financial transactions is guarded, is sometimes necessary to prevent fraud including identity theft. On the other hand, maintaining financial privacy can have the effect of hampering investigative journalism of corruption. *Medical privacy* allows a person to withhold their medical records and other information from others, perhaps to avoid the embarrassment caused by revealing medical conditions or treatments. Medical information could also reveal other aspects of one's personal life, such as

sexual preferences or proclivity. Medical privacy is also directly connected to *bodily privacy*. A right to *sexual privacy* enables individuals to have personal relations without fear of them being revealed to the general public. *Privacy of home* is a classical intimate area. *Political privacy* has been a concern since voting systems emerged and the secret ballot helps to ensure that voters cannot be coerced into voting in certain ways. *Religion* belongs to classical areas of privacy as well.

Under liberal democratic systems, *privacy creates a space separate from political life* and allows personal autonomy, while ensuring democratic freedoms of association and expression. Public figures are said to voluntarily put themselves in public life and are thus subject to the scrutiny that comes along with it. Another basis for added exposure to criticism is that public persons have a greater capacity to answer in kind.[120]

Private "gossiping" of true statements is not a crime. Even if an intrusion is made through mass media, legitimate public concern or interest would justify the publishing of private information. For example, in Finland, the spreading of private information is allowed, if it a) "*concerns a person in politics, business, public office or public position, or in a comparable position",* b) if the information "*may affect the evaluation of that person's activities in the position in question*"; and c) if it is "*necessary for purposes of dealing with a matter with importance to society".*[121]

Looking once more at the United Kingdom expense scandal (highlighted above in chapter III.C.2. of this Tool), privacy rights were used initially by the House of Commons to refuse disclosure of the expense claims of individual MPs. However, this decision was overruled by the High Court which found that the public's interest favouring disclosure outweighed any privacy interest of individual MPs. The case underlines yet again the importance of carefully balancing conflicting rights, for instance on the one hand, the right of newspapers to have sufficient freedom to engage in investigative journalistic activity and the right of the public to be informed by newspapers on these issues and on the other hand, the right of individuals not to suffer unwarranted intrusion.

Many questions of privacy are dealt with in different ways in different legal systems. For example "the Head of State" enjoys far less protection of his/her private sphere than normal public officials in several common law legal systems. The public has a legitimate reason based on the fact that the actions of public figures are likely to be of "public concern". In some other legal systems, the Head of State may be provided with greater privacy.[122]

UNCAC can provide some guidance in certain cases, as various articles of the Convention deal with the disclosure of information and encourage States to strengthen transparency in

[120] The seminal case illustrating the reduced protection of public persons in protection of reputation and privacy is *Hustler Magazine v. Faldwell,* 486 U.S. 46 (1988).

[121] The Criminal Code of Finland (39/1889), chapter 24 (531/2000), section 8 (531/2000).

[122] The position of family members of the public figure is also unclear. The fact that a person is a close relative of a public figure or official may draw them into the sphere of public person if the subject matter is legitimately of public interest or concern. In other words, a familiar status may draw a person "within the vortex" of a public controversy.

public administration. The establishment of systems of asset declarations of public officials is one example which is highlighted in chapter III.C.1. of this Tool.

The term "*rights of others*" could pave the way for countless other rights which could be used legitimately to limit freedom of expression. However, it should be noted that the three-part test including the balancing of rights and the possible public interest override are always applicable. In principle, in a conflict between a human right and a right which does not have the same status, greater weight should be given to the protection of the human right.

*Commercial interests and trade secrets* are another example of rights which might, in some cases, allow for the restriction of the freedom of expression. States might withhold such information from others, for example, as a result of regulatory requirements, licences, subsidies, or through tendering procedures and contracts. This sort of information should be public unless there is a risk of harm to the legitimate commercial interests of third parties.

The need for protection of such information, which might deal with manufacturing secrets or similar, derives from the commercial value as a right of the owner. Other information, for instance about the company's structure, relation with its holding company or financial solvency are not trade secrets.

Exceptions to accessing or publishing such information should be applied sparingly. A trade document should, for instance, be protected under trade secrecy only if its disclosure would clearly harm the legitimate commercial interests of an objecting third party[123] and if the disclosure would harm the contracting parties' business interests more than its concealment would harm the public interests in question.

[123] See for instance the case of *Casas Cordero and Other v. National Customs Service* (Chile, 2007), http://www.right2info.org/cases/r2i-cordero-and-others-v.-national-customs-service

## C. National security, *ordre public*, public health or morals

Restrictions to the freedom of expression concerning corruption can also be based on "*national security or ordre public or on public health and morals*". This mirrors the formulation in international human rights instruments to emphasize that the same standards are applied, even if the aims of public health and morals seem to have less relevance in regard to cases pertaining to investigative journalism on corruption.

Restrictions of the freedom of expression or denial of access to information in order to protect national security or *ordre public*, seem more prevalent and are elaborated further.

Although all aims listed in article 13 (1) (d) of UNCAC leave some room for interpretation, the following general principles need to be respected: only the aims expressly authorized by the text can form the basis for a limitation of the freedom of expression, and a strict or narrow interpretation needs to be applied, i.e., the language should be taken at face value. Other broader, undefined aims such as, "national interests" are not a sufficient basis for limitations.

Limitations based on any of these grounds are also subject to the three-part test. International courts rarely overrule a restriction on the basis of the part of legitimate aim of the test. Instead, the focus is on the necessity and proportionality part of the test which is more difficult to satisfy in practice.

The protection of national security or *ordre public* has, along with defamation, often been used as a basis to restrict the freedom of expression.[124] While the protection of national security is a legitimate aim of any State, there have been cases around the world where it has been misused to restrict the free flow of information and ideas. Often defined only in general terms in legislation, national security restrictions may be vague or cover statements which pose only a hypothetical risk of harm, making them ideal instruments of abuse to prevent the airing of unpopular ideas or criticism.

Restrictions can be based on *national security* reasons, for instance, if disclosure of information to journalists or publishing would reveal military secrets of a State or elements of its fight against terrorism.[125] The disclosure of defence-related income and spending data is also a sensitive area, and a certain level of confidentiality may be justified and necessary. Further, funds spent on intelligence or the protection of witnesses might require increased levels of confidentiality.

[124] Due to the similarity of the concepts of national security and *ordre public* and due to a lack of distinct interpretation, the examples below, although mainly referring to national security, are meant to address both aims.

[125] The Special Rapporteur reiterates that any domestic criminal laws that prohibit incitement to terrorism must meet the three-part test of restrictions to the right to freedom of expression.
http://www.ohchr.org/Documents/Issues/Opinion/A.66.290.pdf

On the other hand, diminished transparency in areas such as international trade of weapons and military equipment which are of substantial financial magnitude, increases the vulnerability to corruption and might specifically call for investigative journalism.

The United Nations Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, and the OAS Special Rapporteur on Freedom of Expression jointly declared:

> "Certain information may legitimately be secret on grounds of national security or protection of other overriding interests. However, secrecy laws should define national security precisely and indicate clearly the criteria which should be used in determining whether or not information can be declared secret, so as to prevent abuse of the label 'secret' for purposes of preventing disclosure of information which is in the public interest. Secrecy laws should set out clearly which officials are entitled to classify documents as secret and should also set overall limits on the length of time documents may remain secret. Such laws should be subject to public debate."[126]

According to the General Comment No. 34 of the Human Rights Committee on article 19, "extreme care must be taken by States parties to ensure that treason laws and similar provisions relating to national security, whether described as official secrets or sedition laws or otherwise, are crafted and applied in a manner that conforms to the strict requirements of paragraph 3", which allows only certain restrictions provided by law and necessary to protect a limited list of aims.[127]

No clear definition of what constitutes "national security" has emerged from international jurisprudence. Instead of defining "national security", international courts have focused their attention on whether the restrictions were *necessary* and on the closeness of the link between the statements and any risk to security. In the *Observer and Guardian v. United Kingdom*,[128] for example, the European Court of Human Rights did not question whether a British ban on the memoirs of a former secret agent served a national security goal, even though the book had already been published and widely circulated in Australia and the United States. Instead, the Court found that the ban failed the necessity test since any possible harm to national security had already become irreversible due to prior publication.

[126] http://www.oas.org/en/iachr/expression/showarticle.asp?artID=319&lID=1

[127] On the issue of confidential information and breach of secrecy see the case of *Dupuis and others v. France*, European Court of Human Rights, 12 November 2007. http://echr.ketse.com/doc/1914.02-en-20070607/view/ ; The case of *Stoll v. Switzerland* also deals with a conviction for publishing "secret official deliberations". The European Court of Human Rights held by twelve votes to five that there was no violation of Article 10 of the Convention. The judgement makes reference to the joint declaration of the four special representatives on freedom of expression of 19 December 2006, various other cases and includes the dissenting opinions of some of the judges. *Stoll v. Switzerland*, European Court of Human Rights, 10 December 2007. http://echr.ketse.com/doc/69698.01-en-20071210/view/

[128] *The Observer and Guardian v. the United Kingdom*, European Court of Human Rights, 26 November 1991.

***Case example: Balancing national security interests - Judgment in the Spycatcher case***

In the *Spycatcher* case, the courts of the United Kingdom had issued and upheld various injunctions which prohibited newspapers from publishing excerpts of the book *Spycatcher*, the memoirs of a former intelligence officer, even after it had been published in the United States and other countries. The Government of the United Kingdom claimed that the injunctions were necessary for national security reasons to preserve the confidence of other governments in the secrecy of information held by the intelligence services, to enforce the duty of confidentiality owed by Crown servants, and to safeguard the rights of the Attorney-General pending final determination of the injunction's lawfulness by the House of Lords. The European Court of Human Rights ruled that once the information had been published elsewhere, the residual national security interest was minimal and was outweighed by the interest of the press and public in imparting and receiving the information.

Source: *The Observer and Guardian v. United Kingdom*, European Court of Human Rights, 26 November 1991, para. 65.

In general, cases addressing national security have set out two key principles that follow from the "necessity" test. First, statements may only be sanctioned if they were made *with intent to cause harm to national security*. The intent requirement further serves to shield speakers from responsibility for unintended responses on the part of their listeners. A speaker who makes comments with grossly reckless disregard for their consequences can, however, be considered to possess the requisite intent.

The requirement of intent seeks to draw a line between legitimate political debate on matters of national security and incitement to illegal action. Citizens should be permitted to introduce any views they hold into the marketplace of ideas and promote them through peaceful means, so that others can form their own opinion about them. However, when the speaker intends to spur others to concrete acts against national security, it might be considered "necessary" to limit his or her freedom of expression.

The European Court of Human Rights has consistently emphasized that intent is a crucial factor to be taken into consideration in judging the legitimacy of a restriction on the grounds of national security. For example, in *Şener v. Turkey*, the applicant had published a critical article about Turkey's policy towards its Kurdish minority, and referred to the south-eastern part of the country as "Kurdistan". The Court observed that:

> "[A]lthough certain phrases seem aggressive in tone ... the article taken as a whole does not glorify violence. Nor does it incite people to hatred, revenge, recrimination or armed resistance. ... Furthermore, the Court observes that the applicant was convicted ... for disseminating separatist propaganda by referring to a particular region of Turkey as 'Kurdistan' and alleging that the population of Kurdish origin living in that region was subjected to oppression. In this regard, the Court considers that the domestic authorities ... failed to give sufficient weight to the public's right to be informed of a different perspective on the situation in south-east Turkey, irrespective of how unpalatable that perspective may be for them".[129]

[129] *Şener v. Turkey,* European Court of Human Rights, 18 July 2000, para. 45.

Second, there should be *a clear link between the statement and the likelihood of harm* occurring to national security. This requirement serves to emphasize that States should not take a "better safe than sorry" approach to restricting freedom of expression. Restricting expression based on an uncertain or remote risk of harm would create a great opportunity for abuse, and endanger democratic debate about some of the most important and contentious political issues. Moreover, national security can benefit from a situation where individuals with controversial and radical opinions are permitted to express themselves within the framework of the law, which may avoid them taking action outside of that framework (i.e. by resorting to violence to achieve their ends).

