ECOWAS: Draft Framework on Freedom of Expression and Right to Information

November 2012

Legal analysis

ARTICLE 19

About the Article 19 Law Programme

The ARTICLE 19 Law Programme advocates for the development of progressive standards on freedom of expression and access to information at the international level, and their implementation in domestic legal systems. The Law Programme has produced a number of standard-setting publications, which outline international and comparative law and best practice in areas such as defamation law, access to information and broadcast regulation.

On the basis of these publications and ARTICLE 19's overall legal expertise, the Law Programme publishes a number of legal analyses each year, comments on legislative proposals, as well as existing laws that affect the right to freedom of expression, and develops policy papers and other documents. This work, carried out since 1998 as a means of supporting positive law reform efforts worldwide, frequently leads to substantial improvements in proposed or existing domestic legislation. All materials developed by the Law Programme are available at http://www.article19.org/resources.php/legal.

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1. Executive summary and recommendations

In November 2012, ARTICLE 19 analysed the draft "Supplementary Act on a Uniform Legal Framework on Freedom of Expression and the Right to Information in West Africa" ("Draft Supplementary Act") of the Economic Community of West African States (ECOWAS).ARTICLE 19's analysis identifies various positive aspects of the Draft Supplementary Act, and provides guidance and recommendations for the ECOWAS drafters to refine and amend the remaining shortfalls, with reference to international and regional standards and jurisprudence.

The analysis begins by outlining the importance of protecting these rights through implementing legislation, not only because of international obligations on the ECOWAS states to do so, but also because the respect of these fundamental rights will enable many of the countries' to improve their human rights records. It provides an overview of guarantees for freedom of expression and freedom of information in international, regional and comparative law and refers to illustrative examples of constitutional practices from the progressive modern constitutions of Kenya and South Africa.

ARTICLE 19 welcomes the recognition of regional and international standards demonstrated by the obligations on states to ensure that defamation, libel, sedition, "false news" and insult are not criminal offences, and the provision prohibiting the government from initiating any lawsuits for defamation or the protection of the reputation of the state. Nonetheless, the Draft Supplementary Act could be strengthened in its treatment of other offences, for example, by ensuring in all cases involving statements of public interest the burden of proving the falsity of the content should be on the party claiming that it is false.

The overwhelming focus of the provisions of the Draft Supplementary Act is on the media, suggesting that the title should be reconsidered to reflect this. In this respect, positive provisions include the prohibition of prior censorship, which is a fundamental principle of international law on freedom of expression, the general assertion of the importance of editorial freedom and integrity, express recognition that the print media should not be licensed, and the promotion of diversity in broadcasting.

The provisions for the protection of journalists against attacks and threats are also positive, especially given the dangerous context in many ECOWAS countries for journalists. Similarly, the protection of journalists' sources, except in exceptional circumstances, demonstrates recognition of their dependence on contacts for the supply of information of public interest. Nevertheless, this could be extended to include the protection of journalistic equipment and property from search and seizure and surveillance, which are more direct intrusions.

On the whole, the provisions on freedom of information broadly correspond with international and regional standards. Progressive features include the requirement for the right to access to information to be implemented through law, and the principle of maximum disclosure. Nonetheless, the lack of clarity and specificity in relation to several important issues diminishes their overall value. Before the finalisation of the Draft Supplementary Act, the following issues should be addressed: the addition of clear definitions for key terms such as "information" and "public body", specified time limits and methods for processing and

responding to requests, and an outline of the limited circumstances in which information may be exempt from the principle of maximum disclosure.

The Draft Supplementary Act should also adopt more comprehensive provisions for the Internet and other modern information communications technologies, in order to safeguard against restrictions on expression and the free flow of information online. Such provisions should reflect the important principles of online expression highlighted by international authorities, including the Human Rights Committee and the UN Special Rapporteur on the protection and promotion of freedom of opinion and expression.

ARTICLE 19 welcomes the provisions on implementation, which bolster states' existing obligations under international and regional human rights law and foresee the adoption of freedom of information laws across the ECOWAS region. We advise that the Draft Supplementary Act would be further improved by expressing the provisions therein as a minimum standard, and that ECOWAS member states should be encouraged to adopt higher protections in accordance with international and regional human rights law and comparative best practices.

The Draft Supplementary Act would also benefit from the inclusion of clear and "effective" remedies outlining the consequences of non-compliance and or violation of the Act, and failure to implement the provisions. Article 2 of the International Covenant on Civil and Political Rights contains useful guidance for this, requiring states parties to ensure that individuals whose rights have been breached have an adequate remedy and access to a court or tribunal.

ARTICLE 19 encourages ECOWAS to protect freedom of expression and freedom of information as comprehensively as possible in the final version of the Act. We stand ready to support the ECOWAS drafters with a view to achieving the best possible protection for these rights.

Overview of recommendations:

- Article 1 of the Draft Supplementary Act ("Draft Act") should clearly distinguish the right to freedom of expression and freedom of information from the freedom of the media.
- Article 1 should be amended to specifically protect the right to hold opinions without restriction.
- Article 1(1) should define freedom of expression broadly to include the right to seek, receive and impart information and ideas of all kinds, to cover all types of expression and modes of communication, and to grant this right to every person.
- Article 1(7)(b) should indicate that there may be restrictions imposed on freedom of expression only if these are provided by law and are necessary: (a) for the respect of the rights or reputations of others; or (b) for the protection of national security or of public order (*ordre public*), or of public health or morals.
- Article 2(1) of the Draft Supplementary Act should be revised to state that the states should adopt legislation which prohibits advocacy of hatred on such grounds as racial or ethnic origin, religion or belief, nationality, or sex or sexual orientation only when it constitutes incitement to discrimination, hostility or violence.

- Article 2 should be amended to include a provision stating that in cases involving statements of public interest, including statements made by or relating to public officials, the claimant should bear the burden of proving the falsity of any statements or imputations of fact alleged to be defamatory.
- Article 2(5) should indicate that defamation law should not provide any special protection for public officials, whatever their rank or status.
- Article 1(4) should provide explicit protection for freedom of all media.
- All references to the "independent *media* regulatory body" should be replaced with reference to the "independent *broadcasting or telecommunications* regulating body".
- Article 5(7)(b) should expressly state that the process of appointment to the governing body of regulators should be open and democratic, should not be dominated by any particular political party or commercial interest, and should allow for public participation and consultation.
- Article 5(7)(b) should exclude the appointment of anyone to the regulatory body who is: employed in the civil service or any branch of government, holds official office, is an employee of a political party or holds an elected or appointed position in government, holds a position in, receives payment from or has significant direct or indirect financial interests in telecommunications or broadcasting.
- Article 11(3) should state that any searches of a journalist's home or office or surveillance of communications should not be used to circumvent rules on the protection of sources and shall be presumed to be invalid. It should indicate that the state has the burden of demonstrating that any search or seizure or any intrusive surveillance of communications was provided for by law, pursued a legitimate aim, and was necessary and proportionate in the circumstances. It should also provide that any materials obtained in violation of the protection of sources should not be admissible in any proceedings.
- Article 11 should contain a provision affirming that the right to express oneself through the media by practicing journalism shall not be subject to undue legal restrictions, such as compulsory membership of a professional association.
- Article 7 should state that the term "information" refers to any records held by a public body regardless of the form in which the information is stored, its source, and the date of production.
- Article 7 should state that the term "public bodies" encompasses all the branches of State (the executive, legislative and judicial branches), as well as other public or governmental bodies at all levels, and also entities that are carrying out public functions.
- Article 7(5) should indicate that requests for information may be submitted in person, orally or in writing, by mail, by telephone, or through a representative
- Article 7(8) should state that the body must respond in 15 working days to all requests; if the requested information is not held by the body, the public body shall transfer the request to the appropriate body within no more than 5 working days. The applicant should have at least 30 working days to file for an appeal against the decision of the public body refusing the information. Any internal appeal should be decided within a maximum of 20 working days. The body should have a maximum of 20 working days to provide information which was not available, and which the regulatory body required to be generated..

- Article 7(12) should state that access to information should be granted unless the following criteria are both met: (a) disclosure would cause serious harm to a protected interest and (b) this harm outweighs the public interest in accessing the information.
- Article 3 should affirm that the Internet is an indispensable tool for the realisation of a range of human rights. It should also:
  - state that access to the Internet is a human right.
  - emphasise that all forms of expression and the means of their dissemination of information, including through ICTs, are protected by the right to freedom of expression.
  - reaffirm that any restrictions on such ICTs, including Internet Service Providers, must meet the requirements for permissible limitations on freedom of expression.
    state that the imposition of criminal liability for expression-related offenses must take into account the overall public interest in protecting both expression, and the forum in which it is made.
  - stipulate that states should provide adequate safeguards against abuse, including through the possibility of challenge and remedy against the abusive application of any legislation restricting freedom of expression using ICTs.
- Article 12(b) and (c) should clearly indicate that it presents only a minimum set of standards on freedom of expression and freedom of information, and that ECOWAS member states should be encouraged to adopted higher protections in accordance with international and regional human rights law and comparative best practices.
- Article 12(a) of the Draft Supplementary Act should be deleted.
- Article 12 should stipulate that states parties should ensure that any person whose rights, as recognised by the Draft Supplementary Act, are violated shall have a right to an effective remedy, and any such person in the determination of this right has access to a competent judicial, administrative or legislative authority.

2. Introduction

Founded in 1975, the Economic Community of West African States (ECOWAS) is a regional organisation of fifteen countries aiming to promote economic integration in "all fields of economic activity, particularly industry, transport, telecommunications, energy, agriculture, natural resources, commerce, monetary and financial questions, social and cultural matters."[1]

ECOWAS has committed to develop a "Supplementary Act on a Uniform Legal Framework on Freedom of Expression and the Right to Information in West Africa" ("Draft Supplementary Act"). The current version of the Draft Supplementary Act was most recently considered at the meeting of the ECOWAS Technical Committee on Legal and Judicial Affairs in Abuja, Nigeria, on 5 March 2012. The Vice President of the ECOWAS Commission, Dr Toga Mcintosh, said that the Act "would ensure that member states maintain the standards agreed to and set in many international conventions and serve to entrench the independence of the Media and Media Professionals within the legal jurisprudence, and to regulate operations of the Print and Broadcast Media in the region".[2] Nigeria's Federal Attorney, Victoria Umoren, representing Nigeria's Attorney-General and Minister of Justice described the draft as a "step in the right direction".[3] She stated: "There is no doubt that this [Draft Act] would greatly enhance the right to information and freedom of expression which are fundamental human rights issues enshrined in our respective National Constitutions and varied International Treaties and Conventions"[4]

This legal analysis examines the text's substantive provisions in order to evaluate whether it achieves these goals. This legal analysis highlights the strengths and shortfalls of the Draft Supplementary Act from the perspective of international and regional human rights law and comparative standards on freedom of expression and freedom of information. The aim is to comprehensively examine the content of the Draft Supplementary Act with a view to positively influencing the final version of the text and ensuring that the best possible protection for freedom of expression and freedom of information under the framework of ECOWAS is achieved. ARTICLE 19 has already commented on previous initiatives of ECOWAS, and has participated in various civil society consultations across the region.[5]

This legal analysis has the following structure: the next part, Part 3, examines the reasons for protecting freedom of expression and freedom of information through the framework of ECOWAS; Part 4 then examines relevant provisions of international and regional human rights law – notably the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples' Rights - and also highlights some potentially useful comparative constitutional provisions; Part 5 then examines the way in which the Draft Supplementary Act protects freedom of expression; Part 6 looks at the way it deals with civil and criminal

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[1] The member states of ECOWAS are: Benin, Burkina Faso, Cape Verde, Cote D'Ivoire, Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, Togo.See http://www.comm.ecowas.int/sec/index.php?id=about_a&lang=en.
[2] ECOWAS Press Release, 7 March 2012, http://news.ecowas.int/presseshow.php?nb=043&lang=en&annee=2012.
[3] Ibid.
[4] Ibid.
[5] Press Release, "ECOWAS Champions Regional Right to Information Agreement", 10 May 2010, http://www.article19.org/resources.php/resource/1415/en/west-africa:-ecowas-champions-regional-right-to-information-agreement.

defamation and other offences; Part 7 turns to the provisions concerning media freedom; Part 8 examines the protection of journalists' rights; Part 9 then looks at the Draft Supplementary Act's approach to freedom of information; Part 10 looks at the way in which it deals with expression through information communications technologies, including the Internet; and finally, Part 11 deals with the Draft Supplementary Act's provisions on implementation and remedies.

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3. Protecting freedom of expression and freedom of information in ECOWAS

ARTICLE 19 encourages ECOWAS to protect freedom of expression and freedom of information in the Draft Supplementary Act as comprehensively as possible. This is for a number of overlapping reasons, which are outlined here.

