

A large, stylized number '2' filled with a fine, diagonal hatched pattern. It is positioned in the upper left quadrant of the page. The background features abstract geometric shapes: a solid grey shape at the top left, a hatched grey shape below it, and a solid black shape at the bottom right.

Hallmarks of a democratic media environment

In this chapter, you will learn about:

- ▷ eighteen instruments that contain key principles of democratic media regulation
- ▷ ten key principles of democratic media regulation:
 - › freedom of the press and other media
 - › independent media
 - › diversity and pluralism in the media
 - › professional and self-regulatory media
 - › protecting journalists' sources
 - › access to information
 - › commitment to transparency and accountability
 - › commitment to public debate and discussion
 - › availability of local content
 - › ensuring that states do not use their advertising power to influence content
- ▷ eight key principles of democratic broadcasting regulation:
 - › national frameworks for the regulation of broadcasting must be set down in law
 - › independent regulation of broadcasting
 - › pluralistic broadcasting environment with a three-tier system for broadcasting: public, commercial and community
 - › public as opposed to State broadcasting services
 - › availability and nature of community broadcasting services
 - › equitable, fair and transparent processes for licensing
 - › universal access to broadcasting services and equitable access to broadcasting signal distribution and other infrastructure
 - › regulating broadcasting content in the public interest

- ▷ seven key principles of democratic internet regulation:
 - › internet access and affordability
 - › freedom of expression and information online
 - › freedom of assembly and association online
 - › the right to privacy, anonymity, personal data protection and freedom from surveillance online
 - › security, stability and resilience of the internet
 - › democratic multi-stakeholder internet governance
 - › equitable distribution of internet revenues

1 Introduction

Chapter 1 examined a number of international human rights instruments to gain a better understanding of the nature and extent of the right to freedom of expression and grounds for limiting expression, as well as its relationship to freedom of the press and other media. This chapter looks more specifically at the internationally accepted hallmarks of democratic media regulation — in other words, the legal regime that establishes a democratic media environment.

This chapter identifies 18 treaties, conventions, charters, protocols or declarations adopted, either by international bodies (such as the UN, the AU and SADC), or at significant conferences held under the auspices of international bodies (such as the United Nations Education, Scientific and Cultural Organisation (Unesco)) or civil society bodies focusing on the media (for example, Article 19, an international non-governmental organisation (NGO) focusing on press freedom issues).

It is important to note that some of these instruments may be legally binding upon certain countries but most are aspirational in the sense that they set out international best practice on a range of media-related regulatory issues without being legally enforceable.

The 18 instruments — many of which have a particular focus on Africa — deal with, among other things, various aspects of democratic media regulation. Ten key principles of general democratic media regulation, eight key principles of democratic broadcasting regulation and seven key principles of democratic internet regulation have been identified from these instruments.

The principles can be used as a yardstick to assess an individual country's commitment to democratic media, broadcasting and internet regulation and, more broadly, its commitment to the underlying principle of freedom of expression. Bear this in mind when reading the chapters that deal with the media laws of specific southern African countries and when evaluating their level of commitment to,

and compliance with, international best practice standards for democratic media, broadcasting and internet regulation.

2 Key instruments that establish democratic media, broadcasting and internet regulatory principles

This section examines eighteen treaties, conventions, charters, protocols or declarations to determine what are considered to be international best practice in respect of democratic media, broadcasting and internet regulatory environments.

As mentioned previously, some of these have been developed by international bodies established by treaty, such as the UN, the AU and SADC, and some have been established by NGOs with long-standing records of work in the areas of freedom of expression and freedom of the media.

Since this handbook is aimed at journalists and other media practitioners as opposed to lawyers, the instruments, charters, protocols or declarations are not set out in full, however, the key media-related provisions are detailed under the various principle headings.

It is also important to note that the instruments, charters, protocols, declarations and resolutions discussed are a selection of key documents relevant to democratic media, broadcasting and internet regulation made by bodies of international standing, with particular (but not exclusive) reference to Africa, including southern Africa.

The selected instruments, charters, protocols, declarations and resolutions are listed below in alphabetical order:

- ▶ **The Access to the Airwaves Principles:**¹ Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation is a set of standards on how to promote and protect independent broadcasting while ensuring that broadcasting serves the interests of the public. The principles were developed in 2002 by Article 19, an international NGO working on freedom of expression matters as part of its International Standards series.
- ▶ **The African Charter on Broadcasting:**² The African Charter on Broadcasting was adopted by participants at a 2001 Unesco conference to mark the 10th anniversary of the Windhoek Declaration. While the Windhoek Declaration focuses mainly on print media, the African Charter on Broadcasting focuses on broadcast media.
- ▶ **The African Declaration on Internet Rights and Freedoms:**³ The African Declaration on Internet Rights and Freedoms was developed by members of the African Declaration group in 2015. This is a Pan-African NGO initiative to

promote human rights standards and principles of openness in internet policy formulation on the continent.

- ▶ **The African Democracy Charter:**⁴ The African Charter on Democracy, Elections and Governance was adopted by the African Union (AU) in 2007 and came into force in 2012.
- ▶ **African Principles on Freedom of Expression and Access to Information Declaration:**⁵ The original Declaration of Principles on Freedom of Expression in Africa was adopted in 2002 by the African Commission on Human and Peoples' Rights, a body established under the auspices of the AU. The ACHPR updated and replaced it in 2019 with the Declaration of Principles on Freedom of Expression and Access to Information in Africa.
- ▶ **The Agenda for Sustainable Development:**⁶ The 2030 Agenda for Sustainable Development was adopted by heads of state at a UN summit in 2016 together with their corollary. It provides more information on the requirements of each of the UN's 17 Sustainable Development Goals.
- ▶ **AU Declaration on Internet Governance:**⁷ The Declaration on Internet Governance and Development of Africa's Digital Economy was adopted by the Heads of State and Government of the African Union in 2018. It is not a treaty, capable of being signed or ratified and is, therefore, not legally binding on African states. Nevertheless, the Declaration on Internet Governance contains some important statements on internet governance, even if these are only aspirational.
- ▶ **The Dakar Declaration:**⁸ The Dakar Declaration was adopted in Senegal in 2005 at a Unesco-sponsored World Press Freedom Day conference.
- ▶ **The Declaration of Table Mountain:**⁹ The Declaration of Table Mountain was adopted in 2007 by the World Association of Newspapers and the World Editors Forum. It contains a number of important statements on African media issues made by a civil society forum of newspaper publishers and editors.
- ▶ **The Johannesburg Principles:**¹⁰ The Johannesburg Principles on National Security, Freedom of Expression and Access to Information were adopted in October 1995 by a panel of experts in international law, national security and human rights. The panel was convened by Article 19, the International Centre against Censorship and the University of the Witwatersrand's Centre for Applied Legal Studies. The Johannesburg Principles have been endorsed by the UN Committee on Human Rights and the UN Special Rapporteur on Freedom of Opinion and Expression.
- ▶ **Malabo Convention:**¹¹ The AU Convention on Cyber Security and Personal Data Protection (known as the Malabo Convention) was adopted by the heads of state of the African Union in 2014. It comes into force when 15 countries have ratified it. At the time of writing this chapter, only four countries had done so. This means it is not yet legally binding and so its status is aspirational in nature.

- ▶ **Resolution 169:**¹² Resolution 169 on Repealing Criminal Defamation Laws in Africa was adopted by the African Commission on Human and Peoples' Rights (ACHPR) in 2010.
- ▶ **Resolution 362:**¹³ Resolution 362 on the Right to Freedom of Information and Expression on the Internet in Africa was adopted by the African Commission on Human and Peoples' Rights (ACHPR) in 2016.
- ▶ **The SADC Protocol:**¹⁴ The Southern African Development Community Protocol on Culture, Information and Sport was adopted in 2001 and came into force in 2006.
- ▶ **Unesco's Internet Universality Indicators:**¹⁵ In 2019 Unesco published a document entitled 'Internet Universality Indicators: A Framework for Assessing Internet Development' which contains a set of 303 indicators divided into six categories: The ROAM-X Principles (Rights, Openness, Accessibility, Multi-stakeholder participation and Cross-cutting).
- ▶ **Unesco's Media Development Indicators:**¹⁶ Unesco's International Programme for the Development of Communications in 2008 published a document entitled 'Media Development Indicators: A Framework for Assessing Media Development.'
- ▶ **The Windhoek Declaration:**¹⁷ The Windhoek Declaration on Promoting an Independent and Pluralistic Press was adopted in 1991 by participants at a UN-Unesco seminar on promoting an independent and pluralistic African press. It was endorsed by Unesco's General Conference thereafter. The Windhoek Declaration is an important international statement of principle on press freedom and the day of its adoption, 3 May, is now Annual World Press Freedom Day.
- ▶ **The WSIS Geneva Principles:**¹⁸ The WSIS Geneva Principles were adopted in Geneva in 2003 at the World Summit on the Information Society (WSIS), held by the UN in conjunction with the International Telecommunications Union. While the WSIS Geneva Principles cover mainly issues concerning universal access to information and communication technologies (ICTs), they also contain some important statements on the media more generally.

3 Ten key principles of democratic media regulation

3.1 Principle 1: Freedom of the press and other media

3.1.1 Relevant provisions in international instruments

- ▶ Article 2(10) of the African Democracy Charter states, in its relevant part, that

one of its objectives is to 'Promote the establishment of the necessary conditions to foster ... freedom of the press.'

- ▶ Article 27(8) of the African Democracy Charter provides, in its relevant part, that 'In order to advance political, economic and social governance, states shall commit themselves to ... Promoting freedom of expression, in particular freedom of the press.'
- ▶ Principle 1.2 of the African Principles of Freedom of Expression and Access to Information Declaration states that 'States ... shall create an enabling environment for the exercise of freedom of expression and access to information.'
- ▶ Principle 5 of the African Principles on Freedom of Expression and Access to Information Declaration states that 'The exercise of the rights to freedom of expression and access to information shall be protected from interference both online and off-line ...'
- ▶ Principle 10 of the African Principles on Freedom of Expression and Access to Information Declaration states that 'Freedom of expression, including the right to seek, receive and impart information and ideas, either orally, in writing or in print, in the form of art or through any other form of communication or medium, including across frontiers, is a fundamental and in a reasonable human right and an indispensable component of democracy.'
- ▶ Principle 12.2 of the African Principles on Freedom of Expression and Access to Information Declaration states that 'Any registration system for media shall be for administrative purposes only, and shall not impose excessive fees or other restrictions on the media.'
- ▶ Principle 19.1 of the African Principles on Freedom of Expression and Access to Information Declaration states that 'The right to express oneself through the media by practising journalism shall not be subject to undue legal restrictions.'
- ▶ The preamble to the AU Declaration on Internet Governance recognises that the right 'to freedom of expression and access to information (one and offline), and human and peoples' rights ... must be upheld online as well as offline.'
- ▶ The Declaration of Table Mountain declares, among other things, that 'African states must recognise the indivisibility of press freedom and their responsibility to respect their commitments to African and international protocols upholding the freedom ... and safety of the press.'
- ▶ The Declaration of Table Mountain identifies 'as the greatest scourge of press freedom on the continent the continued implementation of 'insult laws', which outlaw criticism of politicians and those in authority and criminal defamation legislation, both of which are used indiscriminately in the vast majority of African states that maintain them and which have as their prime motive the 'locking up of information.'
- ▶ Resolution 169 calls on states parties to the AU 'to repeal criminal defamation

laws or insult laws which impede freedom of speech.'

