

THE
CARTER CENTER



Séances plénières: Lecture générale recommandée

A. Attached Articles

- Darch, Colin. “Struggles for Freedom of Information in Africa.” *Freedom of Information and the Developing World: Demand, Compliance and Democratic Behaviours*. 2009.
- Tlakula, Pansy. “Activity Report of Special Rapporteur on Freedom of Expression and Access to Information in Africa,” May & November 2009.

B. Links to Relevant Articles

- Dimba, Mukelani. “Africa: Access to Information as a Tool for Socio-Economic Justice, *allAfrica.com*, 22 May, 2008. <http://allafrica.com/stories/200805220769.html>
- Executive Summary, Voice and Choice: Opening the Door to Environmental Democracy, World Resource Institute, 2008
<http://www.accessinitiative.org/sites/default/files/Voice%20and%20Choice%20-%20Executive%20Summary.pdf>
- Fox, Jonathan. “The uncertain relationship between transparency and accountability,” *Development in Practice*, Vol. 17, No.4-5, 2007.
<http://publications.oxfam.org.uk/oxfam/display.asp?TAG=&CID=oxfam&K=002J1231>
- Freedom of Information and Women’s Rights in Africa: A Collection of Case Studies from Cameroon, Ghana, Kenya, South Africa, and Zambia, African Women’s Development and Communication Network (FEMNET), 2009.
http://portal.unesco.org/ci/en/files/29376/12605246833foi_africa_en.pdf/foi_africa_en.pdf
- Islam, Roumeen, Does more Transparency Go along with Better Governance? *Economics & Politics*, Vol. 18, No. 2, pp. 121-167, July 2006.
<http://www3.interscience.wiley.com/journal/118589467/abstract>
- Stiglitz, Joseph. “RIETI – Transparency of Government (Part 1) – Breakthrough for Reforming the Shape of a Nation.” RIETI. Jull, 2003.
<http://www.rieti.go.jp/en/special/economics-review/013.html>

In collaboration with:



AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS
COMMISSION AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES



Open Democracy Advice Centre

This chapter is distributed to participants in the Regional Conference on Freedom of Information in Africa, Accra, Ghana, February 2010, with the permission of the publisher and authors. It is taken from Darch and Underwood, *Freedom of Information and the Developing World* (Chandos, 2010)

Struggles for freedom of information in Africa

The 'third wave' of transitions to democracy has been amply studied. Over the last two decades, scholars have produced hundreds of texts that compare, contrast, and draw lessons from the world phenomenon of democratization. One of the central lessons of the more recent texts is that new democracies are plagued with problems of accountability. Despite the fact that they are democratically elected, leaders of state tend to behave like short-term dictators; they often act without informing the public and, for the most part, are not subject to sanctions for wrongdoing. Some scholars have gone so far as to claim that many new democracies are best termed 'delegative democracies' since the public is left virtually powerless between elections.¹

J. M. Ackerman and I. E. Sandoval-Ballesteros

In the previous chapter we examined some of the different ways in which the demand for freedom of information rights has grown and been dealt with in America south of the United States, in Asia, and in Russia considered as a transitional state. The core elements of the concept of an information access right are obviously common in all these varied situations. The case studies show the extent to which implementation and maintenance of access rights depends critically on highly specific features of the social history of particular societies, including such abstract factors as how bureaucracy and citizenship are conceived.

¹ Ackerman and Sandoval-Ballesteros, 'The global explosion of freedom of information laws', pp. 86–7.

On the African continent, the conditions that have made access rights both important and hard to implement in the global south generally, are found in their most extreme forms. This chapter, therefore, does not consist of a series of stories in which virtue triumphs over oppression. On the contrary, the fragility of post-colonial and post-settler state formations in Africa, the linguistic, cultural and ethnic diversity within particular countries, widespread violent conflict, the absence of adequate economic and social infrastructure, and the near-universal replacement of politics-as-policy-making by the politics of patronage under the aegis of the Bretton Woods institutions and the World Trade Organization, all mean that demand-driven state compliance with the requirements of transparency and freedom of information is rarely seen. More specifically, as far as freedom of information is concerned, good record-keeping and archival practices – an essential pre-condition for compliance – are often lacking, and bureaucracies themselves are disorganised and poorly trained. In many African countries the post-colonial languages of administration – English, French, Portuguese, Arabic – may make such documents as are available incomprehensible to the majority of the population.

By themselves, these explanatory factors are necessary but insufficient, particularly as they lead all too easily to the conclusion that it is the backwardness of the political and judicial systems in African countries, and perhaps even inadequacies in actual African people, that have prevented this ‘essential right for every person’² from attaining universal recognition on the continent. But it is also legitimate to ask what it might be about the universalised paradigm of freedom of information that is an obstacle to its own success. Makau wa Mutua has written persuasively in a broader context of a

grand narrative of human rights discourse [that] contains a subtext that depicts an epochal contest pitting savages, on the one hand, against victims and saviors, on the other [. . .] This rendering of the human rights corpus and its discourse is uni-directional and predictable, a black-and-white construction that pits good against evil.³

Makau wa Mutua goes on to describe this phenomenon as ‘deeply unsettling’, as it indeed is.⁴ If he is correct about this subtext in the human rights

² Banisar, *Freedom of Information around the World 2006*, p. 6.

³ Makau wa Mutua, ‘Savages, victims and saviors’, pp. 201–2.

⁴ Makau wa Mutua, ‘Savages, victims and saviors’, p. 202.

context, then his strictures must apply to freedom of information in Africa and elsewhere in the global south – a narrative that is heir not only to the righteousness and power of the broader discourse but also to the incredulity shown towards it.⁵

The data presented in Chapter 2 showed that the number of African countries where battle has been successfully joined between civil society alliances and the legislatures over the need to pass freedom of information laws is tiny, with only a handful of the 53 countries on the continent having enabling laws actually in place. The ‘veritable wave’ that has been ‘sweeping the globe’⁶ has passed the African continent almost completely by, for reasons that merit examination. The data in Chapter 2 may even have presented an exaggerated picture, since neither Zimbabwe nor Angola makes any serious pretence that the laws on their statute books are intended to encourage a new kind of relationship between state and citizen. Table 7.1 presented below, of African countries and their status with regard to access rights, is derived from a 2008 survey by Roger Vleugels, and reveals in detail a dismayingly widespread lack of interest and engagement with the issue.⁷

Of the 53 independent African countries, 36 (or 68 per cent) have so far given no indication of any interest in freedom of information, according to Vleugels’ data; there is no lobbying activity, no NGO alliance and no draft legislation on the horizon. Another eleven (or 21 per cent) have draft legislation or bills underway, but as the Nigerian example shows us, such processes can be lengthy with no guarantee of a successful outcome. Two countries have some undefined lobbying activity going on. With the exception of Cameroon, which is officially bilingual, not a single French-speaking sub-Saharan African country has apparently manifested any detectable public interest in freedom of information. There is consequently little that can be said about Francophone Africa with regard to this issue. A meeting of activists that discussed the broader media situation in the entire continent in May 2007 concluded bluntly that ‘the situation of journalists and freedom of expression activists in

⁵ J.-F. Lyotard, *The Post-Modern Condition: A Report on Knowledge* (Manchester: Manchester University Press, 1984), p. xxiv.

⁶ Mendel, *Freedom of Information: A Comparative Legal Survey*, p. vi.

⁷ Various offshore islands and territories, most of which are still possessions of European countries, are not included in the table. They are the Canary Islands and Ceuta (Spain), Madeira (Portugal), Mayotte (France), Melilla (Spain), Réunion (France), Saint Helena (United Kingdom) and the Western Sahara (occupied by Morocco).

Table 7.1 African countries and the adoption of freedom of information legislation, as of September 2008

Country	Dominant language	Region	Year	Status
Algeria, Benin, Botswana, Burkina Faso, Burundi, Cabo Verde, Central African Republic, Chad, Comoros, Congo, Côte d'Ivoire, Democratic Republic of Congo, Djibouti, Equatorial Guinea, Eritrea, Gabon, Gambia, Guinea, Guinea-Bissau, Lesotho, Libya, Madagascar, Mali, Mauritania, Mauritius, Namibia, Niger, Rwanda, São Tomé e Príncipe, Senegal, Seychelles, Somalia, Sudan, Swaziland, Togo, Tunisia				No sign of Fol legislation
Angola	Portuguese	Southern	2002	Lei de Acesso aos Documentos Administrativos
Cameroon	French/English	West		Lobbying
Egypt	Arabic	North		Draft law
Ethiopia	Amharic	Horn of Africa	2008	Law on media and Fol takes effect after 2010
Ghana	English	West	2003	Draft law
Kenya	English	Eastern	2005	Draft law
Liberia	English	West		Lobbying
Malawi	English	Southern	2004	Draft law
Morocco	Arabic	North		Draft law due for adoption after 2009
Mozambique	Portuguese	Southern	2005	Draft law
Nigeria	English	West		Fol Bill
Sierra Leone	English	West		Draft law
South Africa	English	Southern	2000	Promotion of Access to Information Act
Tanzania	English	East		Draft law
Uganda	English	East	2006	Access to Information Act
Zambia	English	Southern		Draft law
Zimbabwe	English	Southern	2002	Access to Information and Privacy Protection Act

Source: adapted from data in Roger Vleugels, *Overview of all 86 FOIA [Freedom of Information Act] Countries* (22 September 2008).

Africa [. . .] remain[s] dire', and it is hard to disagree with regard to information access rights as well.⁸

A note of caution is necessary, however. The absence of information regarding activity may not necessarily mean that there is no public or political interest in freedom of information, merely that it goes unreported. There is some evidence that this is the case in at least some of the African countries listed above as giving 'no sign', and we return to this point below.

In this chapter we examine the realities of freedom of information behaviours in five countries, four of which were involved in armed struggle for independence and democracy, and in two cases, prolonged post-independence conflict as well. As a result, these countries have had mixed levels of success in breaking free of a political discourse in which opposition is construed as enmity, and in which the dominant metaphor is one of violence rather than persuasion. The case studies presented here do not pretend to contribute to the building of a representative picture, if such a thing were possible, of the African situation. No Arabic-speaking countries are examined, nor for obvious reasons are there any French-speaking examples, while two of the five Lusophone African nations are described in detail. The regional distribution is skewed, with four of the chosen countries located in southern Africa, and one in West Africa: there is no study of an eastern or North African nation. This is consistent with our contention that the most important – and indeed, the most definitive – factors in any struggle over access to information are local rather than universal. A selection of case studies that attempted linguistic or regional balance by systematically representing simple groupings would implicitly endorse the idea that it was offering some sort of typology. If a typology is to be found in these five studies, or in some different set, then it is likely to be discernible in layered, complex and unexpected sets of local characteristics rather than in the obvious and conventional ones.

In Zimbabwe, legislation with the phrase 'access to information' in its title is used in practice only to stifle the free press and independent journalism. Nigeria is the one country analysed here that experienced peaceful decolonisation. Nonetheless, the near break-up of the post-colonial state during the Biafra war in the 1960s has left enduring political and social scars. A civil society coalition has waged a lengthy and

⁸ African Commission on Human and People's Rights (41st Ordinary Session, Accra, Ghana), *Report of the Special Interest Group on the Right to Freedom of Expression* (13 May 2007) (Declaration 1).

courageous struggle for legislative action for over 15 years without it bearing fruit. In Mozambique and Angola, both former Portuguese colonies, the authoritarian and *dirigiste* legacies of both colonial-fascism and local forms of Marxism have yet to be fully overcome. In South Africa, while model legislation is in place, demand for access remains at a low level, and even data collection on the use made of the law is difficult.

Zimbabwe: through the looking glass

The social history of first Rhodesia's and then Zimbabwe's attitude towards freedom of information is full of ironies. Colonial and settler Southern Rhodesia, with its strongly British self-image, was never in any sense an open society; on the contrary it was highly stratified by race and ethnicity as well as class. Rhodesian society was characterised by a 'virulent racism' on the part of the white settlers, not only with regard to people of colour, but also towards Afrikaners and Portuguese, nominally also white.⁹ The story is well known: the settlers attempted to declare a unilateral and illegal independence from British rule in 1965, and democratic majority rule was eventually achieved only after a brutal war that lasted from 1966 to 1979 and may have cost as many as 30,000 civilian casualties. The transformation to democratic behaviours that was required – at least formally – at independence in 1980 was only possible within the framework of a silent policy of 'reconciliation' between black and white that consisted essentially of burying the past.

[T]he bargain, which is never discussed but is generally understood, is basically that the Whites who are in independent Zimbabwe can stay, continue to operate their businesses and farms, and lead the 'colonial life style' that they are accustomed to for the rest of their lives. However, their children, in general, are discouraged from staying. The racial bargain has been implicitly signalled by a myriad of government actions and statements [. . .]¹⁰

At the time of independence in 1980 the settlers understood clearly enough the political necessity of covering their tracks regarding the war

⁹ G. Horne, *From the Barrel of a Gun: The United States and the War against Zimbabwe, 1965–1980* (Harare: Sapes Books, 2001), p. 29.

¹⁰ J. I. Herbst, *State Politics in Zimbabwe* (Berkeley, CA: University of California Press, 1990), p. 222.

that they had just lost fighting against African nationalism. Like the British colonial government in Kenya, like the apartheid state in South Africa, the Smith regime set about systematically burning or otherwise disposing of potentially incriminating records in an orgy of pre-emptive destruction. All accounts agree that this was a large-scale operation.

[I]ntelligence organisations invariably destroy or avoid written records [. . .] in 1980 [. . .] the Zimbabwe-Rhodesian authorities destroyed many official records.¹¹

The historians Bhebe and Ranger state bluntly that ‘Rhodesian army and police files were either burnt in a great holocaust of documents or smuggled to South Africa’,¹² and the right-winger Peter Stiff, in a lengthy passage, refers to ‘the biggest bonfire you’ve ever seen. Everything is going’.¹³

With the slate wiped clean, it was hoped that the new project of an independent and democratic Zimbabwe could move forward relatively unencumbered by its own brutal past. As in other parts of southern Africa, the liberation movement carried the bellicose discourse of the armed struggle over into the new political context, often seeing political opponents normatively as political enemies and political information as political intelligence. The constant emphasis on war and revolution, on vigilance and struggle, and on a binary essentialism in politics, has continued to hinder the development of a minimal shared political agenda across race and class. In such circumstances, instilling a culture of government transparency, regardless of who is in power, is likely to be a slow and difficult process.

The unspoken agreement between the settlers and the African population held the political system together until 1998, when it was dramatically torn apart by the war veterans’ violent land occupations and their aftermath.¹⁴ Regardless of the rights and wrongs of the land issue, the economic and political situation in Zimbabwe since the collapse of the Zimbabwe dollar, as a result of pressures attributed to

¹¹ H. Ellert, *The Rhodesian Front War: Counter-insurgency and Guerrilla War in Rhodesia 1962–1980*, rev. ed. (Gweru: Mambo Press, 1993), p. vii.

¹² N. Bhebe and T. Ranger (eds.), *Society in Zimbabwe’s Liberation War* (Oxford: James Currey, 1996), p. 3.

¹³ P. Stiff, *See You in November* (Alberton: Galago, 1985), pp. 15–16.

¹⁴ W. Z. Sadomba, ‘War veterans in Zimbabwe’s land occupations: complexities of a liberation movement in an African post-colonial settler society’ (Ph.D. thesis, University of Wageningen, 2008).

Mugabe's land distribution and pension policies, has been catastrophic. Ongoing hyperinflation has been accompanied by spreading hunger and poverty, and by the disappearance of the rule of law.¹⁵ This prolonged disaster has been widely and continuously reported in the world – and especially the British – press.

The ruling clique's blank refusal to release the results of the legislative and presidential elections of 29 March 2008 for over five weeks demonstrated in an extraordinarily unequivocal and ruthless manner their clear understanding of the direct relationship between knowledge and power.¹⁶ Even though it was widely understood – indeed 'known' – that Mugabe had lost the presidential election, it was unclear if his opponent, Morgan Tsvangirai of the Movement for Democratic Change (MDC) had won the necessary absolute majority. By simply behaving as if there were no requirement to publish the result, the government was able to relegate this question to irrelevance, to gain enough time to organise the repression that it believed would win a second round, and by then 'winning' the second round, to begin negotiating with the exhausted opposition from a position of power.