The nexus is a consistent feature of the decisions rendered by the European Court of Human Rights and other international courts in national security cases. Whether a clear nexus exists between the prohibited expression and the occurrence of violence depends, necessarily, on the specific circumstances of each case. For example, in *Karataş v. Turkey*, the European Court of Human Rights took note of the "the sensitivity of the security situation in south-east Turkey" and the "need for the authorities to be alert to acts capable of fuelling additional violence." Nevertheless, it found that poetry which was arguably intended to incite violent acts should have been permitted, because it was unlikely to have that effect in practice:

> "The work in issue contained poems which, through the frequent use of pathos and metaphors, called for self-sacrifice for 'Kurdistan' and included some particularly aggressive passages directed at the Turkish authorities. Taken literally, the poems might be construed as inciting readers to hatred, revolt and the use of violence. In deciding whether they in fact did so, it must nevertheless be borne in mind that the medium used by the applicant was poetry, a form of artistic expression that appeals to only a minority of readers.
>
> [E]ven though some of the passages from the poems seem very aggressive in tone and to call for the use of violence, the Court considers that the fact that they were artistic in nature and of limited impact made them less a call to an uprising than an expression of deep distress in the face of a difficult political situation."[130]

In contrast, in the case of *Zana v. Turkey*, after the former mayor of Diyarbakır had stated in a daily national newspaper interview: "I support the PKK national liberation movement; on the other hand, I am not in favour of massacres. Anyone can make mistakes, and the PKK kill women and children by mistake", the Court held that the restriction was valid given the context in which the remark was made. The Court found there was a great likelihood of further violence resulting:

> "The statement cannot, however, be looked at in isolation. It had a special significance in the circumstances of the case, as the applicant must have realised. ... [T]he interview coincided with murderous attacks carried out by the PKK on civilians in south-east Turkey, where there was extreme tension at the material time. In those circumstances the

[130] *Karataş v. Turkey,* European Court of Human Rights, 8 July 1999, para. 49 and 52.

support given to the PKK – described as a 'national liberation movement' – by the former mayor of Diyarbakır, the most important city in south-east Turkey, in an interview published in a major national daily newspaper, had to be regarded as likely to exacerbate an already explosive situation in that region".[131]

Another threat to investigative journalism might be specific regulations imposed during *states of emergency*. It is recognized in international law that during acute emergencies, States may be unable to perform the careful balancing act normally required to justify a restriction on the freedom of expression. For example article 4 of ICCPR allows States parties to temporarily suspend some of their obligations under ICCPR, including article 19 on the freedom of expression. However, derogations are allowed only under strict conditions. Derogations may only be made in times of emergency which "threaten the life of the nation". They must be officially proclaimed. They may only limit rights to the extent strictly required and may never be applied in a discriminatory way. States imposing derogations must inform other States parties through the United Nations Secretary-General of the rights to be limited and the reasons for such limitation and derogating States must inform other States parties of the termination of any derogation. Despite this provision, it should be noted that States are encouraged to provide for the full protection of the freedom of expression even in states of emergency.

***Elements to be considered***

- Is the three-part test (set out in law, legitimate aim, necessity and proportionality) applied to assessing the legitimacy of a restriction to the right to freedom of expression in all cases?
- Is the increased importance given to the prevention of and fight against corruption reflected in the balancing of interests?
- Are exceptions subject to a public interest override in this balancing of interests, so that information could be disclosed even if this would harm a protected interest in case the public interest is considered more important?
- Are national security (as well as the other legitimate aims) used restrictively as a ground for limitation of the freedom of expression concerning corruption?
- In case some parts are restricted, is there a provision which requires the States to grant partial access, namely to disclose at least the parts of the documents/information which are not restricted (principle of divisibility)?

[131] *Zana v. Turkey*, European Court of Human Rights, 25 November 1997, para. 59 and 60.

# D. Licensing and pre-censoring of media

## 1. Licensing, registration and notification

### Licensing of media outlets

Although article 13 of UNCAC does not explicitly regulate licensing of mass media, arbitrary license administration for media outlets is usually considered as a violation of the freedom of expression.[132] As States parties are encouraged to respect, promote and protect this freedom specifically concerning corruption, this issue should be addressed.

The Technical Guide to UNCAC states:

> "States parties should review their licensing and other arrangements for various forms of media to ensure that these are not used for political or partisan purposes to restrain the investigation and publication of stories on corruption."[133]

International human rights instruments do not usually explicitly prohibit the licensing of media, but note that it should be restricted to a minimum.

Article 10 of the European Convention on Human Rights allows "licensing of broadcasting, television or cinema enterprises". The exception was included because of the limited number of available frequencies and the need to impose licensing regimes to ensure the orderly use of the airwaves.

*Licensing* of broadcasting media companies might be necessary for technical reasons, such as limited frequencies, transmission cables or satellites.[134] However, due to the switch to digital media with technology which does not involve similar limitations, this argument may not hold the same relevance.[135]

Specific requirements might also exist for print media with the aim to establish a register of existing print media outlets. Generally, there might be a procedure which requires media outlets to inform authorities about their existence. If this is a mere administrative *notification*, it is comparable to any business registration and could be justified on the basis of taxation, social obligations, control of anti-monopoly regulations etc.

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[132] Note: Additionally, UNCAC addresses the issue of prevention of corruption in relation to the administration of licenses for private businesses in article 12 (2) (d).

[133] *Technical Guide to the United Nations Convention against Corruption*, UNODC 2009, page 63.

[134] In relation to this topic, see also the Joint Declaration on the protection of freedom of expression and diversity in the digital terrestrial transition of the four special representatives on freedom of expression of 05 April 2013. http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CI/CI/pdf/WPFD/Joint-Declaration-foe-rapporteurs-2013-en.pdf

[135] In regard to the separate issues arising from the transition period of the switch over to digital-terrestrial transmission, see, for instance, the Guide for the Digital Switch-Over from the OSCE Representative on the Freedom of Media http://www.oscebih.org/documents/osce_bih_doc_2013041709281795eng.pdf

In some cases, the procedure involves the acquisition of a permission based on further substantive information, a fee or other prerequisites. In order to distinguish this process from administrative notification, the OSCE Representative on Freedom of Media calls this process "*registration*" and has recommended "that the arbitrary system of permissive registration be abolished for the print media. The possibility to refuse registration of print press outlets based on grounds of content, subject matter or intended audience should be removed. Restrictions on content, where applicable, should be provided for in general legal provisions and not used as a basis to deny the existence of a newspaper".[136]

In addition to abuses of licensing and registration, pre-censorship can also take other indirect forms if, for example, the government distributes its advertisements solely to "friendly" media or withholds information related to issues of public interest from "unfriendly" media.

A fundamental tenet that is reflected in many Constitutions is the *exclusion of prior censorship of media by a State body*.[137] Even in those States where the Constitution does not expressly prohibit pre-censorship of media, it is usually considered to be an essential part of the freedom of expression.

Although the European Court of Human Rights has not prohibited prior restraint altogether, it has, for instance in the context of providing ratings for films said that "the dangers inherent in prior restraints are such that they call for the most careful scrutiny."[138] It is clear from its case law that the European Court does not argue in favour of a general system of prior censorship of the media.

[136] http://www.osce.org/fom/24436

[137] There may be some exceptions to this main rule in order to protect children from immediate and significant harm or the general public from serious forms of violent publications.

[138] *The Observer and Guardian v. the United Kingdom*, European Court of Human Rights, 26 November 1991, para. 60.

***Case example: Critical reporting no justification to suspend broadcasting licence - Judgment in the case of Özgür Radyo-Ses Radyo Televizyon Yayin Yapim Ve Tanitim A.S. v. Turkey***

*Özgür Radyo-Ses Radyo Televizyon Yayin Yapim Ve Tanitim A.S.* is a Turkish limited company which broadcasts radio programmes in Istanbul. It was issued warnings and its licence was suspended four times in the 1990s and 2000s by the broadcasting regulatory authority, the RTÜK, which accused it of, among other things, broadcasting programmes liable to incite the people to engage in violence, terrorism or ethnic discrimination or to stir up hatred. The programmes touched on various themes such as corruption, the methods used by the security forces to tackle terrorism and possible links between the State and the mafia.

The company was successful in its three appeals to the European Court of Human Rights. In assessing the situation, the Court noted that the programmes covered very serious issues of general interest that had been widely debated in the media. The dissemination of information on those themes was entirely consistent with the media's "watchdog" role in a democratic society. The Court noted that the information concerned had already been provided to the public. Some of the programmes had done no more than to relate, without comment, newspaper articles that had already been published and for which no one had been prosecuted. Moreover, the applicant company had been careful to explain that it was citing a newspaper.

Source: *Özgür Radyo-Ses Radyo Televizyon Yayin Yapim Ve Tanitim A.S. v. Turkey*, European Court of Human Rights, 30 March 2006 (two suspensions); *Özgür Radyo-Ses Radyo Televizyon Yayin Yapim Ve Tanitim A.S. v. Turkey*, European Court of Human Rights, 4 December 2007 (365 day suspension), and *Özgür Radyo-Ses Radyo-Televizyon Yayin Yapim Ve Tanitim A.S. v. Turkey (no. 3),* European Court of Human Rights, 10 March 2009 (total suspension of its radio programmes for 30 days).

## Licensing of journalists

Some States require individuals to obtain a licence before working in the media, using the justification that journalism is a profession and that it is both normal to licence professionals – such as doctors and lawyers – and that this is necessary to maintain professional standards. In some cases, however, this licensing is used as a political tool for governments to suppress alternative, critical or diverse voices.

Accredition of a journalist can, in some situations, be justified. For example, entrance to high-security premises such as those belonging to government, or to high-security meetings can be reserved for journalists who have been accredited to enter.

The Inter-American Convention on Human Rights, in article 13 (2), expressly prohibits all prior censorship. The Inter-American Court of Human Rights issued an advisory opinion in a case in which Costa Rica voluntarily sought the views of the Court stating that compulsory licensing of journalists violates article 13 of the American Convention if it "denies any person access to the full use of the news media as a means of expressing themselves or imparting information".[139]

The Court held that the licensing of journalists was different from that of other professionals. "The problem results from the fact that Article 13 expressly protects freedom 'to seek, receive

[139] Sources: Advisory Opinion OC-5/85, 13 November 1985 Inter-Am. Ct. H.R. (Ser. A) No. 5 (1985) and *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism.* http://www.oas.org/en/iachr/expression/showarticle.asp?artID=149&lID=1

and impart information and ideas of all kinds…either orally, in writing, in print...' (…) The practice of journalism consequently requires a person to engage in activities that define or embrace the freedom of expression that the Convention guarantees. This is not true of the practice of law or medicine, for example". [140]

The Court acknowledged that the goals the Government sought to achieve by the restriction – good ethics, independence and high quality of journalism – were legitimate as a means to promote the "general welfare" and "public order". However, it reasoned that compulsory membership in a journalists' association was not necessary to ensure those goals.

***Elements to be considered***

- Are all public authorities which exercise formal regulatory powers over the media protected against interference, particularly of a political or economic nature? Such protection could include an appointment process for members which is transparent, allows for public input and is not controlled by any particular political party.
- Do regulatory systems take into account the fundamental differences between the print and broadcast media sectors?
- Is the allocation of broadcast frequencies based on transparent criteria? Does the allocation ensure equitable opportunity of access and pluralism of the media?
- Are special registration requirements (beyond the level of an administrative notification) imposed on the print media?
- Do registration systems which impose substantive conditions on the print media, involve excessive costs? Are the systems overseen by bodies which are not independent of government?
- Is accreditation based on the security classifications of individual journalists and restricted to entering high security premises and to limited space venues such as parliament?

[140] Sources: Advisory Opinion OC-5/85, 13 November 1985 Inter-Am.Ct. H.R. (Ser. A) No. 5 (1985) and *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Para. 72 - 73; Also, id. at para. 79.

## 2. Injunctions against media

Article 10 of ECHR does not prohibit the imposition of all prior restraints on publication. Nevertheless, the European Court, in the *Spycatcher* case[141] emphasized that "the dangers inherent in prior restraints are such that they *call for the most careful scrutiny* on the part of the Court". The Court noted that this is especially so as regards the press, since "news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest".[142]

In the United States, the ban on judicially-imposed prior restraints on publication of information by newspapers is almost absolute. A prior restraint is presumptively unconstitutional, with the petitioner bearing the "heavy burden of showing justification for the imposition of such a restraint."[143] This justification must satisfy a three-pronged test: (a) publication must pose a clear threat of immediate and irreparable damage to a near sacred right; (b) the prior restraint must be effective; and (c) no less extreme measures may be available.[144]

The United States Supreme Court has indicated that exceptions to the prohibition of prior restraints should be tolerated only when it comes to a very narrow range of publications. In times of peace, the prohibition can be justified if the statements pose a clear and imminent threat to a defendant's fair trial rights where those rights cannot be safeguarded by less onerous means.[145]

***Case example: The Pentagon Papers case***

In the *Pentagon Papers* case, the United States Supreme Court observed that "any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity". Thus it ruled that the prior restraint on publication during the Vietnam War of 47 volumes of "top secret" documents sought by the Government on grounds of national security and maintaining good relations with other countries was unconstitutional. The documents gave a detailed description of the internal decision-making procedures of the Government of the United States leading to its involvement in the war and also highly sensitive information regarding the efforts by other Governments in arranging an end to the war. The Supreme Court refused to uphold the restraint, even though the source who provided the papers may well have obtained them in breach of the criminal law and even though, in the view of a majority of the Court, publication would cause "substantial damage to public interests".

Source: The *Pentagon Papers* case, note 83, supra, 403 U.S. 713 (1971).

If a State decides to make it a criminal offence to create obstacles for journalists in their line of duty, it could be a useful tool to promote freedom of expression, if it is effectively implemented.

[141] See case example on page 65 of this Tool.

[142] *The Observer and Guardian v. United Kingdom*, European Court of Human Rights, 26 November 1991, para. 60.

[143] *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971).

[144] *Nebraska Press Association v. Stuart*, 427 US 539, 565-66 (1976); *New York Times Co. v. United States*, 403 U.S. 713, 730 (1971) (*per curiam*) (the *Pentagon Papers* case).

[145] E.g., *Cable News Network v. Noriega and United States*, 111 S.Ct. 451 (1990).

