

# Legal Guidance on Internet Restrictions and Shutdowns in Africa

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International Commission of Jurists  
Rue des Buis 3  
P.O. Box 1740  
1211 Geneva 1  
Switzerland

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# **Legal Guidance on Internet Restrictions and Shutdowns in Africa**

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## BACKGROUND

Access to the internet is necessary for the realization of freedom of expression, the right of access to information and the exercise of many other related human rights.<sup>1</sup> However, on the African continent, as elsewhere in the world, the practice of internet shutdown for the purpose of suppressing access to information and the exercise of freedom of expression has been on the rise. With a view to providing a tool for policy makers, legal professionals and civil society to address unlawful and arbitrary practices in this area, the International Commission of Jurists (ICJ) has developed this legal guidance.

This Guidance is derived primarily from the legal obligations arising from the *International Covenant on Civil and Political Rights* (ICCPR)<sup>2</sup> and the *African Charter on Human and Peoples' Rights* (ACHPR),<sup>3</sup> as re-affirmed and interpreted by United Nations (UN) and regional tribunals and authorities.<sup>4</sup> Nearly all African States are parties to both of these treaties. Therefore, these are the main legally binding instruments applicable to African States, on the protection of the freedom of expression and the right of access to information. The Guidance is also based on secondary non-treaty standards relevant to these rights. These include the *Declaration of Principles of Freedom of Expression and Access to Information in Africa*, reports of the Office of the High Commissioner for Human Rights, reports of the Special Rapporteur on freedom of expression and the *Joint Declaration on Freedom of Expression and the Internet* produced by the UN Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (African Commission) Special Rapporteur on Freedom of Expression and Access to Information.<sup>5</sup>

In recent years, there has been an increasing number of governments on the continent resorting to shutting down the internet entirely or otherwise restricting access. Internet

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<sup>1</sup> Frank La Rue, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/17/27, (2011), paras. 20-22. See also African Commission on Human and Peoples' Rights, Declaration of Principles of Freedom of Expression and Access to Information in Africa, 65<sup>th</sup> Ordinary Session (21 October to 10 November 2019), principle 37. Also see *Amnesty International and others v Togo*, ECOWAS Court of Justice, ECW/CCJ/APP/61/18 (25 June 2020), accessible at [https://www.accessnow.org/cms/assets/uploads/2020/07/ECOWAS\\_Togo\\_Judgement\\_2020.pdf](https://www.accessnow.org/cms/assets/uploads/2020/07/ECOWAS_Togo_Judgement_2020.pdf).

<sup>2</sup> See Article 19.

<sup>3</sup> See Article 9.

<sup>4</sup> See, for example, *Amnesty International and others v Togo* ECW/CCJ/APP/61/18. See also UN Human Rights Committee, General Comment No. 34, Article 19: Freedoms of opinion and expression, UN Doc. CCPR/C/GC/34 (12 September 2011); Including General Comment No. 34, Article 19: Freedoms of opinion and expression, CCPR/C/GC/34, July 2011.

<sup>5</sup> See Joint Declaration on Freedom of Expression and the Internet (1 June 2011), accessible at <https://www.osce.org/files/f/documents/e/9/78309.pdf>.

shutdowns, for purposes of this Guidance, can be loosely characterized as: “the intentional disruption of internet or electronic communications, rendering them inaccessible or effectively unusable, for a specific population or within a location, often to exert control over the flow of information.”<sup>6</sup> Types of restrictive practices include complete shutdowns,<sup>7</sup> throttling (the slowing of access) and blocking communications platforms such as messaging applications. The 2020 State of Internet Freedoms in Africa<sup>8</sup> notes several such incidents across the continent. Notably, in January 2019, the Zimbabwean government imposed a nationwide suspension of access to the internet for a week in response to mass anti-government protests.<sup>9</sup> In July 2020, the government of Ethiopia shut down internet access for two weeks following popular protest actions demanding justice for the killing of a popular musician.<sup>10</sup> In 2021 in both Uganda and Zambia, the governments shut down internet access in the period towards and after general elections.<sup>11</sup> Similarly, the government of Eswatini suspended access to the internet twice during 2021 in response to mass protests against the government.<sup>12</sup>

The shutting down of the internet per se constitutes a serious and overwhelming limitation on the freedom of expression and the right of access to information, which is unlikely to be permissible under international human rights law.<sup>13</sup>

This Guidance does not address all forms of restrictions on the internet. It is limited to addressing the key regional and international legal standards to be complied with by States in instances where governments have sought to impose any form of internet shutdown or widespread prevention of access to the internet.

