



Somalia:

**Media Law
and Policy Review**

December 2012

Executive Summary

As Mogadishu and other parts of South Central Somalia continue to stabilise, and with a new government formed in Mogadishu, now is the time for extensive discussions about the legal and regulatory framework for media and communications in Somalia. As part of that process, the Media Law of 2007 should be reconsidered, and the draft Somalia Communications Act of 2012 should be more broadly discussed and consulted.

UNESCO has established a comprehensive system for setting goals and measuring success of media development in any given country known as UNESCO's Media Development Indicators (MDIs). A subset of the MDIs speaks to having 'a system of regulation conducive to freedom of expression, pluralism and diversity of the media.' The current Somali frameworks, and goals for the new framework, are benchmarked below against these MDIs. Recommendations are made that would bring the Somali framework in line with international standards on freedom of expression and good governance and would promote democracy, increased competition, and further investment in the media and communications sectors. These recommendations include the following:

- National legislation should provide for three types of broadcasters: (1) commercial broadcasters, (2) public service broadcasters, and (3) community broadcasters. The law should require publicly funded broadcasters to promote the public interest (rather than that of governmental or other interests), to act with editorial independence, and to operate in line with the international standards that govern public service broadcasting.
- National legislation should allow for and require that broadcasters are licensed and regulated by a regulatory authority that is independent, effective, transparent and accountable. Having a converged regulator of both broadcasting and telecommunications should be considered for administrative efficiency and other benefits.
- Print media outlets should not be subject to licensing requirements. Complaints about print media should be addressed by a self-regulatory body, based on a pre-established code of conduct drafted in consultation with the industry. Only light sanctions or remedies should be imposed upon print media for any violations.
- Internet should be subject to only the lightest regulation, and should not be subject to filtering or blocking.
- Access by the public to information held by public bodies is critical to holding government accountable, and legislation guaranteeing such access should be considered.
- Defamation standards should be reviewed to provide for civil liability rather than criminal penalties, and for compliance with international standards.
- Other legislation (including the Bill of Rights and other laws of general application) affecting journalism, media, media content and freedom of expression should be considered, including laws conferring special rights or obligations upon journalists and the media, protecting journalists' safety, hate speech, incitement to violence, privacy, security, public order and obscenity.

The recommendations above should be implemented only following a very broad consultation in Somalia. A series of conferences, workshops and meetings should be held in Mogadishu and elsewhere over the coming months to solicit broad stakeholder input into the legal and regulatory framework for the media. Participants should include representatives of industry, government, parliament, academia, civil society and the public, from South Central Somalia and other regions. Participation by women should be encouraged. International and local experts should be hired to provide advice as appropriate.

This legal review was prepared by the African Union/United Nations Information Support Team (IST) and the Centre for Law and Democracy (CLD). It is an important part of the media development strategy established by the Somali Media Support Group (SMSG), a group of donors and implementing partners that meets regularly to coordinate efforts, share information and determine priorities regarding media development. The SMSG is co-chaired by UNESCO, the United States Embassy and Relief International. Other elements of the SMSG's media development strategy include journalists' education, training and safety, among others.

UNESCO and a working group of the SMSG provided important input into this review.

I. The Time is Right for Reform

Somalia has made great strides in the past several months, with the drafting of an interim constitution, the election of a parliament and a president, and the selection of a cabinet. It is now important for the new government to build on the constitutional process and establish legislation and institutions that serve the public, protect human rights and provide for good governance.

One critical area where legislative reform is required is Somalia's legal and regulatory framework applicable to media, journalism and communications. Article 18 of Somalia's interim constitution promises to uphold the freedoms of expression and opinion. This new government now has the opportunity to live up to those promises and move Somalia forward by enacting laws that promote and protect freedom of expression, guarantee the independence and pluralism of the media, and encourage competition and investment in the communications sector. This legal review is designed to outline the current legal framework and to suggest ways to bring it into compliance with international standards.

II. Overview of Somali Media

BBC Media Action conducted an analysis of media across the three regions in Somalia in 2011 and summarised it as follows:¹

There is a broad selection of media organisations operating in Somalia. Radio is the most prolific media with 35 radio stations located across the three regions. In the last five years the number of radio stations has increased from 22 to 35 outlets. There are currently nine television stations operating in Somalia across the three regions, with two of these stations opening in 2011. Five years ago newspapers were quite prominent across South Central Somalia and Somaliland. However, in this intervening period many outlets have closed and print media is now prevalent only in Somaliland.

The number of media organisations, in particular radio stations, continues to fluctuate dramatically as organisations form and close due to a combination of practical and technical difficulties (such as equipment shortages and electricity supplies) and take-overs from militant groups. In South Central Somalia the number of radio stations operating has increased (from 15 stations to 21) whilst many newspapers have closed down; now there is just one newspaper in circulation. However, the landscape is constantly changing, mainly due to closures and pressure put on organisations by militant groups, such as Al-Shabab and Hizbul Islam. In the last year, seven radio stations have closed in South Central Somalia.

Radio Bar Kulan

One Somali radio station, Radio Bar Kulan (RBK), was started in 2009 as part of a broader project to support the African Union Mission in Somalia (AMISOM) funded by the United Nations Support Office to AMISOM (UNSOA). It provides 24-hour broadcasts into the capital and surrounding areas, and carries news programming as well as thematic programmes. It is estimated that RBK is listened to by 66% of people in Mogadishu. It also has audiences in Bossaso and Gaalkayco, is transmitted on Thaicom satellite, and reaches

¹ <http://downloads.bbc.co.uk/rmhttp/mediaaction/pdf/AnAnalysisOfTheSomaliMediaEnvironment.pdf>

Europe, the Middle East, Australia, Africa and Asia. With the success of African Union troops, RBK has been expanding the scope of its terrestrial transmission capacity, and it has new transmission facilities in parts of South Central Somalia, including imminently in Kismayo.