- ▶ Clause 1 of Resolution 362 called on states parties to the AU to 'take legislative and other measures to guarantee, respect and protect citizen's right to freedom of ... expression through access to internet services.'
- ▶ Article 20 of the SADC Protocol requires SADC states to 'take necessary measures to ensure the freedom ... of the media.'
- ▶ Unesco's Internet Development Indicators at (RB.1) asks: 'Is freedom of expression guaranteed in law, respected in practice, and widely exercised?'
- ▶ The Unesco Media Development Indicators provide that states must guarantee freedom of expression in law and must respect it in practice. This requires, among other things:
 - ▶ national laws or constitutional guarantees on freedom of expression
 - ▶ bodies that guarantee the concrete application of the right to freedom of expression
- ▶ Article 1 of the Windhoek Declaration states that 'the establishment, maintenance and fostering of [a] ... free press is essential to the development and maintenance of democracy in a nation, and for economic development.'
- ▶ Principle 55 of the WSIS Geneva Principles states, in its relevant part, that 'the principle ... of freedom of the press ... [is] essential to the Information Society.'

3.1.2 Summary

- ▶ A free press is essential for democracy.
- ▶ A free press is essential for economic and social development.
- ▶ A free press is essential to the information society.
- ▶ Freedom of expression and access to information must be upheld online as well as offline.
- ▶ Governments must uphold the freedom of the press and the safety of journalists.
- ▶ States must have national laws or constitutions guaranteeing the right to freedom of expression and must ensure that this is respected in practice.
- ▶ States cannot impose undue restrictions on the practice of journalism or on media operations, including through onerous registration processes.
- ▶ Criminal defamation, sedition, insult and false news laws impede freedom of speech and ought to be repealed.

3.1.3 Comment

- ▶ There is widespread international recognition that freedom of the press has tangible benefits for society and that real economic and social development, or democracy, is not possible without it.
- ▶ Also important is recognition of the need for legal, particularly constitutional, guarantees of freedom of expression (on and offline) and the need to repeal laws such as criminal defamation, sedition, insult, false news and media registration laws which impede media freedom.

3.2 Principle 2: An independent media

3.2.1 Relevant provisions in international instruments

- ▶ Article 1 of the Windhoek Declaration states that ‘the establishment, maintenance and fostering of an independent ... press is essential to the development and maintenance of democracy in a nation, and for economic development.’
- ▶ In article 2 of the Windhoek Declaration, an ‘independent press’ is defined as ‘a press independent from governmental, political or economic control or from control of materials and infrastructure essential for the production and dissemination of newspapers, magazines and periodicals.’
- ▶ In article 17(a) of the SADC Protocol, SADC members agreed ‘to cooperate in the area of information in order to attain ... Cooperation and collaboration in the promotion, establishment and growth of independent media ...’
- ▶ Article 20 of the SADC Protocol requires SADC states to ‘take necessary measures to ensure the development of media that are editorially independent’.
- ▶ Article 7 of Part I of the African Charter on Broadcasting states that ‘States should promote an economic environment that facilitates the development of independent production and diversity in broadcasting.’
- ▶ Principle 12.1 of the African Principles on Freedom of Expression and Access to Information Declaration provides that ‘States shall guarantee the right to establish various forms of independent media, including print, broadcast and online media.’
- ▶ Principle 12.3 of the African Principles on Freedom of Expression and Access to Information Declaration provides that ‘States shall develop regulatory environments that encourage media owners and media practitioners to reach agreements to guarantee editorial independence and prevent commercial and other considerations from influencing media content.’
- ▶ Principle 55 of the WSIS Geneva Principles states, in its relevant part, that ‘the principle ... of independence ... of media ... [is] essential to the Information Society.’

- ▶ The Dakar Declaration calls on member states of Unesco to ‘create an enabling environment in which an independent ... media sector can flourish.’
- ▶ The Declaration of Table Mountain declares, among other things, that ‘African states must recognise the indivisibility of press freedom and their responsibility to respect their commitments to African and international protocols upholding the ... independence ... of the press.’

3.2.2 Summary

- ▶ Independence means being free from governmental, political and economic control or commercial interference. In other words, it means having editorial independence.
- ▶ An independent media is essential for democracy.
- ▶ An independent media is essential for economic development.
- ▶ An independent media is essential for the information society.
- ▶ Governments, media owners and publishers must act to secure the independence of the media.
- ▶ In respect of the broadcast media, independent production is an important aspect of independence.
- ▶ Media published by public authorities must be adequately protected against undue political interference.

3.2.3 Comment

- ▶ There is widespread international recognition that an independent media has tangible benefits for society and that real economic and social development, or democracy, is not possible without it.
- ▶ Another noteworthy aspect is that independence does not only mean independence from governmental or political interference, but also independence from commercial interference, such as pressure from advertisers or owners of media companies to report on an issue in a particular way. Commercial interference is a problem in developed countries and is likely to be even more of a problem in developing countries that have much smaller advertising pools.
- ▶ The international community has identified that media distributed by public authorities (for example, public broadcasters) needs particular protection against political interference.

3.3 Principle 3: Diversity and pluralism in the media

3.3.1 Relevant provisions in international instruments

- ▶ Article 1 of the Windhoek Declaration states that ‘the establishment, maintenance and fostering of [a] ... pluralistic ... press is essential to the development and maintenance of democracy in a nation, and for economic development.’
- ▶ Article 2 of the Windhoek Declaration defines a ‘pluralistic press’ as ‘the end of monopolies of any kind and the existence of the greatest possible number of newspapers, magazines and periodicals reflecting the widest possible range of opinion within the community.’
- ▶ Article 17(d) of the SADC Protocol requires member states to agree to cooperate in the area of information by ‘taking positive measures to narrow the information gap between the rural and urban areas by increasing the coverage of the mass media, whether private, public or community-based.’
- ▶ In article 18(4) of the SADC Protocol, member states agree ‘to create political and economic environments conducive to the growth of pluralistic media.’
- ▶ Principle 11.1 of the African Principles on Freedom of Expression and Access to Information Declaration states that ‘State or private media monopoly over print, broadcast and online media is not compatible with the right to freedom of expression.’
- ▶ Principle 11.3 of the African Principles on Freedom of Expression and Access to Information Declaration states that ‘States shall take positive measures to promote a diverse and pluralistic media ...’
- ▶ Principle 55 of the WSIS Geneva Principles states, in its relevant part, that ‘the principle ... of pluralism and diversity of media ... [is] essential to the Information Society ... Diversity of media ownership should be encouraged, in conformity with national law ...’
- ▶ The Dakar Declaration calls on member states of Unesco to ‘create an enabling environment in which [a] ... pluralistic ... media sector can flourish.’

3.3.2 Summary

- ▶ A diverse and pluralistic media environment is one in which there are no monopolies and in which there is a variety of media (print and electronic) reflecting the widest possible range of opinions.
- ▶ A diverse and pluralistic media environment is essential for democracy.
- ▶ A diverse and pluralistic media environment is essential for economic development.
- ▶ A diverse and pluralistic media environment provides a range of media options to both urban and rural people.

- ▶ Governments must act to ensure pluralistic media environments and broadcasting regulatory regimes should provide for a diversity of broadcasting services.
- ▶ Governments must pass cross-ownership legislation to avoid market dominance by a single player across different media platforms.
- ▶ Avoid undue concentration of media ownership without damaging development of the media sector as a whole.

3.3.3 Comment

- ▶ There is widespread international recognition that a pluralistic media has tangible benefits for society and that real economic and social development — or democracy — is not possible without it.
- ▶ The international community recognises that diversity is not just a matter of having different types of media available in a country, but also about availability in both rural and urban areas. In addition, it stresses the need for diversity within broadcasting and different categories of broadcasting services (public, commercial and community).
- ▶ The international media recognises that diversity of media ownership is crucial to ensuring, not only diversity of services, but also diversity of viewpoints. Consequently, it is important that there are laws to regulate media ownership diversity — that is, laws to prohibit undue media ownership concentration, particularly in respect of cross-ownership (for example, of print and broadcast media). However, this regulation cannot be made in such a way that it damages the development of the media sector as a whole. For example, if a country limits a media company to holding only one or two small media outlets, it might be stifling investment in its media sector unwittingly. Governments need to perform a fine balancing act in this regard; ensuring that media companies can grow sufficiently to encourage investment and growth in the industry as a whole without stifling diversity through allowing the development of media monopolies.

3.4 Principle 4: Professional and self-regulatory media

3.4.1 Relevant provisions in international instruments

- ▶ Article 12 of the Windhoek Declaration describes the establishment of independent, representative associations, syndicates or trade unions of journalists and associations of editors and publishers as ‘a matter of priority in all the countries in Africa where such bodies do not now exist.’
- ▶ Article 13 of the Windhoek Declaration states that national media and labour relations laws of African countries should be drafted so as ‘to ensure that representative associations can exist and fulfil their important tasks in defence of press freedom.’