First, the **human rights record of ECOWAS member states compels enhanced legal protection of these rights, which may be promoted through ECOWAS**. ARTICLE 19 has observed that many ECOWAS states have grave challenges concerning freedom of expression and freedom of information. The ECOWAS region has proved a particularly volatile area in terms of journalists' safety. As recent reports and statements from ARTICLE 19 and other NGOs reveal, violence against journalists takes place against the backdrop of political instability and total impunity in states such as Cote D'Ivoire, Mali and Guinea Bissau.[6] In Nigeria, particularly in the north part of the country, the Islamist group Boko Haram has deliberately targeted and openly threatened journalists who the organisation accuses of being "biased" in favour of the Nigerian government.[7]

Over the past year, ARTICLE 19 has been particularly concerned by the situation in the Gambia, which has also been highlighted the Special Rapporteur on Freedom of Expression and Access to Information in Africa, Faith Pansy Tlakula in her recent report to the African Commission on Human Rights.[8] The Gambia faces challenges of persistent harassment and intimidation of journalists and human rights defenders coupled with significant flaws in the legal framework governing the media – such as the registration requirements for newspapers, the overly broad nature of speech-related offences, the lack of independence of the broadcasting regulator, and legal provisions which unduly interfere with online communication.[9] The situation has markedly deteriorated following the November 2011 election, which saw President Yahya Jammeh confirmed for a fourth term.[10] We have also highlighted the specific case of the conviction and sentencing of Amadou Scattred Janneh, a former Minister of Information and Communication, as well as six others, for distributing t-shirts calling for democratic change in the Gambia.[11]

[6] See generally: ARTICLE 19, "Oral statement to the African Commission on Human and Peoples' Rights", 8 May 2012, http://www.article19.org/resources.php/resource/3090/en/oral-statement-to-the-african-commission-on-human-and-peoples%27-rights; ARTICLE 19, "West Africa: Free expression and law in 2011", 5 April 2011, http://www.article19.org/resources.php/resource/3027/en/west-africa:-free-expression-and-law-in-2011. See also Reporters Sans Frontiers, "Three weeks of media freedom violations in Mali" 23 July 2012, http://en.rsf.org/mali-three-weeks-of-media-freedom-23-05-2012,42671.html

[7] See "Nigeria: Boko Haram Wages War on Nigerian Journalists", 8 June 2012, http://allafrica.com/stories/201206081025.html

[8] Activity Report presented at the 51st Ordinary Session of the African Commission on Human and Peoples' Rights, Banjul, The Gambia 18 April – 2 May 2012, http://www.achpr.org/sessions/51st/intersession-activity-reports/freedom-of-expression/.

[9] See ARTICLE 19, "The Gambia: New report highlights draconian media laws", 18 April 2012, http://www.article19.org/resources.php/resource/3047/en/the-gambia:-new-report-highlights-draconian-media-laws; ARTICLE 19, "The Gambia: Analysis of selected laws on the media", 17 April 2011, http://www.article19.org/resources.php/resource/3043/en/the-gambia:-analysis-of-selected-laws-on-media

[10] ARTICLE 19, "The Gambia: Freedom of expression continued casualty", 16 December 2011, http://www.article19.org/resources.php/resource/2903/en/the-gambia:-freedom-of-expression-continued-casualty

[11] ARTICLE 19, "The Gambia: Life sentence for distributing anti-government t-shirts violates free speech", 20 January 2012, http://www.article19.org/resources.php/resource/2934/en/gambia:--life-sentence-for-distributing-anti-government-t-shirts-violates-free-speech.

Second, **freedom of expression and freedom of information, crucial to the enjoyment of other rights and democracy, should be promoted through ECOWAS.** The importance of freedom of expression was particularly emphasised by the Inter-American Court of Human Rights, which stated that:

> Freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. It is also a *conditio sine qua non* for the development of political parties, trade unions, scientific and cultural societies and, in general, those who wish to influence the public. It represents, in short, the means that enable the community, when exercising its opinions, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free.[12]

If people are not free to say what they want, to disseminate information and express their opinion on matters of political interest, and to receive information and ideas from a variety of sources, then they will not be able to cast an informed vote or to participate in governance in other ways. The right to freedom of expression and freedom of information are also key in any system for protecting and promoting the enjoyment of all other human rights – whether civil or political rights, or economic, social and cultural rights. It is important to highlight that human rights violations thrive in a climate of secrecy while freedom of expression helps combat violations by empowering journalists and others, notably civil society organisations, to investigate and report on violations, and by opening up government institutions to public scrutiny. Freedom of expression also has a wider importance in its own right: the idea that everyone should be able to speak their mind freely on matters of concern to them is central to human dignity. A person who is not free to speak his or her mind is not truly free. In this sense, the right to freedom of expression extends beyond the political arena and finds its roots in people as social beings, relating and interacting at a multiplicity of levels through their ability to express themselves. Freedom of information fulfils an important social function, recognising that individuals not only have a right to speak, but that society at large also has a right to listen to what others have to say. In other words, freedom of information encompasses a broad guarantee of the free flow of information and ideas in society. The protection of the individual right to request information and a legal framework for proactive disclosure are unsurprisingly vital tools against corruption. At the same time, freedom of expression and the related right of freedom of information are not absolute and may be restricted under a limited range of circumstances, as indicated in the next part.

Third, **the proper protection of freedom of information requires express implementing legislation – which the vast majority of ECOWAS states do not have yet**. There is a burgeoning movement of states that have adopted constitutional provisions, legislation, or national regulation on freedom of information. Moreover, a growing number of inter-governmental bodies, such as the World Bank[13] and the African Development Bank[14], have also adopted freedom of information policies. The collection of states that have adopted freedom of information legislation either by law or regulation encompasses states as diverse as Angola (2002),[15] Chile (2008)[16], Sweden (1766)[17] and Tunisia (2011).[18] Yet, out of the nearly one

[12] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts 13 and 29, American Convention on Human Rights) Advisory Opinion OC-5/85, November 13, 1985, Inter-Am. Ct. H.R. (Ser. A) No 5 (1985).

[13] World Bank, Information Disclosure Policy, 1 July 2010, http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2010/06/03/000112742_20100603084843/Rendered/PDF/548730Access0I1y0Statement01Final1.pdf.

[14] African Development Bank Group Policy for Public Disclosure of Information, March 2012. http://www.afdb.org/fileadmin/uploads/afdb/Documents/Policy-Documents/Bank%20Group%20Policy%20on%20Disclosure%20and%20Acess%20to%20Infomation.pdf

[15] Law on Access to Administrative Documents, No. 11/02, 2002.

hundred states that have adopted laws or regulations on freedom of information, only ten are in Africa. Four of these ten – Guinea, Liberia, Niger and Nigeria – are members of ECOWAS.[19] This means that the following states should adopt laws on freedom of information: Benin, Burkina Faso, Cape Verde, Cote D'Ivoire, Gambia, Ghana, Guinea Bissau, Mali, Senegal, Sierra Leone and Togo.

Fourth, **as a matter of international law, all ECOWAS states are obliged to implement both freedom of expression and freedom of information.** Article 19 of the Universal Declaration of Human Rights and the corresponding provision of the International Covenant on Civil and Political Rights ("ICCPR") has been ratified by and is therefore binding on all ECOWAS states, protect these rights. ECOWAS states are not only bound as a matter of international law by the provisions of the ICCPR, but are obliged to give effect to the treaty through national implementing measures including legislation and judicial decisions.[20] Moreover, as members of the African Union, all ECOWAS states are bound by the African Charter on Human and Peoples' Rights, which includes provisions on freedom of expression and freedom of information.[21] Whilst the next part examines the content of these international obligations in further detail, as well as those of regional and comparative human rights law, it is important to emphasise here that the international community has long recognised that freedom of information is a fundamental human right that is crucial to the protection of other rights,[22] and that freedom of expression embraces a right of access to information held by public bodies.[23]

Fifth, the **protection of freedom of expression and freedom of information clearly comes within the scope of the legal competence of ECOWAS and its institutions**. Although the principal aim of ECOWAS concerns the promotion of integration in the economic sphere, it is notable that the Treaty of ECOWAS includes provisions on cooperation in political, judicial and legal affairs, regional security and immigration (Chapter X), as well as human resources, information, and social and cultural affairs (Chapter XI).[24] In 2001, ECOWAS adopted a protocol on Democracy and Good Governance which guarantees freedom of the press and access to information among other fundamental rights.[25] In 2010, it adopted a Supplementary Act on protecting personal data which gives individuals the right to access their own records held by public and private bodies.[26] There is also the Community Court of Justice of ECOWAS, which has jurisdiction to hear cases concerning human rights violations in any member state and adjudicate on the basis of international human rights instruments "ratified by the State or States party to the case".[27] It is interesting to note that in 2010 this court ordered the Gambian state to pay compensation to a journalist who was detained and

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[16] Law No 20.285 on Access to Information published in Official Gazette on 20 August 2008.
[17] The principle of public access to information has been established in Sweden since the 1766 Freedom of Press Act.
[18] Law 47 of 2007 on Access to Information.
[19] The others are: South Africa, Uganda, Ethiopia, Tunisia, Angola and Zimbabwe.
[20] Articles 2(1)(b), 14(1) and 16, Vienna Convention on the Law of Treaties 1969.
[21] Mali and Guinea Bissau were suspended in 2012. See "African Union Suspends Mali Over Coup", 23 March 2012, http://www.aljazeera.com/news/africa/2012/03/2012323134643629717.html, and "Guinea Bissau suspended from African Union", http://www.aljazeera.com/news/africa/2012/04/20124171148930754.html.
[22] As the UN General Assembly indicated at its first session in 1946: "Freedom of information is a fundamental human right and … the touchstone of all the freedoms to which the UN is consecrated". UN GA Res 59/1 14 December 1946.
[23] Human Rights Committee, General Comment No 34, Freedoms of Opinion and Expression (Article 19), CCPR/C/GC/34, 12 September 2011, paras 18-19. See also *Toktakunov v Kyrgyzstan*, Communication No. 1470/2006, CCPR/C/101/D/1470/2006, 21 April 2011.
[24] Adopted 24 July 1993, http://www.comm.ecowas.int/sec/index.php?id=treaty&lang=en.
[25] Protocol A/SP1/12/01 on Democracy and Good Governance, 21 December 2001.
[26] Supplementary Act A/SA.1/01/10 on Personal Data Protection within ECOWAS, 16 February 2010.
[27] See http://www.courtecowas.org/site/index.php?lang=en.

tortured for three weeks.[28] Moreover, the activities of the ECOWAS Commission cover a broader range of political, social and developmental issues, including in the areas of children, civil society, culture, education and training, environment, defence and security, gender issues, humanitarian matters and water.[29] The ECOWAS Commission has recently developed specific positions on such matters as the aggravating food crisis in West Africa (June 2012),[30] and attempts "to create a so-called 'Islamic State of Azawad'" and "to disrupt the political process" in Mali.[31]

[28] See Committee To Protect Journalists, "ECOWAS court orders Gambia to pay tortured journalist", 17 December 2010, http://www.cpj.org/2010/12/ecowas-court-orders-gambia-to-compensate-tortured.php.
[29] See generally the ECOWAS Commission's website for a list of the activities: http://www.ecowas.int/.
[30] The ECOWAS Commission, Press Release 158/2012, 6 June 2012, http://news.ecowas.int/presseshow.php?nb=158&lang=en&annee=2012.
[31] "Statement by the President of the ECOWAS Commission on the continued attempts by some political forces in Mali to disrupt the political process", 28 May 2012, http://www.ecowas.int/publications/en/statement/mali28052012.pdf; "Statement by the President of the ECOWAS Commission on the attempt to create a so-called 'Islamic State of Azawad' in Northern Mali", 28 May 2012, http://www.ecowas.int/publications/en/statement/mali28052012bis.pdf.

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4. International, regional & comparative law

International law

International Covenant on Civil and Political Rights

The right to freedom of expression and freedom of information is protected by a number of international human rights instruments that bind states, including as indicated above, all ECOWAS states. Article 19 of the **Universal Declaration of Human Rights** ("UDHR") guarantees the right to freedom of expression in the following terms:

> Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive, and impart information and ideas through any media and regardless of frontiers.[32]

The UDHR, as a UN General Assembly Resolution, is not directly binding on states. Nevertheless, parts of it, including Article 19, are regarded as having acquired legal force as customary international law.[33] The **International Covenant on Civil and Political Rights** ("ICCPR") elaborates upon and gives legal force to many of the rights articulated in the UDHR. As of June 2012, the ICCPR has 167 states parties who are required to respect its provisions and implement its framework at the national level.[34] Significantly, all member states of ECOWAS have acceded or ratified the ICCPR, which means that they are legally bound to give effect to the treaty through domestic law and policies.[35]

Article 19 of the ICCPR guarantees freedom of expression and freedom of information as follows:

> 1. Everyone shall have the right to hold opinions without interference.
>
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
>
> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others;
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.

[32] UN General Assembly Resolution 217A(III), adopted 10 December 1948.
[33] *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir., 1980) (US Circuit Court of Appeals).
[34] Article 2 of the ICCPR, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966); 999 UNTS 171; 6 ILM 368 (1967).
[35] Adopted 16 December 1966, entered into force 23 March 1976. The dates for the accession or ratification of states to the ICCPR are as follows: Benin, 12 March 1992; Burkina Faso, 4 January 1999; Cape Verde, 6 August 1993; Cote D'Ivoire, 26 March 1992; Gambia, 22 March 1979; Ghana, 7 September 2000; Guinea, 24 January 1978; Guinea Bissau, 1 November 2010; Liberia, 22 September 2004; Mali, 16 July 1974; Niger, 7 March 1986; Nigeria, 29 July 1993; Senegal, 13 February 1978; Sierra Leone, 23 August 1996; Togo, 24 May 1994.

As recently and expressly confirmed by the Human Rights Committee, Article 19(2) embraces a right of access to information held by public bodies.[36]

Other international instruments

In addition, a number of other international human rights instruments protect freedom of expression and freedom of information. The **Convention on the Rights of Persons with Disabilities** of 2006 ("CRPD"),[37] which has been ratified by 113 states parties, including a majority of ECOWAS member states, includes a justifiably detailed provision on freedom of expression and freedom of information. Nine ECOWAS member states have ratified the CRPD,[38] four have signed the CRPD without ratifying it[39] and two - Gambia and Guinea Bissau – have not signed it.

Article 21 of the CRPD states that:

> States Parties shall take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice, as defined in article 2 of the present Convention, including by:
>
> (a) Providing information intended for the general public to persons with disabilities in accessible formats and technologies appropriate to different kinds of disabilities in a timely manner and without additional cost;
> (b) Accepting and facilitating the use of sign languages, Braille, augmentative and alternative communication, and all other accessible means, modes and formats of communication of their choice by persons with disabilities in official interactions;
> (c) Urging private entities that provide services to the general public, including through the Internet, to provide information and services in accessible and usable formats for persons with disabilities;
> (d) Encouraging the mass media, including providers of information through the Internet, to make their services accessible to persons with disabilities;
> (e) Recognizing and promoting the use of sign languages.