# INTEGRITY AND ACCOUNTABILITY

# V. Integrity and accountability

Investigative journalists have risked their personal safety to produce strong, ethical and important reports on corruption in all regions of the world.

However, if the media is to play a role in exposing public corruption and informing society, it should also take measures which address transparency, integrity, and accountability in its own dealings. This transparency extends to the ownership and operations of private sector media outlets.

Article 12 of UNCAC encourages measures which promote transparency among private entities, including measures regarding the identity of legal and natural persons involved in the establishment and management of corporate entities, creation of codes of conduct for the relevant professions, and measures to prevent conflicts of interest in regard to activities of former public officials.[146]

> Investigative reporting on corruption can only impact society if the public trusts the media and the work it produces. Building that trust begins with a strong ethical and professional approach.

Trust and respect for journalists is lower than ever in some countries such as the United States[147] and the United Kingdom, in large part because the media has failed repeatedly to keep its own house in order. Citizens of the United Kingdom said they trusted journalists even less than they trust bankers and Members of Parliament.[148] Revelations of journalists bribing public officials for information, hacking into telephones of citizens and lying to investigators about their actions outraged the public and led to calls for stronger regulation of the press.

Scepticism also remains high in other countries. “In a lot of places, there hasn’t been professional or independent journalism, or anything even close to what we would think of as investigative journalism. Instead (media organizations) were always putting out propaganda for various interests,” said Mike O’Connor, a country representative for the Committee to Protect Journalists.[149]

[146] For public officials in service, States are also requested to endeavour adoption of conflict of interest regulations in article 7, para. 4 of UNCAC.

[147] Gallup Poll, 21 September 2012. http://www.gallup.com/poll/157589/distrust-media-hits-new-high.aspx

[148] IPSOS Mori Trust Poll, February 2013 . http://www.ipsos-mori.com/Assets/Docs/Polls/Feb2013_Trust_Topline.PDF

[149] Telephone interview with Mr. O’Connor, March 2013.

Newspapers and television outlets that operate as fronts for political parties, governments, specific business interests, or even organized crime, exist in many parts of the world. Many of these organizations use their prominence to influence public opinion on topics or political realities. Efforts to increase transparency can and should be made.

In Eastern Europe, Asia, the Middle East and Africa, lawmakers and critics of mainstream media are increasingly complaining about lapses in media ethics, and calling for stronger governmental regulation in response.

***Case example: Vulnerability of journalists to corruption – Operation Elveden***

In the United Kingdom, at least 22 journalists were arrested on charges that they bribed police and other public officials for information, and the investigation was ongoing at the time of writing this Tool. Details revealed that the journalists paid money not for information vital to the nation's well-being, but for salacious details of the personal lives of public figures such as sports and music stars.

The primary duty of investigative journalism is as a watchdog over the powerful in the private sector, or over a Government, its officials and the way it treats its citizens. In the United Kingdom cases, journalists colluded with the police rather than monitored them in criminal acts. That undermined the credibility of these two vital institutions.

*Source: BBC News, the United Kingdom, 8 March 2013, http://www.independent.co.uk/news/uk/crime/police-officer-and-a-prison-officer-plead-guilty-to-selling-stories-to-the-sun-8526011.html*

Steps to improve ethical standards, such as those outlined in investigative journalism manuals published by UNESCO,[150] FAIR[151] and others will improve the quality and consistency of investigative reporting. All this work, however, will not lead to an immediate rise in public trust and the undoing of past damage.

When the public does not trust the messenger, how can it trust its message? A bond of trust and respect – even if occasionally strained – between journalist and reader is crucial to investigative reporting that makes a difference for society.

Bad journalism and ethical lapses create public disdain for the media. Every inaccurate story, unfair front page attack or act of blatant partisanship makes it more difficult for the next investigative journalist who attempts to tackle a difficult or controversial story on corruption. When the media is not trusted, whistle-blowers, victims of abuse, and witnesses to public wrongdoing are less likely to come forward and share information with the press.

The public's clear scepticism about the entire concept of ethical journalism should be troubling to all who believe that quality investigative reporting can help curb rampant

[150] http://www.unesco.org/new/en/communication-and-information/resources/publications-and-communication-materials/publications/full-list/story-based-inquiry-a-manual-for-investigative-journalists/ http://www.unesco.org/new/en/communication-and-information/resources/news-and-in-focus-articles/all-news/news/unesco_launches_the_global_casebook_of_investigative_journalism/

[151] http://fairreporters.net/ij-manuals/

corruption. When faith in impartial and ethical investigative reporting erodes, so does the journalist's ability to provide a vital service to the public.

Good investigative reporting is, by definition, ethical reporting.[152] A journalist's obligation is to report accurately and fairly, confront the subjects of any story and give them a platform to explain and respond to the findings.[153] Publishing well-documented stories is the best way journalists can serve their States and their profession.

Aidan White, former General Secretary for the International Federation of Journalists, wrote in a 2011 discussion paper on journalism and human rights for the Council of Europe: "In essence, ethical journalists serve the public's right to know. They are professional also in the sense that they seek the truth and resist the pressure to convey distortions, be they from media owners, business interests or political forces. These are the ethics which should be promoted.''[154]

Around the world, States and journalist associations in some of the most difficult environments have begun reforms aimed at creating broader freedoms of opinion and expression and a more responsible press. A movement in Guatemala, for example, has brought together journalists, educators and civic leaders to emphasize the importance of ethics and provides guidelines for others to follow.

The problems facing Guatemalan journalists are familiar to journalists in developing countries all over the world: low salaries, threats and violence.[155] Media ownership is often concentrated in a few hands, and newsrooms are lacking resources, which make them susceptible to pressure from advertisers.

"Reformers (in Guatemala) must show how their ideas would promote a healthy public sphere and are linked to the goals of other reform groups, such as human rights coalitions," argues Stephen Ward, the director of the Center for Journalism Ethics at the University of Wisconsin-Madison. "Otherwise, the public will dismiss journalistic initiatives, such as better right to access of information laws, as motivated by a prurient desire to report the private lives of individuals. This justification will rely ultimately on ethical reasoning about the value of a free press, why journalists should be independent, and the link between media and democracy. (…) Media ethics should be a form of social activism: an activism to create the news media system that Guatemala needs." [156]

[152] Rosemary Armao presentation at the UNODC Expert Group Meeting, 11 April 2010.
[153] Henrik Kaufholz presentation at the UNODC Expert Group Meeting, 11 April 2010.
[154] Council of Europe, "Ethical Journalism and Human Rights,'' 8 November 2011. https://wcd.coe.int/ViewDoc.jsp?id=1863637
[155] PBS.ORG Mediashift, "Even in Troubled Guatemala Media, Journalism Ethics Matter,'' 8 October 2012. http://www.pbs.org/mediashift/2012/10/even-in-troubled-guatemalan-media-journalism-ethics-matters282
[156] Idem.

## A. Why ethical reporting is important

There are many reasons why journalists should act ethically, but ultimately those reasons fall into two distinct categories: the first relates to fairness, accountability and morality, while the second category of reasons are both practical and for self-preservation.

First, the moral argument. Every good journalist must understand the potential impact a story may have on the subjects of their stories and, quite likely, their families and business associates. Lives can be ruined, jobs lost and fortunes confiscated in the wake of powerful reporting. There is nothing unethical about that if the information is accurate and presented fairly and backed by details and documented proof. However, such a responsibility is not to be taken lightly.

Ethical reporting begins with factual reporting. The information has to be correct and all possible mitigating factors examined.[157] The subjects of any story and their supporters have to be given a chance to respond and their explanation has to be included in a final report. However, factual reporting is only part of a journalist's job. Relaying information fairly, in context, and in a manner that does not sensationalize or exploit is equally important. Fairness is perhaps even harder to achieve than accuracy. Developing a sense of journalistic fairness requires thoughtful contemplation.[158]

***Case example: Prejudgment by the press – The Boston Marathon Bombing***

An example of the distinctions between fairness and accuracy – and a tremendous ethical breach – can be found in a front page photograph in the New York Post following the Boston Marathon bombing in April 2013. In the wake of the attack, the Federal Bureau of Investigation and police circulated photos of two potential suspects amongst other law enforcement agencies, but since there was no proof of any wrongdoing, the photos should not have reached the public.

The photos made their way to most news organizations in the United States, but almost all of them avoided printing the photos out of fairness. Linking these two men to an attack that killed three people and injured more than 260 would cause irreparable harm even if they were cleared of any involvement. The lone exception was the New York Post, which marked the men in bold red circles and ran their photos under the front-page headline "Bag men", in the reference to bombs left in bags at the marathon.

The men pictured had nothing to do with the bombing, but the New York Post and publisher Rupert Murdoch refused to apologize or run a correction. Murdoch and editors at the New York Post argue that technically their article was correct, since the FBI had indeed circulated the photos of the men as "people of interest". They ignored the fact that the officials never named the men as suspects or "bag men", and never publicly distributed their photos.

[157] See also chapter II in regard to the degree of care and threshold.

[158] Barney Calame, Dow Jones Newsfund, "Why Ethics Are Important''. https://www.newsfund.org/PageText/JournRoad.aspx?Page_ID=JrRdYEth

Professional journalists have an ethical obligation to treat all stories and all subjects fairly, and are encouraged to constantly question their own motives in each case. When they resort to irreverent headlines and unfair inferences, they exhibit contempt for their subjects and for the profession.

The second category of reasons is more practical. When journalists make false or unsubstantiated claims, they lose the respect of their sources and the public. Eventually, this lack of respect costs them access to sources and information – two crucial tools for journalists investigating corruption.

There are other reasons for news organizations to practice ethical journalism. False, reckless or malicious stories expose news organizations to lawsuits and sanctions that could even force a company into bankruptcy. Journalists face imprisonment in societies with criminal libel laws, or steep fines in civil courts.

Ethical journalism instils confidence in an organization's readers and viewers, which creates a larger and more loyal audience. When the public trusts the news organization, it is more likely to trust what it reports. "This translates into commercial success. What journalists have to sell is the news and if the public does not believe their reporting, they have nothing to sell. Consumers of the news are more likely to believe reporting if they see the journalists as ethical in the way they treat the public and the subjects of news coverage."[159]

Finally, ethical reporting at one organization sets a standard for others to follow. Change happens slowly, but good reporting by one organization spurs a similar response by competitors. Ultimately, society benefits when journalists compete to produce detailed and accurate stories.

On the specific subject of reporting on criminal proceedings, the Council of Europe Committee of Ministers issued a Declaration in 2003. Amongst other things, it encourages States to support training of journalists about criminal proceedings and calls on journalists to draw up professional ethical guidelines and standards and to respect key principles such as the presumption of innocence.[160]

[159] Gene Foreman, textbook "The Ethical Journalist: Making Responsible Decisions in Pursuit of News" Wiley-Blackwell Publishing, September 2009.
http://media.wiley.com/product_data/excerpt/17/EHEP0021/EHEP002117-1.pdf

[160] Declaration on the provision of information through the media in relation to criminal proceedings
https://wcd.coe.int/ViewDoc.jsp?id=51355&Site=CM&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75
See also: Recommendation Rec (2003) 13 of the Committee of Ministers on the provision of information through the media in relation to criminal proceedings.
https://wcd.coe.int/ViewDoc.jsp?id=51365&Site=CM&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75

## B. Creating an ethical environment through self-regulation

The responsibility for constructing a code of conduct and establishing mechanisms which help to ensure that the code is followed, falls on journalists and news organizations themselves. Similar to integrity initiatives of other sectors, *self-regulation measures* help to raise professional standards. In the media sector, they also contribute to the respect and social standing of investigative journalism.

However, in many countries, the additional imposition of rules by an independent body is necessary to facilitate self-regulation. A lack of self-regulation might not only undermine public confidence, but also open the door for unnecessary regulations.

As discussed, the rise of Internet reporting, bloggers, independent media centres, and anti-corruption NGOs is altering the definition of what constitutes a journalist. Efforts to create systems of self-regulation should acknowledge these changes and strive to include new methods and new practitioners. It is critical that persons who engage in investigative journalism contribute to and respect self-regulation measures. In addition, others are encouraged to pay attention to and be guided by the principles of self-regulation.

Below are some practical steps that journalists, journalists' associations, media outlets or the media sector as a whole, could take to promote ethical reporting and greater accountability to the public they serve.

### Creating a Code of Conduct

A code of conduct is a tool to provide general guidance and minimum standards of ethics, integrity, accountability and further areas of relevance for the specific industry (e.g. privacy rights, safety). It also serves as the basis on which the public and those who feel unfairly treated by the media can lodge complaints. Codes of conduct for journalists may exist at different levels, either designed for the whole media sector or industry, separate for print and broadcasting media or for individual media outlets. Codes at the level of individual media outlets may reflect the wording of a sector-wide code, but could include more detailed information or specific regulations. A journalist might relate more to a code of the media outlet for which he/she works.

UNCAC in article 12, paragraph 2 (b) encourages the private sector as a whole to establish codes of conduct. This is also of relevance for the media sector and its various media outlets.[161]

Although essential as a safeguard mechanism, a code of conduct is not a guarantee of ethical behaviour and should not be treated as such. The media sector in the United Kingdom operated under a general code of ethics for all journalists and employees, and yet that did not prevent one of the largest journalism scandals in decades.

