INTER-SESSION ACTIVITY REPORT
(November 2018 to April 2019)

Presented to the 64th Ordinary Session of the African Commission on Human and Peoples’ Rights

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And
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I. Introduction ........................................................................................................................................3
II. Inter-sessional Activities ..................................................................................................................3
III. Special Call for Recommitment to Ensure the Right to Freedom of Expression and Access to Information .........................................................................................................................6
I. Introduction

1. This Report is prepared pursuant to Rules 23(3) and 72 of the Rules of Procedure of the African Commission on Human and Peoples’ Rights (‘Commission’ or ‘African Commission’), which requires each of the Commission’s subsidiary mechanisms to present a report on its work at each Ordinary Session, and each Commissioner to submit a report on activities undertaken during the inter-session.

2. I submit this Report to the 64th Ordinary Session (Ordinary Session) of the African Commission in my capacities as the Vice-Chairperson of the Commission, the Special Rapporteur on Freedom of Expression and Access to Information in Africa (Special Rapporteur), Member of the Committee for the Prevention of Torture in Africa (CPTA), and Member of the Working Group on Older Persons and Persons with Disabilities.

3. This Report covers the inter-session between the 63rd and the 64th Ordinary Sessions of the African Commission, during the period November 2018 to April 2019.

4. The Report is divided into this introduction; my inter-sessional activities; and a call for recommitment to ensure the Right to Freedom of Expression and Access to Information in Africa.

II. Inter-sessional Activities

5. I undertook the following activities as the Vice-Chairperson of the Commission and as Special Rapporteur:

a. On 26 November 2018, in my capacity as the Commission’s Vice Chairperson, I attended a meeting of the Permanent Representatives Sub-Committee on Audit Matters where I presented the African Commission’s responses to the performance audit undertaken by the Office of Internal Audit. I in particular raised the concern that the performance audit had not been presented to the Commissioners by the auditors before its finalisation.
b. From 15 to 16 January 2019, in my capacity as the Vice Chairperson of the Commission, I attended the 37th Ordinary Session of the Permanent Representatives’ Committee of the African Union (AU). From 7 to 11 February 2019, I attended the 34th Ordinary Session of the Executive Council and the 32nd Ordinary Session of the Assembly of Heads of State and Government of the AU. These meetings of the AU’s policy organs discussed the Commission’s 45th Activity Report before it was authorized for publication.

c. From 19 February to 05 March 2019, I attended the Commission’s 25th Extra-Ordinary Session, which was held in Banjul, The Gambia.

d. From 11 to 13 March 2019, I participated in the International Conference of Information Commissioners, held in Midrand, South Africa, where I provided perspectives from the African Commission on international and regional trends in public access to information.

e. From 28 to 29 March 2019, in my capacity as the Special Rapporteur, in Mombasa, Kenya, I convened a follow up meeting of the technical drafting team which was constituted in 2018 to work on the revision of the Declaration of the Principles on Freedom of Expression in Africa. During the meeting, the Draft Declaration on Principles of Freedom of Expression and Access to Information in Africa was presented and discussed, and it was agreed that public consultations would be initiated in April 2019.

6. During the intersession, I issued the following press releases and other documents in my capacity as Commissioner Rapporteur and Special Rapporteur:

a. On 15 November 2018, in my capacity as the Commissioner Rapporteur on the human rights situation in the Federal Democratic Republic of Ethiopia, I transmitted a Joint Letter of Appreciation addressed to H.E. Abiy Ahmed, Prime Minister of Ethiopia, which commended efforts taken to increase the representation of women in positions of power in Ethiopia.

b. On 10 December 2018, in my capacity as the Special Rapporteur, I issued a press statement on the occasion of Human Rights Day, concerning Access to Information
for persons who are blind or otherwise print disabled. My statement called on all African States to eradicate the book famine for visually impaired and other print disabled persons, including by becoming party to the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Persons with Disabilities in Africa, and the Marrakesh Treaty To Facilitate Access To Published Works For Persons Who Are Blind, Visually Impaired, Or Otherwise Print Disabled, and implementing the letter and spirit of those instruments.

c. On 21 January 2019, in my capacity as the Special Rapporteur, I issued a press statement condemning the killing of Ahmed Hussein-Suale Divela, an investigative journalist with Tiger Eye Private Investigations in Ghana. The statement called on the Government of Ghana to investigate the killing of Mr. Ahmed, with the view to bringing the perpetrators to justice.

