



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

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This Note contains the Centre for Law and Democracy's (CLD) and the Freedom of Expression Hub's comments on the draft Declaration of Principles on Freedom of Expression and Access to Information in Africa (draft Declaration).¹ The draft Principles were circulated by Lawrence M. Mute, African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, for comments in May 2019.² We are providing this Note with the goal of

¹ The draft Declaration is available at:
http://www.achpr.org/files/news/2019/04/d375/draft_declaration_of_principles_on_freedom_of_expression_in_africa_eng.pdf.

² A notice of the call for submissions is available at: <https://altadvisory.africa/2019/05/02/draft-declaration-of-principles-on-freedom-of-expression-and-access-to-information-in-africa/>.
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improving the Declaration, including by ensuring it is fully in line with established international standards and it represents a strong effort to progressively develop international standards.

General Points

We have three general points regarding the draft Declaration. First, we note that it frequently refers to rather general and sometimes even vague standards. For example, it often states that something should be in line with international standards. A key purpose of a Declaration like this is precisely to clarify what international standards are in different areas. We recognise that this is not always possible but, wherever possible, these references should be replaced with more specific standards.

Second, we believe that the draft Declaration would benefit from a careful review of the way it is organised. There are a number of examples of issues which are dealt with in more than one place, sometimes using repetitive language. In other places, the draft would benefit from reconsidering the way it is arranged. For example, quite general principles on freedom of expression are found at the beginning of Part II, instead of Part I: General Principles. Finally, under this point, we note that in some cases sections are “introduced” by very general statements leading into the subject of the section. We do not believe that these add substance to the Declaration, due to the fact that they are too general in nature, and we also note that this has not been done consistently throughout the draft Declaration. Instead, we feel that they break the flow and sometimes even create confusion

Third, we believe that the draft Declaration would be easier to understand and use if, instead of including over 100 separate principles, similar ideas were grouped under a smaller number of principles. Just as one example of this, the section on Procedure for Accessing Information contains five separate principles whereas these could all be grouped under one principle on procedure, as sub-statements.

All of these issues are highlighted, as relevant, below under Specific Points on the Draft Declaration.

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Recommendations:

- Wherever possible, general references should be replaced with more specific standards.
- Careful consideration should be given to the way the draft Declaration is organised and arranged, so as to ensure that this is as logical, flowing and non-repetitive as possible. Consideration should be given to removing the very general “introductory” statements that are found at the beginning of some sections.
- Consideration should be given to reducing the number of separate principles, in part by grouping similar ideas under one principle, where needed by using sub-statements.

Preamble

In general, the Preamble of the draft Declaration reads well and covers the required content. We just have one comment on the paragraph starting with “Acknowledging”, which states that the exercise of freedom of expression and access to information using the Internet are central to, among other things, “bridging the digital divide”. It is not immediately clear to us how using the Internet will help bridge the digital divide, which is largely caused by people not being able to access the Internet in the first place or only having poor quality or limited access to it.

Recommendation:

- Consideration should be given to amending the paragraph of the preamble starting with “Acknowledging” so as to make it more precise.

Specific Points on the Draft Declaration

Part I

Principle 2

This principle suggests that States should not interfere with freedom of opinion, including the right to “form, express and change all forms of opinion”. International law provides

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absolute protection to the right to **hold** (form and change) opinions. But once an individual moves to express an opinion, that becomes part of the exercise of freedom of expression and it is no longer absolute but, instead, subject to the restrictions provided for in relation to that right, for example as provided for in Article 19 (3) of the International Covenant on Civil and Political Rights (ICCPR). We recommend that this principle focus on the absolute right to hold opinions (i.e. that the reference to expressing opinions should be removed).

Principle 3

This principle suggests that everyone “shall have the equal opportunity to exercise the right to freedom of expression and the right of access to information without distinction”. As wonderful as that would be, we doubt whether it is correct as a statement of principle. Everyone does have an equal **right** to these values but, as a matter of practice, opportunities will always vary, for example based on issues like wealth, education, position and so on. Just to give one practical example, the editor-in-chief of a large media outlet (which is an “occupation”, one of the items included in the list of grounds for non-discrimination in this principle) will inevitably have a greater opportunity to exercise her right to freedom of expression than most ordinary citizens.

