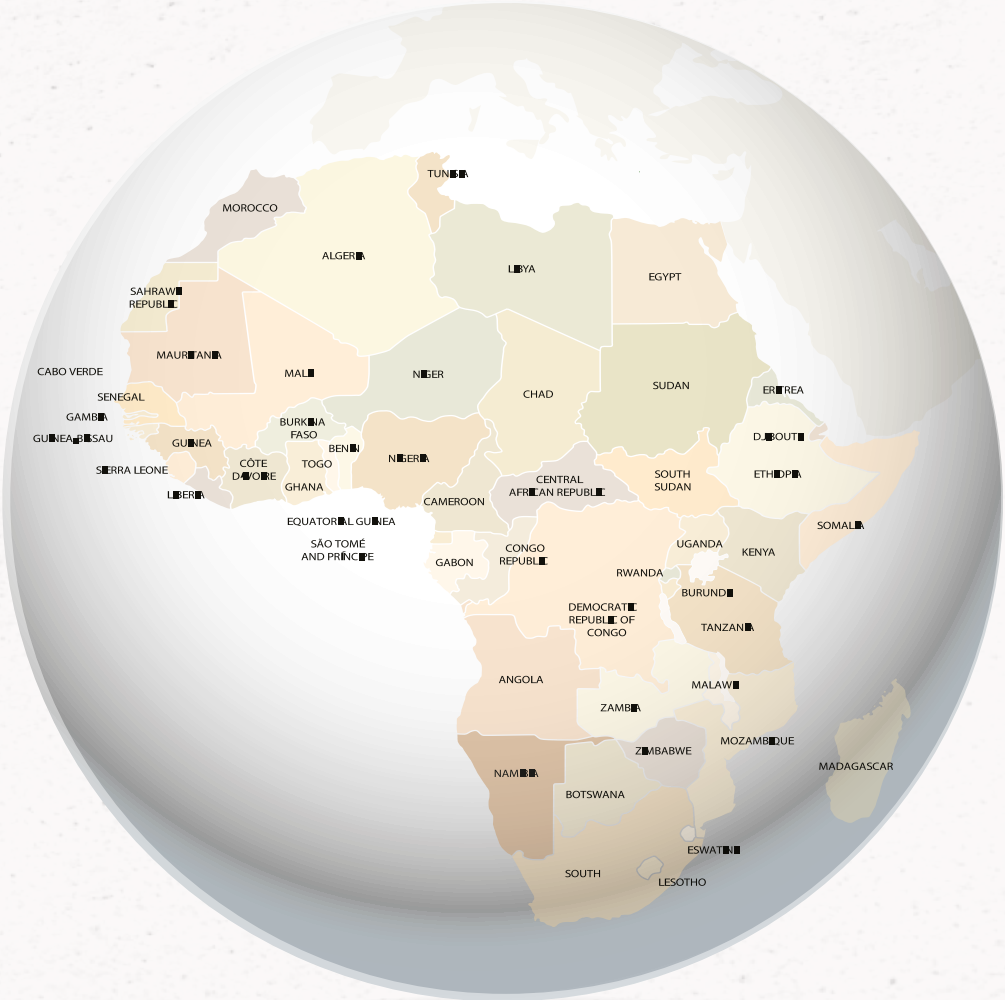
A Comparison between the ACHPR Declaration of Principles on Freedom of Expression in Africa (2002)

and the

Declaration of Principles on Freedom of Expression and Access to Information in Africa (2019)



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A COMPARISON BETWEEN THE ACHPR PRINCIPLES OF FREEDOM OF EXPRESSION IN AFRICA (2002)

AND

THE ACHPR PRINCIPLES ON FREEDOM OF EXPRESSION AND ACCESS TO INFORMATION IN AFRICA (2019)

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FOREWORD BY THE SPECIAL RAPPORTEUR ON FREEDOM OF EXPRESSION AND ACCESS TO INFORMATION IN AFRICA

Freedom of expression and access to information in Africa is guaranteed by Article 9 of the African Charter on Human and Peoples' Rights (the African Charter), which echoes the spirit of Article 19 of the Universal Declaration of Human Rights (UDHR), and Article 19 of the International Covenant on Civil and Political Rights (ICCPR). The African Commission on Human and People's Rights (the African Commission), established by Article 30 of the African Charter, recognises, protects, and promotes freedom of expression and access to information as human rights that are essential to the enjoyment of other fundamental human rights by all Africans, as enshrined in the African Charter.

In 2001, the African Commission resolved to develop, through a consultative process, the Declaration of Principles on Freedom of Expression in Africa (the 2002 Declaration), which was adopted at the Commission's 32nd Session in October 2002 in Banjul, The Gambia. The preamble of the Declaration reaffirmed the fundamental importance of freedom of expression as an individual human right, as a cornerstone of democracy, and as a means of ensuring respect for all human rights and freedoms. It also acknowledged that freedom of expression and information is a fundamental and inalienable human right and an indispensable component of democracy.

The Commission established the Special Rapporteur on Freedom of Expression with the adoption of Resolution 71 at its 36th Ordinary Session held in Dakar, Senegal, in December 2004. Taking into account the importance of access to information in relation to freedom of expression, at its 42nd Session held in Brazzaville, Republic of Congo, in November 2007, the Commission renewed the mandate of the Special Rapporteur. It renamed the mechanism as the **Special Rapporteur on Freedom of Expression and Access to Information in Africa** (the Special Rapporteur), whose mandate is, among other functions, to analyse national media legislation, policies and practices within the Member States, monitor their compliance with freedom of expression and access to information standards in general and the Declaration of Principles on Freedom of Expression in Africa in particular, and advise the Member States accordingly.

Acknowledging the need to improve the 2002 Declaration and incorporate access to information, the African Commission, during its 51st Ordinary Session held in May 2012 in Banjul, The Gambia, adopted a resolution to modify the Declaration adopted in 2002 and mandated the Special Rapporteur to expand Principle IV on Freedom of Information, to include access to information. The Special Rapporteur spearheaded developing the **Declaration of Principles on Freedom of Expression and Access to Information in Africa**, which the African Commission adopted during its 65th Ordinary Session held from 21 October to 10 November 2019 in Banjul, The Gambia. States Parties, public institutions, civil society organisations and other stakeholders from across the African continent were invited to contribute to the revision of the Declaration.

The revision of the 2002 Declaration of Principles on Freedom of Expression increased the principles from 16 to 43, including principles on access to information, access to the internet, and the recognition of the rights of marginalised groups, such as children and those with disabilities.

This comparison of the Declarations of 2002 and 2019, commissioned by *fesmedia* Africa, the regional media project of the Friedrich-Ebert-Stiftung (FES), and conducted by an African researcher, outlines the differences between the two Declarations and gives a detailed analysis of the developments over the two decades and the premises for the new principles in the 2019 Declaration. I believe this comparison will deepen the understanding of the 2019 Declaration and facilitate the promotion and protection of freedom of expression and access to information as human rights by all stakeholders, including States Parties.

The ability to express one's opinions and ideas without fear of retaliation or censorship, and the free flow of information, particularly information held by governments or public institutions, are critical ingredients to a functional, participatory democracy and enablers for social and political empowerment of citizens and civil society organisations, especially

those that are legitimate representatives of marginalised communities such as people with disabilities, rural women and girls and the youth.

I invite all stakeholders to use this resource as we collectively forge the pathways to the 'Africa We Want' by upholding the ideals of the **Declaration of Principles on Freedom of Expression and Access to Information in Africa**.

Finally, I wish to acknowledge the work done by *fesmedia* Africa and thank them for undertaking this initiative of unpacking and assessing the principles contained in the revised 2019 Declaration. I appreciate and acknowledge this valuable resource, which I am confident will contribute to promoting and protecting the rights enshrined in Article 9 of the African Charter.

Hon. Commissioner Ourveena Geereesha Topsy-Sonoo
Special Rapporteur on Freedom of Expression and Access to Information
African Commission on Human and Peoples' Rights

ABBREVIATIONS

ACHPR: African Commission on Human and Peoples' Rights

APAI: African Platform on Access to Information

ATI: Access to Information

AU: African Union

BBC: British Broadcasting Corporation

CIPESA: Collaboration on International ICT Policy for East and Southern Africa

COVID-19: Coronavirus Disease

ECOWAS: Economic Community of West African States

FAMOD: Mozambican Disabled People's Organisation Forum

FOE: Freedom of Expression

HRDs: Human Rights Defenders

ICCPR: International Covenant on Civil and Political Rights

LGBTQIA+: Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, and Asexual

MDGs: Millennium Development Goals

MISA: Media Institute of Southern Africa

MRA: Media Rights Agenda

PWDs: Persons with Disabilities

SABC: South African Broadcasting Corporation

SANEF: South African National Editors Forum

SDGs: Sustainable Development Goals

VOA: Voice of America

WAN-IFRA: World Association of News Publishers

WIN: Women in News

ZBC: Zimbabwe Broadcasting Corporation

CONTEXT

The revised Declaration of Principles on Freedom of Expression and Access to Information in Africa (the revised Declaration) is a soft law document adopted during the Commission's 65th Ordinary Session in November 2019. Its objective is to provide State Parties with guidance on their responsibilities to facilitate full and unimpeded access to information in the public interest and preserve the right of freedom of expression.

The revised Declaration provides a strong advocacy tool for human rights defenders, freedom of expression advocates, media lobby organisations and access to information campaigners. It allows stakeholders to effect meaningful change by referencing a policy framework instituted by a quasi-judicial body – the African Commission on Human and Peoples' Rights (the African Commission) – set up by State Parties of the African Union.

This well-crafted document emphasises the link between freedom of expression and access to information. The measured tone and carefully considered language used in the revised Declaration help to reinforce these rights more forcibly than the previous Declaration, which used purely encouraging language. For instance, throughout the revised document, the term 'should' (which urged State Parties to act) has been replaced with the stronger term 'shall' (which insists that State Parties take action).

The approach recommended in the revised Declaration comes against a backdrop of increasing repression throughout Africa. Internet restrictions and shutdowns have become a common characteristic of contested elections, as well as the brutal quelling of protests across the continent.[1] In addition, varying degrees of censorship and restrictions were increasingly prevalent during the COVID-19 pandemic. Indeed, an audit of freedom of expression and access to information across the African continent paints a bleak picture.

The contents of the revised Declaration provide an antidote against States' tendencies to adopt laws and policies or take measures that unjustifiably restrict the right to freedom of expression and access to information. Often this is done under the pretext of protecting national security, but these restrictions have an unsettling effect on meaningful discourse and the free flow of ideas. This undoubtedly undermines the realisation of the right for people to express themselves freely or to push for accountability when seeking access to information.

The enhanced provisions of the revised Declaration provide State Parties with clear-cut guidelines to promote and protect their rights in Africa while offering stakeholders strategies to adopt towards promoting and protecting these rights.

The development of the revised Declaration included a broad array of stakeholders and a technical team of 15 experts drawn from five sub-regions of the continent.[2] The technical team held four meetings, two in Kenya[3] and one each in Mauritania and South Africa.

Several consultations were held to validate the Declaration, starting with a panel discussion held on 29 April 2019 at the margins of the 64th Ordinary Session of the African Commission on Human and Peoples' Rights held in Sharm-el-Sheikh, Egypt. A two-month public call allowed State and non-State actors to provide feedback. A specific call to all State Parties to the African Charter also accompanied this. Three other validation workshops were held in Maputo (Mozambique), Windhoek (Namibia), and Banjul (the Gambia).

The revised African Commission Declaration on the Principles of Freedom of Expression and Access to Information[4] is available in AU languages – English, French, Portuguese and Arabic. It is arranged into five sections: general principles;

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1 Social and political protests, exacerbated by the COVID-19 pandemic, on the increase in Africa, ACCORD. Available at https://www.accord.org.za/analysis/social-and-political-protests-exacerbated-by-the-covid-19-pandemic-on-the-increase-in-africa/

2 ACHPR Press Statement on the Regional Consultation on Freedom of Expression and Access to Information for Francophone North and West Africa. Available at https://www.achpr.org/pressrelease/detail?id=446. Accessed on 10th Aug 2022. See also https://www.chr.up.ac.za/tech4rights-news/2056-african-commission-publishes-revised-declaration-of-principles-of-freedom-of-expression-and-access-to-information-in-africa-amid-covid-19-crisis. Accessed on 10th August 2022.

3 First meeting held in Mombasa, Kenya from 11–12 October 2018 and the second from 28–29 March 2019.

4 https://www.achpr.org/pressrelease/detail?id=490.

right to freedom of expression; right to access to information; freedom of expression and access to information on the internet; and implementation.

A primary consideration was to bring the revised Declaration in line with digital developments. Significant provisions that enhance rights include:

- Inducing State Parties to 'recognise universal, equitable, affordable and meaningful access to the internet and subsequently creating a policy framework that will promote affordable access to the internet'.
- The establishment of a legal framework that protects personal information, requiring States to adopt and implement laws regulating the processing of personal information, and adhering to fundamental fair information practice principles.
- Offering protection to affected groups against hate speech – which is discussed for the first time in this document.
- The inclusion of a section dedicated to the right to access to information, Principles 26-36. This section gives access to information laws supremacy over laws that hinder or block such rights, e.g. anti-terrorism or secrecy laws, and entrench proactive disclosure and limited exceptions as core principles in public information management.
- It requires States to include information on their implementation of the Declaration in their Periodic Reports to the African Commission.

WHAT'S IN A NAME?

Declaration of the Principles of Freedom of Expression and Access to Information in Africa

The intent and tone of the revised Declaration are established from the onset – with the title reflecting the equal importance placed on freedom of expression and the right to information. Emphasis is placed on the realisation and appreciation that freedom of expression and access to information are enabling rights upon which other rights can be realised. Access to information and media freedom is inherent in the right to freedom of expression.[5]

PREAMBLE

The African Commission on Human and Peoples' Rights (African Commission):

Affirming its mandate to promote human and peoples' rights in accordance with Article 45 of the African Charter on Human and Peoples' Rights (African Charter).

The Preamble begins with the mandate of the African Commission on Human and Peoples' Rights and aligns it to Article 45 of the African Charter on Human and Peoples' Rights,[6] which states that:

The functions of the Commission shall be:

1. *(a) To collect documents, undertake studies and research on African problems in the field of human and peoples' rights, organise seminars, symposia, and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights, and should the case arise, give its views, or make recommendations to Governments.*

   (b) To formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislations.

   (c) Co-operate with other African and international institutions concerned with the promotion and protection of human and peoples' rights.

5 The struggle for the realisation of the right to freedom of expression in Southern Africa, Association for Progressive Communications (APC). Available at https://www.apc.org/en/pubs/struggle-realisation-right-freedom-expression-southern-africa.

6 https://www.achpr.org/legalinstruments/detail?id=49

2. *Ensure the protection of human and peoples' rights under conditions laid down by the present Charter.*

3. *Interpret all the provisions of the present Charter at the request of a state party, an institution of the OAU or an African Organisation recognized by the OAU.*

4. *Perform any other tasks which may be entrusted to it by the Assembly of Heads of State and Government.*

Article 45 above delineates how the African Commission may engage State Parties to the African Charter to:

- Adopt legislative, administrative, judicial, and other measures to give effect to the revised Declaration and facilitate its dissemination.

Review or adopt legislation on access to information in line with the Model Law on Access to Information for Africa;[7]

- Use the Guidelines on Access to Information and Elections in Africa[8] in the context of elections.

- Report on the implementation of the provisions of the Declaration in Periodic Reports submitted to the African Commission.

Recalling Resolution 222 (ACHPR/Res.222 (LI) 2012) calling on the African Commission to modify the Declaration of Principles on Freedom of Expression to include access to information, Resolution 350 (ACHPR/Res.350 (EXT.OS/XX) 2016) mandating the African Commission to revise the Declaration of Principles on Freedom of Expression in Africa, and Resolution 362 (ACHPR/Res.362 (LIX) 2016) requesting the Special Rapporteur on Freedom of Expression and Access to Information in Africa to take note of developments in the internet age during the Revision of the Declaration of Principles on Freedom of Expression in Africa;

The Preamble names three important ACHPR Resolutions, which informed how the 2002 Declaration was revised to become the 2019 Declaration. These are Resolution 222: revising the Declaration's Article on Freedom of Information; Resolution 350: revising the whole Declaration; and Resolution 362: the inclusion of internet rights and freedoms.

Before these three resolutions were passed, the recognition that peoples' ability to freely express themselves was inextricably linked to their ability to unreservedly receive and access information, guided the adoption of Resolution 122 in 2007.[9] This happened with the extension of the term of the then Special Rapporteur on Freedom of Expression in Africa, Commissioner Faith Pansy Tlakula. The extension included the expansion of her mandate, thereby eliciting a change in the title of Special Rapporteur on Freedom of Expression to include Access to Information in Africa.

