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# Protecting digital rights through soft law: Ensuring the implementation of the revised Declaration of Principles on Freedom of Expression and Access to Information in Africa

*Tomiwa Ilori**
Post-Doctoral Fellow, Centre for Human Rights, Faculty of Law, University of Pretoria, South Africa
https://orcid.org/0000-0002-2765-3103

**Summary:** *This article examines the use of soft law for digital rights protection in African countries. Focusing particularly on the Declaration of Principles on Freedom of Expression and Access to Information in Africa, 2019 (revised Declaration) adopted by the African Commission on Human and Peoples' Rights, it highlights some of the digital rights challenges in African countries that necessitated normative guidance for African states. Some of these challenges include increased internet shutdowns; unlawful interception of communication; social media bans; expensive internet access; attacks on media freedom; inadequate protection of personal data; and problematic laws on online harms. The article then examines the need for soft international human rights law to address these challenges, the provisions of the revised Declaration as soft law and how these provisions address digital rights challenges in African countries. It concludes that the revised Declaration is a unique soft international human rights law instrument and that it should not be treated as ornamental. It recommends that the African Commission*

* LLB (Ife) LLM LLD (Pretoria); tomiwailori@gmail.com

*should formulate an implementation plan that mainstreams the legislative, administrative, judicial and other measures provided for in the revised Declaration into African national contexts.*

**Key words:** *digital rights; soft law; African Commission on Human and Peoples' Rights; implementation; freedom of expression; revised Declaration*

## 1 Introduction

There has been more focus on digital rights challenges in Africa compared to efforts designed to tackle them. Some of these challenges include increased internet shutdowns; unlawful interception of communication; social media bans; expensive internet access; attacks on media freedom; inadequate protection of personal data; and problematic laws on online harms.[1] However, while these challenges exist and continue to pose problems for digital rights protection in African countries, there is a limited focus on how various actors and, as it concerns this article, the African Commission on Human and Peoples' Rights (African Commission) have committed to overcome these challenges through their mandates. Therefore, this article examines the African Commission's soft law instrument – the revised Declaration of Principles on Freedom of Expression and Access to Information (revised Declaration) 2019 – and how it provides an important means of digital rights protection through normative guidance for African states.

1 MD Hernández & F Anthonio 'The return of digital authoritarianism: Internet shutdowns in 2021' Access Now (2022), https://www.accessnow.org/cms/assets/uploads/2022/05/2021-KIO-Report-May-24-2022.pdf (accessed 15 June 2022); International Commission of Jurists 'Regulation of communications surveillance and access to internet in selected African states' (2021), https://www.kas.de/documents/275350/0/Report-on-Regulation-of-Communications-Surveillance-and-Access-to-Internet-in-Selected-African-States.pdf/66dbd47d-4d7d-2779-a595-a34e9f93cfbb?t=1639140695434 (accessed 15 June 2022); T Ilori 'Social media regulation in African countries will require more than international human rights law' *Techdirt* 30 September 2021, https://www.techdirt.com/2021/09/30/social-media-regulation-african-countries-will-require-more-than-international-human-rights-law/ (accessed 15 June 2022); M Onkokame & A Gillwald 'COVID-19 compounds historical disparities and extends the digital divide' Research ICT Africa 2021 Policy Brief 5/2021 (April 2021), https://researchictafrica.net/wp/wp-content/uploads/2021/05/Policy-Brief-April-2021-COVID19-compound-historical-disparities.pdf (accessed 15 June 2022); Collaboration on International ICT Policy for East and Southern Africa (CIPESA) 'Mapping and analysis of privacy laws and policies in Africa: Summary report' (2021), https://cipesa.org/?wpfb_dl=454 (accessed 15 June 2022); T Ilori 'How social media companies help African governments abuse "disinformation laws" to target critics' *Rest of World* 4 November 2021, https://restofworld.org/2021/social-media-africa-democracy/ (accessed 15 June 2022).

In conducting this examination, the article is organised in five parts. The first part introduces the article, while the second part highlights some of the digital rights challenges that necessitated the revised Declaration. The third part discusses the need for a soft law instrument to address these challenges, highlights the various processes that led to the adoption by the African Commission to address the revised Declaration and examines its substantive provisions. The fourth part identifies some of the ways in which these provisions can be implemented to protect digital rights in Africa, while the last part concludes that the revised Declaration should be seen as an indispensable instrument, and recommends that the African Commission should draw up an implementation plan to guide African states on how to mainstream specific legislative, administrative, judicial and other measures into national contexts to facilitate its compliance.

## 2 Digital rights challenges in African countries

While the use of digital technologies was not as popular when the Declaration of Principles on Freedom of Expression (Declaration) was first adopted in 2002, by the turn of the decade they had begun to lead to various persisting human rights challenges.[2] These persisting challenges are best seen in the way in which the actions and omissions of state and non-state actors in African countries impact the enjoyment of and protection from digital technologies. Some of these persisting challenges are discussed below.

### 2.1 Increased internet shutdowns

Internet shutdowns have been described as the deliberate restriction of network access. They have also been identified as a disproportionate measure of restricting human rights under international human rights law.[3] Since the first recorded internet shutdown incident in Guinea in 2007, more than 30 African countries have blocked internet access.[4] It has been noted that in African countries, these shutdowns are mostly used by authoritarian governments to quell dissent, mask atrocities and violate human rights. Some of these countries include Cameroon, Chad, Equatorial Guinea, Uganda, Togo, and several others.[5] Not only do these shutdowns have negative impacts on

2 As above.
3 G de Gregorio & N Stremlau 'Internet shutdowns and the limits of law' (2020) 14 *International Journal of Communication* 4224, 4226, 4230.
4 As above.
5 CIPESA 'Despots and disruptions: Five dimensions of internet shutdowns in Africa' (2019), https://cipesa.org/2019/03/despots-and-disruptions-five-dimensions-of-internet-shutdowns-in-africa/ (accessed 16 June 2022).

economic development, but they also violate specific human rights, such as the right to development, freedom to hold opinions, freedom of expression, association, assembly, and political participation. They have been noted to have adverse impacts on political,[6] economic[7] and social rights[8] in African countries. Governments' reasons for these shutdowns range from ensuring public order to electoral integrity.[9] However, these shutdowns have not been shown to ensure any of these.[10] Rather, what has been shown is that internet access, not shutdowns, guarantees public order through unfettered access to information online.[11]

## 2.2 Unlawful interception of communication

Unlawful interception of communication is rife in African countries.[12] This kind of interception may be defined as the unauthorised access to communication or data.[13] A report by Citizen Lab, a university-based research organisation that works on information technologies, human rights and global security, reveals that African states such as Nigeria, Zambia, Equatorial Guinea, Kenya and Zimbabwe are heavily invested in the purchase, deployment and misuse of surveillance tools that facilitate these interceptions.[14] While African states may require the aid of surveillance technologies to fight

6 C Heyns and others 'The right to political participation in sub-Saharan Africa' (2019) 8 *Global Journal of Comparative Law* 128, 149-154, 155-159; T Ilori & M Killander 'Internet shutdowns in Africa threaten democracy and development' *The Conversation* 26 July 2020, http://theconversation.com/internet-shutdowns-in-africa-threaten-democracy-and-development-142868 (accessed 16 June 2022).

7 S Woodhams & M Migliano 'The global cost of internet shutdowns 2021 report' (2022), https://www.top10vpn.com/research/cost-of-internet-shutdowns/2021/ (accessed 16 June 2022).

8 T Ilori 'Life interrupted: Centring the social impacts of network disruptions in advocacy in Africa' GNI (2021), https://globalnetworkinitiative.org/wp-content/uploads/2021/03/Life-Interrupted-Report.pdf (accessed 16 June 2022).

9 As above.

10 J Rydzak, M Karanja & N Opiyo 'Dissent does not die in darkness: Networked shutdowns and collective actions in African countries' (2020) 14 *International Journal of Communication* 4266, 4280.

11 E Lirri 'How weaponisation of network disruptions during elections threaten democracy' *CIPESA* 16 November 2021, https://cipesa.org/2021/11/how-weaponization-of-network-disruptions-during-elections-threatens-democracy/ (accessed 16 June 2022).