Principle 4

This principle states that in case of conflict between the Declaration and “any domestic, regional or international human rights standards”, the standards which are most favourable to freedom of expression shall prevail. While we appreciate the sentiment behind this, we again doubt whether this is correct. According to our understanding, a soft law statement like this cannot prevail over hard law such as an international human rights treaty. Rather, a statement like this should aim to provide an authoritative, progressive interpretation of human rights treaties, and not to conflict with them.

Section on Protection of the Right to Freedom of Expression and the Right of Access to Information Online

We believe that this section comes too early in the Declaration. The general points on freedom of expression, including on restrictions, should precede this section.

Principle 5

This principle calls for the rights to freedom of expression and access to information to be “protected from interference both online and offline”. This is too general to provide clear direction as to what is intended. In any case, it is in direct conflict with clear international standards, and indeed other parts of the Declaration itself, which accept that these rights may be interfered with as long as this is in line with the conditions for such restrictions under international law.

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Principle 7

This principle calls for the protections accorded to journalists to be applied, “to the extent possible” to everyone. This needs to be reconsidered. If a protection is supposed to apply to everyone, why would it be accorded to journalists in the first place. It is also not practical. For example, the draft Declaration calls for source protection for journalists (Principles 57 and 58). If this were to apply to everyone, it would inhibit the ability of courts to function effectively and would no longer represent an appropriate balance between the competing interests. This is why no country affords the right of source protection to everyone.

Principle 8

Consideration should be given to adding linguistic minorities to the list of marginalised groups in this principle. They often suffer serious disadvantages in the enjoyment, quite specifically, of the right to freedom of expression (as well as other rights).

Principle 9

This principle calls for “the evolving capacities of children” to be taken into account when considering respect for their freedom of expression. It would be useful to add into this principle some statement about how this respect should be to the maximum extent possible.

Principle 11

It is not clear to us what the real difference is between parts (b) and (c) of this principle, which could, as a result, usefully be combined.

Principle 13

It is not clear to us whether this principle is directed towards legal restrictions in the abstract or the application of a restriction in a particular case, which is quite a different matter. Also, part (a) combines two quite different ideas – that restrictions should address a pressing and substantial need and that restrictions should be relevant and sufficient to address that need – and so it should be divided into two different statements. Similarly, part (b) also combines two quite different ideas – that the limitation should have a direct and immediate connection to the expression and that it should be the least restrictive means of achieving the aim – which should again be separated. Finally, the idea of restrictions not being overbroad should be added to this principle.

Part II

Section on The Guarantee of Freedom of Expression

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This section appears to us to set out very general principles regarding freedom of expression which, furthermore, significantly overlap in substance and even language with Principles 1 and 2. We therefore recommend that they be integrated into Principles 1 and 2.

Principle 15

Once again, as with Principle 2, which uses identical language in this respect, the reference to the right to “express” opinions should be removed.

Principle 16

This principle contains two quite separate ideas, namely that there should be no State monopoly over broadcasting and that State broadcasters should be transformed into public service broadcasters. The latter is covered later on (Principle 22) and so can simply be removed from here.

Principle 17

This principle is somewhat confusing. First, it is not clear who is responsible for facilitating the list of goals: States or a diverse media. Second, in our view, States have a responsibility to promote a diverse media, following which we believe and hope that some of these benefits will flow naturally from that. But it is difficult to make this connection as a direct and obligatory link, which the principle currently tries to do. For example, even the most positive and sophisticated media environments find it challenging to meet part (c), on access to “gender sensitive, non-discriminatory and non-stereotyped information”. We believe that a better formulation of this principle would be to call for specific diversity measures to be informed by the idea of promoting some of these benefits. Finally, part (g), on the use of local languages in public affairs, has very little to do with a diverse media.

Principle 19

This principle is also generally problematical. First, any registration system for the media is automatically a restriction so the part of the principle which calls for registration not to restrict freedom of expression does not make sense. Second, it is very vague and fails to provide clear guidance to States as to what they need to do in this area. Apart from the initial contradiction in calling for registration systems that are not restrictions, it is unclear what limiting the scope of registration systems to “administrative purposes” means. Far more specific standards on registration systems for the print media (since broadcasters are everywhere licensed) should be put forward here, such as that careful consideration should be given in the first place to whether registration is necessary, that registration may not be refused, that only limited information may be demanded for purposes of registration and so on.

