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The Right to Privacy and the Protection of Personal Information in Africa: Challenges and Prospects

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OVERVIEW

- *Introduction- what are human rights, three information related rights-FOE, ATI & Privacy*
- *Legal Framework on ATI-interconnectedness of ATI and privacy, legal framework of ATI in relation to privacy*
- *Legal Framework on Privacy (HRs and ICT sector)-what is privacy?, overview of international, regional and national legal frameworks,*
- *Gaps in the Legal Framework on Privacy*
- *Recommendations-International, regional and national*



Introduction

Introductory videos

<https://www.youtube.com/watch?v=yrjT8m0hcKU>

<https://www.youtube.com/watch?v=MR-e-3wkfOA>

<https://www.youtube.com/watch?v=bqWuioPHhz0>



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Introduction

What are human rights?

- Inalienable, by virtue of being human.
- UDHR- 'All human beings are born free equal in dignity and in rights'
- Universal, indivisible, interdependent and interrelated
- Respect, protect, fulfill
- Sources- treaties, custom, general principles of law recognised by civilised nations, judicial decisions, teachings of experts
- Ultimate aim of international treaties- gradual adjustment of domestic laws and policies; merely declaratory

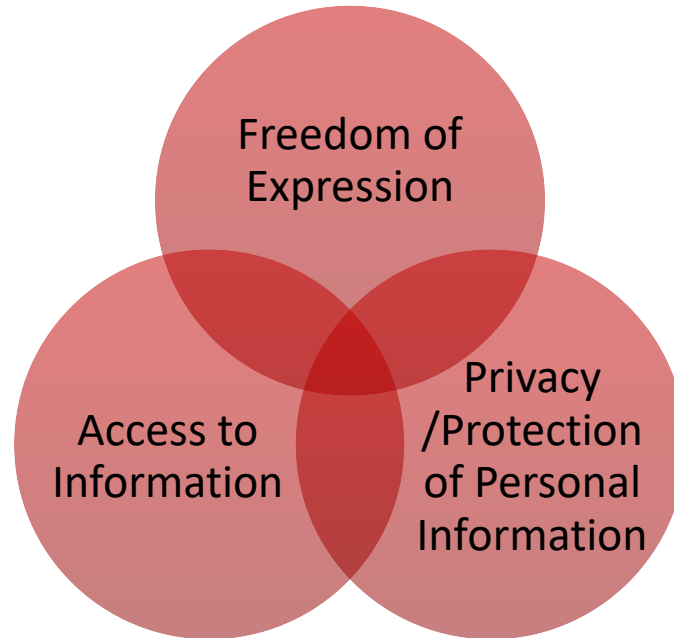


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Introduction

Three information related rights



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Legal Framework on ATI

Interconnectedness of ATI and Privacy

- Both rights are intertwined and the decision by countries like Canada, UK, Mexico and South Africa to have 1 body monitor implementation of both ATI and personal information mirrors the need to balance both rights
- The right of ATI is the right to access information held by government/public bodies and increasingly by private bodies, subject to clearly defined exemptions.
- ATI recognises the protection of personal information as an exception to the right of ATI (sec 27 Model Law)
- ATI also recognises- (General Comment 34)
 - right of individuals to access personal data stored in automatic data files and for what purposes, while stipulating which public authorities or private individuals or bodies may control these files; and
 - right of an individual whose personal data has been collected or processed contrary to the provisions of the law, to have the records rectified or deleted.



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Legal Framework on ATI

Legal Framework of ATI in relation to Privacy

International-General Comment 34 right to access personal data stored in automatic data files and to rectify or delete records collected or processed unlawfully

Regional- recognise protection of personal information as an exemption and the right to access and update personal information (ACHPR-Model Law and Declaration of Principles)

National- *Constitutions*

In Africa, 6 of 13 constitutional provisions on ATI refer to personal data/information or the right to privacy.

Kenya-the right to correct or delete untrue or misleading personal information (section 35(2))

Seychelles-the right to rectify or otherwise amend inaccurate personal information (section 28(1))

Angola (section 200(4), **Morocco** (article 27), **Seychelles** (section 28(2)(d), **South Sudan** (section 32), **Uganda** (section 41) identify the right to privacy as a limitation to the right of access to information.