12 T Roberts and others *Surveillance law in Africa: A review of six countries* Institute of Development Studies (2021), https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/16893/Roberts_Surveillance_Law_in_Africa.pdf?sequence=1&isAllowed=y (accessed 16 June 2022).

13 T Ilori 'Framing a human rights approach to communication surveillance laws through the African human rights system in Nigeria, South Africa and Uganda' (2021) 5 *African Human Rights Yearbook* 140.

14 B Marczak and others 'Running in circles: Uncovering the clients of cyberespionage firm circles' Citizen Lab Research Report 133 (2020), https://tspace.library.utoronto.ca/bitstream/1807/106212/1/Report%23133--runningincircles.pdf (accessed 16 June 2022).

crime, state actors are unable to justify their arbitrary use of these technologies. Currently, only a few African countries have primary and substantive communication surveillance laws, and those that do, including Uganda, Zimbabwe and South Africa, do not comply with international human rights standards.[15] This lack of compliance is characterised by inadequate provisions of legal principles on lawful interception and oversight mechanisms to ensure transparency, due diligence and accountability.[16] In addition to these, many African countries do not provide for the establishment and maintenance of 'independent, effective, adequately resourced and impartial administrative and/or parliamentary domestic oversight mechanisms capable of ensuring transparency, as appropriate, and accountability for state surveillance of communication, their interception and collection of personal data'.[17]

Most of the laws that provide for lawful interception or communication surveillance may be found in dedicated and single-purpose laws and others that focus on public interest themes, such as cybercrimes, terrorism, national security, mutual assistance, and so forth.

### 2.3 Social media bans

International human rights law is clear on the impropriety of social media bans.[18] Social media bans should not be confused with social media regulation or social media platform governance. Social media bans are an extreme and disproportionate form of content regulation, while social media regulation refers to the use of legal or extra-legal actions to determine the type of content that stays on a platform.[19] Social media platform governance is also different from social media bans in that it refers to the actors involved in the regulation of platform content.[20]

15 Ilori (n 13) 134.
16 As above.
17 United Nations General Assembly The right to privacy in the digital age A/RES/69/199 (10 February 2015) para 4(d), https://undocs.org/en/A/RES/69/166 (accessed 16 June 2022).
18 United Nations General Assembly The role of digital access providers A/HRC/35/22 (30 March 2017) paras 9, 77, https://undocs.org/en/A/HRC/35/22 (accessed 16 June 2022); B Sander 'Democratic disruption in the age of social media: Between marketized and structural conceptions of human rights law' (2021) 32 *European Journal of International Law* 159, 168.
19 GNI 'Content regulation and human rights: Analysis and recommendations' (2020), https://globalnetworkinitiative.org/wp-content/uploads/2020/10/GNI-Content-Regulation-HR-Policy-Brief.pdf (accessed 16 June 2022).
20 T Flew 'Social media governance' (2015) 1 *Social Media and Society* 1.

African governments have found social media bans fashionable. Oftentimes, the excuse given by governments is that social media platforms foment disorder during a political or public event.[21] However, it has been noted that governments have not been able to demonstrate the direct connection between access to these platforms and public disorder.[22] Since African governments began to restrict social media platforms, there has not been any meaningful human rights assessment done by states or the private sector on the impacts of these bans. A chronic feature of these bans is that internet service providers (ISPs) roll over without any hesitation when they are asked by the government to block access to online content.[23] The kind of future this portends for the general digital rights landscape in Africa is that it would become normal for governments to ban social media platforms at every turn, and the state would gradually become the sole determinant of what media is and what part of it is free. One obvious impact of this will be over-censorship and state-designed information controls.[24] More than 16 African countries have specifically blocked social media platforms in Africa, including Uganda, Nigeria, Tanzania, the Democratic Republic of the Congo (DRC), Morocco, Egypt, and others.[25] These platforms include sites such as Facebook, Twitter, Instagram and communication applications such as WhatsApp, Skype and Viber.

### 2.4 Expensive internet access

The cost of accessing the internet is beyond the reach of many Africans.[26] Internet access in African countries is expensive, which poses challenges to the enjoyment of human rights such as the rights to freedom of expression, access to information, participate in government, work, sexual and reproductive health information, and many more.[27] This costly access is due to various reasons that

21 United Nations Human Rights Council Internet shutdowns: Trends, causes, legal implications and impacts on a range of human rights A/HRC/50/55 (13 May 2022) para 31, https://undocs.org/en/A/HRC/50/55 (accessed 23 July 2022).
22 Gregorio & Stremlau (n 3) 4228.
23 Rydzak and others (n 10) 4271.
24 Rydzak and others (n 10) 4270.
25 C Mureithi 'These are African countries that have restricted social media access' *QUARTZ* 9 August 2021, https://qz.com/africa/2044586/african-countries-that-have-restricted-social-media-access (accessed 7 October 2023).
26 Web Foundation 'Mobile data costs fall but as demand for internet services surges, progress remains too slow' *Web Foundation* 4 March 2021, https://webfoundation.org/2021/03/mobile-data-costs-fall-but-as-demand-for-internet-services-surges-progress-remains-too-slow/ (accessed 16 June 2022).
27 DM Nyokabi and others 'The right to development and internet shutdowns: Assessing the role of information and communications technology in democratic development in Africa' (2019) 3 *Global Campus of Human Rights Journal* 147.

include inadequate investment in broadband infrastructure;[28] internet tariffs and taxation;[29] the availability of and access to a reliable power supply;[30] digital divides;[31] low smartphone adoption;[32] and many more. Some of the countries with expensive internet access include Benin, Burkina Faso, Ethiopia, Malawi, Mali, and others. In addition to this, African governments have been noted to underutilise the Universal Service Access Funds (USAFs).[33] USAFs are unique government agencies whose main function is to provide information and communications technology (ICT) access for underserved communities. ICT tools here may refer to various aspects of information and communication technologies, such as computers, mobile smart phones, fast, affordable, safe and reliable internet access, accessible and free basic digital education. While maximising the USAFs is one out of many ways to bring Africa's offline population online, it is one of the most available opportunities to ensure affordable internet access in African countries. Some other ways of ensuring more affordable internet access is by reducing the cost of last-mile connections;[34] removing bureaucratic and cumbersome regulatory and licensing requirements for investors in the telecom sector;[35] maximising public-private partnerships (PPPs)

28 T Corrigan 'Africa's ICT infrastructure: Its present and prospects' South African Institute of International Affairs (2020), https://media.africaportal.org/documents/Policy-Briefing-197-corrigan.pdf (accessed 16 June 2022).

29 S Ahmed & A Gillwald 'Multifaceted challenges of digital taxation in Africa' Research ICT Africa (2020), https://researchictafrica.net/wp/wp-content/uploads/2021/05/Revised-Final-Tax-PB-Nov-2020-SA-AG.pdf (accessed 16 June 2022).

30 CIPESA 'Towards an accessible and affordable internet in Africa: Key challenges ahead' (2021), https://cipesa.org/?wpfb_dl=482 (accessed 16 June 2022).

31 Alliance for Affordable Internet 'Rural broadband policy framework: Connecting the unconnected' (2020), https://a4ai.org/wp-content/uploads/2020/02/Rural-Broadband-Policy-Framework-Report-web-ready.pdf (accessed 16 June 2022); A Johnson 'Human rights and the gender digital divide in Africa's COVID-19 era' *GC Human Rights Preparedness* 21 January 2021, https://gchumanrights.org/preparedness/article-on/human-rights-and-the-gender-digital-divide-in-africas-covid-19-era.html (accessed 16 June 2022).

32 A4AI 'From luxury to lifeline: Reducing the cost of mobile devices to reach universal internet access' *Alliance for Affordable Internet* 5 August 2020, https://a4ai.org/research/report/from-luxury-to-lifeline-reducing-the-cost-of-mobile-devices-to-reach-universal-internet-access/ (accessed 16 June 2022).

33 T Woodhouse 'Affordability report 2021: A new strategy for universal access' Alliance for Affordable Internet (2021), https://a4ai.org/wp-content/uploads/2021/12/A4AI_2021_AR_AW.pdf (accessed 16 June 2022).

34 USAID 'Barriers to investing in last mile connectivity' (2020), https://www.usaid.gov/sites/default/files/documents/15396/Barriers_to_Investing_in_Last-Mile_Connectivity.pdf (accessed 16 June 2022).