- ▶ Article 16(ii) of the Windhoek Declaration calls for detailed research to be done by the international community on 'the training of journalists and managers and the availability of professional training institutions and courses', clearly indicating a concern for the issue.
- ▶ Article 5(1) of the SADC Protocol, in its relevant part, requires states to 'cooperate in the research and training of ... media practitioners.'
- ▶ In article 18(5) of the SADC Protocol member states agree 'to promote specialised training of journalists in the areas of culture and sports to improve the coverage of these.'
- ▶ Article 21 of the SADC Protocol provides that 'State Parties shall encourage the establishment or strengthening of codes of ethics to build public confidence and professionalism in the information sub-sector.'
- ▶ Principle 23.2 of the Access to the Airwaves Principles provides that 'where an effective self-regulatory system for addressing broadcasting content concerns is in place, an administrative system should not be imposed.'
- ▶ Principle 16.1 of the African Principles on Freedom of Expression and Access to Information Declaration states that 'States shall encourage media self-regulation which shall be impartial, expeditious, cost-effective, and promote high standards in the media.'
- ▶ Principle 16.2 of the African Principles on Freedom of Expression and Access to Information Declaration states that 'Codes of ethics and conduct shall be developed by the media through transparent and participatory processes and shall be effectively implemented to ensure the observance of the highest standards of professionalism by the media.'
- ▶ The Dakar Declaration calls on member states of Unesco to 'create an enabling environment in which [a] ... professional media sector can flourish' and calls on media outlets and professional associations to 'commit themselves to fair and professional reporting as well as to put in place mechanisms to promote professional journalism ... [and to] commit themselves to ongoing programmes for training for journalists to strengthen professional and ethical standards.'
- ▶ Article 27(8) of the African Democracy Charter provides, in its relevant part, that 'In order to advance political, economic and social governance, states shall commit themselves to ... fostering a professional media.'

3.4.2 Summary

- ▶ A professional media is essential to political, economic and social good governance.
- ▶ A professional media is essential to the defence of press freedom.
- ▶ A professional media requires independent associations of media owners, publishers and journalists, including trade unions.

- ▶ A professional media requires institutions and courses aimed at specialised training for journalists and other media professionals.
- ▶ A professional media requires specialist journalists.
- ▶ A professional media requires self-regulation through the development and enforcement of codes of ethics and good practice for journalists.
- ▶ Administrative (by way of statutory or regulatory provisions enforced by a statutory body) systems of regulation in respect of broadcasting content ought to imposed only where there is no effective self-regulation.

3.4.3 Comment

- ▶ It is noteworthy that so many international statements deal with the question of the need for a professional media and state that a professional media is essential to good governance (political, social and economic) and for the defence of press freedom itself.
- ▶ Professionalism requires appropriate specialist training and expertise which, in turn, raises the issue of the need for training institutions and courses for journalists.
- ▶ Professionalism is also, crucially, an issue of self-identification with professionalisation by the media industry. This industry professionalisation requires two important areas of development:
 - ▶ the need for media workers, owners and publishers to form representative industry bodies
 - ▶ the need for these bodies to develop self-regulatory standards or codes of ethics and practice.

3.5 Principle 5: Protecting confidentiality of sources

3.5.1 Relevant provisions in international instruments

- ▶ Principle 18 of the Johannesburg Principles states that 'Protection of national security may not be used as a reason to compel a journalist to reveal a confidential source.'
- ▶ Principle 25.1 of the African Principles on Freedom of Expression and Access to Information Declaration provides that 'Journalists and other media practitioners shall not be required to reveal confidential sources of information or to disclose other material held for journalistic purposes except where disclosure has been ordered by a court after a full and fair public hearing.'
- ▶ Principle 25.2 of the African Principles on Freedom of Expression and Access to Information Declaration provides that 'The disclosure of sources of information or journalistic material as ordered by a court shall only take place where:

- (a) the identity of the source is necessary for the investigation or prosecution of a serious crime or the defence of a person accused of a criminal offence;
 - (b) the information or similar information leading to the same result cannot be obtained elsewhere;
 - (c) the public interest in disclosure outweighs the harm to freedom of expression.'
- ▶ Principle 25.3 of the African Principles on Freedom of Expression and Access to Information Declaration provides that 'States shall not circumvent the protection of confidential sources of information or journalistic material through the conduct of communications surveillance except where such surveillance is ordered by an impartial and independent court and is subject to appropriate safeguards.'
 - ▶ The Unesco Media Development Indicators provide that journalists must be able to 'protect the confidentiality of their sources without fear of prosecution or harassment.'

3.5.2 Summary

- ▶ A journalist should not be forced to reveal the identity of a confidential source or provide confidential journalistic material unless exceptional circumstances relating to public safety or criminal proceedings exist and such disclosure has been ordered by a court.

3.5.3 Comment

- ▶ It is extremely significant that international instruments have recognised the need to protect journalists' confidential sources of information. However, the international instruments do not clearly state why this protection is necessary.
- ▶ Sources of information are vital for journalists. Without these, journalists have little, if any, real role to play. Sometimes journalists receive sensitive, perhaps explosive, information on political issues of the day. Journalists have to be able to reassure a source that his or her identity will be kept confidential; otherwise people with information that ought to be reported in the media will not come forward and speak to journalists for fear of reprisals.
- ▶ The international principle is reasonable because it is not absolute. A court must be involved where the public interest requires a journalist's confidential source to be revealed. The revelation must be necessary in relation to matters of serious public concern, such as a criminal investigation.
- ▶ Importantly, international instruments now also recognize the potential of surveillance, including of communications, to undermine the right of journalists to protect confidential sources of information.

3.6 Principle 6: Access to information

3.6.1 Relevant provisions in international instruments

- ▶ Article 1 of Part I of the African Charter on Broadcasting states that the 'legal framework for broadcasting should include a clear statement of the principles underpinning broadcast regulation including ... the free flow of information and ideas ...'
- ▶ Paragraph 2 of principle 3 of the African Declaration on Internet Rights and Freedoms provides that 'Everyone has a right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds through the internet and digital technologies and regardless of frontiers.'
- ▶ Principle 4 of the African Declaration on Internet Rights and Freedoms provides that 'Everyone has the right to access information on the internet. All information, including scientific and social research, produced with the support of public funds, should be freely available to all, including on the internet.'
- ▶ The preamble to the AU Declaration on Internet Governance recognises that the right 'to ... access to information (on- and offline) and human and peoples' rights ... must be upheld on- as well as offline.'
- ▶ Part of principle 11 of the Johannesburg Principles states that 'Everyone has the right to obtain information from public authorities, including information relating to national security.'
- ▶ Principle 13 of the Johannesburg Principles states that 'In all laws and decisions concerning the right to obtain information, the public interest in knowing the information shall be a primary consideration.'
- ▶ Part of Principle 14 of the Johannesburg Principles states that 'The state is obliged to adopt appropriate measures to give effect to the right to obtain information.'
- ▶ Article (2)(d) of the SADC Protocol requires states to be guided by the general principle of commitment to the right of access to information.
- ▶ Principle 26.1 of the African Principles on Freedom of Expression and Access to Information Declaration states that 'The right of access to information shall be guaranteed by law in accordance with the following principles:
 - (a) Every person has the right to access information held by public bodies ... expeditiously and inexpensively.
 - (b) Every person has the right to access information of private bodies that may assist in exercise or protection of any right expeditiously and inexpensively.'

- ▶ Principle 27 of the African Principles on Freedom of Expression and Access to Information Declaration states that 'Access to information laws shall take precedence over any other laws that prohibit or restrict the disclosure of information.'
- ▶ Principle 28 of the African Principles on Freedom of Expression and Access to Information Declaration states that 'The the right of access to information shall be guided by the principle of maximum disclosure ... [and] may only be limited by narrowly defined exemptions, which shall be provided by law and shall comply strictly with international human rights law and standards.'
- ▶ Principle 35.1 of the African Principles on Freedom of Expression and Access to Information Declaration states that 'No person shall be subject to civil, criminal, administrative or employment-related or other sanctions or harm, for releasing information on wrongdoing or which discloses a serious threat to health, safety or the environment, or whose disclosure is in the public interest, in honest belief that such information is substantially true.'
- ▶ Principle 55 of the WSIS Geneva Principles states, in its relevant part, that 'the principle ... of ... freedom of information ... [is] essential to the Information Society. Freedom to seek, receive, impart and use information for the creation, accumulation and dissemination of knowledge are important to the Information Society.'
- ▶ The Dakar Declaration calls on member states of Unesco to 'ensure that government bodies respect the principles of ... public access to information in their operations.'
- ▶ The Dakar Declaration calls on member states of Unesco 'to provide for comprehensive legal guarantees for the right to access information recognising the right to access information held by all public bodies, and requiring them to publish key categories of information and to introduce effective systems of record management ...'
- ▶ Article 2(10) of the African Democracy Charter sets out certain of the African Democracy Charter's objectives, the relevant part of which states that one of its objectives is to 'Promote the establishment of the necessary conditions to foster ... access to information ...'
- ▶ Clause 1 of Resolution 632 called on states parties to the AU to 'take legislative and other measures to guarantee, respect and protect citizen's right to freedom of information ... through access to internet services.'
- ▶ Unesco's Internet Development Indicators at (RC.1) asks: 'Is the right of access to information guaranteed in law and respected in practice?'

3.6.2 Summary

- ▶ Access to information (online and off-line) is essential to the free flow of information and ideas.

- ▶ Freedom to receive information (online and off-line) is essential to the information society.
- ▶ Public bodies hold information as custodians of the public good; therefore everyone has the right of access to information held by public bodies.
- ▶ Information produced with the support of public funds should be freely available to all, including on the internet.
- ▶ Information held by private bodies should be available where the information is required for the exercise or protection of any right.
- ▶ Governments must foster access to information by:
 - ▶ respecting the principle of public access to information
 - ▶ passing laws formally recognising the right to access information held by public and private bodies
 - ▶ publishing categories of information available
 - ▶ managing records effectively.
- ▶ National laws can impose limitations on the right to access information but these must be narrowly crafted in line with international human rights.
- ▶ No person can be subject to sanctions for disclosing information in the public interest.

3.6.3 Comment

The importance of the right of access to information is becoming widely recognized as being of vital importance in the information age. Many countries have elevated this to a constitutional right and many more have passed laws containing detailed provisions in support of the right of access to information held by the state and private bodies in certain circumstances, including in the public interest.

3.7 Principle 7: Commitment to transparency and accountability

3.7.1 Relevant provisions in international instruments

- ▶ The Dakar Declaration calls on member states of Unesco to ‘ensure that government bodies respect the principles of transparency [and] accountability ... in their operations’.
- ▶ The Dakar Declaration calls on member states of Unesco to ‘respect the functioning of the news media as an essential factor in good governance, vital to increasing both transparency and accountability in decision-making processes and to communicating the principles of good governance to the citizenry’.