[I]nfluential hardliners in the party and military [would] not simply hand over power to the MDC. They and Mugabe likely manipulated the presidential results to show a run-off was necessary and [. . .] put in place a strategy to retain power through force.¹⁷

Given this history, it is not surprising that the World Bank and UNDP indicators cited in Chapter 2 rank Zimbabwe low on a scale to measure political freedom. The irony is that Zimbabwe does nominally have freedom of information legislation in place. The Access to Information and Privacy Protection Act (hereafter AIPPA) became law in early 2002. The inclusion of Zimbabwe in any list of countries with freedom of information legislation would be highly ironic, as Banisar notes, since the law has been used to stifle the free press rather than to encourage any kind of information access right.¹⁸ AIPPA is only one of a battery of laws

¹⁵ In an extensive literature on the crisis, see especially P. Bond and M. Manyanya, *Zimbabwe's Plunge: Exhausted Nationalism, Neo-Liberalism and the Search for Social Justice*, 2nd ed. (London: Merlin, 2003).

¹⁶ International Crisis Group, *Negotiating Zimbabwe's Transition* (Pretoria/Brussels, 2008), p. 1 (Africa Briefing no. 51).

¹⁷ International Crisis Group, *Negotiating Zimbabwe's Transition*, p. 1.

¹⁸ Banisar, *Freedom of Information around the World 2006*, p. 20.

adopted by the Zimbabwean government for the control of information and the suppression of criticism.

AIPPA has the expressions ‘access to information’ and ‘protection of privacy’ in its title, and recognises those rights in an extremely limited way in its provisions. Section 5 grants a nominal access right to state information, as well as requiring the state to limit the uses that it can make of personal information collected about citizens. But the list of exceptions is both extensive and broad. Access can be refused if the requested information consists of

records containing teaching materials or research information of employees of a post-secondary educational body, any record that is protected in terms of the Privileges, Immunities and Powers of Parliament Act and material placed in the National Archives or the archives of a national body by or for a person or agency other than a public body [. . .] public bodies do not have to provide information where granting access ‘is not in the public interest’ [. . .] exceptions from the duty to disclose information [. . .] include all cabinet documents, including draft legislation, advice or recommendations provided to public bodies [. . .] information whose disclosure would affect relations between different levels of government or [. . .] result in harm to the economic interest of the public body [. . .] non-citizens and any mass media outlet which is not registered do not have the right to request information [. . .]¹⁹

This is a very wide-ranging list indeed. The use of the catchall term ‘public interest’ to justify a *refusal* to release information is, as the Article 19 organisation notes, an extraordinary inversion of usual practice, which is to use public interest as an overarching reason to make information available. In addition, other exception clauses of AIPPA do not require the state to make any argument regarding possible harm that might result from making information available, a standard practice elsewhere. In one notorious provision, the possibility that publishing information might ‘affect relations’ between central and local government is offered as grounds for refusal. As Article 19 points out ‘the effect [. . .] might be entirely salutary’.²⁰ The

¹⁹ Article 19, *The Access to Information and Protection of Privacy Act: Two Years On*, p. 5.

²⁰ The section is 18 (1) (a) (i). See *The Access to Information and Protection of Privacy Act*, p. 6.

mechanism for appeals against refusals is manifestly inadequate, as it relies on judgements by a state body, the Media and Information Commission. Even without these defects, any possibility that AIPPA might be usable as a weapon against the state can be discounted: as of 2006, 'there [had] only been one reported instance of the access to information provision being used by the opposition party'.²¹

The real purpose and actual use of AIPPA is the control of mass media, including the activities of journalists and newspapers. AIPPA's provisions serve to

give the government extensive powers to control the media and suppress free speech by requiring the registration of journalists and prohibiting the 'abuse of free expression'.²²

Some of AIPPA's provisions are harshly punitive, such as the constitutionally dubious section 80 which criminalises what it terms the 'abuse of journalistic privilege' with sentences of up to two years' imprisonment and massive fines for publishing 'falsehoods'.²³ Because of the difficulties in defining what a false statement consists of, this provision has had a stifling effect.²⁴ It is not only journalists and news media that are subject to control: other potentially subversive forms of expression, such as popular music, are also subject to the restraints of what amounts to a pre-censorship law:

[AIPPA was] shrewdly crafted by Jonathan Moyo to bar singers [. . .] from reporting on the misdeeds of officials in both the government and the private sector [. . .].²⁵

The ideological roots of this particular piece of legislation, despite its title, are deeply embedded, not in the universalising discourse of human

²¹ Banisar, *Freedom of Information around the World 2006*, p. 164.

²² Banisar, *Freedom of Information around the World 2006*, p. 164.

²³ Media Institute of Southern Africa – Zimbabwe Chapter, 'Analysis of Section 80 of the Access to Information and Protection of Privacy Act' (5 June 2002).

²⁴ Media Institute of Southern Africa – Zimbabwe Chapter, 'Analysis of Section 80 of the Access to Information and Protection of Privacy Act'.

²⁵ M. T. Vambe and B. Vambe, 'Musical rhetoric and the limits of official censorship in Zimbabwe', *Muziki* vol. 3, no. 1 (2006), p. 65.

rights, but rather in an exclusionary politics that is paramilitary in character – a deformed nationalism that elevates the virtues of discipline and obedience above those of independent analysis. Yet, historically, Zimbabwe has been one of the few African countries with the material conditions to realise genuine access rights. Into the 1990s, it continued to take the training of registry clerks and other records management staff in the public sector seriously. The Records, Archives and Information Management Association of Zimbabwe (RAIMAZ) still had around 50 members in 1998. Training in records management was available within the Public Service Commission, at Harare Polytechnic, and from private consultancy companies.²⁶ This tradition may well be in the process of disappearing. This rare capacity co-exists with a total absence of government willingness to comply even minimally with freedom of information practices and behaviours.

A prolonged struggle: secrecy and corruption in Nigeria

Nigeria is a very different case, but like Zimbabwe, it is an African country that is often seen in the world press as near collapse. In the words of Karl Maier, ‘the very name Nigeria conjures up images of chaos and confusion, military coups, repression, drug trafficking and business fraud’.²⁷ Of course, this is a parody of a more complex truth: Nigeria is a country in a permanent and chronic state of crisis, constantly afflicted both politically and socially by a combination of corruption, criminality and incompetence, all leading to serious and ongoing human rights violations. The battle – in the ‘specific conditions of competition for political power’²⁸ – to implement meaningful access to information measures has a particular sharpness, since so much depends upon a successful outcome. The story is one of frustration and prolonged struggle that is still incomplete.

The post-independence political history of this huge and multifaceted country has been turbulent, marked by a fierce civil war over the attempted secession of Biafra from 1967 to 1970, and with brief interludes of usually weak and ineffective democratic civilian government alternating

²⁶ P. Mazikana, ‘Records management training in sub-Saharan Africa’, *Records Management Journal* vol. 8, no. 3 (December 1998), pp. 78–80.

²⁷ K. Maier, *This House has Fallen: Nigeria in Crisis* (London: Penguin, 2000), p. xviii.

²⁸ Blanton at the Japan-United States Symposium, Tokyo, Japan (Paragraph 12).

with much longer periods of brutal military rule.²⁹ The last of these military autocracies, which lasted for 14 years, came to an end on 29 May 1999. Subsequently, the Nigerian government has conspicuously failed to deal effectively or decisively with such abuses as the apparent impunity of the police, or violence between religious or ethnic communities over *sharia* law which is in force in 12 of the country's 36 states. Other ongoing crises involve the status of so-called non-indigenes, and armed conflict in the Niger River Delta, where impoverished communities live next to or even on top of huge oil resources with no benefit to themselves.

At the same time, Nigeria is far from being a basket case. The giant of Africa, it is a major trading nation, especially as an oil producer, and is a significant trading partner of the United States. It is the most populous country in Africa, with close to 140 million people. It is culturally vibrant, counting such eminent writers as the Nobel laureate Wole Soyinka (1934–) and Buchi Emecheta (1944–), and distinguished musicians such as the late Fela Anikulapo Kuti (1938–1997) among its famous sons and daughters. Nigeria under President Olusegun Obasanjo (1937–) has also been a major international player in such issues as the Darfur crisis.

The human rights records of various Nigerian military regimes have been extremely poor, and civilian governments have not been much better. Over the years Nigerian citizens have been denied political, economic and social rights as successive military regimes systematically looted state resources, condemning the vast majority of people to a life of poverty.³⁰ Unhappily, the government gains credibility from trade and diplomacy, combined with Nigeria's importance as an oil producer. The United Kingdom and the United States, as well as the African Union and the Commonwealth, are seen as reluctant to censure Nigerian administrations for human rights abuses that are well documented externally as well as internally. For its part, the Nigerian government does little to address such questions.³¹

Corruption and impunity are major economic as well as political issues. For example, a significant segment of the unaccountable ruling elite, unable even to agree effectively on the division of spoils, routinely resorts to the massively under-reported practice of illegal oil bunkering, which

²⁹ Nigeria was under military rule for 27 years between independence in 1960 and 1999, just under 70 per cent of the time.

³⁰ E. O. Ojo, 'Human rights and sustainable democracy in Nigeria, 1999–2003', *Journal of Social Sciences* (Delhi) vol. 13, no. 1 (2006), p. 15.

³¹ Human Rights Watch, *Essential Background: Overview of Human Rights Issues in Nigeria* (Washington, DC, 31 December 2005).

accounts for the theft of up to 10 per cent of Nigeria's crude oil production. Crude oil is simply siphoned off by armed gangs into private ships for subsequent resale in what amounts to the country's most profitable private sector business activity, in an example of a completely unregulated 'free market'. Such large scale crime can only rely on the tacit agreement of the powerful, as well as – importantly for our purposes – the silence of the media, for its continuation.³²

Given this context of widespread, ongoing and largely unaddressed human rights abuses, international and local freedom of information activists – again, the 'conventional doctrinalists' – argue powerfully that Nigeria is a country that urgently needs to enact freedom of information legislation.³³ This must go further than merely passing a law, and should involve implanting the roots of freedom of information behaviour and creating a freedom of information culture, in order to remove the barriers of secrecy and opacity that corrupt politicians and civil servants hide behind. Freedom of information may not be a sufficient condition for cleaning up Nigerian political life, but in the clearly expressed view of Nigerian activists themselves, its absence may make the task virtually impossible. They argue that

accountability and transparency in Government [are] crucial to any meaningful anti-corruption crusade [. . .] accountability and transparency [are not . . .] possible if citizens have no right of access to information held by the State or its agencies or if no mechanism exists for giving practical effect to the right to freedom of information.³⁴

The long-running campaign for freedom of information in Nigeria started at a low point in the country's political history. In 1993, independently of each other, three Nigerian organisations decided to agitate for freedom of

³² For a summary of how this works, see Human Rights Watch, 'Illegal oil bunkering', in: *The Warri Crisis: Fuelling Violence* (New York, November 2003), pp. 17–21.

³³ For example, M. Erubami, 'Access to information, human rights and government accountability: establishing a relationship', in: L. Arogundade (ed.), *FOIA (Freedom of Information Act) and Civil Society* (Lagos: International Press Centre, 2003), pp. 68–70.

³⁴ Media Rights Agenda in a letter to President Olusegun Obasanjo (10 June 1999), summarised in *Campaigning for Access to Information in Nigeria: A Report of the Legislative Advocacy Programme for the Enactment of a Freedom of Information Act* (Lagos, 2003), p. 8.

information legislation. They were the Media Rights Agenda (MRA), the Civil Liberties Organisation (CLO) and the Nigeria Union of Journalists (NUJ), all based in Ikeja, Lagos. This was a year of crisis even by Nigeria's own exciting political standards. On 12 June, free elections had been held to choose a civilian president to take over from the military. Unfortunately, when it became clear that the people's choice was Chief Mashood Abiola, who was unacceptable to the generals, Ibrahim Babangida annulled the elections, and after a brief struggle within the soldiers' ranks General Sani Abacha emerged as the country's new and possibly most brutal dictator. Abiola was arrested and died in prison in mid-1998.

The three Nigerian civic organisations quickly agreed to cooperate with each other in a joint drive for freedom of information legislation. This kind of organised approach was still relatively new in the early 1990s, although the tradition of individual struggle for human and civil rights stretched back for decades. As in other African countries, what was innovative at this time was

the emergence [. . .] of open and self-professed human rights organizations. Especially since the late 1980s, these voluntary associations of citizens have taken on the task of monitoring abuse of human rights, educating the people about their rights under national and international law, and making recommendations to governments about how to improve their protection of human rights.³⁵

In Nigeria especially, these organisations were well-informed and able to work with international counterparts around the development of normative human rights standards. They possessed appropriate institutional and staff structures with clear plans and well-defined mandates and were among the best in West Africa at what they did:

While there are still growing pains within many of these groups, this type of planning process has resulted in the Nigerian human rights community's being far ahead of its anglophone neighbors in putting human rights institutions into place.³⁶

³⁵ Swedish NGO Foundation for Human Rights and International Human Rights Internship Program, *The Status of Human Rights Organisations in sub-Saharan Africa* (Washington, DC and Stockholm, 1994), p. 2.

³⁶ Swedish NGO Foundation for Human Rights and International Human Rights Internship Program, *The Status of Human Rights Organisations in sub-Saharan Africa*, p. 133.

What was the campaign up against, and who were its likely allies? On the one hand, Nigeria boasts an outspoken press and a network of experienced, well-organised, tough-minded human rights groups that are accustomed to working cooperatively. Harassment of these groups, and of journalists, is commonplace. In 2005, for example, two newspaper offices were ransacked after they had published stories about corrupt behaviour by the wife of the then president, Olusegun Obasanjo.³⁷

Nigeria also has an obdurate and highly secretive bureaucracy and scores high on most indices of opacity and corruption. Embedded in both law and precedent is a multiplicity of prohibitions, often carrying criminal penalties, against making state information publicly available.³⁸ Even apparently innocuous legislation such as the ‘Architects (Registration) Act’ includes barriers to transparency. Nigeria still has a British-style Official Secrets Act on the statute book, and some bureaucrats are even required to take an oath of secrecy upon taking up their appointments. Government documents must be categorised into classifications including ‘Secret’, ‘Top Secret’ and ‘Confidential’. The courts have no recognised jurisdiction under existing law to require or compel even limited access to state information.³⁹ In the words of the activist group Media Rights Agenda,

a veil of secrecy surrounds the conduct of government affairs. Officials of government do not only routinely deny citizens, whom they supposedly serve, explanations for actions undertaken on their behalf, they also block citizens’ access to even the most mundane of publicly held information.⁴⁰

Nigeria was one of the countries surveyed by the Open Society Justice Initiative and reported on in 2006. Unsurprisingly, in the absence of any freedom of information legislation and given the powerful tradition of bureaucratic secrecy, the results were not encouraging. The response to nearly half the 140 information requests submitted – 44 per cent – was

³⁷ Human Rights Watch, *Essential Background: Overview of Human Rights Issues in Nigeria*.

³⁸ Media Rights Agenda, *Unlocking Nigeria’s Closet of Secrecy: A Report on the Campaign for a Freedom of Information Act in Nigeria* (Lagos, 2000), p. 2.

³⁹ Human Rights Watch, *Essential Background: Overview of Human Rights Issues in Nigeria*.

⁴⁰ Media Rights Agenda, *Unlocking Nigeria’s Closet of Secrecy*, p. 2.

mute refusal.⁴¹ Only two requests, or less than 1.5 per cent, resulted in access to the requested information.⁴²

There is little constitutional basis for the assertion of a right of access to information. Article 39 (1) of the Federal Constitution of 1999 guarantees freedom of expression in general terms, but avoids any explicit mention of an access right:

Every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference.⁴³

This provision appears to descend from the original sense of the Universal Declaration's article 19, dealing with the publication and reception of ideas and opinions. The other sections of article 39 deal with ownership of the mass media, and it concludes with a provision, no. 39 (3) (a), regarding the prevention of 'the disclosure of information received in confidence'. There is, therefore, only the weakest of guarantees in the Nigerian constitutional framework upon which an access law might rely. Partly as a result, and partly because of delaying tactics from sections of the political class, progress towards the adoption of freedom of information legislation in Nigeria has been agonisingly slow. A draft bill inched its way towards approval for several years from 1999, and in September 2006 was still under consideration in the Nigerian Federal Senate. At one stage it had been held up because President Obasanjo regarded the fact that access rights were recognised for both Nigerian citizens and non-citizens alike as 'unrealistic', and wanted rather a 'home-grown' piece of legislation.⁴⁴

In April 2008, after a nine-year struggle, Nigeria's Federal House of Representatives rejected the Freedom of Information Bill, despite the fact that it was itself engaged in investigating past abuses and corruption by previous administrations.⁴⁵ It seems likely that struggles for access to state

⁴¹ Open Society Justice Initiative, *Transparency and Silence*, p. 43 (Figure 1).

