



**African Declaration on Internet Rights and Freedoms Coalition**

# **POSITION PAPER IN RESPONSE TO THE COVID-19 PANDEMIC**

**June 2020**

## INTRODUCTION

This position paper is informed by monitoring conducted by the African Declaration on Internet Rights and Freedoms (AfDec) Coalition of developments relating to the COVID-19 pandemic. Various measures adopted by states and other relevant stakeholders have had a direct impact on the enjoyment of rights online. This position paper consolidates the Coalition members' assessment of, and positions on, the protection, promotion and exercise of human rights online as African states respond to the COVID-19 pandemic.

The AfDec Coalition is a Pan-African initiative which promotes human rights standards and principles of openness in internet policy formulation and implementation on the continent, guided by the 13 principles in the African Declaration on Internet Rights and Freedoms,<sup>1</sup> hereafter referred to as the Declaration.

The Coalition contends that internet rights and freedoms are more important now than ever before, particularly with the shift of citizens' daily communication, education, work, trade, transacting and access to basic services from face-to-face interaction to mostly online. It is therefore imperative that states, private sector actors and other stakeholders implement appropriate measures to safeguard internet rights and freedoms, and do not develop laws, policies or practices that unduly limit them. The Coalition reiterates the call made by the United Nations High Commissioner for Human Rights that human rights be front and centre in the response to the COVID-19 pandemic,<sup>2</sup> and further emphasises that emergency measures taken in response to the pandemic should not suppress human rights.<sup>3</sup>

The paper focuses on five key areas found in the Declaration, namely:

- Internet access and affordability
- Regulation of content online
- Privacy, surveillance and data protection
- Gender equality and marginalised communities
- The right to information.

The positions in this paper are made mainly with reference to the Declaration, as well as the newly adopted Declaration of Principles on Freedom of Expression

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1 <https://africaninternetrights.org/articles>

2 Office of the High Commissioner for Human Rights. (2020, 6 March). Coronavirus: Human rights need to be front and centre in response, says Bachelet. <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25668&LangID=E>

3 Office of the High Commissioner for Human Rights. (2020, 16 March). COVID-19: States should not abuse emergency measures to suppress human rights – UN experts. <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25722&LangID=E>

and Access to Information in Africa of the African Commission on Human and Peoples' Rights (ACHPR Declaration).<sup>4</sup> Furthermore, consideration has also been given to the April 2020 report by the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (UN Special Rapporteur on freedom of expression) regarding the exercise of the right to freedom of expression in the context of disease pandemics.<sup>5</sup> These resources provide guidance on the triad of information rights – freedom of expression, access to information and privacy – as well as their interplay with other associated rights.

At the outset, it must be noted that any limitation of a right – including the rights to freedom of expression, access to information and privacy – must comply with the three-part test for a justifiable limitation under international law. The three-part test mandates that a restriction must be prescribed by law; serve a legitimate aim; and be a necessary and proportionate means to achieve the stated aim in a democratic society. It bears noting that with regard to any limitation of the right to freedom of expression, the ACHPR Declaration provides that:

States shall ensure that any law limiting the rights to freedom of expression and access to information:

- a. is clear, precise, accessible and foreseeable;
- b. is overseen by an independent body in a manner that is not arbitrary or discriminatory; and
- c. effectively safeguards against abuse including through the provision of a right of appeal and impartial courts.<sup>6</sup>

The ACHPR Declaration further explains that a limitation will be considered to serve a legitimate aim where the objective of the limitation is to preserve respect for the rights or reputations of others, or to protect national security, public order or public health.<sup>7</sup> Importantly, in order to be necessary and proportionate, the limitation must originate from a pressing and substantial need that is relevant and sufficient; have a direct and immediate connection to the expression and disclosure of information, and be the least restrictive means of achieving the stated aim; and be such that the benefit of protecting the stated interest outweighs the harm to the expression and disclosure of information, including with respect to the sanctions authorised.<sup>8</sup>

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4 <https://www.achpr.org/legalinstruments/detail?id=69>

5 Kaye, D. (2020, 23 April). Disease pandemics and the freedom of opinion and expression: Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/44/49. [https://freedex.org/wp-content/blogs.dir/2015/files/2020/04/A\\_HRC\\_44\\_49\\_AdvanceEditedVersion.pdf](https://freedex.org/wp-content/blogs.dir/2015/files/2020/04/A_HRC_44_49_AdvanceEditedVersion.pdf)

6 Principle 9(2) of the ACHPR Declaration.

7 Principle 9(3) of the ACHPR Declaration.

8 Principle 9(4) of the ACHPR Declaration.

While this paper focuses on recommendations to states, regulators and the private sector, the Coalition also encourages other civil society actors and digital rights activists to engage in advocacy to promote these reforms in line with the Declaration and human rights standards.

## **INTERNET ACCESS AND AFFORDABILITY**

Principle 2 of the Declaration states that access to the internet should be available and affordable to all persons in Africa without discrimination on any grounds. It further states that everyone should enjoy unrestricted access to the internet, and that any shutting down – or blocking – of access to social networking platforms, and in fact, the internet in general, constitutes a direct interference with this right.