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Principle 20

This principle should not refer to media being owned or operated by a public authority, as this would appear to justify government media. Rather, it should revolve around the idea of publicly owned media. Then, the reference to “undue interference” should be replaced by a reference to “interference of a political or economic nature”, all of which is “undue”, as is the case with the current African Declaration (Principle VI).

Principle 21

The idea behind this principle is positive but it is too vague to provide clear guidance as to what States should actually do. Specifically, it fails to indicate what sort of regulation States should impose that “encourages media owners and media practitioners to reach agreements to guarantee editorial independence”. This is complex and we do not believe there is a clear standard to call for here, in which case consideration should be given to dropping the principle.

Principle 23

Consideration should be given to adding the word “diverse” between the words “promote” and “private”.

Principle 24

Part (b) of this principle calls for licensing processes to promote diversity essentially through ownership measures. These are important but there are other important ways that licensing can be used to promote diversity, such as directly by including this as one of the competitive conditions for awarding licences (i.e. awarding licences directly to applicants that enrich diversity) and indirectly by including minimum diversity criteria, such as quotas for the production of local content, as licence conditions.

Principle 25

We do not understand the second part of this principle (i.e. what it means to call for frequency allocation to encourage interconnection between broadcasters and for this to encourage interoperability). This needs to be clarified. If the point is about allocating digital frequencies, which does require collaboration on the sharing of multiplexes, then we would suggest a completely different approach to this recommendation.

Principle 26

This is another principle which is so vague as to fail to provide guidance to States or others as to what is being recommended. In particular, the reference to “such conditions as are necessary for ensuring diversity” fails to provide any specific guidance.

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Principle 28

The introductory statement of this principle, stating that the “regulation of community broadcasting shall be governed, including in accordance with the following principles” is confusing. Perhaps it would be better simply to indicate that the “regulation of community broadcasting shall be in accordance with the following principles”. Part (a), calling for the management of community broadcasters to be representative of the community, is fine in principle. However, it is often difficult for these broadcasters to get going in the first place with properly representative structures. As a result, we recommend that some qualification be added here (such as “as far as possible”). Part (b) calls for licensing to be “cost effective” but perhaps what is meant is that it should be “low cost”. Part (c) is again vague, with the references to the idea that licensing should fulfil “the objectives of community broadcasting” and not be “prohibitive” being unclear. Part (d) says that States “may” reserve a part of the spectrum for community broadcasting but this is not as strong as it could be. It should instead say that States “should” do this.

Principle 29

This principle calls on self-regulation to be based on codes that are developed through “multi-stakeholder processes”. This is too rigid. While some self-regulatory systems use this sort of process, others have codes developed exclusively by media professionals, such as editors, and this is perfectly legitimate.

Principle 30

This is another principle that we cannot really understand. What does it mean, for example, to say that the powers of “regulatory bodies” should be “administrative in nature”? It is not clear that content regulation is an administrative matter and yet that is the main thrust of most self-regulatory initiatives. It is also not clear why the reference to “not usurping the role of the courts” has been added. We are not aware of any cases where self-regulation has been accused of this. Finally, we suggest that the word “self” be added between “powers of” and “regulatory”.

Principle 32

This principle seems to overlap considerably with part (a) of Principle 24 and we suggest that they be combined.

Principle 36

We believe that this principle could be understood in ways that fail to respect international standards relating to freedom of expression. There is no problem with a self-regulatory system for the print and online media and Internet intermediaries but the experience so far with State regulators for these sets of actors has been extremely problematical. We suggest that this principle be integrated into the section on Self-

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Regulation.

Principle 39

This is another principle that is far too vague, in particular in referring to “undue legal restrictions”. We recommend the introduction of far more precise statements here such as saying directly that access to the profession of journalism should not be subject to licensing or even a system of registration, which is entirely unnecessary. At a more general level, all of the principles relating to journalists and media workers should be brought together.