Freedom of expression and the right of access to information are interrelated and interdependent with other protected human rights, including, among others, freedom of association, freedom of assembly, the right to political participation and the right to privacy. In addition, economic, social and cultural rights, including the right to health,

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<sup>6</sup> This is a definition developed by AccessNow. See <https://www.accessnow.org/keepiton-faq/>.

<sup>7</sup> Whereby access is cut entirely.

<sup>8</sup> *Report: The State of Internet Freedom in Africa 2020*, Collaboration on International ICT Policy in East and Southern Africa. <https://cipesa.org/wp-content/uploads/2021/04/The-State-of-Internet-Freedom-in-Africa-2020-Report.pdf>

<sup>9</sup> See “Zimbabwe imposes internet shutdown amid crackdown on protests” in *Al Jazeera*, 18 January 2019, available at <https://www.aljazeera.com/news/2019/1/18/zimbabwe-imposes-internet-shutdown-amid-crackdown-on-protests>.

<sup>10</sup> Access Now, “Back in the dark: Ethiopia shuts down internet once again”, in *Access Now*, 16 July 2020, available at <https://www.accessnow.org/back-in-the-dark-ethiopia-shuts-down-internet-once-again/>.

<sup>11</sup> Nita Bhalla and Alice McCool, “Internet shutdown for Uganda election”, in *Business Day*, 21 January 2021, available at <https://www.businesslive.co.za/bd/world/africa/2021-01-21-internet-shutdown-for-uganda-election/>

<sup>12</sup> Access Now, “#KeepItOn: Eswatini authorities shut down internet to quell protests”, 21 October 2021, available on <https://www.accessnow.org/keepiton-eswatini-protests/>.

<sup>13</sup> See the decisions of the ECOWAS Court of Justice in *Amnesty International Togo & Others v The Togolese Republic* and in *Registered Trustees of The Socio-Economic Rights & Accountability Project (SERAP) v Federal Republic of Nigeria*, ECW/CCJ/JUD/07/10 (30 November 2010).

may at times be engaged, as one's ability to access or obtain health care is dependent on their ability to access the necessary health information.<sup>14</sup> Through exercising their right to freedom of expression, individuals, alone or jointly with others, hold their government accountable, as well as contribute towards the development of public policy. This is also connected to the exercise of the right to political participation, protected under article 25 of the ICCPR. By exercising their right of access to information, individuals enforce government transparency and public accountability. In this sense, freedom of expression and the right of access to information are critical rights which must be protected as a means of protecting the rule of law and other human rights.<sup>15</sup>

The internet has now become integral for the exercise and enjoyment of freedom of expression and access to information, as affirmed by various UN authorities and the African Commission. The Commission, in its Declaration of Principles on Freedom of Expression and Access to Information, calls upon States to "*facilitate the rights to freedom of expression and access to information online and the means necessary to exercise these rights.*"<sup>16</sup> The internet is a source of information and a means for individuals to communicate and express their views. For these reasons, the African Commission on Human and Peoples' Rights has noted that:

*"States shall not interfere with the right of individuals to seek, receive and impart information through any means of communication and digital technologies...unless such interference is justifiable and compatible with international human rights law and standards."*

The UN Human Rights Council has made similar findings.<sup>17</sup> The UN Human Rights Committee, in clarifying State obligations under article 19 of the ICCPR, provides the bases for limiting rights in respect of freedom of expression under article 10 of the ICCPR, including in respect of access to the internet. States may only limit the exercise of freedom of expression and the right of access to information, if the limitation is

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<sup>14</sup> As the Committee on Economic, Social and Cultural rights has emphasized in its General Comment on the Right to Health, "[t]he right to health is closely related to and dependent on the realization of other human rights, including the right[] to...access to information". See General Comment No. 14, UN Doc E/C.12/2000/4 (11 August 2000), para. 3. Access to information is identified in various places in the General Comment as being essential to the realization of different aspects of the right to health.