From the very beginning, UNSOA encouraged RBK to be editorially independent and credible. The goal has been to transform RBK as quickly as possible from a station funded by a UN mission to a broadcaster that is run by Somalis for Somalis and meets international standards for public service broadcasters (PSB) concerning independence, quality, and impartial programming that serves the public interest. That transition is underway: a trust has been established to oversee funding and management of RBK, and the trust deed requires that RBK adhere to international standards for PSB. As is discussed below, those PSB standards for RBK and other stations should be enshrined in legislation.

III. Requirements for Legal and Regulatory Framework

UNESCO has established a comprehensive system for setting goals and measuring success of media development in any given country known as UNESCO's Media Development Indicators (MDIs). A subset of the MDIs speaks to having 'a system of regulation conducive to freedom of expression, pluralism and diversity of the media.' The current Somali frameworks, and the goals for the new framework, are benchmarked below against these MDIs. (The numbering below reflects the original numbering of the MDIs.)

Studies suggest that only a small minority of African countries meet a substantial number of the goals of the MDIs (e.g., South Africa and Ghana).² This should not, however, provide a justification for Somalia also to fail to meet these standards. Many of these countries have been left with legacies of media laws that do not foster free speech and do not encourage competition in the media marketplace, and many of them are working slowly toward reform. Somalia now has the chance to leapfrog past its neighbours and achieve a higher standard, and should take advantage of that opportunity as advised in this legal review. By doing so, Somalia would be racing toward to the top of the region, rather than settling for the bottom.

A. Legal and Policy Framework

1.1 Freedom of expression is guaranteed in law and respected in practice.

Under international law, freedom of expression is protected as a fundamental right that can be restricted only in limited circumstances. Somalia recognises this fundamental right in its interim constitution. Specifically, Article 18 provides the following guarantees for freedom of expression and opinion:

- (1) Every person has the right to have and express their opinions and to receive and impart their opinion, information and ideas in any way.

² See, for example, a UNESCO analysis of the legal and regulatory frameworks in ten African nations (Ethiopia, Ghana, Kenya, Mali, Mozambique, Nigeria, Senegal, South Africa, Tanzania and Zambia): Guy Berger, *Media Legislation in Africa, A Comparative Legal Survey* (2007). Available at: <http://unesdoc.unesco.org/images/0015/001570/157072e.pdf>. It is important to note that more than five years have passed since this publication was published, and facts about these countries' legal frameworks are likely to have changed. It is also important to note that a particularly useful reference from this publication is the chart comparing the countries' frameworks at Appendix 4.

(2) Freedom of expression includes freedom of speech, and freedom of the media, including all forms of electronic and web-based media.

(3) Every person has the right to freely express their artistic creativity, knowledge, and information gathered through research.

Somalia is also a signatory to the *International Covenant on Civil and Political Rights* (ICCPR),³ the primary global human rights treaty guaranteeing freedom of expression. As Article XIX states, the ICCPR allows only “limited restrictions on this key right. In particular, it allows only for restrictions to be imposed to ensure respect for the rights or reputations of others, or to protect national security, public order, or public health or morals. Furthermore, restrictions are only valid where they are set out clearly and narrowly in law, and where they are truly ‘necessary’ to protect that interest.”⁴

a. Overview of Legal Framework in the Three Regions of Somalia

The establishment of a new legal framework for media and communications in Somalia is complicated by the fact that the country consists of three autonomous regions—South Central Somalia, Puntland and Somaliland—each of which is governed by its own media legislation. The SMSG strategy describes relevant law in each region as follows:⁵

Legislation at the national level consists of the *Somali Media Law*, approved by the Transitional Federal Parliament of the Somali Republic in 2007 and guarantees “*freedom of expression and ideas*” and states that media cannot be subject to censorship. However, it presents a regulatory framework largely controlled by the government, with a National Media Council as the main regulatory body, consisting of 10 members from the private media and 5 members of the public media nominated by the Ministry of Information. The law has been criticized by journalists and others, particularly for the important role given to the government-appointed National Media Council (NMC), and the legal obligation for media stations to promote Islam. ...

Legislation in the semi-autonomous state of Puntland abides [by] a Transitional Constitution that was ratified on 18 April 2012. Article 25 states that every person shall have the right to display free expression of his/her opinion and that the person can freely express his/her opinion in oral, press, writing, media, audio-visual, literature and other methods according to the law without any interference. Furthermore Article 35 guarantees the Freedom of Press as the media and the information agencies have the right of freedom to their institutional duties, without any interference [with] and hindrance to their objectives. It also specifies that a special law shall be promulgated for regulation of media and information agencies. In June 2010, the Ministry of Information of Puntland issued directives for independent media, which ordered media to only broadcast religious programmes of Puntland clerics, banning broadcasts of independent media that had not been previously authorized by the government. Additionally, they placed a ban on commercials that were not in line with the culture of Puntland. While the Puntland

³ Adopted by UN General Assembly Resolution 2200A (XXI), 16 December 1966, entered into force 23 March 1976.

⁴ <http://www.article19.org/data/files/pdfs/analysis/somalia-media-note.pdf>

⁵ These excerpts are quoted directly from the media development strategy of the Somali Media Support Group, a group of donor and implementing agencies chaired by UNESCO that meets regularly to discuss and provide coordination for media development initiatives in all regions of Somalia.

Government continues to defend its protection of Freedom of speech, it sees the role of the media as “*to preserve and to defend the security and Unity of the Somali people*”; it would appear that the legislative environment and manner of enforcement makes it difficult for journalists to work effectively in Puntland.