In November 2010, through Resolution 167,[10] the African Commission tasked the Special Rapporteur with developing a Model Law on Access to Information for Africa,[11] as only five countries had such legislation.[12] This Model Law, completed in 2013, would serve as a guide to State Parties in crafting or modifying respective access to information laws in line with international law and standards. In 2013, only 13 countries in Africa had access to information laws, some of which were at odds with international standards, such as Zimbabwe's access to information law AIPPA[13] (which was recently repealed by the Freedom of Information Act). In fact, the process of the adoption of the model law on access to information spurred the enactment of the comprehensive laws in Liberia (2010); Tunisia, Nigeria, Niger (2011); and Sierra Leone, South Sudan, Rwanda, and Ivory Coast (2013).

Resolution 222[14] was adopted by the ACHPR in May 2012 to expand Article IV of 2002 on Freedom of Information to include Access to Information (ATI). This resolution had been brought about by the ACHPR's concerns over State Parties not sharing information they held with the media and the public, and the lack of ATI framework across the continent.

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7 https://www.chr.up.ac.za/images/researchunits/dgdr/documents/resources/model_law__english_final.pdf

8 https://www.chr.up.ac.za/images/researchunits/dgdr/documents/resources/guidelines_on_access_to_information_and_elections_in_africa_en.pdf

9 https://www.achpr.org/sessions/resolutions?id=174

10 https://www.achpr.org/sessions/resolutions?id=340

11 https://www.achpr.org/public/Document/file/English/Model Law on Access to Information for Africa 2013_ENG.pdf

12 South Africa [2000], Zimbabwe [2002], Angola [2002], Uganda [2005] and Ethiopia [2008].

13 http://www.veritaszim.net/node/240

14 https://www.achpr.org/sessions/resolutions?id=241

The adoption of Resolution 222 and the African Platform on Access to Information Declaration resulted from targeted advocacy by ATI State and non-State advocates on the continent.[15]

The APAI-Working Group eventually went on to successfully lobby for 28 September to be observed by the United Nations as the International Day for Universal Access to Information[16] in 2019. Interestingly, the push for the date was part of the ACHPR's Resolution 222, which requested the African Union to have the day commemorated as the International Day for Access to Information in Africa.

Resolution 350,[17] adopted in June 2016, gave the Special Rapporteur a further mandate to revise the document. Before this, approval had been given for expanding the Freedom of Information section only.

Since the first Declaration was written in 2022, there have been developments in human rights, freedom of expression (FOE) and ATI standards and laws. This broad revision ensured that developments in FOE and ATI standards and laws would be considered and that both rights would be equally prioritised.

Further to the revamping of the whole Declaration, Resolution 362,[18] adopted in November 2016, called on the Special Rapporteur to include digital rights as guided by international instruments. These instruments included the Human Rights Council Resolution[19] on the promotion, protection and enjoyment of human rights on the internet and the Joint Declaration on Freedom of Expression and the Internet.[20] The African Declaration on Internet Rights and Freedoms,[21] adopted by civic rights groups in 2014, formed the background documents considered when crafting the revised Declaration.

Recognising the need to revise the Declaration to consolidate developments on freedom of expression and access to information, including by taking account of African Union treaties and soft law standards, the emerging jurisprudence of judicial and quasi-judicial organs of the African Union, as well as the need for the elaboration of the digital dimensions of both rights;

This Clause is a clear appreciation of the changing landscape and the need to integrate these changes into the revised Declaration. The African Union adopted treaties and soft law standards that had a strong bearing on FOE and ATI, after the 2002 Declaration was passed. These regional standards were taken into consideration during the drafting of the revised Declaration.

Some of the AU treaties include:

- The African Union Convention on Preventing and Combating Corruption,[22] adopted in 2003, acknowledges that access to information is crucial in fighting corruption and calls on State Parties to 'create an enabling environment that will enable civil society and the media to hold governments to the highest levels of transparency and accountability in the management of public affairs'.
- The African Charter on Democracy, Elections and Governance,[23] adopted in 2007, emphasises ATI strongly and reiterates its role in creating the necessary conditions to foster citizen participation, transparency, freedom of the press and accountability in managing public affairs.

The grave concerns around the violation of digital rights by increasing unwarranted internet shutdowns, online incitement to violence, hatred and discrimination, and a widening digital divide made it crucial for the African continent to have clear, concise principles which protect digital rights under threat by the broad application of already existing laws or new cyber-crime laws.

15 http://www.unesco.org/new/en/member-states/single-view/news/african_platform_on_access_to_information_adopted_at_confere/
16 https://www.un.org/en/observances/information-access-day
17 https://www.achpr.org/sessions/resolutions?id=301
18 https://www.achpr.org/sessions/resolutions?id=374
19 https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/G12/153/25/PDF/G1215325.pdf?OpenElement
20 https://www.osce.org/files/f/documents/e/9/78309.pdf
21 https://africaninternetrights.org/sites/default/files/African-Declaration-English-FINAL.pdf
22 https://au.int/sites/default/files/treaties/36382-treaty-0028_-_african_union_convention_on_preventing_and_combating_corruption_e.pdf
23 https://au.int/sites/default/files/treaties/36384-treaty-african-charter-on-democracy-and-governance.pdf

Reaffirming the fundamental importance of freedom of expression and access to information as individual human rights, as cornerstones of democracy and as means of ensuring respect for other human rights.

The appreciation of the correlation between a democratic system of governance strengthened by the protection of the foundational rights to FOE and ATI is further reinforced. This preamble section is similar to Principle 1 of the revised Declaration.

The revised Declaration takes a more holistic approach to protecting rights and references, AU and African Commission protocols, model laws, treaties and relevant international norms and standards in relation to FOE, ATI and digital rights as a form of guidance. By citing the specific regional and international instruments, the intent is to clearly illustrate, even to lay analysts, how FOE and ATI are cross-cutting rights linked to other fundamental human rights. It positions FOE and ATI within the context of previous policies and protocols adopted by the African Union, namely:

- The African Charter on the Rights and Welfare of the Child[24]
- The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa[25]
- The African Union Convention on Preventing and Combating Corruption[26]
- The African Charter on Statistics[27]
- The African Youth Charter[28]
- The African Charter on Democracy, Elections and Governance[29]
- The African Charter on Values and Principles of Public Service and Administration[30]
- The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa[31] and
- The African Union Convention on Cyber Security and Personal Data Protection[32]

It also suggests that the instruments mentioned above can be used when interpreting the contents of the revised Declaration.

Noting the adoption by the African Commission of relevant soft law standards, such as the Model Law on Access to Information for Africa of 2013 and the Guidelines on Access to Information and Elections in Africa of 2017.

The Preamble points out that the Model Law on Access to Information for Africa and Guidelines on Access to Information and Elections in Africa were vital documents in drafting the revised Declaration. These two soft laws are referred to again in Principle 43 – Implementation, giving clear guidance that countries with ATI laws should review existing legislation and bring it in line with the Model Law on ATI for Africa. It goes further to say that State Parties that do not have existing legislation can use the Model Law on ATI as a template for crafting ATI laws.

The strong link between ATI and elections is emphasised in the Guidelines on Access to Information and Elections:

> *For elections to be free, fair, and credible, the electorate must have access to information at all stages of the electoral process. Without access to accurate, credible, and reliable information about a broad range of issues prior, during and after elections, it is impossible for citizens to meaningfully exercise their right to vote.*

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24 https://www.unicef.org/esaro/African_Charter_articles_in_full.pdf
25 https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-persons-disabilities-africa
26 https://au.int/en/treaties/african-union-convention-preventing-and-combating-corruption
27 https://au.int/en/treaties/african-charter-statistics
28 https://au.int/en/treaties/african-youth-charter
29 https://au.int/en/treaties/african-charter-democracy-elections-and-governance
30 https://au.int/sites/default/files/treaties/36386-treaty-charter_on_the_principles_of_public_service_and_administration.pdf
31 https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-women-africa
32 https://au.int/en/treaties/african-union-convention-cyber-security-and-personal-data-protection

Noting further the adoption of the African Union Convention on Cyber Security and Personal Data Protection.

Mention of this standard-setting document serves as a reminder of the sound guidelines of the African Union Convention on Cyber Security and Personal Data Protection for State Parties when crafting their cyber security and personal data frameworks. Unfortunately, though the African Union Convention on Cyber Security and Personal Data Protection was adopted in 2014, it has not come into force, as only a few countries have signed up to it. Principle 40 in the revised Declaration takes up some features from the convention.

Recognising that the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, as well as other international instruments and national constitutions, also guarantee the rights to freedom of expression and access to information.

This section, which has slight wording changes compared to its corresponding section in the 2002 Declaration, acknowledges international human rights standards and respective national constitutions which guarantee FOE and ATI. This points to the measures which have been incorporated in the revised Declaration.

Conscious that freedom of expression and access to information are cross-cutting rights that are important for the realisation of all other human rights, including socio-economic rights, and of the potential of both rights to contribute to the socio-economic transformation of the continent.

Once more, substantial weight is given to the concept that FOE and ATI are intrinsically linked to enabling all other rights, leading to citizens enjoying their full range of socio-economic rights, including the right to work, the right to a living wage and the right to water. These human rights are crucial to achieving continental growth as desired by targets set in the Sustainable Development Goals (SDGs). The United Nations Office of the High Commissioner for Human Rights sees the nexus of these conjoining human and socio-economic rights. The Millennium Development Goals (MDGs) served as a proxy for certain economic and social rights but ignored other important human rights linkages. By contrast, human rights principles and standards are strongly reflected in an ambitious new global development framework, the 2030 Agenda for Sustainable Development.[33]

Recognising the need to protect and promote the right to freedom of expression and access to information of marginalised groups and groups that face multiple discrimination, including women, children, persons with disabilities, older persons, sexual and gender minorities, refugees and internally displaced persons.

This new Clause in the revised Declaration highlights the broader focus on marginalised and discriminated groups, calling for their inclusion in enjoying the rights to FOE and ATI. Already stated in the Preamble are the protocols and charters protecting marginalised groups. This section previews the non-discriminatory Clauses as laid out in the revised Declaration – Principle 3: Non-Discrimination; Principle 7: Specific Measures; Principle 11: Media Diversity and Pluralism; Principle 37: Access to the Internet. The focus of these Clauses is on marginalised groups getting their rights.

Desiring to promote the free flow of information and ideas and greater respect for the rights to freedom of expression and access to information.

The revised Declaration hopes to spark the empowerment of citizens sharing their ideas and information, which will bring a better understanding of how FOE and ATI work.

Noting that local languages are critical in optimising the realisation of access to information by communities and for the effective realisation of freedom of expression.

For communities to fully exercise their FOE and ATI rights, these rights must be in the context and language they understand. Although French, Portuguese and English are recognised as official languages in Africa, only a small per cent of Africans consider any of these three languages to be their mother tongue. This Clause reminds State Parties of their obligation to consider the entire population when facilitating FOE and ATI rights.

33 https://sustainabledevelopment.un.org/post2015/transformingourworld

Considering the key role of the media and other means of communication in ensuring full respect for the right to freedom of expression, promoting the free flow of information and ideas, assisting individuals in making informed decisions and facilitating and strengthening democracy.

Aware of the particular importance of broadcast media in Africa, given its capacity to reach a wide audience due to the comparatively low cost of receiving transmissions and its ability to overcome barriers of illiteracy.

This is the only unchanged section from the 2002 Declaration's preamble. It recognises the continued importance of broadcast media in sharing information and influencing citizens' decisions within a democracy. In Africa, radio is the most popular and the most accessible form of media. Even though there are new forms of communication, radio will likely remain dominant for decades.

Recognising the role of new digital technologies in the realisation of the rights to freedom of expression and access to information and the role of open government data in fostering transparency, efficiency, and innovation.

Affirming that the same rights that people have offline should be protected online and in accordance with international human rights law and standards.

This Clause is based on the notion that the internet is a public good[34] and underpins and acknowledges the impact of digital technologies and the internet. It shows how enhancing FOE and ATI can bolster democracy, government accountability and State development. This is highlighted in The Elders' article on *Protecting fundamental freedoms, online and offline:* [35]

> *The internet, mobile phones and social media give ordinary citizens the power to inform ourselves, voice our opinions and coordinate action, with sometimes dramatic results. In the face of efforts to exercise greater control over internet access and activity, it is vital that we protect these rights – both online and offline – that form the bedrock of inclusive, open societies.*

This follows the global sentiment that the same rights that people have offline must also be protected online. The UN Human Rights Council has consistently reinforced this, to the extent that former UN Special Rapporteur Frank La Rue's ground-breaking report on promoting and protecting the right to freedom of opinion and expression focused strongly on the internet. His observations and outline of the issues have guided the development of numerous policy frameworks, including relevant sections of the revised Declaration.

Acknowledging that the exercise of the rights to freedom of expression and access to information using the internet is central to the enjoyment of other rights and essential to bridging the digital divide.

Conscious that freedom of expression and privacy are mutually reinforcing rights that are essential for human dignity and the overall promotion and protection of human and peoples' rights.

The revised Declaration predicts an increased reliance on the internet for people to express themselves and search for information. Online FOE and ATI open various opportunities such as online education, health care and e-governance, and introduce an avenue for citizens to participate in their government's processes. The hindrance to FOE and ATI automatically closes the door to attaining other rights. Along with complementing Principles, this Clause calls on State Parties to prioritise access to the internet for all citizens, especially marginalised groups, as a guaranteed right to fully exercise FOE and ATI.

The introduction of privacy rights in the Preamble of the revised Declaration is a new feature. By protecting personal information and shielding against unjustified surveillance of communications, privacy rights preserve one's dignity and safety, enabling one to communicate anonymously and have complete control of one's personal information.

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34 https://www.article19.org/resources/article-19-at-the-unhrc-the-same-rights-that-people-have-offline-must-also-be-protected-online/

35 https://theelders.org/news/protecting-fundamental-freedoms-online-and-offline

Considering the key role of the media and other means of communication in ensuring full respect for the right to freedom of expression, promoting the free flow of information and ideas, assisting individuals in making informed decisions and facilitating and strengthening democracy.

Aware of the particular importance of broadcast media in Africa, given its capacity to reach a wide audience due to the comparatively low cost of receiving transmissions and its ability to overcome barriers of illiteracy.

The focus on broadcast media is the appreciation of radio being the most popular medium on the African continent amongst audiences. When compared with other media such as television, newspaper and the internet, radio is by far the easiest to access. It is relatively affordable with the ability to have a wide reach, and of all the mediums, radio has the highest chance of overcoming many challenges, such as gender disparities, literacy levels or physical challenges.

This is due to the proliferation of national, regional and community radio stations which are accessible through relatively cheap radio sets and affordable mobile phones which can receive radio signals. Radio does not demand as many resources to produce programmes as television or newspapers. Language and regionalism constitute a significant draw for listeners who want to listen to the radio in a language they understand and issues they relate to.

Recognising the role of new digital technologies in the realisation of the rights to freedom of expression and access to information and the role of open government data in fostering transparency, efficiency, and innovation.

This Clause in the Preamble is about the opportunity new digital technologies bring in the enjoyment of freedom of expression and access to information rights. An informed citizen is born from the effective use of new digital technologies as they seek for their government to be transparent and held accountable. State Parties who adopt e-governance in terms of sharing information and providing services online will have an improved relationship with citizens.

Affirming that the same rights that people have offline should be protected online and in accordance with international human rights law and standards.

The Revised Declaration uses the phrase, 'The same rights that people have offline should be protected online'. This is repeated in Principle 5, then again in Part IV of the Declaration. This part of the Preamble makes it clear that the revised Declaration was crafted with the foresight of growth in the use of Information Communications Technologies (ICTs), along with the increase of online rights violations perpetrated by State and non-State actors.

Acknowledging that the exercise of the rights to freedom of expression and access to information using the internet is central to the enjoyment of other rights and essential to bridging the digital divide.

The internet's unquestionable power in enabling people to exercise their FOE and ATI rights is reinforced through the revised Declaration and supported by the belief that it must be accessible to all, as these rights are the hallmark of democracy and good governance. The internet has opened an opportunity for feedback and for people to engage community leaders or elected candidates in a more efficient way as compared to conventional media such as television and radio.

The Preamble acknowledges the digital divide between people in rural areas and those in urban areas. The revised Declaration is optimistic that digital rights and the benefits of education and business will bridge the gap.

Conscious that freedom of expression and privacy are mutually reinforcing rights that are essential for human dignity and the overall promotion and protection of human and peoples' rights.

Freedom of expression and privacy are essential to the promotion and protection of rights. Privacy, which was not mentioned in the 2002 Declaration, is a new concept in the revised Declaration, which speaks about persons being able to communicate anonymously and still enjoy their FOE rights. It speaks of the work of whistle-blowers who expose wrongdoing often at personal risk. Privacy, discussed in Principles 40-42 of the revised Declaration, guarantees citizens the right to privacy and State Parties are mandated to protect that right.

The African Commission adopts the Declaration of Principles on Freedom of Expression and Access to Information in Africa to replace the Declaration on Principles of Freedom of Expression in Africa of 2002.

The Declaration's name is formally changed to accommodate Access to Information, pointing out that it would be a comprehensive document.

PART I: GENERAL PRINCIPLES

This section outlines the first nine principles of the Declaration and how rights shall be protected in the proceeding parts of the revised document. Out of the nine principles, seven are new (1, 2, 4, 5, 6, 7 and 8) while two have been strengthened (3 and 9).

