Freedom of Expression and the Angolan Elections

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1. INTRODUCTION

In 2008 and 2009, Angola will be holding its first Parliamentary and Presidential elections in 16 years. The elections represent a pivotal point in Angola's recent history: they will be the first national elections held since the 2002 ceasefire, and only the second round of elections ever to be held in the country. The success of the elections will be crucial to the future of democracy in Angola.

Full respect for freedom of expression will be a critical factor in the elections. In a democracy, citizens appoint the government of their choice by voting for their preferred candidates at periodic elections. To be able to do this, they must be fully informed about who is standing and what the candidates' programmes and backgrounds are. This in turn implies a free and pluralistic media and equitable access to the media for candidates, and a regulatory framework that enables freedom of expression. Free access to information, including that held by the government, is also crucial: proper scrutiny of the policies of the incumbent government is impossible if a climate of secrecy prevails. This means that a functioning access to information law needs to be in place, and that state secrets laws and other criminal restrictions should not unjustifiably counteract the free circulation of information.

This report examines three sets of laws within Angola's current legislative framework that are relevant to freedom of expression in the elections: the electoral laws and regulations; the regulatory framework for the media; and the regulatory framework for access to information. We analyse these laws against international standards in the area of freedom of expression. Angola is a party to various international treaties that protect the right to freedom of expression as well as the right to vote and participate in public affairs, and is legally bound to give effect to these rights to all within its territory and under its jurisdiction.[1] While these international treaties recognise that freedom of expression is not an unlimited right, they require that any restrictions on it must be clearly stated in law and strictly limited to that which is necessary and proportionate to protect a legitimate public interest. While international law recognises that the orderly conduct of elections warrants some regulation of media conduct, restrictions must remain within tightly defined parameters: laws that impose restrictions beyond those that are strictly necessary, or that impose vague or broadly phrased restrictions are incompatible with the right to freedom of expression.[2]

Against this background, while we welcome steps that have recently been made towards liberalising the regulatory regime for the media, we are concerned that the overall legal framework still restricts freedom of expression more than can be justified as 'necessary'. Our concerns, broadly speaking, fall into two categories. First, we have concerns about a set of laws and regulations that impose unjustifiable restrictions on freedom of expression. This

[1] We will refer in particular to the *International Covenant on Civil and Political Rights*, the flagship UN Human Rights treaty, and to the *African Charter on Human and Peoples Rights*, the main regional human rights treaty. Angola is party to both and bound under international law to give effect to the rights guaranteed under these treaties, which include the right to freedom of expression. We will also make reference to the *Declaration of Principles on Freedom of Expression in Africa*, a standard-setting instrument issued by the African Commission on Human and Peoples' Rights, the body established to monitor implementation of the *African Charter*; and to judgments and resolutions issued by human rights bodies from around the world which interpret and clarify the meaning of freedom of expression in different contexts. A detailed report of international standards on freedom of expression is included as Annex 1 to this report.

[2] Annex 1 elaborates on these general requirements.

includes restrictions on the media under, for example, the defamation provisions of the criminal code or the requirement that all journalists should be strictly impartial; but we are also concerned at restrictions placed on candidates themselves under various electoral laws and regulations. The Electoral Code of Conduct, for example, prohibits the making of 'unrealistic' election promises, or acting contrary to 'ethics' and 'social customs'. Restrictions such as these are easily abused to restrict freedom of expression. Second, we are concerned that while some legislation exists that could enhance the free flow of information and ideas, these laws are insufficiently implemented. The main example here is the largely un-implemented "Law on Access to Documents held by Public Authorities", which was adopted in 2002. Although legislation such as this could in theory open up government and allow journalists to hold those in power to account for their actions, the Angolan access to information law has remained largely unused.

Overall, this results in a legal and regulatory situation that hinders rather than promotes the free flow of information and ideas. We therefore recommend that the following steps to improve media freedom are taken ahead of the 2008 and 2009 elections:

Recommendations on electoral laws and regulations:

Direct access

- The right of direct access should be limited to public media. The law should make it clear that all candidates and parties have free use on equal terms of public media facilities for the production of their campaign ads.
- The Electoral Commission should act with the greatest caution and respect for freedom of expression when an abuse of the right of direct access is alleged.

Restrictions on campaign speech and reporting

- The law should not impose vaguely worded or open-ended restrictions on campaign speech. In particular, there should be no prohibitions on defaming public agencies, offending democratic values or institutions, or 'smearing' candidates.
- There should be no ban on the reporting of opinion polls.
- The duty of balance and impartiality should be imposed only on the broadcast media.

Political meetings and rallies

- The police should not have the power to refuse to authorise political gatherings. If they come across an unauthorised gathering, they should make every effort to allow it to go ahead, and take measures to break it up only if there is an immediate danger of serious public disorder.

Recommendations on media regulation and content restrictions

On media regulation

- The registration scheme for print media should be purely technical and administrative in nature. It should be administered by an independent body, there should be no discretion to refuse registration and no penalties for publishing without registration.
- Individual journalists should not be required to register or be licensed.
- There should be no duty on all journalists to be impartial, or to publish with absolute accuracy.

Content restrictions
- The Press Law should not repeat offences already provided for in the Criminal Law.
- Restrictions on freedom of expression included in the Press Law should be clearly and narrowly drafted, and pursue legitimate aims.
- The Press Law should not prohibit the publication of "false news".
- Defamation should be fully decriminalised. If this is not immediately possible, then at the very least the sanction of imprisonment should be removed and a defence of truth allowed.

Restrictions on investigative techniques
- The restriction on journalists' use of hidden cameras or tape recorders should be removed from the Press Law. The general laws on privacy should allow for a public interest override of privacy interests.

The right of reply
- The right of reply should only be available in response to the publication of a false report that affects a third party's rights, and only when a correction would not suffice.

Recommendations on access to information:

Improving the access regime
- The Access to Information Law needs to be revised to incorporate the principle that all documents held by public authorities are open, subject only to narrow exceptions.
- Access should be refused only when disclosure would cause real harm to a legitimate protected interest, such as national security, unless there is an overriding public interest in the disclosure.
- The State Secrets Law should be revised along similar lines, allowing for the classification of documents only when their release would cause real harm to national security or other legitimate protected interests.

Monitoring and oversight
- An effective monitoring and oversight regime needs to be established, with powers both to enforce compliance where necessary but also to conduct training and raise broad awareness of the Law.
- The supervisory body should be adequately staffed and financed to carry out its tasks.

Release of state secrets
- Journalists who publish information leaked to them in good faith and in the public interest should not be liable for prosecution.
- There should be protection for whistleblowers: individuals who in the course of their duties come across information that reveals wrongdoing, and who decide in good faith to publish that information.

The following Sections elaborate on our concerns and recommendations.

2. THE ELECTORAL LAW AND REGULATIONS

Overview

Angola's electoral laws and regulations contain a number of provisions that regulate freedom of expression and information in times of elections, including what candidates can and cannot say, how the media should report elections and the extent to which political candidates and parties should have access to the media. Three pieces of legislation are of particular relevance: the Electoral Law of 17 June 2004;[3] the Electoral Regulations of 24 August 2005, which implement the Electoral Law;[4] and Government Resolution 10/05 of July 2005, which enacted the Electoral Code of Conduct.[5]

Media access and reporting

The Electoral Law lays down the general regulatory framework for freedom of expression in times of elections. Chapter II of Title V of the Electoral Law, entitled "Electoral Propaganda", provides for a number of rules both on campaigning by candidates and parties as well as on media reporting of campaigns. It prescribes rules on postering and the use of public address audio equipment (which is restricted to the hours of 7am-8pm), and also provides for a right of access to radio and television for candidates. Article 87 states that during the campaign period, candidates for Presidential elections and parties and coalitions for other elections may have access to ten minutes of radio time a day, between the hours of 12pm and 10pm, and five minutes of television time between the hours of 6pm and 10pm. The order of access is determined through a lottery to be run by the Electoral Commission. Additional time may be made available by the private media, so long as it is made available to all candidates and parties on equal terms. Article 93 of the Electoral Law, however, forbids the use of "commercial publicity" which would appear to have the effect of prohibiting any paid advertising.[6]

Article 184 prohibits "abusive use" of the right of access, which is defined as "expressions or images which constitute the crime of defamation, calumny or injury to the person of another or makes a call to disorder anarchy, insurrection or incitement to hate, to violence or to war". Any candidate or party found to have expressed himself in a way falling within Article 184 loses the right of access to the media, and may also be liable under general civil or criminal law. Article 185 provides that the Electoral Commission will enforce Article 184 and provides some basic due process guarantees. Article 51 of the Electoral Regulations broadly repeats the substance of Article 184 of the Electoral Law, but provides for a suspension of the right to broadcast for up to five days. Articles 52-56 lay down related due process rules, including a right of final appeal to the courts.