Similarly, the ACHPR Declaration calls on states, in cooperation with all relevant stakeholders, to “adopt laws, policies and other measures to provide universal, equitable, affordable and meaningful access to the internet without discrimination.”<sup>9</sup> This includes, but is not limited to, the development of independent and transparent regulatory mechanisms for effective oversight; the improvement of information and communications technology (ICT) and internet infrastructure for universal coverage; the establishment of mechanisms for regulating market competition to support lower pricing and encourage diversity; the promotion of local access initiatives, such as community networks, for enabling the increased connection of marginalised, unserved or underserved communities; and the facilitation of digital literacy skills for inclusive and autonomous use.<sup>10</sup>

For Africa, an issue closely related to internet access is the provision of electricity, without which internet access is rendered meaningless. A World Bank report indicates that in Sub-Saharan Africa, only 14% of people have access to grid electricity – even though nearly 70% have access to mobile phones. Overlooking the centrality of electricity to internet access can have enormous consequences.<sup>11</sup> In determining strategies regarding access to the internet and connectivity, states must ensure that the consistent supply of electricity is considered as an integral part of this strategy.

The Coalition has identified three key issues that arise in the context of internet access in Africa during this pandemic:

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9 Principle 37(3) of the ACHPR Declaration.

10 Ibid.

11 Oghia, M. J. (2017, 22 August). Internet access, sustainability, and citizen participation: Electricity as a prerequisite for democracy? *OpenDemocracy*. <https://www.opendemocracy.net/en/internet-access-sustainability-and-citizen-participation-electricity-as-prerequisite>

## Equitable access to the internet

First, there is a need to recognise access to the internet as a basic right and to ensure that every person is connected. The World Wide Web Foundation suggests that the COVID-19 pandemic justifies why access to the internet should be recognised as a basic right and the imperative to get every person connected.<sup>12</sup> Notably, digital inequality deprives billions of people of the critical connections necessary in a time of physical distancing occasioned by COVID-19.<sup>13</sup> By the end of 2019, 54% of the global population was connected to the internet, with studies indicating that people in poorer regions were far less likely to be online, along with women, elderly people, persons with disabilities, and those living in rural areas. Among those who are online, “many are only connected via their place of work, school or in public access spaces such as libraries and cafés – meaning the closures of these public spaces will push even more people offline.”<sup>14</sup>

As a result, there have been calls on governments and private sector actors to urgently develop strategies to increase internet access for digitally excluded communities, or those with limited connectivity,<sup>15</sup> and recommendations that during emergency situations, such as this one, governments should consider adopting national connectivity pledges and solidarity plans to encourage companies to implement policies that ensure citizens remain connected.<sup>16</sup> The Coalition also brings attention to the use of universal service and access funds. At this critical moment, these funds can be used to subsidise the cost of digital devices and provide internet services to low-income or marginalised communities to close the digital divide. As pointed out by the World Wide Web Foundation and the Alliance for Affordable Internet (A4AI), universal service and access funds offer a promising path to implement policies and programmes needed to address digital divides by developing new markets, as well as ensuring wider access to the social benefits of connectivity.<sup>17</sup>

For the Coalition, community networks play an important role in responding to the COVID-19 pandemic. These decentralised community-built and owned networks are the most effective way to overcome digital exclusion in areas that

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12 Sarpong, E. (2020, 15 April). Covid-19 shows why internet access is a basic right. We must get everyone connected. *World Wide Web Foundation*. <https://webfoundation.org/2020/04/covid-19-shows-why-internet-access-is-a-basic-right-we-must-get-everyone-connected>

13 Ibid.

14 Ibid.

15 APC. (2020). *Closer than ever: Keeping our movements connected and inclusive – The Association for Progressive Communications’ response to the COVID-19 pandemic*. <https://www.apc.org/en/pubs/closer-ever-keeping-our-movements-connected-and-inclusive-association-progressive>

16 Jorge, S., Sarpong, E., & Nakagaki, M. (2020). *Covid-19 Policy Brief: Internet Access & Affordability*. *Alliance for Affordable Internet and Web Foundation*. [https://webfoundation.org/docs/2020/04/Covid-Policy-Brief-Access\\_Public.pdf](https://webfoundation.org/docs/2020/04/Covid-Policy-Brief-Access_Public.pdf)

17 Thakur, D., & Potter, L. (2018). *Universal Service and Access Funds: An Untapped Resource to Close the Gender Digital Divide*. *Web Foundation*. <https://webfoundation.org/docs/2018/03/Using-USAFs-to-Close-the-Gender-Digital-Divide-in-Africa.pdf>

are still isolated from the social and economic dynamics of the digital era,<sup>18</sup> as seen with Zenzeleni Networks NPC in South Africa and TunapandaNET in East Africa.<sup>19</sup> Instructively, they are examples of community networks that are using their infrastructure to localise COVID-19-related information to fit the local context and languages, as the information released is mostly in English. At the same time, TunapandaNET is providing an e-learning platform and has been supporting teachers in the digitisation of Kenya's school curriculum. Further, the Centre for Youth and Development in Malawi is supporting teachers to run classes on WhatsApp to enable teachers to share lessons recorded as videos or voice notes with parents.<sup>20</sup>

However, community networks face many challenges for their development, from lack of access to unused spectrum in underserved areas, to expensive and highly bureaucratic processes to obtain a licence. The Coalition sees this as an opportune time for governments to remove these barriers so community networks can expand services to unserved or underserved communities.