The **Convention on the Rights of the Child** ("CRC"),[40] which has been ratified by 193 states parties, including all ECOWAS states, protects the freedom of expression and freedom of information of children in similar terms to Article 19 of the ICCPR.[41] Article 13 of the CRC states:

> 1. The child 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 the child's choice.
>
> 2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

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[36] Human Rights Committee, General Comment No 34, Freedoms of Opinion and Expression (Article 19), CCPR/C/GC/34, 12 September 2011, pp 18-19.
[37] Adopted 13 December 2006. Entry into force 3 May 2008.
[38] Burkina Faso on 23 July 2009; Cape Verde on 10 October 2011; Guinea on 8 February 2008; Mali on 7 April 2008; Niger on 24 June 2008; Nigeria on 24 September 2010; Senegal on 7 September 2010; Sierra Leone on 4 October 2010; Togo on 1 March 2011.
[39] Benin on 8 February 2008; Cote D'Ivoire on 7 June 2007; Ghana on 30 March 2007; Liberia on 30 March 2007.
[40] Adopted 20 November 1989. Entry into force 2 September 1990.
[41] All ECOWAS states have ratified the CRC. Benin on 3 August 1990; Burkina Faso on 31 August 1990; Cape Verde on 4 June 1992; Cote D'Ivoire on 4 February 1991; Gambia on 8 August 1990; Ghana on 5 February 1990; Guinea on 13 July 1990; Guinea Bissau on 20 August 1990; Liberia on 4 June 1993; Mali on 20 September 1990; Niger on 30 September 1990; Nigeria on 19 April 1991; Senegal on 31 July 1990; Sierra Leone on 18 June 1990; Togo on 1 August 1990.

(a) For respect of the rights or reputations of others; or
(b) For the protection of national security or of public order (ordre public), or of public health or morals.

Twelve of the fifteen ECOWAS states have also ratified the UN **Convention Against Corruption** ("UNCAC"), which clearly requires states to ensure that the public has effective access to information as well as protection of whistleblowers;[42] two others have signed and only Gambia has not signed.[43] With the exception of Cape Verde, all 14 ECOWAS States have also ratified the **African Union Convention on Preventing and Combating Corruption** which states the importance of access to information.[44]

Regional instruments

ECOWAS

Although it does not have specific provisions on freedom of expression and freedom of information, it is important to note that the **ECOWAS Treaty** does have particular provisions on information, radio and television (Article 65) and the press (Article 66), which are relevant to the analysis of the Draft Supplementary Act.

Article 65 on information, radio and television obliges member states to:

(a) co-ordinate their efforts and pool their resources in order to promote the exchange of radio and television programmes at bilateral and regional levels;

(b) encourage the establishment of programme exchange centres at regional level and strengthen existing programme exchange centres;

(c) use their broadcasting and television systems to promote the attainment of the objectives of the Community.

Article 66 on the press states that:

1. In order to involve more closely the citizens of the Community in the regional integration process, Member States agree to co-operate in the area of information.

2. To this end they undertake as follows:

(a) to maintain within their borders, and between one another, freedom of access for professionals of the communication industry and for information sources;
(b) to facilitate exchange of information between their press organs; to promote and foster effective dissemination of information within the Community;
(c) to ensure respect for the rights of journalists;
(d) to take measures to encourage investment capital, both public and private, in the communication industries in Member States;
(e) to modernise the media by introducing training facilities for new information techniques; and

[42] Article 13, UNCAC, UN GA Resolution 58/4, 31 October 2003. The following ECOWAS states have ratified the UNCAC: Benin on 14 October 2004; Burkina Faso on 10 October 2006; Cape Verde on 23 April 2008; Ghana on 27 June 2007; Guinea Bissau on 10 September 2007; Liberia on 16 September 2005; Mali on 18 April 2008; Niger on 11 August 2008; Nigeria on 14 December 2004; Senegal on 16 November 2005; Sierra Leone on 30 September 2004; and Togo on 6 July 2005.
[43] Cote D'Ivoire and Guinea signed the UNCAC on 10 December 2003 and on 15 July 2005 respectively.
[44] Article 9 of the AU convention http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/Convention%20on%20Combating%20Corruption.pdf

(f) to promote and encourage dissemination of information in indigenous languages, strengthening co-operation between national press agencies and developing linkages between them.

As noted above, the **Supplementary Act A/SA.1/01/10 on Personal Data Protection within ECOWAS** gives individuals a right of information to their own personal information held by public or private bodies and how it has been used and transferred.[45] It also gives them rights to correct and control the use of that information by 3rd parties. At the same time, it specifically recognises the free expression rights of journalists, artists and others to use personal data in compliance with the ethical rules of their professions.[46]

African Union

All ECOWAS member states are also members of the African Union,[47] and as such signatory to the principal human rights instrument for the African continent, the **African Charter on Human and Peoples' Rights** ("ACHPR"), which is legally binding on them.[48] Article 9 of the ACHPR guarantees freedom of expression in the following terms:

1. Every individual shall have the right to receive information.
2. Every individual shall have the right to express and disseminate his opinions within the law.

The **Declaration of Principles on Freedom of Expression in Africa** ("African Declaration"), adopted by the African Commission on Human and Peoples' Rights in 2002,[49] affirms in Article II that:

1. No one shall be subject to arbitrary interference with his or her freedom of expression.
2. Any restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary and in a democratic society.

Article XII of the African Declaration, which deals with the protection of reputation, stipulates that:

1. States should ensure that their laws relating to defamation conform to the following standards:
   - No one shall be found liable for true statements, opinions or statements regarding public figures which it was reasonable to make in the circumstances;
   - Public figures shall be required to tolerate a greater degree of criticism; and
   - Sanctions shall never be so severe as to inhibit the right to freedom of expression, including by others.
2. Privacy laws shall not inhibit the dissemination of information of public interest.

Similarly, Article XIII on criminal measures mandates states to review all criminal restrictions on content to ensure that they serve a legitimate interest in a democratic society. It also further affirms that freedom of expression should 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.

The African Declaration also extensively addresses the right to access to information. In Part IV, the Declaration mandates that public bodies hold information not for themselves but as

[45] Supplementary Act A/SA.1/01/10 on Personal Data Protection within ECOWAS, ibid, Articles 38-41 .
[46] *ibid,* Article 32.
[47] For the list of member states, see http://www.au.int/en/member_states/countryprofiles.
[48] Adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), and entered into force Oct. 21, 1986.
[49] Adopted at the 32nd Session of the African Commission on Human and Peoples' Rights, 17-23 October 2002.

custodians of the public good and that everyone has a right to access this information, subject only to clearly defined rules established by law. The African Declaration further specifies the right to information principles in the following terms:

- everyone has the right to access information held by public bodies;
- everyone has the right to access information held by private bodies which is necessary for the exercise or protection of any right;
- any refusal to disclose information shall be subject to appeal to an independent body and/or the courts;
- public bodies shall be required, even in the absence of a request, actively to publish important information of significant public interest;
- no one shall be subject to any sanction for releasing in good faith information on wrongdoing, or that which would disclose a serious threat to health, safety or the environment save where the imposition of sanctions serves a legitimate interest and is necessary in a democratic society; and
- secrecy laws shall be amended as necessary to comply with freedom of information principles.

There have also been a number of significant NGO-led initiatives that have received backing from international and regional special procedures on freedom of expression and freedom of information. Notably, the African Platform on Access to Information (APAI), which was developed by groups across Africa including ARTICLE 19, has been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression and the Special Rapporteur on Freedom of Expression and Access to Information of the African Commission on Human and Peoples' Rights.[50] There is also a "Draft Model Law for AU Member States on Access to Information", which has been prepared by the Special Rapporteur on Freedom of Expression and Access to Information in Africa, that is currently under discussion.[51]

Other regional standards

Freedom of expression and freedom of information are also protected by other regional human rights instruments, such as the American Convention on Human Rights and the European Convention on Human Rights, which are obviously not binding in the ECOWAS region but may nevertheless provide inspiration to the ECOWAS drafters of the Draft Supplementary Act. The right to freedom of expression enjoys a prominent status in each of these regional conventions and the norms and principles deriving from these systems (through the judgments of and decisions issued by courts under these regional mechanisms) offer an authoritative interpretation of freedom of expression principles in various different contexts.

Article 13 of **the American Convention on Human Rights** ("ACHR")[52] protects freedom of expression in the following terms:

[50] Adopted September 2011, see: http://www.pacaia.org/images/pdf/apai%20final.pdf. These principles provide guidance to African states on the right to freedom of information including the importance of battling corruption, protecting whistleblowers, promoting unhindered access to Information Communication Technologies and access to electoral information.
[51] This has been prepared under the auspices of the Special Rapporteur on Freedom of Expression and Access to Information in Africa in partnership with The Centre for Human Rights, University of Pretoria. See http://www.chr.up.ac.za/images/files/news/news_2011/draft_model_law_access_info.pdf.

[52] American Convention on Human Rights, adopted on 22 November 1969, and in force 18 July 1978. As of 20 January 2012, 24 of the OAS' 35 member states had ratified the ACHR.

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.

2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:

   a. respect for the rights or reputations of others; or
   b. the protection of national security, public order, or public health or morals.

3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.

4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.

5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.

As cited above, the Inter-American Court of Human Rights has described freedom of expression as "a cornerstone upon which the very existence of a democratic society rests."[53] Furthermore, setting a landmark global precedent, the Court held in 2006 that the general guarantee of freedom of expression contained in Article 13 of the ACHR protects freedom of information held by public bodies.[54]

Article 10 of the **European Convention on Human Rights** ("ECHR")[55] protects freedom of expression. It is binding on all 47 Members of the Council of Europe who are obliged to give effect to the ECHR in their domestic legal orders. It states that:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The European Court of Human Rights ("European Court") has built up over the years a rich and instructive jurisprudence under Article 10 of the ECHR. The European Court has

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[53] *Ibid*, footnote 12.
[54] In *Claude Reyes et al v Chile*, the Inter-American Court stated that Article 13 of the ACHR "encompasses the right of individuals to receive ... information and the positive obligation of the State to provide it, in such form that the person can have access in order to know the information or receive a motivated answer when for a reason recognised in the Convention, the State may limit the access to it in the particular case." This remains an extremely important decision and showed the Inter-American Court leading the way for other regional human rights courts on the recognition of the right to information. *Claude Reyes et al v Chile* Judgement of the Inter-American Court of Human Rights of 19 September 2006 Series C.
[55] European Convention on Human Rights, adopted 4 November 1950, and in force 3 September 1953.

elaborated on the importance of freedom of expression on numerous occasions, stating in a seminal judgment that:

> Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".[56]

The European Court has also consistently emphasised the "pre-eminent role of the press in a state governed by the rule of law". The media as a whole merit special protection in part because of their role in making public "information and ideas on matters of public interest. Not only does [the press] have the task of imparting such information and ideas: the public also has the right to receive them. Were it otherwise, the press would be unable to play its vital role of 'public watchdog'".[57]

In 2009, the European Court recognised that when public bodies already hold information that is needed for public debate, the refusal to provide it to those who are seeking it is a violation of the right to freedom of expression and information as protected by Article 10 of the ECHR.[58]

In June 2009, the Council of Europe also adopted the **Convention on Access to Official Documents**, the first regional treaty devoted to access to information.[59]

Within the EU, Article 11 of the **EU Charter of Fundamental Rights**,[60] which has binding legal effect equal to that of the EU Treaties, protects the freedom of expression and freedom of information in the following terms:

> Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
>
> The freedom and pluralism of the media shall be respected.

The **Arab Charter on Human Rights** ("Arab Charter"), which was adopted by the Council of the League of Arab States in 2004, purports to affirm the principles of the UDHR and ICCPR, as well as the International Covenant on Economic, Social and Cultural Rights (ICESCR), the UN Charter and the Cairo Declaration on Human Rights in Islam.[61] Although the Arab Charter provides less robust protections for certain fundamental rights, Article 32 of the Revised Arab Charter protects freedom of expression in the following terms:

1. The present Charter guarantees the right to information and to freedom of opinion and expression, as well as the right to seek, receive and impart information and ideas through any medium, regardless of geographical boundaries.
2. Such rights and freedoms shall be exercised in conformity with the fundamental values of society and shall be subject only to such limitations as are required to ensure respect for the

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[56] *Handyside v. United Kingdom*, Application No 5493/72, judgment of 7 December 1976, Series A no 24, 1 EHRR 737.
[57] *Thorgeirsen v Iceland*, 25 June 1992, Application No 13778, para 63.
[58] *Társaság a Szabadságjogokért v. Hungary*, Application No 37374/05, 14 April 2009.
[59] As of 20 January 2012, the Convention on Access to Official Documents has been ratified by 3 states (Norway, Sweden and Hungary) and signed by 11. It requires 10 ratifications to come into legal effect.
[60] EU Charter of Fundamental Rights (2000/C 364/01).
[61] League of Arab States, Arab Charter on Human Rights, 22 May 2004. Entered into force 15 March 2008.

> rights or reputation of others or the protection of national security, public order and public health or morals.

In addition, Article 42 protects the right to scientific and artistic research and creative activity, and the right to take part in cultural life. Importantly, Article 24 now guarantees the rights to political participation, including the freedom to pursue political activity, to form and join associations with others and to freedom of assembly.[62] It is significant that even this controversial text protects in express terms the right to freedom of expression and freedom of information.