- ▶ Article 2(10) of the African Democracy Charter sets out certain objectives, the relevant part of which states that one of its objectives is to promote the establishment of the necessary conditions to foster transparency and accountability in the management of public affairs.
- ▶ Article 3(8) of the African Democracy Charter requires states to implement the charter in accordance with the principle of transparency and fairness in the management of public affairs.
- ▶ Article 12(1) of the African Democracy Charter requires states to promote good governance by ensuring transparent and accountable administration.
- ▶ Article 32(1) of the African Democracy Charter requires states to strive to institutionalise good political governance through accountable, efficient and effective public administration.
- ▶ Article 33(2) of the African Democracy Charter requires states to institutionalise good economic and corporate governance through promoting transparency in public finance management.
- ▶ The preamble to the African Principles on Freedom of Expression and Access to Information Declaration states, among other things, that it recognizes 'the role of open government data in fostering transparency, efficiency and innovation'.

3.7.2 Summary

- ▶ Transparency and accountability promote good governance, whether political, economic or corporate.
- ▶ The news media is essential for good governance.
- ▶ The news media is vital to increasing transparency and accountability in decision-making processes.
- ▶ The news media is vital to communicating the principles of good governance to the citizenry.
- ▶ Governments must respect the functioning of the news media in relation to transparency and accountability.
- ▶ Governments must foster the principles of transparency and accountability in their operations and in public affairs generally, including through open data.

3.7.3 Comment

- ▶ It is noteworthy that the international instruments, declarations and statements deal with the issue of transparency and accountability by linking the relationship between the role of the news media and the transparency and accountability of government.
- ▶ Governments are notorious for proclaiming a commitment to accountability

and transparency while denying the news media appropriate scope within which to operate. A democratic media regulatory environment is one which recognises that the news media is essential to a government's ability to communicate with the public. Unless the news media operates in an environment in which it (and the public's right to transparency) is respected, real accountability by government to the public for its actions is all but impossible. This is because being transparent means that the public is able to see what government is doing and know why it is doing it. The public is generally informed about government decisions, actions and programmes through the media. Thus, if the media is shunned and shut out by government or, worse, actively prevented from obtaining or publicising information about governmental activities, the public is similarly shunned, shut out and prevented from being informed. Once the public is unable to know what government is doing, it becomes difficult for the public to hold government to account for its actions.

- ▶ The relationship of trust, mandate, representation and responsibility that ought to exist between the government and the governed is mediated by the media. The media acts as a public information valve, reporting on government's activities and actions and reflecting public sentiments and opinions thereon back to government.

3.8 Principle 8: Commitment to public debate and discussion

3.8.1 Relevant provisions in international instruments

- ▶ Article 2(10) of the African Democracy Charter sets out certain of the African Democracy Charter's objectives, the relevant part of which states that one of its objectives is to 'Promote the establishment of the necessary conditions to foster citizen participation ... in the management of public affairs.'
- ▶ Article 3(7) of the African Democracy Charter requires states to implement the charter in accordance with the principle of 'Effective participation of citizens in democratic and development processes and in governance of public affairs.'
- ▶ Article 13 of the African Democracy Charter provides, in its relevant part, that states 'shall take measures to ensure and maintain political and social dialogue, as well as public trust ... between political leaders and the people, in order to consolidate democracy and peace.'
- ▶ Article 27(2) of the African Democracy Charter requires states to commit to, among other things, fostering popular participation.
- ▶ Article 28 of the African Democracy Charter requires states to ensure and promote 'dialogue between government, civil society and [the] private sector.'
- ▶ Article 30 of the African Democracy Charter requires states to 'promote citizen participation in the development process through appropriate structures.'

3.8.2 Summary

- ▶ Public trust requires public participation.
- ▶ Public participation is essential for democracy, governance, peace and development.
- ▶ Governments must foster public dialogue, including between government, civil society and the private sector on political and social issues.
- ▶ Governments must foster public participation in public affairs and administration, as well as in democratic and development processes.

3.8.3 Comment

- ▶ It is accepted that public debate and discussion are essential for public participation, which is itself essential to democracy and social and economic development. The media is the key vehicle through which society conducts its 'public discussions.'
- ▶ Another important way of fostering citizen participation in these public debates is to ensure that government is able to interact with the public electronically. The increasing availability of the internet and mobile technology allows for 'citizen-journalists' to play an increasingly important role in public debate and discussion.

3.9 Principle 9: Availability of local content

3.9.1 Relevant provisions in international instruments

- ▶ Principle 11.3 of African Principles on Freedom of Expression and Access to Information Declaration states that 'States shall take positive measures ... which shall facilitate: ... the promotion of local and African languages, content and voices.'
- ▶ Article 15 of the AU Declaration on Internet Governance requires member states to promote local content.
- ▶ Article 17(c) of the SADC Protocol requires member states to agree to cooperate in the area of information in order to ensure the development and promotion of local culture by increasing local content in the media such as magazines, radio, television, video, film and new information technologies.
- ▶ Article 17(e) of the SADC Protocol requires member states to agree to cooperate in the area of information in order to ensure the encouragement of the use of indigenous languages in the mass media as vehicles of promoting local, national and regional inter-communication.
- ▶ Principle 53 of the WSIS Geneva Principles states, in its relevant part, that 'The creation, dissemination and preservation of content in diverse languages and

formats must be accorded high priority in building an inclusive Information Society ... the development of local content suited to domestic or regional needs will encourage social and economic development and will stimulate participation of all stakeholders, including people living in rural, remote and marginal areas.'

3.9.2 Summary

- ▶ Availability of content in a variety of African languages is essential for building an inclusive information society.
- ▶ Local content is essential to the development of local culture.
- ▶ Developing local content encourages social and economic development, including in rural areas.
- ▶ Local content should be available in all media: print, broadcasting and online.

3.9.3 Comment

- ▶ While Africa has many different languages and cultures, there is often insufficient reflection of this in the print and electronic media. All too often media is available largely (although not exclusively) in colonial languages, such as English, French, Portuguese or German. Encouraging the use of indigenous local languages is important to opening up conversations in societies and ensuring that marginalised people who can speak only these languages are included in public debate and discussion. The media must reflect a society back to itself, and it cannot do this effectively if large numbers of people are 'silenced' in the media because their languages are not used.
- ▶ Owing to widespread poverty and other developmental challenges, southern African governments often do not prioritise the development of local cultures.

3.10 Principle 10: Ensuring states do not use their advertising power to influence content

3.10.1 Relevant provisions in international instruments

- ▶ Principle 24.2 of the African Principles on Freedom of Expression and Access to Information Declaration provides that 'States shall ensure that the allocation of funds for public advertising is transparent and subject to public accountability, and they shall not abuse their power over the placement of public advertising.'
- ▶ The Dakar Declaration provides that it 'condemns all forms of repression of African media that allows for ... the use of ... devices such as withholding advertising.'
- ▶ Principle 28.1 of the Access to the Airwaves Principles provides, in its relevant part, that 'Access to State resources, including the placement of State

advertisements, should always be provided in a fair and non-discriminatory manner ...'

- ▶ The Declaration of Table Mountain recognises the 'deliberate exclusion of certain newspapers from State-advertising placement.'

3.10.2 Summary

State advertising is the lifeblood of many media outlets and this should not be abused by governments to skew editorial content.

3.10.3 Comment

- ▶ This principle is of critical practical importance to a range of fundamental principles, including freedom of the press and independence of the media.
- ▶ This principle recognises that in many poor and underdeveloped countries in Africa, particularly those with small or weak private sectors, states wield enormous influence due to their advertising spend capabilities.
- ▶ If a newspaper or broadcaster is dependent on state advertising to remain operational, it might do almost anything to secure the continuation of such revenue streams to ensure its economic survival.
- ▶ The media must be protected from undue content influence that may result from the State's advertising power.
- ▶ The state should not be entitled to use its advertising spend to reward compliant media or to punish what it sees as hostile media. If this happens, freedom of the press is undermined, the public's right to be informed is jeopardised and society as a whole risks moving away from democracy. Sadly, this is a frequent occurrence in a number of southern African countries.

4 Eight key principles of democratic broadcasting regulation

The previous section examined a range of international instruments in order to understand the ten key principles of democratic media regulation. These looked at the media generally: print, broadcast and online media. This section discusses certain of the international instruments, charters, protocols, declarations and resolutions that focus exclusively on the broadcast media in order to discern eight internationally-recognised hallmarks of democratic broadcasting regulation.

4.1 Principle 1: National frameworks for the regulation of broadcasting must be set down in law

4.1.1 Relevant provisions in international instruments

- ▶ Article 1 of the African Charter on Broadcasting provides, in its relevant part, that 'The legal framework for broadcasting must include a clear statement of the principles underpinning broadcast regulation, including promoting respect for freedom of expression ... and the free flow of information and ideas.'
- ▶ Principle 14 of the Access to the Airwaves Principles provides, in its relevant part, that 'The powers and responsibilities of regulatory bodies, for example in relation to licensing or complaints, should be set out clearly in the legislation which establishes them ... These powers and responsibilities should be framed in such a way that regulatory bodies have some scope to ensure that the broadcasting sector functions in a fair, pluralistic and smooth manner and to set standards and rules in their areas of competence ...'
- ▶ Principle 17.1 of the Access to the Airwaves Principles provides, in its relevant part, that 'The framework for funding [of regulatory bodies] should be set out clearly in law ...'

4.1.2 Summary

Broadcasting must be regulated in accordance with legislation that sets out:

- ▶ principles underpinning broadcasting regulation, including freedom of expression
- ▶ powers and duties of broadcasting regulatory bodies, which are necessary to ensure that the broadcasting sector is fair and pluralistic
- ▶ the funding framework for broadcasting regulatory bodies.

4.1.3 Comment

This principle is important as certain countries still do not have operational broadcasting laws and, instead, as a practical matter, allocate broadcasting as an area of responsibility to a particular ministry, such as internal affairs, communications or information. This means that the executive dominates broadcasting matters and 'regulates' broadcasting in accordance with the short-term interests of the government of the day, rather than in the long-term public interest.

4.2 Principle 2: Independent regulation of broadcasting

4.2.1 Relevant provisions in international instruments

- ▶ Article 2 of Part I of the African Charter on Broadcasting states that 'All formal powers in the areas of broadcast ... regulation should be exercised by public

authorities which are protected against interference, particularly of a political or economic nature, by, among other things, an appointments process for members which is open, transparent, involves the participation of civil society and is not controlled by any political party.'

