

South African Editors Forum (SANEF)

Nat Nakasa Awards Radisson Blu Hotel, Umhlanga, Durban,
September 17, 2022.

Freedom of Expression By Judge Navi Pillay

Distinguished Guests,

I thank SANEF for their kind invitation to address this event . I have great pleasure in congratulating the recipients of the Nat Nakasa Courageous Journalism Award. Nat Nakasa was a courageous and outstanding journalist who exposed the underbelly of apartheid atrocities . His legacy is being kept alive by these awards established by SANEF and the sponsors .

Sanef represents all areas of the South African media and proclaims its commitment to championing freedom of expression, ethical journalism and respect for diversity.

Sanef has noted that I am the only South African serving on the International Commission on Information and Democracy; and that our country is a member of the International Partnership For Information and Democracy, which affirms the principles of media freedom, safety of journalists and media sustainability. I am invited to address you on how South Africa should implement these commitments and how they would advance media freedom.

They have also asked me to share some of my experiences as UN High Commissioner for Human Rights, and Judge and President of the UN International Criminal Tribunal for Rwanda in relation to the role of the media.

I was invited to dinner and then I got this tall order!

I will divide my subject into

- A general focus on the global situation of the media.

- A specific country focus – South Africa.

- The campaigns of the International Commission on Information and Democracy.

- My work as HC at the UN relating to freedom of expression and human rights.

- The “Media “ judgement of the ICTR on which I presided.

Before I proceed to speak of the global situation relating to freedom of speech ; let me observe that the role of the media is sharply in focus right now in our own country : A few days ago, there was news of the warning issued to a journalist or journalists by the judge presiding in the Senzo Meyisa murder case relating to media interference in the judicial process. I saw on the news that SANEF appreciated the apology from errant reporters from TV stations.. It is important for journalists to respect the rule of law, court proceedings, the rights of the accused to presumption of innocence unless proven guilty in a court of law; and the rights of witnesses to privacy and protection. While clearly underlining the important role of the media to keep the public informed, we do not wish to have trials by the media and sensationalism creeping into the investigation and prosecution of crime.

General:

The UN Resolution on World Press Freedom Day on 3 May of each year, focuses on the media. It affords an opportunity for consolidating international action for freedom of expression and greater respect and protection for journalists- who are the frontline providers of information to the public. Every call to action is addressed to all states including South Africa ; thus the responsibility and duty of our government on how to implement their obligations flows from the international obligations they signed up to.

The principal framework ICCPR (International Convention on Civil and Political Rights) and HRC Business and Human Rights Guidelines. Article 19 of the ICCPR places a duty on states to safeguard the right to freedom of expression ; and Article 20 obliges states to prohibit hate speech amounting to incitement to crime and violence. (It has some Resonance with the recent decision of the SA Equality Court on “ Kill/Kiss the Boer” Afriforum v EFF.) I will say more about the rights and responsibilities of journalists, in my account of the Media case of UN-ICTR.

This year’s focus of World Press Freedom Day was on surveillance and spying upon the media, and the resulting invasion of the independent media. I shall say more about this in my remarks about the activities of the International Commission on Information and Democracy.’ and the Partnership of associated states, including South Africa.

All of us agree that a free, uncensored and independent press is a cornerstone for democratic societies. It can educate and bring information for informed public participation to ensure good governance, justice and accountability and respect for human rights. In a statement issued jointly by the presidents of the UNGA and HRC and UNESCO on May 3, 2022, they emphasised the paramount importance of ensuring that journalists and media workers can work freely, independently and safely without hindrance, threats, violence or reprisals. "Each and every day", they said, "we are reminded of how vital the information they provide is for democracy, for the promotion and protection of human rights and for fighting corruption, for sustainable development and for the preservation of international peace and security".

The number of arrests and killings of journalists in the world is staggering and according to UNESCO, 87% of the murders are not investigated nor perpetrators brought to justice. The internationally known cases of Khashoggi, killed in the Saudi Arabian Embassy in Turkey, and Shireen Abu Akleh likely shot dead by Israeli military are notorious examples of impunity.