Legislation in Somaliland abides [by] Article 32 of the *Constitution of the Republic of Somaliland* and protects the freedom of expression and of the press and other media and it also prohibits the subjugation of the media. The media landscape in Somaliland is governed by the *Press Law (No: 27/2004)*, but some journalists lobbied for the provision of an independent regulatory body. Some reservations were also expressed regarding the *2007 Somaliland Press and Publications Bill*, which was intended to replace the *Press Law 2004*. The bill was not passed and is currently not an issue of debate. In early 2011, various stake-holders including Somaliland parliamentarians, journalists associations and government officials joined in a consultative process supported by INGO Free Press Unlimited (formerly Press Now) to draft under the auspices of the Somaliland parliament's sub-committee on social affairs, religion and national guidance: A Law on Media & Access to Information (which would establish a National Media Board to license and regulate media outlets and introduce provisions to promote government transparency and public access to information); and a Broadcasting Law (which would establish a regulatory framework for TV and Radio stations in Somaliland). Both draft laws currently remain with the parliamentary sub-committee on social affairs and have not yet been sent to the full parliament for consideration.

As this legal review is designed primarily to assist the new government in Mogadishu in South Central Somalia, it will focus on reforms to legislation in that region. It is likely that discussions will ensue over coming months and years as to how to coordinate with other regions on various aspects of the national framework. In the meantime, it will be important for the regions to consider issues of overlapping jurisdiction, such as resolving conflicts around radio frequency spectrum for broadcasters along the borders. In any event, establishing a framework that guarantees freedom of expression in line with international principles will serve to instigate improvements across all regions. For all of these reasons, it will be important to involve representatives from those regions in consultations on the legal framework for media and communications in South Central Somalia to the extent possible.

b. Media Law of 2007

As discussed above, the key piece of media legislation in South Central Somalia is the Media Law of 2007. At the time it was drafted and revised before passage, the UK nongovernmental organisation Article XIX, a respected leader in media law and policy, reviewed the law and issued recommendations for changes to bring the law in line with international standards.⁶ They state:

The Law provides for a comprehensive regulatory regime for all media, defined broadly, as well as for journalists. The draft Law includes some positive provisions—for example ruling out censorship and any obligations requiring media to carry statements by either the government or the opposition. Many of its provisions,

⁶ See <http://www.article19.org/data/files/pdfs/analysis/somalia-media-note.pdf> for full analysis by Article XIX from January 2008. This analysis was drafted under the supervision of Toby Mendel, Executive Director of Centre for Law and Democracy, then Senior Director of Law at Article XIX.

however, are quite control oriented. Among other things, the Law provides for extensive government control over establishment of media outlets, in direct breach of international law. It also places stringent constraints on media output, as well as workers, threatening serious sanctions for breach.

While we are sensitive to the difficult circumstances in Somalia, we believe that these features of the draft Law are not only contrary to international law, but will also fail to secure the objectives the law seeks to promote, such as more responsible media and better media output. Extensive experience in countries in very different situations around the world demonstrates that imposing strict obligations to respect the truth or not to shock the public, as well as government-controlled registration regimes, do not promote quality media. On the contrary, they promote a media which is cowed and timid, and which fails to mature and grow in a way which maximises its potential to serve the interests of development, democracy and the public generally.

Below is a summary of key recommendations for changes to the Media Law of 2007 that quote or draw upon Article XIX's analysis, with which we agree. We cite here the general principles discussed in that analysis and refer the reader to Article XIX's analysis for further detail. Following these recommendations would bring the law more into line with international standards for freedom expression. Many of these points are reiterated below when discussing relevant, specific MDIs.

- The law should be restricted in scope to the mass media, namely broadcasters and mass circulation periodical publications.
- All rules and processes, including on authorisation/registration of media outlets, should be clarified by providing for clear requirements, clear processes and clear roles for the different bodies involved.
- The registration system should either be abolished or restricted to the print media, narrowly defined as mass circulation periodicals. If retained, the system should be technical in nature, and not be unduly onerous or allow any discretion to refuse registration.
- Broadcasting should be subject to regulatory oversight by an independent regulator that is protected against political and commercial interference, and operates in line with international principles. If that regulator remains or is based upon the National Media Council (NMC) established in the Media Law, the appointments process to the NMC should be amended to enhance its independence, in particular by removing or limiting the role of the Minister in the process. Consideration should be given to expanding the scope of membership of the NMC, for example to include public representatives.
- Broadcasting standards should be developed in line with international standards.
- If rules on media output are retained in the law, they should be substantially amended so that they are clear and narrow, and protect only interests recognised as legitimate under international law. The print media should be given the opportunity to develop a self-regulatory system for content.

- Media output should not be required to reflect the ‘right information and ideology.’
- Consideration should be given to doing away with the distinction between journalists and other members of the media profession.
- Consideration should be given to doing away altogether with the obligations placed upon journalists. Instead, the law could include a provision appropriately tailored to the protection of confidential sources of information.
- Publicly funded media should be transformed into true public service media, protected against political interference, operating in the public interest and accountable to the public rather than the government or Ministry of Information.
- Consideration should be given to restricting the types of media outlets that the State will maintain and, in particular, by removing newspapers from this category.
- A comprehensive law on access to information should be adopted in line with international standards and better practice.

It is important to note that guarantees of freedom of expression will be meaningful only if the public is aware of them. Furthermore, civil society has a right to be consulted on proposed legal reforms that affect freedom of expression, and public information campaigns should follow the adoption of new laws.