The foregoing discussion of international and regional human rights law indicates that on the right to freedom of expression and freedom of information there is a wealth of treaty law, which is formally binding on states, as well as an increasing amount of "soft law", which is formally not binding, but has persuasive value. The most important international treaty law on the issue of freedom of expression and freedom of information – for all states, including those in West Africa - is Article 19 of the ICCPR.

Comparative Constitutional Law

In finalising the Draft Supplementary Act for the region, ECOWAS may be also assisted by constitutional practices from around the world in addition to the international and regional human rights standards which were considered in the previous part. Two progressive comparative constitutional law examples from within the African continent are highlighted here.

The recent Constitution of Kenya, which was promulgated on 27 August 2010, is the most recent example of a constitution which reflects an attempt to protect freedom of expression and freedom of information in a comprehensive manner. It was welcomed by international figures after a highly participatory drafting process, which brought together a broad array of stakeholders and civil society organisations.[63] It has relatively elaborate – and broadly progressive – provisions on freedom of expression, media freedom and access to information.

> Article 33. Freedom of expression
>
> (1) Every person has the right to freedom of expression which includes –
> a. Freedom to seek, receive or impart information or ideas;
> b. Freedom of artistic creativity; and
> c. Academic freedom and freedom of scientific research.
>
> (2) The right to freedom of expression does not extend to –
> a. Propaganda for war;
> b. Incitement to violence;
> c. Hate speech; or
> d. Advocacy of hatred that –
> i. Constitutes ethnic incitement, vilification of others or incitement to cause harm; or
> ii. Is based on any ground of discrimination specified or contemplated in Article 27(4).
>
> (3) In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.

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[62] Ibid.
[63] "Clinton, Experts Laud Kenya Constitution Reform Process", 8 December 2009, http://www.america.gov/st/democracyhr-english/2009/December/200912081350591EJrehsiF6.330073e-02.html?CP.rss=true.

Article 34. Freedom of the Media

(1) Freedom and independence of electronic media, print and all other types of media is guaranteed, but does not extend to any expression specified in Article 33(2).

(2) The State shall not –
   a. Exercise control over or interfere with any person engaged in broadcasting, the production or circulation of any publication or the dissemination of information by any medium; or
   b. Penalise any person for any opinion or view or the content of any broadcast, publication or dissemination.

(3) Broadcasting and other electronic media have freedom of establishment, subject only to licensing procedures that –
   a. Are necessary to regulate the airwaves and other forms of signal distribution; and
   b. Are independent of control by government, political interests or commercial interests.

(4) All State-owned media shall –
   a. Be free to determine independently the editorial content of their broadcasts or other communications;
   b. Be impartial; and
   c. Afford fair opportunity for the presentation of divergent views and dissenting opinions.

(5) Parliament shall enact legislation that provides for the establishment, which shall
   a. Be independent of control by the government, political interests or commercial interests;
   b. Reflect the interests of all sections of the society; and
   c. Set media standards and regulate and monitor compliance with those standards.

Perhaps the most comprehensive and highly praised of all modern constitutions is the South African Constitution, which includes a section entitled "Bill of Rights", detailing the protection of freedom of expression including freedom of information.

Constitution of South Africa (Bill of Rights), 1996

Article 16. Freedom of expression

(1) Everyone has the right to freedom of expression, which includes
   a. freedom of the press and other media;
   b. freedom to receive or impart information or ideas;
   c. freedom of artistic creativity; and
   d. academic freedom and freedom of scientific research.

(2) The right in subsection (1) does not extend to
   a. propaganda for war;
   b. incitement of imminent violence; or
   c. advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

5. Guarantee of freedom of expression

Scope of freedom of expression and freedom of information

There are a number of positive elements to the guarantee of "freedom of expression and information" in Article 1 of the Draft Supplementary Act. Reflecting the universality of human rights and all international human rights instruments, Article 1(1) defines "freedom of expression and information" as a "fundamental human and inalienable right to which all persons are entitled and is an indispensable condition for democracy".[64] The wording of the provision also echoes Article 19 of the ICCPR specifically in defining the modes of expression covered by freedom of expression and freedom of information broadly. Article 1 (1) covers the right to seek, receive and impart information and ideas "either orally or in writing or in print, in the form of art or signs and symbols and through other forms of media of mass communication... across all frontiers". "New information and communication technologies", which are deemed to be included within Article 19 of the ICCPR by the Human Rights Committee, are also covered by Article 1(1).[65] Furthermore, the non-discrimination provision in Article 1(2) of the Draft Supplementary Act, which states that States Parties "shall endeavour to provide adequate facilities for persons living with disability to exercise fully these fundamental rights", is also to be welcomed.

Nonetheless, the scope of freedom of expression and freedom of information in Article 1 displays a number of shortfalls.

First, Article 1 both addresses freedom of expression and freedom of information, but also pays particular attention to media freedom, which may be viewed as confusing and distracting from the overarching human right. Article 1's title, "the right to freedom of expression and independence of the media", appears odd given that the scope of the right applies to everyone, not only the media. Article 1(4) then guarantees "freedom and independence of the mass media", and Article 1(6) protects the "editorial independence and integrity of the media whether private or public". These specific references to media freedom, whilst in themselves positive, may arguably be better placed elsewhere in the Draft Supplementary Act.

Second, the guarantee in Article 1 does not appear to cover the right to hold opinions as well as expression generally. Unlike the right to freedom of expression and freedom of information, the right to hold opinions is an absolute right under international law, in recognition of the illegitimacy of the state trying to either prohibit certain opinions or to force individuals to adopt certain opinions. Article 19 of the ICCPR protects all forms of opinion and General Comment No 34 of the Human Rights Committee emphasises this:

> 9. This is a right to which the Covenant permits no exception or restriction. Freedom of opinion extends to the right to change an opinion whenever and for whatever reason a person so freely

[64] Article 2 of the ICCPR requires a state to ensure respect for the rights guaranteed by it for all persons "within its territory and subject to its jurisdiction", without distinction of any kind, including on the basis of national origin. Therefore, the rights contained in the ICCPR, including under Article 19, apply to all persons physically within the territory of the state, as well as to persons under its jurisdiction (e.g. on a state-owned vessel or on a piece of territory which is under the effective control of the state although not belonging to it).

[65] The Human Rights Committee has stated that the means of expression includes "all forms of audio-visual as well as electronic and internet-based modes of expression". See Human Rights Committee, General Comment No 34, Freedoms of Opinion and Expression (Article 19), CCPR/C/GC/34, 12 September 2011, paras 11-12.

> chooses. No person may be subject to the impairment of any rights under the Covenant on the basis of his or her actual, perceived or supposed opinions. All forms of opinion are protected, including opinions of a political, scientific, historic, moral or religious nature. It is incompatible with paragraph 1 to criminalize the holding of an opinion.[66] The harassment, intimidation or stigmatization of a person, including arrest, detention, trial or impairment of the opinions they may hold, constitutes a violation of article 19, paragraph 1.[67]
>
> 10. Any form of effort to coerce the holding or not holding of any opinion is prohibited.[68] Freedom to express one's opinion necessarily includes freedom not to express one's opinion.

Third, the scope of the right to freedom of expression contained in Article 1 is more limited than in international law. While Article 19 of the ICCPR indicates that the right covers "information and ideas of *all* kinds", the Draft Supplementary Act only covers "information and ideas".[69]

Permissible limitations

The regime for permissible limitations to the right to freedom of expression contained in the Draft Supplementary Act is confusingly stated and does not accord with international or regional human rights standards. According to Article 1(7), any restriction on freedom of expression should be "provided by law", "correspond to a necessary and legitimate purpose in protecting the rights of the individual or the public interest sufficiently pressing to outweigh the public interest in, and fundamental importance of, freedom of expression in a democracy", and "be proportionate to the legitimate aim pursued or sought to be protected". Article 1(5) also states that "there shall be no censorship and no one shall be subject to arbitrary interference with his or her right to freedom of expression."

Article 19(3) of the ICCPR permits the right to be restricted more clearly and in the following terms:

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

Thus, restrictions on the right to freedom of expression and freedom of information must be strictly and narrowly tailored and may not put into jeopardy the right itself. In order to determine whether a restriction is sufficiently narrowly tailored, the criteria of Article 19(3) of the ICCPR need to be applied. Any restrictions on freedom of expression or freedom of information must: *first* be prescribed by law; *second*, pursue a legitimate aim, such as respect of the rights or reputations of others, protection of national security, public order, public health or morals; and *third*, be necessary to secure the legitimate aim and meet the test of proportionality.[70] It is important to note that this same test is incorporated in all regional human rights treaties,[71] and applied by international and regional human rights bodies.[72]

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[66] Communication No 550/93, *Faurisson v France*. Views adopted on 8 November 1996.

[67] See Communication No 157/1983, *Mpaka-Nsusu v Zaire*. Views adopted on 26 March 1986. No 414/1996, *Mika Miha v Equatorial Guinea*. Views adopted on 8 July 1994.

[68] See Communication No 878/1999, *Kang v Republic of Korea*. Views adopted on 15 July 2003.

[69] See also *Handyside v United Kingdom*, Application No 5493/72,European Court of Human Rights, judgment of 7 December 1976, para 49.

[70] See Communication No 1022/2001, *Velichin v Belarus*. Views adopted on 20 October 2005.

[71] For example, see Article 13(2) of the ACHR or Article 10(2) of the ECHR.

The meaning of these three parts of the test according to international authorities is elaborated upon here to provide guidance for ECOWAS institutions and member states in the interpretation of the Draft Supplementary Act after it is adopted.

Provided by law

Article 19(3) requires that restrictions on the right to freedom of expression and freedom of information must be prescribed by law. This requires a normative assessment; to be characterised as a law, a norm must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly.[73] Ambiguous, vague, or overly broad restrictions on freedom of expression or freedom of information, which fail to set the exact scope of their application, are therefore impermissible under Article 19(3).

General Comment No 34 further provides that, for the purpose of Article 19(3), a law may not confer unfettered discretion for restricting freedom of expression on those charged with executing that law.[74] Laws must provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not. The requirement that the law be sufficiently precise for this purpose is closely related to the requirements of necessity and proportionality. It ensures that restrictions on freedom of expression are only employed for legitimate protective objectives, and limits the opportunities for those restrictions to be manipulated for other purposes.

The "provided by law" part of the test for restrictions also means that laws should not grant authorities excessively broad discretionary powers to limit expression. This would again undermine one of the main purposes of this limitation on restrictions. The UN Human Rights Committee has repeatedly expressed concern about excessive official discretion in the context of media regulation.[75]

Legitimate aim

Interferences with the right to freedom of expression must pursue a legitimate protective aim, as exhaustively enumerated in Article 19(3)(a) and (b) of the ICCPR. Legitimate aims are those that protect the human rights of others, protect national security or public order, or protect public health and morals.[76] As such, it would be impermissible to prohibit expression or information solely on the basis that it casts a critical view of the government or the political social system espoused by the government.[77] Nor would it be permissible to achieve such illegitimate objectives through a reliance on Article 19(3) that is merely pre-textual. Where a state does limit freedom of expression, the burden is on that state to show a direct or immediate connection between that expression and the legitimate ground for the restriction.

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[72] See, for example, the European Court of Human Rights in the case of *The Sunday Times v UK*, Application No 6538/7426, judgment of April 1979, para 45.

[73] *Leonardus J.M. de Groot v The Netherlands*, No. 578/1994, CCPR/C/54/D/578/1994 (1995).

[74] Ibid.

[75] See *Re Ontario Film and Video Appreciation Society v. Ontario Board of Censors* (1983) 31 O.R. (2d) 583 (Ont. H.C.), where the Ontario High Court struck down a law giving film censors wide powers to approve or deny films.

[76] In the context of national security, the Johannesburg Principles on National Security, Freedom of Expression and Access to Information (Johannesburg Principles), a set of international standards developed by ARTICLE 19 and international freedom of expression experts, are instructive on restrictions on freedom of expression that seek to protect national security. These Principles, which were adopted on 1 October 1995, have been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression and have been referred to by the United Nations Commission on Human Rights in each of their annual resolutions on freedom of expression since 1996.

[77] Concluding observations of the Human Rights Committee on the Syrian Arab Republic CCPR/CO/84/SYR.

General Comment No 34 notes that extreme care must be taken in crafting and applying laws that purport to restrict expression to protect national security. Whether characterised as treason laws, official secrets laws, or sedition laws, they must conform to the strict requirements of Article 19(3). General Comment No 34 provides further guidance for laws that restrict expression with the purported purpose of protecting morals. Such purposes must not be based on principles deriving exclusively from a single tradition; instead they should be understood in the context of the universality of human rights and the principle of non-discrimination.[78] It would therefore be incompatible with the ICCPR, for example, to privilege one particular religious view or historical perspective.

Necessity

States party to the ICCPR are obliged to ensure that the legitimate restrictions on the right to freedom of expression are necessary and proportionate. This part of the test is the most critical element, and the basis upon which the vast majority of international and national cases are decided. Necessity requires that there must be a pressing social need for the restriction. The party invoking the restriction must show a direct and immediate connection between the expression and the protected interest. Proportionality requires that a restriction on expression is not over-broad, and that it is appropriate to achieve its protective function. It must be shown that the restriction is specific and individual to attaining that protective outcome, and is no more intrusive than other instruments capable of achieving the same limited result.

Courts around the world have elaborated on the specific requirements of this test. Three distinct elements can be discerned. *First*, the measures taken must be carefully designed to meet the objective in question. They should not be arbitrary, unfair or irrational.[79] If a government cannot provide any evidence to show that a particular interference with freedom of expression is necessary, the restriction will fail on this ground.[80] While states may, and should, protect various public and private interests, measures taken by them must be carefully designed so that they are effective in protecting those interests. It is a very serious matter to restrict a fundamental right, and when considering doing so, states are bound to reflect carefully on the various options open to them.[81]

Second, the interference should be designed to impair the right to freedom of expression "as little as possible".[82] If there are various options to protect a legitimate interest, then the one which least restricts the protected right must be selected.[83] In applying this rule, courts have recognised that there may be practical limits on how finely honed and precise a legal measure may be. But, subject only to such practical limits, restrictions must not be overbroad.