Principle 1. Importance of the rights to freedom of expression and access to information

1. Freedom of expression and access to information are fundamental rights protected under the African Charter and other international human rights laws and standards. The respect, protection and fulfilment of these rights are crucial and indispensable for the free development of the human person, the creation and nurturing of democratic societies and for enabling the exercise of other rights.
2. State Parties to the African Charter (States) shall create an enabling environment for the exercise of freedom of expression and access to information, including by ensuring protection against acts or omissions of non-State actors that curtail the enjoyment of freedom of expression and access to information.

The first Principle of the revised Declaration underlines the importance of freedom of expression and access to information as fundamental rights that the African Charter and other universal non-binding policy frameworks protect. It links FOE and ATI as enabling rights to achieve development and democracy. The African Charter draws the same conclusion that rights are pivotal in the development of the African continent:

> *Convinced that it is henceforth essential to pay a particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social, and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights;*[36]

This first Clause clearly states that the revised Declaration was influenced by the African Charter on Human and Peoples' Rights and other international protocols and human rights standards. This explains why the content of the revised Declaration is contemporary in terms of rights and freedoms and is traceable to other rights documents. This Clause challenges States to achieve democracy by promoting and protecting these rights.

The second Clause compels State Parties who are party to the African Charter[37] to proactively ensure that their respective citizens enjoy FOE and ATI. Governments are advised to create and foster a landscape that facilitates the flourishing of rights through policy and legislative frameworks instead of contesting them as States are inclined to do to retain power. Governments are also advised to protect citizens from non-State actors who may impede those rights to assert and/or abuse power.

Principle 2. Non-interference with freedom of opinion

Freedom of opinion, including the right to form and change all forms of opinion at any time and for whatever reason, is a fundamental and inalienable human right indispensable for the exercise of freedom of expression. States shall not interfere with anyone's freedom of opinion.

This Clause is succinctly explained by Tomiwa Ilori, who says, 'Freedom of opinion is intrinsic to being human, it's how we are human. We talk, share ideas and thoughts through it. It's on the same wavelength with accessing information. It's through accessing information that we form opinions and opinions need not be based on facts.'

36 https://www.achpr.org/public/Document/file/English/banjul_charter.pdf pg. 2

37 https://www.achpr.org/statepartiestotheafricancharter

This section echoes Article 19(1) of the International Covenant on Civil and Political Rights (ICCPR), which reads, 'Everyone shall have the right to hold opinions without interference'. The notion is that opinions cannot be restricted as they are about our perception of the world around us. Freedom of opinion is critical in society because it creates debate, widening the knowledge of a given topic or idea. Before freedom of expression, one must enjoy freedom of opinion. States must be encouraged not to look at the diversity of views as a threat to power, and instead as an opportunity to explore ideas that could develop nations. Freedom of expression can only be enjoyed where freedom of opinion is also protected.

This new Principle on freedom of opinion fills a gap in the African Charter that does not speak of freedom of opinion. It only mentions it when it defines freedom of expression in Article 9(2), 'Every individual shall have the right to express and disseminate his opinions within the law'.

Principle 3. Non-discrimination

Everyone shall have the right to exercise freedom of expression and access to information without distinction of any kind, on one or more grounds, including race, ethnic group, colour, sex, language, religion, political or any other opinion, political association, national and social origin, birth, age, class, level of education, occupation, disability, sexual orientation, gender identity or any other status.

This Principle is an expansion of Principle 1.2 of the 2002 Declaration. The original Clause gave 'everyone an equal opportunity', but the revised Declaration quantifies 'everyone' without distinction.

This Clause is in sync with the various international and regional legal instruments and standards which demand equality and equity in exercising and enjoying the rights of FOE and ATI. It challenges the perception and the prevalent behavioural attitude that gender, ethnicity, age and even sexual orientation are justified motives in denying citizens their enjoyment of rights protected in the revised Declaration.

This Clause encompasses equality enshrined in international treaties such as the United Nations Convention on the Elimination of All Forms of Discrimination Against Women,[38] the United Nations Convention on the Rights of Persons with Disabilities[39] and the various United Nations resolutions against discrimination based on sexual orientation and gender identity.[40] Regionally, the African Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa;[41] the African Youth Charter and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa[42] demand equality. This equality is also stated in the Model Law on Access to Information in Africa, among other soft laws developed by the African Commission.

Women and Persons with Disabilities (PWDs) are groups often denied FOE and ATI rights in Africa.

This Principle demands that PWDs have access to media they can use, such as voice-activated media services that aid persons with visual impairment, disability-friendly websites, and the use of subtitles in films aired on television stations/services to accommodate the deaf. A survey of telecommunications companies in Kenya and Nigeria by Collaboration on International ICT Policy for East and Southern Africa (CIPESA), found that most telecommunications providers do not have services which address the needs of PWDs.[43] In another investigation by Mozambican Disabled Peoples Organisation Forum (FAMOD) and Data4Change, it was found that the majority of Mozambique's most useful and important sites were not helpful to PWDs.[44]

Women face discrimination and sexual harassment offline and online.[45] Women journalists are more prone to online abuse for their work.[46] A survey conducted by Women In News (WIN) found that one in every two women was sexually harassed at work.[47] There is less representation of women in editorial positions and management.

38 https://ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx
39 http://ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx
40 https://ohchr.org/EN/Issues/Discrimination/Pages/LGBTUNResolutions.aspx
41 https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-persons-disabilities-africa
42 https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-women-africa
43 https://cipesa.org/2021/04/telcos-in-nigeria-and-kenya-should-address-exclusion-of-persons-with-disabilities/
44 https://cipesa.org/2021/03/investigation-finds-more-than-700000-barriers-limiting-website-accessibility-in-mozambique/
45 https://ogbv.pollicy.org/report.pdf
46 https://en.unesco.org/news/unescos-global-survey-online-violence-against-women-journalists
47 https://womeninnews.org/2021/07/sexual-harassment-new-research-reveals-the-scale-of-the-problem-in-african-newsrooms-and-its-disturbing/

Additionally, in news gatherings, women are under-represented in expert opinion compared to men.

The declaration infuses more current views on human rights while understanding Africa's sensitivity to lesbian, gay, bisexual and transgender (LGBTQIA+) rights. The last section of the Principle, which reads, 'Everyone shall have the right to exercise freedom of expression and access to information without distinction of any kind, on one or more grounds, including sexual orientation, gender identity or any other status' was crafted to accommodate the group while bearing in mind that homosexuality is still a crime in many countries[48] in Africa. Attitudes have slowly been changing as Angola,[49] Gabon[50] and Mozambique[51] have scrapped homophobic laws. However, LGBTQIA+ people continue to grapple with prejudice, threats and attacks, and South Africa is the only country on the continent that permits gay marriage.

Principle 4. Most favourable provision to prevail

Where a conflict arises between any domestic and international human rights law, the most favourable provision for the full exercise of the rights to freedom of expression or access to information shall prevail.

Over the years, court cases involving FOE issues have increased. In some instances, organisations and individuals cannot seek recourse in local courts, so they opt to seek justice in regional courts. Courts such as the ECOWAS Community Court of Justice and the African Court on Human and Peoples' Rights have made critical decisions on FOE cases.

This new Principle in the revised Declaration makes it clear that the law, which best defends FOE and ATI, will be prioritised in terms of application,especially where domestic and international laws are not aligned. The addition was in response to State Parties passing laws that do not meet universal standards in protecting FOE and ATI.

The Principle influences the judiciary to consider international and regional human rights law standards in their rulings. Legal counsel, in turn, can benchmark their defence against standards that offer a maximum advantage. As a standard-setting principle, it empowers FOE and ATI advocates to lobby States for improved legislation. The effect of this Principle is that legal action can be taken against errant State Parties at the regional and continental legal systems using the revised Declaration as the standard-setting document. There is the additional advantage of lobbying regional and international bodies such as the African Commission and the United Nations.

More importantly, it requires State Parties to frame laws in line with the provisions of the revised Declaration or enact legislation that draws upon model laws – e.g. the African Commission's Guidelines on Access to Information and Elections in Africa. These model laws provide a minimum benchmark, with State Parties having the room to offer added protection.

This Principle also addresses a problem related to the initial interpretation of Article 9(2) of the African Charter:

> *Every individual shall have the right to express and disseminate his opinions within the law.*

Article 9(2), regarded as a clawback clause, was often misinterpreted by individual States to mean that a citizen is to enjoy freedom of expression within the legal framework of their respective countries. The ACHPR made a landmark decision in the case between *Media Rights Agenda (MRA) and Others v Nigeria* (2000).[52] It ruled that freedom of expression should not be deciphered in relation to Nigerian law, but instead should be measured against international human rights standards. This was in response to Abacha's military government passing decrees which superseded courts and led to the closure of media houses critical of him.[53] MRA therefore approached the ACHPR as they could not seek redress in the local courts. This was before the Declaration of the Principles on Freedom of Expression in Africa was adopted in 2002.

48 https://www.reuters.com/article/us-nigeria-lgbt-lawmaking-idUSKBN27C2XQ
49 https://www.hrw.org/news/2019/01/23/angola-decriminalizes-same-sex-conduct
50 https://www.reuters.com/article/us-gabon-lgbt-lawmaking-idUSKBN240258
51 https://www.bbc.com/news/world-africa-33342963
52 https://africanlii.org/afu/judgment/african-commission-human-and-peoples-rights/2000/24
53 *Media Rights Agenda and Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998)

The African Court on Human and Peoples' Rights offers another opportunity for redress once local options are exhausted. However, only 33 nations out of 54 African countries have ratified the treaty that brought the African Court into existence.[54] Of the 33, only 8 countries allow individuals or non-governmental organisations to approach the court. At one point, 12 countries allowed citizens to file cases with the continental court, but 4 withdrew that right. Another regional court, the Southern African Development Community Tribunal, was disbanded in 2012, leaving few options for citizens to seek legal recourse when FOE and ATI rights are violated.

Principle 5. Protection of the rights to freedom of expression and access to information online

The exercise of the rights to freedom of expression and access to information shall be protected from interference both online and offline, and States shall interpret and implement the protection of these rights in this Declaration and other relevant international standards accordingly.

This Principle emerged from the need to protect online FOE and ATI rights in the same way as offline rights. Acknowledging the changing landscape where people increasingly communicate online, the existing international standards are not enough to guarantee online rights. The ICCPR Article 19(2) gives sufficient space to include online rights, which are catered for in the section that reads 'or through any other media of his choice' in the Clause:

> *Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*

This Principle gives ample protection of FOE and ATI rights if there is an absence of a law that focuses explicitly on online rights. States tend to use legal loopholes and extra-judicial means to target citizens criticising governments online. Using that standard of guaranteeing equal protection online and offline constricts States to implementing laws in line with continental and international standards of pro-human rights.

This Clause was designed with foresight because as reliance on and use of the internet grows, so will the importance of this principle. There is an appreciation of the operating landscapes on the continent. Despite obstacles, such as lack of political will or drawn-out parliamentary/legislative processes in passing relevant legislation – emphasis on the equal protection of online rights is being endorsed.

This allows for legal sanctions against violating a person's right to freedom of expression and access to information online. Undoubtedly, there is an issue of political will in prosecuting such encroachments, as in most instances, governments perpetrate the violations through their agencies or political supporters. An excellent example of this is the Nigerian government shutting down Twitter[55] and the suspected blocking of the *Peoples Gazette* website.[56]

Principle 6. Protection of human rights defenders and others

The protections accorded to journalists and other media practitioners in this Declaration shall apply, as necessary, to every human rights defender and any other individual or group exercising their rights to freedom of expression and access to information through any medium.

This Clause is acclaimed for its inclusion of Human Rights Defenders (HRDs). It is in direct response to the growing number of HRDs who have become targets of repressive and authoritarian governments in recent years. In addition to supporting survivors of violations, HRDs bravely push governments to account for their actions while providing empirical evidence of violations through collecting and sharing information. Their activism puts them at high risk of being persecuted by State and non-State actors. While this Clause specifically refers to HRDs, it adds that 'and any other individual or group' will be equally protected for exercising their FOE and ATI rights.

The 2002 Declaration was crafted with a natural slant towards protecting FOE and ATI rights in journalism and the media sector. A diverse group of human rights and media rights advocates drafted the revised Declaration.

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54 https://www.youtube.com/watch?v=xcTjtZHylU8&t=5s

55 https://www.reuters.com/technology/nigeria-indefinitely-suspends-twitter-operations-information-minister-2021-06-04/

56 https://rsf.org/en/news/nigerian-news-site-deliberately-blocked-expert-report-confirms

This Clause is in response to the changes in activism due to new digital technologies which give rights advocates the ability to communicate with a large number of people.

Governments tend to repress FOE and restrict the information rights of persons perceived as critics, who are not journalists. Therefore, this Clause affects the right of ATI to other persons who are not in the media.

Activists who have been persecuted for sharing their views include investigative journalist Hopewell Chin'ono who reported on the COVID-19 scandal implicating Zimbabwe's First Family. He was arrested in June 2020[57] and detained for a lengthy period of time[58] before the courts acquitted him.[59]

The ending of that Clause in Principle 6 is similar to the provision of Article 19(2) of ICCPR, which has the same effect of covering the various forms of communications and the avenues through which FOE and ATI rights can be enjoyed. It has the additional advantage of accommodating newer forms of communication in the future.

Principle 7. Specific measures

States shall take specific measures to address the needs of marginalised groups in a manner that guarantees the full enjoyment of their rights to freedom of expression and access to information on an equal basis with others. Marginalised groups include women, children, persons with disabilities, older persons, refugees, internally displaced persons, other migrants, ethnic, religious, sexual or gender minorities.

State Parties are mandated to ensure marginalised groups enjoy their rights as stated in the African Charter's Article 2, which speaks of non-discrimination:

> *Article 2: Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.*

The rights of marginalised groups are interlinked with FOE and ATI rights. This Clause connects the revised Declaration with the various protocols and treaties that require governments to protect marginalised groups. Although similar to Principle 3 on Non-Discrimination, this Clause focuses on the governments fulfilling their roles in assisting marginalised groups in ways that do not violate their FOE and ATI rights.

Refugees are particularly vulnerable, and even though they are guaranteed equal rights by the African Charter and the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa,[60] there are instances where they continue to be trapped within refugee camps. This denies them access to education, freedom of movement and water.

The media has a crucial role in airing marginalised groups' issues. Some States impose heavy restrictions on media coverage of refugee camps for fear of being exposed for their shortcomings in ensuring refugee rights. In 2020, the Burkina Faso government banned media[61] from visiting refugee camps, citing the need to keep the dignity of refugees. However, this ban came after an exposé on how refugee women were experiencing sexual violence in the camps. Such actions deny refugees a voice and violate their freedom of expression rights. Marginalised groups must have access to the media or tools such as the internet so that they are informed of their rights and the environment around them.

Principle 8. Evolving capacities of children

States shall recognise and respect the evolving capacities of children, and shall take measures that enable children, including adolescents, to exercise the rights to freedom of expression and access to information. In all such actions, the best interest of the child shall be a primary consideration.

57 https://www.frontlinedefenders.org/en/case/human-rights-defender-hopewell-chinono-detained-and-charged
58 https://www.americanbar.org/groups/human_rights/reports/zimbabwe-the-persecution-and-prosecutions-of-hopewell-chinono/
59 https://www.theeastafrican.co.ke/tea/rest-of-africa/zimbabwe-court-clears-journalist-hopewell-chin-ono-of-charges-3644088
60 https://au.int/sites/default/files/treaties/36400-treaty-oau_convention_1963.pdf
61 https://www.voanews.com/press-freedom/media-blocked-burkina-fasos-displaced-denied-voice-journalists-say

This is a reinforcement of Article 7 of the African Charter on the Rights and Welfare of the Child:

> *Every child who is capable of communicating his or her own views shall be assured the rights to express his opinions freely in all matters and to disseminate his opinions subject to such restrictions as are prescribed by laws.*

This is a particularly essential Clause as Africa is projected[62] to have the highest number of children in the world, with the population expected to reach one billion by 2055. The vulnerability of children exposed to child labour, violence, sexual violence, and conflict makes it more critical for them to be taught the value of FOE and ATI.

This new Principle in the revised Declaration is in line with Principle 3 of Non-discrimination mentioned before, which stresses the importance of children being given FOE and ATI rights.

This Principle binds State Parties to guarantee children's rights, including freedom of expression, freedom of assembly, and privacy. Children on the continent are discriminated against due to their age and a widespread culture where children are to be seen but not to be heard.

This Clause goes further by imploring State Parties to implement measures that empower children to enjoy FOE and ATI. Such measures could include ensuring the media gives a voice to children, especially in matters that affect them. There is an obligation for State Parties to go further by granting information requests made by children and even ensuring children have access to media. In their implementation, State Parties must ensure the child's best interests, again, in line with international law.

The qualification 'adolescents' makes it clear that the person defined as a child is a person who is under 18 years.