Around the world, people have increasingly taken to the streets to protest and demand their economic and social rights as well as an end to discrimination, racism, corruption and impunity. Journalists, fulfilling their fundamental role of reporting on these social protests have become targets - subjected to violence at the hands of law enforcement, arbitrary arrests and killings.

Michelle Bachelet, the UN HC for HRs, my successor, in her world press freedom day statement of 3 May 2022 recalled that in today's world, with conflicts intensifying, many of which demonstrate little or no regard for IHL and IHR (International Human Rights Law and International Humanitarian Law), the work of journalists to expose atrocities is ever more critical. Journalists work in countries where they have little choice but to work amidst ever-increasing harassment, intimidation, surveillance and risk to their lives and livelihoods. They do so, she reminded us, for the sake of all of us; so that we can have access to free, accurate and independent information; so that we can live in just, peaceful societies.

The statements made on World Press freedom day highlighted the

rising use of surveillance tools against journalists, such as Pegasus or Candiru spyware. This use is a violation of the right to privacy and obstructs freedom of expression. Surveillance led to arrests, intimidation of journalists and put them and their families at risk. Pegasus spyware is reportedly used in at least 45 countries, often in total secrecy and outside of any legal framework.

Domestic law must regulate their use, permitting the use if they met a legitimate goal. Governments, including ours as well as business enterprises should publicly affirm their responsibility to respect freedom of expression and the right to privacy and to undertake human rights due diligence.

It is crucial that governments, including ours take concrete action to promote a free and independent press - instrumental to combat disinformation, build public trust and advance the promotion and protection of human rights. Here I would say that such action must also protect media sources and whistleblowers, who bravely and at great risk commit to bring us the truth. As we know from the sad assassination of whistleblowers and witnesses in our country, such as Mrs Babita Deokaran.

Now, after ten years of impunity for all manner of criminalities, subterfuge and diversionary tactics, shocking revelations are emerging from the many court cases, commissions of Inquiry such as the Zondo Commission into state capture, private investigations, and media exposures of unbridled looting and theft of state assets, corruption, nepotism, patronage and incompetence within state and non-state actors.

While these secret and hidden acts of criminal conduct are now coming to light because of media exposure, because of brave witnesses speaking out, transparent nature of Inquiries and court proceedings and the political will to hold them albeit under much public pressure,-- the withholding of information, obfuscation and less than candid disclosures and intimidation of witnesses should make us fear that truth is being held to ransom.

My narrative so far has looked at the challenges faced by journalists. The reality here and globally is of a negative and dark environment. Their work is challenging but also necessary.. So let me highlight the positive side: On the positive side, the world honours brave and fearless journals. The award of the Nobel Peace Prize to journalists, Maria Reesa of the Philippines and Dmitry Muratov

are welcome recognition of the achievements for journalists.— The SANEF Nat Nakasa Courageous Journalism Awards falls into that spirit of celebration of brave and courageous journalists and expresses public gratitude for their work. This is what counts- the appreciation of the constituency to whom you are accountable . The silencing of journalists is a loss to society; honouring them is a gain.

World Press Freedom Day (3 May) 2022

As I mentioned earlier, this year's focus was on surveillance.

When I assumed office as UN High Commissioner for Human Rights in 2008, my office, OHCHR communicated important human rights messages by writing op-Eds that may or may not be published by mainline media. Even where they were published, we had no idea whether they were being read. With the advent of the internet, our statements went round the world digitally, instantly reaching millions of users and the feedback came back just as speedily.

In the digital era, communications technology enhanced freedom of expression but also came with challenges of false information, the use of surveillance and invasion of personal privacy. In my case, fraudulent facebook and web accounts were created in my name and vile, anti-human rights messages attributed to me. Photos of me on Google images were superimposed by the face of Osama Bin Laden. UN Security tracked threats issued against me and continue to maintain watch as I serve in my current position as the Chair of the UN/HRC COI on Israel/Palestine.

The risk of surveillance in the digital era first came for consideration before the UN in 2013. The alarm was raised by two presidents : Chancellor Angel Merkel of Germany and President Dilma Rousself of Brazil; both of whom discovered that their personal cell phones had been hacked and they took their complaint to the UNGA.