35 As above.

for broadband development;[36] gender mainstreaming;[37] building more community networks;[38] and many more.

## 2.5 Attacks on media freedom

In 2002 when the first Declaration was adopted, internet penetration was 1 per cent in Africa.[39] What this suggests with respect to media freedom is that internet was not accessible to many in Africa's media ecosystem before 2002 as it is now. Therefore, while the 2002 Declaration provided safeguards for traditional media such as print, broadcast, public, private and community media, it could not have provided guidance for new media such as social media platforms and internet-based information sources. Unfortunately, despite the safeguards provided for by the 2002 Declaration and now in the 2019 version, both traditional and new media are under attack.[40] These attacks include both legal and extra-legal tools used to harass, arrest and jail journalists, bloggers, government critics and human rights defenders by African governments such as Burkina Faso, Mali, Ethiopia, DRC, Cameroon, Somalia, Rwanda, Senegal, Burundi, Niger and Uganda.[41] There have been several incidents of state-sanctioned unlawful surveillance of media practitioners, state-ordered blockage of online news outlets, physical attacks on media offices and violence against media workers.[42]

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36 D Baxter & DA Dodd 'We need more progress on delivering digital broadband PPPs to underserved communities' *World Bank Blogs* 28 April 2021, https://blogs.worldbank.org/ppps/we-need-more-progress-delivering-digital-broadband-ppps-underserved-communities (accessed 16 June 2022).

37 NO Alozie & P Akpan-Obong 'The digital gender divide: Confronting obstacles to women's development in Africa' (2017) 35 *Development Policy Review* 137, https://onlinelibrary.wiley.com/doi/abs/10.1111/dpr.12204 (accessed 16 June 2022).

38 LT Gwaka and others 'Towards low-cost community networks in rural communities: The impact of context using the case study of Beitbridge, Zimbabwe' (2018) 84 *Electronic Journal of Information Systems in Developing Countries* e12029, https://onlinelibrary.wiley.com/doi/abs/10.1002/isd2.12029 (accessed 16 June 2022).

39 World Bank 'Individuals using the internet (% of population) – Sub-Saharan Africa', https://data.worldbank.org/indicator/IT.NET.USER.ZS?locations=ZG (accessed 16 June 2022).

40 J Conroy-Krutz 'The squeeze on African media freedom' (2020) 31 *Journal of Democracy* 96, https://muse.jhu.edu/article/753197 (accessed 16 June 2022).

41 CIPESA 'The state of media freedom and safety of journalists in Africa' (2022), https://cipesa.org/wp-content/files/The_State_of_Media_Freedom_and_Safety_of_Journalists_in_Africa_Report.pdf (accessed 12 October 2023); Reporters Without Borders 'Africa: The new disinformation and propaganda laboratory' (2023), https://rsf.org/en/classement/2023/africa (accessed 18 October 2023).

42 A Munoriyarwa & SH Chiumbu 'Big brother is watching: Surveillance regulation and its effects on journalistic practices in Zimbabwe' (2019) 40 *African Journalism Studies* 26, https://doi.org/10.1080/23743670.2020.1729831 (accessed 16 June 2022).

## 2.6 Inadequate protection for personal data

While many African countries are slowly embracing data protection laws, there have been various challenges with the implementation of these laws to meet the challenge of increasing misuse of personal data.[43] These challenges manifest in different ways. For example, while there are strong regulatory frameworks in some African countries with respect to data protection authorities (DPAs), these frameworks are not met with equally strong implementation.[44] In addition to these, data breaches continue to occur as a result of weak implementation mechanisms.[45] Another example with respect to implementation is that while some countries do not have DPAs, countries that do, do not have them fully functional. Some of the reasons for this include under-funding and lack of capacity.[46] In addition, in order for data protection laws to be properly implemented, DPAs should be independent and dedicated.[47]

## 2.7 Problematic laws on online harms

Various laws seek to regulate speech-related online harms. These online harms, which include misinformation, disinformation, malinformation, cyberbullying, online violence against women, online violence against children, online hate speech and others, have been sought to be regulated by African governments.[48] However, most of the provisions that seek to regulate these harms often are overbroad and not in compliance with international human rights

43 Thirty-three African countries have data protection legislation. African Declaration on Internet Rights and Freedoms Coalition 'Privacy and personal data protection in Africa: A rights-based survey of legislation in eight countries' Association for Progressive Communications (2021), https://www.apc.org/sites/default/files/PrivacyDataProtectionAfrica_CountryReports.pdf (accessed 16 June 2022); United Nations Conference on Trade and Development 'Data protection and privacy legislation worldwide', https://unctad.org/page/data-protection-and-privacy-legislation-worldwide (accessed 16 June 2022).

44 As above.

45 N Kshetri 'Cybercrime and cybersecurity in Africa' (2019) 22 *Journal of Global Information Technology Management* 77, 79, https://doi.org/10.1080/1097198X.2019.1603527 (accessed 16 June 2022).

46 T Ilori 'Data protection in Africa and the COVID-19 pandemic: Old problems, new challenges and multistakeholder solutions' African Declaration on Internet Rights and Freedoms (2020), https://africaninternetrights.org/sites/default/files/Tomiwa%20Ilori_AfDec_Data%20protection%20in%20Africa%20and%20the%20COVID-19%20pandemic_Final%20paper.pdf (accessed 16 June 2022); J Bryant 'Africa in the information age: Challenges, opportunities, and strategies for data protection and digital rights' (2021) 24 *Stanford Technology Law Review* 389, 438.

47 Art 11 African Union Convention on Cyber Security and Personal Data Protection; LA Abdulrauf 'The legal protection of data privacy in Nigeria: Lessons from Canada and South Africa' PhD thesis, University of Pretoria, 2015 373.

48 Ilori (n 1).

standards.[49] These provisions have their roots in colonial criminal and penal codes that provide for human rights-averse offences such as sedition, false news, insult and criminal defamation.[50] These are what governments rely upon when seeking to regulate online harms and, unfortunately, social media platforms also defer to these problematic laws.

For example, in Nigeria, several attempts to regulate online harms on social media platforms may be described as abuse of power by state actors.[51] Interestingly, these attempts at online regulation of content were justified by these problematic laws.[52] Between 5 June 2021 and 12 January 2022 the Nigerian federal government placed a ban on Twitter for threatening Nigeria's corporate existence, a claim that was neither substantiated by facts nor backed by any law.[53] The ban was effected by internet intermediaries based on the Nigerian federal government's order to block the micro-blogging website. This excessive abuse of power may also be found in Uganda where the government banned the Facebook platform as it suspended its official accounts for spreading online harm.[54] Ethiopia's Hate Speech and Disinformation Prevention and Suppression Proclamation 1185/202 has also been criticised as having broad provisions capable of arbitrary use.[55]

49 As above.

50 T Ilori 'Stemming digital colonialism through reform of cybercrime laws in Africa' Yale Law School Information Society Project 19 June 2020, https://law.yale.edu/isp/initiatives/wikimedia-initiative-intermediaries-and-information/wiii-blog/stemming-digital-colonialism-through-reform-cybercrime-laws-africa (accessed 16 June 2022).

51 S Olaniyi 'Senate throws out frivolous petitions bill' *The Guardian* 18 May 2016, https://guardian.ng/news/senate-throws-out-frivolous-petitions-bill/ (accessed 16 June 2022); T Ilori 'A socio-legal analysis of Nigeria's Protection from Internet Falsehoods, Manipulations and Other Related Matters Bill' *AfricLaw* 5 December 2019, https://africlaw.com/2019/12/05/a-socio-legal-analysis-of-nigerias-protection-from-internet-falsehoods-manipulations-and-other-related-matters-bill/ (accessed 16 June 2022).

52 T Ilori 'In Nigeria, the government weaponises the law against online expression' *Global Voices* 17 December 2021, https://globalvoices.org/2021/12/17/in-nigeria-the-government-weaponises-the-law-against-online-expression/ (accessed 16 June 2022).

53 A Akintayo 'Nigeria's decision to ban Twitter has no legal basis. Here's why' *The Conversation* 24 June 2021, http://theconversation.com/nigerias-decision-to-ban-twitter-has-no-legal-basis-heres-why-163023 (accessed 16 June 2022).