Article 88 of the Electoral Law requires that all publications guarantee equality of treatment to all candidates. Article 48 of the Electoral Regulations elaborates on this, requiring all periodicals except for those that belong to political parties to be fully impartial in their coverage of the elections, including in the amount of space they dedicate to each of the

[3] Electoral Law of Angola, Act 7/2004, of 17 June 2004, available at http://www.cne.gv.ao/legislacao/legislacao.html.
[4] Decree No. 58/05, 24 August 2005, available at http://www.cne.gv.ao/legislacao/legislacao.html.
[5] Resolution No. 10/05, of 4 July 2005, available at http://www.cne.gv.ao/legislacao/legislacao.html.
[6] The official translation of the Law is unclear on this point.

candidates or parties. Article 49 imposes a general 'equal treatment' obligation on all broadcast media.

The Electoral Law also imposes various broadly phrased restrictions on media reporting of elections. Article 78 protects the right to freedom of expression, but requires that media must conduct themselves "in a disciplined professional manner". Article 21 of the Electoral Code of Conduct elaborates on this, and requires the media to act with due rigour and professionalism, and not to incite to hatred or use "other forms of language that can lead to violence". Article 82, finally, repeats a number of prohibitions found in other legislation, on defamation, calumny or injury, incitement to disorder, violence, hate or war.

Article 81 of the Electoral Law prohibits all reporting of opinion polls during the entire campaign. Article 41 of the Electoral Regulations adds to this a general 'day of silence', prohibiting any campaigning activity in the 24 hours from midnight of the day preceding the election preceding the elections.

Article 124 allows the media to be present within polling stations, provided that they identify themselves and that they refrain from filming or taking pictures "very close to the urns" and from interviewing voters within 500 meters of a polling station.

Article 78(3) of the Electoral Law provides that the media and their representatives may not be subject to any sanctions for their conduct until after the electoral campaigns have concluded.

Restrictions on campaign and related speech
Both the Electoral Regulations and the Electoral Code of Conduct place various limitations on campaign propaganda. Article 40 of the Electoral Regulations forbids, amongst others, offending morality, justifying the use of violence, instigating public disorder or civil disobedience, and defaming public agencies or entities. This is elaborated upon in Articles 3-8 of the Electoral Code of Conduct, which lay down the rights and duties of parties and candidates, and of their supporters. The rights, on the whole, elaborate on the general rights of freedom of expression and assembly, put in an electioneering context. The restrictions, which are included in Articles 4, 6 and 8, include the following:

- not to assemble without prior notification to the authorities (Articles 4(b) and 6(b));
- not to make "unrealistic" election promises (Articles 4(f) and 6(e));
- not to act in a manner contrary to electoral ethics or social customs (Articles 4(g) and 6(f)), or to act in an "undemocratic" manner (supporters only, under Article 8(g); and
- not to use the mass media to 'denigrate' other parties and candidates (Article 8(e)).

The Code of Electoral Conduct also imposes duties on religious entities, traditional leaders and civil society representatives, including to refrain from using language that could lead to intolerance or discrimination (in Articles 25, 27 and 29, respectively).

The Electoral Code of Conduct is enforced by the Electoral Commission.

Analysis

The various provisions in the Electoral Law, Code of Conduct and Regulations that affect free expression and the media fall into two categories: one set regulating access to the media, and another set restricting what may be said, printed or broadcast during election periods by candidates, parties, the media and other actors.

While we broadly welcome the rules on direct access, we have serious reservations with regard to the compatibility of the content restrictions imposed by the three laws with international guarantees on the right to freedom of expression. We elaborate on these concerns below.

Direct access
Access to the media is an important issue. Most people get their information through the media, and some form of direct access to the media is essential for parties and candidates in elections to get their message across. While news and other programming should provide voters with information about parties' policies and platforms, direct access to the media allows them to speak in their own voices.

The vast majority of the established democracies have instituted systems whereby a set amount of direct access slots are allocated among the various competing parties and candidates. The idea is to allow parties to speak directly to the electorate. Publicly owned or funded broadcasters are normally the main means for disseminating these slots but, in some countries, private broadcasters are also required to provide them.

The exact allocation of airtime among the parties and candidates may be calculated in different ways. In most countries with an established track record of elections, airtime is allocated in proportion to the previous performance of the party in question, as determined, for example, by the number of votes obtained in the last election. In other countries, free airtime is distributed evenly among all political parties and candidates.

The Angolan Electoral Law has adopted this latter approach, allowing equal amounts of airtime for every candidate, with the precise slots to be determined through a lottery. This is a fair way of distributing airtime, and one which we welcome.

We note, however, that Article 87 grants a right of airtime on both public and private broadcast media. This is excessive, particularly in light of the fact that no provision is made for reimbursing private stations for the airtime or the use of any equipment by candidates and parties. We recommend therefore that consideration is given to limiting the right of access to public television and radio stations only. We also recommend that it should be made clear that parties and candidates may make use of the facilities of public radio and television stations for the production of their five and ten minute slots. This ensures a level playing field for all, and avoids a situation wherein the richer of the parties and candidates would gain an unfair advantage because of their ability to produce higher quality ads.

Under Article 51 of the Electoral Regulations, the right of access may be suspended for a period of up to five days for a number of reasons, including spreading defamation or causing "offence" to democratic institutions. This provision is to be administered by the Electoral Commission. We have a couple of concerns with regard to these provisions. First, "institutions" as such, democratic or not, have no reputation, cannot be offended and therefore should not be allowed to sue for "offence" or for defamation. Second, the phrase "causing offence to democratic institutions" is undefined in the law and could well be interpreted as including language that offends the presidency – a democratic institution. If interpreted this way, it is easily abused to silence political criticism, which would be a violation of the right to freedom of expression.

We are also concerned at the possible loss of access rights for defamation or calumny. An allegation of defamation often hinges on a complex set of facts and circumstances, which the Electoral Commission may be ill-equipped to settle. Yet, allegations of defamation are commonly abused in countries around the world to silence political opponents. We therefore call for caution in the use of these provisions by the Commission.

We are also concerned at the apparent contradiction – in the English translation, at least – between Articles 87 and 93, on the issue of paid political advertising. This is an important issue and to the extent that there are ambiguities in the original Portuguese draft, this should be addressed.

Restrictions on campaign speech and reporting
We are concerned at a number of the restrictions imposed on the media and candidates' right to freedom of expression under the Electoral Law and regulations.

International law allows restrictions on a number of grounds, including to prevent violence, or to protect public order or the rights of others. This covers 'regular' restrictions imposed by States, for example on defamation and hate speech. These restrictions are in force in times of elections and apply as they do normally.

During elections, however, specific restrictions may be imposed to ensure that the public is adequately informed. In particular, it is internationally accepted that broadcasters may be required to be balanced and impartial in their election reports. This obligation applies particularly to news and current affairs programmes, as well as to other programmes likely to influence the attitude of voters. Two things, however, must be borne in mind. First, while this obligation may be legitimately imposed on broadcasters, it should not be imposed on the print media. Print media are often politically aligned, in developed democracies as well as in new democracies, and the argument of scarcity that justifies imposing the obligation of balance on broadcasters does not apply to the print media. While running a broadcaster requires a licence and a significant amount of investment capital, communicating with voters through the press should be feasible for all political parties of some size. Second, even for the broadcast media, the obligation of balance should not impair their socially important function of 'public watchdog', to investigate and expose possible wrongdoing, corruption and maladministration by elected representatives. The fact that a current incumbent is standing for election should not shield them from critical reports in the media.[7] Generally, it must also be noted that international law regards restraints on political speech, and particularly prior restraint, with extreme suspicion.[8] Freedom of expression is of particular importance during elections, when it is crucial that parties and candidates should be able to voice their opinions and ideas without undue restraint and the media should be able to report on issues of concern.[9]

[7] Although the obligation of balance and impartiality does require broadcasters to display the same critical attitude towards other candidates as well.
[8] For example, the European Court of Human Rights (ECHR) has ruled that, "freedom of political debate is at the very core of the concept a democratic society…." *Lingens v. Austria*, Judgment of 8 July 1986, Application No. 9815/82, para. 42.
[9] The European Court of Human Rights has emphasised "the dangers inherent in prior restraints" and has noted that "news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest." *The Observer and Guardian v. UK*, Judgment of 26 November 1991, Application. No. 13585/88, para. 60. See also Article 13(2) of the American Convention on Human Rights which expressly prohibits all "prior censorship".