The UNGA, in Resolution 68/167, directed me as HC for HRTs to submit a report on the protection and promotion of the right to privacy in the context of domestic and extraterritorial surveillance and/or the interception of digital communications and the collection of personal data, including on a mass scale.

In my report(A/HRC/27/37 dated 30 June 2014) I noted that digital communications technologies, such as the internet, mobile smartphones and WiFi-enabled devices have come to dominate our everyday lives. As contemporary life is played out ever more online, the Internet has become

both ubiquitous and intimate.

Digital technologies facilitate global debate and foster democratic participation. They also have enhanced the capacity of governments, enterprises and individuals to conduct surveillance, interception and data collection and sharing. The state now has greater capability to conduct simultaneous, invasive, targeted and broad surveillance than ever before. Technological platforms upon which global, political, economic and social life depend are not only vulnerable to mass surveillance, they may actually facilitate it.

My report noted the proliferation of overt and covert surveillance by state and non state actors.

Government surveillance involves :

demands for direct access to communication traffic; tapped fibre-optic cables for surveillance purposes; requiring companies to disclose bulk information on users; targeting political opponents and dissenters and trade competitors; monitoring by host governments at global events, and state and non-state groups developing sophisticated digital surveillance capabilities outside regulated controls.

The UNGA Resolution 68/167, following my report, affirmed that human rights held by people offline must also be protected online- and called upon all states to respect and protect the right to privacy in the digital communications. It called upon all states to review their procedures, practices and legislations related to communications surveillance, interception and collection of personal data, emphasising the need for states to ensure full and effective implementation of their obligations under International Human Rights Law.

There is already a clear and universal framework on the protection of the right to privacy (Article 12 of the UDHR provides, " no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, no to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks." ; Article 17 of ICCPR provides, " no one shall be subjected to arbitrary or unlawful interference in privacy, family ,home or correspondence , nor to unlawful attacks on his or her honour and reputation"

These safeguards are embedded in our national legislation.

It is also clear that mass surveillance, the interception of digital communications and the collection of personal data impinge on other human rights besides the right to privacy, namely, the rights to freedom of expression, access to information, freedom of assembly and association and family life and the right to health are increasingly exercised through digital media. My report makes reference to the use of collected data in torture and metadata derived from electronic surveillance to identify the location of targets

for lethal drone attacks.

The law guards against arbitrary or unlawful interference with privacy, family, home and correspondence, not data collection itself. Surveillance of electronic data can be a necessary and effective measure for legitimate law enforcement, or intelligence purposes and even of interest to the media in the public interest.

Challenges arise over how to protect confidentiality and personal identities in the new and emerging market of big data collection. "Metadata" may give an insight into an individual's behaviour, social relationships, private preferences and identity that go beyond even that conveyed by accessing the content of private communications. This risk needs to be countered by reform of existing policies and practices to ensure greater protection for privacy.

Surveillance based on claims of national security or the prevention of terrorism or other crimes may meet the "legitimate aim" allowed in Article 17 of ICCPR. The degree of interference in the right to privacy, however, must be assessed against the necessity of the measure to achieve that aim and the actual benefit it yields towards such a purpose.

In assessing the necessity of a measure, the UN Human Rights Committee (General Comment No. 27, on Article 12 of ICCPR) stressed that the restrictions must not impair the essence of the right. It must be the least intrusive option.

Applying all the checks and balances of IHRL, namely, the surveillance must be lawful, proportionate, necessary serving a legitimate aim, respectful of other human rights and so on, mass or bulk surveillance programmes are deemed to be arbitrary, even if they serve a legitimate aim and have been adopted on the basis of an accessible legal regime.

Mandatory third party data retention-where states compel internet service providers to store metadata about their clients' communications for law enforcement and intelligence agency access, is deemed to fall short of necessity and proportionality tests.

Many national frameworks lack "use limitations", allowing data collected for one purpose to be used in other ways or allowing the sharing of the data among different agencies. Unlimited data-sharing may not be in compliance with a state's obligations under Article 17 of ICCPR.