[161] Article 8 of UNCAC further obliges States to create codes of conduct for the public sector.

However, a code of conduct does set out an organization's goals and commitment to the profession, and defines what is expected of its employees. It is not a substitute for supervision, but is a part of an ethical approach. In cases of complaints, journalists might need to explain their behaviour. The fact that a journalist has adhered to a comprehensive code of conduct and other applicable regulations or laws can help to prove due diligence.[162] As pointed out in the OSCE Media Self-Regulation Guidebook, "there will inevitably be times when journalists test the limit of their freedoms in the name of defending the public good. If journalists work according to agreed ethical standards of behavior - based on accuracy, fairness, independence and accountability - they are less likely to fall foul of the law".[163]

The creation of a code of conduct as a self-regulatory measure should, as the word indicates, be driven by the media and journalists themselves (e.g. without involvement of the government or other unrelated parties).

The senior management of media outlets, i.e. publishers or editors-in-chief should ensure that staff members and collaborating freelancers are aware of the principles of the code. Measures should be taken to ensure that journalists keep the principles of the code in mind in their work and internalize them.

### Creating a position of Ombudsman or Public Editor

Print and broadcasting media outlets should consider creating an internal complaints department (such as an independent ombudsman) to deal directly with concerns from the public and to monitor adherence to the code of conduct. A mechanism that provides for sanctions in case of non-compliance should be established. Additionally, the creation of incentives such as awards for integrity in investigative journalism could be explored.

The internal complaints department would be separate from a national sector-specific self-regulatory body, such as a Press Council, and would provide media outlets the opportunity to respond directly to their readers/audience.

### Forming a collective self-regulatory body such as a Press Council, Citizens Board or Press Complaints Commission

Collective self-regulatory bodies have already been established in many parts of the world. Such a body is designed to offer the public assurances about the quality of the information it receives, to enforce standards of professional journalism and preempt excessive and unneccesary state regulation.

[162] See also case examples and considerations in chapter II.
[163] The Media Self-Regulation Guidebook of the OSCE. http://www.osce.org/fom/31497

In its guide on professional journalistic standards and ethics codes, UNESCO points out that press councils have greatly reduced the number of times journalists and news organizations are brought to court over the publication of stories. [164]

While press councils have a long tradition in North Europe and the Scandinavian States, they are also found in other parts of the world, such as Australia,[165] Bosnia-Herzegovina,[166] India,[167] Indonesia,[168] Kenya[169] and South Africa.[170]

Press councils have two key functions. The first function is to provide a "fast, cheap mechanism for complaints and corrections."[171] Citizens and subjects of stories should have an opportunity to air their grievances to an independent arbiter without the time and expense involved in filing a court procedure. Press councils also build public confidence by demonstrating that the industry is capable of self-regulating in a way that addresses concerns and does not require government interference.

The press council would review cases which fall within its terms of reference and the code of conduct. The objective would be to reach an alternative dispute resolution through dialogue and to mediate between the parties. The mechanism should not be time and cost-intensive and should attempt to create a more conciliatory atmosphere than a court room. The final decision of the council should be published.

Such a system does not guarantee amicable solutions, of course. Often journalists stand by their story as accurate, well-sourced and fair, and are reluctant to make corrections or apologies which they do not believe are warranted. By the same token, the subjects of stories are not always satisfied by the results of the mediation process. In cases where no compromise or agreement can be reached, a finding for or against the media outlet could be issued.

The second function of a press council is to promote a free press and to guard against legislative intrusions. The Australian Press Council, established in 1976, is based on the premise that "freedom of the press is a freedom that must be used responsibly". By strictly self-regulating its members and providing timely and thorough responses to citizen complaints, the Australian Press Council minimizes the possibility of government intervention. "Any statutory controls undermine the freedom of the press. The Council

[164] UNESCO, "Professional Journalistic Standards and Codes of Ethics'' http://www.unesco.org/new/en/communication-and-information/freedom-of-expression/professional-journalistic-standards-and-code-of-ethics/key-concepts/#bookmark3

[165] http://www.presscouncil.org.au/

[166] http://english.vzs.ba/

[167] http://presscouncil.nic.in/HOME.HTM

[168] http://presscouncil.or.id/

[169] http://www.mediacouncil.or.ke/

[170] http://www.presscouncil.org.za/

[171] Henrik Kaufholz, presentation at the UNODC Expert Group Meeting, 11 April 2013.

scrutinizes legislation, court decisions and any activities of politicians, newspaper proprietors or others that may threaten the freedom of the press."[172]

Regarding the power of a press council to impose sanctions, the OSCE Media Self-Regulation Guidebook explains:

> "Voluntary regulation is most effective when sanctions do not include financial penalties. Any system involving fines becomes more legalistic and confrontational, with lawyers arguing over the size of penalties to be levied. This dilutes all that makes self-regulatory bodies practical and useful. There is evidence that financial penalties are not an effective punishment for newspapers because the increased sales from an intrusive story can outweigh the subsequent fine. Moreover, the impact of fines will vary widely and unfairly, depending on the wealth of the newspaper involved. In any case, a self-regulatory body would have grave difficulty introducing fines or compensation unless it had a statutory basis – and that, of course, would conflict with the notion of the system being self-regulatory. Self-regulation is a pledge by quality-conscious media professionals to maintain a dialogue with the public. A complaint mechanism is set up to deal with justified concerns in a rational and autonomous way."

If Press Councils are to have credibility amongst the public and issue fair and impartial rulings, self-regulation must be by a body that is independent of the media itself, as well as of government in many ways. If "self-regulation" is taken to mean regulation by – or partly by - the body being regulated, it is unlikely to be robust. It would be unlikely to be able to deal with corruption within the newspaper industry itself, and also might take a stance towards revelations as to possible corruption involving government officials who are in a position to positively help the media company and its ownership. On that basis, it may be argued that "self-regulation" should be undertaken by a body composed of journalists and persons linked to the media, but not by those (newspaper proprietors or editors) directly or indirectly responsible for media content.

[172] Australian Press Council. http://www.rjionline.org/MAS-Press-Councils-Australia%20

**EXCERPTS FROM THE BRITISH PRESS COMPLAINTS COMMISSION**

**KEY BENEFITS OF THE SYSTEM OF SELF- REGULATION**

**Quick and free**

The main role of the Press Complaints Commission (PCC) is to serve members of the public who have complaints about newspapers and magazines. In order to do this effectively, the PCC offers a service which is both quick and free.

**Accessible to all**

It is our aim to ensure that the PCC is accessible to all. That is why we: operate a local rate helpline to assist members of the public in making complaints; publish details on how to make a complaint in a range of minority languages - including Welsh, Urdu, Bengali, Arabic, Somali and Chinese; maintain this Internet site so that information is available 24 hours a day.

**An industry committed to standards and an independent Commission**

Self-regulation works because the newspaper and magazine publishing industry is committed to it. Throughout the twenty years of the PCC, every critical adjudication against a newspaper or magazine by the Commission has been printed in full and with due prominence. When the Commission receives a complaint, editors now never do anything other than seek to defend themselves in terms of the industry's Code of Practice - a sign of their commitment to it.

**Protecting the vulnerable**

Central to the work of the PCC and to the Code of Practice is the added protection it gives to particularly vulnerable groups of people. The Code gives special protection to children, innocent relatives and friends of those convicted of crime, victims of sexual assault and patients being treated in hospital. It also includes rules on discrimination to protect individuals at risk of racial, religious, sexual or other forms of discrimination.

**Maintaining a free, responsible press**

One of the central benefits of press self-regulation is that it combines high standards of ethical reporting with a free press. Statutory controls would undermine the freedom of the press - and would not be so successful in raising standards. A privacy law, too, would be unworkable and an unacceptable infringement on press freedom. It would be of potential use only to the rich and powerful who would be prepared to use the Courts to enforce their rights - and would be misused by the corrupt to stop newspapers from reporting in the public interest. Self-regulation has none of the problems of the law - yet still provides a system in which editors are committed to the highest possible ethical standards.

*Source: Excerpted from the British Press Complaints Commission*

## Answering questions from the public

The Internet has provided news organizations and journalists an unparalleled opportunity to interact with the public. When it comes to particularly complex or important stories, journalists should consider writing a small sidebar explaining the entire investigative reporting process. This gives the public a chance to see the amount of work and dedication needed to produce such work, and assures them that the story was handled professionally.

Additionally, after a story is published, journalists and editors could consider setting up online chat sessions, inviting the public to call or write in with questions about the project.

In many cases, the public will ask questions that a journalist may not be able to answer because of confidentiality and other promises. These reasons can be explained courteously so that the public better understands the news-gathering process.

### Practicing skillful and fact-based journalism

The best way for journalists to serve their communities is to produce accurate and fully proven articles on corruption. To win public support, journalists and news organizations should investigate their stories thoroughly, avoid editorializing or taking political positions in news articles, and treat their subjects and audience fairly at all times.

Professional and ethical reporting should consider the following:

- Creating a true, fair and accurate portrayal of events or circumstances based on research and reporting.
- Printing or displaying on a website all proof of the story, including documents gathered in the course of reporting, public records, court files and any other information that can assure the public that the report is accurate and fair.
- Giving the subject of the story a full and complete opportunity to respond. Calling a subject at the conclusion of a six-month investigation and giving him one day to respond is neither fair nor professional.
- Having all investigative stories fact-checked, edited and reviewed by a lawyer before publication. The fact-checking process should be done internally, with other journalists reviewing the work and making sure it complies with standards.
- If mistakes are made, correcting the error promptly and in a prominent place where everybody can see it, explaining what the error was, how it occurred and apologizing to the public and the subject of the story.
- Explaining how the information used in the story was obtained, including a list of all information requests. If information came from confidential sources, explaining to the readers why the sources were granted confidentiality, if possible.
- Writing the article in a clear and concise manner.

### Enlisting local freedoms of opinion and expression attorneys to volunteer

Investigative reports on corruption always need to be vetted by experienced lawyers for potential legal issues. Lawyers are expensive, often far beyond the reach of news organizations. Journalists associations and news outlets should form alliances with lawyers who are willing to work pro bono, for news organizations. The lawyer would perform a public service seeking to strengthen the role of a free press in his or her country, and it would be a sign to the public that a news organization is committed to the highest possible standards.

# INDEPENDENT MEDIA CENTRES AND CROSS-BORDER NETWORKS

# VI. Independent media centres and cross-border networks

In April 2013, the International Consortium of Investigative Journalists (ICIJ)[173] published a groundbreaking project that detailed how corrupt government leaders, businessmen, tax dodgers and "the mega-rich" use complex offshore structures to hide assets and launder money with the help of banks and specialized accountants.[174]

The investigation, "Secrecy for Sale", used a cache of 2.5 million records, including personal bank accounts and corporate documents, to uncover what it called widespread fraud and corruption. Many of these records were leaked at first, and many more obtained later by access to information requests and searches. The investigation made headlines around the world because it clearly demonstrated how corruption plagues all societies by robbing governments of badly needed money. A number of countries have now launched national investigations into matters revealed through the project.

Furthermore, the project's reliance on independent media centres may have a great influence on journalism over time. As it produced the stories on tax havens and corporate malfeasance, ICIJ enlisted 84 journalists and researchers in 46 countries to work on the project and produce more than two dozen articles.[175] The list of correspondents revealed that virtually all were recruited from independent media centres operating in their countries.

Over recent years, the growth of independent media centres and transnational networks around the world has been rapid and is changing the landscape of investigative reporting. A survey carried out in 2012 by the Center for International Media Assistance identified 106 investigative journalism non-profit organizations operating in nearly 50 countries, with more than half of them founded in the past five years.[176]

The size, scope and funding of independent centres vary vastly and cannot be easily categorized. In some cases, one or two local investigative journalists have established a centre dedicated to uncovering corruption and improving the quality of life in their countries. Others, such as the Philippines Center for Investigative Journalism (PCIJ), the Romanian Center for Investigative Journalism, and FAIR, have been operating for a decade or longer and also offer training for journalists.

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[173] Founded in 1997, ICIJ is a non-profit global network that enlists journalists in more than 60 countries who collaborate on in-depth investigative stories.

[174] ICIJ, 4 April, 2013, "Secrecy for Sale: Inside the Global Offshore Money Maze''. http://www.icij.org/offshore

[175] ICFJ, "About the Project''. http://www.icij.org/offshore/about-project-secrecy-sale

[176] Center for International Media Assistance, January 2013 "Global Investigative Journalism, Strategies for Support''. http://cima.ned.org/publications/global-investigative-journalism-strategies-support; Global Investigative Journalism Network, "Investigative Journalism Nonprofits: A Survival Guide''. http://gijn.org/2013/04/29/how-to-survive-as-an-investigative-journalism-nonprofit

Some investigative centres were formed as a last resort by professional journalists in regions where the media is controlled by a few powerful businessmen or the government. Others were created and thrive in regions that have a relatively free and vibrant press but are lacking in quality and in-depth investigative reporting from mainstream media. The common denominator is that all of these centres offer an alternative source of investigative reporting that benefits the public, and in many cases provide support and training to likeminded journalists.