Principle 9. Justifiable limitations

1. States may only limit the exercise of the rights to freedom of expression and access to information, if the limitation:
   a. is prescribed by law;
   b. serves a legitimate aim; and
   c. is a necessary and proportionate means to achieve the stated aim in a democratic society.
2. States shall ensure that any law limiting the rights to freedom of expression and access to information:
   a. is clear, precise, accessible and foreseeable;
   b. is overseen by an independent body in a manner that is not arbitrary or discriminatory; and
   c. effectively safeguards against abuse including through the provision of a right of appeal to independent and impartial courts.
3. A limitation shall serve a legitimate aim where the objective of the limitation is:
   a. to preserve respect for the rights or reputations of others; or
   b. to protect national security, public order or public health.
4. To be necessary and proportionate, the limitation shall:
   a. originate from a pressing and substantial need that is relevant and sufficient;
   b. have a direct and immediate connection to the expression and disclosure of information, and be the least restrictive means of achieving the stated aim; and
   c. be such that the benefit of protecting the stated interest outweighs the harm to the expression and disclosure of information, including with respect to the sanctions authorised.

62 https://data.unicef.org/wp-content/uploads/2019/01/Children-in-Africa.pdf

Principle 9 is an expansion of Clause 2.2. of the 2002 Declaration, which reads, 'Any restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary and in a democratic society'. This vague section was insufficient and presented a loophole that States could exploit to trample on FOE and ATI. Already countries such as the Democratic Republic of the Congo, Mauritius, Mozambique, and Tanzania use broad laws against the media which are not in line with international human rights laws.[63]

This strengthened Principle rectifies the weakness contained in the 2002 Declaration by removing ambiguity and clearly defining where freedom of expression and access to information can be limited, in line with international law.

Some State Parties violate FOE and ATI rights unilaterally, such as by implementing internet shutdowns[64] or even legislating laws to find 'legitimate' ways to curtail rights, such as the cybercrime laws passed in Kenya[65] and Zambia.[66] This Principle clarifies that laws restricting such rights must be in line with international human rights standards. In response to what was happening on the continent, the Clause demarcates the basis of limiting FOE and ATI in detail.

Clause 9(1) – demands that State Parties only limit FOE and ATI through a law, which is justified and practical in the practice of democracy.

Clause 9(2) – explains further the structure of the law that will be used to limit FOE and ATI. Such a law must be clear, specific, overseen by an independent body such as a court, and subject to appeal.

Clause 9(3) – explains that limitations are to apply to protect citizens' rights and protect the public from health or security risk. This section is a verbatim copy of the ICCPR's 19(3):

> 3. *The exercise of the rights provided for in Article 19 carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*
>
> *(a) for respect of the rights or reputations of others; and*
>
> *(b) for the protection of national security or of public order (ordre public), or of public health or morals.*
>
> *– Article 19(3) of International Covenant on Civil and Political Rights.*

Clause 9(4) – further qualifies that the limitation must be time-bound, meant to serve an immediate, urgent purpose and that such a limitation can only be implemented as a last resort, where the purpose is more important than the protection of FOE and ATI.

This Principle narrows the possibility of FOE and ATI being curtailed by State Parties by placing a few exceptions that justify such a limitation. The limitation must be in line with international law and involve independent bodies and the courts to decide on such limitations. If followed in word and spirit by State Parties, this will loosen the States' control of expression.

> *The Principle opens a door for litigation and is already impacting the continent's jurisprudence. An example is the case of Amnesty International and Others v Togo at the ECOWAS Community Court of Justice, where the Togo government was ruled to have violated Principles 9(1) and 9(2) of the applicants when it shut down the internet. The Togo government failed to prove it had a law justifying the shutdown.*

State Parties attempting to restrict FOE and ATI will have no option other than to create laws as stipulated by this Principle. There is an increased awareness of the issue of limiting rights by the courts, and in turn, more decisions against illegal limitations will be made. However, there is no guarantee that States will comply as there is no mechanism to ensure governments comply with rulings. The Togo government was ordered to make legislative changes and to pay damages for shutting down the internet, but it is yet to do so.

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63 https://www.kas.de/documents/285576/11521648/MLHSA+2021+-+17+Media+Law+in+the+Region+-+Where+to+from+here.pdf/26bea0f4-e2d2-8e13-1d95-3dbc885aa496?t=1612258533035 page 3 2.1

64 https://www.accessnow.org/cms/assets/uploads/2020/02/KeepItOn-2019-report-1.pdf

65 https://cipesa.org/2018/05/sections-of-kenyas-computer-misuse-and-cybercrimes-act-2018-temporarily-suspended/

66 https://cipesa.org/2021/07/new-cyber-law-impedes-civil-liberties-in-increasingly-repressive-zambia/

PART II: RIGHT TO FREEDOM OF EXPRESSION

This section has a total of 16 principles that focus on the right to freedom of expression. Out of these, four are new (12, 15, 16 and 23), nine have been strengthened (11, 13, 14, 17, 18, 20, 22, 24 and 25), and three are unchanged (10, 19 and 21). The section is heavily influenced by the African Charter on Broadcasting (2001) but has been modernised in line with the current trends of media structure, technology, and innovation. The revised Declaration endorses a three-tier media structure consisting of public service media, private media, and community media.

This section serves as a guide for Member States to create the ideal media landscape where FOE and ATI can flourish. The principles here specifically focus on the following:

- The various structures of the media
- The regulation of the media
- Protection of the media, citizens, and sources
- Punitive measures against the media

Principle 10. Guarantee of freedom of expression

Freedom of expression, including the right to seek, receive and impart information and ideas, either orally, in writing or in print, in the form of art or through any other form of communication or medium, including across frontiers, is a fundamental and inalienable human right and an indispensable component of democracy.

This Principle in the revised Declaration is taken from the 2002 Declaration as is. It was the first Principle in the 2002 document becoming the first Principle in the detailed Part II of the revised Declaration. This Principle rephrases the ICCPR's Article 19(2):

> *Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*

This Clause guarantees fundamental human rights. FOE and ATI are critical to ensure citizens enjoy democracy and societal development.

This Principle has an open-ended framing, accommodating future forms of communication. This proves this document was not only written to address the issues faced now but crafted to have an impact in years to come.

Principle 11. Media diversity and pluralism

1. **State or private monopoly over print, broadcast and online media is not compatible with the right to freedom of expression.**
2. **State and government-controlled broadcasters shall be transformed into public service broadcasters, accountable to the public through the legislature or other mechanism for public accountability.**
3. **States shall take positive measures to promote a diverse and pluralistic media, which shall facilitate:**
   a. **the promotion of free flow of information and ideas;**
   b. **access to media and other means of communication, including by marginalised groups, linguistic and cultural minorities;**

c. access to non-discriminatory and non-stereotyped information;

d. access to the media by poor and rural communities, including by subsidising household costs associated with digital migration;

e. the promotion of transparency and diversity in media ownership;

f. the promotion of local and African languages, content and voices; and

g. the promotion of the use of local languages in public affairs, including by the executive, legislature and the judiciary.

State Parties were encouraged to promote media plurality in the 2002 Declaration to achieve media diversity. However, many States expanded public and private monopolies by increasing the number of stations and newspapers. They also granted licences to political allies. For example, in Zimbabwe, broadcasting licences were given to persons directly linked to the ruling party.[67] The revised Declaration addresses this rampant practice by castigating the creation of monopolies at the expense of genuine diversity and pluralism.

The opaqueness around media ownership has been a cause of concern. Governments veil their control of private media outlets behind shadowy benefactors. Indeed, even State institutions have refused to provide information on ownership of certain media, i.e. *MFWA v Ghana Communications Authority.*[68] This Principle calls for transparency in response to this practice.

This Principle is influenced by the African Charter on Broadcasting, passed in Windhoek, Namibia, in 2001 at the Windhoek +10.[69] Principle 11(2) is almost identical to the African Charter on Broadcasting Clause Part 1(2), which reads:

> *All State and government-controlled broadcasters should be transformed into public service broadcasters, that are accountable to all strata of the people as represented by an independent board, and that serve the overall public interest, avoiding one-sided reporting and programming in regard to religion, political belief, culture, race and gender.*

Unfortunately, most State Parties are unwilling to transform State broadcasters into genuine public broadcasters due to a fear of losing power.[70]

The recurring call for State Parties to ensure minority and marginalised groups enjoy their FOE and ATI rights is repeated in this Clause, with a focus on promoting media diversity and pluralism. Due to the lack of funding and the commercial nature of the media structure in Africa, media remains focused on urban audiences targeted by advertisers who believe they have more disposable income. Delivering media to rural areas also has logistical challenges, such as transport costs and lack of printing infrastructure within communities. This means that if there is no investment in rural areas in terms of access to media, they will continue to be left out of the communications loop.

This Principle calls for sharing information that does not discriminate or stereotype people. Achieving this requires responsible broadcasting training to ensure that only non-discriminatory and non-stereotyped information is shared. Governments must invest in monitoring mechanisms which check on information being disseminated to the public.

The revised Declaration speaks on the current digital switchover (migration) process where countries transition from analogue broadcasting systems to digital terrestrial television. The migration allows State Parties to use less broadcast spectrum. Some nations are currently struggling to go entirely digital as the process requires infrastructure and for households to have set top boxes to receive the digital signal. State Parties in Principle 11(3)(d) are called upon to ensure rural areas are not left behind in the process and must subsidise the price of set top boxes, which are now relatively expensive. The deadline for African countries to achieve the digital switchover was July 2015. However, as of 2018, only 15 African countries had migrated to digital broadcasting systems.[71] A number of them had partially migrated as of the end of 2022.

The revised Declaration promotes the African voice by promoting African content and the use of African languages. This can be done by implementing local content quota systems and regulating local content radio and television

67 https://www.theafricareport.com/52603/zimbabwes-new-television-licenses-media-pluralism-without-diversity/

68 https://ifex.org/mfwa-disappointed-by-ruling-on-rti-case/

69 https://en.unesco.org/sites/default/files/african_charter.pdf

70 https://www.dw.com/en/the-failed-reform-of-public-broadcasters-in-africa/a-19223613

71 https://www.itu.int/en/ITU-D/Regional-Presence/Africa/Documents/Nairobi 2018 ITU Broadcast Workshop - DSO - Digital Migration Status %28Update%29 in Africa.pdf

stations. Another means is to promote community media which by default are in the local language and primarily discuss local issues.

Naturally, the most listened-to radio stations across the continent are those which broadcast in local languages. International broadcasters such as the British Broadcasting Corporation (BBC) and Voice of America (VOA) have repackaged programming in local languages for African audiences. There is a growing interest in Africa from diaspora communities who also tune in to local stations through the internet.

Principle 12. Media independence

1. States shall guarantee the right to establish various forms of independent media, including print, broadcast, and online media.
2. Any registration system for media shall be for administrative purposes only and shall not impose excessive fees or other restrictions on the media.
3. States shall develop regulatory environments that encourage media owners and media practitioners to reach agreements to guarantee editorial independence and to prevent commercial and other considerations from influencing media content.

This new Principle narrows in on one of the continent's main problems: media independence. State or private interests in Africa's media landscape force media companies to practice self-censorship due to fear of closure or losing advertising revenue which is the lifeblood of the traditional media set-up

State Parties are compelled to create a thriving independent media environment, which is a departure from the practice of cronyism or banning independent media practices across the continent. State Parties are now expected to be at the forefront of promoting and protecting the right to establish independent media in various forms.

States have attempted to stop the media from flourishing by restrictive registration measures, and high application fees and hefty terms for media to work under. Principle 12(2) compels States not to impose any other restrictions apart from those which are administrative.

State Parties are instructed to create laws that guarantee editorial independence. This will ensure that there is no external influence on media from State or non-State actors manipulating media through advertising or ownership. This is in response to governments shutting down media directly or indirectly through regulatory authorities, e.g. supermarket chain *Choppies* is reported to influence Botswana media because it is a major advertiser.

Principle 13. Public service media

1. States shall establish public service media governed by a transparently constituted and diverse board adequately protected against undue interference of a political, commercial or other nature.
2. The senior management of public service media shall be appointed by and accountable to the board.
3. The editorial independence of public service media shall be guaranteed.
4. Public service media shall be adequately funded in a manner that protects them from undue interference.
5. Public service broadcasters shall ensure that their transmission systems cover the whole territory of the State.
6. The public service ambit of public broadcasters shall be clearly defined and include an obligation to ensure that the public receive adequate and politically balanced information, particularly during election periods.

The African Charter inspires this Principle on Broadcasting Part II, which speaks to the ideal public service broadcasting structure. It stipulates that the structure be governed by a truly independent board which serves on behalf of and in the public's interest. Most State media entities are run by boards[72] that are aligned to a political party, who in turn hire senior management that is also aligned.

72 https://www.dw.com/en/the-failed-reform-of-public-broadcasters-in-africa/a-19223613

Previously titled 'Public Broadcasting', the revised Declaration has renamed this as 'Public Service Media' in consideration of the convergence of media regarding broadcasting in the traditional sense and accommodating online media.

State Parties are instructed to pass laws and policies that create public service media instead of the current state media set-up that often only serves the interests of the State or ruling party, such as in Zimbabwe[73] and Eswatini.[74] This Principle empowers State Parties to have an independent governance structure and an independent editorial structure. However, it remains to be seen whether countries will be willing to embrace a framework that could threaten their power base.

Public service media needs to be adequately funded to maintain its independence. In Africa, public funding through licensing is not enough to sustain the running of an efficient public service broadcaster. Such broadcasters are then forced to take up advertising as an alternative source of funding. However, this extra revenue is often insufficient. For example, in South Africa, the government often has to give financial assistance to the South African Broadcasting Corporation (SABC).

A growing culture of not paying television and radio licence fees also affects revenue for State media. However, in some instances, the refusal to pay licences may be the public fighting back against biased programming. A parliamentarian refused to pay television licence fees to Zimbabwe's national broadcaster, ZBC, and sued the broadcaster for favouring the ruling party in its programming. The constitutional court threw out the case (*Jessie Majome v ZBC)*.[75]

One of the biggest problems faced by many African countries is the poor national transmission of the broadcasters, as States find it expensive to invest in transmitters that cover all regions in their countries. The digital migration programme meant to ensure more people have access to television and radio services could provide a solution. However, passing the cost to consumers by demanding that they buy relatively expensive set-top-boxes or decoders to receive digital frequency contradicts the principle of ensuring affordable access to broadcasting services.[76] Using satellite technology is another solution, but it is also expensive for the end user, who must have a satellite dish and a decoder. China has been assisting[77] African countries such as Kenya[78] and Zambia[79] by providing satellite television services, targeting villages, and aiming to make satellite television affordable.

This Principle opens the door for litigation, where citizens can seek redress in court whenever they feel their rights are violated by biased or discriminative public broadcasters. Consequently, it will be vital in public broadcasting reforms and the legislation of the relevant laws relating to broadcasting.

Principle 14. Private media

1. States shall promote a diverse private media as vehicles for the development and dissemination of a variety of content in the public interest.
2. States shall encourage broadcast, print and online media to publicly disclose all forms of media ownership and any subsequent acquisitions or change in ownership.
3. States shall establish an independent regulatory body to issue broadcasting licences and to oversee the observance of license conditions.
4. States shall ensure that licensing processes for private media are fair and transparent, and promote diversity in broadcasting by:
   a. mandating full public disclosure of all forms of media ownership and any subsequent acquisitions or change of ownership; and
   b. taking preventive measures against the undue concentration of private broadcasting ownership, including through non-award of licences and non-approval of subsequent acquisitions or change of ownership.

73 https://www.reuters.com/article/us-zimbabwe-television-idUSKCN1IH0TR
74 https://mg.co.za/africa/2020-08-08-the-media-is-dead-long-live-the-king/
75 https://www.herald.co.zw/concourt-dismisses-majomes-zbc-case/
76 https://www.ipsos.com/en/digital-migration-are-we-ready
77 http://en.people.cn/n3/2019/0409/c90000-9564916.html
78 http://www.xinhuanet.com/english/2019-12/20/c_138647087.htm
79 http://www.xinhuanet.com/english/2018-06/26/c_137282532.htm

5. States shall ensure that the process of frequency allocation for private broadcasting use is fair and transparent.
6. States shall ensure that the process for the acquisition of broadcasting rights imposes such conditions as are necessary for ensuring diversity in the private broadcasting sector.
7. States shall encourage private broadcasting services to promote interoperability of platforms and facilities.

This section was previously under Private Broadcasting in the 2002 Declaration, however, it has been altered as broadcasting is not only about radio or television use but incorporates online dissemination of content. There have been significant changes since the 2002 document, as this sector was then a limited and expensive venture due to the heavy infrastructural investment required. Today, broadcasting is relatively affordable due to enhancements in technology.

The Principle recognises the practices of media concentration by 'private' media players, who are usually connected to persons in government, owning radio and television stations, and the press. During President Eduardo dos Santos' reign in Angola, opaque media ownership was rampant, with one media group using the name Anonymous Society.[80] It was later revealed that the president's children owned the leading media groups in the country. Governments are compelled to act against the practice of 'buying' licences through shareholding or acquisition. This is meant to enhance transparency in ownership and avoid media concentration.

Many governments claimed it was impossible to allocate frequencies as the commodity was scarce. This Principle compels States to ensure that there is a vibrant private media sector by availing frequency for radio and television. This opportunity to have more private players has been enhanced by technology and the use of satellites to share digital transmission of television stations, such as in Zambia. The digital migration process also allows more television and radio stations to go on air.