Principles 40 and 41

These principles cover the same issue and should be integrated. Principle 41 is, once again, too vague, specifically in its reference to States taking “measures to prevent attacks”. Far more precise standards should be included here, along the lines of those found in the 2012 Joint Declaration of the four special international mandates on freedom of expression, who of course include the African Special Rapporteur. Furthermore, this obligation should be expanded to cover not only media workers but anyone who is targeted in retaliation for expressing themselves.

Principle 43

This principle refers to the particularly problematical case where State officials are directly responsible for attacking journalists and yet the language is hardly differentiated from the general responsibilities of States in this area. We recommend the inclusion of stronger language here to clearly differentiate it from States’ general obligations in the area of safety.

Principle 46

Part (a) fails to set out the appropriate standard in this context. No one should ever be liable in defamation law for making true statements. It is therefore not appropriate to limit this to cases where both the statement was about a public figure and it was reasonable to make the statement. Furthermore, one should be protected against liability for making even incorrect statements when they are about public figures and it was reasonable to make the statement. Otherwise, we feel this statement is far too brief in its treatment of this very important issue. Numerous other standards could be included about defamation laws, such as that they should not protect States and symbols, that there should be other defences (such as the reasonableness defence noted above) and that pecuniary sanctions need to be subject to limits.

Principle 47

The standard here is not set out clearly enough. It should state simply that in cases where

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privacy and secrecy clash with freedom of expression/access to information, the appropriate way to resolve this is via a public interest balancing test.

Principle 49

In our opinion, sedition laws, at least those that are derived from the British tradition, which is the case in a lot of African countries, are simply not legitimate. Inasmuch as this principle appears to justify these laws by saying only that custodial sentences should not be applied to them, it is inappropriate. We believe it is confusing to refer to both defamation and libel, since libel is simply one form of defamation. Finally, while the second sentence sets out an appropriate standard, it appears to contradict the first sentence, which does not call for decriminalisation but for the removal only of custodial sentences. We believe that the first sentence should be removed and the principle should consist only of the second sentence.

Principle 51

This principle calls for States not to restrict by law speech that “merely” lacks respect for the rights of others. While we appreciate this sentiment, it is unfortunately expressed inasmuch as international law specifically lists the “rights of others” as a ground for restricting freedom of expression.

Principle 53

This is another principle that is too vague to provide clear direction for States. In particular, the references to “last resort” and “the most severe cases” are very unclear, even if the latter is followed by a list of factors to take into account in assessing severity. Regarding the latter, the current text says that “States” shall take these factors into account but given that the principle is about imposing criminal sanctions, we suggest that this should be replaced by a reference to “judges”. Finally, the list of factors to assess severity seems to be based on the issue of incitement to hatred rather than criminal liability for speech more generally. For example, part (c) refers to “intent to incite” but this is simply not relevant in the case, for example, of child pornography or selling State secrets to the enemy (and neither are most of the other factors).

Principle 54

This is again a principle which is too general to provide clear guidance. At a minimum, some examples of how States could promote a supportive economic environment – such as subsidies for public interest content, reduced taxes on media inputs, such as newsprint, and so on – should be added.

Principle 55

A key consideration in ensuring that State advertising power is not abused is to require

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decisions about the allocation of this sort of advertising to be based on objective considerations (essentially, how best to reach the desired audience rather than political considerations). This idea should be added to this principle.

Principle 56

This principle covers the same issue as is addressed in Principle 24(2)(b), although it is broader in scope. The two principles should be integrated.

Principle 57

This principle, on protection of the confidentiality of journalistic sources, is too narrow in scope (subject to Principle 7 which would apply this to everyone which, as noted in relation to that principle, is not realistic). Consideration should be given to extending this right to anyone who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication (as is the case with Council of Europe Rec. (2000)7, which focuses entirely on sources).

Principle 58

As currently phrased, this principle would require mandatory source disclosure whenever the list of conditions was met. Instead, the lead-in to this list should be phrased so as to prevent source disclosure orders unless all of the conditions were met (i.e. something like “Courts shall not order source disclosure unless ...”).

Part III

Principle 62

This principle, focusing on maximum disclosure as a feature of access to information, refers to the idea of “exemptions”. The use of this term suggests that access is a privilege rather than a right. We recommend that, here and elsewhere in the Declaration the term “exceptions” be used, as this is more appropriate when referring to limitations on a right.