A word about the obligations of the private sector- The Responsibility to respect human rights applies throughout a company's global operations regardless of where its users are located, and exists independently of whether the State meets its own human rights obligations. The Guiding Principles on Business and Human Rights, endorsed by the HRC in 2011 provide a global standard for preventing and addressing adverse effects on human rights linked to business activity.

The Guiding Principles is not a legally binding instrument but many companies have adopted explicit policies and commitment to respect human rights, to have due diligence, and impact assessment oversight, exercise transparency and consultations with affected stakeholders and provide remedies and plans against recurrence of lack of protections.

However gaps in implementation remain. Massive increases in technological resources and inexpensive potentially limitless cloud storage enable the storage by organisations of massive amounts of data on private individuals and in many cases use of this data as a source of revenue.

To address this concern, the **EU** introduced The General Data Protection Regulation (GDPR) with global territorial scope to protect data privacy of EU citizens. Heavy penalties levied so far show the reach and impact of GDPR—\$5 billion fine against Facebook's Campaign Analytica- the political research group that accessed the data of 87 million Facebook users. Others who were penalised with huge fines were British Airways, Haga Hospital, Netherlands, Google, Vodafone and Marriot hotel.

Similar legislation has been adopted by other states.

South Africa adopted The Protection of Personal Information Act (POPIA) on 1st July 2020 that came into effect on 1st July 2021. It has some similarities with GDPR, on guiding principles, accountability, transparency, security and data minimisation and ensuring the rights of data subjects. But does not stipulate that the prior consent of users must be obtained except for special personal information and information relating to children. POPIA permits transfer of personal data to outside the country but does not prohibit cross-border transfer of information. There may have been recent developments to POPIA that I may have missed. If this is the case, I apologise .It must be stressed that national legislation cannot be enacted independently of the international context.

Effective protection of the right to privacy in the context of modern communications technology will require an ongoing, concerted multi-stakeholder engagement.

World Press Freedom Day (3 May)

We call for decisive transformation by Messrs. Pichai, Zuckerberg, Cook, Dorsey, Bezos and others for the sake of the right to reliable information

By the members of the Information and Democracy Commission

This a statement I signed up to- for action.

We appeal to the leaders of the digital platforms and social networks who have acquired wealth and power online to commit to a decisive transformation that favors reliability of information and platform accountability based on democratic principles. We ask you, Sundar Pichai, Mark Zuckerberg, Tim Cook, Jack Dorsey, Jeff Bezos, Brad Smith and others, to take all necessary measures, regardless of the cost to your companies in the short term, to guarantee the right to reliable information, a constituent of the freedom of opinion and expression. We are seeking this systemic change from the leaders of digital companies wherever their headquarters are, but we are counting on you to set an example.

The companies you head – Google, Facebook, Apple, Twitter, Microsoft, Amazon and others – nowadays have the power of parliaments and courts to organize the online public space as you see fit. As “code is law” and the terms of use are non-negotiable, you define the framework and rules of the public debate, a role formerly (and normally) assigned to our legislators. But you are not subject to the procedures, checks and balances, and transparency obligations that are imposed on the laws and machinery of democratic states. You have an enormous impact on our societies, our freedoms and our lives without, for the main part, being accountable.

You are sometimes rendered dizzy by your power and the phenomena you cause. The digital platforms have had very positive effects on horizontal communication. But the information chaos – attributable to the absence of obligations – threatens democratic life, civil harmony, the survival of news media and everyone’s basic ability to distinguish true from false or to withdraw from the echo chambers surrounding them. Algorithms hierarchize contents according to the platforms’ interests and even unintentionally favor sponsored content. Thanks to surveillance methods, private information becomes accessible. Conversely, news media that try to serve the public interest by revealing information are being undermined.

If there were still any need, the Covid-19 global epidemic has confirmed the importance of the right to information – meaning reliable information. The “disinfodemic” is one of the symptoms of the information chaos. Without a public debate based on “factual truths,” we cannot effectively address global and local challenges that include public health crises, armed conflicts, terrorism, corruption, discrimination, human rights violations, global warming, the decline in biodiversity and organized crime. As we said in the preamble to the International Declaration on Information and Democracy, which we drafted in the fall of 2018, “knowledge is necessary for human beings to develop their biological, psychological, social, political and economic capacities.”