- ▶ Principle 14.3 of the African Principles on Freedom of Expression and Access to Information Declaration states 'States shall establish an independent regulatory body to issue broadcasting licences and to oversee the observance of licence conditions.'
- ▶ Principle 17.1 of the African Principles on Freedom of Expression and Access to Information Declaration states 'A public regulatory authority that exercises powers in the areas of broadcast... infrastructure shall be independent and adequately protected against interference of a political, commercial or other nature.'
- ▶ Principle 17.2 of the African Principles on Freedom of Expression and Access to Information Declaration states 'The appointment process the members of the public regulatory body overseeing broadcast... infrastructure shall be independent and adequately protected against interference. The process shall be open, transparent and involve the participation of relevant stakeholders.'
- ▶ Principle 17.3 of the African Principles on Freedom of Expression and Access to Information Declaration states 'Any public regulatory authority that exercises powers in broadcast... infrastructure shall be accountable to the public.'
- ▶ Principle 17.5 of the African Principles on Freedom of Expression and Access to Information Declaration states 'The powers of regulatory bodies shall be administrative in nature and shall not seek to usurp the role of the courts.'
- ▶ The Dakar Declaration calls on member states of Unesco to 'guarantee the independence of regulatory bodies for broadcasting.'
- ▶ Principle 11 of the Access to the Airwaves Principles provides, in its relevant part, that 'The independence of regulatory bodies ... should be specifically and explicitly provided for in the legislation which establishes them and, if possible, also in the constitution.'
- ▶ Principle 12 of the Access to the Airwaves Principles provides, in its relevant part, that 'Regulatory bodies should be required to ... act in the public interest at all times.'
- ▶ Principle 13.2 of the Access to the Airwaves Principles provides, in its relevant part, that 'Only individuals who have relevant expertise and/or experience should be eligible for appointment [to governing bodies of public entities which exercise powers in the areas of broadcast regulation]. Membership overall should be required to be reasonably representative of society as a whole.'
- ▶ Principle 17.2 of the Access to the Airwaves Principles provides, in its relevant

part, that 'Funding processes should never be used to influence decision-making by regulatory bodies.'

4.2.2 Summary

- ▶ Broadcasting must be regulated (including the granting and enforcement of broadcasting licences) by independent public authorities.
- ▶ The independence of the broadcasting regulator must be guaranteed in national legislation and, if possible, in the constitution.
- ▶ An independent public broadcasting authority is one which:
 - ▶ the members thereof are appointed in an open and transparent process characterised by public participation and which is not controlled by a single political party
 - ▶ is formally accountable to the public through a multiparty body such as a parliament
 - ▶ acts in the public interest
 - ▶ is not subject to any political or commercial interference
 - ▶ is not influenced by funding processes.
- ▶ Governments must protect the independence of broadcasting regulatory bodies.
- ▶ The members of an independent broadcasting authority must have relevant expertise and/or experience and must be reasonably representative of society as a whole.

4.2.3 Comment

- ▶ It is noteworthy that there are many African-focused international statements on the importance of the independent regulation of broadcasting. This is no doubt due to recognition of the role that broadcasting plays in poor, mainly rural, countries with high rates of illiteracy. Newspapers are often not available outside urban areas and, when they are available, they are often relatively expensive and not published in local languages. Furthermore, the availability and cost of print media is irrelevant if the audience cannot read. Broadcasting, particularly radio, is often the largest means of mass communication in Africa due to the problems of poverty, illiteracy and lack of print media distribution outside urban areas.
- ▶ Owing to the centrality of broadcasting in assisting African people to access news and current affairs, it is recognised that political control and manipulation of broadcasting services can severely limit citizens' rights, such as the rights to press freedom, an independent media and access to information.
- ▶ Independent broadcasting regulation is therefore in the public interest.

- ▶ It is noteworthy that an independent broadcasting authority is defined as one that is appointed by, and accountable to, a multiparty body such as a parliament, with public participation in the nominations process. This is important in guarding against the control (and abuse) of the broadcast media by a single (ruling) political party.

4.3 Principle 3: Pluralistic broadcasting environment that provides for a three-tier system for broadcasting: public, commercial and community services

4.3.1 Relevant provisions in international instruments

- ▶ Article 1(1) of Part I of the African Charter on Broadcasting provides, in its relevant part, that 'The legal framework for broadcasting must include a clear statement of the principles underpinning broadcast regulation, including ... diversity ... as well as a three-tier system for broadcasting: public service, commercial and community.'
- ▶ Principle 14.1 of the African Principles on Freedom of Expression and Access to Information Declaration provides that 'States shall promote a diverse private media as vehicles for the development and dissemination of a variety of content in the public interest.'
- ▶ Principle 14.2 of the African Principles on Freedom of Expression and Access to Information Declaration provides that 'States shall encourage broadcast ... media to publicly disclose all forms of media ownership and any subsequent acquisitions or change in ownership.'
- ▶ Principle 14.6 of the African Principles on Freedom of Expression and Access to Information Declaration provides that 'States shall encourage private broadcasting services to promote interoperability of platforms and facilities.'
- ▶ Principle 20.1 of the Access to the Airwaves Principles provides in its relevant part that 'Restrictions may be imposed on the extent of foreign ownership and control over broadcasters but these restrictions should take into account the need for the broadcasting sector as a whole to develop and for broadcasting services to be economically viable.'
- ▶ The Unesco Media Development Indicators provide that states must take positive measures to promote a pluralistic media. States should pass 'specific legislation on cross-ownership within broadcasting and between broadcasting and other media sectors to prevent market dominance.'

4.3.2 Summary

- ▶ A diverse broadcasting environment is characterised by three tiers of broadcasters: public, private and community broadcasters.

- ▶ There must be an equitable allocation of frequencies between the different types of broadcasters.
- ▶ States must pass laws to prevent market dominance, particularly in the area of cross-media ownership. States may pass laws regulating the extent of foreign ownership, but these must take into account the developmental needs of the sector and the requirements of economic viability.

4.3.3 Comment

Regulating media ownership and control is a critical aspect of ensuring plurality of voices in the media. Too often a sector is judged by how many media outlets there are, rather than how many different voices or points of view are being put across. The aim of cross-media regulation is to prevent a particular media grouping from gaining market dominance over a range of media platforms (newspapers, radio and/or television) with a concomitant detrimental effect on the diversity of views and voices available to the public.

4.4 Principle 4: Public as opposed to state broadcasting services

4.4.1 Relevant provisions in international instruments

- ▶ Article 1 of Part I of the African Charter on Broadcasting states that the 'legal framework for broadcasting should include a clear statement of the principles underpinning broadcast regulation including ... a three-tier system for broadcasting: public service, commercial and community.'
- ▶ Article 1 of Part II of the African Charter on Broadcasting states that 'All state and government controlled broadcasters should be transformed into public service broadcasters, that are accountable to all strata of the people as represented by an independent board and that serve the overall public interest, avoiding one-sided reporting and programming in regard to religion, political belief, culture, race and gender.'
- ▶ Article 2 of Part II of the African Charter on Broadcasting states, in its relevant part, that 'Public service broadcasters should, like broadcasting ... regulators, be governed by bodies which are protected from interference.'
- ▶ Article 3 of Part II of the African Charter on Broadcasting states, in its relevant part, that 'The public service mandate of public service broadcasters should be clearly defined.'
- ▶ Article 4 of Part II of the African Charter on Broadcasting states, in its relevant part, that 'The editorial independence of public service broadcasters should be guaranteed.'
- ▶ Article 5 of Part II of the African Charter on Broadcasting states, in its relevant

part, that 'Public service broadcasters should be adequately funded in a manner that protects them from arbitrary interference with their budgets.'

- ▶ Article 6 of Part II the African Charter on Broadcasting states, in its relevant part, that 'Without detracting from editorial control over news and current affairs content and in order to promote the development of independent productions and to enhance diversity in programming, public service broadcasters should be required to broadcast minimum quotas of material by independent producers.'
- ▶ Principle 13 of the African Principles on Freedom of Expression and Access to Information Declaration sets out, in its relevant part, principles governing public service broadcasters, which include:
 - ▶ Public broadcasters should be governed by a transparently constituted and diverse board which is protected from interference, particularly of a political or commercial nature.
 - ▶ The senior management of public service broadcasters shall be appointed by and accountable to the board.
 - ▶ Editorial independence of public service broadcasters shall be guaranteed.
 - ▶ Public broadcasters should be adequately funded in a manner that protects them from undue interference.
 - ▶ The public service mandate of public broadcasters should be clearly defined and include an obligation to ensure that the public receive adequate, politically balanced information, particularly during election periods.
- ▶ The Dakar Declaration calls on member states of Unesco 'to transform State and government media into public service media and to guarantee their editorial and financial independence.'
- ▶ Principle 35.1 of the Access to the Airwaves Principles provides, in its relevant part, that 'Public broadcasters should be overseen by an independent body, such as a Board of Governors.' In particular, independence should be guaranteed and protected in law:
 - ▶ specifically and explicitly in the legislation which establishes the body and, if possible, also in the constitution
 - ▶ by clear legislative statement of goals, powers and responsibilities
 - ▶ through the rules relating to the appointment of members
 - ▶ through formal accountability to the public via a multiparty body
 - ▶ by respect for editorial independence
 - ▶ in funding arrangements.
- ▶ Principle 35.2 of the Access to the Airwaves Principles provides, in its relevant

part, that 'The governing body should be responsible for appointing senior management of public broadcasters and management should be accountable only to this body which, in turn, should be accountable to an elected multi-party body'.

- ▶ Principle 35.3 of the Access to the Airwaves Principles provides, in its relevant part, that 'The independent governing body should not interfere in day to day decision-making, particularly in relation to broadcast content, should respect the principle of editorial independence and should never impose censorship'.
- ▶ Principle 37 of the Access to the Airwaves Principles provides, in its relevant part, that 'Public broadcasters should be required to promote diversity in broadcasting in the overall public interest by providing a wide range of informational, educational, cultural and entertainment programming'. Their remit should include, among other things, a service that:
 - ▶ provides quality independent programming that contributes to a plurality of opinions and an informed public
 - ▶ includes comprehensive news and current affairs programming, which is impartial, accurate and balanced
 - ▶ provides a range of broadcast material that strikes a balance between programming of wide appeal and specialised programmes that serve the needs of different audiences
 - ▶ is universally accessible and serves all the people and regions of the country, including minority groups
 - ▶ provides educational programmes and programmes directed towards children
 - ▶ promotes local programme production, including through minimum quotas for original productions and material produced by independent producers.