Against this general background, we are concerned at a number of provisions in the Electoral Law, the Electoral Regulations and the Code of Conduct. First, all three impose a number of duties and restrictions that are open to wide interpretation and potential abuse. We are particularly concerned about the following:

1. the prohibitions on "offending morality" and "instigating civil disobedience", in Article 40 of the Electoral Regulations;
2. the prohibitions in the Electoral Code of Conduct on "making unrealistic election promises", and acting in a way that would be contrary to electoral ethics or social customs (Articles 4(g) and 6(f)), or to act in an "undemocratic" manner (supporters only, under Article 8(g);
3. the requirement, in the Electoral Law, that media should behave professionally; and
4. the prohibition on using language that "may lead" to discrimination or intolerance.

All of these prohibitions are open to significant abuse and we recommend that they are abolished. The first three are all open-ended and vaguely phrased, thereby failing the test on restrictions on freedom of expression.[10] Additionally, the restriction on "making unrealistic election promises" is both open to a wide range of interpretations and does not serve any of the legitimate aims recognised under international law;[11] while the prohibition on using language that "may lead" to discrimination or intolerance fails the requirement that there needs to be a strong causal link between restricted speech and any undesirable conduct that might follow.

We are also concerned at the repetition, in Article 82 of the Electoral Law, of various prohibitions found in the Criminal Code. As pointed out above, the Criminal Code remains in force during election times and we see no reason why particular crimes should need to be repeated in another piece of legislation. In the present context, where the crimes concerned are referred to in very general terms only, all that it achieves is to create an uncertain legal situation whereby a set of offences is provided very broadly in one law, and more precisely defined in another. We therefore recommend its removal.

Another cause for concern are the prohibitions on defaming public agencies or entities (Article 40 of the Electoral Regulations) and 'denigrating' parties and candidates (Article 8(e) of the Code of Conduct). As to the first, public agencies and entities do not have reputations to defend and as such cannot be defamed (but the individual civil servants working in them do, and can). Provisions such as these are very easily abused to silence government critics. With regard to the prohibition on smearing candidates and parties, we note that this concept is not defined in the law. As a result, it is likely to be interpreted in a highly subjective manner and is easily abused to silence political opponents. We recommend the removal of both provisions.

We also believe a number of the restrictions imposed on the media cannot be justified. For example, under Article 81 of the Electoral Law, the publication of opinion polls is prohibited during the entire election period. We find it hard to see why this is necessary. While many countries impose a 'day of silence' in the 24 hour period immediately preceding a poll – analogous to the prohibition found in Article 41 of the Electoral Regulations – it seems excessive to impose a ban for the entire duration of the campaign.

[10] See Annex 1 to this memorandum for the applicable international standards.
[11] *Ibid*.

We are also concerned at the stringent requirements of balance imposed under the laws. Under Article 88 of the Electoral Law and Article 48 of the Electoral Regulations, all periodicals except for those that belong to political parties must be fully impartial in their coverage of the elections, including in the amount of columns dedicated to each of the candidates and/or parties. Article 49 imposes a general 'equal treatment' obligation on all broadcast media. As outlined above, international standards accept that broadcasters should be under a duty of balance and impartiality in their reporting. This same duty cannot, however, be extended to the print media. In most countries around the world, it is accepted practice that print media may have a certain political leaning; this is not something that the State should be interfering in. The one exception that may be made in this regard is for state-funded media: because their funding comes from the public purse, they should be balanced and impartial in their reporting.

Finally, we are concerned at the general requirement that all political meetings must be notified to the authorities, under Articles 4 and 6 of the Electoral Code of Conduct. Too often, political gatherings are broken up on the grounds that they are 'unauthorised'; this is a requirement that is easily abused. We therefore counsel against a notification requirement; if there is to be one, it should not grant the authorities any scope to refuse to grant permission.

Recommendations:

- The law should not impose vaguely worded or open-ended restrictions on campaign speech. In particular, there should be no prohibitions on defaming public agencies, offending democratic values or institutions, or 'smearing' candidates.
- The right of direct access should be limited to public media. The law should make it clear that all candidates and parties have free use on equal terms of public media facilities for the production of their campaign ads.
- The Electoral Commission should act with the greatest caution and respect for freedom of expression when an abuse of the right of direct access is alleged.
- There should be no ban on the reporting of opinion polls.
- The duty of balance and impartiality should be imposed only on the broadcast media.
- The police should not have the power to refuse to authorise political gatherings. If they come across an unauthorised gathering, they should make every effort to allow it to go ahead, and take measures to break it up only if there is an immediate danger of serious public disorder.

3. MEDIA REGULATION AND RESTRICTIONS ON FREE EXPRESSION

Overview

As indicated above, the media play a key role in elections. They are both the interface through which parties and candidates reach the general public, and, by questioning their work, policies and track-record, also contribute greatly to the sum of information available to the public. During elections, the parameters of what they can publish are provided not only under the specific electoral laws and regulations discussed in the previous section; the 'normal' regulatory regime remains in force and is of great relevance.

In the following paragraphs, we will focus on two sets of regulation in particular. First, we discuss the general regulatory framework for the media as laid down in the Press Law of

2006; and, second, a set of criminal law restrictions on libel and defamation that particularly affect the media.

The Press Law is an extensive piece of legislation that regulates both the broadcast and the print media, as well as cinemas and news agencies. It was adopted with the aim of bringing Angolan law closer in line with the requirements of international law on freedom of expression. This aim is reflected in Article 4, which states that the Law should be interpreted in accordance with the provisions of the Universal Declaration on Human Rights and the African Charter on Human and Peoples Rights.[12] Articles 5 and 6 of the Law elaborate on the content of the right to freedom of expression, and Article 7 details which limitations on free expression are permissible. This formula is repeated in Articles 17 and 18: Article 17 details a set of fundamental rights of journalists, including the right to maintain the confidentiality of sources, to join any association of their choosing and to refuse to publish material that conflicts with their conscience; and Article 18 lays down the "fundamental duties" of journalists.

Article 8 establishes a "National Mass Media Council", among whose aims is to ensure the "objectivity and impartiality of information … in the press". The Press Law also provides for the adoption, by the government, of a Statute of Journalists, which determines, amongst others, who is a journalist and the licensing procedure for journalists; and it requires that a Code of Ethics for journalists is drawn up.[13] The foreign press is also tightly regulated; all foreign media enterprises and correspondents must obtain official government permission in order to work in Angola.[14]

Chapters II and III of the Press Law enter into matters of internal organisation of mass media outlets, and also limit foreign investment and the formation of monopolies. Article 29 requires that all media must have an editorial statute, which is to be submitted to the National Mass Media Council established under Article 8.

Chapter IV continues with further detailed requirements regarding the internal organisation of print media outlets. For example, it sets out the requirements for the masthead, and it distinguishes between various different types of print publications. All print media must be registered, and the procedure for registration is to be laid down by law. It is not clear whether there is discretion to refuse registration, or if any substantive conditions may be imposed. Section II of Chapter IV then lays down a detailed regime for broadcast licensing – something usually found in separate legislation – naming the Ministries of Social Communication and of Post and Telecommunications as the joint lead authorities in the licensing process. Licences are formally awarded by the Council of Ministers, while the "Angolan Communications Institute" is responsible for the overall management of the airwaves.

Chapter V of the Press Law deals with the right of reply and correction, and allows a reply or correction to anyone who "feels injured" by a publication that "affects their good name and reputation" - even if only indirectly. Replies or corrections must be published within 48 hours of the request for a reply or correction being made, and may not be followed by any further comments. A media outlet that refuses to publish a reply or correction may be coerced to do so by the National Mass Media Council, or by a court order.

[12] Articles 19 and 9 of the instruments, respectively, protect the right to freedom of expression.. See Annex 1 to this Memorandum for a discussion of international law and standards on the right to freedom of expression.
[13] Article 21.
[14] Article 22.

Chapter VI, finally, lays down a set of rules on liability. Article 74 provides specifically for a crime of "abuse of press freedom", which is defined as including the following:

- disclosure of information likely to incite secession;
- disclosure of information likely to cause disruption to public order and tranquillity;
- "manipulation" of the news by systematically withholding information of public interest, or by pejorative treatment of certain stories;
- the disclosure of material obtained fraudulently; and
- the publication of "false news" or rumours.