Third, there must be proportionality between the harm caused by the measures taken to restrict freedom of expression and the benefit of the legitimate aim. In particular, the harm to freedom of expression must not outweigh the benefits in terms of the interest protected. A

[78] *Supra* General Comment 34.
[79] See *R. v. Oakes* (1986), 1 SCR 103, pp. 138-139 (Supreme Court of Canada).
[80] See, for example, *Autronic v Switzerland* (22 May 1990, Application No. 12726/87, European Court of Human Rights) where the respondent state argued that it needed to restrict the availability of satellite dishes in order to protect confidential satellite communications but could not provide any evidence that these signals could be picked up with ordinary satellite dishes.
[81] For example, in *Observer and Guardian v the United Kingdom*, note 47, the European Court of Human Rights found a violation of the newspapers' right to freedom of expression because the respondent government could have pursued other less intrusive options and still achieved the same result.
[82] *R. v. Big M Drug Mart Ltd.*, note 99, p. 352 (Supreme Court of Canada).
[83] See the judgment of the Inter-American Court of Human Rights in Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, note 26, para. 46.

restriction that provided limited protection to reputation but which seriously undermined freedom of expression, for example, would not pass this test.[84] Democratic societies depend on the free flow of information and ideas, and it is only when the overall public interest is served by restricting that flow that such a restriction can be justified. This implies that, for a restriction to be justified, its benefits must outweigh its costs.

Recommendations:

- **The Draft Supplementary Act should clearly distinguish the right to freedom of expression and freedom of information from freedom of the media.**
- **The right to hold opinions without restriction should be specifically protected within the Draft Supplementary Act.**
- **The Draft Supplementary Act should define freedom of expression broadly to include the right to seek, receive and impart information and ideas of all kinds, to cover all types of expression and modes of communication, and to grant this right to every person.**
- **The Draft Supplementary Act should indicate that there may be restrictions imposed on freedom of expression if these are provided by law and are necessary: (a) for the respect of the rights or reputations of others; or (b) for the protection of national security or of public order (*ordre public*), or of public health or morals.**

[84] See, for example, *Open Door Counseling and Dublin Woman Well Centre and Others v. Ireland*, 29 October 1992, Application No. 1423/88 and 142335/88 (European Court of Human Rights), para 73.

6. Civil and criminal defamation and other offences

A number of provisions in the Draft Supplementary Act deal with issues concerning the protection of freedom of expression in the context of protection of reputation. Notably, Article 2(3) affirms the rights of individuals to have their reputation and privacy protected.

Criminal defamation

The Draft Supplementary Act appears to prohibit the criminalisation of defamation and libel, as well as sedition, "false news" and insult. Article 2(2) states that there "shall be no criminal sanctions, be they fines or terms of imprisonment for mere expression, and in particular the offence of: (a) Sedition; (b) False news; (c) Insult laws; (d) Criminal defamation/libel, including the offense against the president or of defaming the president or other high public officials, is inconsistent with the right to freedom of expression and the essential values of a democratic and tolerant society". Moreover, the Draft Supplementary Act proscribes the "procedure of preventive detention and flagrante delicto" for press offences.

The obligations that the Draft Supplementary Act imposes on states to ensure that defamation and the other aforementioned offences are not criminal offences are positive and supported by Article 19 of the ICCPR, as interpreted by the Human Rights Committee in General Comment No 34.[85] This is in addition to regional standards on freedom of expression in Africa,[86] and the opinion of international human rights experts. In a Joint Declaration in 2002, the OAS Special Rapporteur on Freedom of Expression, the OSCE Special Representative on Freedom of the Media and the UN Special Rapporteur on Freedom of Opinion and Expression indicated: "Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws."[87] The African Commission on Human and Peoples' Rights reiterated this in a resolution on repealing of criminal defamation laws in Africa in 2010[88]

Other offences

Article 2(1) states that expression "that interferes with the right to fair trial or the integrity of the judicial process; is likely to cause a real risk to national security; incites people to violence; xenophobia; ethnic or racial hatred and violence may be subject to criminal sanctions where: (a) the publisher acted in bad faith knowing the publication to be false or reckless whether it be true or false; (b) there is a direct causal link between the threatened harm and the expression; So however that the penalty shall be proportionate to the harm

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[85] The Human Rights Committee has stated that: "states parties should consider the decriminalization of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty." Human Rights Committee, General Comment No 34, Freedoms of Opinion and Expression (Article 19), CCPR/C/GC/34, 12 September 2011, para 47.

[86] Declaration of Principles on Freedom of Expression in Africa, adopted at the 32nd Session of the African Commission on Human and Peoples' Rights, 17-23 October 2002, Principle XII.

[87] Joint Declaration of UN Special Rapporteur on Freedom of Opinion and Expression, OAS Special Rapporteur on Freedom of Expression and the OSCE Special Representative on Freedom of the Media of 10 December 2002.

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

caused." This provision is not clearly worded and structured, which makes it difficult to understand. It is submitted that the entire provision be reformulated according to international law, specifically Article 20 of the ICCPR, which requires states to prohibit incitement to hostility, discrimination or violence on the grounds of nationality, race or religion. The Draft Supplementary Act should instead be drafted requiring states to ban incitement to discrimination on any grounds of discrimination recognised in international law, including sexual orientation.[89]

Defamation of public bodies

Article 2(5) states that the "Government shall not at any time bring any suit in defamation on behalf of any public officer, or initiate any lawsuit for the protection of the reputation of the state". This provision is to be welcomed and reflects international standards on defamation actions.[90]

Damages

Article 2(6) states that the "award of damages in a defamation suit shall: (a) Be compensatory in nature and not penal; (b) Be proportionate to the nature of the act alleged; and (c) Not be calculated to reduce the person to pauperism or result in the collapse of the media organization." This provision responds to the concerns of international authorities about the imposition of excessive awards in civil defamation cases.

In their 2010 Joint Declaration on the "Ten Key Challenges on Freedom of Expression", the African Commission on Human and Peoples' Rights Special Rapporteur on Freedom of Expression and Access to Information, the OAS Special Rapporteur on Freedom of Expression, the OSCE Special Representative on Freedom of the Media, and the UN Special Rapporteur on Freedom of Opinion and Expression indicated their concern about "unduly harsh sanctions such as imprisonment, suspended sentences" but also "loss of civil rights, including the right to practise journalism, and excessive fines".[91]

In General Comment No 34, the Human Rights Committee stated that:

> Care should be taken by States parties to avoid excessively punitive measures and penalties. Where relevant, States parties should place reasonable limits on the requirement for a defendant to reimburse the expenses of the successful party.[92]

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[89] Article 26 of the ICCPR prohibits "any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." International authorities are increasingly recognising sexual orientation as an impermissible ground of discrimination. See Human Rights Council Resolution 17/19 of 17 June 2011, A/HRC/RES/17/19. See also the report of the UN High Commissioner for Human Rights on discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, A/HRC/19/41 17, November 2011.

[90] ARTICLE 19, Defining Defamation: Principles on Freedom of Expression and Protection of Reputation (July 2000), Principle 3.

[91] UN Special Rapporteur on Freedom of Opinion and Expression, Tenth Anniversary Declaration: Ten Key Challenges to Freedom of Expression in the Next Decade, 25 March 2010, A/HRC/14/23/Add.2. The UN Special Rapporteur on Freedom of Opinion and Expression has long considered criminal defamation laws a threat to freedom of expression. In 2000, he stated that: "[c]riminal defamation laws represent a potentially serious threat to freedom of expression because of the very sanctions that often accompany conviction." Report of the Special Rapporteur on Freedom of Opinion and Expression, Abid Hussain, 18 January 2000, E/CN.4/2000/4/ 63, para 48.

[92] Ibid.

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Burden of proof in civil defamation laws

Article 1(3), which provides "special protection" to political expression and speech on public affairs, states that "where public officials sue for defamation the publisher of the offending material shall bear the burden of proving that she/he took reasonable steps in verifying the allegation, that the allegation was made in the public interest and in good faith, without knowledge that it is false." This provision is highly problematic and apparently counter-productive to the aim of affording "special protection" to political expression. Public officials should tolerate more rather than less criticism.

According to international standards concerning freedom of expression and the protection of reputation, in cases concerning the public interest, including in matters concerning a public official, it is the claimant (the person claiming to have been defamed) and not the defendant (the author or the publisher of the statement) who should bear the burden of proving the falsity of any statements or imputations of fact alleged to be defamatory.[93] The importance of public debate on matters of public interest justifies placing a higher burden on the claimant. Otherwise, as the US Supreme Court has stated: "[u]nder such a rule, would be-critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so."[94]

Recommendations:

- **Article 2(1) of the Draft Supplementary Act should be revised to state that the states should adopt legislation which prohibits advocacy of hatred on such grounds as racial or ethnic origin, religion or belief, nationality, or sex or sexual orientation only when it constitutes incitement to discrimination, hostility or violence.**
- **The Draft Supplementary Act should state that in cases involving statements of public interest, including statements made by or relating to public officials, the claimant should bear the burden of proving the falsity of any statements or imputations of fact alleged to be defamatory.**
- **The Draft Supplementary Act should indicate that defamation law should not provide any special protection for public officials, whatever their rank or status.**

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[93] ARTICLE 19, Defining Defamation: Principles on Freedom of Expression and Protection of Reputation (July 2000), Principle 7(b).
[94] New York Times Co v Sullivan, 376 US 254, 279 (1964).

7. Media freedom

Focus on media

The overwhelming focus of the provisions of the Draft Supplementary Act concerns the protection of the media and journalists. The following provisions relate to the media or journalists only:

- Article 1(4) guaranteeing freedom and independence of the mass media;
- Article 1(5) prohibiting prior censorship;
- Article 1(6) protecting editorial independence and integrity of the mass media whether private or public;
- Article 3 on Regulation of Print and Broadcast Media (10 subsections);
- Article 4 on the Classification of Broadcasting Services (7 subsections);
- Article 5 on Independent Regulatory Bodies for Broadcasting and Telecommunication (7 subsections);
- Article 6 on Economic measures and support to the media (4 subsections);
- Article 11 on the Rights of Journalists (3 subsections).

The Draft Supplementary Act's extensive focus on matters concerning the media suggests that its title could be reconsidered to reflect this focus. At the same time, the emphasis on the media and the rights of journalists certainly reflects the importance of freedom of expression and freedom of information for journalists and media organisations who are clearly more reliant on these rights than ordinary people. This is because of the very nature of the work of journalists in practicing journalism, which involves expression and relies on quality information. Moreover, the media play a crucial role in any democracy[95] as a "public watchdog".[96] International and regional authorities and courts have frequently emphasised the "pre-eminent role of the press in a State governed by the rule of law."[97]

International law embraces a right whereby the media may receive information on the basis of which it can carry out its function.[98] The free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is

[95] The Human Rights Committee in General Comment No 34 recognised that a "free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights. It constitutes one of the cornerstones of a democratic society." Human Rights Committee, General Comment No 34, para 13. See also Communication No 1128/2002, *Marques v Angola*. Views adopted on 29 March 2005.

[96] See *Castells v Spain*; supra at 43; *The Observer v Guardian v UK*, Application No 13585/88, judgment of European Court of Human Rights of 24 October 1991, para 59; *The Sunday Times v UK (II)*, Application No 13166/87, judgment of European Court of Human Rights of 26 November 1991, at para 65.

[97] *Thorgeisen v Iceland*, Application No 13778/88, judgment of 25 June 1992 of the European Court of Human Rights at 63. "Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is the very core of the concept of a democratic society". *Castells v Spain*, Application No 11798/85, judgment of the European Court of Human Rights of 24 April 1992, para 43. Similarly, the Inter-American Court of Human Rights for its part has stated that: "It is the mass media that make the exercise of freedom of expression a reality." *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 November 1985, Series A, No. 5, para 34. See also preamble of the Declaration of Principles on Freedom of Expression in Africa

[98] See Communication No 633/95, *Gauthier v Canada*.

essential.[99] This implies a free press and other media able to comment on public issues without censorship or restraint, and to inform public opinion.[100] The public also has a corresponding right to receive media output.[101]

No prior censorship

Article 1(5) states that there "shall be no censorship and no one shall be subject to arbitrary interference with his or her right to freedom of expression". This provision is positive and implies that, under the Draft Supplementary Act, no person or media outlet shall have to ask the permission of a state body before publishing. No media – whether a newspaper, television or radio programme, online publication or any form of publication – should be required to submit to a state censorship body prior to dissemination. This is a fundamental principle of international law on freedom of expression that is reflected in regional human rights treaties and their interpretation.[102] However, as noted above, the ICCPR and AU charter require a significantly higher standard than "arbitrary" based on the three part test set out in Part 5 of this analysis so to include this concept confuses rather than clarifies the protections intended to be set out.

The principle of editorial independence and integrity of the media

Article 1(6) asserts that "the editorial independence and integrity of the media whether private or public shall be protected". This general assertion is positive. It is imperative that the media be permitted to operate independently from government control to safeguard the media's role in matters of public interest. Therefore, any bodies with regulatory or governing powers over either public or private broadcasters should be independent and protected against political interference. This relates to two main types of institutions: bodies which license broadcasters and governing boards of public media outlets.

The need for regulatory bodies to be independent is recognised in international law. A Joint Declaration of the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression stated that:

> All public authorities which exercise formal regulatory powers over the media should be protected against interference, particularly of a political or economic nature, including by an appointments process for members which is transparent, allows for public input and is not controlled by any particular political party.[103]

Regional bodies, including the African Commission on Human and Peoples' Rights and the Council of Europe,[104] have also made it clear that the independence of regulatory authorities is fundamentally important for a free media.