4.4.2 Summary

- ▶ State broadcasters must be transformed into public broadcasters that serve the public.
- ▶ Public broadcasting is one of the three tiers of broadcasting services, the others being commercial and community broadcasting.
- ▶ A public broadcaster must have a clearly defined public service mandate including:
 - ▶ providing quality, independent programming that contributes to a plurality of opinions and an informed public
 - ▶ comprehensive news and current affairs programming which is impartial, accurate and balanced

- ▶ avoiding one-sided reporting and programming, particularly during election periods
 - ▶ providing a range of broadcast material that strikes a balance between programming of wide appeal and specialised programmes that serve the needs of different audiences
 - ▶ being universally accessible and serves all the people and regions of the country, including minority groups
 - ▶ providing educational programmes and programmes directed towards children
 - ▶ promoting local programme production, including through minimum quotas for original productions and material produced by independent producers.
- ▶ A public broadcaster must enjoy editorial independence.
 - ▶ A public broadcaster must be run by an independent board as follows:
 - ▶ The board must operate in the public interest.
 - ▶ The board must appoint executive management who are accountable to it.
 - ▶ The board must not be subject to political or economic/commercial interference.
 - ▶ The board's independence must be protected in legislation and, if possible, in the constitution.
 - ▶ A public broadcaster must be accountable to the legislature (a multiparty body), not to the executive.
 - ▶ Public broadcasters must be adequately funded in a manner that protects their independence.

4.4.3 Comment

- ▶ Owing to the centrality of broadcasting in assisting African people to access news and current affairs, it is recognised that political control and manipulation of broadcasting services can severely limit citizens' rights, such as the rights to press freedom, independent media and access to information.
- ▶ Having public broadcasters as opposed to state broadcasters is therefore in the public interest.
- ▶ The essential aspects of public as opposed to state broadcasting include:
 - ▶ having an independent board, capable of appointing executive management
 - ▶ being accountable to a multiparty body such as a parliament, with public participation in the nominations process

- ▶ being editorially independent and avoiding one-sided reporting.

These aspects are important in guarding against the control (and abuse) of the public broadcaster by a single (ruling) political party.

4.5 Principle 5: Availability of community broadcasting

4.5.1 Relevant provisions in international instruments

- ▶ Article 1 of Part III of the African Charter on Broadcasting provides, in its relevant part, that ‘Community broadcasting is broadcasting which is for, by and about the community, whose ownership and management is representative of the community, which pursues a social development agenda, and which is non-profit’.
- ▶ Principle 15 of the African Principles on Freedom of Expression and Access to Information Declaration deals with Community Media and its key provisions are as follows:
 - ▶ States shall facilitate the establishment of community media as independent nonprofit entities, with the objective of developing and disseminating content that is relevant to the interests of geographic communities or communities sharing common interests such as language and culture.
 - ▶ The regulation of community broadcasting shall be governed in accordance with the certain principles, including ownership, management and programming of community broadcasters shall be representative of the community.

4.5.2 Summary

Non-profit community broadcasting has the potential to broaden access to the air-waves by poor and rural communities as it pursues a social development agenda and is owned and managed by people who are representative of the community.

4.5.3 Comment

- ▶ Community broadcasting is generally based on two models:
 - ▶ geographic communities — that is, a community living in a particular area or location
 - ▶ community of interest — that is, a community bound by a common interest, such as a religious community broadcaster or a youth radio station.
- ▶ Community broadcasting provides an important platform for citizen empowerment given that it is not operated along commercial lines.
- ▶ It is, however, important to note that the community broadcasting stations are often beset with long-term viability concerns due to funding constraints.

4.6 Principle 6: Equitable, fair, transparent and participatory licensing processes, inclusive of frequencies

4.6.1 Relevant provisions in international instruments

- ▶ Principle 17 of the African Principles on Freedom of Expression and Access to Information Declaration deals with community media and in respect of licensing, it includes the following provisions:
 - ▶ Licensing processes shall be simple, quick, cost-effective and guarantee community participation.
 - ▶ Licensing requirements shall not be prohibitive.
 - ▶ States to allocate a fixed percentage of available radio frequency spectrum to community broadcasters to encourage diversity.
- ▶ Principle 14 of the African Principles on Freedom of Expression and Access to Information Declaration deals with private media and in respect of licensing, it provides that states shall ensure that licensing processes for private media of fair and transparent and promote diversity in broadcasting by:
 - ▶ mandating full public disclosure of all forms of media ownership and any subsequent acquisitions or change of ownership
 - ▶ taking preventive measures against the undue concentration of private broadcasting ownership, including through non-award of licences and non-approval of subsequent acquisitions or change of ownership
 - ▶ ensuring that the process of frequency allocation for private broadcasting use is fair and transparent
 - ▶ ensuring that the process for the acquisition of broadcasting rights imposes conditions as are necessary for ensuring diversity in the private broadcasting sector.
- ▶ Article 3 of Part I of the African Charter on Broadcasting provides that 'Decision-making processes about the overall allocation of the frequency spectrum should be open and participatory and ensure that a fair proportion of the spectrum is allocated to broadcasting uses'.
- ▶ Article 4 of Part I of the African Charter on Broadcasting provides that 'The frequencies allocated to broadcasting should be shared equitably among the three tiers of broadcasting'.
- ▶ Article 5 of Part I of the African Charter on Broadcasting provides that 'Licensing processes for the allocation of specific frequencies to individual broadcasters should be fair and transparent and based on clear criteria, which include promoting media diversity in ownership and content'.
- ▶ Principle 18 of the Access to the Airwaves Principles provides, in its relevant part, that 'Broadcasters should be required to obtain a licence to operate'.

- ▶ Principle 19.1 of the Access to the Airwaves Principles provides, in its relevant part, that ‘All licensing processes and decisions should be overseen by an independent regulatory body’.
- ▶ Principle 20.1 of the Access to the Airwaves Principles provides, in its relevant part, that ‘There should be no blanket prohibitions on awarding broadcasting licences to applicants, except in relation to political parties, where such a ban may be appropriate’.
- ▶ Principles 21.1 and 21.2 of the Access to the Airwaves Principles provide, in their relevant parts, that ‘The process [for obtaining a broadcasting licence] should be fair and transparent, include clear time limits within which decisions must be made and allow for effective public input and an opportunity for the applicant to be heard ... Licence applications should be assessed according to clear criteria set out in advance in ... law or regulations ... [which] criteria should ... be objective and should include promoting a wide range of viewpoints which fairly reflect the diversity of the population and preventing undue concentration of ownership, as well as an assessment of the financial and technical capacity of the applicant’.

4.6.2 Summary

- ▶ Broadcasters must have a licence to operate.
- ▶ Licensing decisions must be made by independent broadcasting regulatory bodies.
- ▶ Licensing processes, including the licensing of radio frequency spectrum, must be:
 - ▶ fair, open, transparent and participatory, allowing for both the public and the applicant to be heard
 - ▶ based on clear criteria set down in law and which ought to include the technical and financial capabilities of the applicant
 - ▶ subject to time limits for decisions.
- ▶ The aim of licencing processes is to promote diversity of ownership and content in broadcasting.
- ▶ A fair proportion of the radio frequency spectrum must be allocated to broadcasting uses and these must be shared equitably among the three tiers of broadcasting services — public, commercial and community.
- ▶ The only appropriate blanket prohibition on awarding licences is in respect of political parties.

4.6.3 Comment

- ▶ As more and more countries pass broadcasting-specific legislation, these

internationally accepted standards relating to licencing processes are becoming increasingly common.

- ▶ There are still a number of countries where the actual decision to grant a licence is made by, or in conjunction with, the relevant minister, as opposed to being made entirely by an independent broadcasting regulatory authority.

4.7 Principle 7: Universal access to broadcasting services and equitable access to signal distribution and other infrastructure

4.7.1 Relevant provisions in international instruments

- ▶ Article 7 of Part II of the African Charter on Broadcasting provides, in its relevant part, that 'The transmissions infrastructure used by public service broadcasters should be made accessible to all broadcasters under reasonable and non-discriminatory terms.'
- ▶ Principle 11.3.d of the African Principles on Freedom of Expression and Access to Information Declaration provides that 'States shall ... facilitate: access to the media by poor and rural communities, including by subsidising household costs associated with digital migration.'
- ▶ Principle 13.5 of the African Principles on Freedom of Expression and Access to Information Declaration provides that 'Public service media shall ensure that their transmission systems cover the whole of the territory of the state.'
- ▶ Principle 7.1 of the Access to the Airwaves Principles provides, in its relevant part, that 'The State should promote the necessary infrastructure for broadcast development, such as sufficient and constant electricity supply and access to adequate telecommunications services.'

4.7.2 Summary

- ▶ The state must promote infrastructure for broadcast development including:
 - ▶ reliable electricity supply
 - ▶ telecommunications.
- ▶ Universal access must be promoted by ensuring that public broadcasting transmission or signal distribution systems cover the whole country and by subsidising household costs associated with digital migration.
- ▶ Public broadcasting transmission systems must be made available to all licensed broadcasters on reasonable and non-discriminatory terms.

4.7.3 Comment

- ▶ Broadcasting requires infrastructure: telecommunications facilities and links, signal reception and distribution facilities and, in particular, broadcasting transmitters, including digital facilities.
- ▶ The public broadcaster must guarantee universal access to its services owing to the importance of public broadcasting for ensuring access to news and information.
- ▶ Public broadcasting infrastructure can, and should, be used by other licenced broadcasters on reasonable and non-discriminatory terms so as to avoid unnecessary costs in duplicating infrastructure and to ensure diversity of available services.

4.8 Principle 8: Regulating broadcasting content in the public interest

4.8.1 Relevant provisions in international instruments

- ▶ Article 6 of Part 1 of the African Charter on Broadcasting states that ‘Broadcasters should be required to promote and develop local content, which should be defined to include African content, including through the introduction of minimum quotas.’
- ▶ Principle 11.3.f of the African Principles on Freedom of Expression and Access to Information Declaration provides that ‘States shall ... facilitate: the promotion of local and African languages, content and voices.’
- ▶ Principle 13.6 of the African Principles on Freedom of Expression and Access to Information Declaration provides that ‘The public service ambit of public broadcasters shall be clearly defined and include an obligation to ensure that the public receive adequate and politically balanced information, particularly during election periods.’
- ▶ Principle 16.3 of the African Principles on Freedom of Expression and Access to Information Declaration provides that ‘Co-regulation may also be encouraged by states as a complement to self-regulation, founded on informed collaboration between stakeholders including the public regulatory authority, media and civil society.’
- ▶ Principle 18.2 of the African Principles on Freedom of Expression and Access to Information Declaration provides that ‘Any regulatory body established to adjudicate complaints about media content shall be protected against political, commercial or any other undue interference.’
- ▶ Principle 2.1 of the Access to the Airwaves Principles provides, in its relevant part, that ‘The principle of editorial independence, whereby programming decisions are made by broadcasters on the basis of professional criteria and the public’s right to know, should be guaranteed by law ...’