<sup>15</sup> See the Preamble and Principle 1 of the African Commission on Human and Peoples' Rights, Declaration of Principles of Freedom of Expression and Access to Information in Africa. See also UN Human Rights Committee, General Comment No. 34, para. 2 which states that: "They are essential for any society. They constitute the foundation stone for every free and democratic society." See also Resolution 19/36, Human rights, democracy and the rule of law, UN Doc. A/HRC/RES/19/36 (19 April 2012).

<sup>16</sup> Principle 37(1) of African Commission on Human and Peoples' Rights Declaration of Principles of Freedom of Expression and Access to Information in Africa, 10 November 2019.

<sup>17</sup> See Resolution 44/12, Freedom of opinion and expression, UN Doc. A/HRC/44/L.18/Rev. (16 July 2020). See also UN Human Rights Committee, General Comment No. 34; Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (2011), paras. 19-22.

prescribed by law; serves a legitimate purpose; and is a necessary and proportionate means to achieve the stated legitimate purpose.<sup>18</sup> Similar standards are set out under Principle 9 of the Declaration of Principles of Freedom of Expression and Access to Information in Africa adopted by the African Commission in light of its interpretation of Article 9 of the ACHPR.

The use of internet shutdowns as a measure in derogation of human rights obligations pursuant to a declared state of emergency, would likely be impermissible even in an emergency situation. Article 4 of the ICCPR provides that pursuant to a public emergency which threatens the life of a nation, States may take limited measures derogating from certain rights, such as freedom of expression and information. However, any such measures must be temporary and strictly necessary to meet a specific threat to the life of the nation.<sup>19</sup> Sweeping full-scale shutdowns of information systems will not satisfy these conditions of necessity and proportionality.

This Guidance will not specifically address situations of derogations pursuant to public emergencies. It addresses standards to be met based on article 19 of the ICCPR and article 9 of the African Charter.

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<sup>18</sup> Frank La Rue, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (2011), para. 24.

<sup>19</sup> See UN Human Rights Committee, General Comment No. 29, Article 4: Derogations during a State of Emergency, CCPR/C/21/Rev.1/Add.11 (31 August 2001). See also Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, accessible at <https://www.icj.org/wp-content/uploads/1984/07/Siracusa-principles-ICCPR-legal-submission-1985-eng.pdf>

## LEGAL GUIDANCE

### 1. States have an obligation to ensure that human rights are realized both online and offline.

States must respect, protect and promote all human rights, including freedom of expression, the right of access to information and the right to privacy both online and offline.

#### **Commentary**

States have an obligation to respect, protect and promote the same rights online as offline. This includes, in particular, freedom of expression, which is applicable regardless of frontiers and through any media of one's choice, in accordance with article 19 of the Universal Declaration of Human Rights and article 19 of the ICCPR.<sup>20</sup>

### 2. Restrictions must be provided for by law (Principle of Legality)

Limitations on freedom of expression and information, must be provided for by law which is consistent with international human rights standards. Limitations must comply with the principle of legality, by which they are set in law in clear, non-ambiguous, and non-overbroad terms, such that the scope and terms of their application and consequences are foreseeable.

#### **Commentary**

- i. Restrictions on access to the internet constitute limitations on freedom of expression, and the right of access to information. The UN Human Rights Committee<sup>21</sup> and the African Commission<sup>22</sup> have affirmed that to ensure compliance with the ICCPR and ACHPR in particular, such restrictions must be provided for by a law which is consistent with international law principles.
- ii. Decisions to impose restrictions or any limitation on access to the internet must be made only by officials who are mandated by law with

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<sup>20</sup> See Human Rights Council Resolution on the promotion, protection and enjoyment of human rights on the Internet, A/HRC/38/7 (2018), para. 1.

<sup>21</sup> UN Human Rights Committee, General Comment No. 34, paras. 25 and 26.