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Legal Framework on ATI

Legal Framework of ATI in relation to Privacy

All 20 ATI laws in Africa prevent the 'unreasonable disclosure of the personal information of a 3rd party' as an exception to the right of access to information. **Angola, Côte d'Ivoire, Ethiopia, Kenya, Guinea, Liberia, Malawi, Mozambique, Niger, Nigeria, Rwanda, Sierra Leone, South Africa, South Sudan, Sudan, Tanzania, Togo, Tunisia, Uganda, and Zimbabwe.**

Disclosure of information is not unreasonable where:

a. Where the 3rd party:

- expressly gives consent;
- fails to object to the disclosure upon receipt of notice of the request for the information;
- is the next of kin or a representative of the next of kin of a deceased person;
- is an employee of a public body and the requested information relates to that position or function in that public body; or

b. Where the information relates to:

a deceased person who has been dead for more than 20 years;
public health and public safety;



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Legal Framework on ATI

Legal Framework of ATI in relation to Privacy

- the physical or mental health of the 3rd party who is under the care of the requester and the 3rd party is under 18 or incapable of understanding the nature of the request, and providing the information will be in the interest of that third party;

Where the information is:

- is already in the public domain;
- necessary for public scrutiny;
- was supplied by a 3rd party who was informed that it would or could be disclosed to others;
- Where the disclosure of the information is mandated by a Court Order



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Legal Framework on Privacy

What is Privacy?

- Somewhat elusive concept.
- 'time, place, economy and technology (TPET) dimensions of the right to privacy.
- Four main facets of privacy have been identified- bodily, territorial, information, communication
- UN Special Rapporteur on the right to Privacy appointed in July 2015 with a mandate to *inter alia* 'identify obstacles and promote principles and best practices for the promotion and protection of the right to privacy, at the national, regional and international level'



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Legal Framework on Privacy

Overview of the legal framework on the right to privacy and data protection



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International legal framework on data protection

ICT Framework

Two parallel normative frameworks on privacy/protection of personal information as a human rights issue and as an ICT/economic issue, though now increasingly intertwined and mutually reinforcing. Yet, still distinct

First data protection law in 1970 by the Land of Hesse in Germany, followed by Sweden, the United States of America, Germany and France.

Three international data protection instruments were adopted in Europe

- Council of Europe *Convention for the Protection of Individuals with Regard to the Automatic Processing of Personal Data* 1981

Open to ratification by non-members States, - Mauritius and Senegal ratified, Cape Verde and Tunisia have pending invitations to ratify.

- Organisation for Economic Cooperation and Development *Guidelines Governing the Protection of Privacy and Transborder Data Flows* 1981 (amended 2013)

European Union *Directive on Data Protection* of 1995



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International legal framework on Privacy

International human rights framework

International human rights standards on privacy and protection of personal information

- UDHR non-binding but customary international law
- ICCPR- ratified by all African States except Comoros and Sudan
- Article 12 UDHR and 17 ICCPR guarantees freedom from arbitrary or unlawful interference with privacy, family, home or correspondence ...

Interpreted in General Comment 34 by Human Rights Committee to

- require States to regulate the gathering and holding of personal information by law' and prevent unauthorised use and processing.
- enable individuals ascertain whether, in what form, and for what purposes, personal information is stored who controls their files and how to ensure rectification or deletion incorrect or unlawfully obtained data.



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Regional Legal Framework on Privacy/Data Protection

African Union

African Charter on Human and Peoples' Rights (1981) Contains no provision on the right to privacy.

Declaration of Principles on Freedom of Expression in Africa (2002) supplements freedom of expression (article 9) contains a right to access, update and correct personal information.

What does this mean?

- The issue of data protection has received minimal attention within the African human rights system, no elaboration by the African Commission or the African Court on protection of personal information from a rights perspective.
- Usage of 'protection of personal information' is strategic as what is already recognised

Development of legal frameworks has occurred at sub-regional level and most recently continental level.

ECOWAS

- First and only binding Data Protection Instrument in Force in Africa
- Harmonised legal frameworks on ICTs (2005-2007)
- Supplementary Act on Personal Data Protection (2010)



EAC
non-binding, lacking depth

EAC Framework for Cyberlaw
I (2010)

Member States to adopt
international best practice on
data protection.

EAC Member Countries

The EAC now comprises six countries; South Sudan joined the EAC in early September 2016.



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SADC **non-binding**

SADC Model Law on Data Protection
2013

Unique provisions- special provisions
on the rights of a data subject who is a
child; trans border flow of information;
notification by data processors of
security breaches and whistleblowing
provisions.