Article 75 goes on to create a number of other 'press crimes': of 'disobedience', including to publish without registration; of failing to comply with an order to publish a right of reply or correction; and of failing to disclose a publication's means of financing. Article 77 provides that a periodical that has been found guilty of defamation, insult, disobedience or 'abuse of press freedom' for the third time within a period of three years may be suspended, while its director will loose the right to head any media institution for a period of three years. A number of other penalty provisions refer back to substantive restrictions mentioned in the preceding paragraphs.

Article 76 provides for the crime of 'attack on freedom of press', rendering liable any person who interferes with the media.

In addition to the Press Law, the Penal Code also provides for a number of offences that restrict media freedom. Chapter V, which deals with defamation, is particularly relevant. Article 407 of the Criminal Code describes the crime of defamation as follows: "If one person defames another publicly, *de viva voce*, in writing, in a published drawing, or in any public manner, imputing to him something offensive to his hono[u]r and dignity, or reproduces this, then he shall be condemned to a prison term of up to four months and a fine of up to one month." Article 408 limits the ability to plead a defence of truth to allegations made in relation to the public functioning of public officials, or where the allegation made concerns a criminal offence. In the case of the latter, defamation hearings are suspended until the conclusion of a criminal trial; which in essence means that a defendant will need to have proof of the alleged wrong-doing at the time of publication that would satisfy the burden of proof at a criminal trial.

Article 410 provides for the crime of "injuria": "The crime of injury, without imputation of any determined fact, if committed against any person publicly, by gestures, *de viva voce*, by published drawing or text, or by any other means of publication, shall be punished with a prison term of up to two months and a fine […]." No defence of truth may be brought in response to a charge of "injuria".

Analysis

The regulatory regime for the media set up under the Press Law and the Penal Code is very harsh. All media, including the print media, are controlled through registration and licensing systems and are subject to numerous broad and open-ended restrictions on what they may publish or broadcast. The Penal Code's provisions on defamation have recently been criticised

by the UN Human Rights Committee, in particular for the limitations they place on arguing a defence of truth,[15] and we understand that they are currently being redrafted.

The following paragraphs assess the restrictions on what the media can say or print, examining them against international standards on free expression and in the context of elections.[16] We also discuss the right of reply regime, which can be of particular relevance during elections.

Restrictions on media freedom
The Press Law was adopted in May 2006 and has been portrayed as a step forward for the protection of freedom of expression in Angola. While we welcome provisions such as Article 4, which require the Law to be interpreted in accordance with international standards on free expression, we are extremely concerned that this is negated by the multitude as well as the severity of the restrictions imposed on the media in the Act's subsequent provisions. In fact, many of the restrictions strike at the very heart of freedom of expression and are so severe that it is difficult to see how they can be read or interpreted in a way that is compatible with international human rights law.

The limitations imposed under the Press Law can be grouped into four different categories. First, there is a group of provisions limiting how journalists may obtain information. Articles 7(2)-(3) provide that journalists may not obtain information through fraudulent, illegal or 'disloyal' ways. These restrictions are absolute, meaning that journalists are barred from using devices such as hidden cameras or tape recorders when they do not have the consent of the person being recorded. We are concerned that this will seriously hinder investigative reporting. It is not uncommon for journalists to use hidden cameras, for example, to uncover instances of corruption. This is a legitimate exercise of the right to freedom of expression, which includes the right to 'seek' information[17] and which should not be banned. We are also concerned by the use of the word 'disloyal', in Article 7(2), which is undefined and open to wide interpretation, and which is therefore easily abused to clamp down on media freedom.[18]

A second set of provisions imposes 'duties' on all journalists. Article 18 imposes a number of absolute duties, which include an obligation to "inform with accuracy, objectivity and impartiality", respect the "boundaries" of media freedom and to contribute to civic education. These duties are, again, absolute, meaning that they are binding on every journalist without exception. We are concerned that many of them are overly restrictive. For example, while it is true that journalists should strive for accuracy in their reports, international human rights law recognises that honest mistakes are sometimes made and journalists should not always be liable for them. Constitutional courts in countries such as Zimbabwe and Uganda have struck down provisions that prohibit the printing of "false news" for violating the right to freedom of expression.[19] Article 18 violates this principle by establishing a binding legal obligation to

[15] See Communication No. 1128/2002, 18 April 2005, CCPR/C/83/D/1128/2002.
[16] Please note that this Memorandum does not provide an exhaustive analysis of the provisions of the Press Law. For example, we do not enter into the detail of the regulatory regime for broadcasting, or the legitimacy of some of the measures that are imposed, such as a requirement to reveal financing. For an overview of the relevant international standards, see Annex 1 to this Memorandum.
[17] Article 19 ICCPR protects the right to disseminate, receive and seek information.
[18] Although we note that Article 7(3) provides an example of what may be considered as 'disloyal', it does not provide a clear and exhaustive definition.
[19] See *Chavunduka and Choto v. Minister of Home Affairs & Attorney General*, 22 May 2000, Judgement No. S.C. 36/2000 (Supreme Court of Zimbabwe); *Onyango-Obbo and Mwenda v. AG*, Constitutional Appeal No. 2, 2002, 11 February 2004 (not yet published) (Supreme Court of Uganda).

only print that which is "accurate". Similarly, the duty on all journalists to be 'impartial' violates international law. As outlined in Section 2 of this Memorandum, it is common practice in democratic countries around the world for the print media to express a political preference or bias. It is hard to see, therefore, how a duty on all journalists to adhere to strict requirements of impartiality can be justified as "necessary" in a democratic society, even during election periods, and we suggest that it is abandoned.

A third set of provisions goes to the heart of the journalistic profession, and limits who may become a journalist or set up a media outlet. These provisions also regulate foreign media activities in Angola. The main provision governing the journalistic profession is Article 21, which provides for the adoption of a "Statute of the Journalist" and a Code of Ethics. The Statute, which defines who may become a journalist and provides for rules on issuing press cards, is adopted by the Government, while the Code of Ethics is to be adopted by journalists associations in an assembly convened by the National Mass Media Council. At the time of writing, neither had been adopted and no draft texts were available. We are highly concerned that the regulatory regime to be set up under Article 21 may in practice be restrictive of media freedom. International human rights law clearly provides that any form of licensing of individual journalists violates the right to freedom of expression;[20] and we urge that the implementing regulations for Article 21, which are yet to be drawn up, should not impose any substantive restrictions on the practice of journalism.

Similarly, Article 38 of the Law provides for the establishment of a register of print media outlets. Pursuant to this provision, all print media outlets need to apply to a designated body with a request for registration. It is not clear whether registration may be refused and whether substantive conditions can be imposed upon registration. If this is so, then the registration scheme would essentially become a licensing tool that would grant the implementing body significant powers over the media. This would also be contrary to international guarantees on freedom of expression.

A fourth and final set of provisions imposes vague and open-ended restrictions on what may be published in the media. Article 7 provides the main basis of these restrictions, and provides that "[t]he exercise of press freedom is limited by the principles, values and norms of the Constitution and the law". This provision goes on to list a number of aims in pursuit of which media freedom may be restricted, including the need to safeguard objectivity and impartiality of information (which we criticised in the previous paragraph), to protect the right to a reputation and to protect the public interest, democratic order or public health and morality. This is elaborated in Articles 74 and 75, which provide for the "crimes" of "abuse of press freedom" and "disobedience". Offences under these provisions include disclosure of information likely to cause racial hatred or disruption to public order, the publication of "false news" or rumours, manipulation of the news, publishing or selling unregistered periodicals or failing to disclose a publication's means of financing.

These provisions need to be seen in light of the restrictions established under the Criminal Code on libel and defamation. Pursuant to Articles 407 and 409, defamation or 'calumny'

[20] See, amongst others, Principle X of the African Commission on Human and Peoples' Rights Declaration of Principles on Freedom of Expression in Africa, adopted October 2002; the 18 December 2003 Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression; and the Inter-American court of Human rights seminal judgment in Advisory Opinion OC-5/85, November 13 29, 1985, Inter-American Court of Human Rights (Ser.A) No.5 (1985).

may lead to the imposition of a severe prison sentence. A defence of 'truth' may be argued by a defendant only in very limited cases, which is likely to exercise a real chilling effect on media freedom.