⁴² Open Society Justice Initiative, *Transparency and Silence*, p. 71.

⁴³ Federal Republic of Nigeria, *Constitution of the Federal Republic of Nigeria, 1999*.

⁴⁴ O. Odemwingie, 'Obasanjo and the Freedom of Information Bill', *The Guardian* (Lagos) (14 December 2003), p. 17.

⁴⁵ I. Anaba, 'Freedom of Information Bill: what the nation will lose', *Vanguard* (Lagos) (15 May 2008).

information in Nigeria may have to rely for some time to come on tactics that do not depend on formal structures of bureaucratic compliance.

Oil, secrecy and law in Angola

When it comes to Angola and freedom of information, the question ‘what happened to the oil money?’ is really the only show in town. As Human Rights Watch has rather more formally put it, ‘fiscal transparency, political accountability, and human rights are inextricably intertwined in Angola’.⁴⁶ It is the misappropriation, embezzlement and unaccounted use, over many years of war against the *União Nacional para a Independência Total de Angola* (UNITA), of billions of dollars of oil revenue that sets the context for any discussion of government transparency or access to state information.⁴⁷ The country produces about 1.3 million barrels of oil a day, second only to Nigeria in sub-Saharan Africa, and oil income has traditionally constituted by far the main source of government financing:

Between 1995–1999, oil revenues comprised approximately 70 to 89 percent of government revenues and approximately 85 to 92 percent of exports, according to the IMF. In 2000, oil accounted for US\$3.26 billion of government revenue.⁴⁸

Virtually none of the income received has been used over the years for development purposes. Instead, it has been the oil money that has quietly and secretly ‘generated most of the resources enabling the government to pursue its conflict with [. . .] UNITA’.⁴⁹ Angolan government budgeting and accounting procedures throughout the 1980s and 1990s were so opaque as

⁴⁶ Human Rights Watch, *The Oil Diagnostic in Angola: An Update* (Washington, DC, March 2001), p. 2.

⁴⁷ Angola has been at war for most of the last 45 years. The armed struggle for independence from Portuguese colonial rule lasted from 1961 to 1975, and was immediately followed by another three decades of intermittent warfare between the ruling *Movimento Popular de Libertação de Angola* (MPLA), Marxist-Leninist in orientation through the 1970s and 1980s, and the rebel *União Nacional para a Independência Total de Angola* (UNITA). This ended when the UNITA leader, Jonas Savimbi, was killed in 2002. The first multi-party elections in the country’s history took place in September 1992, and resulted in a return to fighting when Savimbi refused to accept the first-round results.

⁴⁸ Human Rights Watch, *The Oil Diagnostic in Angola*, p. 1.

⁴⁹ Human Rights Watch, *The Oil Diagnostic in Angola*, p. 1.

to have even raised concern in multilateral financial institutions such as the IMF. According to reports, up to US\$8.45 billion of oil revenues were simply not accounted for, over the five years between 1997 and 2001.⁵⁰

In such an environment, unsurprisingly, 'fraud [has] occurred at the highest levels'.⁵¹ Angolan newspaper reports claimed in 2003 that 20 senior government figures, including President Eduardo dos Santos, had allegedly amassed personal fortunes of over US\$100 million each, while twice as many were allegedly worth over US\$50 million each.⁵²

After the death of Jonas Savimbi in 2002 had opened the way for a negotiated peace, concern about the opacity of the Angolan state accounts began to grow rapidly among multilateral financial institutions, civil society organisations and international corporations, and pressure has been exerted on the Angolan regime to behave in a more accountable way.⁵³ Because Angola does not need concessionary lending, the situation has been described as 'delicate'. According to one Western point of view, the Angolan government was unable to decide whether accepting an international responsibility to account for its own behaviour constituted a 'loss of sovereignty' or was rather, in fact, 'the only way toward international prestige and a normal country integrated into the global economy'.⁵⁴

The international community exerted pressure on Angola to accept an IMF programme that included a component for monitoring oil revenues, known by the technical name of the Oil Diagnostic. This programme, first mooted in April 2000, was to be

a forward-looking agreement to monitor oil revenues; to help the Angolan government develop an effective mechanism for determining how much revenue the central bank should receive from oil production; and to encourage good governance.⁵⁵

⁵⁰ Global Witness, *Time for Transparency: Coming Clean on Oil, Mining and Gas Revenues* (London, March 2004), p. 47.

⁵¹ J. McMillan, 'The Main Institution in the Country is Corruption': *Creating Transparency in Angola* (Stanford, CA: Center on Democracy, Development, and the Rule of Law, Stanford Institute on International Studies, 7 February 2005), p. 1 (CDDRL Working Paper no. 36).

⁵² *Angolense* (Luanda), 'Riqueza muda de cor: os nossos milionários [Wealth has changed its colour: our millionaires]' (11 January 2003).

⁵³ Human Rights Watch, *Some Transparency, No Accountability: The Use of Oil Revenue in Angola and its Impact on Human Rights* (Washington, DC, January 2004) provides a detailed narrative account.

⁵⁴ J. Reed, 'Angola to join corruption fight after IMF deal', *Financial Times* (London) (26 October 2005).

⁵⁵ Human Rights Watch, *The Oil Diagnostic in Angola*, p. 1.

Progress has been slow. In March 2006 there were still many questions unresolved from the most recent Oil Diagnostic study which had been issued in May 2004, and ‘to which the government ha[d] not yet made a comprehensive response’.⁵⁶ The Angolan government has also shown cautious interest in the Extractive Industries Transparency Initiative, or EITI, which other African oil producers such as São Tomé e Príncipe and Nigeria already support, as well as some of the major multinationals such as Chevron, BP and Total.⁵⁷

All these initiatives have been mainly driven by the international financial organisations, the oil companies and foreign governments, with Angolan civil society playing a relatively minor role. In general, Angolan NGOs have been weak, and often intimidated by government. Writing in 2003, Simão Cacumba Morais Faria commented on the general frailty of Angolan civil society organisations, especially with regard to human rights issues, such as freedom of information:

Angolan civil society has been weak to publicize or lobby on human rights abuses [. . .] many Angolan NGOs are careful about what to say and do in public, especially ‘on the record’. Privately, they are more open. When they seek minimal rights [. . .] it is often at great risk to them. When they have acted collectively to promote basic civil and socio-economic rights, they have been met with suspicion and hostility by the authorities. Many of these grassroots associations are very fragile [. . .]⁵⁸

Other sources agree that although the situation is improving as more organisations emerge, the sector is still struggling to define an appropriate function in the post-war situation:

⁵⁶ International Monetary Fund, *Angola: 2006 Article IV Consultations; Preliminary Conclusions of the IMF Mission* (29 March 2006), para. 15.

⁵⁷ On 22 August 2006, the Bishops Conference of Angola, and São Tomé Episcopal Commission for Peace, Justice and Migration, issued a strong appeal in Luanda for Angolan implementation of EITI, concluding that ‘Otherwise, we will leave the impression that Angola is concerned neither about transparency, nor the use of natural resources for poverty reduction [. . .]’.

⁵⁸ S. C. Morais Faria, ‘Civil society and human rights in Angola’, paper presented at the Institute for Justice and Reconciliation, Cape Town, 23 May 2003, available at <http://www.africafiles.org/article.asp?ID=1992> (Section 4: Speaking out) (accessed 20 November 2006).

Despite the significant upsurge in civil society organizations in the last decade, civil society itself is still grappling with defining its role and identity. This process is accentuated by the [. . .] shift in activities from emergency to development [. . .]⁵⁹

In such circumstances, it is hardly surprising that Angola's record regarding freedom of the press – and indeed other human rights issues too – is poor. From the notorious 'Baton da ditadura' incident of 1999, to numerous other cases of harassment of and violence towards journalists, it is clear that the government has a low threshold of tolerance towards those who expose its misdeeds.⁶⁰ But what is surprising is the fact that Angola does actually have freedom of information legislation in place. The story of how it came to be adopted is far from clear, as is its subsequent social and legal impact.⁶¹ The *Lei de Acesso aos Documentos Administrativos* [Law on Access to Administrative Documents], law no. 11/02, is closely modelled on the Portuguese legislation of the same name, and entered into force on 16 August 2002. It rests on the extremely broad provisions of article 89 (b) of the 'constitutional law' of 25 August 1992. This simply states that 'the Assembleia Nacional shall have full and sole legislative powers on the [. . .] rights, freedoms and basic guarantees of citizens'. In other words,

⁵⁹ International Bank for Reconstruction and Development/The World Bank, *Engaging Civil Society Organizations in Conflict-affected and Fragile States: Three African Country Case Studies* (Washington, DC, 28 June 2005), p. 37 (report no. 32538-GLB).

⁶⁰ A polemical opinion piece by R. Marques de Morais was published in the 3 July 1999 issue of *Agora*, under the punning title 'O "baton" da ditadura [The "big stick" of dictatorship]'. The article accused the Angolan president of 'promoting incompetence, embezzlement and corruption as political and social values'. On 16 October Marques was arrested and detained, and was eventually sentenced to six months' imprisonment, later suspended on appeal. In March 2005 the UN Human Rights Committee found that his conviction and sentence unlawfully violated his right to freedom of expression. For other examples, see Human Rights Watch, *Unfinished Democracy: Media and Political Freedoms in Angola* (Washington, DC, 14 July 2004), pp. 18–20.

⁶¹ One of the very few general survey articles on openness in Angola does not mention the legislation and does not discuss freedom of information by name. See J. MacMillan, 'Promoting transparency in Angola', *Journal of Democracy* vol. 16, no. 3 (July 2005), pp. 155–69.

there is no specific constitutional foundation for freedom of information, other than parliamentary initiative.⁶²

The current status and impact of the Angolan legislation remains obscure, even to presumably well-connected advocacy groups. For example, the Article 19 group stated in May 2006 that ‘to date we have not been able to ascertain if any of its provisions have been implemented’.⁶³ Banisar is similarly cautious:

The law has not been particularly implemented. The Media Institute of Southern Africa reports that many public bodies have appointed information officers but there are ‘major difficulties’ for journalists to obtain information.⁶⁴

Occasional glimpses of activity have been reported: in 2002, three legal staff members from the Angolan parliament visited the Portuguese *Assembleia da República* under a cooperation agreement and were briefed on the constitutional principles of open access and organisational questions.⁶⁵ Despite this, puzzling questions remain. How did this particular piece of legislation come to be adopted by the National Assembly? What, if anything, does it have to do with the oil money question? And precisely why has it been so ineffective?

⁶² In the original text: ‘à Assembléia Nacional compete legislar com reserva absoluta de competência legislativa, sobre [...] direitos, liberdades e garantias fundamentais dos cidadãos’. It may be worth noting that the Portuguese law on which the Angolan act is apparently modelled rests on the much firmer constitutional provision that ‘Os cidadãos têm [...] o direito de acesso aos arquivos e registos administrativos, sem prejuízo do disposto na lei em matérias relativas à segurança interna e externa, à investigação criminal e à intimidade das pessoas [Citizens have . . . the right of access to administrative archives and records, without prejudice to legal requirements in matters related to internal and external security, criminal investigations and the privacy of persons]’.

⁶³ Article 19, *Freedom of Expression and Access to Information: Overview and Conclusions on the Angolan Situation Regarding the Upcoming Elections, Late 2006/Early 2007*, p. 1.

⁶⁴ Banisar, *Freedom of Information around the World 2006*, p. 35.

⁶⁵ Republic of Portugal, Comissão de Acesso aos Documentos Administrativos ‘Actividade da Comissão de Acesso aos Documentos Administrativos no ano de 2002’ (Lisbon, 2003).

Mozambique: the development of 'informal' access rights

From a freedom of information point of view, the case of Mozambique, one of the poorest countries in Africa, is interesting because it is a country with a weak tradition of individual human rights, and an apparently strong culture of government secrecy, having moved directly from a regime of colonial-fascism under Portuguese rule, to a one-party Marxist-Leninist system under Frelimo (the Front for the Liberation of Mozambique) after independence in 1975.⁶⁶ At present, government information is widely available, yet an initiative to pass a conventional freedom of information law has met with failure.

The war for independence against the Portuguese lasted from 1964 to 1974. Mozambique subsequently suffered a damaging internal conflict waged by a rebel group, RENAMO, which relied heavily on support from Rhodesia's white settler regime, and later from the apartheid government then in power in South Africa. Fighting continued from the late 1970s until a negotiated ceasefire came into effect in October 1992. This agreement and the events surrounding it resulted in major policy shifts. Marxism as ideology and economic planning as practice were already being abandoned. Political pluralism in the form of multi-party elections was introduced for the first time. Frelimo has nonetheless managed to remain in power, winning successive general elections in 1994, 1999 and 2004.

During the period of single-party rule, Frelimo was genuinely challenged by questions about the role of 'information' in its attempt to achieve revolutionary social change in a country where the forces of production remained severely underdeveloped. Although Portuguese was the working language of the liberation movement as well as of the colonial state, and was adopted as the official language in independent Mozambique after 1975, it was and remains accessible only to a small, mainly urban minority. Newspapers and magazines are consequently distributed only in big cities and are largely unobtainable in the

⁶⁶ It has been argued that Mozambique in the Marxist-Leninist phase actually defended economic human rights, but primarily for groups, e.g. free education or health care for poorer workers or peasants (G. Machel, oral intervention at the International Symposium 'Moçambique no Contexto da África Austral, da Independência ao Acordo Geral de Paz', Centro de Documentação «Samora Machel», Maputo, 4–6 October 2006).

countryside. Radio broadcasting, in various local languages as well as Portuguese, is the main source of news and information for most people.⁶⁷ Since social communication through the printed word reached only a fraction of the population, it was necessary to rely heavily on the transmission of information through the bureaucratic hierarchies of the state or the political party. As the conflict with RENAMO intensified in the 1980s, the already limited channels through which the government and the citizenry could communicate narrowed even further, although after the 1992 peace agreement some independent newspapers were launched.⁶⁸ Mozambique has thus been characterised as a ‘low-information society’, in a not entirely convincing attempt to explain low levels of popular demand for, among other things, information access rights.⁶⁹ But the authoritarian traditions deriving from Portuguese colonial-fascism and Frelimo’s *dirigiste* political style may have as much to do with the phenomenon as perceived low levels of information availability.

Ironically, there is some anecdotal evidence first that ad hoc access to government information is by no means impossible, and second that there is some demand for information as a ‘leverage right’, in the assertion of other rights claims. Petitions to the national parliament (the *Assembleia da República*) or to the *Ministério da Função Pública* support this latter idea.⁷⁰ Nevertheless, in formal terms it may be that

⁶⁷ ‘The public radio covers 70 percent of the country’. H. Malauene, *Access to Information: The Case of Mozambique. Lack of Supply or Lack of Demand?* (Pretoria, 29 September 2004). For a history of radio in colonial Mozambique, see E. Barbosa, *A radiodifusão em Moçambique: o caso do Rádio Clube de Moçambique, 1932-1974* (Maputo: Promédia, 2000).

⁶⁸ For an interesting newspaper-by-newspaper and article-by-article analysis of press and broadcast coverage of the 2004 elections, see Media Institute of Southern Africa — Mozambique Chapter, *Relatório anual sobre o estado de liberdade de imprensa em Moçambique* (Maputo, 2005), pp. 70–102. This document also includes the views of the main parties (Frelimo and RENAMO) on the various dailies and weeklies (pp. 58–68). For data on the media and access to information, see L. de Brito and others, *Formação do voto e comportamento eleitoral dos moçambicanos em 2004* (Maputo: Electoral Institute of Southern Africa [EISA], September 2005).