### **Affordability of access**

The second issue relates to affordability. The Coalition notes that the cost to communicate remains exorbitant in Africa, and beyond the reach of many persons. While some governments and service providers have put measures in place to ensure that key populations can access information online by providing discounted data or special affordable packages for low-income groups, some countries have not taken any measures or have even effected price increases during the period.

For instance, South African mobile network operators Vodacom and MTN have decreased data prices for lower-volume data bundles by between 40% to 50%, while in Kenya, telecoms companies have included a doubling of internet speeds for home fibre packages at no extra cost for at least a month. In Uganda, a "work from home" data bundle by MTN Uganda has been initiated to enable people to work remotely at an affordable price.<sup>21</sup> Similarly, the Ekiti State government in Nigeria has responded by introducing a reduction of right of way charges from NGN 4,500 (USD 247) to NGN 145 (USD 8) per metre.<sup>22</sup>

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18 APC. (2020). Op. cit.

19 APCNews. (2020, 8 April). Zenzeleni and Tunapanda community networks respond to COVID-19 in Africa. APC. <https://www.apc.org/en/news/zenzeleni-and-tunapanda-community-networks-respond-covid-19-africa>

20 <http://www.cydmalawi.org>

21 CIPESA. (2020, 27 March). How technology is aiding the COVID-19 fight in Africa. <https://cipesa.org/2020/03/how-technology-is-aiding-the-covid-19-fight-in-africa>

22 Government of Ekiti State. (2020, 14 May). Broadband penetration: Governor Fayemi crashes Right of Way charges from N4,500 to N145 in Ekiti State. <https://ekitistate.gov.ng/broadband-penetration-governor-fayemi-crashes-right-of-way-charges-from-n4500-to-n145-per-meter-in-ekiti-state>

However, this is not the case for countries like Zimbabwe, where the Postal and Telecommunications Regulatory Authority of Zimbabwe approved a data increase which saw the largest mobile network operator, Econet Wireless, increase its tariffs by over 100% for some of its data packages.<sup>23</sup> Such increases, or a failure to review pricing, ignores calls for urgent action to make sure that as many people as possible can connect to the internet, including by providing discounted data or special affordable packages for low-income groups in order to expand connectivity and improve lives.<sup>24</sup>

Furthermore, there is a need for a stronger campaign against consumer-facing taxes on data and internet services, which have had long-standing effects of increasing connectivity costs for consumers, a scenario likely to worsen during the pandemic. Tax and licensing regimes of note in the region include the social media tax in Uganda,<sup>25</sup> and licensing fees for bloggers and other online content producers in Tanzania and Kenya.<sup>26</sup> A more recent development is the proposal for the introduction of a 1.5% “digital marketplace tax” in Kenya’s Finance Bill (2020).

### **Availability and quality of access**

The final issue is consistency of access to the internet during the pandemic. While no shutdowns or restrictions to internet access have been reported in response to the pandemic, the Coalition expresses concerns of this possibility. This concern arises in particular from provisions on misinformation and disinformation that are found in existing internet-related policies in some jurisdictions, or which have recently been adopted as part of COVID-19 policies (discussed in more detail below). The Coalition reiterates that any complete or targeted shutdown of the internet constitutes an arbitrary interference of the right to access. Furthermore, internet intermediaries should ensure that any traffic or information management practices employed during the COVID-19 period must be transparent and available to all stakeholders.

### **Recommendations**

- States and other relevant stakeholders should use existing strategies, and develop new strategies and regulatory measures, to increase internet access for digitally excluded communities, or those with limited connectivity, through for instance the utilisation of universal service and access funds, ensuring alternatives for electricity supply.

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23 MISA Zimbabwe. (2020, 11 May). Government should prioritise internet affordability as a human right. <https://zimbabwe.misa.org/2020/05/11/govt-should-prioritise-internet-affordability-as-a-human-right>

24 Sarpong, E. (2020, 15 April). Op. cit.

25 Nanfuka, J. (2020, 15 May). Uganda’s social media tax undermining COVID-19 fight. *CIPESA*. <https://cipesa.org/2020/05/ugandas-social-media-tax-undermining-covid-19-fight>

26 ARTICLE 19. (2018, 26 June). Eastern Africa: New tax and licensing rules for social media threaten freedom of expression. <https://www.article19.org/resources/eastern-africa-new-tax-and-licensing-rules-for-social-media-threaten-freedom-of-expression>

- States should create licence exemption provisions, or lessen the administrative burden for small operators, not-for-profit operators and other actors interested in providing affordable access in localised geographical areas.
- States should provide special spectrum allocations – either primary assignment or allowing secondary use of spectrum that is idle – to those interested in serving the unconnected in remote populations.
- States should adopt national connectivity pledges and solidarity plans to encourage relevant stakeholders to implement policies to ensure that members of the public remain connected.
- Mobile operators, internet service providers and other relevant stakeholders should implement measures to expand connectivity, including through the establishment of Wi-Fi hotspots.
- Mobile operators, internet service providers and other relevant stakeholders should consider measures to reduce the price of their connectivity, including through the provision of discounted data, special affordable packages for low-income groups and the subsidisation of devices, and the zero-rating of content.
- States should commit to protecting and promoting free and open access to the internet at all times, and should recognise that internet shutdowns are incompatible with international human rights law and should not be permitted under any circumstances.
- States should preserve the integrity of the core technical infrastructure of the internet by ensuring the protection of net neutrality and encryption, which allows people to communicate with each other in a secure way.
- Civil society players must increase their campaigns for the removal of regulatory barriers faced by community-owned networks, the removal of taxes, levies and duties on internet access, and any other measures that undermine universal, equitable, affordable and meaningful access to the internet.