Principle 63

This principle is about proactive disclosure but the first sentence has nothing to do with that sort of disclosure and is, instead, applicable to the wider concept of access to information. It should, therefore, be moved to the previous principle on maximum disclosure.

Principle 64

Similarly, although this principle is again about proactive disclosure, inasmuch as it limits the scope of application to private bodies, it should apply to both proactive and reactive (request-driven) disclosure. We suggest that it be integrated into Principle 60,

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which is about the application of this Part of the Declaration to “relevant private bodies”.

Principle 65

This calls for information subject to proactive disclosure to be disseminated “through all available mediums”. This is not realistic. Instead, it should refer to dissemination online but also, as relevant, through other mediums. Later, this principle calls for proactive disclosure to take place in accordance with “internationally accepted open data principles”. As in other cases, this general reference should be replaced with more specific references to the key applicable principles, which are essentially that access should be free, provided in machine readable formats and that information should normally be subject to free reuse (unless a private third party has intellectual property rights in the information).

Section on Procedure for Accessing Information

Consideration should be given to adding into this section a principle on ease of lodging a request for information (i.e. not too much information should be asked for, it should be possible to submit requests in different ways and so on).

Principle 67

This principle refers to some of the detail that we recommended be included in Principle 65, specifically regarding reusable formats. Consideration should be given to integrating at least that issue into one principle (i.e. by having just one principle focusing on reuse but covering both proactive and reactive disclosure).

Principle 69

Consideration should be given here to referring explicitly to assisting those who are illiterate (i.e. in addition to persons with disabilities).

Principle 70

Consideration should be given to adding in here the idea that a certain number of pages of photocopies should be provided for free.

Principle 72

This is the first reference to an “oversight mechanism” and this may not be clear to everyone so it would be useful to define this (i.e. by making it clear that we are referring here to an administrative body rather than the courts).

Principle 76

Part (a) here refers to “personal information”. It is better practice to refer to private information about a natural third party in this context since, ultimately, it is privacy and

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not personal data that needs to be protected. While this is conditioned by the disclosure being “unreasonable”, which narrows it considerably, there is a lot of general confusion about the difference between personal data and privacy, so it would be helpful for the Declaration to refer to the latter. Part (e) refers to “diplomatic or official correspondence”. Once again, given that this is conditioned by the disclosure causing “substantial prejudice to international relations”, in practice it may not be too broad but, given that there is again a lot of confusion about the status of diplomatic correspondence, it is unhelpful to include a specific reference to it here. Rather, it would be preferable simply to refer to information the disclosure of which would cause substantial harm to international relations or where the information is legally required to be held in confidence. Part (g) refers to “confidential communication between medical practitioner and patient”. Since the interest to be protected here is privacy, this is already covered by part (a), so there is no need to stipulate this here.

Principle 77

Here, again, there is a reference to an “oversight mechanism”. This needs to be explained either here or in Principle 72. Consideration should also be given to bringing together the statements on oversight mechanisms (in particular Principle 72 might be brought into this Section).

Principle 79

This principle calls on bodies to “accede to the authority of the oversight mechanism”. While this is not wrong, it would be clearer simply to indicate that the decisions of this body should be formally and effectively binding. This principle should also refer to the need for this body to have adequate powers both to investigate complaints and to order appropriate remedies where the law has not been respected.

Principle 80

This principle refers to the idea of whistleblowers acting in good faith. This is not incorrect, but sometimes this notion is interpreted too broadly to mean that whistleblowers must act in good faith overall, including in terms of their underlying motivation for blowing the whistle rather than simply as to the fact that they are whistleblowing. A more precise formulation would be to require them to act in the honest belief that the information they disclosed was substantially true and exposed wrongdoing or the other threats.

Principle 81

This principle refers to the idea of “independent institutions to oversee the protection of whistleblowers”. It is not clear what is being referred to here as there is a multiplicity of ways to approach the protection of whistleblowers. This reference should either be

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removed or clarified.