⁶⁹ C. Shenga and R. Mattes, ‘“Uncritical citizenship” in a “low-information” society: Mozambicans in comparative perspective’, working paper 08/212 (Cape Town: University of Cape Town, Centre for Social Science Research, Democracy in Africa Research Unit, 2008), pp. 1–2.

⁷⁰ Demands made by the ‘madgermanes’ (migrant workers expelled from the German Democratic Republic after German reunification) also exemplify this.

availability in fact exceeds demand, especially as much of the use made of documentation is by organised pressure groups and some journalists and researchers.⁷¹ Reports can often be obtained simply by asking for them, and government websites include increasing quantities of important documents, despite gaps in such key areas as election data. Concrete examples are census data, and the series of increasingly detailed annual reports by the *Procurador-Geral da República* (attorney general). Of course, this is true mainly for residents of Maputo who know the ropes, and those with internet access, who constitute only a small minority of the total citizenry. In addition, scattered and disorganised availability of this kind does not really satisfy the core demand of freedom of information, that the state must support the citizen by facilitating access in a systematic manner.

Within the by now familiar framework of freedom of information diffusion, however, a couple of meetings on the concept of access to information organised by activist groups were held in Maputo from 2000 onwards, but with little in the way of concrete outcomes.⁷² The campaign for freedom of information access rights in Mozambique was finally properly launched at a conference of local and international NGOs and other bodies held in Maputo in September 2003.

After this initial intervention, the local branch of the Media Institute of Southern Africa, MISA-Mozambique, has made much of the running in pushing the freedom of information agenda in the country. It was MISA-Mozambique that was responsible for having the much-criticised draft law drawn up.⁷³ MISA and the NGO-based campaign have also been censured for a lack of inclusiveness regarding civil society organisations generally, and a failure to take account of constructive criticism, especially of the inadequacies of the draft law. Some critics also argue that neither the demand for access nor the conditions for compliance actually exist in Mozambique, because a broad alliance does not exist.

⁷¹ A series of books by J. Hanlon, for example, make extensive use of this kind of official data: see his *Do Bicycles Equal Development in Mozambique?* (with T. Smart) (Oxford: James Currey, 2009), *Peace without Profit: How the IMF Blocks Rebuilding in Mozambique* (Oxford: James Currey, 2003), *Mozambique: Who Calls the Shots?* (Oxford: James Currey, 1991) and *Beggar your Neighbours* (Oxford: James Currey, 1986).

⁷² For example, the two meetings organised by MISA-Mozambique in November 2000 and May 2003 (Malauene, *Access to Information: The Case of Mozambique*).

⁷³ Malauene, *Access to Information: The Case of Mozambique*.

[I]n countries where an [Access to Information] law was passed without any civil society involvement or impulse, the law has tended to fail, atrophying for lack of usage and legitimacy [. . .] The wider the call for a law [. . .] the more likely it is that a critical mass on the ‘demand’ side will be built and sustained [. . .] activists are increasingly recognizing an important paradigm shift in the collective understanding of the conceptual community value of the right to know [. . .]⁷⁴

The apparent failure of the MISA initiative in Mozambique is an interesting example of the potential weakness of freedom of information initiatives led by ‘conventional doctrinalists’. There was no preparatory evaluation of potential obstacles to freedom of information behaviours and practices. There was no effective lobbying of parliamentarians to muster support for the draft law before it was entered into the *Assembleia da República*. Last, it was a strategic error for MISA-Mozambique to sponsor the draft law, since the organisation is merely the local chapter of a Southern African regional body with strong international links, and the initiative appeared to be a foreign one. To what extent these kinds of mistakes have been committed by freedom of information activists in other national contexts remains a largely unexplored area of research.

Certainly it appears that a collective grasp of what the access to information right really means is not deeply rooted in a Mozambique that is polarised along party lines and in which political power remains highly centralised. For example, local archivists have raised the question of the sustainability of an access right based on democratic values in the context of Mozambican material conditions. They have muddied the waters rather than bringing clarity to the issue. For example, Leonor Celeste Silva places the cart before the horse, seeming to believe that a generalised social ‘right to information’ exists, under which access to archival registries would fall as a subordinate category:

Assuming that the right to information, under which falls access to archival documentation, gained status with the emergence of constitutional government based on popular sovereignty, it is appropriate that the values and concepts, with which one must seek to sustain it, should be examined.⁷⁵

⁷⁴ Malauene, *Access to Information: The Case of Mozambique*.

⁷⁵ ‘Supondo-se que a direito à informação, no qual se insere o acesso à documentação arquivística, ganha estatuto com a emergência do governo

The idea that the material conditions for successful implementation of freedom of information legislation may not exist in Mozambique was strongly argued in the Shenga and Mattes study.⁷⁶ Relying heavily on survey data, the authors reported that one fifth of Mozambican respondents agreed that the state should have the power to close down newspapers and media outlets that publish ‘false information’.⁷⁷ Although this was hardly an indication of strong support for the idea that citizens may legitimately challenge government meta-narratives, or for the access right, the method itself is open to the criticism that respondents may be quite adept at avoiding what they consider to be politically delicate issues.

Shenga and Mattes concentrated on the extent to which Mozambicans can recall political information from memory, their ability to form opinions about the government and the state, and their tendency to hold critical (i.e. negative) views about the performance of the government. In all three of these areas, Mozambicans appeared to be functioning below levels reported for other poor African countries. Shenga and Mattes describe the situation as ‘a distinctive and problematic [. . .] profile of uncritical citizenship’ consisting of low levels of information recall, a high proportion of ‘don’t know’ responses to questions, and a generally positive view of the government.⁷⁸ But their conclusions must be treated with great caution, since democratic behaviours (in this case participation in electoral processes) do not necessarily depend directly on high levels of access to information, as we have argued earlier. The extraordinary results of the 2008 mayoral election in Beira, where a popular independent candidate, Daviz Simango, was elected with 62 per cent of the vote, supports the idea that the Mozambican citizenry is not at all apathetic when genuine political competition becomes possible.⁷⁹

Despite all this, there is a history in Mozambique of struggle around broader press freedom issues, dating back to the independence period.

constitucional baseado na soberania do povo, é oportuno que sejam abordados justamente os valores e conceitos nos quais se deve buscar a sua sustentação’. R. S. Nharreluga and L. C. Silva, *Arquivos: paradoxos e desafios frente à organização e acesso à informação* (Maputo: Promédia, 2002), p. 35.

⁷⁶ Shenga and Mattes, “‘Uncritical citizenship’ in a “low-information” society, passim.

⁷⁷ Shenga and Mattes, “‘Uncritical citizenship’ in a “low-information” society’, p. 40.

⁷⁸ Shenga and Mattes, “‘Uncritical citizenship’ in a “low-information” society’, p. 50.

⁷⁹ Mozambique News Agency, ‘Frelimo triumph in local elections’, *AIM Report* no. 369 (8 December 2008).

Some Mozambican journalists, like their colleagues elsewhere, have from time to time taken stands on matters of principle. Examined closely, these issues of principle are not, in an unproblematic, linear or positivist way, identifiable with the normative and ideologically-constructed Western idea of the 'free press'. In 1989 Schiller wrote that the success of the media conglomerates in propagating the free press idea in the global north rests on twin foundations, namely their 'command of vast material assets and the near-universal acceptance of [their] own definition and description of its role and function'.⁸⁰ He went on to ask whether it is necessarily true that the word *free* in the phrase 'free press' must mean *privately-owned*, and by implication whether the word *owned* in 'state-owned' press inevitably implies editorial control. As in the concept of the 'free market', the choice of terminology loads the ideological dice:

[A] certain amount of popular skepticism and unease do exist [but] the trust that the private informational system has been able to create, maintain, and insulate itself within is remarkable. Rarely is there a murmur from any influential quarter that the information lifeline [. . .] is totally in the hands of vast, private, unaccountable domains.⁸¹

There was little doubt in the immediate post-independence period in Mozambique that it was the state's business to run newspapers and radio stations, and that the private sector could not be trusted to do so. The Portuguese word for information, *informação*, was used ambiguously at this time, meaning both 'information' (that which was transmitted, content) and also something structural, the channels of information, the media themselves.⁸² Information in these senses was something valuable to 'the enemy', and at the same time had a functional, militant character.⁸³ 'Information' was a front in the struggle. Jorge Rebelo, a leading Frelimo intellectual, wrote in 1977 that

⁸⁰ H. I. Schiller, *Culture Inc.: The Corporate Takeover of Public Expression* (New York: Oxford University Press, 1989), p. 166.

⁸¹ Schiller, *Culture Inc.*, p. 167.

⁸² Britz and Ackermann call this the 'object-related' and 'conduit-related' aspects of information. See their *Information, Ethics and the Law: A Guide for Information Practitioners, Students and the Corporate Environment*, p. 6 et seq.

⁸³ E. Machiana, *A revista 'Tempo' e a revolução moçambicana: da mobilização popular ao problema da crítica na informação, 1974-1977* (Maputo: Promédia, 2002), p. 87.

it was necessary [...] to create a structure that would guarantee the transmission of information from the headquarters of the Department of Information and Propaganda and its dissemination in the provinces and abroad.⁸⁴

'The enemy' was the subject of speeches, newspaper reports, radio broadcasts and pamphlets with titles such as 'How the enemy acts' and 'We must know who the enemy is'.⁸⁵ Even academic research was treated with extreme caution as far as its dissemination was concerned. In the late 1970s and early 1980s, the mimeographed research reports of the *Centro de Estudos Africanos* (Centre of African Studies or CEA) at Eduardo Mondlane University on such topics as migrant labour, the cotton industry or containerisation at Maputo port were not handed out freely to anybody:

Most of these reports, produced in small print-runs, are unfortunately not for sale, and a good number are even 'restricted' which is to say that their distribution is carefully limited and controlled for political reasons.⁸⁶

Even a figure such as Carlos Cardoso – who was in conflict with Frelimo virtually from independence onwards, and was regarded by the ruling party as an 'ultra-leftist' – was committed to the revolution, and applied unsuccessfully in 1976–1977 to join the party.⁸⁷ Cardoso was jailed briefly in 1982 for a failure to follow guidelines in reporting on Angola and Mozambique. In November 2000, he was gunned down in the street for his relentless pursuit of the story of how US\$14 million was stolen

⁸⁴ Machiana, *A revista 'Tempo' e a revolução moçambicana*, p. 87, authors' translation.

⁸⁵ *Como age o inimigo: análise política da situação económica e social do país; um comunicado do Conselho de Ministros* (Maputo: DTI, 1977); *Devemos saber quem é o nosso inimigo: luta da classe operária contra o capitalismo* (Maputo: Imprensa Nacional, 1975).

⁸⁶ 'La plupart de ces rapports, tirés à un faible nombre d'exemplaires, ne sont malheureusement pas en vente, et une bonne partie d'entre eux est même «restreinte» c'est-à-dire de diffusion très limitée et contrôlée, pour des raisons politiques'. M. Cahen, 'Publications du Centro de Estudos Africanos de l'Université Eduardo Mondlane, Maputo, Mozambique', *Politique Africaine* no. 5 (March 1982), p. 113. Full disclosure: Colin Darch worked at the Centro de Estudos Africanos from 1979 to 1987.

⁸⁷ Fauvet and Mosse, *Carlos Cardoso: Telling the Truth in Mozambique*, pp. 47, 49.

during Mozambique's bank privatisation process. The story of his approach to journalism, within a critically-oriented and emancipatory epistemology, is not the story of somebody fighting for a 'free press' in the sense criticised by Schiller. His career has rather been characterised by one of his biographers as being 'against all orthodoxies'.⁸⁸

If the depiction of Mozambique as a low-information society in which 'uncritical' citizens remain largely incurious about the activities of government has any merit, it may well be that a legislated access right, should such a law be adopted, would have little immediate impact. The tradition of independent investigative journalism in Mozambique was embodied most famously by Carlos Cardoso, but may well have died with him. On the other hand, there is some hope in the fact that the state is making information increasingly available (if not easily accessible), even though newspapers, broadsheets and other media are not systematically using access to information to hold the political class accountable in new ways. It is to be hoped that a critical citizenry will both demand and help to create a high-information society in which real democratic practices become, if not inevitable, at least possible.

South Africa: an incomplete transformation

In some parts of the global south, where the bureaucratic structures of the state are weak and where the record-keeping function is inadequate, the paper trails can be hard to follow, and forgetfulness and silence overtake public consciousness quickly. South Africa is a special case, since it was run under apartheid by a moderately efficient if unimaginative bureaucracy, which was needed to administer the absurdly detailed and pseudo-scientific system of racial classification and separation. Indeed, from 1950 onwards, under the leadership of Hendrick Verwoerd, the Department of Native Affairs was transformed into a 'great super-ministry whose tentacles extended into every aspect of government policy' with an army of functionaries to accompany it.⁸⁹ 'Surveillance' in Foucault's sense of the term underpinned every aspect of the functioning of the apartheid state, since all the subjects of the state

⁸⁸ Fauvet and Mosse, *Carlos Cardoso: Telling the Truth in Mozambique*. The phrase is the title of the first section of the book, by Fauvet.

⁸⁹ D. O'Meara, *Forty Lost Years: The Apartheid State and the Politics of the National Party, 1948–1994* (Johannesburg: Ravan Press, 1996), p. 68.

had to be assigned racial identities on which in turn depended rules that governed the most private aspects of their personal and professional lives, rules about where they could live and work, whom they could marry, and even with whom they could have sex.

At a superficial level the publication of government information and disinformation in the apartheid period was reasonably well systematised, with printed gazettes and other documents produced by the Government Printer and available for sale to the public. But much if not all of the material was overtly intended not to inform but to reinforce policy, and as the country was gradually splintered into various self-governing homelands or 'Bantustans' – some of which were nominally independent of Pretoria – government publishing proliferated out of control. After 1980, the various departments were permitted to decide for themselves what the print runs of their published documents would be, and what distribution channels to use.⁹⁰ Behind this system, the state bureaucracy was apparently all too conscious of the need to pre-emptively destroy potentially incriminating documents. A whole chapter of the Truth and Reconciliation Commission (TRC) report (Volume 1, Chapter 8) is devoted to the 'Destruction of Records', pointing out that this process amounted to nothing less than the silencing of the voices of the oppressed:

The story of apartheid is, amongst other things, the story of the systematic elimination of thousands of voices that should have been part of the nation's memory [. . .] the former government deliberately and systematically destroyed a huge body of state records and documentation in an attempt to remove incriminating evidence and thereby sanitise the history of oppressive rule [. . .] the urge to destroy gained momentum in the 1980s and widened into a co-ordinated endeavour, sanctioned by the Cabinet and designed to deny the new democratic government access to the secrets of the former state.⁹¹

The most extraordinary aspect of this story is not that records were destroyed, but that meta-records were kept that documented the process. The cover-up was not itself covered up. According to the account in the

⁹⁰ P. J. Lor and A. van As, 'Work in progress: developing policies for access to government information in the new South Africa', *Government Information Quarterly* vol. 19 (2002), p. 104.

⁹¹ Republic of South Africa, Truth and Reconciliation Commission, *Truth and Reconciliation Commission of South Africa Report* (Cape Town: Juta, 1998), vol. 1, p. 201.

final report of the TRC, early guidelines were drawn up as far back as 1978, in the aftermath of the 1976 Soweto uprising. These procedures were signed by the then Prime Minister and circulated to all government departments, and authorised heads of department to destroy documentation. As the TRC comments, the new rules 'did not explicitly challenge the authority of the Archives Act; they simply authorised destruction without mentioning the Archives Act at all'.⁹²

But the destruction of records is not in and of itself evidence of malicious intent and good governments destroy records as do bad ones. Professional archivists know only too well that the vast majority of written records in any government system will end up in the shredder or the furnace, simply because no purpose is served by keeping them, and no archive will ever be large enough to do so. The proportion of public records that are kept permanently in both the United States and in Great Britain is around 1 per cent; in South Africa it may be as high as 15 per cent.⁹³ The question is who decides what to destroy, and under what rules? Since 1953, South African law, in alignment with international practice, has assigned the responsibility for deciding what gets kept and what gets destroyed to the State Archives – and the Archives are empowered to 'supervise the management of every official record [. . .] from the moment of its creation'.⁹⁴

The problem in the South African case has been first that the law was widely ignored, and second that even if enforced, still permitted key exemptions, including the documents of 'offices of record', the records of the Bantustans, intelligence and military records, and some others.⁹⁵ The perpetrators of human rights violations throughout the apartheid period had every motive to take advantage of all possible legal loopholes, as well as extra-legal methods, in covering their tracks. This combination of legislated exemptions, ignorance, malice and incompetence was in the end fatal to the integrity of South Africa's documented historical record, despite the fact that the country boasted highly qualified, committed and reflective professional archivists.⁹⁶

⁹² Republic of South Africa, Truth and Reconciliation Commission, *Truth and Reconciliation Commission of South Africa Report*, vol. 1, p. 210.