d. On 21 January 2019, in my capacity as the Special Rapporteur, I transmitted a Letter of Appeal to H.E. the President of the Republic of Zimbabwe regarding concerns on the situation of freedom of expression and access to information in Zimbabwe. The letter requested clarification of the reports on the shutdown of internet, which would amount to a violation of Article 9 of the African Charter, which guarantees every individual’s right to express and disseminate opinions within the law and the right to receive information. On 10 April 2019, the Government of Zimbabwe transmitted a response to the Commission on the shutdown of the internet, stating the following: “The events which transpired between 14 and 16 January 2019 were characterized by unmitigated violence; public order had to be restored. Accordingly, the State was compelled to act in order to safeguard the rights of the public including stopping wanton destruction of property being fueled by the abuse to Freedom of Expression and Access to Information … The Government, as a measure of last resort deemed it fit to shut down internet services to quell potential civil unrest which, if it was left unchecked could have escalated to civil disobedience and escalated to civil unrest.”

f. On 29 January 2019, in my capacity as the Special Rapporteur, I issued a Press Release on the continuing trend of internet and social media shutdowns in Africa, which expressed concern on the continuing trend of internet shutdowns including in Chad, Sudan, the Democratic Republic of Congo (DRC), Gabon and Zimbabwe.

g. On 22 March 2019, in my capacity as the Special Rapporteur, I transmitted a Letter of Appeal to H.E. the President of the Republic of Chad regarding reports of the orders by the Government of Chad to mobile operators to block access to social media platforms in the country. To date, no response has been received to this Letter.

h. On 22 March 2019, in my capacity as the Special Rapporteur, I transmitted a Letter of Appeal to H.E. the President of the Republic of Mozambique in response to reports of the arrest, prolonged detention and ill-treatment of Mr. Amade Abubacar, a journalist working for Rádio e Televeisao Comunitária Nacedje and Zitamar News in Mozambique. To date, no response has been received to this Letter.

III. Special Call for Recommitment to Ensure the Right to Freedom of Expression and Access to Information

7. In this part of the inter-session report, I wish to make a special appeal to all States Parties to the African Charter, as well as the fraternity of the African Union and all of Africa’s non-state actors.
8. It is my call and appeal that Africa must reaffirm guarantee of and respect for the rights to freedom of expression and access to information which are affirmed in Article 9 of the African Charter.

9. The call which I am making today is well-advised. An atmosphere regressive of respect for Article 9 rights is increasingly becoming pervasive in Africa.

10. Just focusing on the internet and social media, during the last six months alone, I have, as already reported, made multiple public and private communications to States where the internet has been disrupted. In that time, at least five States shut down the internet, apparently for political and hence unsupportable reasons.

11. The social media shutdown in Chad has persisted for over one year, while social media disruption in Sudan was initiated in response to the anti-government demonstrations which escalated in December 2018. In the Democratic Republic of the Congo, internet and social media were blocked in many parts of the country throughout much of the electoral period spanning December 2018-January 2019. In Zimbabwe, the Government directed internet service providers and social media platforms to cease their services; but, commendably, the High Court in Harare ruled those shutdowns unconstitutional and required their restoration.¹

12. Why, then, should Africa reaffirm guarantee of and respect for the rights to freedom of expression and access to information?

13. The rationales for freedom of expression have been summarised to include: ‘... self-fulfilment/individual autonomy; the advancement of knowledge/discovery of truth/avoidance of error; effective participation in democratic society; self-government; distrust of government ... societal stability and progress; tolerance and understanding/conflict prevention or resolution, and the enablement of other human rights.’²

²Tarlach Mcgonagle and Yvonne Donders (eds), The United Nations and Freedom of Expression and Information: Critical Perspectives, Cambridge University Press, 2015, 3-4
14. The primary challenges which the exercise of freedom of expression and access to information is facing in Africa today are twofold: the challenge of inadequate or overreaching legislation; and the challenge of capricious and arbitrary State actions. Previous inter-sessional reports by the Special Rapporteur have profiled numerous instances where states parties to the African Charter have enacted laws geared to undermine individual or collective expression or the access of information. The Special Rapporteur has also raised concerns about situations of impunity where the safety of journalists has been eroded and indeed where media infrastructure has been degraded by state actions.3

15. The African Commission has spoken firmly on multiple occasions through its soft-law instruments and its jurisprudence to clarify Article 9 rights. Relevant soft-law instruments in this regard are the 2002 Declaration on Principles of Freedom of Expression in Africa,4 the 2013 Model Law on Access to Information for Africa,5 and the 2017 Guidelines on Access to Information and Elections in Africa.6

16. Since its institution in 1987, the African Commission has had over three decades accumulated experience arising from undertaking oversight of Article 9 implementation. This is the backdrop for the decision by the African Commission, in 2016, to revise its 2002 Declaration on Principles of Freedom of Expression in Africa.

17. In its Resolution 350,7 the African Commission decided to revise the Declaration due to recognition that the Declaration had over time become dated.