In our declaration, we wrote that the global information and communication space “should preserve and strengthen our ability to address challenges of the present time, to anticipate our common destiny and to help us shape global sustainable development which takes into account the rights and interests of future generations.” This space for debate is a common good of humankind. It is the reason why 36 countries have signed the International Partnership for Information and Democracy that was launched on the sidelines of the last UN General Assembly on the basis of our declaration.

As a result of our initiative, these democratic governments urge you to respect “the principles of transparency [and] accountability (...) to foster access to reliable information and to counter the dissemination of false or manipulative information intended to deceive audiences.” They also ask you to “uphold the responsibilities incumbent on [you] according, among others, to the UN principles on business and human rights ahead of the design of new programs, software and connected devices.”

To ensure that your companies respect and promote the “common good,” to respect the necessary due diligence, you must base your actions on collaborative initiatives founded on principles. We invite you to promote reliable news and information sources in search engine algorithms in a structural manner, by example, by implementing the Journalism Trust Initiative (JTI), a self-regulatory project launched by Reporters Without Borders (RSF) in which 120 media outlets, unions, rights organizations, consumer groups and digital platforms have collaborated.

We invite you to work with the **Information and Democracy Forum** that was created in November 2019 by 11 organizations, think tanks and research centers in nine countries in order to implement the Partnership. The purpose of this independent entity is to bring together jurists, IT researchers and civil society representatives to produce recommendations for regulation and self-regulation, starting from the dilemmas posed by paradigm change in the public space. We invite you to cooperate with this civil society-led organization in order to work together to emerge from this crisis and avoid all the others that could follow.

You have managed to put unprecedented measures in place in order to combat rumor and disinformation about the coronavirus, sometimes contrary to well-entrenched practices. We salute your efforts. But the projects you have launched or supported will not suffice because they aim to rein in phenomena when it is the entire framework that needs rethinking. We are calling on you to take a huge step, in order to contribute to the implementation of a global framework that will enable public debate that is open, tolerant and as honest as possible.

Signatories:

Christophe Deloire, Secretary General of RSF, co-chair of the Commission

Shirin Ebadi, Nobel Peace Prize laureate, co-chair of the Commission

Emily Bell, director of the Tow Center for digital journalism

Teng Biao, academic lawyer and human rights activist

Nighat Dad, founder of the Digital Rights Foundation

Can Dündar, former editor in chief of *Cumhuriyet*

Mireille Delmas-Marty, emeritus professor at Collège de France

Francis Fukuyama, professor at Stanford University

Ulrik Haagerup, founder of the Constructive institute

Hauwa Ibrahim, laureate of the Sakharov Prize

Antoine Petit, chairman and CEO of of the CNRS

Navi Pillay, former UN High Commissioner for Human Rights

Maria Ressa, journalist, CEO of Rappler

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 Maria Ressa, journalist, CEO of Rappler
 Amartya Sen, Nobel Prize laureate in Economic Sciences
 Mario Vargas Llosa, Nobel Prize laureate in Literature
 Joseph E. Stiglitz, Nobel Prize laureate in Economic Sciences
 Aidan White, founder of the Ethical Journalism Network
 Mikhail Zygar, Russian independent journalist

Some insights into my work as UN HC for Human Rights.

1. Taxi driver in DC – which HC? Refugees or HRTs?
2. Ethiopia
3. Eritrea
4. China Dissent equated to destabilising existing system
5. Russian Law on Funding for NGOs “ Foreign Agents” ; Same in India; Israel.
6. Executions of Journalists eg Myanmar.
7. Speaking FRENCH
8. Arusha streets: Mandela; Bafana Bafana: South Africans work hard and can be trusted.
9. Corruption kills.
10. The Guardian London reaction : The world mourns today because Pillay is retiring.

ICTR Media case.

Case no. ICTR- 99-52-T

Trial Chamber 1 before judges: Navanethem Pillay, presiding, (RSA)
 Erik Mose (Norway) and Asoka de Zoysa Gunawardana (Sri Lanka)
 Judgment date 2 december 2002



ICTR Media case.