⁹³ Figures quoted in V. Harris, 'Public access to official records and the record management function of the South African State Archives Service', *Innovation* no. 4 (June 1992), p. 14.

⁹⁴ Harris, 'Public access to official records', p. 15.

⁹⁵ Harris, 'Public access to official records', p. 15.

⁹⁶ The articles in the collective volume by C. Hamilton and others (eds.), *Refiguring the Archive*, are evidence of this.

By the time Mandela was released and the African National Congress (ANC) and other banned political organisations were legalised in February 1990, it had become clear that a new ‘human rights’ approach to the political system as a whole was likely. One of the earliest indications that the ANC was committed to legislate for freedom of information appeared in October 1991, ironically in a report complaining that the ANC had covered up a poisoning:

Albie Sachs [. . .] is now engaged in composing an entrenched provision for the constitution on the lines of the [US] Freedom of Information Act, protecting the right of the public to have full knowledge of matters which fall within the public interest.⁹⁷

In August 1993 newspaper stories began to appear reporting that government departments had been instructed – yet again – to destroy large quantities of classified information. The written order, itself a classified document, mandated the destruction of ‘everything that did not have immediate value for administrative purposes’.⁹⁸ But the ANC-led and democratically-elected government that took power in South Africa in 1994 was committed to a constitutional regime, with a bill of rights embedded in the constitution and a programme of enabling legislation to follow. As promised in 1991, Section 32 of the South African Constitution of 1996 did indeed guarantee information access in quite explicit terms:

1. Everyone has the right of access to
 - (a) any information held by the state; and
 - (b) any information that is held by another person and that is required for the exercise or protection of any rights.
2. National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.⁹⁹

The implementing legislation that translated this into a justiciable right, a right that could be asserted and enforced in the law courts, was the

⁹⁷ Albie Sachs later became a Constitutional Court judge. See Editorial: ‘Freedom of information’, *Weekly Mail* no. 41 (18–24 October 1991), p. 20.

⁹⁸ G. Davis, ‘Civil servants told to destroy secret files’, *Weekly Mail and Guardian* (13–19 August 1993), p. 3.

⁹⁹ Republic of South Africa, *Constitution of the Republic of South Africa*, no. 108 of 1996, Section 32.

Promotion of Access to Information Act, no. 2 of 2000.¹⁰⁰ This law was intended to

- (a) to give effect to the constitutional right of access to
 - (i) any information held by the State; and
 - (ii) any information that is held by another person and that is required for the exercise or protection of any rights.
- (b) to give effect to that right
 - (i) subject to justifiable limitations [. . .]
 - (ii) in a manner which balances that right with any other rights [. . .]¹⁰¹

But despite the fact that the South African legislation as drafted and adopted has been recognised as exemplary and has even been termed the ‘gold standard’ for freedom of information laws,¹⁰² the uncomfortable truth is that, as far as it is possible to tell, citizen demand remains low and bureaucratic compliance inadequate: South Africa’s citizens simply do not seem to be making significant use of their right to know.

Part of the difficulty is that, even leaving aside the normative idea that high usage (however defined) is a good indicator of something, the available data are incomplete and ambiguous. Under South African legislation, all public bodies must make what is called a ‘Section 32’ report to the national Human Rights Commission (SAHRC), detailing the number of requests received, the number granted in full, the number granted under Section 46 (mandatory disclosure in the public interest), the number of partially and fully refused requests, and some other statistics. The SAHRC then tabulates this data and includes it in its annual report to Parliament. The public bodies are grouped as national public bodies, provincial departments, local government and ‘Chapter 9’ institutions (the various commissions on human rights, gender, and so forth). The SAHRC itself was subjected to scathing criticism in a published report by a parliamentary sub-committee chaired by Kader Asmal in mid-2007. The report comments that it is ‘unclear whether the

¹⁰⁰ Republic of South Africa, *Promotion of Access to Information Act*, no. 2 of 2000.

¹⁰¹ *Promotion of Access to Information Act*.

¹⁰² Open Democracy Advice Centre, ‘The state of whistleblowing and access to information in South Africa: a submission to the African Peer Review Mechanism’ (Cape Town, 2005), p. 2.

Commission has fully grasped the nature of its legal obligation', describes the appointment of commissioners as a 'shambles' and, with regard to freedom of information rights, recommends the appointment of a special Information Commissioner within the organisation.¹⁰³ The report calls attention to the 'urgent need for the Commission to pay particular attention to its functions and obligations in terms of the Promotion of Access to Information Act'.¹⁰⁴

In the five years (2003/2004 to 2007/2008) since the SAHRC started publishing Section 32 reports, compliance with the reporting requirement has been consistently poor, and the body of data available for analysis is seriously compromised as a result. The Commission has been unable to enforce the reporting requirement:

The submission of section 32 reports over a five year period has revealed worrying trends in relation to the implementation of [the Promotion of Access to Information Act]. These trends are evidenced throughout the public sector [. . .] Compliance with section 32 for all levels of public bodies has been consistently low.¹⁰⁵

In the SAHRC annual report for April 2007 to March 2008, for the first time, data are provided on bodies that have been non-compliant with Section 32 in the reporting year. At national level, only 17 out of 39 departments and other bodies submitted reports. Out of 89 provincial bodies only 20 per cent submitted statistics and less than 5 per cent of the country's 284 municipalities reported.¹⁰⁶ As the SAHRC points out:

Local government in general usually forms the first interface between the South African public and government whether for service delivery or otherwise. The widespread non-compliance with

¹⁰³ Republic of South Africa, Parliament, *Report of the Ad Hoc Committee on the Review of Chapter 9 and Associated Institutions: A Report to the National Assembly of the Parliament of South Africa* (Cape Town, 31 July 2007), pp. 152, 174.

¹⁰⁴ Republic of South Africa, Parliament, *Report of the Ad Hoc Committee on the Review of Chapter 9 and Associated Institutions*, p. 175.

¹⁰⁵ South African Human Rights Commission, *12th Annual Report, April 2007-March 2008* (Pretoria, 2008), p. 139. All the annual reports of this body may be downloaded from http://www.sahrc.org.za/sahrc/cms/publish/cat_index_47.shtml (accessed 16 November 2008).

¹⁰⁶ South African Human Rights Commission, *12th Annual Report, April 2007-March 2008*, pp. 142-5.

section 32 in this sector therefore raises grave concern when monitoring implementation.¹⁰⁷

Even the data that are available in the five SAHRC reports published so far are highly problematic and difficult to analyse.¹⁰⁸ The instrument used to gather data has itself been subjected to criticism on the grounds that it lacks clarity in places and that the relationship between various categories is often unclear. For example, the requirement to report on ‘the number of times each provision of this Act was relied on to refuse access in full or partially’ is interpreted by the SAHRC, and apparently by all the bodies submitting reports, to mean simply the total number of refusals that relied on this or that provision of the Act. It has been argued that a more probable interpretation is that the intention was to collect statistics for each type of exemption as defined in Sections 34–45 of the Promotion of Access to Information Act.¹⁰⁹

There are other problems. To pursue a point made previously, in the 12th annual report, the SAHRC for the first time lists bodies that have not complied with Section 32. But non-compliance with Section 32 does not mean that the non-reporting body did not receive any requests, and tells us nothing about whether such requests were granted or refused. It can easily be established from other sources that such requests were made by various NGOs and other groups.¹¹⁰ The data tell us nothing about the kind of information requested, and nothing about the level of mute refusals. Above all, they tell us little by themselves about the level of transparency in the country. For the sake of argument, if the state were pro-actively compliant, placing significant amounts of appropriate and useful government information on websites, or making information easily and freely available through non-adversarial procedures outside the framework of the Promotion of Access to Information Act, then request and complaint figures would presumably fall. In such a case ‘low’ levels of demand would not be an indication of opacity.

¹⁰⁷ South African Human Rights Commission, *12th Annual Report, April 2007-March 2008*, Annexure, p. 140.

¹⁰⁸ The SAHRC has published 12 reports. The 8th to 12th of these contain analysis and tabulation of the Section 32 reports.

¹⁰⁹ Sorensen, ‘Statistics with respect to Promotion of Access to Information Act’, pp. 6–8.

¹¹⁰ Sorensen, ‘Statistics with respect to Promotion of Access to Information Act’, pp. 6–8.

Most requests for politically sensitive information appear to originate from a small group of activist NGOs. Dale McKinley complained in 2004 that in two years of operation of the Promotion of Access to Information legislation,

the vast majority of requests for access to both the [Truth and Reconciliation Commission] archive and related information on human rights violations have been submitted by one organisation [. . .]¹¹¹

namely the South African History Archive (SAHA) in Johannesburg, while the remainder came mainly from the Centre for the Study of Violence and Reconciliation (CSVR) in Johannesburg with an office in Cape Town, the Freedom of Expression Institute (FXI) in Johannesburg, the Khulumani network, and the Open Democracy Advice Centre (ODAC) in Cape Town.

SAHA is ‘an independent human rights archive dedicated to documenting and providing access to archival holdings that relate to past and contemporary struggles for justice in South Africa’.¹¹² SAHA runs a Freedom of Information Programme that is specifically intended to exploit the Promotion of Access to Information Act, and thus ‘extend the boundaries of freedom of information’.¹¹³ Since 2001, the programme has advised and assisted people or organisations wanting to submit requests and has also built up an archive of materials on several topics including the Truth and Reconciliation Commission, gay people in the South African armed forces, attempts to develop nuclear weapons capacity, HIV and AIDS, and migration. In 2008, SAHA began to assist community organisations in developing the expertise necessary to exploit the opportunities offered by the Promotion of Access to Information Act by training and capacity building. It has successfully built a high profile as a source of genuine expertise and analysis on freedom of information questions in South Africa.¹¹⁴

¹¹¹ D. McKinley, *The State of Access to Information in South Africa* (Johannesburg: Centre for the Study of Violence and Reconciliation, 2004), p. 24.

¹¹² South African History Archive, ‘About SAHA’, available at <http://www.saha.org.za/about.htm> (accessed 7 November 2008).

¹¹³ South African History Archive, ‘About SAHA’.

¹¹⁴ An important new book, reflecting on the South African situation and drawing especially on SAHA’s experience, appeared just before our volume went to press. See K. Allen (ed.), *Paper Wars: Access to Information in South Africa* (Johannesburg: Wits University Press, 2009).

ODAC is also a high profile activist organisation that has taken the lead in trying to turn Promotion of Access to Information Act practices into reality. ODAC describes its mission as being ‘to promote open and transparent democracy; foster a culture of corporate and government accountability; and assist people in South Africa to be able to realize their human rights’.¹¹⁵ In 2003 it carried out an influential study that assessed compliance with the requirements of the Promotion of Access to Information Act. The organisation monitored

100 information requests submitted by a diverse group of requestors to a range of government institutions. Though the information requested varied in nature, no information that was expected to be protected under [the Act] was requested.¹¹⁶

The results of this study demonstrated very poor levels of compliance, lower than at least two other surveyed countries (Armenia and Macedonia) in which no legislation is in force, an anomaly that raised some questions about the instrumental efficacy of freedom of information legislation. Several commentators have seized on this point, arguing that since bureaucrats ‘by their very nature’ do not want to disclose information, what the Promotion of Access to Information Act actually does is to create a mechanism for non-compliance.

[I]n addition to the serious barriers that have been erected in simply locating the archive and related information, those who want to exercise their right of access to such information are faced with a generally ‘hostile’ officialdom that tends to treat provisions for non-disclosure [. . .] ‘as a shopping list for reasons to refuse information’.¹¹⁷

Of the 100 requests made in the ODAC study, only 23 per cent were granted. The rest were refused: 52 per cent met with mute refusal (that is, the request was ignored), 6 per cent with a verbal refusal, and 2 per cent received written refusals. ODAC did not even manage to get as far as

¹¹⁵ Open Democracy Advice Centre, ‘About us’ (Cape Town, [2008?]).

¹¹⁶ Open Democracy Advice Centre, *The Challenge of Implementation: The State of Access to Information in South Africa* (Cape Town, 2003), p. 1.

¹¹⁷ McKinley, *The State of Access to Information in South Africa*, p. 21.

submitting 17 of its requests.¹¹⁸ In late 2004, as a result of the study, ODAC complained formally to the Public Protector about mute refusal.

[A]n illiterate woman was given the run-around and was harassed by officials with questions such as why she wanted this information [. . .] the motivation for a request is completely immaterial, and its consideration is illegal [. . .]¹¹⁹

It is obvious that despite having adopted model legislation under a constitutional guarantee, the struggle for transparency in South Africa is by no means over, and faces major obstacles. Indeed, it is probable that it is only through continuous struggle that access to information can be maintained as a right. What is encouraging is that struggles over these issues are taking place more or less in the public arena. It is widely agreed, for example, that South Africa's post-apartheid intelligence agencies have become 'extremely powerful [. . .] highly politicised and prone to overreaching'.¹²⁰ It is all the more surprising, then, that in an extraordinary passage in a report on intelligence gathering (surveillance) policy commissioned in late 2008 by the outgoing Minister of Security, Ronnie Kasrils, the document states unambiguously that

the Act allows for exemptions from the duty of public bodies to produce a [Promotion of Access to Information Act] manual [. . .] The intelligence services applied for and received such an exemption, which remains in force. The [South African] HRC believes that the exemption is unnecessary and that the services should be subject to greater scrutiny and openness [. . .] *We agree with the [South African] HRC and believe that this issue is a good example of the need to replace the intelligence community's emphasis on secrecy with an emphasis on openness.*¹²¹

¹¹⁸ Open Democracy Advice Centre, *The Challenge of Implementation: The State of Access to Information in South Africa* (Cape Town, 2003), p. 1.

¹¹⁹ A. Dick, 'Power is information: South Africa's Promotion of Access to Information Act in context', *Mousaion* vol. 23, no. 1 (2005), p. 5.

¹²⁰ *Mail and Guardian*, 'The overlong arms of the spooks' (21–27 November 2008), p. 18.

¹²¹ Republic of South Africa, Ministerial Review Commission on Intelligence, *Intelligence in a Constitutional Democracy: Final Report to the Minister for Intelligence Services, the Honourable Mr Ronnie Kasrils, MP* (Pretoria, 10 September 2008), p. 274, our emphasis.

It remains to be seen whether those forces within the state working in favour of the principles of openness and transparency – and they clearly do exist, even in the South African intelligence services – will eventually prevail.

African countries are not ‘basket cases’

Freedom of information in its universalised form – a piece of national or local legislation guaranteeing individual citizens and others access to government information – has not really caught on in Africa. The evidence for this statement is the tiny number of countries with laws adopted, and apparently low levels of demand for access. The reason can be attributed at least partly to the intransigence of bureaucratic and political ruling elites in the face of transparency challenges, and to the absence of the material conditions for implementation, such as adequate and publicised registry and archival systems in government structures, a widely shared administrative language, and a citizenry with the self-awareness, skills and resources necessary to confront the machinery of the state. In this sense, to use human rights terminology, there is a clear and ongoing failure of the state in its duties to respect, protect and fulfil the right to information (see above, Chapter 5).

But two further points need to be made. The existence in African countries of a demand for the information needed to assert rights – which is, of course, not the only type of information needed – is not and cannot be demonstrated *only* through the measurement mechanisms of freedom of information legislation and its accompanying executive systems. To paraphrase Paulin J. Hountondji, it is essential to listen for the ‘stifled voices of protest’ to understand that in virtually any situation where resistance to the state occurs, a struggle over access to information is taking place.¹²² The nature of these struggles is frequently not determined merely by the parameters of an adversarial judicial system in the form of access legislation.