The application process for private broadcasting must be transparent, where the best bidders get the broadcasting licences. The process must be accessible to the public, and aggrieved applicants can appeal if bids are unsuccessful. It must be noted that even if there is a transparent process, there could still be a situation where those connected to the government are given licences. This happened in Zimbabwe, even after a public hearing.[81]

Broadcasting rights to national events are usually restricted to state media, while private broadcasters and journalists are shut out. In response to this practice, the revised Declaration compels State Parties to ensure private broadcasters have access to beam national events. Even the acquisition of other television rights, e.g. sports, must be done so that private media can access them.

States, through an independent body, must make available a variety of licences to allow media houses to apply for radio or television licences and webcasting. With the current technological changes, owning a radio or television station without a website is not practical.

Principle 15. Community media

1. States shall facilitate the establishment of community media as independent non-profit entities, with the objective of developing and disseminating content that is relevant to the interests of geographic communities or communities sharing common interests such as language and culture.
2. The regulation of community broadcasting shall be governed in accordance with the following principles:
   a. The ownership, management and programming of community broadcasters shall be representative of the community.
   b. Licensing processes shall be simple, expeditious and cost-effective, and guarantee community participation.
   c. Licensing requirements shall fulfil the objectives of community broadcasting and shall not be prohibitive.

80 https://www.reuters.com/article/ozatp-angola-media-20100811-idAFJOE67A0PT20100811

81 https://www.theafricareport.com/52603/zimbabwes-new-television-licenses-media-pluralism-without-diversity/

d. States shall allocate a fixed percentage of available radio frequency spectrum to community broadcasters to encourage diversity.

This new Principle was originally under *Private Broadcasting* in the 2002 Declaration but has been given its own principle in the revised document. This is due to the popularity of community broadcasting in South Africa, Zambia and across Africa.[82] Through an independent authority, governments are compelled by the revised Declaration to ease licensing requirements for community broadcasting.

Community media, by nature, struggles to get funding to stay afloat as advertisers seek commercial media with a wider reach. Although community media has a smaller geographical reach (unless it has a website), it plays a crucial role in sharing educational material and preserving local languages and culture. Therefore, this Principle calls for community media to be recognised as non-profit organisations, which must be subjected to an easier licensing and registration process. States can also establish community media by directly funding such initiatives.

The relevant regulatory authorities on broadcasting must ensure that frequencies are available for community media to enable them to broadcast to adjacent communities. These community radio stations do not have the money or political influence compared to commercial or public media.

Campus broadcasting is also included in community media, a ubiquitous feature in South Africa's radio landscape. These campus radio stations are training grounds for broadcasting students. Following the American campus broadcasting style, it tends to be more liberal than conventional commercial and public radio.

Principle 16. Self-regulation and co-regulation

1. States shall encourage media self-regulation which shall be impartial, expeditious, cost-effective, and promote high standards in the media.
2. Codes of ethics and conduct shall be developed by the media through transparent and participatory processes and shall be effectively implemented to ensure the observance of the highest standards of professionalism by the media.
3. Co-regulation may also be encouraged by States as a complement to self-regulation, founded on informed collaboration between stakeholders including the public regulatory authority, media, and civil society.

The 2002 Declaration Principle 9.3 stated that self-regulation was the best 'system for promoting high standards in the media'. The revised Declaration gives it a stand-alone principle and maintains that self-regulation is key to promoting high standards in media. The addition of co-regulation was in response to the media inevitably working with governments and regulators. Co-regulation can complement the self-regulation mechanism as long as it does not override it. For example, during consultations on the Zimbabwe Media Commission Bill, which is now an Act of Parliament, MISA Zimbabwe lobbied for co-regulation. MISA Zimbabwe Director Tabani Moyo said, 'Initially, we had a strong position that we want self-regulation outright, but as a compromise, we settled for co-regulation, whereby ZMC is appellant while the self-regulatory body will regulate the industry. So, it will be the industry regulating itself.[83] This is a position we have been pushing from way before, but the government was not keen on it; it wanted to entrench [the media].'

This Principle acknowledges the importance of having an agreed code of ethics and conduct that governs the media, creating a basis for self-regulation. The absence of such a code of ethics means there is no self-regulatory system, leaving the media at the mercy of State laws. A lack of an agreed code of conduct may be due to weak media unions that usually drive such a process. Voluntary complaints bodies have difficulty getting all media players to abide by the code of ethics or rulings.

Co-regulation brought about by consensus involving the State, media, and civic society is key to promoting professionalism in the media. States are already involved in the selection of persons in media regulatory authorities through parliament and in the legislation of media law. States, therefore, already have a stake in regulating media, but its role must not be overbearing but supportive of the self-regulation systems.

82 https://www.un.org/africarenewal/magazine/july-2005/community-radio-voice-poor

83 https://www.newsday.co.zw/2019/10/media-co-regulation-way-to-go-govt/

Principle 17. Regulatory bodies for broadcast, telecommunications, and the internet

1. A public regulatory authority that exercises powers in the areas of broadcast, telecommunications or internet infrastructure shall be independent and adequately protected against interference of a political, commercial, or other nature.
2. The appointment process for members of a public regulatory body overseeing broadcast, telecommunications or internet infrastructure shall be independent and adequately protected against interference. The process shall be open, transparent and involve the participation of relevant stakeholders.
3. Any public regulatory authority that exercises powers in broadcast, telecommunications or internet infrastructure shall be accountable to the public.
4. A multi-stakeholder model of regulation shall be encouraged to develop shared principles, rules, decision-making procedures, and programmes to shape the use and evolution of the internet.
5. The powers of regulatory bodies shall be administrative in nature and shall not seek to usurp the role of the courts.

This Principle in the revised Declaration is heavily influenced by Section 4 of Article 19's Access to the Airwaves: Principles of Freedom of Expression and Broadcast Regulation[84] and Part I of the African Charter of Broadcasting. The Principle in the 2002 Declaration did not have regulation of internet infrastructure, which has now been included.

This Principle calls on State Parties to have regulatory bodies, but independent in:

- how members of such a regulatory body are selected – through an independent public process such as through parliamentary nominations and public interviews.
- how the constituted body conducts its work without any influence from State or commercial entities. When it is registering new television stations, the process must be public. Such a body will be accountable to the public through parliament.

This Principle is in response to the use of regulatory bodies that have power that cannot be appealed. By adding the last section, 'The powers of regulatory bodies shall be administrative in nature and shall not seek to usurp the role of the courts', this Declaration opens the way for litigation if a media organisation wants to appeal a regulating authority's decision.

Persons selected into the regulatory bodies must be chosen based on their expertise in the given subject in terms of education and experience.

Principle 18. Complaints

1. Public complaints systems for print, broadcast, online media, and internet intermediaries shall be widely accessible and determined in accordance with established rules and codes of conduct.
2. Any regulatory body established to adjudicate complaints about media content shall be protected against political, commercial or any other undue interference.

A complaints mechanism is critical to ensuring the enjoyment of FOE and ATI by making recourse in cases of injury affordable to the public who may not afford legal representation. State Parties are compelled to ensure there is an agreed code of conduct which will, in turn, create a complaints mechanism.

For example, the Broadcasting Complaints Commission of South Africa is the complaints mechanism set up by the National Association of Broadcasters. [85] It ensures that South African broadcasters follow the broadcasting code of conduct.

84 https://www.article19.org/data/files/pdfs/standards/accessairwaves.pdf

85 https://www.bccsa.co.za/

In countries like Zimbabwe, the code of conduct has not been finalised, making complaints challenging to resolve outside court. A complaint mechanism is a viable alternative compared to the court process, which is not only costly but in which journalists may be subjected to criminal sanction for press offences.

In some instances, the media regulators such as Media Commissions and Broadcasting Authorities have the added responsibility of handling complaints from the public.

Principle 19. Protection of journalists and other media practitioners

1. The right to express oneself through the media by practising journalism shall not be subject to undue legal restrictions.
2. Journalists and other media practitioners shall be free to organise themselves into unions and associations.

This is one of the principles from the 2002 Declaration, which remained unchanged, save for the title. The change of the title, which was originally *Promoting professionalism* to *Protection of journalists and other media practitioners*, widens rights which were initially meant for journalists to include other media practitioners such as bloggers and social media influencers.

Undue legal restrictions on media practitioners in this Principle include complex media registration processes, e.g. the high fees foreign correspondents have to pay to work in Mozambique[86] and criminalising press offences.

This document recognises unions' important role in lobbying and litigating for FOE and ATI rights. The 2002 Declaration only says, 'Media practitioners shall be free to organise themselves into unions and associations', thus it was journalist centric. The revised Declaration has added the qualification, 'Journalists and other media practitioners shall be free to organise themselves into unions and associations'. It accommodates not only journalists but the various media practitioners within the communications ecosystem.

In addition to representing media practitioners, unions can engage governments on policy and legislation. Vibrant journalist associations such as the South African National Editors Forum[87] (SANEF) and the Gambia Press Union[88] are examples of media unions that directly engage with their respective governments. Unions play a crucial role in lobbying for better wages and working conditions.

Other unions, such as the Bloggers Association of Kenya (BAKE), Zambian Bloggers and the Zimbabwe Bloggers Association, are coming up to defend the rights of their members.

Principle 20. Safety of journalists and other media practitioners

1. States shall guarantee the safety of journalists and other media practitioners.
2. States shall take measures to prevent attacks on journalists and other media practitioners, including murder, extra-judicial killing, torture, and other forms of ill-treatment, arbitrary arrest, and detention, enforced disappearance, kidnapping, intimidation, threats, and unlawful surveillance undertaken by State and non-State actors.
3. States shall take measures to raise the awareness and build the capacities of journalists and other media practitioners, policy makers and other stakeholders on laws and standards for ensuring the safety of journalists and other media practitioners.
4. States shall take effective legal and other measures to investigate, prosecute and punish perpetrators of attacks against journalists and other media practitioners, and ensure that victims have access to effective remedies.

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86 https://www.hrw.org/news/2018/08/17/mozambique-new-media-fees-assault-press-freedom#:~:text=The%20Mozambican%20government%20on%20July,US%248%2C300%20per%20year%20respectively.

87 https://sanef.org.za/28343-2/

88 https://ifex.org/historic-moment-for-gambia-as-it-adopts-ati-law/

5. States shall be liable for the conduct of law enforcement, security, intelligence, military, and other personnel which threatens, undermines, or violates the safety of journalists and other media practitioners.
6. States shall take specific measures to ensure the safety of female journalists and media practitioners by addressing gender specific safety concerns, including sexual and gender-based violence, intimidation, and harassment.
7. In times of armed conflict, States shall respect the status of journalists and other media practitioners as non-combatants in accordance with international humanitarian law.

As in the 2002 Principle: Attacks on Media Practitioners, the State is implored to take measures to prevent attacks on journalists. In addition to this Principle in the revised Declaration is the instruction that State Parties promote laws and standards which protect journalists and other media practitioners and hold perpetrators of attacks on journalists to account.

The Principle makes the State responsible for the actions of its security agents against journalists and other media practitioners. Using this Clause in Nigeria, the Media Rights Agenda is suing the government for failing in its mandate to protect journalists and arrest perpetrators who attack journalists.[89] Somalia, ranked as one of the most dangerous countries for journalists, appointed a special prosecutor to investigate and prosecute suspects in the killing of journalists.[90] More than 50 journalists were reportedly killed in the Horn of Africa country.

Sexual and gender-based violence and sexual harassment were not mentioned in the first Declaration but are included in the revised Declaration, in recognition of the struggles female journalists face. Women journalists are more likely to face violence and threats both offline and online for their work than their male counterparts. There is also rampant sexual harassment in newsrooms in Africa, as pointed out by WAN-IFRA research on African newsrooms.[91]

International Humanitarian Law and protocols for treating prisoners of war must apply in conflicts where journalists are primarily targeted. Militant groups do not adhere to these protocols, and journalists are kidnapped and killed. Recent examples are those of French journalist Olivier Dubois who was abducted in Mali,[92] and Spanish journalists David Beriain and Roberto Fraile, who were killed in Burkina Faso.[93]

Principle 21. Protecting reputations

1. States shall ensure that laws relating to defamation conform with the following standards:
    a. No one shall be found liable for true statements, expressions of opinions or statements which are reasonable to make in the circumstances.
    b. public figures shall be required to tolerate a greater degree of criticism.
    c. Sanctions shall never be so severe as to inhibit the right to freedom of expression.
2. Privacy and secrecy laws shall not inhibit the dissemination of information of public interest.

This is an unchanged Principle from the 2002 Declaration, which points to the continued importance of protecting freedom of expression while protecting reputations. It is linked to Article 19(3)(a) of the ICCPR, which states that the rights to freedom of expression and access to information come with duties and responsibilities to protect reputations:

> *3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as provided by law and are necessary:*
>
> *(a) For respect of the rights or reputations of others.*

89 https://mediarightsagenda.org/mra-files-suit-to-compel-federal-government-to-investigate-attacks-against-journalists-punish-perpetrators/
90 https://allafrica.com/stories/202009090676.html
91 https://wan-ifra.org/2021/07/new-research-shows-extent-of-sexual-harassment-in-african-media/
92 https://www.voanews.com/africa/french-journalist-kidnapped-northern-mali-appears-video
93 https://cpj.org/2021/05/in-burkina-faso-spanish-journalist-killings-underscore-broader-dangers-to-the-press/#:~:text=The%20murder%20of%20Spanish%20reporters,militant%20activity%20in%20recent%20years.

Reputation is defined[94] as the opinion that people have about someone or something. Freedom of expression heavily influences this reputation as perception about a person or institution is shaped by what is said about them.

Defamation laws serve the genuine purpose of protecting a person's reputation from being tarnished by false statements. However, on the African continent, defamation laws are disproportionately used to curtail FOE and ATI. The broad application of defamation laws by governments is at odds with the international standards of defamation laws. These impose only narrow restrictions that protect individuals' reputations without blocking FOE and ATI rights.

Clause 21(a) clarifies that an accurate statement is not considered defamation. It adds that airing an opinion depending on the situation should not be punished if, for example, someone says an unsubstantiated statement out of anger or gives an argument that could be believable given the circumstances.

This Principle shuns the continued use of insult laws where one could be imprisoned for making fun of a government official. A direct call is made to public figures such as politicians, businesspeople, or religious leaders to expect to be criticised. FOE has the role of creating public debate on the issues of the day and putting officials under scrutiny for their actions. Defamation laws cannot be used to block such discussions or stop government officials or prominent persons from being criticised. Ironically, as pointed out by Article 19's Defining Defamation: Principles of Freedom of Expression and Protection of Reputation[95] (pg. 6), 'The practice in many parts of the world is to abuse defamation laws to prevent open public debate and legitimate criticism of wrongdoing by officials'.

There are remedies if one's reputation has been defamed, which should not be so punitive as to censor the media or citizens. Sanctions such as imprisonment, stiff fines and media closures tend to protect government officials from accountability and contribute to concealing their wrongdoing. Such penalties for media offences are outlawed in Principle 22.

Clause 21(2) addresses the common practice by some State Parties of using privacy and secrecy laws that shut out the media and citizens from accessing information that is of public interest.

Principle 22. Criminal measures

1. States shall review all criminal restrictions of content to ensure that they are justifiable and compatible with international human rights law and standards.
2. States shall repeal laws that criminalise sedition, insult, and publication of false news.
3. States shall amend criminal laws on defamation and libel in favour of civil sanctions which must themselves be necessary and proportionate.
4. The imposition of custodial sentences for the offences of defamation and libel is a violation of the right to freedom of expression.
5. Freedom of expression shall not be restricted on public order or national security grounds unless there is a real risk of harm to a legitimate interest and there is a close causal link between the risk of harm and the expression.

Compared with the Criminal Measures Principle in the 2002 Declaration, this is a strengthened principle, focusing on removing the criminalisation of press offences. This Principle absorbs Resolution 169[96] of the ACHPR adopted in September 2010, which 'Calls on State Parties to repeal criminal defamation laws or insult laws which impede freedom of speech and to adhere to the provisions of freedom of expression, articulated in the African Charter, the Declaration, and other regional and international instruments'. This Resolution 169 refers to other international laws and standards against criminal defamation and insult laws, such as the Dakar Declaration on Media and Good Governance[97] and the Declaration of Table Mountain.[98]

94 https://dictionary.cambridge.org/dictionary/english/reputation

95 https://www.article19.org/wp-content/uploads/2018/02/defining-defamation.pdf

96 https://www.achpr.org/sessions/resolutions?id=343

97 http://www.unesco.org/new/en/unesco/events/prizes-and-celebrations/celebrations/international-days/world-press-freedom-day/previous-celebrations/worldpressfreedomday200900000/dakar-declaration/

98 http://www.blog.wan-ifra.org/sites/default/files/field_article_file/Declaration of Table Mountain Eng text.pdf

The Principle calls on State Parties to review their laws to decriminalise press offences, acknowledging that most countries have such laws. Cameroon,[99] Botswana[100] and Mozambique[101] are examples of countries with criminal defamation and insult laws. There has been progress on the continent as Kenya, Zimbabwe and Ghana decriminalised defamation. Further, Lesotho[102] in 2016 and Sierra Leone[103] in 2021 repealed laws criminalising press offences. Civil remedies are encouraged as a better sanction than sending journalists and other media practitioners to jail for press offences.