<sup>22</sup> See African Commission on Human and Peoples' Rights, Declaration of Principles of Freedom of Expression and Access to Information in Africa, principle 9 (1)(a).



such authority and such decisions must be made after following all the procedures prescribed in the law.<sup>23</sup>

- iii. The Human Rights Committee<sup>24</sup> and the African Commission<sup>25</sup> have noted that legislation providing for the imposition of restrictions on access to the internet must have been adopted through ordinary legislative or judicial process consistent with the rule of law, and must be publicly available and accessible.
- iv. Whenever a decision is taken to impose any form of restrictions on freedom of expression, including the shutting down of the internet, the responsible authorities must disclose the specific legal provisions by which they are competent and empowered to impose those restrictions.<sup>26</sup>

### 3. Restrictions may be imposed only in pursuit of legitimate purposes.

Limitations on freedom of expression and the right of access to information may be imposed in pursuit of only the purposes identified as legitimate under international law: for the protection of national security, public order, public health or morals or protection of the rights or reputations of others.

#### **Commentary**

- i. Article 19(3) of the ICCPR provides the finite and definitive grounds for which the right to freedom of expression and information may be limited namely (i) for the protection of the rights or reputations of others, or (ii) for the protection of national security or public order, or of public health or morals. Restrictions on access to the internet, including the shutting down of the internet must not be imposed for any other purpose outside of these enumerated.<sup>27</sup>
- ii. Whenever a decision is taken to impose any form of restrictions on access to the internet, including decisions to suspend access to the internet, the responsible authority must indicate expressly the particular legitimate purpose for which protection is sought through the imposition of those restrictions.

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<sup>23</sup> See UN Human Rights Committee, General Comment No. 34.

<sup>24</sup> UN Human Rights Committee, General Comment 34, para. 24.

<sup>25</sup> See African Commission on Human and Peoples' Rights, Declaration of Principles of Freedom of Expression and Access to Information in Africa, principle 9(2).

<sup>26</sup> See *Korneenko et al. v. Belarus*, Human Rights Committee Communication No. 1553/2007, Views adopted on 20 March 2009, UN Doc. CCPR/C/95/D/1553/2007 (HRC 2009).

<sup>27</sup> In Article 19(3) of the ICCPR.

- iii. The responsible authority must demonstrate that there is a direct link between the shutting down of the internet and the mitigation or addressing of the identified threat against a legitimate purpose.<sup>28</sup>

**4. Limitations on human rights must not discriminate on grounds of race, colour, sexual orientation or gender identity, age, gender, religion, language political or other opinion, citizenship, nationality or migration status, national, social or ethnic origin, descent, health status, disability, property, socio-economic status, birth or any other status.**

**Commentary**

Any limitations on human rights, including restrictions on freedom of expression and the right of access to information, must in their purpose, design and implementation, not discriminate on grounds of race, colour, sexual orientation or gender identity, age, gender, religion, language political or other opinion, citizenship, nationality or migration status, national, social or ethnic origin, descent, health status, disability, property, socio-economic status, birth or other status.

- i. Under articles 2(1), 3 and 26 of the ICCPR, States have an obligation to ensure that the rights recognized in the Covenant, including freedom of expression and information, are accessible to and enjoyed by all individuals within their territory and those subject to their jurisdiction, without discrimination. Restrictions which discriminate against individuals on any impermissible grounds are inconsistent with these Principles. Article 26 of the Covenant is of broader application, guaranteeing not just non-discrimination in the enjoyment of ICCPR rights, but in respect of all conduct of the State. In particular, article 26 provides that:

*"All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."*<sup>29</sup>

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<sup>28</sup> UN Human Rights Committee, General Comment No. 34, para. 35.

<sup>29</sup> This obligation is also underscored in various other treaties including the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women. See also International Commission of Jurists, "The Tunis Declaration on

- ii. Article 2 of the ACHPR<sup>30</sup> provides for a similar obligation of non-discrimination.
- iii. While the ICCPR and the ACHPR expressly list certain status grounds on which discrimination is forbidden, there is a catch all of “other status” included as well. Contemporary developments in international law have served to identify several other status grounds that are clearly included in this ambit. The UN Human Rights Committee and the Committee on Economic, Social and Cultural Rights have affirmed these in their jurisprudence.<sup>31</sup>
- iv. Restrictions on access to the internet, including the shutting down of the internet, targeted at individuals or groups on any of the proscribed grounds constitutes a breach of these obligations.<sup>32</sup> Internet restrictions which are directly or indirectly discriminatory or perpetuate discrimination on any of these grounds are inconsistent with international human rights law.