1.2 The right to information is guaranteed in law and respected in practice.

Somalia does not yet have legally guaranteed access to information. Citizen access to information held by public bodies (this right is not limited to media) is critical to holding government accountable. International standards for access to information legislation are as follows:

- Presumption of Openness. All information produced or held by government agencies or bodies performing public functions, and all meetings, at which governmental decisions are taken, including court proceedings, should be open to the public, subject only to narrowly drawn exceptions, the application of which can be appealed to higher authority.
- Exceptions. Any exceptions to the right of access should be narrow and clearly enumerated. Exceptions should be allowed only where information relates to a legitimate exception spelled out in the law, the disclosure of the information would cause substantial harm to the interest protected by the exception, and the harm to that interest would be greater than the public interest in having the information. Such exceptions may include, for example, where the provision of information would cause substantial harm to the privacy of citizens, the integrity of police investigations, national security, public health or public order.
- Procedure for Requesting Information. Each public body should be required to designate a person or department to whom requests for information must be addressed. A government official who believes a request should be denied as falling within an enumerated exception should be required to inform the person

requesting the information within a certain number of days and in writing, as to why access is being denied and under what exception he or she believes the information falls.

- Appeal. Any person whose request is denied should be able to appeal that decision before an independence administrative oversight body and from there to the courts.

Access to information legislation should be considered as the legal framework is reviewed. The African Commission has developed a Draft Model Law for African States on Access to Information,⁷ which, as explained in an analysis by CLD, represents better practice regarding these international standards,⁸ and which would serve as a useful model for Somalia.

1.3 Editorial independence is guaranteed in law and respected in practice.

The law should provide strong guarantees for editorial independence. As discussed above, Article XIX has stated that the Media Law of 2007 “includes some positive provisions—for example ruling out censorship and any obligations requiring media to carry statements by either the government or the opposition. Many of its provisions, however, are quite control oriented. Among other things, the Law provides for extensive government control over establishment of media outlets, in direct breach of international law. It also places stringent constraints on media output, as well as workers, threatening serious sanctions for breach.” The Media Law of 2007 must thus be reviewed to strengthen protection for editorial independence.

Specific requirements for editorial independence for publicly funded media are set out below in the discussion of MDI 1.7, subsection a.

1.4 Journalists’ right to protect their sources is guaranteed in law and respected in practice.

This principle means that journalists should be able to protect confidentiality of their sources without fear of prosecution or harassment. Somali legislation should include such a guarantee.

1.5 The public and civil society organisations participate in shaping public policy towards the media.

In order to ensure that laws, rules and codes will be effective and have buy-in from stakeholders, the public, regulated industries and civil society organisations must be consulted extensively during the drafting process. A series of conferences, workshops and meetings should be held in Mogadishu and elsewhere over coming months to solicit broad stakeholder input into the legal framework. Participants should include representatives of industry, the government, parliament, civil society and the public, from South Central Somalia and other regions. A similar process was followed when the draft Somali Communications Act was discussed (see Section 1.6, subsection d below), and that process needs to be expanded upon to maximise stakeholder participation and buy-in.

⁷ See <http://www.achpr.org/instruments/access-information/>.

⁸ See <http://www.law-democracy.org/live/rti-rating-examines-international-rti-frameworks/>.

Additionally, in Somalia, women have historically been excluded almost entirely from government and positions of power. In order to improve the plight of women in the country, they should be allowed and encouraged to participate in the processes, events and consultations envisioned in this document. More on gender sensitivity in the media can be found below in Section VI.

B. Regulatory System for Broadcasting

1.6 Independence of the regulatory system is guaranteed by law and respected in practice.

a. Regulation of Broadcast versus Print

Under international standards, broadcasting and non-broadcast media, including print, are regulated very differently, with broadcast media being subject to more burdensome regulation than other media. More onerous regulation of broadcasting is primarily justified because it uses a scarce public resource—the radio frequency spectrum. For that reason, broadcasters are licensed and regulated under almost all legal systems, while international better practice is to leave the print media to develop more self-regulatory mechanisms.

b. Independent Regulation of Broadcasting and Telecommunications

International standards require bodies that regulate the media to be independent, and this is also recognised as being the most effective, democratic and economically viable model for governance of broadcast media and telecommunications. The World Bank lists the existence of an independent telecommunications regulator as one of the core prerequisites for investment. Within an independent regulatory system, the government, regulatory body, and service providers all have distinct roles to play, with the government creating policy, the regulator implementing and enforcing that policy, and service providers delivering the goals of the policy through providing services to users. If the regulatory body is independent from government control, it reduces the likelihood of political interference in broadcast media and communications, and thus encourages freedom of expression, economic development of these sectors, and free and fair elections. The functions of and requirements for these regulatory bodies under international standards are set out below.

i. Primary Functions

The principle functions of a broadcast regulator are:

- Implementing government policy.
- Licensing broadcasting operations.
- Regulating broadcast programme content through a code of conduct that is developed in consultation with broadcasters and is made mandatory through being included in the broadcast license.
- Issuing industry rules and regulations for broadcasters, governing such issues as technical standards and elaboration of legal rules.
- Managing and assigning frequency spectrum.
- Handling broadcasting complaints, both content-related and technical.

ii. Requirements for Effective Operations

Legislation should allow and require that a broadcasting regulatory authority is independent, effective, transparent and accountable. Desired qualities for a broadcast regulatory authority are as follows:

- A broadcasting regulatory authority should be independent. Its board and management should be appointed through a process that minimises undue political influence; its decisions and actions should be protected from political intervention; and its funding should be secure, non-discretionary and adequate.
- It should have adequate and proportionate powers to license and regulate its licensees and to enable it to ensure public access to services, set minimum standards for content, and ensure a healthy and technologically advanced broadcasting sector.
- It should be consulted on the development and implementation of national audio-visual and broadcasting policies and legislation.
- It should have well-trained, professional staff, who are sufficient in number to meet its needs and those of the industries it regulates.
- It should have the ability to monitor, supervise and, if necessary, sanction broadcasters, as provided for by law. But, the overriding goal should be to work with broadcasters in order to encourage them to comply with rules rather than to punish them for failing to do so.