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[99] Resolutions on Elections http://www.achpr.org/sessions/48th/resolutions/174/

[100] See Committee's General Comment No 25 (1996) on Article 25 (Participation in public affairs and the right to vote), para 25, Official Records of the General Assembly, Fifty-first Session, Supplement No 40 vol I (A/51/40 (Vol I)), annex V.

[101] See Communication No 1334/2004, *Mavlanov and Sa'di v Uzkbekistan.*

[102] Notably, Article 13(2) of the American Convention on Human Rights states that: "The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship". The European Court of Human Rights has also stated that "the dangers inherent in prior restraints are such that they call for the most careful scrutiny." *The Observer v Guardian v UK*, Application No 13585/88, judgment of the European Court of Human Rights of 24 October 1991, at para 60.

[103] Joint Declaration of 18 December 2003, available at http://www.article19.org/data/files/pdfs/igo-documents/three-mandates-dec-2003.pdf.

[104] See for instance the Committee of Ministers Recommendation on the Independence and Functions of Regulatory Authorities for the Broadcasting Sector Recommendation No R (2000) 23, adopted 20 December 2000.

It is recalled that the Declaration of Principles on Freedom of Expression in Africa includes the statement of principle:

> Any public authority that exercises powers in the areas of broadcast or telecommunications regulation should be independent and adequately protected against interference, particularly of a political or economic nature.[105]

Furthermore, the Declaration of Principles on Freedom of Expression in Africa also emphasises the importance of the independence of public broadcasters. It states at Principle VI that:

> State and government controlled broadcasters should be transformed into public services broadcasters accountable to the public through the legislature rather than the government, in accordance with the following principles:
>
> - public broadcasters should be governed by a board which is protected against interference, particularly of a political or economic nature;
> - the editorial independence of public service broadcasters should be guaranteed.

Print media

The Draft Supplementary Act distinguishes between the regulation of the print media and the broadcast media. In accordance with well-established international law and jurisprudence, Article 3(2) states that there should be "no requirement of any license or approval by any authority" for the publication of any print media, and Article 3(3) then indicates that the registration of print media "shall be a simplified administrative procedure and merely for the purposes of informing the public of the ownership" and details of the publication.[106] These provisions should be interpreted to mean that the authorities have no discretion whatsoever to refuse registration.[107]

Broadcast media

The Draft Supplementary Act includes recognition of some important principles concerning broadcasting, such as the promotion of diversity. For example, Article 3(7) states that the "object of the broadcast media shall be to promote freedom of expression, universal access, plurality, equity and participation, diversity, national identity, cultures and languages and quality in broadcasting service and to inform, entertain and educate and provide a forum for participation, discourse and critical debate on public affairs. They shall also promote values and norms which foster the wellbeing and cooperation of the various groups of the society." It is also positive that the provisions concerning broadcasting recognise that "Digital broadcasting and modern communications technologies include on-line and citizen journalism for disseminating information", and that these "shall be given full recognition and protection by States Parties" (Article 3(10)). It is significant, however, that the Draft Supplementary Act

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[105] Adopted by the African Commission on Human and Peoples' Rights at its 32nd session, 17-23 October 2002.

[106] Communication No 1479/2006 *Kungurov v Uzbekistan*, CCPR/C/102/D/1478/2006, 2 September 2011. See also Concluding Observations on Lesotho's Initial Report, 8 April 1999, CCPR/C/79/Add.106, para 23; Concluding Observations on Cambodia's Initial Report, 27 July 1999, CCPR/C/79/Add.108, para 18.

[107] *Supra* note 131. The UN, OAS and OSCE special mandates on freedom of expression, in a Joint Declaration issued in 2003, stated that: "Imposing special registration requirements on the print media is unnecessary and may be abused and should be avoided. Registration systems which allow for discretion to refuse registration, which impose substantive conditions on the print media or which are overseen by bodies which are not independent of government are particularly problematical."

does not further elaborate on the nature of that protection, especially in the context of challenges to freedom of expression online.

Classification of broadcasting services

The Draft Supplementary Act contains a substantial section on the classification of broadcasting services in Article 4, which recognises the categories of public service broadcasting, private or commercial broadcasting and community broadcasting. Broadly speaking, this section is in line with international standards on freedom of expression and broadcasting regulation.[108] It is positive that this provision requires the transformation of state and government controlled broadcasters into public service broadcasters, and reflects certain principles such as: editorial independence and public accountability; the ethos of fairness, balance and accuracy; and the promotion of linguistic diversity (Articles 4(1)(a)-(e)).[109] It is also positive that the editorial independence and integrity of the public service broadcaster is reinforced (Article 4(3)).

Broadcasting and telecommunications regulation

The following part concerns Article 5 on the regulatory environment for broadcasting. It is encouraging that the Draft Supplementary Act emphasises the importance of the independence of "Any public authority that exercises powers in the area of broadcast or frequency control and management" (Article 5(1)-(3)). The procedure for licensing and allocation of frequencies is also in accordance with international standards. The process should be clearly set out, transparent and according to "stipulated timelines". Furthermore, according to the Draft Supplementary Act, there should be an "equitable allocation of frequencies to cater for the legitimate interests of the three sectors of broadcasting and for society as a whole in its political, social, occupational, cultural, gender, ethnic, religious and demographic diversity" (Article 5(7)(c)). Anyone who receives a refusal to issue them a frequency license "shall be notified in writing within a specific period and shall have a right to appeal to a court of law".

Article 5(7) refers to the "independent national *media* regulatory body" instead of the "independent *broadcasting or telecommunications* regulating body"; this should be corrected in subsequent drafts to avoid confusion about the scope of the body's powers. It is positive that the mode of appointment attempts to "insulate" the members of the regulatory body "from executive control". Membership of the body shall encompass "nominees from the major independent civil society organizations such as the trade unions, the journalists association, the religious bodies, the bar association, artistic/literary and cultural actors, institutions responsible for the education of journalists, other representatives of societies and representatives of parliament and appointees of the president." Whilst the provision also indicates that the "representatives of parliament together with the appointees of the President shall ... be less in number than the representatives of the independent civil society organisations," it is perhaps more important that the provisions on appointment to the regulatory body emphasise that the process of appointment should be "open and democratic,

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[108] ARTICLE 19, International Standards: Regulation of broadcasting media, 5 April 2012, http://www.article19.org/resources.php/resource/3023/en/international-standards:-regulation-of-the-print-media; ARTICLE 19, *A Model Public Service Broadcasting Law*, June 2005; ARTICLE 19, *Access to the Airwaves, Principles on Freedom of Expression and Broadcast Regulation*, April 2002.

[109] A whole Recommendation of the Committee of Ministers of the Council of Europe provides for the independence of public broadcasters. This states, among other things, that: "The legal framework governing public service broadcasting organisations should clearly stipulate their editorial independence and institutional autonomy." Recommendation No R (96) 10 of the Committee of Ministers of the Council of Europe to Member States on the guarantee of the independence of public service broadcasting, adopted 11 September 1996.

should not be dominated by any particular political party or commercial interest, and should allow for public participation and consultation".[110] Furthermore, the Draft Supplementary Act, if it is intended to be comprehensive on the issue of broadcasting regulation, should include certain grounds for exclusions or 'rules of incompatibility', which would exclude the appointment of anyone who is: employed in the civil service or any branch of government, holds official office, is an employee of a political party or holds an elected or appointed position in government, holds a position in, receives payment from or has significant direct or indirect financial interests in telecommunications or broadcasting.

Financial support for the media

It is interesting that the Draft Supplementary Act includes a provision on "economic measures and support to the media". This is an unusual provision to include in any legislative act on freedom of expression and freedom of the media, even though it is supported by international standards on freedom of expression and broadcast regulation.[111] Such a provision should not in principle be problematic if it does not in any way compromise freedom of expression (or other human rights) or the independence of the media in their role.

Article 6 encompasses a number of positive provisions which encourage states to support the media in various ways. It stipulates that states parties "shall promote a general conducive environment in which the media can operate"; "shall not use their power over placement of public advertisement to interfere with media content or discriminate among media houses"; "shall adopt effective measures to avoid undue concentration of media ownership, while ensuring that such measures do not inhibit the development of the media sector as a whole"; and "shall endeavour to mitigate the financial burden incurred by the media in their work" through indirect (eg tax rebate or waiver of import and excise duties) and direct (eg establishment of training institutions) subsidies. Although these provisions are to be welcomed, they might face criticism for their potential implications on the state. In this context, it is important to note that Article 6(4) only requires states to "endeavour" to mitigate the financial burden on media organisations.

Recommendations:

- **Article 1(4) should provide explicit protection for freedom of all media.**
- **All references to the "independent *media* regulatory body" should be replaced with reference to the "independent *broadcasting or telecommunications* regulating body".**
- **Article 5(7)(b) should expressly state that the process of appointment to the governing body of regulators should be open and democratic, should not be dominated by any particular political party or commercial interest, and should allow for public participation and consultation.**
- **Article 5(7)(b) should exclude the appointment of anyone to the regulatory body who is: employed in the civil service or any branch of government, holds official office, is an employee of a political party or holds an elected or appointed position in government, holds a position in, receives payment from or has significant direct or indirect financial interests in telecommunications or broadcasting.**

[110] ARTICLE 19, Access to the Airwaves, Principles on Freedom of Expression and Broadcast Regulation, April 2002, Principle 2.
[111] ARTICLE 19, Access to the Airwaves, Principles on Freedom of Expression and Broadcast Regulation, April 2002, Principle 8.

ARTICLE 19

8. Protection of journalists' rights

Definition of a journalist

The Draft Supplementary Act defines a journalist as a "person who practises journalism, the gathering and dissemination of information about current events, trends, issues, and people while striving for viewpoints that are not biased, and includes various types of editors and visual journalists, such as photographers, graphic artists and page designers" (Article 11). This definition appears to reflect a desire to be comprehensive in the definition of who is a journalist. However, it is important that the definition of who is a journalist is revised to more expressly encompass any natural person who is regularly and professionally engaged in the communication and dissemination of information for the public via any means of mass communication.[112]

Protection of journalists

Article 11 of the Draft Supplementary Act concerns the rights of journalists. The provisions on the protection of journalists are to be welcomed, and are particularly important given the dangerous context of the ECOWAS region for journalists.

Article 11(1) stipulates that states parties are "under an obligation to take effective measures to prevent attacks on media practitioners (journalists), such as murder, kidnapping, intimidation and or, threats against them in the performance of their duties, and where they do occur, to investigate them, punish perpetrators and ensure that victims have access to effective remedies". This provision may be further elaborated according to international human rights standards concerning general obligations on states for the right to life,[113] the prohibition on torture, inhuman or degrading treatment,[114] and the provision of an effective remedy[115] and fair trial.[116]

Article 11(2) then states that "[i]n times of conflict, the States parties shall respect the status of media practitioners as non-combatants". Under the few specific provisions of international humanitarian law on the question of journalists in armed conflict, journalists should be considered as civilians.[117] It is also important to emphasise here that whilst international humanitarian law applies only in situations of armed conflict, the obligations flowing from international human rights law apply at all times.

Protection of sources

[112] See the definition of a journalist in Council of Europe Recommendation No R(2000), adopted on 8 March 2000.
[113] Article 6 of the ICCPR, General Comment on the Right to Life (Article 6), 30 April 1982.
[114] Article 7 of the ICCPR, General Comment on Torture, or Cruel, Inhuman or Degrading Treatment or Punishment (Article 7), 30 May 1982.
[115] Article 2 of the ICCPR.
[116] Article 14 of the ICCPR.
[117] Article 79 of Additional Protocol I of the Geneva Conventions concerns the protection of journalists engaged in dangerous missions in areas of armed conflict. In addition, Security Council Resolution 1738 of 23 December 2006 on the protection of journalists in armed conflict, emphasises that "journalists, media professionals and associated personnel engaged in dangerous missions in areas of armed conflict shall be considered as civilians and shall be respected and protected as such…".

Article 11(3) states that "Media practitioners shall not be required to reveal confidential sources of information or to disclose other material held for journalistic purposes except in accordance with the following principles: (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; (c) the public interest in disclosure outweighs the harm to freedom of expression; and (d) disclosure has been ordered by a court, if it is satisfied after a full hearing". This is a positive provision which recognises that journalists routinely depend on contacts outside the media for the supply of information on issues of public interest. Individuals sometimes come forward with secret or sensitive information, relying upon the reporter to convey it to a wide audience in order to stimulate public debate or expose wrongdoing. In many cases, anonymity is the precondition upon which the information is provided to the journalist by the source; this may be motivated by fear of repercussions which might adversely affect their job security or even physical safety.

Article 11(3) reflects international and national law concerning the special privilege enjoyed by the media, allowing them not to reveal confidential sources of information unless certain stringent conditions are met. It is recalled that the African Commission's Declaration on Principles on Freedom of Expression in Africa, most notably, states that:

> Media practitioners shall not be required to reveal confidential sources of information or to disclose other material held for journalistic purposes except in accordance with the following principles:
>
> - 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;
>
> - the information or similar information leading to the same result cannot be obtained elsewhere;
>
> - the public interest in disclosure outweighs the harm to freedom of expression; and disclosure has been ordered by a court, after a full hearing.[118]

The Council of Europe has issued an entire Recommendation on the protection of journalists' sources.[119] Moreover, in the seminal case of *Goodwin v UK*, the European Court of Human Rights ruled that an attempt to force a journalist to reveal his source for a news story violated his freedom of expression. In its decision, the Court emphasised the importance of affording safeguards to the press in general, and in particular, of protecting journalists' sources.[120] The European Court of Human Rights emphatically reinforced this view in the 2010 decision of *Sanoma Uitgevers BV v Netherlands*, and detailed the procedural safeguards in cases where sources are ordered to be disclosed by the courts.[121]

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[118] See also the Declaration of Principles on Freedom of Expression adopted by the Inter-American Commission on Human Rights, which states that: "Every social communicator has the right to keep his/her source of information, notes, personal and professional archives confidential." Inter-American Declaration of Principles on Freedom of Expression, approved by the Inter-American Commission on Human Rights during its 108th regular session, 19 October 2000.