## REGULATION OF CONTENT ONLINE

In response to the COVID-19 pandemic, a number of concerning trends have been recorded: unjustified restrictions on freedom of expression and access to information; censorship; detention of activists for disseminating critical information; intimidation and harassment of internet users; crackdowns on human rights defenders and media outlets; and violations of the right to privacy.<sup>27</sup>

While legitimate concerns about disinformation during the COVID-19 pandemic have been expressed by the UN Special Rapporteur on freedom of expression and

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<sup>27</sup> CIVICUS Monitor. (2020). *Civic freedoms and the COVID-19 pandemic: A snapshot of restrictions and attacks*. <https://monitor.civicus.org/COVID19>



public health authorities globally, the Coalition states that it is also necessary to carefully scrutinise the responses from states and relevant private sector actors in line with international human rights law. As with other parts of the world, examples of misinformation and disinformation in Africa have included conditions of quarantine centres, healthcare advice, statistics and fake official statements on containment and cushioning measures, all of which have implications on the health of individuals and stability in the different countries.

While some countries are likely to invoke already existing policies and legislative frameworks on disinformation, others will use the provisions in the COVID-19 prevention, containment and treatment policies. Disinformation laws exist in countries like Kenya, Uganda and Tanzania. In South Africa, the government has criminalised the dissemination of false information through regulations published in terms of the Disaster Management Act 57 of 2002, which seeks to address the publication of any statement published through any medium, including social media, with the intention to deceive any other person in respect of information relating to COVID-19.<sup>28</sup> As for Zimbabwe, section 14 of Statutory Instrument 83 of 2020, Public Health (COVID-19 Prevention, Containment and Treatment) (National Lockdown) Order, stipulates:

For the avoidance of doubt any person who publishes or communicates false news about any public officer, official or enforcement officer involved with enforcing or implementing the national lockdown in his or her capacity as such, or about any private individual that has the effect of prejudicing the State's enforcement of the national lockdown, shall be liable for prosecution under Section 31 of the Criminal Law Code ("Publishing or communicating false statements prejudicial to the State") and liable to the penalty there provided, that is to say a fine up to or exceeding level fourteen or imprisonment for a period not exceeding twenty years or both.<sup>29</sup>

This new provision is based on section 31 of the Criminal Law Codification and Reform Act, which criminalises the publishing or communications of false statements that are prejudicial to the state of Zimbabwe.<sup>30</sup>

The Coalition reiterates that these provisions must comply with international law standards on the right to freedom of expression, echoed in Principle 3 of the Declaration. The need to comply with international law is necessary particularly as disinformation laws have been used to limit freedom of expression. Most states

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28 <https://cdn.24.co.za/files/Cms/General/d/8296/998082c0829846979a52f11933b621bd.pdf>

29 [https://www.veritaszim.net/sites/veritas\\_d/files/SI%202020-083%20Public%20Health%20%28COVID-19%20Prevention%2C%20Containment%20and%20Treatment%29%20%28National%20Lockdown%29%20Order%2C%202020.pdf](https://www.veritaszim.net/sites/veritas_d/files/SI%202020-083%20Public%20Health%20%28COVID-19%20Prevention%2C%20Containment%20and%20Treatment%29%20%28National%20Lockdown%29%20Order%2C%202020.pdf)

30 MISA Zimbabwe. (2020, 24 April). Curbing misinformation in the wake of COVID-19 pandemic. <https://zimbabwe.misa.org/2020/04/24/curbing-misinformation-in-the-wake-of-covid-19-pandemic>

have failed to demonstrate the necessity of limiting the right to freedom of expression through the criminalisation of false news, or that this is linked to addressing specific public interest needs. To counter misinformation and disinformation more directly, the relevant authorities, in collaboration with telecommunications companies and respective newsrooms, can provide timely and reliable information. This can be done through frequent public service announcements, increased public-interest reporting and support for fact-checking platforms.

In respect of content take-downs and censorship, as has recently been witnessed in the banning of Tanzanian newspaper *Mwananchi* from publishing news online for the next six months,<sup>31</sup> the Coalition states that such measures may result in limiting access to important information for public health and should only be taken where they meet the standards of necessity and proportionality. As advised by the UN Special Rapporteur on freedom of expression, vague prohibitions of disinformation empower government officials to determine the truthfulness or falsity of content in the public and political domain, in conflict with the requirements of necessity and proportionality under article 19(3) of the International Covenant on Civil and Political Rights.<sup>32</sup>

The Coalition further points to the responsibility of internet search and social media platforms, many of whom have already taken various steps in response to the COVID-19 pandemic. Members of the public in Africa rely heavily on social media for news content, and it is important that social media platforms with higher uptake on the continent, such as Facebook and Twitter, conduct ongoing due diligence to determine the impact of their content policies. There should be increased efforts to engage public health authorities and affected communities to ensure that content moderators are available as soon as possible to review COVID-19-related information.