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Trial Chamber 1 before judges: Navanethem Pillay, presiding, (RSA)
Erik Mose (Norway) and Asoka de Zoysa Gunawardana (Sri Lanka)
Judgement date 3 december 2003.

The Prosecutor v

Ferdinand Nahimana (professor at University of rwanda; Founder with others of
RTLM (Radio Television Libre des Mille Collines ; Member of MRND,a political party)

Jean- Bosco Barayagwiza Lawyer, founding member of CDR party, co founder of
RTLM and director of political affairs in the Government.

Hassan Ngeze Journalist, founder and editor in chief of Kangura newspaper.

They faced charges of of genocide, crimes against humanity and direct and public
incitement to commit genocide, among other crimes.

ICCPR, Artt 19(2): " Everyone shall have the right to freedom of expression Art 19(3)
states that the right comes with special duties and responsibilities and may be
subject to restrictions- such as respect for the rights of others, for the protection of
national security or public order, public health or public morals.

Article 20 of ICCPR directs that certain speech must be prohibited and lists them as
any advocacy of national, racial or religious hatred that constitutes incitement to
discrimination, hostility or violence. There are other conventions (CERD) that
prohibits racial discrimination.

There is extensive jurisprudence both in international, regional and national courts on
the proper balancing of the right to freedom of expression and the right to restrict
such freedom.

A number of the European Court of Human Rights cases address the role of
journalists, as well as editors and publishers, and their responsibility for the
dissemination of views promoting discrimination.

In the case of *Jersild v Denmark (ECHR) Judgment of 22 August 1994*,

The ECHR overturned the decision of the National court of Denmark that convicted
a journalist for the Danish Broadcasting Corporation, based on his interview of three "
greenjackets", members of a racist youth group in Denmark. The interview was
broadcast on Sunday News Magazine, described by the court as a " serious television
broadcast programme intended for a well-informed audience, dealing with a
wide-range of social and political issues, including xenophobia, immigration and
refugees." In the interview, the Greenjackets identified themselves as racist and made
extremely offensive remarks about black people and immigrants.

The court in denmark convicted both the interviewees and the TV journalist of "
dissemination of ideas based on racial superiority, or hatred or incitement to racial
discrimination and violence. The ECHR reversed the conviction of the journalist,
finding that he had clearly disassociated himself from their views in his introduction
of them, as extremist youths and had rebutted some of their statements. But it was
noted that he should have explicitly condemned their views.

Editors and publishers have generally been held responsible for the media they

Editors and publishers have generally been held responsible for the media they control. In determining the scope of this responsibility, the importance of intent, that is, the purpose of the communications they channel, emerges from the jurisprudence—whether or not the purpose in publicly transmitting the material was of a bona fide nature (news and information or the accountability of government authorities).

In the *Jersild* case, the comments of the interviewer distancing himself from the racist remarks made by his subject were a critical factor for the ECHR in determining that the purpose of the television programme was the dissemination of news rather than the propagation of racist views.

Media case

Followed case of Julius Streicher, who was sentenced to death by the IMT at Nuremberg for the anti-semitic articles that he published in his weekly newspaper, *Der Stürmer*. Known widely as “Jew-Baiter Number one” Julius Streicher was the publisher of *Der Stürmer* from 1923 to 1945 and served as its editor until 1933. In its judgement, the Tribunal did not look for any causal link between his publication and any specific acts of murder. Rather, it characterises his work as a poison “injected into the minds of thousands of Germans which caused them to follow the national Socialists’ policy of Jewish persecution and extermination. He was convicted of the crime against humanity for his incitement to murder and extermination of Jews.

In the media case we looked for causation—whether there was a link between the speech and the acts of atrocity and found ample evidence.

RTLM

Broadcasting was a drumbeat, calling on listeners to take action against the enemy and enemy accomplices, equated with the Tutsi population. The phrase they used, “heating up heads” captures the process of incitement systematically engaged in by RTLM, which, after the start of the genocide, on 6th April 1994 was also known as “Radio Machete”
Drops of petrol...