- ▶ Principle 23.2 of the Access to the Airwaves Principles provides that ‘where an effective self-regulatory system for addressing broadcasting content concerns is in place, an administrative system should not be imposed.’
- ▶ Principle 23.3 of the Access to the Airwaves Principles provides, in its relevant part, that ‘Any content rules should be developed in close consultation with broadcasters and other interested parties and should be finalised only after public consultation.’
- ▶ Principle 23.4 of the Access to the Airwaves Principles provides, in its relevant part, that ‘Responsibility for oversight of any content rules should be by [an independent] regulatory body.’
- ▶ Principle 24.2 of the Access to the Airwaves Principles provides, in its relevant part, that ‘positive content obligations may be placed on commercial and community broadcasters but only where their purpose and effect is to promote broadcast diversity by enhancing the range of material available to the public ... Such obligations may be imposed, for example, in relation to local content and/or languages, minority and children’s programming and news.’
- ▶ Principle 29.2 of the Access to the Airwaves Principles provides, in its relevant part, that ‘Public broadcasters have a primary obligation [to ensure that the public receive adequate information during an election period] but obligations may also be placed on commercial and/or community broadcasters ... provided ... these obligations are not excessively onerous.’
- ▶ Principle 29.3 of the Access to the Airwaves Principles provides, in its relevant part, that ‘broadcasters are required to ensure that all election coverage is fair, equitable and non-discriminatory.’
- ▶ Principle 29.4 of the Access to the Airwaves Principles provides, in its relevant part, that ‘any obligations regarding election broadcasting should be overseen by an independent regulatory authority.’

4.8.2 Summary

General content regulation

- ▶ Editorial independence, whereby programming decisions are made by broadcasters on the basis of professional criteria and the public’s right to know, must be guaranteed by law.
- ▶ Content rules must be developed in close consultation with broadcasters and other interested parties and must be finalised only after public consultation.
- ▶ It is preferable to have an effective self-regulatory system for addressing broadcasting content concerns although co-regulatory systems (with public regulatory authorities, civil society and broadcasters) is also encouraged.
- ▶ Positive content obligations may be placed on commercial and community

broadcasters, but only where their purpose and effect is to promote broadcast content diversity. Such obligations may be imposed, for example, in relation to local content and/or languages, minority and children's programming and news.

- ▶ Oversight of any content rules, including election broadcasting obligations, must be by an independent regulatory body.

Local content regulation

Governments should promote local content, including African content, by introducing minimum local content quotas for broadcasting services.

Election-related content regulation

- ▶ Public broadcasters have a primary obligation to provide adequate and balanced political reporting, particularly during election periods.
- ▶ Obligations to provide information during an election period may also be imposed upon commercial and/or community broadcasters, provided the obligations are not too onerous.
- ▶ All broadcasters are required to ensure that election coverage is fair, equitable and non-discriminatory.

4.8.3 Comment

- ▶ Owing to its 'push' nature, broadcasting has always been subject to far more stringent content restrictions than the print media, which has a 'pull' nature — requiring one to actually read it. This is not problematic, provided the safeguards set out above and in Chapter 3 on internationally accepted grounds for restricting the media, are adhered to.
- ▶ The problem of insufficient investment in local culture is particularly acute in respect of broadcasting due to high production costs. Nevertheless, ensuring that people have access to content in their home language and which is reflective of their community is important for preserving local cultures and identities, as well as for ensuring that people's information needs are met.
- ▶ Undoubtedly, the most serious challenge in respect of broadcasting content regulation is ensuring that broadcasters provide balanced, informative public interest information during election periods. All too often political parties (particularly ruling parties) try to ensure that broadcasters (particularly public broadcasters) play a partisan role in the government's interest rather than in the public's interest.

5 Seven key principles of democratic internet regulation

The previous two sections in this chapter examined a range of instruments in order to understand the ten key principles of democratic media regulation and the eight key principles of democratic broadcasting regulation. This section discusses certain of the international instruments, charters, protocols, declarations and resolutions that focus exclusively on the internet and online media in order to discern seven internationally-recognised hallmarks of democratic internet regulation.

5.1 Principle 1: Internet access and affordability

5.1.1 Relevant provisions in international instruments

- ▶ Principle 1 of the African Declaration on Internet Rights and Freedoms provides that 'The internet should have an open and distributed architecture, and should continue to be based on open standards and application interfaces and guarantee interoperability so as to enable a common exchange of information and knowledge. Opportunities to share ideas and information on the internet are integral to promoting freedom of expression, media pluralism and cultural diversity. Open standards support innovation and competition, and a commitment to network neutrality promotes equal and non-discriminatory access to and exchange of information on the internet.'
- ▶ Principle 2 of the African Declaration on Internet Rights and Freedoms provides that 'Access to the internet should be available and affordable to all persons in Africa without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, prosperity, birth or other status. Access to the internet plays a vital role in the full realisation of human development, and facilitates the exercise and enjoyment of a number of human rights and freedoms...'
- ▶ Principle 13 of the African Declaration on Internet Rights and Freedoms provides that 'To help ensure the elimination of all forms of discrimination on the basis of gender, women and men should have equal access to learn about, define, access, use and shape the internet. Efforts to increase access should therefore recognise and redress existing gender inequalities...'
- ▶ Principle 37.1 of the African Principles on Freedom of Expression and Access to Information Declaration provides that 'States shall recognise that universal, equitable, affordable and meaningful access to the internet is necessary for the realisation of freedom of expression, access to information and the exercise of other human rights.'
- ▶ Goal 9(c) of the Agenda for Sustainable Development requires countries to 'Significantly increase access to information and communications technology

and strive to provide universal and affordable access to the internet in least developed countries by 2020.'

- ▶ The preamble to the AU Declaration on Internet Governance acknowledges that 'the internet is an essential tool and a dynamic force for economic, social and cultural development.'
- ▶ Article 4 of the AU Declaration on Internet Governance reaffirms that the states parties remain 'committed to facilitating a resilient, unique, universal and interoperable internet that is accessible to all and will strive to ensure universal and affordable internet access for all African citizens, including people with specific needs.'
- ▶ Unesco's Internet Development Indicators at (AA.4) asks: 'Does the government have a policy and programme to implement universal access to reliable, affordable broadband, and is thus effectively implemented?'
- ▶ Unesco's Internet Development Indicators at (AB.2) asks: 'Are broadband networks available in all districts of the country?'
- ▶ Unesco's Internet Development Indicators at (AD.1) asks: 'Are there significant differences in broadband access and use between regions and between urban and rural areas?'
- ▶ Principle 21 of the WSIS Geneva principles provides, in its relevant part, 'Universal, ubiquitous, equitable and affordable access to ICT infrastructure ... should be an objective of all stakeholders involved in building it.'

5.1.2 Summary

- ▶ The internet plays a vital role in the full realisation of human development, including economic, social and cultural development.
- ▶ The internet facilitates the exercise and enjoyment of a number of human rights and freedoms.
- ▶ Access to broadband internet must be universal and affordable for all African citizens without discrimination, including for rural populations, women and people with specific needs.
- ▶ The internet should have an open and distributed architecture.
- ▶ The internet should be based on open standards and application interfaces and network neutrality.
- ▶ The internet should be interoperable.

5.1.3 Comment

- ▶ It is clear that, in the information age, the internet is an essential component of the realisation of human development and that it facilitates the exercise and enjoyment of a number of human rights and freedoms.

- ▶ New concepts in media regulation such as 'open and distributed architecture', 'open standards and application interfaces', 'network neutrality' and 'interoperability' come to the fore with regards to the internet. Essentially what this is dealing with is requiring the structure of, standards and applications used on the internet to be and remain open, accessible, widespread, neutral (that is, not favouring any particular platform or content)¹⁹ and interoperable (the ability of two or more components or systems to exchange and/or use information).²⁰
- ▶ The international instruments clearly recognise that affordability and non-discrimination are key elements of ensuring universal access to the internet.

5.2 Principle 2: Freedom of expression and information online

5.2.1 Relevant provisions in international instruments

- ▶ Paragraph 2 of principle 3 of the African Declaration on Internet Rights and Freedoms provides that 'Everyone has the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds through the internet and digital technologies and regardless of frontiers.'
- ▶ Paragraph 3 of principle 3 of the African Declaration on Internet Rights and Freedoms provides that 'The exercise of this right should not be subject to any restrictions, except those which are provided by law, pursue a legitimate aim is expressly listed under international rights law (the rights or reputation of the others, the protection of national security, or of public order, public health or morals) and are necessary and proportionate in pursuance of a legitimate aim.'
- ▶ Principle 24 of the WSIS Geneva Principles provides that the 'ability for all to access and contribute information, ideas and knowledge is essential in an inclusive Information Society.'

5.2.2 Summary

- ▶ Everyone has the right to freedom of expression, which includes the freedom to seek, receive and impart information, ideas and knowledge through the internet.
- ▶ Limitations on these rights can be imposed only to the extent that they are:
 - ▶ prescribed by law
 - ▶ pursue a legitimate aim recognised under international human rights law (the rights or reputation of the others, the protection of national security, or of public order, public health or morals)
 - ▶ necessary in pursuance of a legitimate aim

- ▶ proportionate in pursuance of a legitimate aim.

5.2.3 Comment

It is clear that the general protections granted to freedom of expression and information offline are required to apply online too.

5.3 Principle 2: Freedom of assembly and association online

5.3.1 Relevant provisions in international instruments

- ▶ Paragraph 1 of principle 5 of the African Declaration on Internet Rights and Freedoms provides that ‘Everyone has the right to use the internet and digital technologies in relation to freedom of assembly and association, including through social networks and platforms.’
- ▶ Paragraph 2 of principle 5 of the African Declaration on Internet Rights and Freedoms provides that ‘No restrictions on usage of and access to the internet and digital technologies in relation to the right to freedom of assembly and association may be imposed unless that restriction as prescribed by law, pursues a legitimate aim is expressly listed under international rights law [the rights or reputation of the others, the protection of national security, or of public order, public health or morals] ... And is necessary and proportionate in pursuance of a legitimate aim.’
- ▶ Unesco’s Internet Development Indicators at (RD.2) asks: ‘Can non-governmental organisations organise freely online?’

5.3.2 Summary

- ▶ The right to assemble and associate is recognised in respect of the internet, including in respect of social networks and platforms.
- ▶ Limitations on these rights can be imposed only to the extent that they are:
 - ▶ prescribed by law
 - ▶ pursues a legitimate aim recognised under international human rights law (the rights or reputation of the others, the protection of national security, or of public order, public health or morals)
 - ▶ necessary in pursuance of a legitimate aim
 - ▶ proportionate in pursuance of a legitimate aim.