The second point, which follows from the first, is that the freedom of information idea may be under wider critical examination in African countries than the data in the global surveys indicate. An absence of

¹²² P. J. Hountondji, ‘The master’s voice: remarks on the problem of human rights in Africa’, in: *Philosophical Foundations of Human Rights*, Alwin Diemer (ed.) (Paris: UNESCO, 1986), p. 332.

reports does not logically mean that there is no interest or activity. In Botswana, for instance, listed by Vleugels as a country with 'no sign' of impending legislation, the government had already indicated by 2003 that freedom of information was 'not a priority'.¹²³ But a 2006 doctoral thesis by a local scholar, Peter Sebina, argued powerfully for the implementation of the constitutionally-defined access right in the form of appropriate enabling legislation,¹²⁴ and in July 2008 a local member of parliament, Keletso Rakhudu, announced that he was going to start the ball rolling by tabling a motion asking for local freedom of information legislation.¹²⁵

Other African governments shared the same dim view of freedom of information. In 2005 Benjamin Mkapa, president of Tanzania from 1992 to 2005, stated categorically that access legislation would never be adopted on his watch.¹²⁶ Despite this, by October 2006 the new President Jakaya Kikwete was promising that a forthcoming 'omnibus media law' would include guarantees for citizens' access to information held by public institutions.¹²⁷ In 2007, critics were claiming that drafted legislation would have the effect of 'classifying all cabinet papers and information as secret documents', clearly not a desirable outcome.¹²⁸

Similar low-key activity can be seen elsewhere on the continent, indicating that even if no campaigns are underway, some awareness nevertheless exists. According to a UNESCO source, in Chad there is a Centre d'accès à l'information located in the capital, N'Djamena, although it is unclear what this institution actually is or what it does.¹²⁹ For Cabo Verde, the journalist Fernando Monteiro, editor of the weekly newspaper *Horizonte*, presented a paper as early as 1999 at a

¹²³ M. Dimba and J. Fugier, 'Africa: anti-terror laws or freedom of information?', *Pambazuka News* (25 September 2008) (Paragraph 4).

¹²⁴ P. Sebina, 'Freedom of Information and records management: a learning curve for Botswana' (Ph.D. thesis, University College London, 2006).

¹²⁵ B. Piet, 'Rakhudu to table freedom of information motion', *Mmegi* vol. 25, no. 106 (18 July 2008).

¹²⁶ Dimba and Fugier, 'Africa: anti-terror laws'.

¹²⁷ Media Institute of Southern Africa (Windhoek), *Press Release: Tanzania: New Law on Access to Information Underway* (4 October 2006).

¹²⁸ P. Tindwa, 'MCT maintains stand on freedom of information bill', *The Guardian* (Dar es Salaam) (9 February 2007) (Paragraph 4).

¹²⁹ Republic of Chad, 'Centre d'accès à l'information de N'Djamena [Centre for access to information of N'Djamena]': Contact details. Available at http://portal.unesco.org/culture/en/ev.php-URL_ID=10084&URL_DO=DO_PRINTPAGE&URL_SECTION=201.html (accessed 22 June 2009).

Colloquium on ‘Os países de língua portuguesa e a liberdade de informação’ (Portuguese-speaking countries and freedom of information) in Lisbon.¹³⁰ In Cameroon, a workshop on information access rights was held in October 2008.¹³¹ In Sierra Leone, the Society for Democratic Initiative (SDI) organised a workshop in June 2008 to raise awareness among members of parliament.¹³² In Rwanda, where from 1993 onwards the radio station Radio Télévision Libre des Mille Collines actively encouraged the perpetrators of the mass genocide in the name of ‘Hutu power’, experience has led to a more nuanced general awareness of the dangers of untrammelled freedom of mass media.¹³³

¹³⁰ Republic of Portugal, Alta Autoridade para a Comunicação Social, ‘Colóquio “Os Países de Língua Portuguesa e a Liberdade de Informação” [Colloquium on “Portuguese-speaking countries and freedom of information”]’ (Lisbon, 25–26 June 1999), programme available at http://www.aacs.pt/bd/documentos/col25_06_99.htm (accessed 22 June 2009).

¹³¹ V. B. Yongka, ‘Cameroon: gov’ts information hoarding thwarts nation building’, *Postnewsline.com* (10 October 2008), available at <http://allafrica.com/stories/200810101057.html> (accessed 2 July 2009).

¹³² I. Tarawallie, ‘Sierra Leone: SDI looks at freedom of information’, *Concord Times* (Freetown) (10 June 2008).

¹³³ Ligue des Droits de la Personne dans la Région des Grands Lacs, *La problématique de la liberté d’expression au Rwanda: cas de la presse. Étude réalisée par l’Association pour la Promotion et la Protection de la Liberté d’Expression au Burundi (APPLE) sur demande et pour le compte de la LDGL* (Kigali, 2002), pp. 28–30.

Freedom of Information and the Developing World

*The citizen, the state and
models of openness*

COLIN DARCH
AND
PETER G. UNDERWOOD



Chandos Publishing
Oxford • Cambridge • New Delhi

Chandos Publishing
TBAC Business Centre
Avenue 4
Station Lane
Witney
Oxford OX28 4BN
UK
Tel: +44 (0) 1993 848726
Email: info@chandospublishing.com
www.chandospublishing.com

Chandos Publishing is an imprint of Woodhead Publishing Limited

Woodhead Publishing Limited
Abington Hall
Granta Park
Great Abington
Cambridge CB21 6AH
UK
www.woodheadpublishing.com

First published in 2009

ISBN:
978 1 84334 147 5

© C. Darch and P. G. Underwood, 2009

British Library Cataloguing-in-Publication Data.

A catalogue record for this book is available from the British Library.

All rights reserved. No part of this publication may be reproduced, stored in or introduced into a retrieval system, or transmitted, in any form, or by any means (electronic, mechanical, photocopying, recording or otherwise) without the prior written permission of the Publishers. This publication may not be lent, resold, hired out or otherwise disposed of by way of trade in any form of binding or cover other than that in which it is published without the prior consent of the Publishers. Any person who does any unauthorised act in relation to this publication may be liable to criminal prosecution and civil claims for damages.

The Publishers make no representation, express or implied, with regard to the accuracy of the information contained in this publication and cannot accept any legal responsibility or liability for any errors or omissions.

The material contained in this publication constitutes general guidelines only and does not represent to be advice on any particular matter. No reader or purchaser should act on the basis of material contained in this publication without first taking professional advice appropriate to their particular circumstances. All screenshots in this publication are the copyright of the website owner(s), unless indicated otherwise.

Typeset by Domex e-Data Pvt. Ltd.
Printed in the UK and USA.

ACTIVITY REPORT

OF

*THE SPECIAL RAPPOREUR ON FREEDOM OF EXPRESSION AND
ACCESS TO INFORMATION IN AFRICA*

ADV. PANSY TLAKULA

Presented to the 45th Session of the African Commission on Human and Peoples' Rights

*13 – 27 May 2009
Banjul, The Gambia*

INTRODUCTION

1. This Report, presented to the African Commission on Human and Peoples' Rights (African Commission), details the activities undertaken by the Special Rapporteur on Freedom of Expression and Access to Information in Africa (Special Rapporteur), since the 44th Ordinary Session of the African Commission which was held in Abuja, Federal Republic of Nigeria from 10 to 24 November 2008.
2. The mandate of the Special Rapporteur on Freedom of Expression was established at the 36th Ordinary Session of the African Commission held in Dakar, Senegal from 23 November to 5 December 2004. Commissioner Pansy Tlakula was appointed as Special Rapporteur at the 38th Ordinary Session held in Banjul, The Gambia from 21 November to 5 December 2005 and reappointed at the 42nd Ordinary Session held in Banjul, The Gambia from 15 to 28 November 2007.
3. The Plan of Action of the Special Rapporteur incorporating her terms of reference and working methods is contained in her Activity Report presented to the African Commission at its 40th Ordinary Session held in Banjul, The Gambia from 15 to 19 November 2007.
4. This report consists of three parts. Part I details the activities undertaken by the Special Rapporteur in the period under the review, Part II presents the planned activities of the Special Rapporteur, Part III gives an overview of the status of Freedom of Expression and Access to Information on the continent and Part IV provides the recommendations and conclusions of the Report.

I. ACTIVITIES UNDERTAKEN IN THE PERIOD UNDER REVIEW

5. On 2 February 2009, the Special Rapporteur delivered the keynote address at the opening of the LLM (Human Rights and Democratisation in Africa) 2009 of the Centre for Human Rights at the Faculty of Law, University of Pretoria. In her address, she observed that despite the numerous regional human rights initiatives which have increased the comparative enjoyment of human rights on the continent, the African human rights landscape remained bleak as a result of numerous unresolved conflicts, poverty, underdevelopment and the HIV/AIDS pandemic.
6. She highlighted the importance of Access to Information in promoting transparency, accountability and good governance, adding that the absence of Access to Information laws on the continent has prompted her decision to prioritise their adoption by States Parties, as one of her areas of focus. In this regard, she thanked the Centre for Human Rights for providing her mandate with research assistance on status of the adoption of Access to Information laws on the continent which formed part of her last report presented to the African Commission.
7. In her report to the 44th Ordinary Session of the African Commission, the Special Rapporteur indicated as one of her planned activities, research with partners on the progress towards the adoption of Access to Information Legislation in Africa. Accordingly, a research is presently being conducted in collaboration with the Centre for Human Rights, University of Pretoria, on the extent to which existing Access to Information legislation in States Parties and those in

the process of being adopted comply with regional and international human rights standards. The research will also provide guidelines for States Parties on the formulation of Access to Information legislation.

II. PLANNED ACTIVITY

8. In commemoration of World Press Freedom Day which is celebrated worldwide on 3 May every year, the Special Rapporteur intends to introduce the African Commission on Human and Peoples' Rights Human Journalist/Media Practitioner of the Year Award, to recognise journalists and media practitioners who have made outstanding contribution to the advancement of Freedom of Expression and Access to Information on the continent.

III. STATUS OF FREEDOM OF EXPRESSION AND ACCESS TO INFORMATION IN AFRICA

1. Appeals

The Gambia

9. At the 44th Ordinary Session of the African Commission, the Special Rapporteur reported on the letters of Appeal she had sent to the Government of the Gambia, calling for the release of Chief Ebrimma Manneh, a Gambian Journalist and former reporter of the independent Gambian newspaper *Daily Observer*, who was reportedly taken into custody on 16 July 2006 by members of the National Intelligence Agency (NIA).
10. During the 44th Ordinary Session, the African Commission passed a Resolution on the human rights situation in The Gambia which *inter alia* called on the Government of the Gambia to '*bring to an immediate end, the harassment and intimidation of independent media institutions and respect the rights of journalists*' and '*to immediately and fully comply with the 5th June judgement of the ECOWAS Community Court of Justice in respect of the release of Chief Ebrimma Manneh from unlawful detention and pay the damages awarded by the court*'.¹
11. While the African Commission has received no response from the Government of the Gambia in respect of this Resolution, the Special Rapporteur welcomes the fact that she has received a response with regard to her letters on Chief Ebrimma Manneh. In a letter dated 31 October 2008, but received by the Special Rapporteur after the 44th Ordinary Session, the Government of The Gambia stated that '*Chief Ebrima Manneh has never been arrested*' by the Government and '*therefore to allege that the Gambian Authorities are holding him incommunicado and even to the extent of going to a Court to have him released is quite incredible*' and is considered an '*indication of contempt towards The Gambia and the Gambian Authorities*' adding that *it will no longer entertain anymore exchanges on the subject of Chief Ebrimma Manneh*.

¹ ACHPR /Res.134 (XXXXIII) 08.

12. In the light of the above, the Special Rapporteur has sought the authorisation of the Government of the Gambia to conduct a Promotional Mission to the Republic of The Gambia to engage with Government officials on the situation of Freedom of Expression in the Republic of The Gambia in general and in particular, the steps that have been taken to comply with the resolution of the African Commission passed during the Ordinary Session as it relates to Freedom of Expression.

Senegal

13. In her report to the 44th Ordinary Session of the African Commission, the Special Rapporteur informed the African Commission, of the letter she had written to the Republic of Senegal in response to reports of the deteriorating situation of Freedom of Expression in the country through the alleged harassment, arrest and detention of journalists for offences such as “insults and offences towards the Head of State” “publication of false news” and “public insult”. In her letter, she urged the Government of the Republic of Senegal to ensure the observance of Freedom of Expression as provided by the African Charter and the Declaration of Principles on Freedom of Expression in Africa which supplements it.

14. The Special Rapporteur therefore welcomes reports that in March 2009, the President of the Republic of Senegal announced plans by his government to amend existing legislation so as to decriminalise press offences. She urges the Government of the Republic of Senegal to translate the commitment to the observance of regional standards on Freedom of Expression, which this gesture signifies, by ensuring that the necessary processes for the promised legal reform are initiated without delay.

South Africa

15. The Special Rapporteur welcomes the statement by the recently elected President of South Africa, President Jacob Zuma on the occasion of his inauguration on 9 May 2009, affirming the commitment of his Government to defend Freedom of Expression in South Africa.

2. Alleged Violations of Freedom of Expression and Access to Information

16. During the intersession period, the Special Rapporteur received numerous reports, alleging the violation of Freedom of Expression and Access to Information on the continent. In this regard, she wishes to reiterate to States Parties that the African Charter, unlike other international human rights instruments, does not permit derogation from any of its provisions. Accordingly, States Parties have an obligation to uphold at all times, the provisions of Article 9 of the *African Charter* and the *Declaration of Principles of Freedom of Expression in Africa* which supplements it, irrespective of circumstances such as armed conflict, civil unrest or any other form of emergency that may exist in States Parties.

17. In line with her mandate to ‘*keep a proper record of violations of the right to freedom of expression and denial of access to information and publish this in her reports submitted to the African Commission*’,² the Special Rapporteur brings to the attention of the 45th Ordinary Session of the African Commission the following reports she has received in respect of the continued application of criminal defamation laws against journalists, the closure of

² ACHPR / Res.122 (XXXXII).

independent television and radio stations and of the murder, kidnapping, harassment and threats made against journalists, in the under listed States Parties.

Democratic Republic of Congo, Niger, Cote d'Ivoire, Zimbabwe, Cameroon, Sierra Leone, Tunisia and Liberia .

18. The Special Rapporteur is in the process of bringing the details of these allegations to the attention of the States Parties concerned and is looking forward to receiving responses from these States Parties.

Eritrea

19. The Special Rapporteur remains concerned about reports of the continued deterioration of Freedom of Expression in Eritrea. In particular she is concerned about the continued incommunicado detention of the 18 journalists arrested during the 18 September 2001 crackdown on the press by the Eritrean Government, despite the 'decision' of the African Commission in Article 19/ Eritrea, in this regard.³ She is gravely concerned about reports that four of these journalists have since died in prison, owing to the intolerable conditions of their detention.

20. She therefore urges the Government of Eritrea to release these journalists from detention without any further delay, and to respect, protect and fulfil its obligations under Article 9 of the African Charter and the *Declaration of Principles on Freedom of Expression in Africa*.

CONCLUSION AND RECOMMENDATIONS

21. The Special Rapporteur thanks States Parties who have taken steps towards fulfilment of their obligations to respect, promote and protect Freedom of Expression in their respective countries, and in so doing steered their nations towards the path of greater public transparency and accountability necessary for good governance and strengthening of democratic ideals on the continent. She is equally grateful to individuals and Non Governmental Organisations (NGOs) alike for cooperating with her mandate and tirelessly providing her with much welcome information on violations, progresses and other developments on Freedom of Expression and urges them to continue to so. She also recognises the invaluable contributions made by NGOs through the dedication of their resources and expertise to the promotion and protection of Freedom of Expression and Access to Information in Africa.

22. The Special Rapporteur stands in solidarity with all journalists, media practitioners and individuals on the continent who have been arrested, convicted and imprisoned as well as those who remain in unlawfully detention by reason of their commitment and determination to effect positive improvements to Freedom of Expression and Access to Information in their respective countries and in Africa as a whole and honours the memory of those who have lost their lives in the defence of Freedom of Expression and Access to Information in Africa.