## 5. Limitations may be imposed only if they are necessary.

Measures that constitute limitations on freedom of expression and the right of access to information may be imposed only if they are necessary for the protection of a legitimate purpose.

### **Commentary**

- i. Article 19(3) of the ICCPR provides that limitations on freedom of expression and the right of access to information may be imposed only if they are necessary to protect or achieve one of the enumerated purposes. If it is not necessary and if other less restrictive means can be adopted and implemented toward the purpose, a restriction will not be permissible. In clarifying the scope of this provision, the UN Human

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Reinforcing the Rule of Law and Human Rights” (March 2019), para. 44, available at <https://www.ici.org/wp-content/uploads/2019/04/Universal-ICJ-The-Tunis-Declaration-Advocacy-2019-ENG.pdf>.

<sup>30</sup> It states that, “[e]very individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.”

<sup>31</sup> See, for example, UN Committee on Economic, Social, and Cultural Rights, General Comment No. 20, Non-discrimination in economic, social and cultural rights, UN Doc E/C.12/GC/20 (2 July 2009); UN Human Rights Committee, General Comment No. 37, The right of peaceful assembly, UN Doc CCPR/C/GC/37 (20 September 2020).

<sup>32</sup> See Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, (2011).

Rights Committee<sup>33</sup> has emphasized that a direct and immediate connection must be proven to exist between the limitation imposed and the threat against a legitimate purpose which the limitation seeks to address. Similarly, the African Commission has affirmed that in order to meet the requirement of necessity, the limitation on freedom of expression “shall originate from a pressing and substantial need that is relevant and sufficient” to threaten a legitimate purpose.<sup>34</sup>

- ii. Restrictions on access to the internet,—may be imposed only where such restrictions are strictly and demonstrably necessary to protect or achieve the stated legitimate purpose. The complete shutting down of the internet is likely never to be a necessary or proportionate measure. As the Human Rights Committee has affirmed:

*“Any restrictions on the operation of websites, blogs or any other internet-based, electronic or other such information dissemination system, including systems to support such communication, such as internet service providers or search engines, are only permissible to the extent that they are compatible with paragraph 3 [setting out the lawful basis for restrictions]. Permissible restrictions generally should be content-specific; generic bans on the operation of certain sites and systems are not compatible with paragraph 3.”<sup>35</sup>*

- iii. The authority imposing the restrictions on the internet must demonstrate that there is a direct and immediate connection between the suspension of access to the internet and the threat which the restriction seeks to address, and that the restriction is strictly necessary to meet the threat.

## 6. Proportionality

### a. Restrictions must be the least restrictive means

Limitations on freedom of expression and the right of access to information must be the least restrictive means of protecting the stated legitimate purpose.
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### **Commentary**

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<sup>33</sup> UN Human Rights Committee, General Comment No. 34, para. 35.

<sup>34</sup> African Commission on Human and Peoples’ Rights, Declaration of Principles of Freedom of Expression and Access to Information in Africa, principle 9(4).

<sup>35</sup> UN Human Rights Committee, General Comment No. 34, paras. 44 and 45.

- i. The UN Human Rights Committee<sup>36</sup> and the African Commission on Human and Peoples' Rights<sup>37</sup> have noted that restrictions on the exercise of freedom of expression must not put in jeopardy the essence of the right itself. Both bodies have further commented that the restrictions must be the least intrusive instruments amongst those which might achieve the same protective function"<sup>38</sup>
- ii. Therefore, where it has become necessary to impose restrictions on access to the internet, the responsible authority must select and apply the least restrictive means of achieving or protecting the stated legitimate purpose. The shutting down of the internet may only be imposed if it is the least restrictive means to achieve the stated protective function.

#### b. Restrictions must not be overbroad

Limitations on freedom of expression and the right of access to information must not be overbroad.

### **Commentary**

- i. The UN Human Rights Committee<sup>39</sup> has noted that where restrictions on freedom of expression and the right of access to information are necessary to advance a legitimate purpose, the responsible authority must ensure that such restrictions are constructed with care.<sup>40</sup> The scope, scale and manner of enforcement of the restrictions must be carefully designed to limit their impact to what is strictly necessary and proportionate for the protection of the concerned legitimate purpose.
- ii. Restrictions on access to the internet, including the shutting down of the internet, must be as targeted as possible to limit their interference with the rights of all persons under a State's jurisdiction, which the State is bound to respect and protect. By its nature, the blanket suspension of the internet necessarily has an indiscriminate impact on the members of the public and therefore will almost always be a

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<sup>36</sup> UN Human Rights Committee, General Comment No. 34, para. 21.