To the extent that intermediaries operate on a self-regulatory basis and/or make judgment calls on content and privacy issues, including in respect of misinformation and disinformation relating to the COVID-19 pandemic, it is suggested that such decisions should be made taking into account the need to protect expression that is legitimate under the principles provided for under international human rights standards. Processes developed by intermediaries should be transparent and include provisions for appeals. These relevant stakeholders must see the value in broad consultation in the development of user-friendly content policies and the need for continuous efforts to educate the users on the same. In line with the ACHPR Declaration, states should not require the removal of online content by internet intermediaries unless such requests are clear and unambiguous;

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31 Committee to Protect Journalists. (2020, 11 May). Tanzanian newspaper banned from publishing online for 6 months over COVID-19 report. <https://cpj.org/2020/05/tanzanian-newspaper-banned-from-publishing-online-19.php>

32 Kaye, D. (2020, 23 April). Op. cit.

imposed by an independent and impartial judicial authority; subject to due process safeguards; justifiable and compatible with international human rights law and standards; and implemented through a transparent process that allows a right of appeal.<sup>33</sup>

### **Recommendations**

- States should safeguard the right to freedom of expression in all forms while taking measures to address the COVID-19 pandemic, and any restrictions on the right to freedom of expression should comply strictly with the three-part test for a justifiable limitation under international human rights law.
- States should respond to misinformation and disinformation relating to COVID-19 with approaches that promote transparency and media freedom, rather than relying on criminal sanctions.
- States and other relevant stakeholders should refrain from taking any measures or using existing policy and legislative frameworks which censor or criminalise content online, including on social media.
- Internet intermediaries, including internet and social media platforms, should conduct ongoing due diligence to determine the impact of their content policies, and review their policies and practices on a regular basis.
- Internet intermediaries should ensure that all decisions taken in response to the COVID-19 pandemic are implemented in a transparent manner, and that they protect the right to freedom of expression and comply with the principles of international human rights law.

## **PRIVACY, SURVEILLANCE AND DATA PROTECTION**

Principle 8 of the Declaration provides that everyone has a right to privacy online, including the right to the protection of personal data concerning him or her. Everyone has the right to communicate anonymously on the internet, and to use appropriate technology to ensure secure, private and anonymous communication. As with the right to freedom of expression, the right to privacy on the internet should not be subject to any restrictions, except those that are provided by law, pursue a legitimate aim, and are necessary and proportionate in pursuance of a legitimate aim. Principle 9 of the Declaration further provides that unlawful surveillance, monitoring and interception of users' online communications by state or non-state actors fundamentally undermine the security and trustworthiness of the internet.

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<sup>33</sup> Principle 39(4) of the ACHPR Declaration.

The Collaboration on International ICT Policy in East and Southern Africa (CIPESA) notes that while the extent to which African countries are conducting technology-based disease surveillance is not fully known, reports from Kenya, South Africa and Uganda, among others, suggest that this is indeed a growing trend.<sup>34</sup> CIPESA notes further that, while this may be well-intentioned, COVID-19 surveillance and data-based tracking interventions have been effected in haste, and with limited precedent and oversight mechanisms.<sup>35</sup>

Monitoring by the Coalition of trends in sharing of personal information has noted the over-disclosure of personal information of individuals infected by the virus and lack of transparency by governments and telecommunications companies in the sharing of information for contact tracing and distribution of aid and relief funds. In other instances, as witnessed in Uganda, instances of citizens self-policing following pronouncements of mandatory testing of returning citizens has led to “outing” and sharing of people’s information on popular social media platforms, including Facebook and WhatsApp, resulting in offline violence and victimisation of the citizens.

The Coalition notes that this trend has diverted attention from the governments’ obligations to protect citizens’ rights to privacy in line with human rights standards and with their respective data protection legislation. At present, there are just over 30 countries across Africa that have either an existing or proposed data protection law. However, these laws have been implemented to varying degrees, and various states are still experiencing challenges in the full implementation of these laws. Cases in point include official announcements by the Zimbabwean finance minister on the use of a sophisticated algorithm to determine distribution of aid,<sup>36</sup> and reports that the Kenyan government plans to use the National Integrated Identity Management System (NIIMS) for the same.<sup>37</sup> In January 2020, the Kenyan High Court delivered a judgement that stopped the implementation of NIIMS, “until an appropriate and comprehensive regulatory framework on the implementation of NIIMS is first enacted.” The Coalition reiterates that such tools must be limited in use, both in terms of purpose and time, and that individual rights to privacy and non-discrimination must be rigorously protected.