54 S Kafeero 'Facebook has taken down hundreds of political accounts in Uganda ahead of a tense election' *Quartz* 11 January 2021, https://qz.com/africa/1955331/facebook-takes-down-pro-museveni-accounts-as-election-nears/ (accessed 16 June 2022).

55 A Degol & B Mulugeta 'Freedom of expression and hate speech in Ethiopia: Observations (Amharic)' (2021) 15 *Mizan Law Review* 195, https://www.ajol.info/index.php/mlr/article/view/215352 (accessed 16 June 2022).

## 3 The need for a soft international human rights instrument for digital rights in Africa

Laws are made to adapt to contexts and needs while they are also tasked with earning their legitimacy.[56] Oftentimes, the type of law adapted by state and non-state actors depends on contexts and needs. Whether hard or soft law, actors often consider the kind of law that best serves their interests.[57] For example, where there is a need to address an urgent issue requiring strict and specific compliance under international law, states may agree to develop a binding instrument.[58] What this primarily means is that state actors must accede to such instrument and ensure its implementation in their various contexts. Examples of such instruments include binding treaties.

In some instances, soft law instruments are *opinio juris*, that is, they are adopted as a legal obligation to interpret a treaty and require a certain degree of compliance.[59] Soft laws are categorised differently. Primary soft law refers to 'normative texts, not adopted in treaty form, addressed to the international community as a whole or to the entire membership of the adopting institution or organisation'.[60] The major features of primary soft law are that it sets forth new standards, reaffirms previous stndards and further elaborates on previously-accepted vague or general standards.[61] Examples of primary soft law include declarations, model laws and guidelines. Oftentimes, primary soft laws are easily adaptable to contexts – flexible in application but with clear principles as guardrails.

Secondary soft law refers to recommendations and General Comments of international human rights supervisory organs.[62] These supervisory organs include the African Commission. Examples

56 KW Abott & D Snidal 'Hard and soft law in international governance' (2000) 54 *Legalisation and World Politics* 441-444; AE Boyle 'Some reflections on the relationship of treaties and soft law' (1999) 48 *International and Comparative Law Quarterly* 901, 913.

57 D Bradlow & D Hunter 'Introduction: Exploring the relationship between hard and soft international law and social change' in D Bradlow & D Hunter (eds) *Advocating social change through international law* (2019) 2.

58 A Mudukuti 'The International Criminal Court and the use of hard law in the quest for accountability for core international crimes' in Bradlow & Hunter (n 57) 85.

59 Compare T Gruchalla-Wesierski 'A framework for understanding "soft law"' (1984) 30 *McGill Law Journal* 37 with the African Commission's obligation under art 45(1)(b) of the African Charter to formulate and lay down rules to solve human rights problems.

60 D Shelton 'Compliance with international human rights soft law' (1997) 29 *Studies in Transnational Policy* 120.

61 As above.

62 Shelton (n 60) 122.

of secondary soft law include General Comments or interpretative declarations and specific recommendations. Usually, secondary soft laws are used to shed more light on a particular right or issue of concern, and they often take a definitive stand with respect to how state and, in some cases, non-state actors must protect such right or address a particular concern.

Soft laws have also been categorised based on who makes them. These include state-generated soft law (by national governments); non-state generated soft law (by organisations other than the government); and quasi-state-generated soft law (by state-created treaty-making bodies). These categories may be used to 'advance more substantively legitimate outcomes' and 'democratise and humanise international law'.[63] For example, the revised Declaration is a primary and quasi-state-generated soft law qualifying it as a 'higher' form of soft law because it sets forth new standards by state-created treaty-making bodies for states, which could further strengthen its legitimacy.

Just as the name suggests, the 'softness' of the law is characterised by benefits and risks. Some of the benefits include 'simplified negotiation, agreement facilitation and quick process; flexibility and adaptability; multi-stakeholder collaboration', while some of the risks include 'unaccountable actors and lack of legitimacy; interference or conflict with existing laws; lack of representation and weak legal enforcement mechanisms'.[64]

In 2019 the African Commission adopted a revised set of principles in order to guide African governments with respect to protecting the right to freedom of expression and access to information in the digital age.[65] These principles were revised based on the 2002 version of the Declaration of Principles on Freedom of Expression.[66] Seventeen years later, and given new technological developments, the revised Principles adopted in 2019 provided directions for African governments not only on how to protect the right to freedom of

63 B Kabumba 'Soft law and legitimacy in the African Union: The case of the Pretoria Principles on Ending Mass Atrocities Pursuant to Article 4(h) of the AU Constitutive Act' in O Shyllon (ed) *The Model Law on Access of Information for Africa and other regional instruments: Soft law and human rights in Africa* (2018) 167, 189.

64 M Naicker 'The use of soft law in the international legal system in the context of global governance' LLM dissertation, University of Pretoria, 2013.

65 African Commission 'Declaration of Principles on Freedom of Expression and Access to Information in Africa 2019' (2019), https://www.achpr.org/legalinstruments/detail?id=69 (accessed 16 June 2022).

66 African Commission 'Declaration of Principles on Freedom of Expression in Africa 2002' (2002), https://www.achpr.org/presspublic/publication?id=3 (accessed 16 June 2022).

expression and access to information, but also on how to protect aspects of the right to privacy with respect to the surveillance and protection of personal information.

These rights may be described as digital rights that are freedoms enjoyed through digital technologies.[67] Some of these freedoms include the right to opinion, expression, privacy, association and assembly, property, work, education, and many others. Digital rights can also be understood based on the need to protect human rights from violations.[68] This article adopts the term 'digital rights' because other than digital freedoms, most terms used to describe digital rights suggest that they are freedoms that only occur online through the internet. Digital rights accommodate a broader scope of rights beyond those enjoyed through the internet because the term 'digital' is not limited to the internet but inclusive of it and other digital technologies.[69] In protecting digital rights, it is important to keep in mind that its scope changes to include multi-dimensional issues even if its meaning remains relatively the same. Digital rights can best be understood as a phenomenon capable of assuming broader meanings and scope due to the multi-dimensional impacts of dynamic technologies on human rights.[70] This is one of the reasons why it would be normatively expedient to use soft law instruments to advance digital rights – a flexible normative guide for dynamic technologies. In the context of this article, digital rights refer to the respect, protection and fulfilment of the rights to freedom of opinion, expression, access to information, privacy and other related rights. What is most important, when thinking of digital rights, is what would best protect and promote them in every possible circumstance.

Research into how African governments have protected these rights has shown that between 2009 to 2021, out of all the African countries assessed, only South Africa has remained 'free' in terms of how countries protect internet freedoms.[71] While this does not point

67 K Karppinen & O Puukko 'Four discourses of digital rights: Promises and problems of rights-based politics' (2020) 10 *Journal of Information Policy* 304, 309.

68 Karppinen & Puukko (n 67) 313.

69 Eg, software and hardware such as mobile phones and computers, as information and communication technology tools, are all capable of being used to protect or violate human rights. These tools also facilitate internet access but are different from the internet both in its technical and non-technical aspects.

70 Identifying the fluidity and the role of context in defining digital rights, Karppinen & Puukko argued that 'there is need to be aware of the assumptions, intentions, and effects of the different uses of digital rights'. See Karppinen & Puukko (n 67) 324.

71 'Freedom on the net' *Freedom House*, https://freedomhouse.org/report/freedom-net (accessed 16 June 2022). There was no report in 2010.

to the conclusion that all African countries do not protect digital rights, it suggests that based on assessed countries, digital rights protection in African countries is at risk. A prominent challenge in the reports and, as seen in many other African countries identified in other analyses, is that while African governments use extra-legal means to violate digital rights, they also pass laws that violate them.[72] This then raises the question of how to provide an elaborate normative foundation that protects digital rights.