<sup>37</sup> African Commission on Human and Peoples' Rights, Declaration of Principles of Freedom of Expression and Access to Information in Africa, principle 9(4)(b).

<sup>38</sup> Ibid, Principle 9(4) (b). See also UN Human Rights Committee, General Comment No. 34, para. 34.

<sup>39</sup> UN Human Rights Committee, General Comment No. 34, para. 34.

<sup>40</sup> Ibid, para. 28.

disproportionate response unless the responsible authority can demonstrate that such restrictions are the only available means of protecting the threatened legitimate purpose.<sup>41</sup>

- iii. Restrictions on access to the internet, including the shutting down of the internet, even if permissible, may only be imposed for a limited and narrowly defined period of time which is strictly necessary for their protective function in relation to the stated legitimate purpose.

#### c. Discretion to impose restrictions must be constrained

The authority to prescribe limitations must be constrained both by law and by process and oversight, including oversight by independent judicial and administrative bodies.

#### **Commentary**

- i. A law which authorizes the imposition of restrictions on freedom of expression and the right of access to information must clearly identify the authorities charged with the powers to impose such restrictions, the circumstances under which restrictions may be imposed, the specific nature of restrictions that may be imposed and the procedures to be followed when exercising such restrictive powers.<sup>42</sup>
- ii. A law which authorizes the shutting down of the internet must expressly identify the authority that may exercise such powers. The specific competency to do so should be provided for in legislation, and not simply in administrative rules or executive orders. The law must clearly indicate that the shutting down of the internet is a restrictive measure of last resort, to be undertaken only under circumstances specified in the law. The law must stipulate the type or nature of internet blackouts which may be imposed as well as prescribing the maximum period of time for the suspension of internet.
- iii. A law enacted to authorize the shutting down of the internet must clearly set out procedures to be followed before such restrictions are imposed. Such procedures should include application for a judicial warrant from a competent court. When adjudicating an application for a warrant to impose internet restrictions, the court should ensure that

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<sup>41</sup> African Commission on Human and Peoples' Rights, Declaration of Principles of Freedom of Expression and Access to Information in Africa, principle 38(2).

<sup>42</sup> UN Human Rights Committee, General Comment No. 34, para. 25.

the requirements of legality, legitimate purpose, non-discrimination, necessity and proportionality (set out in paragraphs 4-6 of this Guidance) are adequately met. Those to whom the restrictions are directed, their lawyers and other affected stakeholders must be provided with an opportunity to make representations.

- iv. The actual decision to shut down the internet should be undertaken only by the authorized person after following all the prescribed procedures.

## 7. Limitations must be subjected to judicial oversight

Limitations on human rights, including restrictions on freedom of expression and the right of access to information must be subject to judicial control.

### **Commentary**

- i. Article 2 (3) of the ICCPR, requires States to establish appropriate judicial and administrative mechanisms for the addressing of claims of rights violations under domestic law.<sup>43</sup>
- ii. Restrictions on access to internet constitute limitations on various human rights including freedom of expression. Such restrictions must be subject to judicial review by an independent and impartial court, since, as noted by the Human Rights Committee, the protection of rights engages the responsibility of the judicial authorities.<sup>44</sup>
- iii. The suspension of access to the internet is likely to always have a disruptive and negative impact on the exercise of a range of human rights. Therefore, petitions which challenge the appropriateness of internet shutdown must be prioritized.
- iv. When reviewing the appropriateness of restrictions on access to the internet, including the shutting down of the internet. courts shall consider whether the impugned restrictions meet the standards of lawfulness, non-discrimination, necessity and proportionality, in line with paragraphs 4-7 of this Guidance above. Upon review, a court of law shall grant effective remedies to address the violations caused by

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<sup>43</sup> See United Nations Human Rights Committee, General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13 (26 May 2004) at para. 15.