Repeated violations of prohibitions established under the Penal Code or Press Law can lead to a publication being shut down or suspended, and will lead to the director of the media outlet loosing his or her job and becoming ineligible to lead another media outlet for a period of three years.[21]

In the context of election reporting and campaigning, these restrictions need also be looked at in light of the specific restrictions placed on free speech in election times, which we assess and criticise in Section 2 of this Memorandum.

Overall, we are concerned that this results in an unduly strict regime of content restrictions. Many of the offences listed in Article 74 are very broadly drawn, allowing for the imposition of a penalty if speech is merely 'likely to' lead to events such as public disorder or violence. This violates international principles on freedom of expression, which require not only that the speech is likely to lead to unrest, but also that there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.[22]

The crime of publishing "false news" essentially backs up the duty of every journalist to report accurately, which we criticised in the previous paragraph. It needs to be understood that journalists, like everyone else, are human and do make mistakes from time to time. To render them criminally liable for even a small error in reporting, particularly when the journalist concerned acted in accordance with professional ethics, violates the right to freedom of expression. Moreover, what constitutes the 'truth' is often open to differing interpretations and the law should allow every person to make up his or her own mind, rather than enforcing a particular position.

We are also concerned that the regime essentially repeats what is already prohibited under the criminal law, with perhaps some minor variations. We see no justification for this. It would be far better if there were a unified regime on, for example, incitement to hatred, with one rule applying to everyone in Angola, regardless of whether they are media professionals or not.

With regard to the criminal law itself, we note that the defamation provisions of the Criminal Code have been criticised by the UN Human Rights Committee. In a case concerning a conviction for defamation of the President, the Committee did not believe that it was necessary to provide public figures with heightened protection, and considered the bar on arguing truth as an aggravating factor. It stated:

> [T]he requirement of necessity implies an element of proportionality, in the sense that the scope of the restriction imposed on freedom of expression must be proportional to the value which the restriction serves to protect. Given the paramount importance, in a democratic society, of the right to freedom of expression and of a free and uncensored press or other media, the severity of the sanctions imposed on the author cannot be considered as a proportionate measure to protect public order or the honour and the reputation of the President, a public figure who, as such, is subject to criticism and opposition. In addition, the

[21] Article 77 of the Press Law.
[22] See, in particular, the *Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Freedom of Expression and Access to Information*, U.N. Doc. E/CN.4/1996/39 (1996). See, in particular, Principle 6(c).

> Committee considers it an aggravating factor that the author's proposed truth defence against the libel charge was ruled out by the courts. In the circumstances, the Committee concludes that there has been a violation of article 19 (which protects freedom of expression).[23]

We are aware the Penal Code is currently being redrafted. At the very least, we would urge the drafters to heed the words of the Committee and remove the sentence of imprisonment while allowing a defence of truth to be argued by defendants. We would also strongly suggest that consideration is given to full decriminalisation of defamation. Intergovernmental free speech watchdogs including the UN Special Rapporteur on Freedom of Opinion and Expression have urged States to decriminalise defamation.[24] In a Joint Declaration with his counterparts at the OSCE and OAS, he has stated:

> Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.

Defamation is a dispute between two persons and is, in essence, a civil matter. No wider public interests are involved; there is no risk of disturbance of public order. There is therefore no reason to have defamation covered under the criminal law to protect reputation, and every reason to abolish it: the harshness of the criminal sanction that may be imposed, as well as the possibility of ending up with a criminal record, exerts a serious chilling effect on free speech which ultimately harms the overall public interest in the free circulation of information.

Right of reply

The right of reply regime provided under Chapter V of the Press Law is an example of a positive attempt to provide for a non-criminal and non-litigious response to a charge of defamation. As such, we welcome it in broad lines.

However, the regime as currently drafted is too broadly worded and needs to be narrowed down. A right of reply constitutes an interference with the editorial freedom of the publication with whom a reply is sought, and as such needs to be proportionate and narrowly drawn. It should be available only in response to the publication of false information that affects a third party's rights, and only when a correction – which is a smaller interference in editorial freedom – does not suffice. The response itself should be proportionate to the original publication, and should not launch into any unconnected diatribes.

The regime set out in Chapter V fails to follow these general principles on a number of points. Article 64 provides that any person who "feels injured" by a publication that "affects their reputation and good name" has a right of reply. We do not believe this is correct. First, it provides a right of reply even to truthful information, such as a story uncovering corruption; second, providing a right of reply to anyone who "feels injured" does not establish a sufficiently objective standard. Some people might "feel injured" more quickly than others, something which is particularly true for politicians and others in public life. Yet they should tolerate more, not less criticism of their functioning. Chapter V also fails to distinguish between a mere correction and a reply.

[23] Communication No. 1128/2002, note 15.
[24] See Joint Declaration of 10 December 2002 by the the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression.

Recommendations:

- The restriction on journalists' use of hidden cameras or tape recorders should be removed from the Press Law. The general laws on privacy should allow for a public interest override of privacy interests.
- The registration scheme for print media should be purely technical and administrative in nature. It should be administered by an independent body, there should be no discretion to refuse registration and no penalties for publishing without registration.
- Individual journalists should not be required to register or be licensed.
- There should be no duty on all journalists to be impartial, or to publish with absolute accuracy.
- The Press Law should not repeat offences already provided for in the Criminal Law.
- Restrictions on freedom of expression included in the Press Law should be clearly and narrowly drafted, and pursue legitimate aims.
- The Press Law should not prohibit the publication of "false news".
- Defamation should be fully decriminalised. If this is not immediately possible, then at the very least the sanction of imprisonment should be removed and a defence of truth allowed.
- The right of reply should only be available in response to the publication of a false report that affects someone's rights, and only when a correction would not suffice.

4. ACCESS TO INFORMATION

Overview

The right to freedom of expression and information is of fundamental importance to democracy and to the protection of human rights. A society where the flow of information is inhibited cannot call itself a democratic society. As the United Nations General Assembly put it in its very first session, freedom of information – understood as the free flow of information in its broadest sense – is "the touchstone of all the freedoms to which the UN is consecrated."[25]

The free circulation of information is also necessary in order to ensure that the public is aware of the activities of their chosen leaders, and, come election time, to inform who they vote for. Even if most people themselves are unlikely to make elaborate use of the right to access information, it is a key tool that allows the media to perform its role of public watchdog, and inform the public.

Freedom of information laws have been adopted in record numbers in the last decade. Angola adopted its "Law on Access to Documents held by Public Authorities" in August 2002.[26] Under this Law, everyone may upon request access documents held by or originated with public authorities, with the exception of the following:

[25] UN General Assembly Resolution 59(1), 14 December 1946.
[26] Law 11/02 of 16 August 2002. Available on-line at http://www.privacyinternational.org/countries/angola/foi-law02.doc.

- personal data (Articles 4(1) and 7(1)), access to which is restricted to the person whom the data concerns or third parties who can demonstrate a direct and personal interest. Access may also be granted if the personal data can be excised from the document (Article 8(4));
- "personal annotations and other notes, sketches or other records of a similar nature" (Article 4(2)(a));
- "documents whose production does not arise from the activities of public bodies, in particular documents with reference to meetings of the Council of Ministers as well as the preparation of such meetings" (Article 4(2)(b));
- properly classified documents whose release may harm internal or external security (Article 5);
- documents concerning *in camera* proceedings (Article 6);
- documents concerning unfinished court proceedings, until one year after the documents were first produced (Article 7(5));
- documents concerning inquests and inquiries, until expiry of the period during which disciplinary proceedings may be taken (Article 7(6));
- documents "within the domain of notaries or public registers, documents on an individual's civilian identity and criminal records, documents concerning automatically processed personal data, and documents kept in historical archives" (Article 7(7)).

Subject to these same exemptions, access may also be had to documents held by private bodies that exercise 'public authority" (Article 3).

Article 11 of the Law requires that all public bodies should also publish the following information proactively, without waiting for a request:

- all "documents, regular internal decisions, circulars and guidelines that fall within the ambit of its scope of activities";
- a listing of "all documents containing an interpretation of legislation or a description of an administrative procedure, with specific mention of the title, subject, date, origin and where the documents may be consulted".

All these materials need to be updated and republished at least every six months.

Exercising the right of access is relatively straightforward. Under Article 13, requests must be made in writing and contain sufficient information to enable the official dealing with it to identify the document asked for. Article 15 requires public bodies to respond within ten days, either providing access or giving reasons why total or partial access will not be possible. Refusals to provide access may be challenged under Article 16. Article 12 provides that if access is granted, documents may be inspected in their original form, or that the applicant may be sent photocopies (which s/he will need to pay for).