Repealing these laws does not mean that journalists are safe from detention or conviction, as the case of Guinea sports journalists Ibrahima Sadio Bah and Amadou Diouldé Diallo revealed.[104] Guinea outlawed the imprisoning of journalists for press offences in 2010. However, Bah was sentenced to six months in prison for defaming the president of the country's football federation, while Diallo was detained for six weeks for allegedly insulting President Alpha Condé.

Regional courts have a pivotal role in influencing how such cases of defamation, libel, sedition and insult law, are interpreted and judged. A case which has impacted this Principle was the first freedom of expression case before the African Court of Human and Peoples' Rights (*Konaté v Burkina Faso*,[105] pg. 423).

Journalist Lohé Issa Konaté – the Editor-in-Chief of the weekly publication *L'Ouragan* – was found guilty by the Ouagadougou High Court of defaming a state prosecutor in his articles accusing the official of corruption. Konaté was convicted to serve a year in prison, made to pay hefty fines totalling US$12,000, and the publication was suspended for six months.[106] When the case was brought before the continental body, the court ruled that imprisoning Konaté and fining him were disproportionate sanctions. The court ruled that this violated Konaté's freedom of expression rights (African Charter Article 9). In addition, it ruled that Burkina Faso had failed to prove that jailing Konaté was 'A necessary limitation to freedom of expression in order to protect the rights and reputation of members of the judiciary (in this instance the State prosecutor)'.

Investigative journalist Ignace Sossou, convicted[107] of harassing a public prosecutor through electronic means in 2020, is set to approach the ECOWAS Community Court of Justice to contest his 18-month conviction.[108] He served six months of his sentence before he was released. Sossou was imprisoned for quoting the government official's speech verbatim on Twitter.

There is the practice of journalists not only being charged with press offences but also facing additional charges of incitement or disrupting public order. As in the case of Zimbabwean journalist Hopewell Chin'ono, who was arrested and charged with incitement for alleging that President Emmerson Mnangagwa's family was involved in corruption.[109] Charges based on threatening public order or national security stem from other laws which are not media laws, but still regulate media's coverage and conduct. These colonial rule laws are still being applied to silence journalists and critics. These additional charges are meant to punish the critics who stay longer in detention and intimidate other media practitioners.

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99 https://rsf.org/en/news/three-journalists-held-several-defamation-cases

100 https://www.kas.de/documents/285576/11521648/MLHSA+2021+-+4+Botswana.pdf/58a1be5a-f589-450f-96a4-61d3f8f7a719?t=1612258526656

101 https://www.kas.de/documents/285576/11521648/MLHSA+2021+-+10+Mozambique.pdf/97066088-4c42-f09e-edf8-13d53e0d4ded?t=1612258529365

102 https://www.kas.de/documents/285576/11521648/MLHSA+2021+-+7+Lesotho.pdf/5203b14d-b0b2-bd27-2fae-adbe539fb2e3?t=1612258528003

103 https://ifex.org/sierra-leones-parliament-repeals-criminal-libel-law-that-threatens-free-speech/

104 https://rsf.org/en/news/guinean-journalists-continuing-detention-incomprehensible-rsf-says

105 https://www.african-court.org/wpafc/african-court-in-favour-of-burkina-faso-journalist/

106 https://globalfreedomofexpression.columbia.edu/cases/lohe-issa-konate-v-the-republic-of-burkina-faso/

107 https://gijn.org/2020/01/10/in-benin-journalist-sentenced-to-18-months-for-publishing-3-tweets/

108 https://rsf.org/fr/actualites/condamnation-confirmee-dignace-sossou-un-recul-inedit-pour-la-liberte-de-la-presse-au-benin-rsf

109 https://cpj.org/2020/07/journalist-hopewell-chinono-arrested-charged-with-incitement-in-zimbabwe/

Principle 23. Prohibited speech

1. States shall prohibit any speech that advocates for national, racial, religious, or other forms of discriminatory hatred which constitutes incitement to discrimination, hostility, or violence.
2. States shall criminalise prohibited speech as a last resort and only for the most severe cases. In determining the threshold of severity that may warrant criminal sanctions, States shall consider the:
    a. prevailing social and political context.
    b. status of the speaker in relation to the audience.
    c. existence of a clear intent to incite.
    d. content and form of the speech.
    e. extent of the speech, including its public nature, size of audience and means of dissemination.
    f. real likelihood and imminence of harm.
3. States shall not prohibit speech that merely lacks civility, or which offends or disturbs.

This new Principle opens with a definition of hate speech or discriminatory speech, which is taken verbatim from ICCPR's Article 20(2), which reads:

> *Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.*

Such laws that curb hate speech are justified if one considers the role radio played in the 1994 Rwanda genocide,[110] where over one million Tutsis and moderate Hutus were killed in 100 days. Independent radio station Radio Television Libre des Mille Collines (RTLM) provoked anti-Tutsi hatred through broadcasts. At the height of the atrocities, the radio station revealed locations where Tutsis were hiding so that mobs could kill them.

The Principle supports hate speech laws but adds that such laws be applied as a last resort. Hate or discriminatory speech shall be determined on a case-by-case basis that shall be guided by the various factors stated in Principle 23(2). African countries apply respective hate speech laws differently; Kenya's hate speech law has criminal sanctions,[111] while South Africa imposes civil remedies.[112]

Justine Limpitlaw captured the threat of hate speech laws to freedom of expression in the *Media Law Handbook of Southern Africa*. She wrote:

> *Although one generally associates the passage of hate speech legislation with progressive governments anxious to protect citizens from racism or other media law pitfalls and protections for the media discrimination, governments sometimes make use of such legislation to stifle dissent and prevent the publication of material in the public interest. Further, a perennial problem with hate speech and anti-discrimination restrictions is that they are often too broadly framed, capturing legitimate content within the net of prohibitions on hate or discriminatory speech.*

The LGBTQIA+ community has been subjected to much hate speech from religious groups and politicians such as Zimbabwe's former President, Robert Mugabe. Under this Principle, homophobia is recognised as discrimination, under the wording in 23(1), 'States shall prohibit any speech that advocates for national, racial, religious, or other forms of discriminatory hatred'. This Clause has been deliberately written not to include the LGBTQIA+ term so as not to face resistance from State Parties to adopt the Declaration. South Africa has made progress in fighting hate speech against the LGBTQA+ community. An example is journalist Jon Qwelane's article which criticised homosexuality and was ruled by the Constitutional Court to have constituted hate speech.[113] Qwelane had contested rulings of lower courts on his view that it was a right of freedom of expression, to write how he feels about homosexuality. However, South Africa's highest court agreed with lower courts that his article was hate speech. The final Clause 23(3) clarifies that saying something impolite, offensive, or vulgar cannot be defined as hate speech.

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110 https://www.aljazeera.com/features/2020/6/7/music-to-kill-to-rwandan-genocide-survivors-remember-rtlm

111 https://www.article19.org/resources/kenya-use-of-hate-speech-laws/

112 https://ohrh.law.ox.ac.uk/is-the-prohibition-and-criminalisation-of-hate-speech-in-south-africa-constitutional/

113 https://www.news24.com/news24/southafrica/news/concourt-finds-qwelanes-column-constitutes-hate-speech-but-declares-section-of-equality-act-unconstitutional-20210730

Principle 24. Economic measures

1. States shall promote a conducive economic environment in which all media can flourish, including through the adoption of policies for the provision of financial or other public support for the sustainability of all media through a fair, neutral, independent, and transparent process, and based on objective criteria.
2. States shall ensure that the allocation of funds for public advertising is transparent and subject to public accountability, and they shall not abuse their power over the placement of public advertising.
3. States shall adopt effective measures to avoid undue concentration of media ownership, whether horizontal or vertical. Such measures shall not be so stringent that they inhibit the development of the media sector.

This is a revamped Principle from the 2002 Declaration. It gives State Parties the mandate to support the media by creating policies that ensure that the media flourish, fund it directly or facilitate public support. Across the continent, the media has been struggling to survive with the situation worsened by the COVID-19 pandemic, forcing media companies to scale down operations or close.

The lifeline of African media is advertising, however, across the continent the advertising base is small in relation to the media outlets. For example, Zambia has over 100 radio stations and 50 television stations, all fighting for a small advertising market.[114] More developed countries with more industries and businesses have a more comprehensive advertising base that supports the media.

Some governments fund the media to preserve the public media role or for cultural purposes. For example, Finland's government supports minority language newspapers and culture periodicals to promote FOE, pluralism and preserve culture.[115] Another example is the United States of America's public broadcasting and radio funded by the federal government.[116]

In countries with a weak advertising base, the government is usually the major advertiser in the media, directly or indirectly, through State-owned enterprises. This gives the State the power to manipulate the media using advertising revenue. One could argue that the media is precisely where governments want them to be, where they are dependent on government advertising. Even without being unduly influenced, the media ends up censoring itself to avoid biting the hand that feeds it. In some cases, only media that portrays the government positively is rewarded with advertising, as in Madagascar, according to its 2019 African Media Barometer report.[117]

The allocation of government advertising is not transparent due to the lack of accountability measures. Such measures could enable the media and the public to access information on how much advertising the state and its line enterprises put into the media.

This Principle calls for measures to stop monopoly in media through the practice of vertical and horizontal concentration. A newspaper will be used as an example to explain these types of concentrations. If a newspaper has its own printing press and then distributes its paper directly to its subscribers, this is a form of vertical concentration – where a media company controls different fields of a media distribution chain. Using the same analogy, horizontal concentration is where a newspaper may control another newspaper, radio station or television station. Thus, horizontal concentration is owning multiple assets within the media space. There is also diagonal concentration where a media house owns various assets within media space and various chains of distributing media.

The discretion to control such a monopoly lies with media regulators and competition commissions. However, these bodies are ill-equipped to understand how media concentration works or have no resources to investigate such practices. There could be an issue of loopholes in the legislation governing competition, as is the case with Zambia, which has a Competition and Consumer Protection Commission, but no specific law addresses anti-competition practices in the media. The Principle calls for a balancing act between controlling monopoly while at the same time not having restrictions limit media development. Most likely, it is suspected that governments would rather support State media or affiliated media and turn a blind eye to concentration if it does not threaten its power.

114 http://library.fes.de/pdf-files/bueros/africa-media/18206.pdf
115 https://medialandscapes.org/country/finland
116 https://www.cpb.org/faq
117 http://library.fes.de/pdf-files/bueros/africa-media/16282.pdf

Principle 25. Protection of sources and other journalistic material

1. Journalists and other media practitioners shall not be required to reveal confidential sources of information or to disclose other material held for journalistic purposes except where disclosure has been ordered by a court after a full and fair public hearing.
2. The disclosure of sources of information or journalistic material as ordered by a court shall only take place where:
    a. the identity of the source is necessary for the investigation or prosecution of a serious crime, or the defence of a person accused of a criminal offence;
    b. the information or similar information leading to the same result cannot be obtained elsewhere; and
    c. the public interest in disclosure outweighs the harm to freedom of expression.
3. States shall not circumvent the protection of confidential sources of information or journalistic material through the conduct of communication surveillance except where such surveillance is ordered by an impartial and independent court and is subject to appropriate safeguards.

This Principle retains the journalist's right not to reveal confidential sources as in the 2002 Declaration but expands it to include other media practitioners, such as bloggers and social media influencers. Confidential sources are critical in the work of journalists, especially when exposing corruption and crime. Without these sources, journalists would not be able to have stories of public interest. Many sources are civil servants or military personnel bound by secrecy laws and codes of conduct which do not allow them to speak to the media openly. The consequences of openly giving information could cost them their jobs or even their freedom.

Under the circumstances stated in Principle 25(2), a court shall order a journalist or media practitioner to divulge their sources. This Clause carefully tasks courts to compel media practitioners to share sources under specific circumstances. Some governments, through security agencies, use intimidation and violence to make journalists reveal their sources. In 2018, Nigerian journalist Samuel Ogundipe was detained[118] by the now-disbanded Special Anti-Robbery Squad in an effort to force him to reveal his source for an article he wrote about the Inspector General of Police.

The Johannesburg Principles on National Security, Freedom of Expression and Access to Information[119] adopted in 1995 states that 'Protection of national security may not be used as a reason to compel a journalist to reveal a confidential source'. The declaration does not state any other reason for a media practitioner to reveal sources other than a court order under certain circumstances, not even the mighty national security laws can compel journalists.

This Principle acknowledges that surveillance in Africa is on the rise as nations build their arsenal to spy on journalists, activists, and opposition members. African countries such as Rwanda, Togo, Uganda, Zambia and Botswana have been accused of using the NSO Group's Pegasus spyware.[120] This contrasts with Principle 25(3), which commands governments not to spy on journalists in order to access their sources. Of late, when journalists are arrested, security agents are increasingly interested in their phones and laptops to analyse information from emails and messages. Journalists Tsaone Basimanebotlhe and Oratile Dikologang had their phones taken and analysed by Botswana police, who were looking for their sources.

Countries must depart from unregulated surveillance of journalists and abide by the Principle's requirement that such operations be done through courts. Journalists can seek recourse against unjustified surveillance. A classic case is Amabhungane's Sam Sole of South Africa, whose communications were intercepted in 2008. In 2019, the High Court ruled that the law used to authorise the surveillance of Sole was unconstitutional. The Constitutional Court in 2020 upheld the High Court's ruling and ordered the ban on 'bulk surveillance', a method of analysing data that comes in and out of the country.

118 https://cpj.org/2018/08/nigerian-journalist-jailed-for-refusing-to-reveal/
119 https://www.article19.org/wp-content/uploads/2018/02/joburg-principles.pdf
120 https://ifex.org/authoritarian-african-governments-a-ready-market-for-manipulative-spyware-vendors/

PART III: RIGHT OF ACCESS TO INFORMATION

This section comprises 11 principles which specifically focus on the right to access information (26, 27, 28, 29, 30, 31, 32, 33, 34, 35 and 36). It comprehensively updates Principle 4 of the 2002 document on Access to Information which was titled Freedom of Information. The terms Freedom of Information and Access to Information are used interchangeably.

This section empowers citizens to access public interest information held by government bodies and private entities. It guarantees the right to access information by thinning out the circumstances under which information requests are denied, protecting whistle-blowers, fighting a culture of secrecy and even punishing unjustified refusals to give information.

The principles in this section speak in the modern language of ATI, taking up experiences from the continent and international standards. This section is heavily influenced by the Model Law for Access to Information in Africa[121] published in 2012. The model law was created through ACHPR's Resolution 167,[122] which gave the Special Rapporteur on Freedom of Expression and Access to Information the mandate to develop it. The African Platform on Access to Information Declaration on access to information, adopted in 2011,[123] was also incorporated into the crafting of Part III of the revised Declaration.

Other international and regional instruments recognise the importance of access to information as seen in the Preamble ACHPR'S Resolution 167:

> *Noting further that several other African Union instruments such as the African Youth Charter, the African Charter on Statistics and the Protocol to the African Charter on Human and Peoples' Rights 14 on the Rights of Women in Africa explicitly recognise the importance of access to information.*

Principle 26. The right of access to information

1. The right of access to information shall be guaranteed by law in accordance with the following principles:

    a. Every person has the right to access information held by public bodies and relevant private bodies expeditiously and inexpensively.

    b. Every person has the right to access information of private bodies that may assist in the exercise or protection of any right expeditiously and inexpensively.

2. For the purpose of this part, a relevant private body is a body that would otherwise be a private body but is owned partially or totally or is controlled or financed directly or indirectly by public funds, or a body that carries out a statutory or public function or a statutory or public service.

The first Clause of Principle 26 was taken from the Model Law on Access to Information for Africa, which gives every person the right to access information from State institutions and private bodies. There is an emphasis on ensuring that all persons have access to information held by these bodies speedily and at an affordable cost.

The second Clause further describes what is meant by a private body, which in this Declaration is an entity that may not be under the control of the State but is funded by the State to serve the public. Telecommunications operators and other entities involved in public interest issues such as health are examples.

121 https://www.achpr.org/public/Document/file/English/model_law.pdf

122 https://www.achpr.org/sessions/resolutions?id=340

123 http://www.africanplatform.org/fileadmin/Content/PDF/APAI-Declaration-English.pdf

Although governments have a major impact on rights and freedoms, this Clause is designed to prepare the African continent for the increased influence of private companies on rights and freedoms as in the developed world. Corporations usually use the fact that they are private entities to avoid accountability to anyone except their business hierarchy. However, this Clause demands that private companies share information that is in the public's interest when their activities directly affect fundamental human rights.

Principle 27. Primacy

Access to information laws shall take precedence over any other laws that prohibit or restrict the disclosure of information.