[119] Recommendation No R (2000) 7 of the Committee of Ministers to member states on the right of journalists not to disclose their sources of information, adopted 8 March 2000.

[120] "Protection of sources is one of the basic conditions for press freedom … Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potential chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest." *Goodwin v UK*, Application No 17488/90, judgment of the European Court of Human Rights of 27 March 1996.

[121] *Sanoma Uitgevers BV v Netherlands*, Application No 38224/03, judgment of the Grand Chamber of the European Court of Human Rights of 14 September 2010, paras 88-91.

Article 11 should also include a provision aiming to protect journalistic equipment and property. Searches and seizures of journalistic material are one of the most obvious interferences with freedom of expression. Indeed, the seizure of journalistic equipment is a more direct intrusion on journalistic activity than an order to reveal sources, and may be considered a more extreme measure to achieve similar ends. Consequently, searches and seizures of journalistic material must meet the conditions of the three-part test in Article 19(3) of the ICCPR as indicated above. According to international and regional human rights jurisprudence, measures such as the confiscation or seizure of journalistic material must demonstrate that the balance between the interests at stake, namely the protection of sources on the one hand, and the prevention and punishment of crime on the other, has been preserved. In demonstrating that the measure was proportionate, state authorities must show that the reasons to justify the particular interference with the journalist's freedom of expression are both relevant and sufficient.[122] It should also be considered that besides violating the right to freedom of expression, a provision on the confiscation of equipment has implications for the right to respect for private life and the protection of property.[123]

Therefore, the Draft Supplementary Act should include a provision stipulating that any searches of a journalist's home or office should not be used to circumvent the rules on the protection of sources, and shall be presumed to be invalid. It should indicate that the state has the burden of demonstrating that any search or seizure was provided for by law, pursued a legitimate aim, and was necessary and proportionate in the circumstances. It should also provide that any materials obtained in violation of the protection of sources should not be admissible in any proceedings.[124]

Licensing of journalists

Despite the section on the rights of journalists, the Draft Supplementary Act does not appear to contain any provisions outlawing the licensing of journalists as such. Yet it is well-established in international law on freedom of expression, that any licensing requirement for the print media, or for journalists as individuals, is incompatible with freedom of expression, although licensing of the broadcast media or cinema businesses may be legitimate.

Article 11 of the Draft Supplementary Act does, however, contain a provision on collective agreements, which states that "State parties shall encourage and facilitate the negotiations and the signing of collective agreements between media organisations and the journalists they employ in line with the Standard ECOWAS/WAJA Framework Collective Agreement."

The provision clearly implicates the right of journalists to freedom of expression as well as freedom of association. The latter right is also enshrined in Article 20 of the UDHR, as well as Article 22 of the ICCPR which states that: "Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests." It is recognised that freedom of association is particularly important for journalists as a means through which to strengthen their independence and professionalism.

[122] *Roemen and Schmit v Luxembourg*, Application No 51772/99, judgment of 25 February 2003 (European Court of Human Rights).
[123] On privacy, see Article 17 of the ICCPR and Article 8 of the European Convention on Human Rights; on the right to property, see Article 1 of the First Protocol of the European Convention on Human Rights.
[124] See further the criteria for disclosure indicated in "Proposed Guidelines on Protection of Journalists' Sources" in David Banisar, *Silencing Sources: An International Survey of Protections and Threats to Journalists' Sources* (Privacy International, 2007) at 96 and 97.

Through an association, journalists can be empowered to criticise the authorities, and they are also more likely to fight for editorial independence in the media.[125] In this sense, the provision on collective agreements is positive.

Nonetheless, the provision on collective agreements – particularly through the reference to the ECOWAS/WAJA Collective Agreement – should be seen as a means to promote the well being of media practitioners and should not be used to impose compulsory membership to an association or to curtail the freedom of expression of journalists by encouraging states to promote a system of licensing.

In this context, it is recalled that the African Commission on Human and Peoples' Rights sees licensing requirements as a restriction on entry into the profession, and it has stated in its Declaration of Principles on Freedom of Expression in Africa that:

> The right to express oneself through the media by practising journalism shall not be subject to undue legal restrictions.[126]

In relation to journalists, the Inter-American Court of Human Rights held in *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*[127] that a licensing requirement for all journalists effected through compulsory membership of a professional association, constituted a violation of the right to freedom of expression. The Court accepted that ensuring "the conditions that assure the normal and harmonious functioning of institutions based on a coherent system of values and principles" was a legitimate aim. Yet, the Court also observed that public order depends in many ways on respect for freedom of expression. While it agreed that many other professions are regulated through entry requirements, such as law or medicine, it pointed out that journalism is a fundamentally different activity.

> Within this context, journalism is the primary and principal manifestation of freedom of expression of thought. For that reason, because it is linked with freedom of expression, which is an inherent right of each individual, journalism cannot be equated to a profession that is merely granting a service to the public through the application of some knowledge or training acquired in a university or through those who are enrolled in a certain professional "colegio".
>
> The argument that a law on the compulsory licensing of journalists does not differ from similar legislation applicable to other professions does not take into account the basic problem that is presented with respect to the compatibility between such a law and the Convention. The problem results from the fact that Article 13 expressly protects freedom to "seek, receive and impart information and ideas of all kinds ... either orally, in writing, in print...." The profession of journalism – the thing journalists do – involves, precisely, the seeking, receiving and imparting of information. The practice of journalism consequently requires a person to engage in activities that define or embrace the freedom of expression which the Convention guarantees.
>
> This is not true of the practice of law or medicine, for example. Unlike journalism, the practice of law or medicine – that is to say, the things that lawyers or physicians do – is not an activity specifically guaranteed by the Convention.[128]

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[125] See *Young, James and Webster v the UK*, Application Nos 7601/76, 7806/77, 13 August 1981, para 49; *Wilson and National Union of Journalists v UK*, Application Nos 30668/96, 30671/96, 30678/96, judgment of the European Court of Human Rights of 2 July 2002.
[126] The Declaration of Principles on Freedom of Expression in Africa, adopted at the 32nd Session of the African Commission on Human and Peoples' Rights, 17-23 October 2002, Principle X(2).
[127] Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts 13 and 29 American Convention on Human Rights)
[128] *Ibid*, paras 71-73.

Following the Inter-American Court's judgment, the Inter-American Commission on Human Rights issued a Declaration stating that:

> Every person has the right to communicate his/her views by any means and in any form. Compulsory membership or the requirement of a university degree for the practice of journalism constitute unlawful restrictions of freedom of expression.[129]

It is therefore suggested that the Draft Supplementary Act should contain a provision affirming that the right to express oneself through the media by practicing journalism shall not be subject to undue legal restrictions, such as compulsory membership of a professional association.

Recommendations:

- **Article 11(3) should stipulate that any searches of a journalist's home or office should not be used to circumvent rules on the protection of sources and shall be presumed to be invalid. It should indicate that the state has the burden of demonstrating that any search or seizure was provided for by law, pursued a legitimate aim, and was necessary and proportionate in the circumstances. It should also provide that any materials obtained in violation of the protection of sources should not be admissible in any proceedings.**
- **Article11 should contain a provision affirming that the right to express oneself through the media by practicing journalism shall not be subject to undue legal restrictions, such as compulsory membership of a professional association.**

[129] Inter-American Declaration of Principles on Freedom of Expression, approved by the Inter-American Commission on Human Rights during its 108th session, 19 October 2000, para 6.

9. Freedom of information

The Draft Supplementary Act's section on freedom of information, Articles 7 – 10, contains many progressive features which conform with international and regional human rights standards on freedom of information (also known as the right to information).[130]

First and perhaps most notably, Article 7(1) indicates that "the right of access to information held by public bodies" shall be "elaborated in full by legislation". Through this provision and Article 12(c), the Draft Supplementary Act constitutes a strong endorsement for the adoption of freedom of information by ECOWAS states. This follows the position of international authorities which have long supported the implementation of freedom of information through legislation devoted to that right.[131] *Second*, the "principle of maximum disclosure of information held by government and public bodies" is guaranteed (Article 7(2)). *Third*, public bodies should proactively disclose and "disseminate information to the public on their constitutional and statutory mandate and activities" (Article 7(3)). *Fourth*, the Draft Supplementary Act extends freedom of information and the principle of disclosure to "Private bodies whose activities include the provision of public services or [who] are funded by the public purse or who exploit public resources" (Article 7(4)). *Fifth*, a number of the provisions on the procedure for making requests for information are positive, particularly those concerning the absence of a duty to provide reasons for the request, the minimal fees chargeable, the designation of an information officer in all public bodies, penalties for the intentional destruction or concealment of information requested, and the institutionalisation of an efficient and effective information management and record system (Article 7(6)-(11)). *Sixth*, it is very positive that Article 7(14) states that "There shall … be no blanket exemptions or limitations to the right to information". *Seventh*, provisions on the procedure for the refusal of an application and the right to review are positive (Article 7(17)-(20)). *Eighth*, the Draft Supplementary Act provides for "an independent body responsible for the enforcement, monitoring and implementation of the right of access to information legislation and for the mass education of the public and for the training of officials" (Article 8). *Ninth*, the burden of proof for justifying a refusal to disclose information lies on the information officer (Article 9(2) and Article 7(19)). *Tenth*, but importantly, the Draft Supplementary Act indicates that it (and presumably any legislation implementing the freedom of information) takes "precedence over any other law on confidentiality and state secrecy and State Parties shall review, amend and repeal such confidentiality and secrecy laws so as to bring them into conformity" with its provisions (Article 10).

Despite these encouraging provisions, the Draft Supplementary Act's regime on freedom of information has a number of weaknesses stemming from a lack of clarity and specificity in relation to a number of important issues. These diminish the overall value of the provisions on

[130] See for instance: A/HRC/14/23 (paras.30 – 39), A/HRC/7/14 (paras.21 – 31), E/CN.4/2005/64 (paras 36 – 44), E/CN.4/2004/62 (paras 34 – 64), E/CN.4/2000/63 (paras 42 – 44); Annex II: ARTICLE 19, *The Public's Right to Know: Principles on Freedom of Information Legislation* (London, 1999).

[131] In 2004, the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression stated that: "The right to access information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation (for example Freedom of Information Acts) based on the principle of maximum disclosure, establishing a presumption that all information is accessible subject only to a narrow system of exceptions." Joint Declaration of the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 6 December 2004 http://www.article19.org/data/files/pdfs/igo-documents/three-mandates-dec-2004.pdf.

freedom of information, and need to be addressed before the finalisation of the Draft Supplementary Act.

First, in relation to the scope of the protection of freedom of information, it is important that the Draft Supplementary Act defines key terms such as "information" and "public bodies". "Information" should include all records held by [a] public body, regardless of the form in which the information is stored, its source and the date of production. Although Article 7 expressly covers private bodies, the scope of the term "public bodies" should itself be clarified to include all the branches of State (the executive, legislative and judicial branches), as well as other public or governmental bodies, at whatever level (national, regional or local), who are in a position to engage the responsibility. The scope of public bodies should also include "other entities when such entities are carrying out public functions".

Second, the Draft Supplementary Act should specify time limits for responding to requests for information and for appeals for review, instead of indicating that information should be disclosed within a "specified and reasonable time" (Article 7(8)). This suggests that the time limits are discretionary and to be determined on a case-by-case basis. Instead, the Act should set down certain time frames within which public bodies should respond. The following examples are given as guidance for the time frames. First, public bodies should respond in 15 working days to requests for information. If the requested information is not held by the body, the public body shall transfer the request to the appropriate body within no more than 5 working days. The applicant should have at least 30 working days to file for an appeal against the decision of the public body refusing the information. Any internal appeal should be decided within a maximum of 20 working days. The body should have a maximum of 20 working days to provide information which was not available, and which the regulatory body required be generated.

Third, the Draft Supplementary Act should indicate that requests for information may be submitted in person, orally or in writing, by mail, by telephone, through a representative, or by email or electronic means.

Fourth, and most importantly, the regime on exemptions needs to be clarified in line with international standards. As it stands, the wording of the provision on exemptions is problematic even though it does refer to key terms such as "necessity" and the "public interest". Articles 7(12) and 7(13) are particularly confusing. Article 7(12) states that: "Any restriction on the right of access to information must be necessary to protect the rights and freedoms of the individual or the public interest and in particular any limitation shall be: (a) based on a sufficient harm and public interest test and the harm ought to be real and not imagined and there shall be a direct causal link between the disclosure and the harm. (b) reasonably necessary and narrowly formulated and proportionate to the legitimate purpose for which the exemption is necessary." Article 7(13) states that: "Disclosure may be withheld if: (a) it is likely to cause a breach of real risk of harm or damage to national security, law enforcement, public order, public health, national defence, sensitive economic information (b) it is likely to prejudice the fair trial of a person or impartial adjudication of a case by a court of law or quasi judicial body; (c) it is likely to prejudice parliamentary privilege; (d) it will reveal confidential communication …; (e) it is likely to reveal a trade secret, technical, economic or financial secret or business secret."