Another common characteristic is high and consistent standards. All of the journalists used by ICIJ, the Danish investigative network Scoop, the Balkan Investigative Reporting Network (BIRN) and other networks that support independent centres undergo extensive training. Every story published or supported by Scoop, for example, is vetted by teams of local editors and has to undergo a mandatory legal screening before publication.[177]

The PCIJ is considered a model for others to follow because of the quality of its reporting and its ability to get reports published in major national newspapers and magazines. It has produced more than 1,000 investigative reports since its foundation in 1989, and its success shows the importance of specialized investigative centres even in countries with robust and free media laws. PCIJ notes that "[d]eadline pressure, extreme competition, budgetary constraints, and safety issues make it difficult for many journalists to delve into the causes and broader meaning of news events."[178] The ability to provide detailed analysis and research is at the heart of investigative reporting, and underscores the importance of independent media centres.

"What makes independent media centres so important is that they can do the type of detailed reporting that newspapers and television cannot or will not do for a number of reasons," said Rosemary Armao, a journalism professor at the State University of New York who has trained and worked with media centres in Africa, the Balkans, Asia and Mexico. "That independence allows them to investigate corruption in ways that others cannot."[179]

## A. Differentiation between centres and networks

While the terms "independent investigative centre" and "investigative networks" are often used interchangeably and their commitment to investigative reporting and methods are nearly identical, the nature of each must be defined.

### Independent Investigative Centres

Local independent investigative centres operate in individual countries with a core mission of exposing corruption and wrongdoings. The largest ones employ staff and editors, and publish

[177] Interview with Henrik Kaufholz, Scoop Chairman of the International Committee; Presentation by Mr. Kaufholtz at the UNODC Expert Group Meeting, 11 April 2013. http://i-scoop.org/scoop/

[178] Philippines Center for Investigative Journalism. http://pcij.org/about/

[179] Ms. Armao Interview, 26 April 2013.

on their own websites or offer their stories to local publications. Most of them generate printed information, and a few produce television shows, videos and documentaries.

The work of these centres should not be considered as a threat to mainstream media in their countries, although in the best circumstances, they challenge traditional outlets into action. In many regions, the work of independent centres is offered free of cost to other publications. The centres can supplement traditional media and provide an elevated level of reporting. The PCIJ notes that it "does not intend to replace the work of individual newspapers or radio and television stations, but merely seeks to encourage the development of investigative journalism and to create a culture for it".[180]

Studio Monitor in Tbilisi, Georgia, was founded in 2004 by a group of television journalists and videographers who were frustrated by what they said was censorship by a tightly controlled group of media owners. In the past decade, the small studio has produced dozens of exposés on corruption, but it still has difficulty finding mainstream media to publish its findings. Studio Monitor receives funding from several international donors but is still in a precarious financial situation, said co-founder and senior journalist Nino Zuriashvili.[181] Around the world, a few investigative centres prosper, while most struggle financially and many disband due to lack of resources. In general, independent media centres operate with small budgets, use journalists who are paid little for their work and rely heavily on donor-sourced funding.

## International Investigative Journalism Networks

Journalism networks can help in linking these independent centres and offer funding which can keep them operating. The best networks bring together journalists and centres from different countries to pool resources, ideas, editing and occasionally finances. They provide training, resources and stipends for participating journalists.

While there are several types of international networks and funding mechanisms, they can broadly be broken down into three categories:

### a) Journalists for hire

This model, used by ICIJ in "Secrecy For Sale," calls for an international organization to initiate the project, then hire, train and edit the work of journalists from independent centres. It is a useful model for producing high-quality cross-border reporting, but is not able to completely address reporting at the local level and has less of a direct impact for aspiring journalists.

[180] Philippines Center for Investigative Journalism. http://pcij.org/about/

[181] Neiman reports, Spring 2011. http://www.nieman.harvard.edu/reports/article/102588/Independence-Buys-Freedom-But-Also-Fewer-Viewers.aspx. Global Investigative Journalism Network, "Investigative Journalism Nonprofits: A Survival Guide''. http://gijn.org/2013/04/29/how-to-survive-as-an-investigative-journalism-nonprofit

Among the many advantages of this model is circulation. Since this approach involves journalists from multiple countries, the stories begin with a wide potential audience. Additionally, organizations such as ICIJ partner with major western media outlets, including the BBC, Washington Post and others, creating even more exposure and impact for the reporting.

### b) Journalism funds

Other organizations, such as Scoop, BIRN, and Journalismfund.eu, solicit story ideas from local journalists and media centres, and then offer grants for the most worthy projects. Scoop and others also provide their expertise and a vast network of journalists and resources to the recipients, and guide the project throughout. This model is growing in acceptance and implementation, and could be emulated by donors and countries seeking to develop strong investigative media.

This method has the advantage of the stories being generated at the local level by journalists who understand their countries, its people and the needs of its citizens. The funding is also targeted directly for the projects and journalists, as opposed to vast overhead and infrastructure. However, this method does not have the readership or circulation that the other approaches offer, and donors employing this method should also train recipients on ways to enlist local media outlets to publish the final product.

### c) International assistance

A third model, one that is currently on the decline, involves large operations – usually funded by outside government aid programmes – that attempt to bring so-called western style media to developing countries. These organizations, funded heavily in the early 2000s, often employ large numbers of international editors and trainers, but spend little money directly on the reporting centres at the grassroots level.

If carried out in a strong top-down approach, these efforts can be counterproductive in many ways, primarily because they put outsiders, and not local journalists, in charge of strictly local projects. Additionally, the motives of the donor countries may not necessarily be trusted in many regions, potentially creating a stigma for the centre among citizens.

Furthermore, this approach makes it more difficult to win sustainable grassroots support, which will be needed if organizations are to survive when the donors move on. "You need local buy-in. … It requires genuine commitment – and you cannot program that from Washington," said Sheila Coronel, director of the Stabile Center for Investigative Journalism at US-based Columbia University's Graduate Journalism School. [182]

[182] Global Investigative Journalism Network, "Investigative Journalism Nonprofits: A Survival Guide". http://gijn.org/2013/04/29/how-to-survive-as-an-investigative-journalism-nonprofit

Independent media centres are growing in quality and stature worldwide, and their development should be encouraged by States seeking to enlist investigative reporting in the fight against corruption, including by the provision of financial support.

If governments, non-profit donor organizations or even for-profit media outlets are to fund or promote independent centres and networks, it is important to look at a number of factors, including the advantages and limitations of the centres, funding, sustainability and practical methods of running such programmes.

## B. Advantages and challenges of independent centres and networks

The growth and success of independent investigative centres and networks is evident in all parts of the world, from well-established centres to those that are just developing. For example, the Network of Iraqi Journalists for Investigative Journalism, formed in May 2011 as the only investigative centre in the country, offers grants and trains journalists, and has already produced an important investigation. In December 2012, a team of Iraqi journalists published an in-depth look at how counterfeit medicine is plaguing the country's Kurdistan Region.[183] The Center for Investigative Reporting in Serbia (CINS) has been operating for just four years, but its journalists have twice been honoured for producing the best investigative reporting projects by Serbia's journalists' association.[184]

Journalists at more established centres in Bosnia and Herzegovina, South Africa and elsewhere continue to produce investigations that affect change in their countries.

The independent centres offer journalists the freedom to investigate and publish stories they deem important to their fellow citizens. While traditional media outlets may shy away from stories in fear of government intrusion or advertising boycotts, these centres have no such limitations.

Media centres also provide an outlet for mainstream journalists to publish stories that are rejected by their own organizations. Due to the fact that investigative centres often lack funds, many journalists work full-time for traditional media, and part-time for the centres. That gives them a channel to investigate and report on corruption – while avoiding censorship – that they would not have with the traditional media houses.

The result of the above is that, in many parts of the world, the best investigative reporting is being done by local centres and networks of dedicated journalists seeking change in their

[183] Network of Iraqi Journalists for Investigative Journalism, "Counterfeit Medicine Plagues Iraqi Kurdistan,'' December 2012. http://www.nirij.org/?p=787&lang=en

[184] Website of the Serbian Independent Journalists Association (NUNS), 3 May 2013. http://www.nuns.rs/Projekti/ongoing-projects/series/21/godisnja-nagrada-nuns-a-za-izuzetnost-u-istrazivackom-novinarstvu-.html

countries. Any assessment of the value of such centres should look at the advantages, and potential concerns relating to a number of their characteristics.

### Independent centres have little or no reliance on advertising

**Advantages**: The centres are immune from potential financial pressure by governments and businesses. With little overhead or liabilities, centres can operate on a small budget for long periods if necessary.

**Challenges:** The centres often lack resources and are unable to tackle large projects. Furthermore, low-paid journalists may face temptations from bribes and other influences.

**Potential response:** Form partnerships with local and international NGOs, local activist groups, and mainstream media outlets to share costs and gain potential funding sources. Mainstream media may be persuaded to provide financial support, or to purchase certain articles for publication.

### The public does not trust or has not even heard of these centres, and is skeptical of their reporting

**Advantages:** There are no preconceptions in place, thus offering centres the chance to eastablish new and strong relationships with the public if the stories are handled properly.

**Challenges:** If the stories are not trusted, the potential impact and public response diminishes greatly.

**Potential response:** Every story published by an independent centre must include links, photocopies and other documentation used in compiling the story, and be made freely available to the public. Centres should also openly announce all funding sources, potential conflicts, mission statement and code of conduct. The centre's founding corporate documents filed with the State should also be placed on the organization's website.

### Quality control and self-editing can be weak, particularly in small organizations

**Advantages:** There are no advantages.

**Challenges:** Small organizations often must rely on the same journalists to research, write, edit, check facts and publish a single investigative story on corruption. Journalists who have invested in a story cannot look at its weaknesses and mistakes objectively, the way an outsider can.

**Potential response:** Centres should reach out to journalists at other centres in their region or around the world and ask for help. This problem is not unique, and this is one way to form easy and lasting partnerships. Language is a consideration as well, but journalists must have someone to take an independent look at all stories before publishing. Another consideration is

to enlist the help of professors and students at local universities, who can offer a fresh read and give independent opinions before publishing.

### True investigative reporting cannot be accomplished without substantial and sustained funding

**Advantages:** More and more non-profit organizations, universities, good governance advocates and anti-corruption organizations have come to appreciate the importance of investigative journalism in the fight against corruption. This financial support is crucial to sustaining investigative reporting.

**Challenges:** Foreign funding sources may have their own agendas, or advocate positions in direct opposition to the goals of a country or its people. In addition, such sources may draw criticism from citizens and those looking to undermine the independent centre, thereby hurting its credibility.

**Potential response:** Publish the names of all donors to underline to the public that there are no secrets. When taking money, make no promises to the donor about content other than to promise a certain amount of stories in a certain time frame on a specified subject. Reject any donations that could put the organization or its journalists in a compromising situation.

### Stories done by independent investigative centres have little impact because they are not widely read.

**Advantages:** The lack of circulation gives enterprising centres and editors an opportunity to solicit new partnerships with mainstream media that are trusted but incapable of producing investigative stories of their own.

**Challenges:** Stories that are not read widely or generate broad discussion cannot lead to public involvement and change.

**Potential response:** Form partnerships with other media, utlilise social media such as Facebook and Twitter to publicise material. Have journalists appear on television and radio stations to discuss their work, thereby generating a higher audience for the stories.

### Investigative reporting creates legal and financial risks if controversial stories are published and subjects file lawsuits or pursue criminal libel cases

**Advantages:** Such concerns keep traditional media away from important and in-depth stories on corruption out of fear of reprisals. Independent centres can win public support and acceptance by tackling such stories and exposing wrongdoing.

**Challenges:** A lawsuit can crush an independent centre, and even accurate stories can be subject to misinterpretation in some court systems. The potential challenges are exacerbated

in countries that have criminal defamation laws or punitive fines for journalists judged guilty of defamation.

**Potential response:** Journalists and editors are encouraged to reach out to freedom of opinion and expression/right to access of information NGOs and lawyers who specialize in the areas of defamation law and free speech. These lawyers should be contacted long before they are needed, and asked to volunteer their time on behalf of the cause of the freedoms of opinion and expression.

***Elements to be considered:***

The rapid growth and quantifiable success of independent investigative centres and networks are already leading to the establishment of new centres and partnerships. Journalists looking to form or expand a centre – and donors looking to sponsor them – should keep a few principles in mind.

- **Trust and build on local knowledge, and be patient.** Donors and international consortiums must embrace the idea that journalists working on the ground are in the best position to judge what needs to be done and how to proceed. Standards must never be compromised, but local norms and cultures must be taken into account.

- **Define roles and project deliverables while the story is being planned and proposed.** This is especially true when dealing with multiple countries and multiple languages. Have all participants write a brief outline of what they see are the potential story lines and difficulties for their portion of the work.

- **Share all data and information as much as possible.** This is difficult for many organizations, and requires a leap of faith when dealing with journalists or organizations for the first time. But it is crucial not only to build trust, but to bring more eyes and potential good ideas into the reporting process.

- **Hands-on training.** Classroom training is not effective for journalists and young organizations. Donors should work with local centres to place experienced journalists in the country for periods of several weeks, working directly to build and publish stories, thereby training by doing. After the initial bond of respect and work ethic is formed, it becomes much easier and less expensive for editor and journalists to communicate and share ideas long distance. An example of this kind of arrangement is the *Network of Journalists against Corruption* which was created in 2012 by the Ghana Anti-Corruption Coalition with the aim to build journalists' capacity to improve investigative reporting (http://ghana-anticorruption.org/newsinfo.php?id=952).