Principles 82 and 83

In both of these principles, each of the references to “and” should be changed to “or” (i.e. so that Principle 82 is engaged whenever an information holder fails to disclose proactively *or* to respond properly to a request). In Principle 82, this should be engaged not only where there is a failure to grant a request but whenever a request has not been dealt with properly (i.e. not in accordance with the law). On the other hand, Principle 82 should apply only where the information holder has acted wilfully or negligently (and not, for example, merely by mistake). Finally, experience in other countries has demonstrated that administrative penalties are often far more effective than criminal penalties, even though the latter are needed for more serious forms of behaviour. This is partly because, in the context of access to information, the imposition of criminal penalties is often excessive and partly because it is a lot more difficult to apply criminal measures. With this in mind, it might make sense to limit Principle 82 to administrative penalties and to make Principle 83 about criminal measures.

Part IV

Principle 84

This is very general and seems to largely cover the same ground as Principle 5 so consideration should be given to dropping it.

Principle 86

This calls on States to “adopt laws and other measures” to promote universal access to the Internet. Although regulatory measures do have a place here, in our experience they are secondary to “other measures” so consideration should be given to rephrasing this, perhaps to something like “States shall take all necessary measures ...”. Part (a) refers to the idea of “developing regulatory mechanisms for effective oversight”. It is not clear what this means and why oversight is necessary in this context (i.e. of measures to expand access). Part (d) refers to the idea of digital literacy “for inclusive, autonomous and accountable use”. There are many benefits to digital literacy but it is not immediately clear how they will increase access to the Internet.

Principle 88

This principle calls for affordable access to the Internet for children, “that equips them with digital literacy skills”. This does not appear to us to make sense (i.e. how would access provide them with literacy skills, which would seem to require other measures, such as awareness raising).

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Principle 89

This principle calls on States not to interfere with the means of communication, except where this is “justifiable and compatible with international human rights law”. This is another provision which is quite vague, something which is particularly problematical when used in the context of authorising State interference. Other authoritative statements have made it clear that mandatory State filtering of online content is never legitimate and that blocking and removal should normally be allowed only after an order from a court or other independent oversight body.

Principle 91

This principle refers to the idea of laws “authorising interference through surveillance”. This should simply be laws “authorising surveillance” since it is not clear what interference is being referred to here and the standards it sets out are relevant for all surveillance laws.

Principle 92

This principle refers to the idea of States adopting economic measures for end-users. This is too limited since any economic measures that States impose on service providers will inevitably get passed onto users. Also, the conditions for imposing such measures, as set out in this principle, are too general, referring to interference with universal access and compatibility with international law. It is not at all clear at what point an economic measure might be deemed to interfere with universal access and, as noted for other principles, simply referring to international law is not enough since the whole purpose of this Declaration is to clarify exactly what that means in different contexts.

Principle 93

This principle, which is about enabling access to all Internet traffic and not blocking or privileging any content, is cast as applying to “Internet intermediaries”. This is too broad since there is a vast range of intermediaries, most of which do not enable access to all traffic and do block access to certain forms of content. Facebook, for example, in its stated goal of being a family friendly service, blocks access to naked images, which is generally legitimate. It would make sense to limit the scope of application of this principle to Internet access providers.

Principle 94

This principle is about intermediary liability. In addition to the conditions stated there, it should limit such liability to cases where courts or other independent oversight bodies hold intermediaries liable.

Principle 95

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This principle is about orders to remove online content. Part (b) calls for such orders to come only from courts which are “independent and impartial”. While it is true that all courts should meet these standards, this Declaration is about freedom of expression and it confuses matters to get into standards relating to the rule of law. Furthermore, it is not realistic to expect countries where the courts are not independent not to order the removal of online content, for example child pornography. Essentially, this is an issue that needs to be worked on separately from the process of rendering laws and practices compliant with the right to freedom of expression. Separately, it is increasingly being recognised that other independent oversight bodies might be given the role of regulating online content, much as independent administrative bodies regulate broadcasters in most democracies. Finally, part (d), referring to compatibility with international law, is too general to be useful. More specific standards need to be set out here.

Principle 96

This principle requires intermediaries, when moderating content, to undertake “mitigation strategies to address State restrictions”. It is not clear what exactly this means or, to put it differently, what we are actually asking intermediaries to do. It is also not clear how realistic this is. While it is increasingly clear that, at some point, companies do need to engage to push back on repressive measures by States, this is an area which remains unclear under international law. Finally, it seems a bit unrealistic to call on States to require intermediaries to resist those same States.