States and other relevant stakeholders must ensure that any use of such technology abides by the strictest protections for personal data and the right to privacy, and are only made available according to domestic law that is consistent with

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34 CIPESA. (2020, 27 March). COVID-19 in Africa: When is surveillance necessary and proportionate? <https://cipesa.org/2020/03/covid-19-in-africa-when-is-surveillance-necessary-and-proportionate>

35 Ibid.

36 Kunambura, A. (2020, 30 April). Zimbabwe: Transparency a pipedream as Ncube throws algorithm farce. *AllAfrica*. <https://allafrica.com/stories/202005010369.html>

37 Mbatia, J. (2020, 24 April). Huduma Namba could assist government in COVID -19 donations. *Kenyans.co.ke*. <https://www.kenyans.co.ke/news/52438-govt-considering-using-huduma-namba-covid-19-donations>

international human rights law. These considerations should be complemented by the guidance provided in the ACHPR Declaration for the safeguards needed in any law authorising targeted communication surveillance, including the prior authorisation of an independent and impartial judicial authority; due process safeguards; specific limitation on time, manner, place and scope of the surveillance; notification of the decision authorising surveillance within a reasonable time of the conclusion of such surveillance; proactive transparency on the nature and scope of its use; and effective monitoring and regular review by an independent oversight mechanism.<sup>38</sup> Furthermore, states and private sector actors should strictly implement the principles for the lawful processing of personal information set out in their domestic data protection laws or regional standards.

### **Recommendations**

- States should safeguard the right to privacy in all forms while taking measures to address the COVID-19 pandemic, and any restrictions on the right to privacy should comply strictly with the three-part test under international human rights law.
- Any surveillance measure, including contact tracing, taken in response to the COVID-19 pandemic should be prescribed by law, and subject to appropriate safeguards and oversight.
- States and other relevant stakeholders should be proactively transparent about the surveillance measures being taken in response to the COVID-19 pandemic, for instance, with regard to the nature and scope of the personal information being used, including health-related personal data, and should publicly disclose any data-sharing agreements.
- States and other relevant stakeholders should only collect personal information in response to the COVID-19 pandemic for a specific purpose, namely, to curb the spread of the virus.
- States and other relevant stakeholders should implement specific limitations on the time, manner, place and scope of the surveillance.
- States and other relevant stakeholders should strictly implement the principles for the lawful processing of personal information set out in their domestic data protection laws or regional standards, including the relevant time periods, the way in which the data will be handled, and the conditions of access, storage and security of the information.
- Appropriate protocols should be adopted and clearly communicated to prevent third parties – within and outside the public administration – from gaining access to the information gathered and using it for illegitimate purposes.

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38 Principle 41(3) of the ACHPR Declaration.

## GENDER EQUALITY AND MARGINALISED COMMUNITIES

Principle 10 of the Declaration provides for the rights of all people, without discrimination of any kind, to use the internet as a vehicle for the exercise and enjoyment of their human rights, and for participation in social and cultural life, which should be respected and protected. Furthermore, Principle 13 of the Declaration provides that to help ensure the elimination of all forms of discrimination on the basis of gender, women and men should have equal access to learn about, define, access, use and shape the internet. In this regard, efforts to increase access should therefore recognise and redress existing gender inequalities, including women's under-representation in decision-making roles, especially in internet governance.

The Women of Uganda Network (WOUGNET) notes that lockdown restrictions in African states have further marginalised millions of women and girls, particularly those in rural communities, as they have lesser access to the internet, and resultantly, lesser access to critical information related to COVID-19 and sexual and reproductive health.<sup>39</sup> However, for the few women with access to the internet, the lockdowns have brought about the need to prioritise the use of data to cater for online schooling for their children. As with the rest of the globe, Africa has also witnessed an upsurge in domestic violence during this period. In spite of commendable initiatives and support networks that have been set up on social media to support women during a time when movement has been restricted, the harsh reality of access continues to be a barrier.

It therefore remains essential that states and other relevant stakeholders take measures to address the gender digital divide, with factors such as level of employment, education, poverty, literacy and geographical location resulting in African women having lower levels of access than men. The ACHPR Declaration stresses that, in providing access to the internet, states must take specific measures to ensure that marginalised groups have effective exercise of their rights online and that they adopt laws, policies and other measures to promote affordable access to the internet for children that equips them with digital literacy skills for online education.<sup>40</sup>

A further concern for the Coalition arises in respect of persons with disabilities and their access to information during this period. As CIPESA notes, there is growing concern that some persons with disabilities are being left behind in accessing information on COVID-19.<sup>41</sup> The Coalition has noted with great concern the continued exclusion of persons with disabilities in Africa even during such a crucial moment.

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39 WOUGNET. (n/d). The implication of COVID-19 on women's internet use in Uganda. <https://www.wougn.net/org/news/the-implication-of-covid-19-on-women-s-internet-use-in-uganda>

40 Principle 37(5) of the ACHPR Declaration.

41 Kimumwe, P. (2020, 13 April). Why access to information on COVID-19 is crucial to persons with disabilities in Africa. CIPESA. <https://cipesa.org/2020/04/why-access-to-information-on-covid-19-is-crucial-to-persons-with-disabilities-in-africa>

This exclusion is compounded by lack of access to affordable assistive technologies and failure by many public broadcasters, independent online content producers and telecommunications operators to provide information and services in disability-friendly formats. As a result, coverage of the pandemic, including official statements, has remained largely in English, with only a few broadcasters (like the South African Broadcasting Corporation) providing sign language interpretation.