iii. Deficiencies in the Media Law of 2007 in Meeting These Standards

The regulatory regime set out in the Media Law of 2007 does not meet these international standards for broadcast regulation. In particular, the regulatory commission it establishes is subject to too much government control, and it is charged with regulating media other than broadcast media (including print media, which should be subject to a self-regulatory mechanism as discussed below). One regulatory mechanism that would bring Somali closer in line with international standards is that envisioned in the Draft Somali Communications Act of 2012, discussed in subsection d below.

c. Converged Regulation of Telecommunications and Broadcasting

Traditionally, audio-visual programming has been delivered through conventional terrestrial broadcasting and more recently through satellite and cable, but new technology has broken these monopolies. Programming can now be delivered through a variety of systems such as the Internet and mobile phones. In most developed countries, as different distribution technologies are able to carry different sorts of electronic signals-broadcasting but also telephone and Internet-separate broadcast, telecommunications and media regulators have been converged. Though many countries still have separate regulators for broadcasting and telecommunications, the trend is towards convergence and having both under one roof can have the following benefits and advantages:

- An ability to develop and work within, a single strategic policy framework.

- One strong regulator can lead to a reduction in risk of regulatory capture by the industry or political actors.
- Greater certainty and efficiency for investors, with a simple one-stop-shop.
- Development and implementation of compatible uniform rules and coordinated policy.
- Economies of scale in administration and support services.
- Ability to spread regulatory expertise across the sectors with shared programmes for research, market analysis and stakeholder involvement

The following are examples of converged regulators:

- Broadcasting and telecommunications: Canada, Switzerland, Brazil
- Broadcasting, telecommunications and spectrum management: USA, South Africa, Italy, Iraq
- Broadcasting, telecommunications, spectrum and online content: Australia
- Broadcasting, telecommunications, spectrum management, and competition: United Kingdom
- All of the above plus postal services: Malaysia

d. Draft Somali Communications Act of 2012

i. Drafting Process and Resulting Draft Communications Act

A draft law that would create a regulator for both telecommunications and broadcasting, known as the Communications Act of 2012 (the “Draft Communications Act”), was adopted by the Council of Ministers of the Transitional Federal Government earlier this year. The Draft Communications Act was drafted at the request of the Minister of Information, Posts and Telecommunications by international expert consultants hired by the AU/UN Information Support Team (IST). It would, for the first time and after a number of attempts, bring the licensing and regulation of telecommunications into a regulatory framework, establishing a body to tackle service issues such as the lack of interconnection among providers and bringing much-needed revenues into the national treasury in the form of license fees.

The Ministry conducted a two-day workshop in Mogadishu in February 2012 in which an initial draft was presented for purposes of consultation with representatives of industry and other key stakeholders. Both the Prime Minister and the Minister of Information addressed the workshop and expressed their view that the adoption of the Draft Communications Act would represent a major milestone for Somali society and for the Transitional Federal Government. Participation at the workshop was both broad and enthusiastic, with participants supporting the adoption of the law and making numerous suggestions for improvements. The Minister and his team incorporated the input from the workshop into a revised version of the Draft Communications Act, which was approved by the Council of Ministers. The law was never put into effect; it was not ready to be introduced until after parliament disbanded, and

the President decided that he would not sign it without first receiving a vote of approval by the parliament.

The Draft Communications Act would create a converged, independent regulator for telecommunications and broadcasting, the National Communications Commission (NCC). Both the Draft Communications Act and the NCC it would establish are broadly consistent with international best practices, which favour a converged, independent regulator and an open, transparent regulatory process. Some strong points in the Act are as follows:

- The NCC would be legally obligated to respect the right to freedom of expression, while recognising Somali social, cultural, and religious norms.
- The NCC would be a converged regulator, licensing and regulating both telecommunications and broadcasting. This structure conserves resources (by creating one regulator, not two) and recognises the increasing overlap between telecommunications and media.
- The NCC would be an autonomous regulator, in the sense that it would not be part of any Ministry, and the law provides some degree of protection against political interference.
- The NCC would function with a high degree of transparency and would depend on public input in adopting its rules and regulations.
- There are accountability systems for the NCC inasmuch as it would be required to explain its decisions and publish them in writing and its decisions would be subject to review by an independent appeals board.
- The NCC would have a mandate to promote competition and infrastructure development in the Somali telecom and broadcasting industries.

The consultation process described above, although open and inclusive, was limited in time due to the then imminent expiration of the remit of the TFG. As a result, the Draft Communications Act intentionally did not include broadcast provisions, as there was not time prior to looming political deadlines to properly consult with the industry on them. Rather, the idea was that the Draft Communications Act would set up the regulator (for both broadcasting and telecommunications) and specific requirements regarding broadcasting would be set out in a future law after consultation with broadcasters. Broadcasting provisions of this type should either be included in a revised Draft Communications Act or be found in other legislation.

ii. Review of the Communications Act by International NGOs

The IST asked two renowned international NGOs specialising in media and communications law and policy—the Centre for Law and Democracy of Canada and Article XIX of the UK—to review the Draft Communications Act for compliance with international best practice.⁹ As CLD stated in its review: “In many respects, the draft Act provides a strong basis for the

⁹ The review by Centre for Law and Democracy can be found at <http://www.law-democracy.org/live/somalia-analysis-of-draft-telecommunication-law/>, and that of Article XIX can be found at <http://www.article19.org/resources.php/resource/3016/en/somalia:-draft-communications-act>.

regulation of telecommunications and broadcasting. It recognises the international principle that regulation should be overseen by independent bodies, and it incorporates strong openness standards into the process.” Both organisations agreed, however, that there is room for improvement, and that the law would benefit from broader and lengthier consultation with all stakeholders. CLD made the following general recommendations:

- Far more attention needs to be given to matters relating to the regulation of broadcasting. Specifically, the unfettered powers of the Commission in relation to whole areas of broadcast regulation need to be the subject of extensive elaboration and clarification, so as to constrain and guide the actions of the Commission with a view to promoting a public interest broadcasting sector. This should be addressed in a future broadcasting law.
- The practical arrangements for guaranteeing the independence of the Commission could be enhanced.
- There is certain confusion between telecommunications and the Internet, and some standards for the former appear to be applied to the latter, which is inappropriate.