- **Give small, targeted grants and financial support.** Investigative centres need years to grow and to win acceptance if they are to be sustained. Donors should resist calls to fund extravagant and difficult projects that may look good in theory, but do nothing to build and train journalists over long periods of time. Support should help to build up those centres. Support should also be given to individual journalists or smaller groups of journalists who have themselves developed the idea for an investigation. For journalists, this may be the only chance to start an investigation as the media are often financially strained and poorly staffed.

# PROTECTING JOURNALISTIC INDEPENDENCE

# VII. Protecting journalistic independence

The investigative journalist's job of exposing corruption, confronting criminals with incriminating information or uncovering the operations of organized criminal groups has always been a dangerous one. Journalists and society accept the dangers of investigative reporting as a necessary risk in pursuit of information vital to free societies and public discourse.

What is more difficult to accept, and potentially even more damaging to the role of the journalists to inform the public, is that criminals are rarely arrested, tried and convicted for attacking a journalist. According to UNESCO, 372 journalists and media workers have been killed doing their jobs since 2006. In addition, many more were victims of kidnapping, harassment, intimidation or hostage-taking.

*Attacks on journalists are an attack on the freedoms of opinion and expression and the public's right to know. Ultimately, when gathering and reporting information becomes dangerous or even life threatening, society suffers.*

In more than 90 per cent of those cases, no one was ever brought to justice. Without the fear of punishment, criminal attacks on journalists have risen sharply in recent years.[185]

Statistics gathered by UNESCO and other organizations underscore the problem. According to the International Freedom of Expression Exchange (IFEX), in nine out of ten cases, the perpetrators of these crimes are never prosecuted. Impunity perpetuates the cycle of violence against journalists and must be addressed.[186]

The murder of journalists for doing their job is also a crime against freedom of expression.[187] The UNESCO Director-General has emphasized that "[a]ttempts by state and non-state actors to silence or restrict journalists not

[185] The Safety of Journalists and the Danger of Impunity, UNESCO Director-General's Report, 23 March 2012. http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CI/CI/pdf/FED/Safety%20Report%20by%20DG%202012.pdf

[186] UN Plan of Action on the Safety of Journalists and the Issue of Impunity, 2012. http://www.unesco.org/new/en/communication-and-information/freedom-of-expression/safety-of-journalists/un-plan-of-action/

[187] Toby Mendel, Executive Director of the Center for Law and Democracy, presentation at the UNODC Expert Group Meeting, 11 April 2013.

only deny journalists their rights but also jeopardize the fundamental right of society at large to be kept informed".[188]

If the pursuit of a story puts journalists or their families in physical jeopardy, they are more prone to alter their behaviour. Good, important stories remain unpublished because of outside risks and influences, leading to self-censorship.

A closer look at the statistics shows a disturbing trend. The number of States in which journalists were killed jumped from 29 in 2006 to 37 in the most recent survey. 75 per cent of those killed were targeted, and most of them received threats before the attack.[189]

While the number of killed journalists may be expected to soar during conflicts, wars and insurgencies worldwide, "the majority of these attacks did not occur during situations of active conflict but in peacetime, mostly while covering dangerous assignments or reporting on corruption, organized crime and other illegal activities".[190]

Any attack on the journalist's safety, health or physical and mental well-being is a direct assault on that journalist's ability to inform the public. Ultimately, the public suffers. "The safety of journalists and the struggle against impunity for their killers are essential to preserve the fundamental right to freedom of expression," according to the UNESCO 2012 report. "Without freedom of expression, and particularly freedom of the press, an informed, active and engaged citizenry is impossible … In a climate where journalists are safe, citizens find it easier to access quality information and many objectives become possible as a result."[191]

The first part of this chapter examines physical threats against journalists, including blackmail, assaults and killings. The second part focuses on the legal, financial and societal impediments to strong investigative reporting.

## A. Physical safety of journalists

According to the Committee to Protect Journalists, an independent non-profit organization promoting press freedom, 971 journalists have been killed since 1992, more than 700 of which were murdered. Of those, 588 were killed with impunity. Additionally, 221 journalists are imprisoned as of 1 December 2012. This is 53 more than a year earlier.[192] "Journalists here don't worry as much about security because there is a feeling that if the drug gangs want to kill you, they can't be stopped,'' said Marcela Turati, a journalist for Proceso Magazine in

[188] The Safety of Journalists and the Danger of Impunity, UNESCO Director-General's Report, 23 March 2012. http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CI/CI/pdf/FED/Safety%20Report%20by%20DG%202012.pdf

[189] The Safety of Journalists and the Danger of Impunity, UNESCO Director-General's Report, 23 March 2012.

[190] Idem.

[191] Idem.

[192] United Kingdom, Guardian, Roy Greenslade, 11 December 2012. http://www.guardian.co.uk/media/greenslade/2012/dec/11/journalist-safety-press-freedom

Mexico City. "That's why most of the journalists here would rather have life insurance than extra security. They know nothing can protect them."[193]

In Mexico, journalists and newspapers come under attack as they try to investigate the corruption of police and prosecutors that forms part of the decade-long drug violence. Cartels threaten journalists and kill with impunity. According to Reporters without Borders,[194] more than 80 have been killed in the past decade, and 17 have disappeared.

In March 2013, the Mexican newspaper Zocalo issued a front-page editorial announcing that it will no longer investigate or publish information related to the country's drug cartels and the ongoing violence. The announcement came less than a week after the feared and violent Los Zetas drug cartel posted large banners on public highways threatening the newspaper's editor and journalists over previous reporting linking the gangs to public corruption of officials. The decision "is based on our responsibility to watch out for the safety and security of over 1,000 workers, their families and our own,'' the newspaper wrote in an unsigned editorial.[195]

A Mexican journalist, Ms. Turati, noted that as her reporting covers the social damage caused by the drug wars, she rarely receives the direct threats faced by many of her colleagues. Still, in a country where people have been executed, tortured and hung from a public bridge for merely denouncing drug cartels on Facebook,[196] danger is present for all journalists.

Turati and several other Mexican journalists say they are particularly worried about the safety of their sources, especially when reporting brings them to small neighbourhoods where an outsider is easily noticed. "Just talking to me can get someone killed, so we all are very careful,'' she said. "I always worry about someone breaking into my computer, or tapping into our phone calls. I don't know how to keep this in my computer, if I should hide it. How I should hide it? People listen to our phone calls. I think I am putting at risk the sources who talk to me."[197]

Dudley Althaus has lived in and covered Mexico and Latin America for more than 20 years, and was a finalist for the Pulitzer Prize for International Reporting in 1992. "Parts of the country have gone dark, there's a complete lack of coverage of any kind", Althaus said in an interview four days before the Mexican Newspaper Zocalo announced it would no longer cover organized crime and public corruption news after repeated threats and attacks on its

[193] Ms. Turati telephone interview, 8 March 2013.

[194] http://en.rsf.org/report-mexico,184.html

[195] *Sources: Borderland Beat, 12 March 2013, "Zocalo Gives in To Pressure''.* http://www.borderlandbeat.com/2013/03/zocalo-gives-into-to-pressure-by-z42.html, *Associated Press translation of Zocalo announcement, 11 March 2013.*

[196] CNN, "Bodies Hanging From Bridge Are Warning,'' 15 September 2011. http://www.cnn.com/2011/WORLD/americas/09/14/mexico.violence/index.html

[197] Ms. Turati telephone interview, 8 March 2013.

reporting staff.[198] "And if gangsters put out press releases, you have to print them verbatim, that same day, or it's going to be a bloodbath."

In order to respond to the specific security threats women may face, the International News Safety Institute (INSI) in collaboration with UNESCO has launched a global survey on violence against female journalists which is expected to lead to concrete recommendations based on the findings. Although the survey was still ongoing during the time of the production of this Tool, States parties should keep gender-specific aspects in mind while working on the safety issue.

## B. Legal and financial obstacles

Threats to quality investigative reporting are not always physical or violent, but can be equally powerful in intimidating and blocking journalistic freedom. As discussed in chapters III and IV, laws that make defamation a criminal offence, weak right of access to information laws, legislation limiting public access to documents, and even instances where valid right of access to information laws are simply ignored in practice all inhibit the public's freedom of expression.

In most countries, the media works in a commercial market and should be regulated like other companies. However, commercial issues such as ownership, taxes, and advertising revenue can all seriously undermine media independence and diversity. Individuals, companies and Governments can form anti-competitive media monopolies by purchasing a large proportion of the media in a country. A concentration of ownership can result in fewer opportunities to express diverse opinions or, worse, be used to block the publication of information that is in the public interest.[199]

In many countries, the mass media is often more or less dependent on state advertisements and state funding. Advertising is a commercial part of the media which is affected by consumer and other laws.

Corporate takeovers of media companies can lead to an obvious concentration of corporate interests. The question of "who is the master of the watchdog" can be of critical importance in understanding the actual freedom of the press. It can, however, be noted that the Internet is taking on an increasingly important role in opening up access to public discussion and in mitigating press consolidation. In Europe and the United States, laws limiting the concentration of ownership (antitrust laws) are also relevant to concentration of power in media companies.

[198] Telephone interview with Mr. Althaus 9 March 2013.

[199] In several countries, the problem appears to be that the mass media does not have enough economic resources to develop investigative journalism. International cooperation between journalists and international pro bono legal support would be a great asset to those areas. States parties as well as media houses, journalist schools and other organisations should note the importance of collaboration and development assistance as underlined in chapter VI of UNCAC.

Last but not least, *self-censorship* can be even more prevalent and harmful than censorship from the government. Many media organizations are accused of not daring to report on corruption cases in fear of losing advertisers and political supporters of the media organization. Self-censorship of the media can hamper effective anti-corruption activities, particularly in cultures where important decision-making is based on various companionships, loyalty and fidelity, even if direct bribes are uncommon.

***Case example: Prohibitive fines restricting investigative journalism***

Journalists in the Former Yugoslav Republic of Macedonia lived under threat of criminal defamation offences for years until the law was revoked in the summer of 2012. Under the new law, defamation is no longer a crime punishable by imprisonment and the publication of an apology or retraction could pre-empt a lawsuit. The law sets what journalists call prohibitive fines: 2,000 Euros for the journalist who writes the offending article, 10,000 Euros for the editor who publishes it and 15,000 Euros for the media owner.

"A journalist might not make US$2,000 in six months, so that is why journalists are so afraid to write even when they have the documents and full proof," investigative journalist Zaklina Hadzi-Zafirova said.

When the law was introduced, Reporters without Borders was cautiously optimistic: "A lot depends on how the courts implement a law but the law should at least minimize the dangers," the non-profit agency wrote on its website. "We urge the Council of Europe to ask Macedonia to ensure that fines are proportional to the ability of journalists and news media to pay."

In just six months after the law came into force, more than 300 lawsuits had already been filed, leading to a large number of front page apologies because journalists and organizations fear fines that would put them out of business. As the result, the press is mocked and severely degraded in the eyes of the public.

The potential fines are just one of many challenges, Macedonian journalists say. "Everyone working in the media understands the financial pressures that come with reporting on political figures or big business owners. It is a gentle level of pressure at first, like an invisible hand, but you always know it is there," said Aleksandar Bozhinovski, an investigative journalist who has reported on corruption throughout Eastern Europe. "Politicians will stop all public advertising with a newspaper, but they also influence other companies not to advertise, and that is where media really gets hurt, so they just back off covering these stories. The truth is, if you write about somebody very powerful, they will use all means necessary to punish the journalist and the newspaper or television station."

**Sources:** Reporters Without Borders, 25 June 2012, http://en.rsf.org/macedonia-parliament-abolishes-prison-16-05-2006,17725.html. Balkan Insight, "Macedonian Journalists Cry Foul Over Libel Reform'' 15 June 2012 http://www.balkaninsight.com/en/article/macedonian-journalists-cry-foul-over-libel-reform. Balkan Insight, "Macedonian Journalists Hit Back Against Forced Apologies,'' 4 February 2013, http://www.balkaninsight.com/en/article/macedonian-journalists-launch-preemptive-apologies. Interview with Journalists Zaklina Hadzi-Zafirova, Aleksandar Bozhinovski, January and February, 2013. Telephone interview with Mr. Bozhinovski, 26 February 2013.

***Elements to be considered:***

***EXCERPTS FROM THE OSCE SAFETY OF JOURNALISTS GUIDEBOOK, 2012***

- During election periods and times of social unrest and major events, journalists have been exposed to heightened risks of being detained, charged or prosecuted for alleged criminal offences, including libel and defamation; they may also be subject to undue pressures to produce partisan and biased coverage.
  Good practice: Especially at times of elections, laws and regulations must be upheld which guarantee the freedom of the media to scrutinize all aspects of the process.

- Journalists and photographers covering public protests or gatherings have suffered arbitrary arrest and mistreatment at the hands of police and security forces; in some cases they suffered physical injury and loss or damage to equipment while working or while in custody; police surveillance and monitoring of media workers at public protests may be intimidating and hinder their legitimate work.
  Good practice: Police do not detain, arrest or use violence against media that perform their proper role by covering protests or other events in public places.