Under Article 14, every institution falling under the law is required to appoint a person or department responsible for implementing the law.

Articles 17-19 establish a "Monitoring Commission" responsible for ensuring compliance with the Law. The Commission is made up of 7 members, at least 3 of whom are to be appointed by the President and the government, and appears to have mainly advisory functions. Under Article 19, it may:

- "evaluate" complaints from individuals;
- "advise" on access to personal documents;
- "present its opinion on the system of classification of documents";
- "give opinions on the implementation of this law, as well as on the drafting and implementation of the complementary laws"; and
- prepare an annual report.

In practice, it is important to read this Law side by side with the State Secrets Law, which was adopted on the same day.[27] Under this Law, a very broad range of documents may be classified. Article 2 indicates that information "the knowledge of which by non-authorised persons is likely to place at risk or cause harm to national independence, the wholeness and unity of the State and its internal and external safety" is covered by State secrecy; paragraph (2) of Article 2 indicates that documents must be reviewed on a case-by-case basis for the purposes of classification. Paragraph (3) of Article 2 indicates that classification may extend not only to documents such as those dealing with the armed forces but also to documents "governing the functioning of democratic institutions" (under (b)) and "those safeguarding the rights, freedoms and guarantees of individuals" (under (c)).

Article 3 of the State Secrets Law states that the duty of secrecy extends to everyone who comes into contact with classified documents, not just public servants, and Articles 24-26 detail sentences for unauthorised release of state secrets, including by journalists.

Analysis

While we welcome the principle of the right of access to documents that is established under Angola's 2002 Law on Access to Documents held by Public Authorities, we are concerned that the regime of exceptions to the right is so widely drawn as to practically disable it. Additionally, the monitoring and oversight mechanism established under the law – through the "Monitoring Commission" – lacks real teeth and is unlikely to be able to enforce compliance or promote wider awareness of the right. These two factors combine to render the Law ineffective. It is significant that in the four and a half years since the Law was enacted, it has barely been used and does not register among journalists as a tool they can rely upon to gather information. This contrasts starkly with practice in developed democracies, where journalists do rely on freedom of information laws to uncover wrongdoing.

We are additionally concerned at the wide range of documents that may be classified as 'secret' under the State Secrets Law, and the penalties that may be imposed not only on civil servants who 'leak' such documents but also on journalists who publish them. Our present analysis will focus on these three issues.

Exemptions

International law recognises that the right to access to information is not an absolute right: limitations may be placed upon it. However, any such limitations must be provided by law, and be narrowly drawn to protect a legitimate aim. It is important that they are proportionate and do not impair the right of access beyond that which is necessary for the protection of a specific legitimate aim. For example, the disclosure of information that causes serious harm to national security may be limited; but international law does not allow for a rule that bars the disclosure of any information that merely 'relates to' national security. In addition, international law requires that even when disclosure of information causes harm to a

[27] Law 10/02 of 16 August 2002.

legitimate protected interest, it may still not be prohibited if there is an overriding public interest. For example, the disclosure of certain financial transactions of a government minister may harm that minister's privacy; but if they also reveal corruption then the overall public interest demands their release.[28]

The Angolan Access to Documents Law fails adequately to incorporate both of these tests. Articles 4-8 contain a multitude of what are known as 'class exemptions': exemptions of entire classes of documents from the ambit of the Access to Documents Law. In particular, Articles 4 and 7 restrict all access to documents that are of a personal nature (except if they can be released in a form that excises the personal data); and Article 5 restricts the release of any document that is classified as a State Secret. Under the Law on State Secrets, an extremely wide range of documents may be classified as such, including any document the release of which "is likely to place at risk … national independence, the wholeness and oneness of the State and its internal and external safety"[29] or that is even "disadvantageous" to the State, its apparatus or any international organisation it is a member of.[30] There is no public interest test whatsoever; if it is decided that a document falls within one of the protected categories, then its disclosure is prohibited regardless of any wider interest that may exist in its disclosure.

Some of the other exemptions are also worrying. We are particularly concerned that under Article 4(2)(b), any document that has 'reference to' Council of Minister meetings, or that has been used to prepare such a meeting is exempted from the Act altogether. This withdraws from public scrutiny a range of documents that is key to the inner workings of government. While it is internationally recognised that ministers and decision makers do need some 'space to think', and that documents whose disclosure would cause real harm to the decision-making process within government may be withheld, Article 4(2)(b) goes far beyond that.

Ineffective oversight
The "Monitoring Commission" established under Articles 17-19 of the Law suffers from a number of structural weaknesses.

First, more than half of its members are in effect ruling party appointees: out of its seven members, one is nominated by the President, two are nominated by the government, and one ruling party MP also sits on the Commission.[31] In addition, members only serve two-year terms, which means that they are effectively on a 'short leash': the government is entirely free to replace those members who it considers too critical at the expiry of their term. These factors combine to seriously undermine the independence of the Monitoring Commission.

Second, even if the issue of independence were resolved, the Commission lacks sufficient powers to ensure implementation. While it may receive complaints and review practices, its decisions are purely non-binding, meaning that they can be ignored at will. We also note that the Commission does not have a mandate to provide any training for public authorities, or to raise wider awareness of the right of access to information among the public at large. Both are important elements of a successful access to information regime.[32]

[28] See Section IV of the Annex for more on this.
[29] Article 2(1).
[30] Article 9.
[31] See Article 18.
[32] In Mexico, for example, an independent federal agency has been established with significant powers to enforce implementation of the access to information law in that country. In practice, this has led to significant

Third, the Law is silent on the Monitoring Commission's funding and staffing. For the Commission to do its job, it is crucial that is has sufficient resources; and the law ought to guarantee that it will be provided them.

Release of state secrets
The Law on State Secrets establishes harsh penalties for any person who releases or publishes state secrets without proper authorisation. Article 24 provides for a minimum sentence of 6 months imprisonment for any political office bearer or civil servant who releases a state secret with the intent of harming the State or a third party, or to derive a benefit; and Article 25 provides for a prison sentence of up to six months for the negligent release of information. Article 26 provides that journalists publishing any state secrets leaked in violation of Articles 24 or 25 may be subject to the same penalty. There is no provision for the publication of information in the public interest – for example, to reveal corruption – although the intent requirement in Article 24 may go some way to addressing that concern.

International law disapproves of punishing journalists who publish state secrets. The UN, OAS, OSCE and African Union official special rapporteurs on freedom of expression have recently adopted a resolution in which they expressed their concern at legislation that establishes specific penalties for journalists, stating:

> Journalists should not be held liable for publishing classified or confidential information where they have not themselves committed a wrong in obtaining it. It is up to public authorities to protect the legitimately confidential information they hold. [33]

We strongly recommend that this standard is followed in Angola, particularly bearing in mind that state secrets laws are easily abused to bury information that is embarrassing or damaging to the government.

For the same reason, we also recommend that a 'public interest' defence is inserted, allowing defendants to claim that they released information in good faith to protect a greater public good – for example, to expose corruption or mismanagement of public funds. The same UN, OSCE and OAS special rapporteurs on freedom of expression adopted a resolution in 2004, in which they stated:

> "Whistleblowers" are individuals releasing confidential or secret information although they are under an official or other obligation to maintain confidentiality or secrecy. "Whistleblowers" releasing information on violations of the law, on wrongdoing by public bodies, on a serious threat to health, safety or the environment, or on a breach of human rights or humanitarian law should be protected against legal, administrative or employment-related sanctions if they act in "good faith".[34]

Recommendations:

- The Access to Information Law needs to be revised to incorporate the principle that all documents held by public authorities are open, subject to only narrow exceptions.
- Access should be refused only when disclosure would cause real harm to a

public awareness of the right and real improvements in the transparency of public institutions.
[33] 19 December 2006.
[34] 6 December 2004.

legitimate protected interest, such as national security, unless there is an overriding public interest in its disclosure.

- An effective monitoring and oversight regime needs to be established, with powers both to enforce compliance where necessary but also to conduct training and raise broad awareness of the Law.
- The supervisory body should be adequately staffed and financed to carry out its tasks.
- The State Secrets Law should be revised along similar lines, allowing for the classification of documents only when their release would cause real harm to national security or other legitimate protected interests.
- Journalists who publish information leaked to them in good faith and in the public interest should not be liable for prosecution.
- There should be protection for whistleblowers: individuals who in the course of the duties comes across information that reveals wrongdoing, and who decide in good faith to publish that information.