Primacy refers to a law that is more important than other related laws. This Principle is a simplified interpretation of Section 4(1) of the Model Law on Access to Information for Africa which reads:

> *Save for the Constitution, this Act applies to the exclusion of any provision in any other legislation or regulation that prohibits or restricts the disclosure of information of an information holder.*

The APAI Declaration Key Principle 3:

> *The right of access to information shall be established by law in each African country. Such law shall be binding and enforceable and based on the principle of maximum disclosure. The law shall take precedence over other conflicting laws that limit access to information.*

This Clause was included to deal with the practice of using national security and secrecy laws to deny the public access to information. This Principle now compels Member States to ensure that access to information is guaranteed in crafting ATI laws.

This opens an opportunity for litigation if persons are denied information by a public body. The relevant body tasked with assessing ATI appeals or a court will have to reflect on the ATI law before any other law that tries to control it.

Advocacy about this Clause has an impact on creating transparency by public and private bodies. The 22 countries yet to have ATI laws will be compelled to pass ATI laws that meet the standard set by the Declaration and the Model on Access to Information in Africa.

Principle 28. Maximum disclosure

The right of access to information shall be guided by the principle of maximum disclosure. Access to information may only be limited by narrowly defined exemptions, which shall be provided by law and shall comply strictly with international human rights law and standards.

The APAI Declaration Key Principle 2:

> *Maximum disclosure: The presumption is that all information held by public bodies is public and as such should be subject to disclosure. Only in limited circumstances set out in these principles below may disclosure be denied.*

State Parties are compelled to pass or amend existing legislation to ensure full disclosure. ATI law changes the practice of limiting the information that is of public interest and the vaulting of information by African public bodies.

The comparative frameworks that guarantee ATI, such as in the Americas and Europe, have been included in this section of the revised Declaration.

Principle 29. Proactive disclosure

1. Public bodies and relevant private bodies shall be required, even in the absence of a specific request, to proactively publish information of public interest, including information about their functions, powers, structure, officials, decisions, budgets, expenditure and other information relating to their activities.
2. Proactive disclosure by relevant private bodies shall apply to activities for which public funds are utilised or public functions or services are performed.
3. Information required to be proactively disclosed shall be disseminated through all available mediums, including digital technologies. In particular, States shall proactively publish information in accordance with internationally accepted open data principles.

This Proactive Disclosure Principle is essential in creating a culture of public and relevant private bodies to voluntarily share information, even if no law compels them to do so. The fact that this Declaration binds State Parties is enough for bodies to willingly share information that is in the public interest.

The publishing of this information must meet open data principles such as the standards stated by Open Data Government which demand that information that is proactively disclosed must be:

- Complete – all public data is available
- Primary – that information is in raw form without being shortened or modified
- Timely – that information is made available as quickly as possible
- Accessible – data must be made available on the internet
- Machine Processable – data should be in formations that promote reuse and analysis of data
- Non-discriminatory – this information must be available to everyone
- Non-proprietary – must be in an easily accessible format which is not owned by a person or one entity
- Licence Free – that information is not subject to copyright

Principle 30. Duty to create, keep, organise and maintain information

Public bodies, relevant private bodies and private bodies shall create, keep, organise and maintain information in a manner that facilitates the exercise of the right of access to information.

These principles echo the contents of the APAI Declaration Key Principle 13:

> *Duty to Collect and Manage Information – Public and relevant private bodies have a duty to collect information on their operations and activities on behalf of their citizens. They also have a duty to respect minimum standards in relation to the management of this information to ensure that it may easily be made accessible to citizens.*

Public and relevant private bodies are to generate information that is easily saved and accessed by the public. Saving information is not enough – proper filing and documentation are key to achieving the goal of every citizen enjoying ATI.

Principle 31. Procedure for accessing information

1. Access to information shall be granted as expeditiously and inexpensively as possible, and in accessible formats and technologies.
2. No one shall be required to demonstrate a specific legal or personal interest in the information requested or to provide justification for a request.

3. Every person shall be assisted in making requests for information orally or in writing and in conformity with processing requirements. Appropriate support shall be provided to non-literate persons and persons with disabilities to make requests for information on an equal basis with others.
4. No fees shall be payable other than the reasonable reproduction cost of requested information. The cost of reproduction shall be waived where the requester is indigent.
5. Any refusal to disclose information shall be provided timeously and in writing, and it shall be well-reasoned and premised on international law and standards.

The APAI Declaration Key Principle 5 best summarises this principle:

> *Clear and Unambiguous Process: The law shall include procedures for the exercise of the right. The process to obtain information should be simple and fast and take advantage of new information and communication technologies where possible. Bodies falling under the scope of the ATI law should help requesters to ensure that they receive the information they need. The information provided should be in a form understandable to the requestor. Information should be disclosed within a clear and reasonable deadline provided for by law. It should be available at low or no cost.*

This Principle was designed to include how information will be shared in the future through the internet, use of computers and smartphones. Although internet use in Africa is not as widespread as other continents, it is projected to increase sharply.

Principle 31.3 speaks on how State Parties must assist marginalised groups to get the information they request without discrimination in line with the revised Declaration's Principle 3 – Non-discrimination. The emphasis is that information requests must not be expensive. A case in point is that of journalist Evans Aziamor-Mensah whom Ghana's Minerals Commission charged US$1,000 for processing an information request. Aziamor-Mensah appealed to Ghana's Right To Information Commission which ruled that the minerals commission had violated his right to information by overcharging him. It ordered the commission to charge him only US$0.33.

The Clause, which talks about information being provided timeously and in writing, blocks the practice of institutions refusing to respond to information requests. In Mozambique, a country with an ATI law, public entities routinely refuse to process information requests.

The Model Law on Access to Information for Africa gives a detailed approach to processing information requests that could be copied and added to new ATI legislation or to amend existing laws. As shown by the Mozambique example, having a law is not enough, there is a need to lobby governments to have such access to information constantly.

Principle 32. Appeals

Any refusal to disclose information shall be subject to an expeditious internal appeal process at no cost to the applicant. The right of further appeal against the outcome of an internal appeal process shall lie to the oversight mechanism and, ultimately, the courts.

This Principle is like the APAI Declaration's Key Principle 12, Right of Appeal:

> *Everyone has a right to appeal administratively any action that hinders or denies access to information or any failure to proactively disclose information. They have a right to further appeal to an independent body and to finally seek judicial review of all limits of their right of access to information.*

This Principle empowers citizens to appeal to organisations that refuse to give information. If this internal appeal does not work, they can approach an oversight mechanism, and if they are still not happy, they can seek redress in court. The Model Law again gives a detailed appeals procedure which will be good for State Parties to include in their ATI law statutes.

Having an internal appeals process makes requesting information cheaper for the requester.

Principle 33. Exemptions

1. Information may only be legitimately withheld where the harm to the interest protected under the relevant exemption demonstrably outweighs the public interest in disclosure of the information. Such information may only be withheld for the period that the harm could occur.
2. Where a portion of a document containing requested information is exempted from disclosure, the exempted portion shall be severed or redacted, and access granted to the remainder of the document that is not exempted from disclosure.
3. Laws governing classification of information shall stipulate the maximum period of the classification and restrict classification only to the extent necessary, never indefinitely.
4. Information may only be legitimately withheld as an exemption if its release would:
    a. result in the unreasonable disclosure of the personal information of a third party;
    b. cause substantial prejudice to a legitimate commercial or financial interest of relevant stakeholders or other third party;
    c. endanger the life, health or safety of an individual;
    d. cause substantial prejudice to the national security and defence of the State;
    e. cause substantial prejudice to international relations where the information relates to information required to be held in confidence under international law, the position of the State with respect to international negotiations, and diplomatic or official correspondence with States or international organisations and diplomatic or consular missions;
    f. cause prejudice to law enforcement, in particular, the prevention and detection of crime, apprehension or prosecution of offenders and the administration of justice;
    g. result in the disclosure of confidential communication between medical practitioner and patient, lawyer and client, journalist, and sources, or is otherwise privileged from disclosure in legal proceedings; or
    h. jeopardise the integrity of a professional examination or recruitment process.

This Principle states under which circumstances an information requester may be denied information. These are expressly stated, removing the vague application of the Principle by governments and institutions that may avoid divulging crucial information.

The Principle was crafted so that a person requesting information may access some information even if parts are blacked out or pages are removed.

This Principle calls for information to be open to the public after a certain period. Internationally this is practised in Britain,[124] where after 20 years, classified information created by State institutions becomes public. Other European countries also practice the declassification of information. African governments rarely share information about their activities. This Principle could force them to declassify files, thus increasing citizens' trust in their government.

Principle 34. Oversight mechanism

1. An independent and impartial oversight mechanism shall be established by law to monitor, promote and protect the right of access to information and resolve disputes on access to information.
2. The independence of the oversight mechanism shall be guaranteed in law which shall stipulate a transparent and participatory appointment process, a clear and specific term of office, adequate remuneration and resourcing, and ultimate accountability to the legislature.
3. Public bodies and relevant private bodies shall recognise decisions of the oversight mechanism as

124 https://www.nationalarchives.gov.uk/about/our-role/transparency/20-year-rule/

formally and legally binding in all matters relating to access to information, including resolving access to information disputes.

It is crucial for an ATI law to clearly state an independent oversight mechanism that has an in-depth understanding of ATI. This law gives the oversight mechanism power to make binding decisions on matters involving public and relevant private bodies. An oversight mechanism may be a stand-alone Commission, as in Ghana, which has a Right To Information Commission in line with its Right To Information Act.[125] Alternatively, it can be a body with the added function of presiding over ATI legislation matters like Zimbabwe's Media Commission, according to the country's Freedom of Information Act.[126]

Parliament plays a key role in the running of the oversight body, firstly by being involved in the selection of members who are competent and impartial. The oversight body is accountable to the public through parliament. Therefore, parliamentarians must be trained in FOE and ATI.

Lobby groups must be vigilant to ensure oversight mechanisms are set up to protect ATI. The ideal organisation to handle ATI issues is the Human Rights Commission because of its experience with handling rights. However, governments sometimes resist this. In Zimbabwe, the Media Institute for Southern Africa urged the government to allow the Zimbabwe Human Rights Commission to oversee ATI issues instead of the Zimbabwe Media Commission, which the government had proposed.[127] The government's position prevailed in the ATI law that was passed.

Principle 35. Protected disclosures in the public interest

1. No person shall be subject to civil, criminal, administrative or employment-related or other sanctions or harm, for releasing information on wrongdoing or which discloses a serious threat to health, safety or the environment, or whose disclosure is in the public interest, in the honest belief that such information is substantially true.
2. States shall adopt laws to establish protected disclosure regimes and independent institutions to oversee the protected disclosure of information in the public interest.

This section is similarly worded to the Model Law's Section 86, which protects whistle-blowers:

> *(1) No person is criminally or civilly liable for the disclosure or authorisation of the disclosure in good faith of any information under this Act.*
>
> *(2) No person may be subjected to any detriment in the course of their employment by reason of the disclosure or authorisation of the disclosure in good faith of any information under this Act.*

Whistle-blowers are formally recognised as having a pivotal role in exposing and fighting corruption. Unfortunately, whistle-blowers are targeted by State and non-State actors in some African countries. Many whistle-blowers lose their jobs, are arrested, or even killed for their bravery. In the Democratic Republic of the Congo, for example, former bank auditors Navy Malela and Gradi Koko were sentenced to death after they exposed corruption involving a business under US sanctions.[128] The two whistle-blowers are in exile.

In South Africa, Mosilo Mothepu, who exposed corruption involving former President Jacob Zuma and Indian businessmen, the Gupta brothers, was hounded by agents and slapped with criminal charges of conspiracy, corruption and fraud.[129]

Citizens who witness wrongdoing and corruption often feel that there are no mechanisms to protect them, especially when powerful politicians and influential people are involved. State Parties are mandated to ensure that whistle-blowers are protected from harm.

125 https://www.rti-rating.org/wp-content/uploads/2019/09/Ghana.RTI-2019-2.pdf
126 http://www.veritaszim.net/node/4282
127 https://zimbabwe.misa.org/2020/01/08/zimbabwes-freedom-of-information-bill-requires-fine-tuning/
128 https://www.pplaaf.org/2021/03/04/drc-serious-attack-on-whistleblowers.html
129 https://whistleblowersblog.org/whistleblower-of-the-week/mosilo-mothepu/

Principle 36. Sanctions

1. The failure of an information holder to proactively disclose information or to grant a request for information shall be established as offences punishable by law.
2. The wilful destruction, damage, alteration, concealment or falsification of information and the obstruction or interference with the performance of the duties of an information holder or of an oversight mechanism, shall be established as offences punishable by law.

This Principle is a new mechanism that sanctions public and private entities that refuse to process information requests. It is a radical departure from the culture of not being able to get answers from institutions to now having institutions punished for not providing information.

Principle 36(2) deals with deliberately impeding those who have information that is of interest to the public and the oversight mechanism. This targets persons up the food chain who have the power to manipulate information and subordinates. The Model Law in Section 88 – Offences – deems the actions in Principle 36(2) as criminal offences with a sanction or a fine, imprisonment or both.

As a new concept, it has yet to be tested on the continent. It will require strong oversight mechanisms and courts to impose such sanctions on errant public and private bodies and ensure that the guilty are punished.

PART IV: FREEDOM OF EXPRESSION AND ACCESS TO INFORMATION ON THE INTERNET

This section has six principles (37, 38, 39, 40, 41 and 42). It is a new section created to align the revised Declaration to Africa's current and growing internet use. Although Africa has the lowest internet use compared with other regions, it has an exponentially growing information communications technology (ICT) sector bolstered by millions of younger, innovative users.

The African Declaration on Internet Rights and Freedoms,[130] the African Union Convention on Cyber Security and Personal Data Protection[131] and other international laws and standards heavily influence this section.

African governments initially ignored internet rights and did not have a legal framework. However, after seeing the internet's power in mobilising youths and exposing government corruption, States swiftly passed laws to control its use. Countries such as Zambia,[132] Malawi,[133] Kenya,[134] Botswana,[135] and Uganda[136] have enacted laws to deal with internet use. The Principles in this section demand that countries create an environment to ensure citizens enjoy digital rights.

The African Union Convention on Cyber Security and Personal Data Protection, adopted in 2014, sets a good foundation for the protection of privacy. Unfortunately, only eight countries have ratified the Convention, which requires 15 signatures to enter into force.

Principle 37. Access to the internet

1. States shall facilitate the rights to freedom of expression and access to information online and the means necessary to exercise these rights.
2. States shall recognise that universal, equitable, affordable and meaningful access to the internet is necessary for the realisation of freedom of expression, access to information and the exercise of other human rights
3. States shall, in cooperation with all relevant stakeholders, adopt laws, policies and other measures to provide universal, equitable, affordable and meaningful access to the internet without discrimination, including by:
    a. developing independent and transparent regulatory mechanisms for effective oversight;
    b. improving information and communication technology and internet infrastructure for universal coverage;
    c. establishing mechanisms for regulating market competition to support lower pricing and encourage diversity;
    d. promoting local access initiatives such as community networks for enabling the increased connection of marginalised, unserved or underserved communities; and
    e. facilitating digital literacy skills for inclusive and autonomous use.

130 https://africaninternetrights.org/sites/default/files/African-Declaration-English-FINAL.pdf

131 https://au.int/sites/default/files/treaties/29560-treaty-0048_-_african_union_convention_on_cyber_security_and_personal_data_protection_e.pdf

132 https://cipesa.org/?wpfb_dl=447

133 https://malawilii.org/mw/legislation/act/2016/33

134 http://kenyalaw.org:8181/exist/rest/db/kenyalex/Kenya/Legislation/English/Acts and Regulations/C/Computer Misuse and Cybercrimes Act - No. 15 of 2018/docs/ComputerMisuseandCybercrimesAct5of2018.pdf

135 https://www.bocra.org.bw/cybercrime-and-computer-related-crimes-act-2018

136 https://www.nita.go.ug/publication/computer-misuse-act-2011-act-no-2-2011

4. In providing access to the internet, States shall take specific measures to ensure that marginalised groups have effective exercise of their rights online.
5. States shall adopt laws, policies and other measures to promote affordable access to the internet for children that equip them with digital literacy skills for online education and safety, protect them from online harm and safeguard their privacy and identity.
6. States shall not interfere with the right of individuals to seek, receive and impart information through any means of communication and digital technologies, through measures such as the removal, blocking or filtering of content, unless such interference is justifiable and compatible with international human rights law and standards.
7. States shall not engage in or condone any disruption of access to the internet and other digital technologies for segments of the public or an entire population.
8. States shall only adopt economic measures, including taxes, levies and duties, on internet and information and communication technology service end-users that do not undermine universal, equitable, affordable and meaningful access to the internet and that are justifiable and compatible with international human rights law and standards.

The online rights of FOE and ATI depend on State Parties developing policies and passing laws protecting these rights. This Principle demands that countries ensure openness in internet use – which refers to the equal access and sharing of information without being impeded. However, States often block access to websites that criticise the government. For example, the *Peoples Gazette* is not accessible within Nigeria,[137] while the Iwacu website has been blocked in Burundi.[138]

This Principle calls on governments to work together with relevant stakeholders in developing policies around ICTs. Governments must avoid making unilateral decisions in the creation of regulatory bodies, network expansion and setting competition rules in relation to the ICT sector. They are encouraged to consult civil rights groups and experts.

Governments are also encouraged to ensure non-discriminatory access to the internet, by making it affordable and promoting technology that is user-friendly to persons with disabilities, while providing safety nets to protect children online.