The revised Declaration is premised on the African Charter on Human and Peoples' Rights (African Charter).[73] The provisions of article 45(1)(b) of the African Charter allows the African Commission to 'formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights'. Given this background, it is apposite to note that the revised Declaration was adopted to solve legal problems and, in this context, legal problems that have to do with developments on the right to freedom of expression and access to information in the digital age.[74]

### 3.1 The revised Declaration and digital rights protection

Many normative developments on the right to freedom of expression and digital technologies have been carried through the United Nations (UN) human rights procedures and regional human rights systems. This includes decisions and General Comments by the Human Rights Committee and various activities of the UN Special Rapporteurs.[75] Within the African human rights system, these normative developments have been spearheaded by the Special Rapporteur on Freedom of Expression and Access to Information in Africa through various resolutions of the African Commission and the adoption of soft law instruments, including the revised Declaration.[76] The empowering provisions of article 45 of the African Charter

72 Check Global Network Initiative (GNI)'s newly-updated resource 'Country legal frameworks resource (CLFR)' GNI, https://clfr.globalnetworkinitiative.org/ (accessed 16 June 2022).

73 Art 45 African Charter on Human and Peoples' Rights; Preamble Declaration of Principles on Freedom of Expression and Access to Information in Africa.

74 African Commission '362 Resolution on the Right to Freedom of Information and Expression on the Internet in Africa' ACHPR/Res.362(LIX)2016 (2016), https://www.achpr.org/sessions/resolutions?id=374 (accessed 16 June 2022).

75 Special Rapporteur on Freedom of Expression and Opinion 'Comments on legislation and policy' *OHCHR*, https://www.ohchr.org/en/special-procedures/sr-freedom-of-opinion-and-expression/comments-legislation-and-policy (accessed 16 June 2022); UNHRC 'General Comment 34' UN Doc CCPR/C/GC/34 (2011), https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf; (accessed 16 June 2022).

76 African Commission 'Model Law on Access to Information for Africa 2013', https://www.achpr.org/presspublic/publication?id=82 (accessed 16 June 2022); African Commission (n 74); African Commission 'Guidelines on Access to

and the complementary provisions of article 60 of the African Charter enables the African Commission to consider and develop applicable developments under the UN human rights system. All these developments, therefore, have been useful in that they fill a normative gap that would otherwise be created due to the dynamic impacts of digital technologies on human rights. However, most of these developments are fragmented across UN and African Union (AU) human rights documents.

Given the challenging history of human rights protection in African countries, African states may argue that international human rights standards are too distant for application to digital technologies in their local contexts. However, this argument by states no longer is tenable because not only has the African human rights system provided guidance and contextualisation of various human rights issues through norm-setting and application, but the African human rights system also is a global leader in what Okafor and Dzah describe as 'innovative, and even radical, production and clarification of aspects of the normative life of human and peoples' rights'. [77] The revised Declaration pointedly tackles this argument, especially as it concerns fragmented human rights standards by providing clear principles that African governments can apply to their contexts to protect the digital rights, especially as it concerns the rights to freedom of expression and access to information in Africa.[78] The revised Declaration therefore is one of such clarified aspects of normative life referred to by Okafor and Dzah – it is a uniquely designed soft law instrument that provides for elaborate normative foundation for digital rights protection not only in Africa, but across the world.

The process for the revised Declaration was kick-started at the African Commission in June 2016.[79] One of the major objectives of the revision was to take account of developments in the areas of freedom of expression and access to information since the previous Declaration was adopted. These objectives were to be carried out by the Special Rapporteur on Freedom of Expression and Access to Information in Africa. Building on the objectives of previous resolutions, Resolution 362 specifically requested that the Special

Information and Elections in Africa 2017', https://www.achpr.org/presspublic/publication?id=4 (accessed 16 June 2022).

77 OC Okafor & GEK Dzah 'The African human rights system as "norm leader": Three case studies' (2021) 21 *African Human Rights Law Journal* 669, 697.

78 Preamble (73).

79 African Commission '350 Resolution to Revise the Declaration of Principles on Freedom of Expression in Africa' ACHPR/Res.350(EXT.OS/XX)2016 (2016), https://www.achpr.org/sessions/resolutions?id=301 (accessed 16 June 2022).

Rapporteur should take note of developments in the digital age in revising the Declaration. It urged state and non-state actors to collaborate with the Special Rapporteur on the issues of internet rights during the revision.[80]

In her Activity Report at the 61st ordinary session of the African Commission in 2017, the Special Rapporteur on Freedom of Expression and Access to Information in Africa, Advocate Pansy Tlakula, made a recommendation that the provision to expand the Declaration should continue.[81] She initiated the process of revising the Declaration but it was further taken on fully by her successor, Commissioner Lawrence Mute. Through his mandate as the Special Rapporteur on Freedom of Expression and Access to Information in Africa, Commissioner Mute was able to hold strategic activities such as workshops, meetings and consultations with respect to the planning, drafting and publication of the revised Declaration. These activities were kick-started by a discussion event in Nairobi in February 2018,[82] followed by technical meetings in Nouakchott in April 2018,[83] Mombasa, Kenya in October 2018 and March 2019 respectively[84] and in Pretoria, South Africa in October 2019.[85] The technical drafting team was made up of 15 individuals with various expertise. Public consultation on the draft revisions was launched at the 64th ordinary session of the African Commission and took place between May and June 2019. This call for consultations was not only made public but was sent to each state party to the African Charter to provide feedback.[86] After this process, validation workshops were held in Maputo, Mozambique in July 2019; Windhoek, Namibia in September 2019 and Banjul, The Gambia in October 2019. The revised Declaration was finally adopted at the 65th ordinary session

80 African Commission (n 74).

81 P Tlakula 'Inter-session activity report (May to November 2017)' (2017) presented during the 61st ordinary session of the African Commission on Human and Peoples' Rights, https://www.achpr.org/public/Document/file/English/comm_tlakula_cp_srfoe_61_act_report_eng.pdf (accessed 16 June 2022).

82 LM Mute 'Inter-session activity report (November 2017 to April 2018)' (2018) presented to the 62nd ordinary session of the African Commission on Human and Peoples' Rights, https://www.achpr.org/public/Document/file/English/comm_mute_62_act_report_feaia_eng.pdf (accessed 16 June 2022).

83 Mute (n 82) para m.

84 LM Mute 'Inter-session activity report (November 2018 to April 2019)' (2019) presented to the 64th ordinary session of the African Commission on Human and Peoples' Rights paras e, j, https://www.achpr.org/public/Document/file/English/Comm%20Mute_64_Act_Report_FEAI_ENG.pdf (accessed 16 June 2022).

85 LM Mute 'Inter-session activity report (May to October 2019)' (2019) presented to the 65th ordinary session of the African Commission on Human and Peoples' Rights paras c & f, https://www.achpr.org/public/Document/file/English/Com Mute%20_InterssionReport%2065OS_ENG.pdf (accessed 16 June 2022).

86 This could be an argument against the arguments of illegitimacy and representation highlighted above.

of the African Commission in November 2019.[87] This was followed by a press release by the Special Rapporteur in April 2020 and a webinar launch in May 2020.

This background highlights the various steps that led to the adoption of the revised Declaration. It also sets the tone for the revised Declaration as the new testament of the African Commission's commitment to the protection and promotion of human rights through norm setting in the digital age. Some of the major features of the revised Declaration and how it can be used to protect digital rights are further discussed below.

### *3.1.1 Substantive provisions for digital rights in the revised Declaration*

The revised Declaration is made up of various substantive provisions. In terms of structure, the revised Declaration may be divided into two broad sections. The first section introduces the revised Declaration and provides for its Preamble. The introduction linked the revised Declaration to the African Charter; historicised the revised Declaration, why it was necessary, and identified its general outline and objectives. The Preamble to the revised Declaration, like the introduction, also demonstrated that it is a product of international human rights standards and foregrounds its necessity in the digital age.

The second section is made up of five parts consisting of 43 principles. Part I provides for general principles on the right to freedom of expression and access to information with nine major principles. Part II focuses on the right to freedom of expression with 16 major principles. Part III focuses on the right of access to information with 11 major principles, while freedom of expression and access to information on the internet is covered under part IV with six major principles. Part V contains only just one major principle on implementing the revised Declaration. It is important to note that the revised Declaration cannot be divorced from the 2002 version because the latter laid a solid foundation for the former to build on. The strong relationship between both versions can be seen in a textual analysis that yields four categories of digital rights principles. These categories include deleted, new, surviving and revised principles.