5.3.3 Comment

It is clear that the general protections applicable to the rights to freedom of assembly and association offline are required to apply online as well.

5.4 The right to privacy, anonymity, personal data protection and freedom from surveillance online

5.4.1 Relevant provisions in international instruments

- ▶ Paragraph 1 of principle 8 of the African Declaration on Internet Rights and Freedoms provides that ‘Everyone has the right to privacy online, including the right to the protection of personal data concerning him or her. Everyone has the right to communicate anonymously on the internet, and to use appropriate technology to ensure a secure, private and anonymous communication.’
- ▶ Paragraph 2 of principle 8 of the African Declaration on Internet Rights and Freedoms provides that ‘The right to privacy on the internet should not be subject to any restrictions, except those that are provided by law, pursue a legitimate aim as expressly listed under international human rights law [the rights or reputation of the others, the protection of national security, or of public order, public health or morals] ... and are necessary and proportionate in pursuance of a legitimate aim.’
- ▶ Paragraph 2 of principle 9 of the African Declaration on Internet Rights and Freedoms provides that ‘Unlawful surveillance, monitoring and interception of users’ online communications by state or non-state actors fundamentally undermine the security and trustworthiness of the internet.’
- ▶ Principle 40.2 of the African Principles on Freedom of Expression and Access to Information Declaration provides that ‘Everyone has the right to communicate anonymously or use pseudonyms on the internet and to secure the confidentiality of the communications and personal information from access by third parties through the aid of digital technologies.’
- ▶ Principle 41.1 of the African Principles on Freedom of Expression and Access to Information Declaration provides that ‘States shall not engage in or condone acts of indiscriminate and untargeted collection, storage, analysis or sharing of a person’s communications.’
- ▶ The preamble to the AU Declaration on Internet Governance provides that the Heads of State and Government of the AU reaffirmed their commitments to ‘protect the right to privacy, including in the context of digital communication’;
- ▶ Article 17 of the AU Declaration on Internet Governance provides that the Heads of State and Government of the AU undertake to promote ‘personal data protection.’
- ▶ Article 8.1 of the Malabo Convention requires a states party to ‘commit itself to establish a legal framework aimed at strengthening fundamental rights and public freedoms, particularly the protection of physical data, and punish any violation of privacy without prejudice to the principle of free flow of personal data.’

- ▶ Article 25.3 of the Malabo Convention requires states parties to ensure that 'In adopting legal measures in the area of cyber security ... the measures so adopted will not infringe on the rights of citizens ... such as ... the right to privacy ...'
- ▶ Unesco's Internet Development Indicators at (RE.5) ask: 'Are data encryption and online privacy protected in law and practice ...?'
- ▶ Unesco's Internet Development Indicators at (RE.6) ask: 'Do individuals have legal rights to protect their online identity ...?'

5.4.2 Summary

- ▶ The right to privacy, anonymity and to the protection of personal data online is recognised.
- ▶ Limitations on these rights can be imposed only to the extent that they are:
 - ▶ prescribed by law
 - ▶ pursue a legitimate aim recognised under international human rights law (the rights or reputation of the others, the protection of national security, or of public order, public health or morals)
 - ▶ necessary in pursuance of a legitimate aim
 - ▶ proportionate in pursuance of a legitimate aim.
- ▶ Unlawful surveillance, monitoring and interception of online communications fundamentally undermine the security and trustworthiness of the internet.

5.4.3 Comment

- ▶ The general protections applicable to the right to privacy offline are required to apply online too.
- ▶ Unlawful monitoring and interception of online communications is a recognised problem internationally and is rife in Africa,²¹ including in southern Africa.

5.5 Security, stability and resilience of the internet

5.5.1 Relevant provisions in international instruments

- ▶ Paragraph 1 of principle 9 of the African Declaration on Internet Rights and Freedoms provides, in its relevant part, that 'Everyone has the right to benefit from security, stability and resilience of the internet. As a universal global public resource, the internet should be a secure, stable, resilient, reliable and trustworthy network ...'
- ▶ Principle 38.2 of the African Principles on Freedom of Expression and Access

to Information Declaration provides that 'States shall not engage in or condone any disruption of access to the internet and other digital technologies for segments of the public or an entire population.'

- ▶ Principle 37 of the WSIS Geneva Principles provides that 'cyber security should be dealt with at appropriate national and international levels.'

5.5.2 Summary

- ▶ The internet should be a secure, stable, resilient, reliable and trustworthy and cyber security must be dealt with both nationally and internationally.
- ▶ States must not engage in preventing access to internet through blackouts such as switching off the internet as a whole or particular social media platforms.

5.5.3 Comment

Many countries' experience of the internet is that it is not reliable, stable, or resilient. This can be caused by a number of factors including electricity outages, mobile network or fixed line grid failures and, in a number of instances, internet shut downs or throttling, for example when certain internet-based social-media applications such as WhatsApp, Twitter or Facebook are unavailable but, in other respects, the internet is available.

5.6 Democratic multi-stakeholder internet governance

5.6.1 Relevant provisions in international instruments

- ▶ Article 1 of the AU Declaration on Internet Governance reaffirms that 'Internet Governance should be inclusive, transparent and accessible to all.'
- ▶ Principle 13 of the African Declaration on Internet Rights and Freedoms provides that 'To help ensure the elimination of all forms of discrimination on the basis of gender, women and men should have equal access to learn about, define, access, use and shape the internet. Efforts to increase access should therefore recognise and redress existing gender inequalities, including the under-representation of women in decision-making roles, especially in internet governance.'
- ▶ Unesco's Internet Development Indicators at (MB.2) asks: 'Does the government actively involve other stakeholder groups in developing national internet policies and legislation?'
- ▶ Unesco's Internet Development Indicators at (MB.3) asks: 'Is there a national Internet Governance Forum and/or other multi-stakeholder forum open to all stakeholders, with active participation from diverse stakeholder groups?'
- ▶ Principle 49 of the WSIS Geneva Principles provides that the 'management of the internet encompasses both technical and public policy issues and should

involve all stakeholders [at national level these would include the state, the private sector and civil society] and relevant intergovernmental and international organisations.'

5.6.2 Summary

- ▶ Internet governance ought to be inclusive, transparent and accessible to all and women ought to be equitably represented in decision-making roles in internet governance.
- ▶ Management of the internet should involve all stakeholders at the national level (state, private and civil society), as well as intergovernmental and international organisations.

5.6.3 Comment

Multi-stakeholder internet governance is critical to freedom of expression online. However, the reality is that multi-stakeholder governance of the media as a whole is not practised and so most African countries have a long way to go until this becomes a norm.

5.7 Equitable distribution of internet revenues

5.7.1 Relevant provisions in international instruments

Principle 15 of the AU Declaration on Internet Governance requests heads of states and governments to 'put in place necessary mechanisms to ensure equitable distribution of internet revenues.'

5.7.2 Summary

There ought to be equitable distribution of internet revenues.

5.7.3 Comment

- ▶ The distribution of internet revenues is a problematic issue.
- ▶ It is clear that large internet-based companies, including social media platforms, generate enormous profits from the sale of advertising and goods and services, including in southern African countries, and yet many of these countries derive no benefit other than, at best, the levying of Value-Added Tax on the sale of goods and services provided to customers in those countries.²²
- ▶ The disruptive impact of, for example, Over the Top (OTT) services such as Netflix, on African broadcasting companies has already begun to be considered, including by the South African communications regulator.²³

Notes

- 1 <http://www.article19.org/data/files/pdfs/standards/accessairwaves.pdf> [accessed 28 April 2019]
- 2 <http://archive.niza.nl/docs/200207191410309398.pdf> [accessed 28 April 2019]
- 3 <https://africaninternetrights.org/articles/#download-lang> [accessed 28 April 2019]
- 4 http://www.achpr.org/files/instruments/charter-democracy/aumincom_instr_charter_democracy_2007_eng.pdf [accessed 28 April 2019]
- 5 <https://www.achpr.org/legalinstruments/detail?id=69#:~:text=The%20Declaration%20of%20Principles%20of,2019%20in%20Banjul%2C%20The%20Gambia.> [accessed 16 June April 2020]
- 6 <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf> [accessed 28 April 2019]
- 7 <http://saigf.org/AU-Declaration%20on%20IG.pdf> [accessed 28 April 2019]
- 8 <http://www.unesco.org/new/en/communication-and-information/flagship-project-activities/world-press-freedom-day/previous-celebrations/worldpressfreedomday200900000/dakar-declaration/> [accessed 28 April 2019]
- 9 http://www.wan-ifra.org/sites/default/files/field_article_file/Declaration%20of%20Table%20Mountain%20Eng%20text.pdf [accessed 28 April 2019]
- 10 <http://www.article19.org/data/files/pdfs/standards/joburgprinciples.pdf> [accessed 28 April 2019]
- 11 <https://au.int/en/treaties/african-union-convention-cyber-security-and-personal-data-protection> [accessed 29 April 2019]
- 12 <http://www.achpr.org/sessions/48th/resolutions/169/> [accessed 28 April 2019]
- 13 <http://www.achpr.org/sessions/59th/resolutions/362/> [accessed 30 April 2019]
- 14 https://www.sadc.int/files/3213/5292/8362/Protocol_on_Culture_Information_and_Sport2001.pdf [accessed 28 April 2019]
- 15 <https://unesdoc.unesco.org/ark:/48223/pf0000367617?posInSet=1&queryId=a46642b0-1893-4f04-9bf8-b832b0851652> [accessed 1 December 2020]
- 16 <https://unesdoc.unesco.org/ark:/48223/pf0000163102> [accessed 28 April 2019]
- 17 <http://www.europarl.europa.eu/document/activities/cont/201104/20110429ATT18422/20110429ATT18422EN.pdf> [accessed 28 April 2019]
- 18 <http://www.itu.int/wsis/docs/geneva/official/dop.html> [accessed 28 April 2019]
- 19 <https://www.cloudwards.net/net-neutrality/> [accessed 29 April 2019]
- 20 <https://www.techopedia.com/definition/631/interoperability> [accessed 29 April 2019]
- 21 <https://privacyinternational.org/type-resource/state-privacy> [accessed 29 April 2019]
- 22 <https://www.businesslive.co.za/bd/opinion/2018-07-02-the-pros-and-cons-of-the-digital-revolution/> [accessed 29 April 2019]
- 23 <https://www.icasa.org.za/legislation-and-regulations/discussion-document-on-the-inquiry-into-subscription-television-services-gazette-41070> [accessed 29 April 2019]