The Coalition calls on governments, mainstream media and online content producers to work with disability organisations, including advocacy bodies and disability service providers, in the dissemination of COVID-19-related public health information as recommended by the World Health Organization (WHO). This includes inclusion of captioning and sign language for all live and recorded events and communications, including national addresses, press briefings, and live social media. Where possible, there should be conversion of public materials into “easy read” format so that they are accessible for people with intellectual disability or cognitive impairment, and Braille versions and formats and captioning for images used within documents or on social media.

Lastly in this regard, it has been noted that given the delicate and confidential nature of health-related information, any measure that entails the identification of individuals as patients with specific diseases could exacerbate pre-existing situations of vulnerability, and could result in arbitrarily discriminatory actions, creating social stigma whose consequences may be as severe as those of the disease itself.<sup>42</sup> It is therefore “crucial to ensure that the implementation of prevention and control measures related to the pandemic do not aggravate the already vulnerable situation of minority groups or individuals who are at greater risk of infection due to socioeconomic or other factors.”<sup>43</sup>

## **Recommendations**

- States should ensure the elimination of all forms of discrimination on the basis of gender, including by ensuring that women and men have equal access to learn about, define, access, use and shape the internet.
- States and other relevant stakeholders should ensure the meaningful inclusion and participation of all stakeholders in internet policy and decision-making processes and forums, including in respect of the internet.
- States should adopt laws, policies and other measures to promote affordable access to the internet for marginalised communities that equips them with digital literacy skills for online education and safety, protects them from online harm and safeguards their privacy.

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42 APC & Derechos Digitales. (2020). *Surveillance technologies implemented to confront COVID-19 must not endanger human rights*. [https://www.apc.org/sites/default/files/Ecuador\\_statement\\_20200318.pdf](https://www.apc.org/sites/default/files/Ecuador_statement_20200318.pdf).

43 Ibid.

- States and other relevant stakeholders should ensure that COVID-19 public health information is communicated with captioning and, where possible, sign language for all live and recorded events and communications.
- States and other relevant stakeholders should convert public materials into “easy read” format so that they are accessible for people with intellectual disability or cognitive impairment.
- States should increase efforts to publish COVID-19-related information in formats that are accessible to marginalised and differently abled groups through collaboration with tech-development companies and civil society.
- States and other relevant stakeholders should denounce online violence against women and marginalised communities, and should ensure effective access to legal, emotional and logistical support for persons facing such violence.
- Civil society organisations should conduct and engage relevant authorities on current research to address online and ICT-facilitated violence in COVID-19 response and action plans, aimed at addressing violence against women and other marginalised communities.

## RIGHT TO INFORMATION

Principle 4 of the Declaration notes that the internet offers new opportunities to access information, and for governments to communicate with people, using open data. It states that information held by governments should be made publicly accessible, and released proactively and routinely, except where legitimate grounds for restricting access comply with the rule of law. It also provides that everyone has the right to access information on the internet, and that all information, including scientific and social research, produced with the support of public funds, should be freely available to all, including on the internet. It further recommends that public authorities and private bodies which perform public functions, provide public services, or utilise public funds have a duty to collect and maintain information on their operations and activities on behalf of their population. They also have an obligation to respect minimum standards in relation to the management of this information to ensure that it may easily be made accessible to all. States and relevant non-state actors should demonstrate good practices in the management of data.

Paradigm Initiative, for instance, has recently published a statement highlighting how, in the civil society space, it is almost trite to state that freedom of information is an essential freedom.<sup>44</sup> In this regard, the statement highlights the importance of advocating for the passage of laws that uphold this freedom, as well as advocating for systems to ensure that they are enforced once enacted.<sup>45</sup>

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44 Paradigm Initiative. (2020, 11 May). Why we have not given up on processes: Making FOI requests in Nigeria. <https://paradigmhq.org/making-foi-requests-in-nigeria>

45 Ibid.



Importantly, as noted by Paradigm Initiative, at the heart of access to information requests lies a genuine inquiry into facts, which contributes to the quality of public discourse and knowledge.<sup>46</sup>

The Coalition stresses two key principles set out in the ACHPR Declaration as relevant in the context of the COVID-19 pandemic on the continent. The first is the principle of maximum disclosure, in terms of which access to information may only be limited by narrowly defined exemptions, provided for by the law and which comply strictly with international human rights law and standards. It requires that states proactively publish information of public interest, including information about their functions, powers, structure, officials, decisions, budgets, expenditure and other information relating to their activities.<sup>47</sup>

The Coalition emphasises the need for governments to issue information about the pandemic in a timely manner to keep citizens well informed so that they can adequately and responsibly respond to developments and participate in decisions that are being made to combat the spread of the COVID-19 pandemic. This requires states and other relevant stakeholders who are supporting the state to ensure that there are effective disclosures of credible information in a timely and effective manner. As noted by the South African National Editors' Forum (SANEF), the right of access to information is central to the management and containment of the spread of COVID-19, and such information should be detailed and include, for example, the meaning of self-quarantine, what should happen to family members of a self-quarantined person who live in the same house with him or her, what happens to the virus after the quarantine period, and whether there is medication or treatment for the virus.<sup>48</sup>

The second principle relates to the duty to create, keep, organise and maintain information in a manner that facilitates the exercise of the right of access to information.<sup>49</sup> A recently launched report by ARTICLE 19 notes that the right to information is crucial for ensuring public awareness and trust, fighting misinformation, ensuring accountability, as well as developing and monitoring implementation of public policies aimed at solving the crisis.<sup>50</sup> It is crucial that the right to information is maintained during the pandemic as much as possible.