87 LM Mute 'Inter-session activity report (October 2019 to June 2020)' (2020) presented to the 66th ordinary session of the African Commission on Human and Peoples' Rights, https://www.achpr.org/public/Document/file/English/ComMute%20_InterssionReport%2066OS_ENG.pdf (accessed 16 June 2022).

Deleted principles are principles of the 2002 Declaration that did not make it into the revised Declaration. It is important to also note that the revised Declaration only deleted a few principles, as shown in the table below. New principles are those that were introduced by the revised Declaration and were not in any way provided for in the 2002 version. Some of these include principles with a thematic focus on the importance of the rights to freedom of expression and access to information. Principle 1(1) defined the responsibilities of states in holding non-state actors responsible for violations of free expression and access to information in Africa.

Surviving principles refer to those principles that were contained in the 2002 version and were retained by the revised Declaration. Some of these include themes on guarantee of freedom of expression, private and public broadcasting, protecting reputations, and others. Revised principles refer to the principles that were provided for in the 2002 version but have been revised to accommodate developments in the digital age and other contemporary issues. All these principles are highlighted in the table below. Generally, the revised Declaration retained and revised most of the older principles from the 2002 version while it also added many new principles. In fact, only two principles from the old Declaration – interference with freedom of expression and freedom of information – were partly deleted.

***Table: A comparison of the 2002 and 2019 Declaration***

| **Deleted principles** | **New principles** | **Surviving principles** | | **Revised principles** | |
|---|---|---|---|---|---|
| **2002** | **2019** | **2002** | **2019** | **2002** | **2019** |
| Principle II(1) *(Interference with freedom of expression)* | Principle 1, 2, 4, 5, 6, 7, and 8) *(Importance of the rights to freedom of expression and access to information; Non-interference with freedom of expression; Most Favourable provision to prevail; Protection of the rights to freedom of expression* | Principle I(1) *(The guarantee of freedom of expression)* | Principle 10 *(Guarantee of freedom of expression)* | Principle I(2) *(The guarantee of freedom of expression)* | Principle 3 *(Non-discrimination)* |

| | | | | | |
|---|---|---|---|---|---|
| | *and access to information online; Protection of human rights defenders and others; Specific measures; and Evolving capacities of children)* | | | | |
| Principle IV (3) (*Freedom of information*) | Principles 11(1), (2) (3) (c), (d) & (e) *(Media diversity and pluralism)* | Principle V(2) *(Private broadcasting)* | Principle 14(3) & (4) *(Private media)* | Principle II(2) *(Interference with freedom of expression)* | Principle 9 *(Justifiable limitations)* |
| | Principle 12(1) *(Media independence)* | Principle VI *(Public broadcasting)* | 13(1), (3), (4), (5) & (6) *(Public service media)* | Principle III *(Diversity)* | Principles 11 (3)(a), (b) (f) & (g) *(Media diversity and pluralism)* |
| | Principle 13(2) *(Public service media)* | Principle XII *(Protecting reputations)* | Principle 21 *(Protecting reputations)* | Principle IV(2) *(Freedom of information)* | Principle 26(1), 29(1) *(Right of access to information, Proactive disclosure)* |
| | Principles 14(2), (4)(a), (b) & (c) *(Private media)* | Principle XIII(2) *(Criminal measures)* | Principle 22(5) *(Criminal measures)* | Principle V(1) *(Private broadcasting)* | Principle 14(1) *(Private media)* |
| | Principles 15 & 16 *(Community media and Self-regulation and co-regulation)* | | | Principle VII(1), (2) & (3) *(Regulatory bodies for broadcast and telecommunications)* | Principle 17(1), (2) & (3) *(Regulatory bodies for broadcast, telecommunications and the Internet)* |
| | Principles 17(4) & (5) *(Regulatory bodies for broadcast, telecommunications and the Internet)* | | | Principle VIII(1) & (4) *(Print media)* | Principle 12(2) & (3) *(Media independence)* |
| | Principle 20(1), (3), (5) & (6) *(Safety of journalists and other media practitioners)* | | | Principle IX *(Complaints)* | Principle 18 *(Complaints)* |

| | | | | | |
|---|---|---|---|---|---|
| | Principles 22(2), (3) & (4) *(Criminal measures)* | | | Principle X(1) *(Promoting professionalism)* | Principle 19(2) *(Protecting journalists and other media practitioners)* |
| | Principle 23 *(Prohibited speech)* | | | Principle X(2) *(Promoting professionalism)* | Principle 19(1) *(Protecting journalists and other media practitioners)* |
| | Principle 25(3) *(Protection of sources and other journalistic material)* | | | Principle XI(1), (2) & (3) *(Attacks on media practitioners)* | Principle 20(2), (4) & (7) *(Safety of journalists and other media practitioners)* |
| | Principle 26(2) *(Right of access to information)* | | | Principle XIII(1) *(Criminal measures)* | Principle 22(1) *(Criminal measures)* |
| | Principle 27-28 *(Primacy and Maximum disclosure)* | | | Principle XIV(1), (2) & (3) *(Economic measures)* | Principle 24(1), (2), (3) *(Economic measures)* |
| | Principles 30-42 *(Duty to create, keep, organise and maintain information; Procedure for accessing information; Appeals; Exemptions; Oversight mechanism; Protected disclosures in the public interest; Sanctions; Access to the Internet; Non-interference; Internet intermediaries; Privacy and the protection of personal information; Privacy and communication surveillance;* | | | Principle XV *(Protection of sources and other journalistic material)* | Principle 25(1) & (2) *(Protection of sources and other journalistic material)* |

| | | | | | |
|---|---|---|---|---|---|
| | *and Legal framework for the protection of personal information)* | | | | |
| | | | | Principle XVI *(Implementation)* | Principle 43 *(Implementation)* |

The added value of the revised Declaration as an improvement of the 2002 version is how it provides normative guidance for state and non-state actors on the challenges identified above. For example, principles 17, 37, 38, 39 and 43, which are new principles, address the human rights challenges posed by internet shutdowns, social media bans, problematic laws on online harms and expensive internet access discussed above by elaborating on how state and non-state actors must play their role in safeguarding human rights online.

In addition to this, the revised Declaration, through the provisions of principles 40 and 41, addresses the challenges of unlawful interception of communications, attacks on media freedom and inadequate protection of personal data. As a result, Principles 40 and 41 are the most comprehensive provisions by the African Commission on the right to privacy, communication surveillance and data protection in Africa. These additions are important for two reasons. One, the revised Declaration draws its legitimacy from the African Charter, but the African Charter does not provide for the right to privacy as in the case of other regional human rights instruments. Therefore, these principles address an important normative gap on the right to privacy in the African Charter. Two, these principles assert and demonstrate the symbiotic relationship between information rights such as the rights to privacy, freedom of expression and access to information, which may also be referred to as a subset of digital rights.

A closer look at how the revised Declaration was adopted does not only showcase its benefit as a soft law instrument, but it also addresses some of the risks associated with soft laws. For example, while the revised Declaration may not be referred to as a 'simplified negotiation', it was able to facilitate agreement and quicken the process for adopting the revised Declaration, which is a sorely-needed instrument for the protection of human rights online in Africa. While the language of the revised Declaration may also not be said to provide for flexibility, especially for states in its implementation, given the constant use of the word 'shall' and its mandatory language, it

is couched in such a way as to ensure adaptability by state and non-state actors.

The revised Declaration also addresses the risk of 'unaccountable actors, lack of legitimacy and lack of representation' in two ways. First, it identifies a broad set of actors through the various measures with which state parties must comply, for example, actors within the legislative, executive and judicial arms of government.[88] Second, the process that led to the adoption of the revised Declaration went through various iterations for approval from proximate stakeholders such as state parties, the private sector, civil society, academia, and others. This shows that the revised Declaration as a soft law facilitates multi-stakeholder collaboration. These actors will be involved in the implementation of the revised Declaration and, as a result, it cannot be said to lack accountable actors, legitimacy or representation.