Regional Legal Framework on Privacy/Data Protection

ECCAS & CEMAC

Model Law on Data Protection developed for Economic Community of Central African States (ECCAS), 2013 (as part of trio of texts: e-commerce and e-transactions) Angola, Burundi, Cameroon, Central African Republic, Chad, Congo, DRC, Equatorial Guinea, Gabon, Rwanda.

In Central African Economic and Monetary Community (CEMAC), adopted as 'Draft Directives' also in 2013.

Note All CEMAC Member States are also Member States of ECCAS.



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Regional Legal Framework on Privacy/Data Protection

African Union Convention on Cyber Security and Personal Data Protection

- Adopted in June 2014 by AU Heads of States. Not in force, as only 1 ratification of the 15 required. Senegal. 8 other States have signed but not ratified the treaty. Why?
- Conglomeration of three ICT related issues of electronic transactions, data protection, and cyber security
- Like ECOWAS Supplementary Act and SADC Model Law, draws heavily on the EU Directives of 1995

Aims

- Member States establish legal frameworks to strengthen the protection of rights related to **physical data** and sanction violations of the right to privacy. what is physical data?
- Opaque/interesting objective of ‘ensuring that data processing respects the rights of natural persons, while protecting the **‘perogatives of States, rights of local communities and purposes for which businesses were established’**.



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Regional Legal Framework on Privacy/Data Protection

African Union Convention on Cyber Security and Personal Data Protection

I Basic principles governing processing of data

Principle 1- Consent and legitimacy: Data processing is legitimate where data subject gives consent. Consent may be waived if processing is required for:

- compliance with a legal obligation of the data subject
- performance of a task in the public interest or performance of the official duty of the data controller or a 3rd party;
- performance of a contract to which the data subject is party or to take steps at the request of the data subject prior to entering a contract; and
- protection of the 'vital interest' or fundamental rights of the data subject.

Principle 2- lawfulness and fairness: The collection, recording, processing, storage and transmission of personal data should be lawful, fair and non-fraudulent.

Principle 3- purpose, relevance and storage: The initial and subsequent data processing must be for a purpose which is specific, explicit, and legitimate; adequate, relevant and not excessive; and kept only as long as is necessary, except in relation to data processed lawfully for historical, statistical or research purposes.

Principle 4- Accuracy: Data collected must be accurate and updated. As far as is reasonably possible, inaccurate or incomplete data must be erased or rectified.



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African Union Convention on Cyber Security and Personal Data Protection

Principle 5- Transparency: Data controllers must disclose information on personal data they hold.

Principle 6- Confidentiality and security: Confidentiality of personal data must be protected especially where it involves transmission of data over a network..

II. Data processing formalities

- With minor exceptions, data processing is subject to a declaration before the data protection authority.
- Processing of certain categories of personal information require authorisation of the national data protection authority. (data related to: genetic and health research; offences, convictions and security measures; interconnection of files, national identification numbers and other similar information; biometric data; especially for historical, statistical or scientific purposes)
- Processing of sensitive data by or on behalf of Government, public institutions, private entities performing public service and local communities must be in accordance with a law enacted with the advice of the data protection authority. Several exceptions NOTE



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African Union Convention on Cyber Security and Personal Data Protection

Sensitive personal information: State security, defence and public security; prevention, investigation, detection or prosecution of criminal offences or execution of criminal convictions or security measures; racial, ethnic or regional origin, affiliation, political, philosophical or religious beliefs, trade union membership or data about health or sex life.

III. Rights of data subjects

1.Right to information: The data controller must provide the following information to the data subject at the time of their collection:

- his/her identity and that of his/her representative
- the intended purpose of data processing
- the categories of data involved
- persons to whom the data may be disclosed
- capacity to request to be removed from the files
- a right of access to and rectification of data
- period for which data is stored and proposed transfer of data to third countries

2. Right of access: An individual whose personal data is to be processed can request the controller the following: any information that would enable him/her evaluate and object to the processing



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African Union Convention on Cyber Security and Personal Data Protection

- confirmation on whether data relating to him/her is being processed
- communication to him/her of the personal data undergoing processing;
- and information on the purpose of the processing.

3. Right to object: A data subject has the right to object **on reasonable grounds** to the processing of data relating to him or her and must be informed prior to the disclosure of such information to a third party or use for marketing purposes and **expressly** offered the right to object free of charge to such disclosure.