18. The main objective of the Declaration was to elaborate on the scope and content of Article 9 of the African Charter; yet, over time, major pertinent issues emerged

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4 Adopted by the Commission during the 32nd Ordinary Session, 17 to 23 October 2002, Banjul, The Gambia

5 Adopted by the Commission during the 13th Extra-Ordinary Session, 19 to 25 February 2013, Banjul, The Gambia

6 Adopted by the Commission during the 61st Ordinary Session, 01 to 15 November 2017, Banjul, The Gambia

7 Resolution ACHPR/Res. 350 (EXT.OS/XX) 2016 to Revise the Declaration of Principles on Freedom of Expression in Africa
which were either not covered at all, or were covered insufficiently in the Declaration. This was notably the case in respect of access to information issues and the interface between Article 9 rights and the internet and social media. In the latter instance, indeed, Resolution 362 encouraged the Special Rapporteur to ‘… take note of developments in the Internet age during the revision of the Declaration …’.8

19. As Special Rapporteur, I believe that Article 9 of the African Charter should grow with the times and be interpreted in the light of present day conditions, what is referred to as the ‘living instrument’ doctrine.9 Clearly, any interpretation must stay faithful to the ‘original and inherent logic and purpose’ of the standards established in Article 9. At the same time, though, arising interpretation must reflect and respond to changing international legal frameworks and ambient societal situations.10

20. At this point, I wish to highlight ten among the imperatives which must remain at the heart of Article 9 norm standard-setting and implementation:

   a. Imperative one: guaranteeing everyone has the right to hold opinions without interference. Opinions may not be restricted or criminalised.

   b. Imperative two: guaranteeing everyone has the right to freedom of expression. Indeed, presently, the peoples of Algeria and The Sudan are exercising the right to freedom of expression in their popular civil uprisings.

   c. Imperative three: establishing that the right to freedom of expression is subject to restrictions. For a restriction to be permissible, it must pass the three-part test of being established by law, being necessary (having a legitimate purpose, and being proportionate (not being overly broad). In one of its more seminal jurisprudential moments, addressing the right to

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8 Resolution ACHPR/Res. 362(LIX) 2016 on the Right to Freedom of Information and Expression on the Internet in Africa
9 Supra McGonagle and Donders, 41
10 Ibid, 31
freedom of expression, the African Commission determined that limitations established in national legislation may not be framed so as to erode the substance of a right established in the African Charter to the extent it becomes illusory.

d. Imperative four: ensuring a diverse and plural media, and that media independence should be guaranteed and facilitated, including in the forms of public service media, private media and community media.

e. Imperative five: guaranteeing and ensuring the safety of journalists, including through measures to prevent, investigate and punish attacks such as murder, extra-judicial killing, torture and other forms of ill-treatment, arbitrary arrest and detention, enforced disappearance, kidnapping, intimidation and threats which undermine independent journalism and the free flow of information to the public.

f. Imperative six: ensuring decriminalization of defamation or insult laws.

g. Imperative seven: prohibiting, by law, in terms of the three-part test, any speech that advocates for national, racial or religious hatred which constitutes incitement to discrimination, hostility or violence.

h. Imperative eight: guaranteeing every person the right to access information of public bodies and certain private bodies expeditiously and inexpensively. That indeed is why the Special Rapporteur commends the 24 African states, most recently including Ghana, which have enacted freedom of information legislation.

i. Imperative nine: ensuring that all information held by public bodies and certain private bodies is presumed subject to full disclosure.

j. Imperative ten: establishing that universal, equitable, affordable and effective access to the internet is necessary for the realisation of freedom of expression, access to information and the exercise of other human rights.

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The generally applicable principle should be that of equal protection, offline or online, of the right to freedom of expression and the right to access information.

21. While the African Commission has provided solid guidance on freedom of expression and access to information, the interface between these rights and the internet involves novel realities and considerations which require particular normative interventions. Let me, therefore, end by dwelling for a few moments on the internet.

22. Access to the internet facilitates the exercise of multiple human rights guaranteed under the African Charter, including the rights to freedom of expression and access to information. Access to the internet facilitates the right to education, the right to political participation and indeed so many more rights.

23. It seems to me that moving forward, reaffirmation of the importance of individual access to the internet as a means for exercising Charter rights should entail some of the following:
   a. While internet access is itself not a right, States should put in place measures to ensure effective exercise of the rights to freedom of expression and access to information in a digital age.\(^\text{12}\)
   b. States must strive to establish the right balance between liberty on one hand and security on the other hand in approaches to internet. Achievement of this balance should be guided by the three-part limitations test which I have already mentioned.
   c. States must ensure access to content on the internet without arbitrary and unwarranted filtering or blocking of content.
   d. States must ensure access to the infrastructure and equipment required to use the internet.

24. During this 64th Ordinary Session of the African Commission, I have launched public consultation on the draft Declaration on Principles of Freedom of Expression and Access to Information in Africa. I welcome and do look forward to contributions from States, and also from non-state actors.