CLD also made a number of other detailed recommendations, all of which should be considered for the legal framework going forward. Now that the new government has more time to consider the legal framework, the Draft Communications Act should be developed so that it may serve as a model for future legislation as part of the process of a more comprehensive consultation on this issue.

e. Self-Regulation for Print Media

As discussed above, print media may be subject to much less regulation than broadcasters under international standards. Print media, therefore, should not be regulated by the broadcasting regulator. Rather, print media should be regulated as follows:

- Print media outlets should not be subject to licensing requirements.
- Any registration requirements should be technical only, similar to that of any other business (under companies laws, for example). There should be no discretion to refuse an applicant once the requisite information has been provided.
- Complaints should be addressed by a self-regulatory body, based on a pre-established code of conduct established in consultation with interested stakeholders. Only light sanctions or remedies should be imposed on print media outlets for violations.
- Such remedies might include the right of correction or the right of reply. The lighter of the two, the right of correction, should be used where it will redress the harm. The right of reply should apply only where a legal right has been breached (such as, for example, where a legal claim of defamation could arise) and where a right of correction will not suffice to remedy the harm done. There are international standards limiting the right of reply that should be applied (for example, a right of reply should arise only to address only a misstatement of fact and not an opinion).

1.7 Regulatory system works to ensure media pluralism and freedom for expression and information.

Somalia's legal and regulatory framework should take into account, and encourage the development of, three types of broadcasters: (1) commercial broadcasters, (2) public service broadcasters, and (3) community broadcasters. All three play a unique and necessary role in a media landscape. Legislation will have to be drafted with these distinct elements in mind. Very important for all broadcasters will be the independent regulator discussed above. Additionally, each will have distinct issues for consideration, as is set out below.

(1) Commercial Broadcasters

As Somalia emerges from conflict, commercial activity increases, and business begin to advertise, Somalia's commercial media sector will grow. Somali media law and policy thus must address questions of ownership. How will the detriments of monopolistic ownership be avoided? What types of ownership and control by religious and political groups will be allowed? How will pluralism be achieved through licensing criteria and the licensing process? Of course, having an independent and accountable regulator as discussed above will contribute to a thriving commercial sector.

Specifically, legislation may address or require the regulator to address the following:

- How to develop competitive criteria on which to award licenses based on purpose, audience, experience, character, technical capabilities, business plan and financial resources.
- Whether and how to introduce positive program obligations into licenses, e.g., public service obligations, children's programming, educational programming, news and current events.
- Whether and how to license based on public auction, where applicants would need to meet only minimum requirements and licenses would be awarded to the highest bidder.
- Whether and how to license based on economic sustainability, refusing to allow new entrants into markets deemed saturated.
- Practical issues such as the duration of the licenses (research shows that eight to fifteen years seems to be the norm), fees and fee structures, and application procedures.
- Whether and the extent to which to allow foreign ownership and control.

(2) Public Service Broadcasting

A public service broadcaster (PSB) should operate in the public, rather than state or government, interest. It should provide substantial, independent programming. To enable them to deliver on their often quite onerous mandates, PSBs need to receive at least some public funding. This may come from a licence fee, other forms of subscription fees or the state, while many PSBs also receive donations and some advertising revenue. A PSB should have editorial and managerial autonomy in creating programming.

A PSB's mandate should be clearly set out in law, and legislation should establish and guarantee the standards under which it will operate. International standards common to PSBs are as follows:

- Universality: Ideally, the whole population should have access to PSB content, meaning it must be available in all significant languages, as well as the technology to receive the PSB signals and services within the area where it is assigned a broadcast license. No groups or individuals should be excluded from accessing the PSB.
- Diversity: There should be a wide variety of educational, informative and entertainment programming that reflects the diverse backgrounds and perspectives, and satisfies the information needs and interests, of the population served.
- Impartiality: All programming should be objective and free of political bias, and not be influenced by or promote political parties, governing bodies, commercial interests, or individual opinions, thus allowing for the free forming of opinion among the viewers.
- Independence: In order to preserve freedom of expression, a PSB should be independent from both state and commercial interests. This can be achieved by appointing bodies to govern the PSB that are not subject to political influence (by ensuring that its members are appointed in a way that does not allow political interference). Additionally, the budget should be protected against political interference. Programming decisions should be based on professional criteria and citizens' right to information.
- Informative: Programming should encourage and facilitate citizen participation in the democratic process by providing accurate, timely, and comprehensive information on current issues of public interest. News should cover, but not be limited to, politics economics, science, health, society, culture, and both local and international events.
- Entertaining: A PSB should provide innovative and creative entertainment programming outside of news and information that can compete with popular commercial broadcasting. It should foster, encourage, and develop audio-visual technology and use emerging technologies to increase accessibility and audiences.
- Culture: There should be an emphasis on cultural diversity within a nation, with programmes highlighting various cultural events and issues, while at the same time promoting national cultural interests to international audiences.
- Publicly Financed: In many countries, PSBs are funded by a universal license fee on receiver sets, which means that all viewers/listeners must pay a fee to access the signal. Otherwise, other forms of public funding should be provided to enable the PSB to deliver on the sorts of obligations noted above. In addition, revenue can come from advertising. Other forms of revenue include private donations and grant money. Most publicly funded broadcasters have free or inexpensive access to spectrum.

