GLOBAL
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Global Network Initiative Comments on UNESCO's
"Guidance for Regulating Digital Platforms: A Multistakeholder Approach"

I. Context

The Global Network Initiative (GNI) is a multistakeholder initiative that brings together 85 prominent academics, civil society organizations, ICT companies, and investors from around the world. Members' collaboration is rooted in a shared commitment to advancing the GNI Principles on Freedom of Expression and Privacy, which are grounded in international human rights law and the UN Guiding Principles on Business and Human Rights (UNGPs). For over a decade, the GNI Principles and corresponding Implementation Guidelines have guided ICT companies to assess and mitigate risks to freedom of expression and privacy in the face of government laws, restrictions, and demands.

Over the years, GNI has been privileged to collaborate with UNESCO on various initiatives and endeavors. Those collaborations include a colloquium on "Improving the Communications and Information Ecosystem to Protect the Integrity of Elections," which resulted in a report of the same title, participation in UNESCO's annual World Press Freedom Conferences, and consultations around the Internet Universality Principles (ROAM Principles), among other engagements.

GNI and its members appreciate the opportunity to engage in UNESCO's latest initiative on "Internet for Trust" and to provide comments on the associated "Guidance for regulating digital platforms: a multistakeholder approach" (Guidance). In 2020, GNI conducted an analysis using human rights principles of governmental efforts to address various forms of online harm related to user generated content — a practice we refer to broadly as "content regulation." After extensive consultations in a wide range of jurisdictions with GNI members and outside stakeholders, including governments, GNI published a policy brief titled "Content Regulation and Human Rights: Analysis and Recommendations" (Policy Brief), which outlines certain concerns around existing efforts and identifies ways to regulate content in a manner that upholds and strengthens human rights. Given the substantial overlap in purpose of the Policy Brief and the Guidance, we encourage officials in charge of the latter to consider the recommendations in the former in their entirety.

II.   *Comments on the Guidance*

Our feedback focuses first on observations about the process of developing and consulting on the Guidance to date, before examining the substance of the Guidance. Those substantive comments are divided into several relevant sub-sections reflecting issues of long-standing concern that are addressed in the Policy Brief and other submissions GNI has made to individual governments considering various forms of content regulation. The primary recommendation that results from the procedural and substantive analysis below is that UNESCO should slow down and scale back this initiative considerably in order to conduct the type of thorough, multistakeholder consultation that an effort of this import deserves, and which can lead to the kinds of durable, rights-enabling impacts that UNESCO envisions.

A. Observations on the Process of Developing the Guidance

Many GNI members first learned of the upcoming February 2023 UNESCO Global Conference in late November/early December, and were surprised that the first public version (1.1) of the Guidance was published only one month ahead of the deadline for comments and two months prior to that event. Concerns about that rushed process were exacerbated by the fact that the period for review coincided with winter and summer holidays in different parts of the world and that official versions of the Guidance were only available in English and French. The shortcomings of the consultation process are underscored by the lack of any clear and compelling justification for why this process is being expedited, and the resulting lack of risk-benefit analysis or impact assessment. Perhaps due to this rushed process, the Guidance makes only passing mention of the "Our Common Agenda" report, the "Global Digital Compact," the "UN Summit of the Future," and the WSIS+20 process, and does not offer any clear articulation of how this initiative has been or will be coordinated with other relevant UN offices and initiatives, including the Tech Envoy's office, UN Human Rights (OHCHR), and the Internet Governance Forum. In is particularly disappointing that the Guidance makes only passing reference to the UN Guiding Principles on Business and Human Rights, and completely fails to note the applicability of that landmark UN framework to government regulation of business.

This lack of attention to process in inconcistent with the ambitious nature of this exercise and contradicts international best practice on multistakeholder engagement, including the advice that UNESCO itself has offered to lawmakers and regulators in the ROAM Principles. It is also reflected in the lack of clarity as to what the process for incorporating feedback and continuing to engage will look like after the Global Conference and the substantive shortcomings of the Guidance itself, which we analyze further below.

In the Policy Brief, GNI points out how careful and public deliberation can ensure that laws are appropriate to achieve their protective function, are the least intrusive instrument amongst those which might achieve their protective function, and are proportionate to the interests to be protected, in line with the human rights principle of necessity. These same principles apply to international efforts such as this one, whose stated purposes include "provid[ing] guidance in developing regulation that can help member States manage content

that damages democracy and human rights while supporting freedom of expression, information and other human rights."

Any effort of this nature should be undertaken carefully, transparently, and with maximum opportunity for deliberation, discussion, and debate. Going forward, UNESCO should make clear that consultations on both the substance of the Guidance and any subsequent efforts that may be planned to carry them forward ("the Roadmap" referred to on the website) will be conducted in an open, inclusive, and participatory manner before any further decisions on substance or process are made. The plan ahead should be flexible and driven by stakeholder feedback, not artificial timelines.