Additionally, the Declaration addresses the risk of 'interference or conflict with existing laws' by drawing its authority from the African Charter with which state parties have obligations to comply, including through their domestic laws. Where a domestic law is in conflict with international human rights standards, the latter prevails and, as a result, the risk of interference does not arise or apply and the conflict is resolved.[89] The provisions of Principle 43(1) address the challenge of 'weak legal enforcement mechanisms' in that it does not only prescribe legislative measures as forms of enforcing the revised Declaration in national contexts, but adds other measures such as administrative, judicial and other measures as ways of enforcing the revised Declaration. These innovations point to some of the ways in which the revised Declaration benefits digital rights protection as a soft law instrument while also addressing the risks associated with it. The revised Declaration provides a useful template for setting digital rights norms in national contexts in Africa. The specific measures that can be taken to maximise this template are discussed below.

## 4 Ensuring the protection of digital rights in Africa by implementing the revised Declaration

There have been deliberate, traceable and ongoing commitments by the African Commission to develop the rights to freedom of expression and access to information in Africa. Some of these

88 Principle 43(1) of the revised Declaration.
89 Principle 4 of the revised Declaration; United Nations General Assembly Hate speech and incitement to hatred A/67/357 (30 March 2017) paras 51-55, http://undocs.org/en/ A/67/357 (accessed 16 June 2022).

commitments can be seen in the adoption of the first Declaration in 2002; the establishment of the mandate of the Special Rapporteur on the Right to Freedom of Expression in 2004;[90] the inclusion of access to information in the Special Rapporteur's mandate in 2007;[91] and the two Resolutions for the revision of the 2002 Declaration in 2012 and 2016.[92] What this iteration shows is that developing the right to freedom of expression in African countries through the African Commission is deliberate and traceable. However, there is a need for more commitments towards the revised Declaration. These commitments may be implemented in two ways.

First, the African Commission should commit to further develop the substantive principles in the revised Declaration in additional documents. These developments should include collaborative initiatives that seek to develop more branched-out and specific soft law instruments on digital rights issues based on the revised Declaration. This is particularly necessary because the 2002 Declaration laid the foundation for many other soft and hard laws. For example, the Model Law on Access to Information for Africa and the Guidelines on Access to Information and Elections by the African Commission are examples of soft law instruments that were developed from the 2002 Declaration. These instruments have been further adopted and applied to national contexts to improve access to information in African countries. In particular, the Model Law has increased the adoption of access to information and freedom of information laws in Africa since it was adopted.[93] This means that protecting digital rights through the revised Declaration is possible.

Second, the African Commission should ensure active implementation of the revised Declaration by state parties to the African Charter. What this would mean is to draw up an implementation plan on how to enforce the revised Declaration in the African context.[94] According to Mutua, international law standards

90 African Commission 'Special Rapporteur on Freedom of Expression and Access to Information', https://www.achpr.org/specialmechanisms/detail?id=2 (accessed 16 June 2022).

91 African Commission '122 Resolution on the Expansion of the Mandate and Re-Appointment of the Special Rapporteur on Freedom of Expression and Access to Information in Africa' ACHPR/Res.122(XXXXII)07 (2017), https://www.achpr.org/sessions/resolutions?id=174 (accessed 16 June 2022).

92 African Commission (n 79).

93 F Adeleke 'The impact of the model law on access to information in Africa' in Shyllon (n 63) 14.

94 In 2006, Article 19, a civil society organisation, developed a checklist for implementing the 2002 Declaration. See Article 19 'Implementing freedom of expression: A checklist for the implementation of the Declaration of Principles on Freedom of Expression in Africa' (2006), https://www.article19.org/data/files/pdfs/tools/africa-foe-checklist.pdf (accessed 16 June 2022); Heyns and others (n 23) 161. Focusing on the right to political participation, Heyns and

'must have a clear path for their implementation and enforcement'.[95] One of the main objectives of the plan would be to mainstream the various provisions of the revised Declaration, including Principle 43, which could actively implement the revised Declaration in national contexts. The plan may focus on pilot countries and ensure that specific legislative, judicial, administrative and other measures, such as public awareness and education, capacity building and targeted advocacy and campaigns, are carried out in African national contexts. Some of these specific measures are discussed below.

### 4.1 Legislative measures

Legislative measures in the context of digital rights protection refers to the mainstreaming of the revised Declaration into national contexts. This could be done through law and policy reforms targeted solely at digital rights protection. Therefore, the normative guidance of the revised Declaration does not stop at the regional level. It can safely be assumed that one of the most important reasons why the revised Declaration was adopted was to ensure that digital rights laws in African national contexts comply with international human rights standards on issues such as online and offline expression, access to information, privacy and protection of personal information, content governance and regulation, internet shutdowns, and many others. One of the major objectives of these legislative measures would be to repeal and amend existing problematic laws and enact new laws that protect digital rights.

For example, various illegitimate, disproportionate and unnecessary provisions often found in colonial criminal and penal laws should be repealed. Criminal offences such as sedition, insult, false news, criminal defamation and libel must be repealed. In addition to this, various problematic provisions on offensive communications, cyberstalking, cyberbullying, cyberharassment in existing laws must be amended and brought in line with international human rights standards.[96] Telecommunication regulation laws and existing

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others argued that the African Union must take concrete steps to encourage members to establish a mechanism and the legal framework for monitoring state implementation of its laws.

95 M Mutua 'Standard setting in human rights: Critique and prognosis' (2007) *29 Human Rights Quarterly* 547, 620.

96 Eg, the International Centre for Non-for-Profit Law (ICNL) identified at least six possible legal responses to disinformation. These responses include the requirement of social media platforms to uphold their community standards and do so without arbitrariness and subjectivity; the establishment of an independent agency to ensure that businesses comply with rights-respecting laws; administrative tribunals to hear claims; complaint and review mechanisms; education; transparency requirements; and limiting disinformation from

communication surveillance laws in African countries must also be amended and brought in line with international human rights standards. This is particularly necessary in light of the way in which African governments weaponise public interest provisions in these laws to disproportionately limit human rights. In terms of possible new laws, countries need to enact a *sui generis* data protection law and rights-respecting and primary content regulation and communication surveillance laws.[97] States can also adopt national community network plans to use community networks to buffer cheaper and quality internet access, especially in underserved areas through the USAFs. Given the dynamism of digital rights, it is pertinent that actors, including governments, businesses and civil society, start considering the need to enact new laws that could help provide specific normative guidance. For example, given the constant and needless bans on social media platforms, actors need to begin conversations on how to address online harms while also protecting online expression in African countries. All these issues should be the main focus of the legislative measures to be provided for in the implementation plan.

### 4.2 Judicial measures

In a report published by Media Legal Defence Initiative (MLDI), it was found that digital rights litigation is growing in African countries.[98] Analyses of court cases across the region between 1994 to 2021 illustrate that these cases are mostly public interest litigation adjudicated by national and regional judicial systems. The cases deal with digital rights issues such as restricting access and content, internet shutdowns, cybercrimes, media regulation, data protection, defamation, and others. In strengthening judicial capacity to effectively adjudicate digital rights issues in African countries, the implementation plan can focus on a more targeted capacity building, not only for judicial officers but other actors within the justice sector.

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messaging apps. These efforts, which must be geared towards the protection of human rights and digital trust and safety, can be set forth in a national soft law instrument such as a social media charter. ICNL 'Legal responses to disinformation', https://www.icnl.org/wp-content/uploads/2021.03-Disinformation-Policy-Prospectus-final.pdf (accessed 16 June 2022).

97 Principle 17(1) of the revised Declaration on regulatory bodies for telecommunication services requires states to ensure that such services are 'independent and adequately protected against interference of a political, commercial or other nature'. In an African context, internet shutdowns, social media bans and unlawful interception of communications can reasonably fall under interferences of 'other nature' envisaged by the Declaration.

98 Media Defence 'Mapping digital rights and online freedom of expression litigation in East, West and Southern Africa' (2021), https://www.mediadefence.org/resource-hub/resources/mapping-digital-rights-and-online-freedom-of-expression-litigation-in-east-west-and-southern-africa/ (accessed 18 June 2022).

For example, it would be important to have digital rights workshops convened by experts on various aspects of digital rights for judicial officers. In addition, such workshops would also be necessary for law enforcement agencies, state security departments, journalists and other stakeholders.