PSB goals are particularly relevant in a country like Somalia that has endured and is still undergoing conflict and violence. In this environment, a PSB can provide a platform for national cultural identity and reconciliation. It can air programmes important to transition to democracy and can disseminate essential information to all corners of the country. Stations living up to international standards for PSB can also serve to elevate the general quality of journalism in developing countries, setting standards for other stations to live up to. Public service broadcasting is an even more attractive media model where, as is the case in conflict-torn South Central Somalia, there has been little commercial interest in or incentives for non-sectarian or interest-driven media ownership.

In Somalia, significant steps have already been taken toward establishing an entity that can in essence provide the services associated with PSB for Somalia. As discussed above, Radio Bar Kulan was set up by the United Nations with the goal of transitioning to an independently funded public service broadcaster, and that transition has already begun. The standards discussed here need to be enshrined into law, and RBK's ability to live up to them should be discussed as part of the consultation on Somalia's legal framework for media and communications.

There are a number of resources that set out model legislation and processes for public service broadcasting and should be considered as Somalia moves forward. These include:

- Article XIX's A Model Law on Public Service Broadcasting¹⁰
- Elizabeth Smith's publication, supported by UNESCO, entitled "A Road Map to Public Service Broadcasting",¹¹
- Toby Mendel's book, also supported by UNESCO, entitled "Public Service Broadcasting: A Comparative Legal Survey".¹²

(3) Community Broadcasting

Community broadcasting (especially community radio) can be an important part of the broadcasting landscape due to its unique ability to serve small groups that benefit from having a medium for sharing ideas, but are unlikely to attract significant advertising or sponsorship. Often the law grants community broadcasters a discount on license fees or waives them altogether. Communities served are often limited to a particular geographic area (such as a village or a group of villages), and it is common for the community itself to own and manage the station. Such stations can be critical for facilitating participation in local level governance. Another model is when a community broadcaster serves a special interest group (such as women or minorities) that is typically underserved by other types of media. Special licensing requirements for community broadcasters could be considered in future legislation, with the government reserving some of the radio frequency spectrum for this type of broadcaster.

1.8 The state does not place unwarranted legal restrictions on the media.

In order to live up to this principle:

¹⁰ See <http://www.article19.org/pdfs/standards/modelpsblaw.pdf>.

¹¹ See <http://unesdoc.unesco.org/images/0021/002156/215694e.pdf>.

¹² See http://portal.unesco.org/ci/en/ev.php-URL_ID=31375&URL_DO=DO_TOPIC&URL_SECTION=201.html.

- There should be no licensing or registration for individual journalists. Everyone should be free to engage in journalism. This is particularly relevant today in the age of the ‘citizen journalist’ where anyone with a phone or computer and access to networks can publish to a wide audience.
- Accreditation requirements should be used only to ensure privileged access of journalists to limited space venues, not to control access to the profession more generally.

As discussed above, the Media Law of 2007 places obligations on journalists and distinguishes them from other media professionals in a way that is likely to interfere with their work. These provisions should be reviewed as the Media Law of 2007 is reconsidered in order to bring legislation in line with this MDI.

1.9 Defamation laws impose the narrowest restrictions necessary to protect the reputation of individuals.

Media content is regulated in a number of ways, some of which have already been noted above. For example, broadcast content is subject to codes of conduct enforced by a broadcast regulatory authority. Print media is also regulated under codes of conduct through self-regulatory mechanisms. Laws of general application—meaning that they are not media-specific, but rather apply to everyone in society—also apply. One such law of general application is defamation legislation.

Under international standards, administrative warnings or fines are the strongly preferred remedies for defamation claims over criminal fines and imprisonment. Additionally, a defendant should be found liable only where damage has been caused to reputation. Defamation laws should provide for sufficient legal defences including where the disputed statement was an opinion, not an allegation of fact; where dissemination of the disputed fact was reasonable or in the public interest; or where it occurred during a live transmission and/or before a court or elected body. Defamation laws should provide for remedies that allow for proportionate responses to the publication or broadcasting of defamatory statements, including rights of reply and reasonable sanctions. As a general rule, defamation laws should not inhibit public debate about the conduct of officials or official entities.

1.10 Other restrictions upon freedom of expression, whether based on national security, hate speech, privacy, contempt of court laws and obscenity should be clear and narrowly defined in law and justifiable as necessary in a democratic society, in accordance with international law.

As with defamation, legislation should provide only for civil liability where the right for privacy is violated, and only where there was a reasonable expectation of privacy that is not outweighed by the overall public interest.

Criminal sanctions should be applicable only under the following limited circumstances:

- Hate Speech. Violations should be found only for advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.
- Security/Public Order. Violations should be only where intended and likely to incite to imminent violence.

- Obscenity. Violations should not be found where material is merely offensive, but rather where content is harmful, such as with child pornography.
- Judiciary. Criminal sanctions should protect only the integrity of the judicial process, not individual judges.

1.11 The media is not prior censorship as a matter of both law and practice.

Compliance with this indicator can be determined as follows:

- Broadcasting or print content is not subject to prior censorship, either by government or by regulatory bodies.
- Sanctions for breaches of regulatory rules relating to content are applied only after the material has been broadcast or published.
- Broadcasters and print publications are not required to register with or obtain permission from a public body, other than under a licensing regime for broadcasters as described above.
- Broadcasters or print publications are not closed or threatened with closure because of their content.
- There are no explicit or concealed restrictions upon access to newsprint, to distribution networks or printing houses.
- Fines for breaches of rules are not excessive or disproportionate so as to function as a form of censorship.

Although the Media Law of 2007 purports to prevent censorship, it fails to meet these benchmarks in significant ways, including by requiring the registration of print media outlets and providing for excessively severe sanctions for breaches of the law. As discussed above, the Media Law of 2007 and the regulatory regime it establishes must be reconsidered.

1.12 The state does not seek or block or filter Internet content deemed sensitive or detrimental.

UNESCO defines this indicator to mean that:

- Internet content is not blocked or filtered by the state because of its content or source.
- Internet users are not subject to sanctions for accessing or publishing content on the Internet deemed sensitive or detrimental.
- Internet service providers, websites, blogs or Internet broadcasters are not required to register with or obtain permission from a public body.