4. Right of rectification or erasures: right to demand the rectification, completion, updating, blocking or erasure where the information is inaccurate, incomplete, equivocal or out of date, or its collection, use, disclosure or storage is prohibited.

IV. Obligations of data controllers

Data controllers have specific obligations to:

- ensure that the processing of data is confidential
-



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Regional Legal Framework on Privacy and Data Protection

African Union Convention on Cyber Security and Personal Data Protection

- take necessary measures to safeguard data from being altered, destroyed or accessed by unauthorised persons
- ensure data is stored only as long as is necessary and for the purpose(s) it was collected or processed
- ensure that the processed data can be used irrespective of the device and process used.

V. National Data Protection Authorities

- To be established to oversee implementation of the Convention.
- Independent and provided with human, technical and financial resources to accomplish mandate
- Members should **not include** members of government, business executives or shareholders in ICT and Business sector.



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National Legal Framework on Privacy/Data Protection

Constitutions

- Constitutional provisions on data protection on its own or as a subset of the right to privacy did not exist at the time of the drafting of independence constitutions in Africa.
- Thus only few recently enacted incorporate a stand-alone data protection provision.
- The right to privacy is guaranteed as a constitutional right in different formulations by Constitutions across Africa except in Somalia
- Most constitutional provisions on the right to privacy make no reference to information or communication privacy in their wording. But can be read in based on how they are phrased



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National Legal Framework on Privacy/Data Protect

Constitutions

Information Privacy

Only the constitutions of Algeria, Cape Verde and Mozambique contain explicit data protection provisions in Africa separate and distinct from the right to privacy.

ALGERIA-protection of personal data as a fundamental right that must be guaranteed by a law.

CAPE VERDE

- right of citizens to access, rectify and update and to be informed of the purpose of computerised data affecting them
- processing of sensitive data is prohibited except with consent of the individual and is undertaken in a non-discriminatory manner
- enactment of a law to regulate the use, transfer and storage of computerised personal information by public and private authorities

access to and transfer of personal information is prohibited unless provided by law or in accordance with a judicial decision.



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Regional Legal Framework on Privacy/Data Protection

Constitutions

- **The allocation of a single national identification number to citizens is prohibited**
- Right of individuals access to personal information in computerised or manual formats, to be informed about the purposes of the data and to have it rectified or updated

MOZAMBIQUE

- prohibits the processing of sensitive personal information without any express exception.
- Prohibits access to and transfer of personal information of third parties except authorised by law or a Court Order.
- Requires adoption of a law to regulate the processing of personal information in computerised formats and the creation, use and conditions of access to data banks storing such personal information by public and private entities.
- Right of individuals to access and rectify personal information.



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Regional Legal Framework on Privacy/Data Protection

Constitutions

Communication Privacy

- Most constitutional provisions simply protect ‘privacy of correspondence or communication’ or the ‘secrecy of correspondence’.
- Some provisions identify various forms of communication mediums that are prohibited from interference such as ‘all forms of telecommunications’, ‘postal, electronic, telegraphic communication’ ‘telephone conversations and telegraphic and electronic communications’.
- Some provisions permit interference with privacy if authorised by **law** or a Court Order, or both.
 - sometimes required that the law is ‘necessary in a democratic society’.
 - the interference is permitted for specific reasons such as:
 - ‘the interest of defence, public safety, public order, public morality, public health
 - the administration of Government, town and country planning, nature conservation and the economic development and well-being of the country’
 - ‘prevention of crime’ or for the ‘protection of the public order against imminent threats, in particular to fight the risks of epidemic, fires or to protect people in danger’
 - ‘for the purpose of protecting the rights and freedoms of other persons’.



National Legal Framework on Privacy/Data Protection

Data Protection Laws

- Cape Verde was first in 2001
- 15 other countries have since adopted laws

Angola, Benin, Burkina Faso, Cape Verde, Cote, d' ivoire, Gabon, Ghana, Madagascar, Mali, Mauritius, Morocco, Senegal, Seychelles, South Africa, and Tunisia.

I. Definition of Personal Information

Any or all information about an individual through which such individual can be identified or is identifiable. Types of identifiable information include 'an identification number or one or more elements specific to their physical, physiological, genetic, psychological, cultural, social or economic identity'.

II. Scope of application

All laws apply to both public and private institutions. In some cases, however the extent of the application of the laws to public institutions is expressly specified.



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National Legal Framework on Privacy/Data Protection

Data Protection Laws

In terms of territorial applicability, most laws apply to the processing of personal information by data controllers situated in the territories, or that utilise equipment so situated.