B. Substantive Analysis of the Guidelines

1. The Need to Focus on Process

In addition and in parallel to these concerns about the process that UNESCO has managed around this initiative to date, we are also concerned about the lack of emphasis of and detailed guidance on the necessary processes-related measures that lawmakers and regulators should follow in order to ensure that national-level efforts comport with democratic, human rights, and rule-of-law principles.

Despite stating that it will "provide guidance in developing regulation," the Guidance has very little to say about the importance of ensuring that legislative and regulatory efforts are open, transparent, participatory, and evidence-based. These principles are fundamental to ensuring that regulatory systems are designed in a manner that will achieve the capacity, independence, and accountability that the "Guidance" rightly calls for.

The ROAM principles of human rights, openness, accessibility, and multi-stakeholder participation are meant to assist governments and other stakeholders to assess their national Internet environments, as a means towards enabling evidence-based policy formulation. It is important that the Guidance references and is in line with the best practice established under the themes of "Policy, Legal and Regulatory Framework," "Freedom of Expression," "Right of Access to Information," and "The Right to Privacy." UNESCO should work with stakeholders to ensure that any guidance that is developed pays adequate attention to and elaborates recommendations along these process lines.

2. Multistakeholder in name only

The document that UNESCO has released for comment is titled "Guidance for regulating digital platforms: *a multistakeholder approach*" (emphasis added). While the Guidance acknowledges in principle the role of self and co-regulation, there is little in it to explain what "a multistakeholder approach" to regulation should entail. Instead, it describes a framework that is primarily state-led and top-down in nature. This is a missed opportunity that should be rectified given the documented harms to human rights that can emerge from more restrictive models of state-led regulation of digital content and conduct.

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The "Guidance" recognizes some, but not all, of the challenges that regulators face in attempting to provide timely, appropriate, and relevant oversight over a vast scope of services, scenarios, and content. But it fails to recommend appropriate tactics for addressing these challenges, including the network of public-interest oriented expertise and experience that exists within relevant stakeholder communities and initiatives. GNI is one example of the kind of credible, innovative, established co-governance arrangements that regulators could reasonably identify as a source of insight and could be a "force multiplier" if incorporated into relevant regulatory systems.

In order to ensure that the community of multistakeholder experts can provide effective advice, assistance, and oversight of state-led regulatory efforts, UNESCO should affirmatively recommend such a role and clarify how the "multi stakeholder global shared space for the debates on regulation, co-regulation and self-regulation of digital platform services," that it promises to create will be designed and resourced beyond the Global Conference. UNESCO should also ensure that the "international community of practice, capable of exchanging good practices on how to approach regulation of digital platform services" will be multistakeholder.

3. Scope of content and contexts covered

The Guidance is meant to support "freedom of expression and the availability of accurate and reliable information in the public sphere, while dealing with content that potentially damages human rights and democracy" (para. 13). However, it does not grapple with or explain why or how "accurate and reliable information" should be distinguished or prioritized vis-a-vis other content such as opinions, satire, humor, or advocacy. Nor does it articulate what is meant by "the public sphere" and how that relates to the spaces provided and curated by private actors.

In the Policy Brief, GNI notes how very few proposed content regulation efforts establish "a direct and immediate connection between the expression and the threat" or "the necessity and proportionality of the specific [state] action taken," as called for by the Human Rights Committee in General Comment 34. Although the Guidance references a broad range of content, including hate speech, disinformation and misinformation, damaging speech, harassment, inauthentic behavior, bots, synthetic content meant to mislead, and more (para. 28), it does not delve into the complex questions about the differences in nature of these categories, when and how they should be prioritized for action, or the variety of mechanisms that may exist for addressing them. It also does not address the legally challenging questions that stem from the outsourcing of enforcement of such responsibilities to private companies without appropriate guidance on interpretation and application.

Finally, the use of broad, undefined terminology such as "content that *potentially* damages human rights and democracy" (emphasis added) could unintentionally legitimize governments developing mandates that crack down on legitimate speech and action. These shortcomings illustrate the need for significant additional reflection and discussion with relevant experts, including civil society.

4. *Scope of platforms covered*

In the Policy Brief, GNI explains how the "principle of necessity may also suggest lawmakers should focus regulation on particular services in order to minimize its impact on expression," and that "[l]awmakers and regulators would be well served to carefully consider which types of private services, at which layers in the ecosystem, are most appropriately positioned to address the specific concern(s) at issue and to constrain their approaches to those best positioned to address those concerns." Unfortunately, the Guidance does not adequately recognize this diversity or emphasize the importance of regulatory flexibility.

The Guidance identifies "digital platform services" as its focus, and defines that to include services "that can disseminate users' content to the wider public, including social media networks, search engines and content sharing platforms" (Para. 6). While we appreciate this attempt to narrow and clarify the focus, it is important to note that an incredibly wide variety of products and services could fall within this definition and to highlight the significant variety of systems, technologies, and editorial capability among those. For instance, while search engines help users identify content that they are looking for, they do not facilitate content creation, nor do they offer mechanisms for users to communicate directly with one another.