- Police raids have been carried out on media offices and journalists' homes, involving physical detention, destruction of property, and seizure of equipment such as computers as well as recordings, files and notebooks.
  Good practice: Law-enforcement authorities respect the right of journalists to report on matters of public interest and refrain from arresting them or confiscating equipment of property without exceptionally strong evidence that such action is necessary in the public interest.

- Some journalists are unlawfully imprisoned on arbitrary and false charges; many more are detained, sometimes for long periods, in pre-charge or pre-trial detention.
  Good practice: Cases in which journalists are falsely charged with common offences such as hooliganism and handling drugs are investigated and, if found to be unfounded, rejected by independent investigators, prosecutors and judges.

- Threats and acts of violence against journalists have continued and in some parts even increased globally in recent years. Threats made by telephone, fax, e-mail or letter etc have often been followed by physical assaults, including murders.
  Good practice: State authorities investigate reports of threats promptly and thoroughly, and take appropriate steps to protect the person or persons threatened.

- Journalists continue to be exposed to severe risks of injury or death in times of armed conflict, violent political instability and the breakdown of the rule of law
  Good practice: In areas of armed conflict, civilians including journalists are effectively protected by international humanitarian laws in addition to universal human rights law.

- Journalists have been arrested and threatened with prosecution, and their workplace and home or their personal data records have been searched to discover the source of sensitive information which has been or may be made public
  Good practice: The confidentiality of journalists' sources is protected, for example in accordance with the case law of the European Court of Human Rights.

- Over-concentration of media ownership gives excessive power to owners; it prevents media plurality and restricts the freedom of expression of sections of society; opaqueness or secrecy with regard to ownership of media outlets makes it hard to determine whether plurality rules are being infringed.
  Good practice: Plurality and competition rules exist to prevent overconcentration of media ownership.

- Public Service Television and Radio remain an influential or dominant source of news for the population in many places; political control, interference or dominant influence over Public Service Broadcasting (PSB) undermine the independence of editorial practices and of the work of journalists.
  Good practice: Public Service Broadcasting is operated with guaranteed independence, impartiality and editorial integrity and without influence or direction from any political or outside group; PSB governance and editorial appointments are organized according to that principle; senior managers and journalists do not owe their jobs to an affiliation with a political party.

- State controls, ownership and regulation of the media are incompatible with freedom of journalistic inquiry and media independence; they place the security of journalists at risk by making their employment directly or indirectly dependent on the State.
  Good practice: Self-regulation of the media and the work of journalists, by means of press councils, press complaints commissions and the like, give security to journalists and makes them responsible for maintaining professional standards without the danger of State censorship or control.

# USING DATA AND PUBLIC INFORMATION TO WRITE AND REPORT ON CORRUPTION

# VIII. Using data and public information to write and report on corruption

For all but the most experienced investigative journalists, the challenge of accumulating vast quantities of records, databases, corporate documents, and other staples of investigating incidents of public corruption can be both daunting and exhilarating. The work is daunting because of the perceived and real difficulties in collecting, receiving and analysing data, and ultimately proving and producing investigative reports. On the other hand, the potential that these stories have to galvanize the public, expose wrongdoings and effect widespread change in society can be exhilerating and fulfilling.

> Many of the best investigative stories around the world have been based on public records available to journalists who know how to search databases and use available resources to find them.

Fuelled in part by the Internet and by the widespread adoption of UNCAC, countries are releasing more information about the daily workings of government than ever before. Government procurement and public tenders, property records, business registries, court documents and countless other records that are vital to free societies are being made available and regularly updated.[200]

These documents are being used successfully by investigative journalists all over the world to expose incidents of public corruption by corporations and governments alike. In recent years, public records have been used by journalists to expose, among other things, bribery by some of the world's largest corporations, money-laundering by drug cartels and government officials, and stock market and public tender manipulation.

For investigative journalists, understanding what records are available (also in other countries) and how to use them is crucial, particularly in an age where cross-border crime networks are thriving and money is moved around to offshore banks and other safe havens.

Paul Radu, Executive Director of the Organized Crime and Corruption Reporting Project based in Bucharest, Romania, has led dozens of international corruption investigations in Africa, South America, Brazil, Eastern Europe and the Caucuses. He is the creator and

[200] See chapter III.C.1.

curator of the Investigative Dashboard project, which is "designed to showcase the potential for collaboration and data sharing between investigative journalists across the world."[201]

The Investigative Dashboard is a web service that assists reporters and activists in their efforts to follow money across borders and to identify and expose organized crime and corruption. It serves as an online research desk where journalists and activists can access highly-trained researchers and librarians, a portal of company registries and stock exchanges worldwide and a place where information on commercial entities is indexed.

A number of investigative stories on corruption across international borders can be built using Radu's Investigative Dashboard or other online record search techniques. For example, a journalist could look at his or her country's procurement records and tenders to identify companies that have been awarded a certain public construction project. Using local business registries, the journalists could build a file on those listed as the local owners or directors.

The next step would be to take those owners and search public records and the Internet to find other layers of ownership, possibly offshore in tax havens with strict privacy laws. The purpose of this type of investigation is to find the ultimate owner of, in this example, the construction company. That allows journalists – and the general public – to determine if bids are awarded fairly or if there are any insider deals that benefit influential public officials or their families.

When searching for these types of connections, journalists often have to navigate through business registries in multiple countries. If the owner of the construction company is in turn owned by an offshore company, and that company is in turn owned by yet another company, all of those records must be searched. It is important for journalists to understand that such business registry records are public in most countries and available for inspection, with very few exceptions.

Tools like the Investigative Dashboard or even having a general understanding of business registries, greatly enhance a journalist's ability to uncover complex and secretive partnerships. In recent years, there have been several examples of journalists using this approach to uncover massive corruption at the highest levels.

In building his Investigative Dashboard and in his reporting duties, one of the challenges that Radu faced was rationalising the vast differences in the way identical pieces of data are formatted and stored from one jurisdiction to another. With current levels of corruption and cross-border organized crime, a standardized records system would make it much easier for police and investigative journalists to track networks and money-laundering operations.

"I understand there are going to be differences in software, but it is important that the basic data and the way information is stored and made available to the public is the same," Radu

[201] Investigative Dashboard Database, http://www.datatracker.org/category/wwd/

said. "I know it won't be easy, but this is something that should be considered right now, because it is going to become an even bigger problem."[202]

Radu believes that investigative reporting today does not fully connect with the public because it can be too focused on numbers and company names, confusing readers and lessening the impact of the stories. Therefore, his projects rely heavily on charts, graphics and information boxes that break down technical issues into easily understandable segments.

This, in turn, is possible only after all relevant records have been collected. According to Radu, his emphasis in his dealings with the public and media alike is on highlighting the vast amount of information that is available online, or in person at public courthouses and government buildings.

"When people see all these charts and graphics, they think that we must be relying on sources and getting people to steal information and give it to us," Radu said. "But the truth is, at least 90 per cent of all of the information we use comes from public sources. Anybody can get the information."[203]

Brazil has assembled an advanced and accessible online database system for information requests, which is available to journalists and the public alike. In 2012, the database recorded more than eight million visitors to its website, and through April 2013, the public information agency had received nearly 80,000 requests through right to access of information laws. Of those, only about five per cent came from those who identified themselves as journalists. [204] While a few of these may have been from journalists who preferred not to reveal their identity while making requests, records indicate that by far, the vast majority of requests came from the public – something envisaged and encouraged when UNCAC was adopted in October 2003.

However, making information available is only one step in the long battle to expose and combat corruption. Professional investigative journalists should know how to obtain the information, how to make sense of it and how to present it to the public. Along these lines, the use of computer databases and advanced programming has enhanced investigative reporting on corruption, but has not replaced the hard work and instincts needed by the best journalists.

Data journalism empowers journalists with more tools to tell better stories, but it doesn't replace journalism's best practices; neither does it do away with on-the-street reporting, said Giannina Segnini, an award-winning journalist at *La Nacion* in Costa Rica. "Collecting data

[202] Interview with Mr. Radu and Mr. Radu's comments during his presentation at the UNODC Expert Group Meeting, 11 April 2013.

[203] Mr. Radu's comments during his presentation at the UNODC Expert Group Meeting, 11 April 2013

[204] Cibelle Viera, Brazil Office of the Comptroller General, presentation at the UNODC Expert Group Meeting, 10 April 2013. See also page 45 of this Tool, Case example: Brazil's Access to Information Initiative.

without conducting deep and rigorous analysis or the verification of every single record is not journalism."[205]

The following are three examples of outstanding investigative reporting from around the world based almost exclusively on public records. The examples were chosen because each investigation was conducted in a different manner, and involved different methods.

- In Brazil, teams of top investigative journalists from established media outlets collaborated on a ten-part series that exposed a series of hidden documents concealing corruption that cost the public hundreds of millions of dollars.
- In Mexico, an experienced independent investigative journalist was recruited by the New York Times to help compile records for a story on corporate corruption. The work is notable because it shows collaboration by vastly different media organizations and involved more than 800 access to information requests. In April 2013, the work was awarded the Pulitzer Prize.
- In Serbia, an investigative journalist reached out to the local Anti-Corruption Commission for help in compiling records to take a fresh look at an alleged stock scam by a company seeking to monopolize the country's entire grocery store chain. The work is now part of an investigation following the arrest of one of the Balkan's richest and most powerful businessmen.

[205] Global Investigative Journalism Network, "Why Open Data Isn't Enough,'' 2 April 2013. http://gijn.org/2013/04/02/why-open-data-isnt-enough/

***Case example: Brazil's Secret Diaries***

Investigative journalists Katia Brembatti, James Alberti, Gabriel Tabatcheik and Karlos Kohlbach began their story with tips and sources telling them about hidden records being compiled by Assembly members in the Southern Brazil state of Parana, home to ten million people. Two years after they began, they had compiled thousands of pages of records – using the very same public records laws the officials had been accused of violating – to create a powerful project that shook Brazil's political landscape.

The series was the result of a creation of a database which took over two years to build, and which was based on the multimedia integration of the news, utilizing the resources of print editions, television and online resources, as well as the idea of collaborative journalism. The outcome was a series of news pieces unveiling a multimillionaire scheme of corruption involving public funds.

The journalists found that as much as US$400 million of government money had been diverted to bank accounts belonging to public officials, politicians and private citizens. The journalists used hundreds of assembly reports, to create a database of all employees in the assembly, with columns for name, job title, salary, vacation requests, home address and the date they had been hired. Altogether, the journalists compiled 20,000 lines of data over eight months to complete the database. Initial findings showed that 79 per cent of the employees were hired as "trusted employees", meaning that no background checks or prescribed hiring practices were conducted.

With the information they had gathered, the journalists then used Internet search machines and social media to track the employees. They found dozens of dead people and children on government payrolls and hundreds more who worked in other professions but were still paid by the Assembly. The journalists also discovered that crucial accounting records were not publicly available, and that hundreds of people were paid for public jobs without ever showing up for work, an unnecessary expense of US$5 million per month.

Published in 2010, the ten-part series sparked public demonstrations involving 30,000 citizens, five separate criminal investigations and dozens of arrests. After publication, the local Assembly overhauled the way it monitored the hiring process, and made it easier for citizens to access public information. The number of employees on the Assembly payroll fell from 2,457 to around 1,400 a year after the stories were published.

During the course of reporting, two bombs exploded in the lobby of the main newspaper leading the investigation, and journalists received repeated death threats. They faced lawsuits and public recrimination before they had even written the first word of their stories. Journalists interviewed for this report uniformly cited self-censorship in the face of outside threats – whether physical or potential civil and criminal action – as among the biggest problems facing investigative reporting. The network of Brazilian journalists ignored the threats and continued with their work.

***Case example: Bribery Cooperation Across the Mexican Border***

Alejandra Xanic von Bertrab had been a journalist for more than two decades and was an expert on Mexico's Access to Information Laws, which had evolved greatly over the years. However, nothing had prepared her for the assignment she took on with the New York Times more than two years ago.

Von Bertrab was working independently when she was put in touch with David Barstow of the New York Times, who was in the early stages of an extremely sensitive investigation of Wal-Mart, a major American company seeking to expand its Mexico operations. Mr. Barstow had received a tip from a former company employee that the company had created a system of bribes to help facilitate the opening of new stores.

Over the next 18 months, von Bertrab filed more than 800 access to information requests for municipal, state and federal offices, and conducted 200 interviews. "It's a story that was possible thanks to Mexico's transparency laws," she said.

Given the sensitivity of the story, von Bertrab and Barstow kept complete secrecy, sharing information only with each other. Such precautions are good practice for all journalists attempting complex and lengthy investigations that could be subverted over time if information leaks out. The secret was made easier to keep by Mexico's strong public records laws, which allow the requester to keep their identity a secret, and prohibit Government officials from asking why the person is seeking information. "I was shocked at how much they respected that law," said von Bertrab.

Von Bertrab has tips for journalists seeking to do such investigations.