³ Communication 275/03.

23. The Special Rapporteur restates her concern about the continued retention of criminal defamation laws in the statute books of some States Parties and reiterates her call for these States Parties to repeal or amend laws relating to criminal defamation and to ensure that any laws on defamation conform to the following standards of Principle XII of the *Declaration of Principles on Freedom of Expression in Africa* which provides:

1. No one should be found liable for true statements, opinions, or statements regarding public figures which it is reasonable to make in the circumstance;
2. Public figures shall be required to tolerate a greater degree of criticism; and
3. Sanctions should not be so severe as to inhibit the right to freedom of expression, including by others.

24. The Special Rapporteur notes the continued application of national legislations restricting Freedom of Expression on national security grounds. In this regard she urges States Parties to ensure their existing legislations are in conformity with Principle XIII (2) of the *Declaration of Principles on Freedom of Expression in Africa* which states:

Freedom of expression should not be restricted on public order or national security grounds unless there is a real risk of harm to legitimate interest and there is a close causal link between the risk of harm and the expression.

25. The Special Rapporteur also notes the increasing reports of the murder, kidnapping, intimidation and threats against journalists and media practitioners and wishes to bring to the attention of States Parties, the provisions of Principle XI (1) and (2) of the *Declaration of Principles on Freedom of Expression in Africa*, which provides:

- 1) Attacks such as the murder, kidnapping, intimidation of and threats to media practitioners and others exercising their right to freedom of expression, as well as the material destruction of communications facilities, undermines independent journalism, freedom of expression and the free flow of information to the public.
- 2) States are under an obligation to take effective measures to prevent such attacks and, when they do occur, to investigate them, to punish perpetrators and to ensure that victims have access to effective remedies.

26. The Special Rapporteur calls on States Parties in which there are ongoing internal conflicts like Somalia, Sudan, the DRC, Northern Uganda and Central African Republic to refrain from targeting journalists for presenting to the public, reports considered to be unfavourable to the Government and to protect them in any way possible from attacks as required under international humanitarian law. In this regard she wishes to bring to attention of these States Parties, Principle XI (3) of the *Declaration of Principles on Freedom of Expression in Africa* which states that '*In times of conflict, States shall respect the status of media practitioners as non-combatants*'.

27. The Special Rapporteur notes that since her last Report to the African Commission, there has been little progress towards the adoption of Access to Information laws on the continent. She urges States Parties who have taken steps towards the adoption of Access to Information laws, especially those who have been engaged in prolonged attempts to enact such laws such as the Republic of Ghana and the Republic of Nigeria, to do all that is

necessary to ensure that these efforts are concretised into laws which conform to applicable regional and international standards.

28. She calls on States Parties that have adopted Access to Information legislation to ensure that the necessary institutional machinery for their effective application are put in place and where necessary, amend their legislations to conform with relevant international human and regional standards and in particular, Principle IV of the *Declaration of Principles on Freedom of Expression in Africa* which provides:

1. 1. Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.
2. The right to information shall be guaranteed by law in accordance with the following principles:
 - everyone has the right to access information held by public bodies;
 - everyone has the right to access information held by private bodies which is necessary for the exercise or protection of any right;
 - any refusal to disclose information shall be subject to appeal to an independent body and/or the courts;
 - public bodies shall be required, even in the absence of a request, actively to publish important information of significant public interest;
 - no one shall be subject to any sanction for releasing in good faith information on wrongdoing, or that which would disclose a serious threat to health, safety or the environment save where the imposition of sanctions serves a legitimate interest and is necessary in a democratic society; and
 - secrecy laws shall be amended as necessary to comply with freedom of information principles.
3. Everyone has the right to access and update or otherwise correct their personal information, whether it is held by public or by private bodies.”

29. The Special Rapporteur reiterates her call for States Parties to sign and ratify the *African Charter on Democracy, Elections and Governance* (the Charter). She notes that since the adoption of the said Charter on 30 January 2007, only 28 State Parties have signed and 2 i.e. Ethiopia and Mauritania have ratified the instrument. She therefore urges States Parties who have not signed and in particular those that have signed but not ratified the Charter, to do so, to ensure the coming into force of the instrument without further delay.

30. She further calls on States Parties scheduled to hold elections during the rest of the year like Namibia, Cote d’Ivoire, Tunisia, and Botswana, to ensure that journalists and media practitioners are allowed to freely disseminate information on the elections and are not subjected to any form of harassment, intimidation or violence in the course of the exercise of their duties.

31. She urges States Parties who have signed the Charter to take steps to implement provisions of Article 17 which obliges States to : Establish and strengthen independent and impartial national electoral bodies responsible for the management of elections; Establish and strengthen national mechanisms that redress election related disputes in a timely manner; Ensure fair and equitable access by contesting parties and candidates to State controlled

media during elections and also to ensure that there is a binding code of conduct governing legally recognised political stakeholders, government and other political actors prior, during and after elections, which should include a commitment by stakeholders to accept the results of the election or challenge them through exclusively legal channels.

32. The Special Rapporteur is concerned that the Kenya Communications (Amendment) Act 2009 (the Kenya Media Law), signed into law by the President of the Republic of Kenya in January 2009 does not comply with regional and international human rights standards. In particular, she is concerned that the Act: does not sufficiently guarantee the independence of members of the regulatory body ; confers wide scope of powers on the Ministers of Internal Security and Information and Telecommunications; is vague as to the requirements of broadcast content and substantially increases the severity of punishments.
33. In line with her mandate to *'analyse national media legislation, policies and practice within Member States, monitor their compliance with freedom of expression and access to information standards in general and the Declaration of Principles on Freedom of Expression and Access to Information in Africa in particular, and advise Member States accordingly'* the Special Rapporteur urges the Government of the Republic of Kenya to take the necessary steps to bring the provisions of its newly amended Media Law in conformity with applicable regional and international human rights standards.

ACTIVITY REPORT

OF

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

BY

ADV. PANSY TLAKULA

*Presented to the 46th Ordinary Session of the African Commission on Human and Peoples'
Rights*

*11 – 25 November 2009
Banjul, The Gambia*

INTRODUCTION

1. This Report covers the activities undertaken by the Special Rapporteur on Freedom of Expression and Access to Information in Africa (the Special Rapporteur), during the intersession period; May 2009 to November 2009.
2. The mandate of the Special Rapporteur was established at the 36th Ordinary Session of the African Commission held in Dakar, Senegal from 23 November to 5 December 2004.
3. Commissioner Pansy Tlakula was appointed as Special Rapporteur at the 38th Ordinary Session of the African Commission held in Banjul, The Gambia from 21 November to 5 December 2005 and reappointed at its 42nd Ordinary Session held in Banjul, The Gambia from 15 to 28 November 2007.
4. This Report is divided into five parts. **Part I** covers the activities undertaken by the Special Rapporteur in the period under review, **Part II** presents the planned activities of the Special Rapporteur, **Part III** gives an overview of the status of Freedom of Expression and Access to Information on the continent, **Part IV** presents the issues brought to the attention of the Special Rapporteur, and **Part V** provides for the conclusions and recommendations of the Report.

Part I.

ACTIVITIES UNDERTAKEN IN THE PERIOD UNDER REVIEW

A. Global Forum on Freedom of Expression (GFFE)

5. From 1 to 6 June 2009, the Special Rapporteur attended the Global Forum on Freedom of Expression (GFFE) in Oslo, Norway.
6. During the Forum, she participated in a roundtable discussion of Special Rapporteurs for Freedom of Expression from the United Nations, the African Union, and the Organisation of American States.
7. The Special Rapporteur represented the African Union. Other Special Rapporteurs who were represented include; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression from the United Nations Commission on Human Rights (Guatemala), and the Special Rapporteur on Freedom of Expression from the Inter-American Commission on Human Rights (Colombia).
8. There were discussions about the various mandates of the Special Rapporteurs, how they can collaborate, and how their work can support, and be supported by stakeholders that participated at the GFFE.
9. At the same Forum, there was a Training Workshop on 'Regional Human Rights Mechanism for free expression advocacy: Africa.' During this Workshop, the Special

Rapporteur gave training on “How to access and utilise the Special Rapporteur on Freedom of Expression in Africa.”

10. Her training focused on helping participants to access and utilise the Special Rapporteur on Freedom of Expression in Africa, and by so doing maximizing advocacy efforts through institutions that are set out to guarantee such rights.

B. European Development Days

11. From 22 to 24 October 2009, Commissioner Tlakula participated in a panel discussion on “*New Media for a New World: Democracy and Development.*” This panel discussion was organised by the European Commission in the margins of the ‘European Development Days which took place in Stockholm, Sweden.
12. The panel constituted of *inter alia*; the President of Liberia, Her Excellency Ms. Ellen Johnson-Sirleaf and the Prime Minister of Kenya, His Excellency Mr. Raila Odinga. The panel had the style of a TV debate, whereby active moderation with classical elements of interviewing allowed lively discussions among the participants on the podium and with the audience.
13. During the discussions, the panel raised and formulated relevant questions related to the impact new media will have on classical media. It also and provided major tracks to continue a dialogue about the impact of a changing media landscape for development and democracy.

Part II

PLANNED ACTIVITIES

14. Amongst other activities planned for 2010, the Special Rapporteur intends to introduce the African Commission on Human and Peoples’ Rights Human Journalist/Media Practitioner of the Year Award, to commemorate World Press Freedom Day celebrated international on 3 May annually. This Award seeks to recognise journalists and media practitioners who have made outstanding contribution to the advancement of Freedom of Expression and Access to Information on the continent.

Part III

STATUS OF FREEDOM OF EXPRESSION AND ACCESS TO INFORMATION IN AFRICA

15. Article 9 of the *African Charter on Human and Peoples’ Rights* (the African Charter) guarantees the right of every individual to receive information and to express and disseminate his or her opinions. While the *Declaration of Principles on Freedom of Expression in Africa* (the Declaration), adopted by the African Commission during its 32nd

Ordinary Session, which took place in Banjul, The Gambia, in October 2002. This Declaration supplements the provisions of Article 9 of the African Charter.

Appeals

16. Attacks on Media Practitioners and journalists, including prosecution, kidnapping, imprisonment, harassment and intimidation is in contravention of Principle XI(1) of the Declaration which provides as follows:

“Attacks such as the murder, kidnapping, intimidation of and threats to media practitioners and others exercising their right to freedom of expression, as well as the material destruction of communications facilities, undermines independent journalism, freedom of expression and the free flow of information to the public”

17. In this regard, the Special Rapporteur sent letters of Appeal to the following countries:

Sierra Leone

18. On 19 May 2009, the Special Rapporteur forwarded a letter of Appeal to the Republic of Sierra Leone, in respect of the alleged harassment and intimidation of journalists in the country.
19. She urged the Government of the Republic of Sierra Leone, to ensure that these allegations are investigated and the perpetrators, if any, punished to ensure that the victims are afforded an effective remedy.
20. On 29 June 2009, the Special Rapporteur transmitted another letter of Appeal to the Republic of Sierra Leone concerning threats, attacks and harassment of journalists in Sierra Leone.
21. She urged the Government of the Republic of Sierra Leone to fulfil its obligations under Article 1 of the African Charter in respect of the right to Freedom of Expression, by amending all existing laws relating to the media, including the Public Order Act of 1960.

Kenya

22. On 19 May 2009, the Special Rapporteur forwarded a letter of Appeal to the Republic of Kenya with regard to the murder of Mr. Francis Nyaruri, a reporter with the independent newspaper *Weekly Citizen*, who was found, decapitated in a forest in South Western Kenya on 29 January 2009, two weeks after he was reported missing.
23. She urged the Government of the Republic of Kenya to investigate the murder of Mr. Nyaruri, and punish the perpetrator(s) accordingly.

Gabon

24. On 29 May 2009, the Special Rapporteur forwarded an Appeal letter to the Republic of Gabon regarding the deteriorating situation of freedom of expression in the country, with particular reference to allegations of the alleged ill-treatment, arrest and detention of journalists, denial of access to legal and medical assistance for detained journalists.

25. Principle XII(1) of the Declaration provides that States should ensure that their laws relating to defamation conform to the following standards:

- no one shall be found liable for true statements, opinions or statements regarding public figures which it was reasonable to make in the circumstances;
- public figures shall be required to tolerate a greater degree of criticism; and
- sanctions shall never be so severe as to inhibit the right to freedom of expression, including by others.

26. A number of States Parties to the African Charter still use criminal defamation laws to arrest, prosecute and imprison journalists who publish articles that are critical to the government or other influential persons. In this regard, the Special Rapporteur sent letters of appeal to the following countries.

Niger

27. On 29 May 2009, the Special Rapporteur forwarded an Appeal letter to the Republic of Niger regarding the conviction of Nigerien journalists; Mr. Moussa Aksar and Mr. Aboubacar Sani of the weekly *L'Evènement* who were reportedly convicted of criminal libel and sentenced to three months in prison, and ordered a fine of 500,000 CFA francs each for damages on 18 November 2008. Reports declared that their conviction was prompted by a Complaint made by the Managing Director of NIGELEC (Niger's electricity supplier). Mr. Ibrahim Foukori was also convicted for publishing an article in the paper, alleging nepotism in NIGELEC's recruitment process.

Cameroon

28. On 29 May 2009, the Special Rapporteur forwarded a letter of Appeal to the Republic of Cameroon, regarding Mr. Lewis Medjo, a Cameroonian journalist and publisher of the independent weekly newspaper *Détente Libre*, who was convicted for allegedly "spreading false rumours" and sentenced to three years imprisonment and a fine of two million CFA francs, on 7 January 2009.

29. In the Appeal letter, the Special Rapporteur reiterated her Appeal to Member States to bring their laws in line with Freedom of Expression standards in general and the Declaration in particular.

Cote D'Ivoire

30. On 29 May 2009, the Special Rapporteur forwarded a letter of Appeal to the Republic of Cote D'Ivoire in respect of the alleged arrest and detention of two Ivorian journalists: Mr. Nanankoua Gnamanteh, editor of the independent weekly newspaper *Le Repère*, charged with '*Offending the Head of State*' in relation to an article in the paper insinuating that the President of Cote D'Ivoire and members of the Government had been involved in recent corruption scandals; and Mr. Ebenezer Viwami, the editor of an online news agency *Alerte Info*, arrested and detained for four days, while covering a riot at the MACA prison for allegedly reporting falsely about the riot.

31. The Special Rapporteur urged the Government of the Republic of Cote D'Ivoire, to inform her of steps it is taking to create a culture of respect for the right to Freedom of Expression in the country.

Senegal

32. On 22 June 2009, the Special Rapporteur forwarded a letter of Appeal to the Republic of Senegal regarding alleged arrest and detention of journalists in Senegal.

33. She expressed concern about the decision of the Magistrate's Court on 3 June 2009 which found as "insulting to the President" and "likely to disturb public order" the June 2009 edition of *L'Essentiel*, a monthly news magazine, over a story headlined "*Freemasonry: The Grand Lodge of France Conquers Senegal*", "*Nine years after the power change, the state is exploding, the Mourides are in control and Touba is suffering*".

34. Mr. Samba Diarra, managing editor and Ms Seye Diop, reporter of an independent newspaper *Week-End*, were also convicted by a Magistrates Court and sentenced to three months imprisonment and a fine of 10 Million Francs each, for defamation on 16 June 2009. They were convicted for publishing an article in the newspaper titled "*The underhand dealings of Aida Mbodji*", which accused Ms. Aida Mbodji, member of the ruling party, of being a dishonest politician.

35. While asking the Government of the Republic to provide clarification on the situation of the aforesaid journalists, she welcomed His Excellency's plans to amend the existing media legislation so as to decriminalise press offences.

36. The premises of *Wal Fadjiri*, Broadcasting Company based in Dakar, Senegal, were allegedly destroyed on 25 September 2009 by the *talibes* (disciples) of religious leader Serigne Modou Kara Mbacke.

37. The Special Rapporteur sent a letter of Appeal to the Republic of Senegal, on 15 October 2009, calling on the Government to kindly investigate these allegations, and bring the perpetrators to justice.

The Gambia

38. Three letters of Appeal and one letter of appreciation was sent to the Republic of The Gambia during the inter session.