The Guidance does not contemplate how regulations may need to be adapted for different types of platforms. This risks creating a 'one size fits all' solution that does not account for the nuances of different products and services. Regulations that target inappropriate layers of the ecosystem can lead to disproportionate responses, such as blocking entire websites or delisting URLs beyond the content of concern. GNI and Business for Social Responsibility have recently developed the "Across the Stack" tool to help governments, companies, and advocates better identify and understand the distinctions and interrelationships between actors in the tech ecosystem, which we would encourage UNESCO to use and recommend to others.

Although the Guidance acknowledges that it "is developed for those platforms whose services have the largest size and reach" (para. 47), it does not articulate what criteria should be used to make such distinctions (revenue, user base, visits/impressions, etc.). The Guidance also does not clarify what "minimum safety requirements" should "be applied to all platform service companies regardless of size" (para. 47). A broad, baseline requirement that applies without exceptions would require every website, blog, or online journal, including not-for-profit entities, that "can disseminate users' content to the wider public," to be covered by a wide-range of potentially distinct national regulations. This would create significant barriers to innovation in the development of new communications-enabling services, as well as to the scaling-up of smaller services, thereby perversely limiting freedom of expression globally. This scenario could also incentivize smaller and/or not-for-profit entities to actively prohibit users from certain jurisdictions from their services in order to mitigate regulatory exposure, thus limiting the ability of users to communicate openly with one another across jurisdictions.

5. *Responsibilities of governments*

GNI commends the attention paid to the importance of ensuring the independence of any regulatory system empowered to govern online content (paras. 39-56). Paragraph 23 further outlines a set of important responsibilities for governments considering legislation to regulate processes that impact content moderation and/or curation, while paragraph 33 notes a number of critical points that governments must keep in mind about the challenges of content moderation. However, the responsibilities outlined in these paragraphs nevertheless overlook a number of issues that are part of [concerning trends](#) in regulatory developments around platform accountability and have been at the heart of intermediary liability debates around the world.

In the Policy Brief, GNI identifies a number of recommendations for policymakers that stem from the principles of legality, legitimacy, and necessity, which we believe are important to include in any guidance to states engaging in content regulation. Some important points set out there that are not sufficiently addressed in the Guidance include:

1. *Legality*: Don't use vague and reductive definitions that would incentivise over-removal, allow categories of content to be prohibited without a transparent and participatory practice, outsource adjudication to private companies without appropriate clarity on interpretation and application of the law, or shift legal liability from authors to intermediaries for illegal content generated by users.
2. *Legitimacy***:** Don't allow laws to discriminate against content based on medium.
3. *Necessity:* Don't apply legal requirements to small and large platforms in the same manner, impose strict timelines for removal of all infringing content, impose preemptive filtering requirements, or make intermediaries liable for specific content moderation decisions.

In this regard, it is also worth pointing out the curious lack of reference in the Guidance to additional positive initiatives that governments can take to improve critical reasoning and media literacy, foster tolerance, and enable dispute resolution, all which help address the systematic drivers of content and conduct that "damages human rights and democracy."

6. *Risk assessment*

Paragraphs 33, 35, and 36 of the Guidance recommend a number of circumstances under which platforms should undertake risk assessment. As currently framed, these parts of the Guidance do not clarify that risk assessments should be grounded in human rights, nor do they reference the human rights due diligence-based framework set out in the UNGPs. Neither do the Guidelines acknowledge important questions and debates about how standards defining appropriate risk assessment are developed and recognized by regulators, or if audits/assessments thereof should be carried out by the company or a third party. Given the rapidly evolving environment around mandated risk assessments and due diligence, the Guidance can be strengthened by considering and addressing these issues in more detail.

7. Data access

Paragraph 38 focuses on data access for research on content that is potentially damaging to democracy and human rights and is carried out in good faith. The Guidance notes the need to protect privacy and respect commercial confidentiality. It also notes that for companies to practically provide a data access mechanism, regulators will need to align around what is useful, proportionate, and reasonable for research and regulatory purposes.

It is important that models for data access also clarify additional design elements, including: security standards for data access mechanisms; who may have access to data, in what circumstances, and through what process, as well as who will maintain this process (the government, a third party, the company); liability for companies providing access and for researchers accessing and using data; and the need for transparency by and appropriate oversight mechanisms for the data access mechanism itself.

III.   *Conclusion*

Over the years, UNESCO has done important work to empower civil society, establish useful guidance for member states, and build trust with the private sector. In order to continue positioning itself as an important venue for nuanced, inclusive, rights-based collaboration around digital technologies and freedom of expression, it must make significant efforts to ensure that the process for continuing to improve the Guidance, including any follow-up coming out of the Global Summit, is transparent, deliberate, and broadly and meaningfully participatory, thereby modeling a truly multistakeholder approach.

Rather than seeking to finalize the Guidance and launch any next steps to disseminate them, GNI recommends that UNESCO use the Global Conference to seek further input from member states, civil society, and relevant companies on how to design and carry out a process for further, more meaningful consultation. GNI stands ready to support such discussions and participate in any follow-up process that embodies those principles.