ANNEX: INTERNATIONAL STANDARDS ON FREEDOM OF EXPRESSION

I. FREEDOM OF EXPRESSION IN INTERNATIONAL LAW

The right to freedom of expression has long been recognised as a fundamental human right. It is of crucial importance to the functioning of democracy, a necessary precondition for the exercise of other rights and freedoms and, in its own right, essential to human dignity. The *Universal Declaration of Human Rights* (UDHR),[35] the flagship human rights instrument adopted by the United Nations General Assembly in 1948, protects the right to freedom of expression in the following terms, at Article 19:

> Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

The *International Covenant on Civil and Political Rights* (ICCPR),[36] a legally binding treaty to which Angola acceded in 1992, guarantees the right to freedom of opinion and expression in very similar terms to the UDHR, also at Article 19. Angola's Constitution also protects the right to freedom of expression, in Article 32.

Freedom of expression is also guaranteed in *African Charter on Human and Peoples' Rights*,[37] at Article 9. This regional human rights treaty has been ratified by Angola[38] and, like the ICCPR, is binding in law. The African Commission on Human and Peoples' Rights, the intergovernmental body that supervises implementation of the Charter, has adopted an authoritative declaration setting out the main principles of freedom of expression that follow from Article 9 of the Charter. This is the *Declaration of Principles on Freedom of Expression in Africa*.[39]

Global recognition of the importance of freedom of expression is reflected in the two other regional systems for the protection of human rights, the *American Convention on Human Rights*[40] and the *European Convention on Human Rights* (ECHR),[41] both of which guarantee the right to freedom of expression. While neither these instruments nor judgments of the courts and tribunals operating under them are directly binding on Angola, they are important comparative evidence of the content and application of the right to freedom of expression and may be used to inform the interpretation of Article 19 of the ICCPR and Article 9 of the African Charter, both of which are binding on Angola.

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[35] UN General Assembly Resolution 217A(III), adopted 10 December 1948: http://www.unhchr.ch/udhr/index.htm.
[36] UN General Assembly Resolution 2200A (XXI), adopted 16 December 1966, in force 23 March 1976: http://www.ohchr.org/english/law/ccpr.htm.
[37] Adopted 26 June 1981, in force 21 October 1986: http://www.africa-union.org/root/au/Documents/Treaties/Text/Banjul%20Charter.pdf.
[38] On 2 March 1990.
[39] Gambia, 23 October 2002: http://www.achpr.org/english/_info/index_declarations_en.html.
[40] Adopted 22 November 1969, in force 18 July 1978: http://www.cidh.oas.org/Basicos/basic3.htm.
[41] ETS Series No. 5, adopted 4 November 1950, in force 3 September 1953: http://conventions.coe.int/Treaty/EN/Treaties/Html/005.htm.

II. THE IMPORTANCE OF POLITICAL EXPRESSION AND ELECTIONS

International bodies and courts have made it very clear that the right to freedom of expression and information is one of the most important human rights. At its very first session, in 1946, the United Nations General Assembly adopted Resolution 59(I),[42] which refers to freedom of information in its widest sense and states:

> Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated.

As this resolution notes, freedom of expression is both fundamentally important in its own right and also key to the fulfilment of all other rights. Only in societies where the free flow of information and ideas is permitted and guaranteed is democracy able to flourish. In addition, freedom of expression is crucial for the unveiling and exposure of violations of human rights and the challenging of such violations. This has been echoed by human rights courts. For example, the UN Human Rights Committee, the body established to monitor the implementation of the ICCPR, has held:

> The right to freedom of expression is of paramount importance in any democratic society. [43]

Similarly, the African Commission on Human and Peoples' Rights has emphasised "the fundamental importance of freedom of expression and information as an individual human right, as a cornerstone of democracy and as a means of ensuring respect for all human rights and freedoms";[44] and it has stressed that,

> [L]aws and customs that repress freedom of expression are a disservice to society.[45]

The guarantee of freedom of expression applies with particular force to so-called 'political expression' and media reporting on matters of common public interest. The African Commission on Human and Peoples' Rights, for example, has stressed "the key role of the media and other means of communication in ensuring full respect for freedom of expression, in promoting the free flow of information and ideas, in assisting people to make informed decisions and in facilitating and strengthening democracy."[46] The European Court of Human Rights has similarly emphasised the "pre-eminent role of the press in a State governed by the rule of law."[47] It has further stated:

> Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.[48]

The UN Human Rights Committee has also stressed the fundamental role the media play in the political process:

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[42] 14 December 1946.
[43] *Tae-Hoon Park v. Republic of Korea*, 20 October 1998, Communication No. 628/1995, para. 10.3.
[44] Resolution on the adoption of the Declaration of Principles on Freedom of Expression in Africa, 23rd October 2002, preamble.
[45] Declaration, note 39, preamble.
[46] *Ibid.*
[47] *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 63.
[48] *Castells v. Spain*, 24 April 1992, Application No. 11798/85, para. 43.

> [T]he free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.[49]

It follows that in times of elections, freedom of expression assumes particular importance. The ability of political parties to communicate with voters is paramount for the proper functioning of a democracy. Voters will be reluctant to vote for a party if they are not sure what it stands for. Although voters may formally be able to vote for the party of their choice, such choice is illusory in the absence of adequate information about the competing parties and candidates. If only one or two parties have been able to communicate their views, they will inevitably dominate the election.

Some political parties will inevitably be in a better position to spread their message than others; a party founded by a well-known person or bankrolled by rich backers will more easily attract attention than a party which lacks funds or fame. Such natural advantages are simply part of politics. However, under the ICCPR, the State is under an obligation to ensure that all parties have at least some access to means of communicating with the public.[50] Any obstacles other than the natural disadvantages which flow from being a small party should be removed. For example, conditions such as having a certain number of members should not be required before parties may spread leaflets or hold public meetings. In addition, the State must take certain positive steps to ensure that these parties have some access to the means of mass communication. Typically, a publicly owned or funded broadcaster is under an obligation to provide a measure of free airtime to all competing parties. This has been reflected in the *African Declaration*, which states that public service broadcasters should be under "an obligation to ensure that the public receive adequate, politically balanced information, particularly during election periods."[51]

A related requirement is that the media should be truly free and pluralistic. The UN Human Rights Committee has often expressed concern about tight regulation of the media in the context of elections. For example, in its Concluding Observations on Armenia, the Committee expressed,

> "…concern about the strict governmental control over electronic media, which may raise issues under Article 19 and which results in serious limitations to the exercise of the rights guaranteed in Article 25, in particular with regard to elections."[52]

III. FREEDOM OF INFORMATION

The right to access information held by public bodies, often referred to as 'freedom of information', is a fundamental human right recognised in international law. It is crucial as a right in its own regard as well as central to the functioning of democracy and the enforcement of other rights. Without freedom of information, State authorities can control the flow of information, 'hiding' material that is damaging to the government and selectively releasing

[49] UN Human Rights Committee General Comment 25, issued 12 July 1996.
[50] This follows from Articles 2, 19 and 25 ICCPR, read together.
[51] Note 22, Principle VI.
[52] For example, in its Concluding Observations on Armenia (CCPR/C/79/Add.100, 19 November 1998, par. 21);

'good news'. In such a climate, corruption thrives and human rights violations can remain unchecked. The electorate will not be adequately informed about the actions of their chosen representatives, and will be unable to cast an informed vote.