Letters of Appeal

39. On 22 June 2009, the Special Rapporteur forwarded an Appeal letter to the Republic of The Gambia, addressing the deterioration of Freedom of Expression in the country.

40. She made reference to the alleged warning made by His Excellency Yahya A.J.J Jammeh, President of the Republic of The Gambia, to Imam Baba Leigh, the Imam of Kanifing on 22 May 2009, while addressing a rally in the region to desist from publicly criticising His Excellency. She also stated the alleged warning made to Media Practitioners who would face legal action if they reported any remarks made by the Imam.

41. In her Appeal, the Special Rapporteur mentioned the journalists in The Gambia who were arrested on 15 June 2009 and alleged to have been detained *incommunicado*. The journalists were charged with conspiracy to and publishing seditious publication, “*with intent to bring into hatred or contempt or to excite disaffection against the person of the President or the Government of the Republic of The Gambia*” and conspiracy to commit and criminal defamation “*with intent to bring the President of the Republic of The Gambia and the Government of The Gambia into contempt and ridicule.*” They were also reportedly denied bail, with the exception of one.

42. On 20 July 2009, the Special Rapporteur forwarded another letter of Appeal to the Republic of The Gambia, where she restated her appeal to the Republic of The Gambia as a State Party to the African Charter, to decriminalise media related offences and to amend any existing laws on defamation in conformity with Principle XII of the *Declaration* which provides that:

No one shall be found liable for true statements, opinions or statements regarding public figures which it was reasonable to make in the circumstances;

Public figures shall be required to tolerate a greater degree of criticism; and

Sanctions shall never be so severe as to inhibit the right to freedom of expression, including by others.

43. Subsequent to the sentencing of six journalists, **Ms. Sarata Jabbi-Dibba; Mr. Emil Touray; Mr. Pa Modou Faal; Mr. Pap Saine; Mr. Ebrimma Sawaneh, and Mr. Sam Sarr**, by the High Court of The Gambia on 6 August 2009, the Special Rapporteur forwarded a Joint Appeal to the President of The Gambia, together with the Special Rapporteur on the Rights of Women in Africa, Commissioner Soyata Maiga on 20 August 2009. The Special Rapporteurs were particularly concerned about the imprisonment of **Ms. Sarata Jabbi-Dibba**, and her seven months old baby.

44. The Appeal stated that **Sections 368, 51(1) (a), read together with 52(1) (c), and 178** of the Criminal Code Cap 10 Vol.II Laws of The Republic of The Gambia, which deal with criminal libel and defamation, and which the High Court Judge relied on in sentencing the journalists were incompatible with and contravened international and regional guarantees of freedom of expression.
45. The Special Rapporteur called on the Government of The Gambia to repeal these laws to bring them in line with international and regional standards, and also for the President of The Gambia to use his power to pardon the journalists that were imprisoned and release them from jail.
46. Further to this Appeal, the journalists were released by virtue of a Presidential Pardon.

Letter of Appreciation

47. On 9 September 2009, a joint letter of appreciation was forwarded to the Republic of The Gambia by the Special Rapporteurs after the release of the journalists.
48. In the letter of appreciation, the Special Rapporteurs affirmed that, *“the release of the journalists is a demonstration of the Republic of The Gambia’s desire to engage with relevant human rights stakeholders on the continent and beyond, as well as its commitment to the promotion of human rights in general and freedom of expression, as well as the rights of women and children in particular.”*
49. The Special Rapporteur also conveyed her gratitude to the President of The Gambia, for accepting her request to undertake a promotion Mission in the country.

Response of the Government of The Gambia

50. On 13 July 2009, the Special Rapporteur received a response from the Government of The Gambia with regard to the allegations concerning the Imam of Kanifing, and the *incommunicado* detention of journalists. The Government refuted all the allegations stating that *“the Gambian Press has always carried stories on diverse issues, including publication made by Imam Baba Leigh.”*
51. With regard to the arrest of the journalists, the Government of The Gambia submitted that the journalists did not plead to the charges because they had no counsel to represent them. On the issue of bail, the Government stated that *‘the Director of Public Prosecutions objected to their bail on grounds that they were likely to commit a similar offence, but the Magistrate granted Sara Jabbi Dibba bail.’*¹

Eritrea

52. In her Activity Report of the 45th Ordinary Session, the Special Rapporteur expressed her concern about reports of the continued deterioration of freedom of expression in Eritrea. She was particularly concerned about the continued *incommunicado* detention of the 18

¹ Ms. Sarata Jabbi Dibba was a nursing mother at the time of the arrest

journalists arrested during the 18 September 2001 crackdown on the press by the Eritrean Government, despite the 'decision' of the African Commission in Article 19/ Eritrea, in this regard.²

53. In that Communication, the African Commission held that Eritrea was in violation of **Articles 5, 6, 7(1), 9 and 18** of the African Charter, and further:

Urged the Government of Eritrea to release or to bring to a speedy and fair trial the 11 political dissidents and 18 journalists detained since September 2001, and to lift the ban on the press;

Recommended that the detainees be granted immediate access to their families and legal representatives; and

Recommended that the Government of Eritrea takes appropriate measures to ensure payment of compensation to the detainees.

54. On 8 September 2009, the Special Rapporteur transmitted a letter of Appeal to His Excellency ISAIAS Afworki, the President of the State of Eritrea concerning the above.

55. In the Appeal letter, she recalled her initial Appeal sent to the President of Eritrea in 2007 requesting for the release of the said journalists and human rights defenders, of which no response was received.

56. In the Appeal letter, she also mentioned the decision of the African Commission in the aforementioned Communication, and cited a Resolution on the Human Rights Situation in Eritrea,³ adopted by the African Commission during its 38th Ordinary Session, where it expressed concern about the arbitrary arrests and continued detention without trial of cabinet ministers, opposition groups, journalists and media practitioners. The Resolution called on the Government of Eritrea to guarantee, at all times, the right to a fair trial, freedom of opinion and expression as well as the right to peaceful assembly.

57. Based on the above, she urged the Government of Eritrea to take urgent measures to comply with the recommendations of the African Commission in the Communication against Eritrea, as well as the Resolution, and in particular, to bring to a speedy and fair trial, in accordance with international and regional fair trial standards, the political dissidents, human rights defenders and journalists detained since September 2001. She appealed that, if charges are not brought against them, they should be released and paid fair and adequate compensation.

58. Principle I(i) of the Declaration provides that:

"Freedom of expression and information, 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

² See Communication 275/03.

³ ACHPR/Res.91 (XXXVIII) 05). Can be accessed at www.achpr.org

form of communication, including across frontiers, is a fundamental and inalienable human right and an indispensable component of democracy.”

59. The Declaration also imposes an obligation on States Parties to the African Charter. to promote diversity, including among other things;

- Availability and promotion of a range of information and ideas to the public; and
- Pluralistic access to the media and other means of communication, including by vulnerable or marginalized groups, such as women, children and refugees, as well as linguistic and cultural groups;

Namibia

60. In this regard, on 11 October 2009, the Special Rapporteur forwarded a letter of Appeal to the Republic of Namibia, in respect of a ban imposed by a Cabinet **Resolution 38/05/12/00/001**, to *The Namibian* newspaper since 5 December 2001. This Resolution compels Government ministries, offices and agencies to refrain from advertising in *The Namibian* newspaper, because it was allegedly reporting on government leadership and the ruling party negatively.

61. She urged the Government of Namibia to immediately lift the ban, especially due to the upcoming elections in Namibia to ensure freedom of expression, access to information and opinion which form the basis of free and fair elections.

Analysis of National Media Laws

62. The Special Rapporteur also analysed the media laws of certain countries in the continent during the inter session.

Kenya

63. On 19 May 2009, the Special Rapporteur forwarded a letter of Appeal to the Republic of Kenya, expressing her concerns about the recently adopted Kenya Communications (Amendment) Act 2009, in line with her mandate to “*analyse national media legislation, policies and practice within Member States, monitor their compliance with freedom of expression and access to information standards in general and the Declaration of Principles on Freedom of Expression in Africa in particular and advice Member States accordingly.*”

64. She urged the Government of the Republic of Kenya to inform her of steps it intends to take to address the concerns expressed in the Appeal and to ensure that the Act complies fully with applicable regional standards on Freedom of Expression and Access to Information.

65. On 22 June 2009, pursuant to reports that the Government of the Republic of Kenya had introduced the Statute (Miscellaneous Amendments) Bill, to amend some provisions of

the Kenya Media Law, the Special Rapporteur forwarded another letter to the Republic of Kenya welcoming this progress.

66. She welcomed the fact that the amendment Bill provides for the establishment of a Broadcast Content Advisory Council, mandated to manage the content of television and radio broadcasts. Consequently, power will not be exclusively vested in the Minister of Information and Telecommunications, as was the case under the Kenya Media Law.

Swaziland

67. On 20 July 2009, the Special Rapporteur sent a letter of Appeal to the Kingdom of Swaziland concerning charges against Mr. Thulani Maseko, a human rights lawyer, who was arrested on 3 June 2009 and charged with uttering words, contrary to the *Sedition and Subversive Activities Act (Act No 46 of 1938 as amended)* on 4 June 2009. His charge was punishable by twenty years imprisonment without the option of a fine.

68. The Special Rapporteur was concerned that the provisions of the Sedition and Subversive Act were too vague and could be interpreted in such a manner as to severely curtail the enjoyment of freedom of expression as guaranteed under the African Charter. She also expressed her concern that the continued application of this law as well as the *Suppression of Terrorism Act 2008*, would create a climate within the Kingdom of Swaziland, detrimental to the enjoyment of other rights guaranteed under the African Charter, key among them, freedom of association and assembly.

69. The Special Rapporteur urged the Government of the Kingdom of Swaziland, to withdraw all charges against Mr. Maseko, and to take steps in fulfilment of its obligations under Article 1 of the African Charter by amending all existing laws, including the *Sedition and Subversive Activities Act*, and the *Suppression of Terrorism Act 2008* in conformity with the relevant regional human rights standards.

Zimbabwe

70. On 30 June 2009, the Special Rapporteur forwarded a letter of Appeal to the Republic of Zimbabwe, on the procedure for the establishment of the Zimbabwe Media Commission, pursuant to the Access to Information and Protection of Privacy Act (The Act) as amended in January 2008, and the Constitutional Amendment 19 of 2008, which establishes the Zimbabwe Media Commission.

71. The Special Rapporteur expressed her concern that neither the Act nor the Constitutional Amendment 19 provides specific measures guaranteeing the provisions of Principle VII (1) of the *Declaration* which requires that any public authority involved in broadcast or telecommunications regulation is independent and adequately protected against interference, particularly of a political or economic nature. She also expressed concern that both the Act and the Constitutional Amendment 19 are silent on the appointment process of members of the Zimbabwe Media Commission.

72. The Special Rapporteur urged the Government of the Republic of Zimbabwe, to take necessary steps to address her concerns, in order to ensure that the establishment of the Zimbabwe Media Commission complies fully with applicable regional standards on Freedom of Expression.

Part IV

Issues brought to the attention of the Special Rapporteur

73. The Special Rapporteur has received a request from the Media Institute for Southern Africa (MISA) to undertake a fact finding mission in Tanzania this year to amongst other things, ascertain the state of freedom of expression, in particular the media in the country.

74. The invitation was prompted by events that have been taking place in Tanzania since 2008 when Mr. Saed Kubenea, a journalist was allegedly attacked with acid by unknown assailants and was left almost blind. It was also alleged that his newspaper, *Mwanahalisi*, was raided by the police and some materials confiscated. The newspaper was allegedly banned for three months for allegedly publishing a false story about the Head of State. MISA stated in the letter of request for a fact finding mission that, it is particularly concerned about the situation of freedom of expression in the run up to the 2010 elections and wishes that the situation of the media in Tanzania should be addressed as soon as possible, before it deteriorates.

75. The Special Rapporteur therefore hopes that the Republic of Tanzania will accept her request to carry out a promotion mission in the country at a date still to be determined.

Part V

CONCLUSION AND RECOMMENDATIONS

76. Freedom of expression has generally been recognised as a cornerstone of democratic rights and freedoms, and there is a link between the right to receive information and the right to express information. Thus, deprivation of one, automatically leads to deprivation of the other. States Parties can only effectively guarantee citizens' right to free access to information if they allow citizens to express their views freely without any impediment.

77. Journalists in the continent have constantly been victims of attacks in various ways. There have also been censorship designed to prevent or punish publication of materials critical to the government. All of these amount to abuse of the press and violation of the right to freedom of expression and access to information.

78. The Special Rapporteur welcomes progress that has been made by some States Parties in terms of securing respect for the right to freedom of expression and access to information in their respective countries.
79. She also appreciates contributions made by Non-Governmental Organisations (NGOs) and their networks, Journalists' Associations and other stakeholders who constantly provide information on the abuse of freedom of the press in the continent. Their continuous alerts on violations of freedom of expression and access to information in Africa have enabled her mandate to monitor these violations in the continent and act on them accordingly.
80. The Special Rapporteur underlines the dire need for States Parties to propose strategies/measures that will guarantee the rights of individuals to freely express their opinions without any fear of being reprimanded. These strategies/measures should not be in the abstract, but must be accompanied by action, with the help of all stakeholders who have interest in fostering freedom of expression and access to information in the continent.
81. The Special Rapporteur calls on States Parties to allow journalists to be free to report in any situation, because excluding them from reporting translates to a severe restriction on freedom of expression and information.
82. She also calls on States Parties to allow the media to be free from political control in order to serve public interest. Furthermore, she also recommends that bodies with regulatory authority over the media should be fully independent from the government.
83. The Special Rapporteur is aware that criminal defamation laws still exist in some States Parties. These laws are used to prosecute journalists who publish articles that are critical to elected public officials. Media laws can only effectively promote and protect freedom of expression and access to information in Africa if they are guided by the principle of maximum disclosure and if publications regarding matters of public interests are not considered defamatory. She calls on States Parties to end the use of imprisonment for publications critical of the government and abstain from imposing penal sanctions on journalists because of their articles.
84. Criminal defamation laws should therefore be revoked or amended to conform with international and regional standards, and particularly to Principles XII and XIII of the *Declaration*.
85. Principle XIII requires States to *“review all criminal restrictions on content to ensure that they serve a legitimate interest in a democratic society.”*⁴
86. The Special Rapporteur is gravely concerned about the situation of journalists in war torn countries as well as States Parties undergoing transitional governments. It is imperative

⁴ See also Principle XII(1) of the Declaration

that effective measures should be adopted to prevent any harassment or intimidation of journalists and human rights defenders exercising the right to freedom of opinion and expression in such circumstances. The Special Rapporteur therefore brings to the attention of the States Parties concerned, Principle XI (3) of the *Declaration* which states that '*In times of conflict, States shall respect the status of media practitioners as non-combatants*'.

87. She urges States Parties to revoke any existing bans on newspapers, television stations or channels to guarantee the rights to freedom of expression and information to its citizens.
88. The Special Rapporteur calls on Journalists and Media Practitioners to uphold highest standards of professionalism and ethics in carrying out their activities.
89. She also calls on States Parties to the African Charter to promote professionalism amongst Media Practitioners in accordance with principle X (1) of the Declaration. Principle X (1) provides that; "*Media practitioners shall be free to organise themselves into unions and associations*".
90. With regard to upcoming elections, the Special Rapporteur notes that some countries in the continent are expected to hold elections in 2010. Elections are expected in Sudan, Ethiopia, Burundi, Comoros, Mauritius, Rwanda, Madagascar, Tanzania, and Central African Republic.⁵
91. The Special Rapporteur therefore calls on these States Parties to ensure that journalists and media practitioners are allowed to freely disseminate information on the elections without any form of harassment or intimidation.
92. The Special Rapporteur also calls on States Parties that have received her appeal on the situation of Freedom of Expression in their respective countries to kindly provide responses and clarifications to the concerns raised. This will go a long way to show their commitment in promoting human and peoples' rights in general, and freedom of expression and access to information in Africa and support of her mandate in particular.

⁵ '*Africa still has the opportunity to do it right*' available at http://www.iss.co.za/index.php?link_id=23&slink_id=7885&link_type=12&slink_type=12&tmpl_id=3