In addition to these, there is a need for more concerted efforts by various judicial institutions to team up with other strategic stakeholders on various capacity-building initiatives that could improve the judiciary's ability to adjudicate on digital rights issues.[99] For example, as provided, there usually is a designated judicial officer solely responsible for considering communication surveillance requests in existing laws.[100] A region-wide training that targets these officers could yield useful reforms within national court systems.[101] Including judicial measures such as these in the implementation plan could improve the jurisprudential landscape on digital rights protection in African countries. In addition to these, the African Commission should ensure that it publishes the official records of negotiations that led to the eventual adoption of the revised Declaration. This will assist both state and non-state actors to understand the thinking behind various principles.

### 4.3 Administrative measures

It is important that administrative measures to be adopted for the implementation of the revised Declaration are not cumbersome. According to Bagley, in administering measures, to which he refers as procedures in administrative systems, such measures should be

99 The African Commission adopted the Dakar Declaration and Resolution (Declaration and Resolution) on the right to fair trial and legal assistance in Africa through Resolution 41. The Declaration and Resolution point to the interrelatedness of rights, especially with how the right to fair trial and legal assistance is necessary to protect and implement digital rights in national contexts. See African Commission '41 Resolution on the Right to Fair Trial and Legal Aid in Africa' ACHPR/Res.41(XXVI)99, https://www.achpr.org/sessions/resolutions?id=46 (accessed 18 June 2022). The Dakar Declaration made various recommendations to the African Commission, state parties to the African Charter, judicial officers, bar associations, non-governmental organisations and community-based organisations. See 'Resolution on the Right to a Fair Trial and Legal Assistance in Africa – The Dakar Declaration and Resolution' *Criminal Defence Wiki*, http://defensewiki.ibj.org/index.php/Resolution_on_the_Right_to_a_Fair_Trial_and_Legal_Assistance_in_Africa_-_The_Dakar_Declaration_and_Resolution (accessed 18 June 2022).

100 JA Mavedzenge 'The right to privacy v national security in Africa: Towards a legislative framework which guarantees proportionality in communication surveillance' (2020) 12 *African Journal of Legal Studies* 378.

101 'Report of the Special Rapporteur on the Right to Privacy' UN Doc A/HRC/34/60 para 28, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/260/54/PDF/G1726054.pdf?OpenElement (accessed 18 June 2022).

made to achieve more by doing less.[102] One of the reasons for this, especially as it concerns this article, is to ensure that administrative measures do actually achieve digital rights protection and do not bug such protection down. Where new administrative measures are to be introduced for the implementation of the revised Declaration, they must be carefully chosen and serve a specific purpose towards the enforcement of the revised Declaration in national contexts. Such choice and specific purpose would ensure that the implementation plan is realisable and achievable.

For example, one of the ways such administrative measures can be achieved is by provisioning a dedicated desk at each national human rights institution (NHRI) across African countries. The main responsibility of such a desk would be to ensure that the various objectives of the revised Declaration, as indicated in the implementation plan, are realised. In order to ensure that such desks run smoothly, NHRIs should commit to an ethical funding system that protects the integrity and purpose of digital rights protection and also expand their scope of grant making to include philanthropy organisations and the private sector. This desk would also assist states to comply with the provisions of Principle 43(4) of the revised Declaration that requires states to submit periodic reports based on their obligations under article 62 of the African Charter on how they have complied with the revised Declaration.

### 4.4 Other measures

Principle 43(1) of the revised Declaration requires states to adopt other measures to give effect to the Declaration and facilitate its dissemination. While these other measures are not defined like the previous measures, 'other measures' as used in the revised Declaration could be used to design creative measures that could help protect digital rights in national contexts in Africa. This, therefore, suggests that the revised Declaration has again played to one of the strengths of soft law that allows for flexibility that could best protect digital rights. For example, one such other measure could ensure that an implementation plan includes a national plan designed by states on how they intend to mainstream the various principles of the revised Declaration.

Other measures could ensure that an implementation plan includes a national plan designed by states on how they intend to

102 N Bagley 'The procedure fetish' (2019) 118 *Michigan Law Review* 345, 401, https://repository.law.umich.edu/mlr/vol118/iss3/2 (accessed 18 June 2022).

mainstream the various principles of the revised Declaration. These other measures could include drawing up human rights impact assessment principles or national artificial intelligence plans in the region. There also is a need for more multi-disciplinary research on various aspects of the Declaration that could be used to improve the revised Declaration. So far, these other measures are an open-ended option for African countries to carry out legal, legitimate, necessary and proportionate measures that are not immediately provided for in the revised Declaration due to the dynamic nature of digital technologies and how they impact human rights.

In addition to these, there currently is no publicly-available information on how the African Commission intends to create region-wide awareness on the revised Declaration. In the past, such region-wide awareness has been through an implementation plan that was used to ramp up awareness about a soft law instrument in the form of a model law. For example, the purpose of the implementation plan for the Model Law on Access to Information for Africa was to increase awareness about the Model Law and the importance of access to information in six African countries as pilot countries.[103] When the Model Law was adopted in 2013, there were only four countries with *sui generis* access to information laws. With the launch of more awareness on the need to mainstream the Model Law into national contexts, by 2022, at least, more than half of the African countries now have *sui generis* access to information laws.[104] While the increase in the number of states may be due to various factors, the adoption of the Model Law by the African Commission contributed to setting a regional normative tone on the right to access information in Africa. In addition to this, the status of state compliance with the Guidelines on Access to Information and Elections, which is another soft law by the African Commission on the roles of eight stakeholders in ensuring access to information before, during and after elections, has been carried out in a number of African countries.[105]

Therefore, it has become important for the African Commission to collaborate with proximate state and non-state actors on actionable

103 O Shyllon 'Introduction' in Shyllon (n 63) 5.

104 Adeleke (n 93); J Asunka & C Logan 'Access denied: Freedom of information in Africa falls short of public expectations' Afrobarometer (2021), https://www.africaportal.org/publications/access-denied-freedom-information-africa-falls-short-public-expectations/ (accessed 18 June 2022).

105 Centre for Human Rights, University of Pretoria 'Proactive disclosure of information and elections in South Africa' (2020), https://www.chr.up.ac.za/images/researchunits/dgdr/documents/reports/Proactive_Disclosure_of_Information_and_Elections_in_South_Africa.pdf (accessed 18 June 2022).

and measurable implementation of the revised Declaration.[106] Some of the ways through which such awareness may be carried out is by drawing up a strategic plan that mainstreams the revised Declaration into national policy making through advocacy, campaigns, capacity building and research. As a result of such plan, the revised Declaration could be a system of organic norms on digital rights in Africa from which other finer and specific aspects of digital rights policy, such as online expression, communication surveillance, affordable internet access,and protection of personal information, could be developed.

In addition to this, efforts should be intensified to publish the revised Declaration in African Union languages and other local languages. In particular, the revised Declaration should be published in Swahili with concrete plans to publish it in other local languages as well. In further compliance with article 45(1)(b) of the African Charter, the African Commission should develop more normative standards from the revised Declaration as states will be greatly assisted in domesticating various principles provided for in the revised Declaration. For example, states can be provided with model laws on communication surveillance, the protection of personal information, online speech governance, safety of media practitioners, and many others.

## 5 Conclusion

This article examined some of the ways in which the revised Declaration may be used to protect digital rights in African countries. It did this in three major ways. First, it highlighted some of the digital rights challenges that led to the adoption of the revised Declaration. Second, it identified the revised Declaration as a soft law instrument that has set the useful normative foundation for digital rights protection in Africa. Third, it noted that one major way in which the revised Declaration can be further utilised involves the African Commission drawing up an implementation plan for the revised Declaration that mainstreams specific legislative, administrative, judicial and other measures into African national contexts to facilitate its implementation. In summary, the 'soft' part of soft law instruments such as the revised Declaration neither means that they are weak, nor does it mean that they lack legitimacy. On the contrary, as demonstrated above, the revised Declaration is a strong example of

106 LA Abdulrauf & CM Fombad 'The African Union's Data Protection Convention 2014: A possible cause for celebration of human rights in Africa?' Article presented at the 7th International Conference on Information Law and Ethics (ICIL) held at the University of Pretoria, South Africa on 22-23 February 2016 25.

how soft law can be used to design normative flexibility for effective digital rights protection in Africa. A soft law instrument such as the revised Declaration provides African governments with more clarity, direction and relevant principles on how to protect digital rights in their various contexts. This can be further achieved by working closely with the African Commission to draw up an implementation plan.