The advocacy for community networks to promote affordable internet to rural communities under-serviced by network operators is of particular interest. A community network is a local internet service maintained by the communities, costing far less than a network provider would charge. There is a need to popularise community networks through government policy, as Nigeria has done by including community networks in its national broadband policy.[139]

Unregulated telecommunications can create monopolies, which threaten affordable internet. Regulators play a crucial role in creating a level playing field for telecommunications players and protecting the rights of consumers. An example of a regulator stepping in to help consumers is when South Africa's Competition Commission ruled that the country's top internet providers were overcharging customers for data,[140] recommending telecom companies to lower their prices and set zero ratings for educational sites.[141]

Principle 38. Non-interference

1. States shall not interfere with the right of individuals to seek, receive and impart information through any means of communication and digital technologies, through measures such as the removal, blocking or filtering of content, unless such interference is justifiable and compatible with international human rights law and standards.
2. States shall not engage in or condone any disruption of access to the internet and other digital technologies for segments of the public or an entire population.

137 https://cpj.org/2021/02/nigerian-news-website-peoples-gazette-blocked-threatened-with-legal-action/
138 https://rsf.org/en/iwacu
139 https://a4ai.org/how-policymakers-can-support-community-networks-to-expand-connectivity/
140 https://www.competitionpolicyinternational.com/south-africa-competition-commission-slams-high-data-costs/
141 https://mg.co.za/article/2020-03-23-zero-rate-mobile-services-for-health-education-and-development-now/

3. States shall only adopt economic measures, including taxes, levies and duties, on internet and information and communication technology service end-users that do not undermine universal, equitable, affordable and meaningful access to the internet and that are justifiable and compatible with international human rights law and standards.

Some State Parties block citizens from accessing specific social media sites – Uganda blocked Facebook[142] and Nigeria banned Twitter.[143] This is in contravention of Principle 38(1), which demands countries not to interfere with the citizens' African Charter Article 9 right to 'seek, receive and impart information through any means of communications…'

Child protection, anti-terrorism and cybercrime are the justifiable basis for blocking content referred to in this Principle but as guided by international law.

State Parties are instructed not to shut down the internet as this hinders FOE and ATI rights. However, since the revised Declaration was adopted in 2019, at least 11 African countries have implemented various internet shutdowns. Most states shut down the internet during elections (Uganda,[144] Togo[145] and Zambia[146]) or during protests and conflicts (Zimbabwe,[147] Cameroon[148] and Ethiopia[149]).

Although some governments flout this Clause, citizens are encouraged to fight against digital shutdowns. When the Togo government shut down the internet during riots, Amnesty International Togo took it to the ECOWAS Court of Justice for violating citizens' African Charter Article 9 rights to FOE and ATI. The court ruled that by shutting down the internet, the Togolese government had violated citizens' rights to freedom of expression and access to information.

Some countries feel threatened by the internet's power to create an informed citizen who demands that government accounts for its actions. Authoritarian governments are using covert means to curtail internet access by imposing prohibitive taxes on data, making it expensive to discourage users. An example is Uganda's social media tax as well as a blanket 12 per cent tax on data. This is at odds with Clause 38(3), which urges governments to implement economic measures that make the internet affordable. Governments also tax the ICT sector as it is a good revenue stream due to its growth.

Driven by market forces, telecommunications providers tend to be concentrated in urban centres, while giving only minimal service to rural areas. Governments should provide incentives such as tax breaks to telecommunications companies setting up infrastructure in rural areas or supporting community networks.

Principle 39. Internet intermediaries

1. States shall require that internet intermediaries enable access to all internet traffic equally without discrimination on the basis of the type or origin of content or the means used to transmit content, and that internet intermediaries shall not interfere with the free flow of information by blocking or giving preference to particular internet traffic.
2. States shall not require internet intermediaries to proactively monitor content which they have not authored or otherwise modified.
3. States shall require internet intermediaries to ensure that in moderating or filtering online content, they mainstream human rights safeguards into their processes, adopt mitigation strategies to address all restrictions on freedom of expression and access to information online, ensure transparency on all requests for removal of content, incorporate appeal mechanisms, and offer effective remedies where rights violations occur.

142 https://mbu.ug/2021/08/11/we-can-exist-without-facebook-president-yoweri-kaguta-museveni/
143 https://www.reuters.com/technology/nigeria-lift-twitter-ban-minister-says-2021-08-11/
144 https://www.bbc.com/news/world-africa-55705404
145 https://www.accessnow.org/a-shutdown-taints-togos-2020-presidential-elections-what-happened-and-whats-next/
146 https://techcrunch.com/2021/08/12/whatsapp-and-other-social-media-platforms-restricted-in-zambia-amidst-ongoing-elections/
147 https://www.aljazeera.com/news/2019/1/18/zimbabwe-imposes-internet-shutdown-amid-crackdown-on-protests
148 https://techtribes.org/cameroon-shuts-down-the-internet-for-240-days/
149 https://www.accessnow.org/back-in-the-dark-ethiopia-shuts-down-internet-once-again/

4. States shall not require the removal of online content by internet intermediaries unless such requests are:
    a. clear and unambiguous;
    b. imposed by an independent and impartial judicial authority, subject to sub-principle 5;
    c. subject to due process safeguards;
    d. justifiable and compatible with international human rights law and standards; and
    e. implemented through a transparent process that allows a right of appeal.
5. Law-enforcement agencies may request intermediaries for the expedited or immediate removal of online content that poses imminent danger or constitutes real risk of death or serious harm to a person or child, provided such removal is subject to review by judicial authority.
6. States shall ensure that the development, use and application of artificial intelligence, algorithms and other similar technologies by internet intermediaries are compatible with international human rights law and standards, and do not infringe on the rights to freedom of expression, access to information and other human rights.

Internet intermediaries refer to telecommunications companies, web hosting companies and internet service providers. They have a crucial role to play in terms of digital rights and providing services.

In ideal situations, intermediaries are meant to be independent. However, due to their licensing requirements – where permission to operate is sought from the relevant authorities – State Parties can influence their operations.

This principle acknowledges the reality of the State's control over intermediaries and that this trend will only grow across the continent. State Parties are called upon to promote net neutrality – a concept that all internet traffic shall have equal opportunity to be accessed, instead of the rampant practice of Over the Top (OTT) services where preferred packages for certain applications are sold at cheaper rates than others.

Governments want to access information held by intermediaries about their subscribers. Governments can even order intermediaries to filter or block content. The Mauritius government proposed amendments to its ICT law that would force citizens to use a single server to receive information, allowing the State to monitor information.[150]

Although intermediaries may seem powerless, they can take action, such as informing subscribers that they have been instructed to shut down the internet, such as in Zimbabwe[151] and Eswatini.[152] Citizens and rights groups can also demand intermediaries to uphold digital rights and even take them to court. For example, in Sudan, a subscriber sued a telecommunications company for shutting down the internet under the instruction of military rulers, which led to the internet being restored.[153]

Principle 40. Privacy and the protection of personal information

1. Everyone has the right to privacy, including the confidentiality of their communications and the protection of their personal information.
2. Everyone has the right to communicate anonymously or use pseudonyms on the internet and to secure the confidentiality of their communications and personal information from access by third parties through the aid of digital technologies.
3. States shall not adopt laws or other measures prohibiting or weakening encryption, including backdoors, key escrows and data localisation requirements, unless such measures are justifiable and compatible with international human rights law and standards.

150 https://www.christinameetoo.com/2021/05/19/my-final-submission-to-the-icta-on-its-proposed-amendments-to-the-ict-act/

151 https://www.reuters.com/article/zimbabwe-politics-econet-idUSJ8N1YJ01E

152 https://www.iol.co.za/business-report/companies/mtn-takes-urgent-legal-action-to-end-internet-shutdown-in-eswatini-ba8e38db-d921-4dcc-b31e-b44412da5484

153 https://www.bbc.com/news/world-africa-48744853

The revised Declaration recognises the right to privacy which was not in the 2002 Declaration. It is not stated in the African Charter. However, the right to privacy is included in Part IV, which compels State Parties to promote and protect online rights.

The revised Declaration's Principles 40(1) and 40(2) draw directly from the African Declaration on Internet Rights and Freedoms' Principle 8:

> *Everyone has the right to privacy online, including the right to the protection of personal data concerning him or her. Everyone has the right to communicate anonymously on the internet, and to use appropriate technology to ensure secure, private and anonymous communication.*

Each person deserves privacy in terms of their medical records or personal communications. Personal information collected must not be subject to sharing with other parties without the consent of the person in question, and information collected must serve a legal purpose.

The right to communicate anonymously or through a pseudonym online enables persons to whistleblow on corruption while maintaining their safety and security. Such communications from anonymous accounts must be protected from third parties, such as governments who have invested heavily in finding journalists' sources or owners of social media accounts. Kenyan blogger, Malcolm Bidali, based in Qatar, was blogging under the pseudonym Noah Articulates,[154] writing about the ill-treatment of migrant workers at stadium construction sites. His identity was compromised, leading to his arrest. He was charged with spreading false information about the State.

This Principle bars State Parties and State agencies from using the law to pressure institutions and businesses to hand over private information. An example is when MISA Zimbabwe,[155] through the courts, blocked the Zimbabwe government from accessing user information held by a mobile money operator.

There are instances when such access to personal information is justified. However, such access must align with the conditions stated in Principle 9 of the revised Declaration and international laws and standards.

Principle 41. Privacy and communication surveillance

1. States shall not engage in or condone acts of indiscriminate and untargeted collection, storage, analysis or sharing of a person's communications.
2. States shall only engage in targeted communication surveillance that is authorised by law, that conforms with international human rights law and standards, and that is premised on specific and reasonable suspicion that a serious crime has been or is being carried out or for any other legitimate aim.
3. States shall ensure that any law authorising targeted communication surveillance provides adequate safeguards for the right to privacy, including:
    a. the prior authorisation of an independent and impartial judicial authority;
    b. due process safeguards;
    c. specific limitation on the time, manner, place and scope of the surveillance;
    d. notification of the decision authorising surveillance within a reasonable time of the conclusion of such surveillance;
    e. proactive transparency on the nature and scope of its use; and
    f. effective monitoring and regular review by an independent oversight mechanism.

This principle compels State Parties to move away from the unregulated interception of citizens' communications. State Parties must ensure they do not engage in listening in to other people's conversations and do not support such activity by State or non-State actors.

This principle guides State Parties in formulating or amending respective privacy or surveillance laws in line with international laws and standards. The principle lays out the circumstances under which targeted surveillance can

154 https://rsf.org/en/news/qatar-charges-kenyan-disinformation-blogging-about-migrant-workers

155 https://zimbabwe.misa.org/2020/07/24/court-grants-order-in-favour-of-misa-against-econet-search-warrant/

take place. These are when such surveillance has a legitimate aim, is authorised by a court, has a time frame, and is transparent, i.e. disclosure to the person under surveillance soon after the exercise is complete.

An example of how surveillance must not be done was the case of South African journalist Sam Sole, who in 2015, discovered that he had been under surveillance by the State Security Agency in 2008 concerning what is known as the Zuma Spy Tapes Saga. The surveillance was authorised through the RICA Act. Sole challenged the constitutionality of this act because he was not notified of the surveillance and that, as a journalist, his sources were at risk. In 2019, the High Court ruled that the law was unconstitutional, a decision maintained by South Africa's Constitutional Court.[156]

Principle 42. Legal framework for the protection of personal information

1. States shall adopt laws for the protection of personal information of individuals in accordance with international human rights law and standards.
2. The processing of personal information shall by law be:
    a. with the consent of the individual concerned;
    b. conducted in a lawful and fair manner;
    c. in accordance with the purpose for which it was collected, and adequate, relevant and not excessive;
    d. accurate and updated, and where incomplete, erased or rectified;
    e. transparent and disclose the personal information held; and
    f. confidential and kept secure at all times.
3. States shall ensure, in relation to the processing of a person's personal information, that the person has the right to:
    a. be informed in detail about the processing;
    b. access personal information that has been or is being processed;
    c. object to the processing; and
    d. rectify, complete or erase personal information that is inaccurate, incomplete or prohibited from collection, use, disclosure or storage.
4. Every person shall have the right to exercise autonomy in relation to their personal information by law and to obtain and reuse their personal information, across multiple services, by moving, copying or transferring it.
5. Any person whose personal information has been accessed by an unauthorised person has the right to be notified of this fact within a reasonable period and of the identity of the unauthorised person, unless such identity cannot be established.
6. The harmful sharing of personal information, such as child sexual abuse or the non-consensual sharing of intimate images, shall be established as offences punishable by law.
7. Every individual shall have legal recourse to effective remedies in relation to the violation of their privacy and the unlawful processing of their personal information.
8. Oversight mechanisms for the protection of communication and personal information shall be established by law as independent entities and include human rights and privacy experts.

This principle focuses on personal data, calling on State Parties to legislate or amend laws that protect personal data in line with international standards. Principle 42(2) gives guidance on how personal information is to be protected by law. State Parties have access to vast amounts of information about citizens, and because there is a lack of law protecting such information, are exposed to State surveillance.

156 https://cpj.org/2021/02/cpj-welcomes-south-african-constitutional-courts-ruling-condemning-surveillance/

Seemingly innocent processes such as SIM card registration or COVID-19 tracing can expose personal information.

In Ghana, lawyer Francis Kwarteng Arthur challenged[157] the government's COVID-19 contact tracing programme, where telecommunications companies were instructed to provide personal information about their subscribers to National Communications Authority (NCA) as and when required. Arthur contested the directive at the High Court, arguing it violated the country's Data Protection Act. The court ruled in his favour and instructed the NCA to stop collecting data and to destroy what they had already collected.

This principle acknowledges that a person has power over their information which, when processed, must be accurate; if not, it must be open for correction. The person who has their information being collected has the right to know what that information is being used for and have access to that information. A person has a right to seek legal recourse if one feels their privacy has been violated through the unlawful processing of their personal data.

Citizens have the right to be notified if an unauthorised party has illegally accessed personal information; such notice must be done timeously after such a breach. Sensitive information such as banking details could expose citizens to fraud and identity theft. Credit bureaux company Experian where information on 24 million people was stolen and then leaked online[158] is an example of a personal information breach.

This Principle deals with the growing scourge of child pornography and revenge porn. State Parties are instructed to legislate laws which punish such acts. These laws have to protect the survivors of such acts. Although the Anti-Pornography Act was passed in Uganda, women who were meant to be protected from 'revenge porn' by this law ended up being arrested instead, leading to the law being scrapped by the constitutional court.[159]

The principle creates an independent oversight body that deals with the protection of communication and personal information. The revised Declaration calls on State Parties to select human rights and privacy experts because privacy is a human rights issue, which requires an understanding of modern technology used to hack or protect information. There is therefore a need for these bodies to be adequately resourced to effectively protect personal privacy.

Several countries have an oversight mechanism. South Africa has an Information Regulator created by the Protection of Personal Information Act, chaired by Advocate Pansy Tlakula. At the same time, in Kenya, there is a Data Protection Commissioner, Immaculate Kassait, as guided by Data Protection Act.

157 https://ifex.org/high-court-halts-collection-of-personal-data-by-ghanaian-government/

158 https://www.timeslive.co.za/sunday-times/news/2020-09-13-data-from-huge-experian-breach-found-on-the-internet/

159 https://www.rfi.fr/en/africa/20210817-uganda-drops-anti-pornography-law-after-backlash-by-women-s-rights-groups-consitutional-council

PART V: IMPLEMENTATION

Principle 43. Implementation

1. States shall adopt legislative, administrative, judicial and other measures to give effect to this Declaration and facilitate its dissemination.
2. When States review or adopt legislation on access to information, they shall be further guided by the African Commission's Model Law on Access to Information for Africa.
3. When States adopt measures related to elections, they shall be further guided by the African Commission's Guidelines on Access to Information and Elections in Africa.
4. In accordance with Article 62 of the African Charter, States shall, in each Periodic Report submitted to the African Commission, provide detailed information on the measures taken to facilitate compliance with the provisions of this Declaration.

The distinctly separate Implementation section of the document is one of the most significant parts of the revised Declaration.

State Parties had the option of paying cursory attention to guidance from the principles of the 2002 Declaration. The revised Declaration sets out obligations that State Parties are expected to abide by, emphasising compliance with its requirements.

The Implementation section compels governments of State Parties to pass legislation and craft policies in line with the revised Declaration. Additionally, the courts are instructed to interpret the law as guided by standards outlined and set out in the Declaration. State Parties have been given the meaningful responsibility of interpreting and disseminating the contents of the revised Declaration.

While acknowledging that numerous African countries have yet to pass access to information legislation, the revised Declaration categorically advises that the frameworks being established be fashioned along the Model Law on Access to Information. Further, States are encouraged to effectively use the Guidelines on Access to Information and Elections in Africa during electoral processes.

Guided by Article 62 of the African Charter, Periodic Reports submitted to the Commission will now be required to include information on the progress of freedom of expression and access to information, as measured against the standards set out in the revised Declaration.

If followed in letter and spirit, this revised Declaration will define a new era of rights for Africa.

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