The publication, use and re-use of government-held data and information should be available free of charge wherever practical. One example is the South African

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46 Ibid.

47 Principle 29(1) of the ACHPR Declaration.

48 SANEF. (2020, 19 March). COVID-19: The importance of the right of access to information and the right to privacy in the management and containment of the virus. <https://sanef.org.za/covid-19-the-importance-of-the-right-of-access-to-information-and-the-right-to-privacy-in-the-management-and-containment-of-the-virus>

49 Principle 30 of the ACHPR Declaration.

50 ARTICLE 19. (2020, 11 May). Ensuring the public's right to know in the COVID-19 pandemic. <https://www.article19.org/resources/ensuring-the-publics-right-to-know-in-the-covid-19-pandemic>

Coronavirus Resource Portal, which is now zero-rated on all mobile networks. Where initiatives such as these are not practical, pricing should be transparent, reasonable, the same for all users, and not designed as a barrier to the use or re-use of the data. Likewise, transparency in the use of funding to minimise the effects of COVID-19 is requisite. An example of this is shown by a Nigerian-based non-profit, Follow the Money, which took the initiative to compile a list of all the pledges and funds donated to help curb the spread of COVID-19 in Africa in efforts to track how the money is being utilised.<sup>51</sup>

The importance of the effective realisation of the right to information in the context of COVID-19 cannot be denied. It can serve to benefit both the state and members of the public. As advised by the WHO in the context of managing epidemics, early, transparent and understandable communication on the event establishes lines of dialogue with affected populations and stakeholders, and builds trust in the response; frequent but evolving communication will help create a trusted and dynamic relationship that can deliver advice on protective behaviours that populations and individuals can adopt; communication must scope the risk in lay language, and also propose practical actions people can take; and communication must display accountability by keeping people updated on the situation, on what is being done, and the impact of those actions in bringing the outbreak under control.<sup>52</sup> It is also imperative that information be conveyed in a range of different local languages, including sign language, to ensure that all members of the population are appropriately informed and empowered by the information being communicated.

Lastly in respect of the right to information, the role of the media must be protected, respected and promoted to ensure that they can perform their essential function in informing and educating the public, as well as in ensuring accountability. As explained by the UN Special Rapporteur on freedom of expression, one of the key mechanisms that governments can use to ensure public access to information is to provide media access to officials, documentation and other information resources.<sup>53</sup> Importantly, any laws, policies or other measures that deny access to credible information or limit the ability of the media to raise questions and hold officials accountable are of deep concern, and should not be countenanced. As noted by UNESCO, this crisis has brought to the forefront the importance of the media and of access to verified information, with a free and independent media serving as a key source of credible and life-saving information in the public interest.<sup>54</sup>

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51 Salaudeen, A. (2020, 11 May). Massive funding has been donated to help fight the coronavirus in Africa. This non-profit is trying to keep track of it. *CNN*. <https://www.cnn.com/2020/05/11/africa/follow-the-money-coronavirus-africa/index.html>

52 WHO. (2018). *Managing epidemics: Key facts about major deadly diseases*. <https://www.who.int/emergencies/diseases/managing-epidemics/en>

53 Kaye, D. (2020, 23 April). Op. cit.

54 UNESCO. (2020). *Journalism, press freedom and COVID-19*. [https://en.unesco.org/sites/default/files/unesco\\_covid\\_brief\\_en.pdf](https://en.unesco.org/sites/default/files/unesco_covid_brief_en.pdf)

## **Recommendations**

- States should refrain from implementing laws, policies or other measures that constitute blanket limitations on the right to information.
- States and other relevant stakeholders must ensure that there are effective disclosures of credible information in a timely and effective manner, including through the establishment of zero-rated information portals, to enable the public to access vital information about the COVID-19 pandemic.
- States and other relevant stakeholders have a duty to create, keep, organise and maintain information regarding the COVID-19 pandemic in a manner that facilitates the exercise of the right of access to information.
- States and other relevant stakeholders should proactively disclose information in the public interest relating to the COVID-19 pandemic, including in respect of the use of public funds or the performance of public functions or services in response to the COVID-19 pandemic.
- States and other relevant stakeholders should ensure that information is conveyed in a range of different local languages, and formats that cater for people living with disabilities, to guarantee that all members of the population are appropriately informed and empowered by the information being communicated.
- States should ensure that the role of the media is protected, respected and promoted to ensure that they can perform their essential function in informing and educating the public, as well as in ensuring accountability, including through providing the media with relevant information and enabling them to raise questions with relevant officials.



<https://africaninternetrights.org>

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