For these reasons, international bodies such as the United Nations Special Rapporteur on Freedom of Opinion and Expression[53] have repeatedly called on all States to adopt and implement freedom of information legislation.[54] In 1995, the UN Special Rapporteur on Freedom of Opinion and Expression stated:

> The Special Rapporteur, therefore, underscores once again that the tendency of many Governments to withhold information from the people at large … is to be strongly checked.[55]

His comments were welcomed by the UN Commission on Human Rights, which called on the Special Rapporteur to "develop further his commentary on the right to seek and receive information and to expand on his observations and recommendations arising from communications".[56] In his 1998 Annual Report, the Special Rapporteur reaffirmed that freedom of information includes the right to access information held by the State:

> [T]he right to seek, receive and impart information imposes a positive obligation on States to ensure access to information, particularly with regard to information held by Government in all types of storage and retrieval systems…."[57]

In November 1999, the UN Special Rapporteur was joined in his call by his regional counterparts, bringing together all three special mandates on freedom of expression – the United Nations Special Rapporteur on Freedom of Opinion and Expression, the Representative on Freedom of the Media of the Organisation for Security and Cooperation in Europe and the Special Rapporteur on Freedom of Expression of the Organisation of American States. They adopted a Joint Declaration which included the following statement:

> Implicit in freedom of expression is the public's right to open access to information and to know what governments are doing on their behalf, without which truth would languish and people's participation in government would remain fragmented.[58]

The right to access information held by or under the control of a public body has been recognised under Article 19 of both the UDHR and ICCPR. The UN Human Rights Committee, the body established to supervise the implementation of the ICCPR, has long commented on the need for States to introduce freedom of information laws. In its 1994 Concluding Observations on the implementation of the ICCPR in Azerbaijan, for example, the Committee stated that Azerbaijan "should introduce legislation guaranteeing freedom of information…"[59]

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[53] The Office of the Special Rapporteur on of Opinion and Expression was established by the UN Commission on Human Rights, the most authoritative UN human rights body, in 1993: Resolution 1993/45, 5 March 1993.
[54] See, for example, the Concluding Observations of the Human Rights Committee in relation to Trinidad and Tobago, UN Doc. No. CCPR/CO/70/TTO/Add.1, 15 January 2001. 14. The comments of the UN Special Rapporteur on freedom of Opinion and Expression are discussed at length below.
[55] Report of the Special Rapporteur, 4 February 1997, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1997/31.
[56] Resolution 1997/27, 11 April 1997. 12(d).
[57] Report of the Special Rapporteur, 28 January 1998, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1998/40. 14.
[58] 26 November 1999.
[59] UN Doc. CCPR/C/79/Add.38; A/49/40, 3 August 1994, under "5. Suggestions and recommendations".

As a State Party to the African Charter on Human and Peoples Rights, Angola should also respect the freedom of information obligations imposed by *Declaration of Principles on Freedom of Expression in Africa*.[60] Principle IV of the Declaration states:

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

Finally, the right to access information is recognised under the UN Convention against Corruption, which Angola ratified in August 2006,[61] as well as under the African Union Convention on Preventing and Combating Corruption, which Angola has neither signed nor ratified.[62]

A survey of international law and best practice shows that to be effective, freedom of information legislation should be based on a number of general principles. Most important is the principle of maximum openness: any information held by a public body should in principle be openly accessible, in recognition of the fact that public bodies hold information not for themselves but for the public good. Furthermore, access to information may be refused only in narrowly defined circumstances, when necessary to protect a legitimate interest. Finally, access procedures should be simple and easily accessible and persons who are refused access should have a means of challenging the refusal in court.[63]

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[60] Note 39.

[61] United Nations Convention against Corruption, adopted by the UN General Assembly on 31 October 2003, UN Doc. A/58/422: http://www.unodc.org/unodc/en/crime_convention_corruption.html. See, in particular, Articles 10 and 13.

[62] Maputo, Mozambique, 11 July 2003. Article 9 of the Convention states: "Each State Party shall adopt such legislative and other measures to give effect to the right of access to any information that is required to assist in the fight against corruption and related offences."

[63] For an overview of these general principles, see ARTICLE 19's *The Public's Right to Know* (London: 1999) (ARTICLE 19 Principles). These Principles are the result of a study of international law and best practice on freedom of information and have been endorsed by, amongst others, the UN Special Rapporteur on Freedom of Opinion and Expression in his report to the 2000 session of the United Nations Commission on Human Rights (UN Doc. E/CN.4/2000/63, annex II), and referred to by the Commission in its 2000 resolution on freedom of expression (Resolution 2000/38). They were also endorsed by Mr. Santiago Canton, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression in his 1999 Report, Volume III of the Report of the Inter-American Commission on Human Rights to the OAS.

In his 2000 Annual Report to the UN Human Rights Commission, the UN Special Rapporteur endorsed ARTICLE 19's overview of the state of international law on freedom of information as published in *The Public's Right to Know: Principles on Freedom of Information Legislation* and called on Governments to revise their domestic laws to give effect to the right to freedom of information. He particularly directed States' attention to nine areas of importance:

> [T]he Special Rapporteur directs the attention of Governments to a number of areas and urges them either to review existing legislation or adopt new legislation on access to information and ensure its conformity with these general principles. Among the considerations of importance are:
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> - Public bodies have an obligation to disclose information and every member of the public has a corresponding right to receive information; "information" includes all records held by a public body, regardless of the form in which it is stored;
>
> - Freedom of information implies that public bodies publish and disseminate widely documents of significant public interest, for example, operational information about how the public body functions and the content of any decision or policy affecting the public;
>
> - As a minimum, the law on freedom of information should make provision for public education and the dissemination of information regarding the right to have access to information; the law should also provide for a number of mechanisms to address the problem of a culture of secrecy within Government;
>
> - A refusal to disclose information may not be based on the aim to protect Governments from embarrassment or the exposure of wrongdoing; a complete list of the legitimate aims which may justify non-disclosure should be provided in the law and exceptions should be narrowly drawn so as to avoid including material which does not harm the legitimate interest;
>
> - All public bodies should be required to establish open, accessible internal systems for ensuring the public's right to receive information; the law should provide for strict time limits for the processing of requests for information and require that any refusals be accompanied by substantive written reasons for the refusal(s);
>
> - The cost of gaining access to information held by public bodies should not be so high as to deter potential applicants and negate the intent of the law itself;
>
> - The law should establish a presumption that all meetings of governing bodies are open to the public;
>
> - The law should require that other legislation be interpreted, as far as possible, in a manner consistent with its provisions; the regime for exceptions provided for in the freedom of information law should be comprehensive and other laws should not be permitted to extend it;
>
> - Individuals should be protected from any legal, administrative or employment-related sanctions for releasing information on wrongdoing, viz. the commission of a criminal offence or dishonesty, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty or serious failures in the administration of a public body.[64]

This constitutes strong and persuasive guidance to States on the content of freedom of information legislation.

[64] *Ibid*. 44.

IV. RESTRICTIONS ON FREEDOM OF EXPRESSION AND INFORMATION

The rights to freedom of expression and access to information are not absolute; they may, in certain narrow circumstances, be restricted. However, restrictions must be precise and clearly stipulated in accordance with the principle of the rule of law. Moreover, restrictions must pursue a legitimate aim; freedom of expression may not be restricted just because a certain statement or form of speech is considered offensive or because it challenges established doctrines.

Article 19(3) of the ICCPR lays down the conditions which any restriction on freedom of expression or access to information must meet:

> The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
> (a) For respect of the rights or reputations of others;
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.

The *Declaration on Principles of Freedom of Expression in Africa* uses a similar formula. It states, in Principle II:

> 1. No one shall be subject to arbitrary interference with his or her freedom of expression.
> 2. Any restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary and in a democratic society.

Both formulas have been interpreted as requiring restrictions to meet a strict three-part test.[65] First, the interference must be provided for by law. This requirement will be fulfilled only where the law is accessible and "formulated with sufficient precision to enable the citizen to regulate his conduct."[66] This also means that broad or vague phrased laws or laws that leave implementing agencies excessive discretion are illegitimate. Second, the interference must pursue a legitimate aim. The list of aims in Article 19(3) of the ICCPR is exclusive in the sense that no other aims are considered to be legitimate as grounds for restricting freedom of expression. Third, the restriction must be necessary to secure one of those aims. The word "necessary" means that there must be a "pressing social need" for the restriction. The reasons given by the State to justify the restriction must be "relevant and sufficient" and the restriction must be proportionate to the aim pursued.[67] The addition "in a democratic society" in the African Declaration must also be considered: what is considered "necessary" in a democracy is very different from that which may be "necessary" in an authoritarian regime.

In the context of freedom of information, the "necessity" element of the text has been interpreted as imposing two important obligations: first, that documents should be disclosed unless this would cause real harm to a legitimate public interest, and second, that even if harm is caused, a document should be disclosed if this is in the greater public interest. For example,

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[65] See, for example, *Mukong v. Cameroon*, 21 July 1994, Communication No. 458/1991, para. 9.7 (UN Human Rights Committee).
[66] *The Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, para. 49 (European Court of Human Rights).
[67] *Lingens v. Austria*, 8 July 1986, Application No. 9815/82, paras. 39-40 (European Court of Human Rights).

disclosure of a government document showing financial transactions may well harm the interest of confidentiality; but if it also reveals corrupt dealings then it is in the overall public interest that it be disclosed.