<sup>44</sup> Ibid.

any restrictions on access to internet which do not meet these standards.<sup>45</sup>

## 8. Access to effective remedies and reparation must be provided to address threats and redress unlawful violations

Every person has a right to an effective remedy and reparations arising from a violation of rights, including violations of freedom of expression arising from an unlawful restriction on access to the internet.

### **Commentary** <sup>46</sup>

- i. Under Article 2(3)(a) and (c) of the ICCPR, States have an obligation to ensure that access to effective remedies and reparation are provided to any person under a State's jurisdiction whose rights are violated or threatened, and to ensure that the orders for the remedies and reparations are adequately enforced.
- ii. As clarified in the *Basic Principles and Guidelines on the Right to a Remedy*, remedies for violations of international human rights law include the victim's right to (a) equal and effective access to justice; (b) adequate, effective and prompt reparation for harm suffered; (c) access to relevant information concerning violations and reparation mechanisms.<sup>47</sup>
- iii. To be considered as effective, the remedies must be capable of restoring the violated rights as much as is possible, to stop ongoing violations and to prevent the repetition of similar violations in future.<sup>48</sup>
- iv. Where there are reparations to redress violations arising from unlawful internet restrictions, the sum of the reparations must be adequate,

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<sup>45</sup> See for example, the decision of the ECOWAS Court of Justice in *Amnesty International Togo & Others v The Togolese Republic* where the Court found that by shutting down the internet in 2017, the State violated the rights of the plaintiffs, including their right to freedom of expression and access to information. The court awarded damages to the plaintiffs and ordered Togo to put in place a legal framework protecting freedom of expression that is consistent with international human rights law standards. The Court also ordered Togo not to shut the internet down again.

<sup>46</sup> For a detailed analysis of the right to an effective remedy and reparation under international law, see International Commission of Jurists, "The Right to a Remedy and Reparation for Gross Human Rights Violations: Practitioner's Guide 2" (Revised Edition, November 2018), available at <https://www.icj.org/the-right-to-a-remedy-and-reparation-for-gross-human-rights-violations-2018-update-to-practitioners-guide-no-2/>.

<sup>47</sup> Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc. A/RES/60/147 (16 December 2005), para. 11.

<sup>48</sup> UN Human Rights Committee, General Comment No. 31, paras. 15 – 19.



prompt and proportional to the gravity of the violations and the harm suffered.<sup>49</sup>

- v. In certain circumstances States must provide for and implement interim measures to avoid continuing violations caused by the shutting down of the internet, and to strive to repair at the earliest possible opportunity any harm on human rights that may have been caused by such violations.<sup>50</sup>

## 9. Administrative oversight mechanisms

Limitations on human rights, including restrictions on freedom of expression and the right of access to information must be subject to oversight by independent administrative or judicial bodies to ensure transparency and accountability.

### **Commentary**

- i. The UN Human Rights Committee<sup>51</sup> and the African Commission on Human and Peoples' Rights<sup>52</sup> have noted that States must establish independent and impartial administrative mechanisms to provide oversight on the implementation or enforcement of the duties to respect, protect, promote and fulfil human rights
- ii. In respect of the right to privacy, which may also be violated through the imposition of internet restrictions, the UN High Commissioner for Human Rights has commented<sup>53</sup> that "*the enjoyment of the right to privacy depends largely on a legal, regulatory and institutional framework that provides for adequate safeguards, including effective oversight mechanisms.*"
- iii. In addition to ensuring the operation of independent and impartial courts to conduct judicial review of restrictions on access to internet, States must also establish independent and adequately resourced administrative bodies (such as national human rights institutions)

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<sup>49</sup> Basic Principles and Guidelines on the Right to a Remedy, para. 15.

<sup>50</sup> UN Human Rights Committee, General Comment No. 31, para. 19.

<sup>51</sup> Ibid.

<sup>52</sup> See African Commission on Human and Peoples' Rights, Declaration of Principles of Freedom of Expression and Access to Information in Africa, principles 9(2)(b) and 34(1) .