1. Understand what documents are available, and get a full list of the official names of the documents. Public officials will often respond only to specific requests and supply no further information.
2. Prepare to work hard. "In a lot of Government offices, I became part of the furniture. I would spend two or three days in a room with boxes of files. I would get there at 8 in the morning and leave at 7 at night, but they never asked who I was or why I wanted that information," she said.
3. Listen to experienced journalists. Barstow, one of the most accomplished journalists in the United States, provided valuable recommendations that helped von Bertrab ask for documents like visitor lists, hard drives, and CDs. "He had ideas that hadn't occurred to me," she said.

One of the key pieces of information, according to the New York Times story, was uncovering a map that showed that it was legally prohibited for commercial development to take place on land near the Pyramids of Teotihuacan, where Wal-Mart wanted to build. According to the story, Wal-Mart paid US$52,000 to an official to alter the zoning code before the map was entered into the official registry.

In April, Barstow, von Bertrab and the New York Times were awarded the Pulitzer Prize for Investigative Reporting, which led to an ongoing investigation by the United States Justice Department into whether Wal-Mart had violated the Foreign Corrupt Practices Act. "It started with a tip that led to documents, which led to more documents", Barstow said.

Von Bertrab said that the entire project was a learning experience that left her proud of her country. "It was a great joy as a Mexican to prove how well the transparency law works. The key is to know what to ask for and understand the law, because the Government workers can only give you existing information, not create it."

# ANNEX 1: The Investigative Project

With the rapid expansion of investigative reporting internationally, the importance of emphasizing standards and quality has never been greater. Even among some well-regarded investigative journalists, in particular in developing countries, stories are often produced with few sources and little attempt to explain to where the information is coming from.

Reporting on corruption requires patience, consistency and strict adherence to accepted practices and norms. Below is a guide for building and expanding an investigative journalism report.

## A. What story is being investigated?

You should be able to summarize the basic details of the story into one paragraph.

*EXAMPLE:*

*A prominent corruption prosecutor regularly loses important corruption cases. A journalist wants to investigate whether he is doing this intentionally, has possibly taken bribes to lose cases and how long this has been going on. The story will investigate what the prosecutor has been doing in these cases and why his bosses at the prosecutor's office appear to have done nothing to correct this.*

## B. Will the story be worth the effort?

Many media outlets worldwide – print, television and radio – are short of staff. Therefore, they might not be inclined to support an expensive, complex and time-consuming investigation, which is often needed to expose corruption. This means that journalists cannot afford to keep tackling difficult stories and subjects with no results. Time management and honest evaluation of the project must be ongoing throughout an investigation.

Before you start, identify what you think is the best story that may come out of all your efforts. Identify also the smallest or most basic story you may be able to achieve. After that, determine whether or not to continue your investigation.

*EXAMPLE:*

***Largest story**: Prosecutor X lost several major corruption cases because he took bribes or other gifts from criminal defendants in exchange for deliberately losing the case.*

***Smallest story:** The prosecutor's office has lost nearly all of its major corruption cases under Prosecutor X in the past three years, but his bosses have taken no action and criminals keep walking free. The prosecutor is honest, but incompetent, and justice is not served in either case.*

***Potential story that may come from this reporting and follow-up investigation****: The Prosecutor was able to operate so brazenly for years only because he had help from judges, other prosecutors, ministers and even defence lawyers who were in on the corrupt operation.*

### C. What are my chances of getting the story?

At this stage, conduct a self-assessment of the likelihood of producing a final report. Self-censorship is one of the major problems facing journalists around the world today. Often journalists do not pursue the story. Their management might not let the story be published, they might not be able to access the records, or there might be too much political pressure.

While you have to realistically assess whether it is reasonable to proceed, you should not give up just because there seem to be too many obstacles.

### D. What are the most important questions in this case?

This is a critical juncture for any investigation. A good journalist has to be able to spot a potential story and create a detailed plan and time-frame to complete the investigation and publish.

First, make a list of documents or other information that may prove or disprove the initial theory of the story. Think creatively and look for out-of-the-box ideas and unusual angles. Build a list of information that needs to be investigated. While the list is not set in stone and must be updated and adjusted constantly, it serves as a key pillar of any investigation.

When examining the example of a potentially corrupt prosecutor, request a list of every court case handled by the prosecutor's office while the subject has been in charge or in office. In the request, ask for the following:

- Name of the defendant/accused
- Date the case was filed
- City or region where it was filed
- The exact charges at the time of arrest, and charges at indictment
- The name of the judge handling the case
- The name of the prosecutor in the prosecutor's office handling the case
- The name of the defence lawyer(s)
- The final judgment of each case and whether it was determined by the judge, a jury, a guilty plea or upon the prosecutor's motion.

### E. Why is it important to get this information?

Investigative journalists must not only be able to compile information, they must know how to use it by searching for patterns and anomalies. For example, if Prosecutor X is winning all his cases in front of a certain judge, and losing all of his cases in front of another judge, this could be a significant lead in the investigation.

If Prosecutor X wins convictions repeatedly with a certain judge, it could be a sign that he/she has tried to bribe the judge to drop a case, but the judge refused. It could also be a sign that he/she knows the judge is honest, so he/she decided to perform his/her job properly, so he/she would not be exposed.

Although the chances of getting an interview might be very limited, you might be able to approach the judge and get him/her to talk about what he/she is seeing in the courtroom with regard to this prosecutor. Collect also other types of information, such as property records, possessions and the asset declaration card filed by many public officials, judges and prosecutors.

Start with the basic information: What kind of car does the subject drive? In some countries, judges and lawyers making US$800 per month may be driving luxury cars worth US$80,000 or more. Find out whether there is a good explanation for this. In fact, court journalists should routinely be doing these types of investigations about all judges and prosecutors. This is the type of watchdog journalism that can raise public awareness and be a driver for change.

Finally, conduct property or asset ownership searches. Remember also to search for property and companies owned by the subject's wife, children, parents and other relatives.

### F. Re-evaluate the Investigation

At this point, after gathering records, completing initial searches and double checking the findings, take time to assess the story.

Look again for red flags, unusual patterns or anomalous occurrences. For example, if it turns out that Prosecutor X actually won 90 per cent of his cases, it may mean the story is not as strong as initially thought. However, even this figure can be misleading. If the majority of Prosecutor X's convictions were cases involving poor people or local criminals, but he/she lost every important case of corruption involving public officials, the original premise still holds. If an analysis shows no pattern of wrongdoing or incompetence, the story may be at a dead end.

This assessment period is crucial, because it offers a chance to see if there are other, equally interesting aspects to the story. Assuming that the original story holds up, it is time to move on to the next phase of the story.

### G. Create an Interview List

After confirming that there is a problem and compiling records needed to build the most accurate and fair story possible, start interviewing people who can give the story credibility and context.

Identify people who are in a position to provide first-hand, accurate information. Be aware that rumours might be already circulating and potential witnesses may be repeating only what they have heard rather than what they know.

It is also important to distinguish on the record sources from off the record ones. Always try to convince sources to talk on the record. In some cases, if a better understanding of what is going on is needed, it is also acceptable to go off the record as part of a learning process and initial stages of the investigation.

In the case of an anti-corruption prosecutor as outlined above, the following could be a list of some of the people who should be interviewed:

- Lawyers and defendants who lost their cases to the prosecutor: These people can clarify whether he/she or any of his/her associates approached them with a deal. They may have refused because they thought they would win, but now are wishing they paid the bribe. These people can provide a wealth of information.
- Judges.
- Head of corruption prosecution unit, if one exists: This is a key interview and a major part of the story. How could Prosecutor X keep losing cases, but never lose his/her job? Was he/she ever even reprimanded? For this interview, investigative journalists must come fully prepared.
- Victims of the crimes, and their families: If criminals keep walking free, the victims are not getting justice. Search for the victims and their families and talk to them about the entire process, and how they have dealt with it. Good investigative reporting reminds the public that government corruption victimizes ordinary citizens.

### H. Watch Out for Potential Danger

Uncovering and writing about public corruption is dangerous. Good investigative stories make people angry. Investigative reporting leads to people being arrested, losing their property and getting fired.

However, there is also the danger that someone or many people may want to discredit your story. It is possible that someone tried to feed the media false information in an effort to damage the story. A simple mistake can destroy the credibility of an otherwise strong and high-impact story.

A few tips for protecting a story:

- Record all interviews. Along these lines, take extensive notes and keep notebooks in a safe place.
- Use original records and documents whenever possible. Do not trust a source who delivers a pile of records. It is extremely easy to falsify documents. Accept the documents, but then work hard to find the original source of the paperwork.
- Double-check everything and everyone. Even if the person is not intentionally misleading you, they may just have false information. You must prove every piece of information before publication.
- Backup all material. Investigative material can be stored on a flash drive or another device, and store the information separate from your work or home computers.

## I. Telling the Tale

Writing an investigative story is not like providing daily coverage. Investigative reporting involves many sources, hundreds of pages of documents and often months of conscientious analysis.

In addition to convincing writing and reporting, important investigations need strong visual and audio material. Before publication, identify, possibly together with your editor, which photos, charts, graphics, statistics and videos can be published with the story:

Create small “fact boxes”, which highlight the key findings and make them easily understood.

Devise an electronic system that allows readers and viewers to access links to every document used in a story. This builds credibility and trust with your audience.

# ANNEX 2. Articles on freedom of expression in most relevant international Conventions

## United Nations Convention against Corruption

### Article 13. Participation of society

1. Each State Party shall take appropriate measures, within its means and in accordance with fundamental principles of its domestic law, to promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, in the prevention of and the fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption. This participation should be strengthened by such measures as:
    (d) Enhancing the transparency of and promoting the contribution of the public to decision-making processes;
    (e) Ensuring that the public has effective access to information;
    (f) Undertaking public information activities that contribute to nontolerance of corruption, as well as public education programmes, including school and university curricula;
    (g) Respecting, promoting and protecting the freedom to seek, receive, publish and disseminate information concerning corruption. That freedom may be subject to certain restrictions, but these shall only be such as are provided for by law and are necessary:
        i. For respect of the rights or reputations of others;
        ii. For the protection of national security or ordre public or of public health or morals.
2. Each State Party shall take appropriate measures to ensure that the relevant anti-corruption bodies referred to in this Convention are known to the public and shall provide access to such bodies, where appropriate, for the reporting, including anonymously, of any incidents that may be considered to constitute an offence established in accordance with this Convention.

## The Universal Declaration of Human Rights

### Article 19

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

## International Covenant on Civil and Political Rights

### Article 19

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. 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.

## African Charter on Human and Peoples' Rights

### Article 9

1. Every individual shall have the right to receive information.
2. Every individual shall have the right to express and disseminate his opinions within the law.

## American Convention on Human Rights

### Article 13. Freedom of Thought and Expression

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.
2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
    a. respect for the rights or reputations of others; or
    b. the protection of national security, public order, or public health or morals.
3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.

4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.
5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.

## The European Convention on Human Rights

### Article 10

1. Everyone has the right to freedom of expression. this right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

## Charter of Fundamental Rights of the European Union

### Article 11. Freedom of expression and information

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
2. The freedom and pluralism of the media shall be respected.

# ANNEX 3. Further resources and reading material

**Note:** The list of further resources and reading material contains material mentioned in the Resource Tool as well as additional reading material proposed by the experts involved in the creation of the Resource Tool. The list is by no means exhaustive as an abundance of very useful material exists in regard to all aspects of the Resource Tool.

**- Global Right to Information Update - An Analysis by Region (2013)**
Freedom of Information Advocates Network (FOIAnet)
http://www.access-info.org/documents/Access_Docs/FOIAnet/global_right_to_information_update_28-8-2013.pdf

**- Who's Running the Company? A guide to reporting on corporate governance (2012)**
International Finance Corporation (IFC), Global Corporate Governance Forum, and International Center for Journalists (ICFJ).
http://www.icfj.org/resources/who%E2%80%99s-running-company-guide-reporting-corporate-governance\

- **The Global Investigative Journalism Casebook (2012)**
United Nations Educational, Scientific and Cultural Organization (UNESCO)
http://www.unesco.org/new/en/communication-and-information/resources/publications-and-communication-materials/publications/full-list/the-global-investigative-journalism-casebook/

**- Story-based inquiry: a manual for investigative journalists (2011)**
United Nations Educational, Scientific and Cultural Organization (UNESCO)
http://www.unesco.org/new/en/communication-and-information/resources/publications-and-communication-materials/publications/full-list/story-based-inquiry-a-manual-for-investigative-journalists/

**- Follow the Money: A Digital Guide for Tracking Corruption**
Paul Radu, Romanina Centre for Investigative Journalism
https://reportingproject.net/occrp/pdf/Follow_The_Money_WEB.pdf

**- The Media Self-Regulation Guidebook. All questions and answers (2008)**
The Representative on Freedom of the Media
Organizatin for Security and Co-operation in Europe (OSCE)
http://www.osce.org/fom/31497

**- The Online Media Self-Regulation Guidebook (2013)**
The Representative on Freedom of the Media
Organizatin for Security and Co-operation in Europe (OSCE)
http://www.osce.org/fom/99560?download=true

**- Guide to the Digital Switch-over (2010)**
The Representative on Freedom of the Media
Organizatin for Security and Co-operation in Europe (OSCE)
http://www.osce.org/fom/73720

**- Using the Right to Information as an Anti-Corruption Tool (2006)**
Transparency International
http://archive.transparency.org/global_priorities/other_thematic_issues/access_information