Currently, there is no systemic blocking or filtering of the Internet in the country, and the application of content standards to the Internet is unclear. The government should refrain from establishing laws or practices that burden this exciting, relatively new medium. As with

telecommunications (where mobile payment systems act in the place of a functioning banking system), if Somali continues to allow the Internet to remain free as Internet penetration grows, it will likely fuel economic development and make up for areas where Somalia lacks ‘bricks and mortar’ infrastructure.

VI. Gender Sensitivity

UNESCO has developed Gender Sensitive Indicators for Media, the key categories of which are as follows:

- Gender balance at decision-making level
- Gender equality in work and working conditions
- Gender equality in unions, associations, clubs and organisations of journalists, other media professionals and media self-regulatory bodies
- Media organisations promote ethical codes/editorial policies in favour of gender equality in media content
- Gender balance in education and training

It is safe to say that none of these indicators is satisfied in Somalia. As discussed above, women are rarely found in prominent roles in Somali society. And, they do not hold a position equal to men in the workplace.

One way to help ensure that the various media outlets and communications governance structures—from public service broadcasters to the independent regulator to self-regulatory mechanisms—are attempting to reach and serve women would be to include women among members of their boards and senior management. Promoting gender equality in educational and training opportunities relevant to the media is also very important. For media, women should feature prominently among their reporters and on-air personalities. The hope would be that this internal pluralism would then start to be reflected externally in programming. Rules and codes designed to provide further detail for the legal and regulatory framework should incorporate gender sensitivity where appropriate. For example, a self-regulatory journalistic code of ethics might discourage language that denigrates the status of women in society.

VII. How to Move Forward

As discussed above, as Mogadishu and other parts of South Central Somalia continue to stabilise, and with a new government in place in Mogadishu, now is the time for extensive discussions about the legal and regulatory framework for media and communications. A series of conferences, workshops and meetings should be held in Mogadishu and elsewhere over coming months to solicit broad stakeholder input into this framework. Participants should include representatives of industry, the government, parliament, academia, civil society and the public, from South Central Somalia and other regions. Attention should be paid to involving as many women and minority groups as possible to encourage broad support. International and local experts should be hired to provide advice, as possible and appropriate. Topics for discussion should include:

- Necessary conceptual revisions to the Media Law of 2007.
- Independent regulation of broadcasting.
- Specific provisions for broadcasting legislation to address licensing and other regulatory issues for broadcasters.
- Legislation to establish public service broadcasting in Somalia, of which RBK should be an integral part.
- Self-regulation of the print media.
- Access to information principles and legislation.
- Content standards and codes of conduct.
- Legal restrictions on content.
- Internet regulation.
- Other legal provisions and issues dealing with media, communications and journalism.

It is recommended that the Ministry of Information, Post and Telecommunications establish a schedule for review and consultation on the legal and regulatory framework. It would be a good idea to hold an initial conference soon in order to maintain momentum following the constitutional consultation, elections and formation of the new government. At this event, participants could discuss reforms and make specific recommendations regarding legislation. International and local experts could then incorporate these ideas into revised legislation. Further events could then be held from February to April 2013 to engage with stakeholders and obtain their suggestions, buy-in and approval regarding the draft framework.

It is important to note that the recommendations made here regarding the legal and regulatory framework are only part (albeit an important part) of the media development that will need to occur in Somalia to provide for a vibrant, pluralistic communications sector. The Somalia Media Support Group's media development strategy sets out many other critical elements that should be considered immediately and continuously as well.

Contributors

African Union/United Nations Information Support Team for Somalia (IST)—The IST is contracted by the United Nations Support Office to AMISOM (UNSOA) to provide strategic communications support to AMISOM (both its civilian and military components), the UN Political Office for Somalia (UNPOS) and support the political and peace process in Somalia. A consortium comprising Chime and Albany Associates runs IST with a project team operating out of offices in Nairobi and Mogadishu. The team is structured around press and media (including a newsroom), production, research and analysis, outreach, IT and broadcasting communications departments. It also has a specific media development section, assisting Somali media institutions, media legislation and development of Somali broadcasting. The IST comprises a diverse team of internationals and local staff and includes Somali and AU Special advisors. Whilst each department has specific individual tasks, they operate cohesively in order to maximise effect in support of the overall mission.

Centre for Law and Democracy (CLD)—CLD is a Canadian-based international human rights organisation led by Toby Mendel that works to promote, protect and develop those human rights which serve as the foundation for or underpin democracy, including the rights to freedom of expression, to vote and participate in governance, to access information and to freedom of assembly and association. CLD works around the world on legal and regulatory reform, among other things in the areas of media and communications.

Somali Media Support Group (SMSG)—The SMSG is a group of donors and implementing organisations interested in media issues in Somalia. It is chaired by UNESCO and meets monthly. The origins of the SMSG date from 2009, when two groups, the first led by Canada (supporting civil society through assistance to Somalia media), the second led by the UN Political Office for Somalia (supporting TFG on media issues), were joined. It has continued since this time to encompass the majority of donors, UN agencies and INGOs active in this critical sector of Somali society.

UNESCO— In Somalia, UNESCO's activities in the region to date have marked the response necessary to address the needs that violence and political strife have caused especially to the media sector. In late 1990, UNESCO launched a participatory communication for peace project consisting of a network of grassroots communities and Peace Resource centers. They formed the core UNESCO's Civic Education activities and served as training centers for volunteer peace promoters and as launching pads for peace extension work throughout the country. UNESCO has since then undertaken several activities in the region aimed at capacity building and strengthening various aspects of the media in Somalia including human and technical capacity building of the journalism education institutions and as well as training of media professionals and strengthening of the various journalism associations.