The regime on exemptions should clearly indicate that any restrictions on the disclosure of information are permissible only when dissemination would harm a specific legitimate

interest, and the harm to this legitimate interest is greater than the public interest in disseminating the information. This would accord with international standards, including the 2006 Joint Declaration of international experts on freedom of expression, which stresses that:

- Public bodies, whether national or international, hold information not for themselves but on behalf of the public and they should, subject only to limited exceptions, provide access to that information.
- Exceptions to the right of access should be set out clearly in these policies and access should be granted unless (a) disclosure would cause serious harm to a protected interest and (b) this harm outweighs the public interest in accessing the information.[132]

This "public interest override" is also reflected in the Draft Model Law for AU Member States on Access to Information.[133]

Recommendations:

- **Article 7 should state that the term "information" refers to any records held by a public body regardless of the form in which the information is stored, its source, and the date of production.**
- **Article 7 should state that the term "public bodies" encompasses all the branches of State (the executive, legislative and judicial branches), as well as other public or governmental bodies at all levels, and also entities that are carrying out public functions.**
- **Article 7(8) should state that the body must respond in 15 working days to all requests; if the requested information is not held by the body, the public body shall transfer the request to the appropriate body within no more than 5 working days. The applicant should have at least 30 working days to file for an appeal against the decision of the public body refusing the information. Any internal appeal should be decided within a maximum of 20 working days. The body should have a maximum of 20 working days to provide information which was not available, and which the regulatory body required to be generated.**
- **Article 7(5) should indicate that requests for information may be submitted in person, orally or in writing, by mail, by telephone, through a representative, or by email or electronic means.**
- **Article 7(12) should state that access to information should be granted unless the following criteria are both met: (a) disclosure would cause serious harm to a protected interest and (b) this harm outweighs the public interest in accessing the information.**

[132] See Joint Declaration of the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR (African Commission on Human and Peoples' Rights) Special Rapporteur on Freedom of Expression, 20 December 2006, http://www.article19.org/data/files/pdfs/igo-documents/four-mandates-dec-2006.pdf.

[133] This has been prepared under the auspices of the Special Rapporteur on Freedom of Expression and Access to Information in Africa in partnership with The Centre for Human Rights, University of Pretoria. See http://www.chr.up.ac.za/images/files/news/news_2011/draft_model_law_access_info.pdf, Article 36.

10. Information and Communications Technologies (ICTs)

Although the Draft Supplementary Act indicates that online expression should be fully protected by states parties (Article 3(10)), it does not further address the issue of the protection of freedom of expression and freedom of information through the Internet and other relatively recent and developing information communications technologies ("ICTs"). If the Draft Supplementary Act is to be comprehensive in addressing contemporary challenges to freedom of expression and freedom of information, it needs to include more detailed provisions safeguarding against restrictions on expression and the free flow of information through ICTs.

There are several important principles with respect to expression on the Internet, which have been highlighted by international authorities, most notably the Human Rights Committee[134] and the UN Special Rapporteur on the protection and promotion of freedom of opinion and expression.[135] As a text which purports to focus on freedom of expression and freedom of information, and one that is being drafted in the contemporary context, the Draft Supplementary Act should reflect these provisions.

First and fundamentally, the Draft Supplementary Act should reflect burgeoning authoritative international opinion that the Internet has "become an indispensable tool for realizing a range of human rights."[136] The ACHPR has reiterated "the important contribution that can be made to the realisation of the right to freedom of expression by new information and communication technologies"[137] It might also follow the example of the parliament of Estonia in 2000,[138] the constitutional council of France in 2009 and the constitutional court of Costa Rica in 2010[139] which have all effectively declared Internet access a fundamental right. While ECOWAS states clearly do not have anywhere near the resources of European states, this does not mean that they cannot usefully express access to the Internet as a human right. Furthermore, according to a March 2010 survey by the BBC, 79% of those interviewed in 26 countries – including the two ECOWAS states of Ghana and Nigeria – believe that internet access is a fundamental human right.[140]

Second, the Draft Supplementary Act should reinforce the principle – which is already included in Article 3(10) but without sufficient emphasis – that freedom of expression applies

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[134] Human Rights Committee, General Comment No 34, Freedoms of Opinion and Expression (Article 19), CCPR/C/GC/34, 12 September 2011.
[135] The mandate-holder has indicated on numerous occasions his views on the relationship between the Internet and freedom of expression. A/HRC/17/27, A/HRC/14/23/Add.2 (paras 9 – 10); A/HRC/7/14 (paras 29- 31, Internet governance); A/HRC/4/27 (paras 38 – 43, Internet governance and digital democracy); E/CN.4/2006/55 (paras 29 – 43, Internet governance and human rights); E/CN.4/2002/75 (paras 88 - 95).
[136] Report of the Special Rapporteur on the promotion and protection of freedom of opinion and expression, Frank La Rue, 16 May 2011, A/HRC/17/27, A/HRC/14/23/Add.2.
[137] http://www.achpr.org/sessions/32nd/resolutions/62
[138] The parliament of Estonia passed legislation in 2000 declaring Internet access a basic human right. "Internet as Human Right: This is Estonia!" 4 December 2010, available at http://www.lithuaniatribune.com/2010/04/12/internet-as-human-right-this-is-estonia/.
[139] Decision 2009-580; Act furthering the diffusion and protection of creation on the Internet.
[140] "Four in five regard Internet access as a fundamental right: global poll," BBC News, 8 March 2010. Available from: http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/08_03_10_BBC_internet_poll.pdf.

to all forms of expression and the means of their dissemination, including expression on the Internet. This is understandable, as the Internet represents a forum for both the expression of and access to information and ideas.

Third, the Draft Supplementary Act should indicate that any restrictions on Internet-based, electronic or other such information dissemination systems, including Internet Service Providers, must meet the requirements for permissible restrictions to freedom of expression under Article 19(3) of the ICCPR. Accordingly, the requirement that any restrictions must be narrowly tailored and content-specific, means that it would be impermissible to shut down a website or liquidate an Internet Service Provider, when it would be possible to achieve a protective objective by isolating and removing the offending content. The Human Rights Committee has emphasised this point in General Comment No 34, stating that:

> 43. Any restrictions on the operation of websites, blogs or any other internet-based, electronic or other such information dissemination system, including systems to support such communication, such as internet service providers or search engines, are only permissible to the extent that they are compatible with paragraph 3. Permissible restrictions generally should be content-specific; generic bans on the operation of certain sites and systems are not compatible with paragraph 3. It is also inconsistent with paragraph 3 to prohibit a site or an information dissemination system from publishing material solely on the basis that it may be critical of the government or the political social system espoused by the government.[141]

Fourth, the Draft Supplementary Act should indicate that the application of freedom of expression rights to the Internet means that the imposition of criminal liability for expression-related offenses must take into account the overall public interest in protecting both expression, and the forum in which it is made.[142] This principle was highlighted in June 2011 by the four international experts on freedom of expression from the UN and regional human rights systems (Inter-American, European and African)[143] in a Joint Declaration on Freedom of Expression and the Internet.[144]

Fifth and finally, the Draft Supplementary Act should emphasise that in relation to restrictions on content on the Internet, as well as meeting the three-part cumulative test, it is also required that:

> any legislation restricting the right to freedom of expression must be applied by a body which is independent of any political, commercial, or other unwarranted influences in a manner that is neither arbitrary nor discriminatory. There should also be adequate safeguards against abuse, including the possibility of challenge and remedy against its abusive application.[145]

<u>Recommendations:</u>

- **Article3 should affirm that the Internet is an indispensable tool for the realisation of a range of human rights. It should also:**

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[141] Concluding observations on the Syrian Arab Republic (CCPR/CO/84/SYR). See General Comment No 34, para 43.
[142] Paragraph 1(a) and 4(b).
[143] The United Nations Special Rapporteur on Freedom of Opinion and Expression, Frank LaRue; the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights of the Organization of American States, Catalina Botero Marino; the Organization for Security and Cooperation in Europe Representative on Freedom of the Media, Dunja Mijatoviæ; and the African Commission on Human and Peoples' Rights Special Rapporteur on Freedom of Expression, Faith Pansy Tlakula.
[144] Joint Declaration on Freedom of Expression and the Internet (1 June 2011), available at http://www.article19.org/data/files/pdfs/press/international-mechanisms-for-promoting-freedom-of-expression.pdf.
[145] Report of the Special Rapporteur on the promotion and protection of freedom of opinion and expression, Frank La Rue, 16 May 2011, A/HRC/17/27, A/HRC/14/23/Add.2 at para 69.

- **state that access to the Internet is a human right.**
- **emphasise that all forms of expression and the means of their dissemination of information, including through ICTs, are protected by the right to freedom of expression.**
- **reaffirm that any restrictions on such ICTs, including Internet Service Providers, must meet the requirements for permissible limitations on freedom of expression.**
- **state that the imposition of criminal liability for expression-related offenses must take into account the overall public interest in protecting both expression, and the forum in which it is made.**
- **stipulate that states should provide adequate safeguards against abuse, including through the possibility of challenge and remedy against the abusive application of any legislation restricting freedom of expression using ICTs.**

ARTICLE 19

11. Implementation and remedies

Implementation

Article 12 of the Draft Supplementary Act on "implementation" is welcomed for two reasons. *First*, because the provision bolsters the states' existing obligations under international and regional human rights law. More specifically, it requires states parties to "comply with international and regional agreements relating to the freedom of expression which they have ratified such as: The African Charter on Human and Peoples' Rights; Universal Declaration on Human Rights; International Covenant on Civil and Political Rights; Declaration on Principles on Freedom of Expression" (Article 12(b)). It is recalled that international human rights law places a direct obligation on states to give effect to the rights contained in international human rights treaties, under Article 2 of the ICCPR.[146] Yet in those ECOWAS states parties, in which the ICCPR does not form part of the domestic legal order (ie through incorporation into domestic law), Article 12(b) of the Draft Supplementary Act could potentially facilitate the full realisation of the rights guaranteed by it, including freedom of expression, as required by Article 2.[147]

Second, Article 12(c) stipulates that states parties are required to "take all necessary measures to ensure the passage of a right to information law that is consistent with this Act and that all laws or regulations affecting freedom of expression are consistent with this Act". This provision clearly envisages the adoption of laws on freedom of information across the ECOWAS region.

Nonetheless, Article 12 displays significant shortfalls that ought to be addressed. *First*, the requirement that states parties ensure that laws or regulations affecting freedom of expression are consistent with the Draft Supplementary Act could spell the lowering of national protections on freedom of expression in those ECOWAS member states which embrace higher standards than those contained in the Act. In order to avoid the imposition of a "lowest common denominator" of standards on freedom of expression and freedom of information across the region, the Draft Supplementary Act should include a provision that recognises that it presents a minimum standard.

Second, Article 12(a) requires states parties to "take all necessary measures to create conditions under which the media and government shall interact as a means of building trust and dispelling prejudices". This provision may be positively interpreted to mean that both the media and the government should work to "build trust" and "dispel prejudices" between different groups in society. Due to its lack of clarity, however, it may also be interpreted to undermine the independence of the media and to justify a close and mutually beneficial relationship between the media and the body politic, particularly members of the Executive. Given the scope for abusive interpretation of this provision, it should simply be deleted from the final draft of the Draft Supplementary Act.

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[146] Article 2 of the ICCPR states that: "Each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant."

[147] See further, General Comment No 31 on Article 2 of the Covenant (the Nature of the General Legal Obligation Imposed on States Parties to the Covenant), 21 April 2004, CCPR/C/74/CRP.4/Rev 6.

Remedies in case of breach

Despite setting out a series of rights and concomitant obligations on ECOWAS states parties, the Draft Supplementary Act does not indicate the consequences of non-compliance with its provisions upon the adoption of the text. As a potential instrument of the ECOWAS sub-regional regional human rights system, the text should include provisions on the implications of a lack of implementation, and also for violation of the provisions of the Draft Supplementary Act. In doing so, inspiration should be drawn from the ICCPR, which requires states parties to ensure that individuals whose rights have been breached have an adequate remedy and, if necessary, access to a court or tribunal. It is recalled that Article 2(3) of the ICCPR states that:

> Each State Party to the present Covenant undertakes:
>
> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
>
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
>
> (c) To ensure that the competent authorities shall enforce such remedies when granted.

This means that states must put in place appropriate judicial and administrative mechanisms to address claims of violations of rights; such mechanisms should be easily accessible. The most straightforward way of providing remedies for violations of rights is through the normal judicial system. The ordinary courts should have jurisdiction to hear claims of violations; it should not be necessary to refer to a special constitutional court or tribunal. The UN Human Rights Committee has, however, stressed that the establishment of an independent administrative body to investigate violations may be of particular importance.

> Administrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies. National human rights institutions, endowed with appropriate powers, can contribute to this end.[148]

Individuals whose rights have been violated should be provided with an effective remedy. The Human Rights Committee has noted that this generally entails "appropriate compensation" and that where appropriate reparations can involve "restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations."[149] The underlying principle is that the remedy must be "effective".

Recommendations:

- **Article 12(b) and (c) should clearly indicate that it presents only a minimum set of standards on freedom of expression and freedom of information, and that ECOWAS member states should be encouraged to adopted higher protections in accordance with international and regional human rights law and comparative best practices.**
- **Article 12(a) of the Draft Supplementary Act should be deleted.**

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[148] *Ibid*, para 15.
[149] *Ibid*, para 16.

- **The Draft Supplementary Act should stipulate that states parties should ensure that any person whose rights, as recognised by Act, are violated shall have a right to an effective remedy, and any such person in the determination of this right has access to a competent judicial, administrative or legislative authority.**

12. Conclusions

ARTICLE 19 welcomes the Draft Supplementary Act. It many areas, it offers a framework for countries to improve their legal systems and to improve their practices. ARTICLE 19 hopes to continue to be engaged in the process of drafting a final version of the ECOWAS Supplementary Act, so that the best possible legal framework on freedom of expression and freedom of information may be achieved at the regional level for the approximately three hundred million people living within the area of ECOWAS.