<sup>53</sup> Report of the United Nations High Commissioner for Human Rights: The right to privacy in the digital age, UN Doc. A/HRC/39/29 (3 August 2018), para. 26.

which monitor and provide oversight on the imposition and implementation of internet restrictions.<sup>54</sup>

- iv. Members of administrative oversight bodies must be appointed through a transparent, fair process which guarantees their ability to discharge their functions independently.
- v. Such bodies must have the power to receive and investigate complaints of violations promptly and shall have the competence to provide effective remedies and reparation.<sup>55</sup> They should also have the power to initiate investigations on their own initiative, to establish the appropriateness of imposed internet restrictions.
- vi. It should be mandatory for all agencies of the State and every person to co-operate with the oversight body when conducting its investigations on internet restrictions.
- vii. Whenever a decision to impose restrictions on access to the internet have been imposed, including the shutting down of the internet, the authority responsible for imposing the restrictions should promptly inform the public and the relevant oversight body, as well as disclose the legitimate purpose served by the restrictions and the intended duration of the restrictions.

## **10. All business enterprises, including private telecommunications companies, must respect human rights online and offline.**

Business enterprises must respect human rights, including freedom of expression, the right to privacy and access to information online, and must refrain from imposing restrictions that are unlawful and which do not meet the standards of necessity, proportionality and non-discrimination.

### ***Commentary***

- i. Business enterprises are duty bound to respect human rights. They must avoid infringing on the human rights of others and must address adverse human rights impacts in which they are involved.<sup>56</sup> Private companies offering telecommunications services have a duty to respect

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<sup>54</sup> See Principle 17(1) of the African Commission on Human and Peoples' Rights Declaration of Principles of Freedom of Expression and Access to Information in Africa, which states that "A public regulatory authority that exercises powers in the areas of broadcast, telecommunications or internet infrastructure shall be independent and adequately protected against interference of a political, commercial or other nature."

<sup>55</sup> UN Human Rights Committee, General Comment No. 31, para. 15.

<sup>56</sup> Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, UN Doc. A/HRC/17/31 (21 March 2011), principle 11.

internet freedoms, including the exercise of freedom of expression, the right of access to information and the right to privacy online. They must refrain from imposing internet restrictions that are not authorized by law, and which do not meet the standards of necessity, proportionality and non-discrimination as outlined in paragraphs 4-7 of this Guidance above.

- ii. According to the *UN Guiding Principles on Business and Human Rights (UNGPs)*,<sup>57</sup> adopted by the UN Human Rights Council in 2011, in order to meet their responsibility to respect human rights business enterprises should have in place policies and processes including: (a) a policy commitment to meet their responsibility to respect human rights; (b) a human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights; and (c) processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute. Private companies offering telecommunications services must therefore, have a written policy commitment towards respecting internet freedoms, and must exercise due diligence when they receive orders to impose internet restrictions.
- iii. Due diligence entails ensuring that the orders are authorized by law consistent with human rights, that have been issued by persons competent under law to give such orders, have been issued in accordance with the procedures prescribed in the law and that the restrictions to be imposed comply with the standards of necessity, proportionality and non-discrimination as outlined in paragraphs 4-7 of this Guidance above.
- iv. In the event that the orders to impose restrictions do not comply with these standards and are unlawful, private companies must undertake measures to protect internet freedoms and such measures include refusing to comply with the unlawful orders and challenging the orders in court. Companies must also be transparent and disclose to the public when they receive unlawful orders to impose internet restrictions.
- v. For persons complaining about human rights abuses, companies must provide for means of redress through mechanisms which complement, but do not replace judicial and other State mechanisms.

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<sup>57</sup> UN Guiding Principles on Business and Human Rights, principle 15.

- vi. As Principle 29 of the UNGPs establish, “to make it possible for grievances to be addressed early and remediated directly, business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted.” The UNGPs also set out minimum standards for such non-judicial grievance mechanisms, which include the requirement that they are legitimate, accessible, predictable, equitable, transparent, rights-compatible and based on engagement and dialogue.<sup>58</sup>

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<sup>58</sup> UN Guiding Principles, principle 31. See also International Commission of Jurists, “Effective Operational-Level Grievance Mechanisms” (November 2019), available at <https://www.icj.org/companies-around-the-world-must-do-more-to-ensure-effective-operational-grievance-mechanism-practices-and-provide-clear-and-transparent-information/>.

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**International  
Commission  
of Jurists**

P.O. Box 91  
Rue des Bains 33  
CH 1211 Geneva 8  
Switzerland

**t** +41 22 979 38 00

**f** +41 22 979 38 01

[www.icj.org](http://www.icj.org)