Principle 99

This principle, about measures that prohibit or weaken encryption, is again stated too generally, allowing such measures where they are justifiable and compatible with international law. Also, other statements take a stronger position here, saying that encryption may not be prohibited but only restricted.

Principle 100

Part (a) of this principle, which is about the processing of personal information, states, in subpart (i), that this shall take place only with the consent of the individual concerned. This is too limited and every regime on personal data recognises that there are exceptions to this (for example, in the context of criminal law investigations). Subpart (a)(iii) calls for processing of personal information to be done only for the purpose for which it was collected, which is again too strict with most regimes allowing other uses under certain conditions, as long as they are not incompatible with the original purpose. Subpart (a)(v) calls for personal information to be disclosed but presumably this is only to the individual to whom the information relates. Since this is dealt with in subpart (b)(ii), it is not clear why subpart (a)(iii) is necessary. If it is intended to mean that data controllers are supposed to be transparent about the general types of data they are collecting, this should

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be clarified. Part (b) is about the rights of data subjects but, once again, fails to recognise that there are exceptions to this (the example, given above, about criminal investigations is again relevant here). Part (c) refers to the right of data subjects to “reuse” their personal information. It is not clear what this means since the data is about them in the first place. This needs to be clarified. It is not clear that part (e), about harmful sharing of personal information, fits here. Rather, this seems to be about restrictions on freedom of expression (i.e. rather than privacy or personal data rights). As a technical matter, the language would need to be amended, since, by definition, one cannot have personal information about a group. In any case, it is not clear why it is necessary to refer to marginalised groups here. No doubt these groups suffer more from the issues addressed here but the standards involved, for example the non-consensual sharing of intimate images, apply to everyone. However, we have a broader problem with this part because, as a principle that is calling for a restriction on freedom of expression, it is too broad. Specifically, as phrased, it is far too broad since it calls for the penalisation of “harmful sharing” of personal data, which is undefined and could be understood quite widely. Even rules prohibiting the non-consensual sharing of intimate images, which have been adopted in some jurisdictions, need to be drafted sufficiently narrowly if they are to pass muster as restrictions on freedom of expression.

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Recommendations:

Part I

- Principle 2 should be amended by removing the reference to ‘expressing’ opinions.
- Principle 3 should be amended to state that everyone has an equal ‘right’ to freedom of expression and access to information, rather than the “equal opportunity to exercise” these rights.
- Principle 4 should be removed.
- Consideration should be given to moving the section on Protection of the Right to Freedom of Expression and the Right of Access to Information Online further down in the Declaration.
- Principle 5 should either be removed or amended to bring it into line with international law and the rest of the Declaration.
- Principle 7 should be removed.
- Consideration should be given to adding linguistic minorities to the list of marginalised groups listed in Principle 8.
- Principle 9 should call on States to afford maximum respect to the freedom of expression rights of children, taking into account their evolving capacities.
- Consideration should be given to combining parts (b) and (c) of Principle 11.
- It should be made clear whether Principle 13 refers to legal restrictions or the way they are applied in practice.
- The two different ideas which are reflected in both part (a) and part (b) of Principle 13 should be separated out.
- The idea that restrictions should not be overbroad should be added into Principle 13.

Part II

- Consideration should be given to integrating the two principles in the section on The Guarantee of Freedom of Expression into Principles 1 and 2. In any case, the reference to the uninhibited right to express opinions in Principle 15 should be removed.
- The reference to transforming State broadcasters into independent public service broadcasters should be removed from Principle 16 as it does not fit with the other idea expressed there and is in any case addressed in Principle 22.
- Principle 17 should be completely reworked to call on States to promote a diverse media and then list some of the key ways this can be done, with the benefits being cast as aims to inform the design of the diversity measures, rather than indicating the benefits which a diverse media should facilitate.
- Part (g) of Principle 17 should be removed from that principle, since it has nothing to do with a diverse media, and consideration should be given to including it elsewhere in the Declaration.
- Principle 19 should be fundamentally reworked. It should be limited to the idea of registration regimes for the print media and it should set out specific standards governing this type of registration regime, including by expressing scepticism about whether this type of registration is necessary at all.
- Principle 20 should refer to publicly owned media rather than media owned by a

Note on Draft Declaration of Principles on Freedom of Expression and Access to Information in
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