In **Seychelles**, the law applies to data processed inside the country and also to any data processed outside, but intended to be utilised in Seychelles.

In **Ghana, Madagascar and Mali**, applies to the processing of personal information that takes place wholly or partly within their territory.

In **South Africa**, processing by 'responsible party' based in SA or who processes through automated or non-automated means in SA.

III. Processing Formalities

a. Consent

All data protection laws require that the consent of the relevant individual is obtained as a condition for processing their personal information.

South Africa - Voluntary, specific and informed expression of will in terms of which permission is given for the processing of personal information



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National Legal Framework on Privacy/Data Protection

Data Protection Laws

ii Registration/Authorisation

- (DPAs) exercise oversight over processing of personal information, sometimes as a once-off registration as a data controller or data processor (which may then be renewed). This is the case in Ghana, Mauritius and Seychelles.
- Prior authorisation of the DPA is required, especially when the processing involves sensitive personal information.
- Some laws like those of Cape Verde, Mauritius and South Africa also provide that DPAs develop Codes of Conduct on the processing of personal information in consultation with stakeholders.

iii. Exemptions

Some categories of personal information are excluded from application to specific provisions such as the rights of data subjects such as : national security, crime and taxation, health education.



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National Legal Framework on Privacy/Data Protection

Data Protection Laws

- Mere indication by the Prime Minister or a Minister that the information concerned relates to national security is conclusive evidence of such fact in some laws e.g. Ghana (judicial review).
- Cape Verde is unique in that its law provides that its application on issues of public safety, national defence and State security must be in accordance with international instruments to which Cape Verde is party, as well as specific laws dealing with the respective sector.

IV. Security breach notification

- Few laws require data subjects are notified of incidents of breach of security of their personal information. e.g. Ghana and South Africa- individual concerned and the DPA must be informed
- Notification must be given as soon as reasonably practicable after the discovery of the breach
- Must provide the data subject with sufficient information to enable protective measures against the consequences of the breach.
- The absence of this provision from the majority of data protection laws is problematic, because it denies data subjects access to information that is essential for the protection of their personal information from misuse.



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National Legal Framework on Privacy/Data Protection

Data Protection Laws

V. Data protection principles

VI. Rights of data subjects

VII. Obligations of data controllers

VIII. Trans border flow of personal data

Transfer of personal information by data controllers or data processors to other countries can only be done where the other country has 'an adequate level of protection' and usually requires the consent of the data protection authority. Adequate level of protection varies and is usually determined by the DPA with guidance from the law.

IX Data Protection Authority

All establish multiple membership Commissions, except Mauritius and Seychelles. Important for bringing together skills and expertise. Ghana has a hybrid system- Governing Body and Executive Director. Usually expertise in ICT issues, legislators, lawyers and the judiciary and other high-level civil servants.



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GAPS IN REGIONAL AND NATIONAL LEGAL FRAMEWORKS ON PRIVACY/DATA PROTECTION

UN legal frameworks require any law that interferes with the right to privacy to be 'clear and concise; necessary for reaching a legitimate aim; proportional to that aim; the least restrictive option available and should not be discriminatory'. However, not the case with these frameworks.

- Exceptions in AU Convention, Supplementary Act and the SADC Model Law reveal a worrying trend. E.G AU Convention applies to issues of public security, defence, research, criminal prosecution or State security 'subject to exceptions defined in specific provisions of other extant laws'. This situation poses 2 problems
 1. safeguards on data protection, can be overridden by the provisions of a specific law on State security for example. i.e, these other laws are given primacy over data protection laws on matters of data protection.
 2. There is no room provided for an assessment of the application of exceptions in these other laws, to ensure that their application is in the public interest. This is particularly important in relation to exceptions on grounds of public security, defence and state security, which States routinely rely on to trump public scrutiny of controversial actions such as surveillance.



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Gaps in Regional and National Legal Frameworks on Privacy/Data Protection

Conceptualisation of protection of personal information strictly as an ICT issue

A key challenge is the adoption of regional standards as part of a trio of documents- data protection, e-transactions and cyber security. This approach reinforces the perception that data protection is exclusively an ICT issue.

Exemption of important categories of personal information

Broad provisions excluding important categories of personal information from protection against interference. The gives States maximum scope to interfere with these categories of personal information of individuals, without full compliance with the requirements of legality, necessity and proportionality under international law.

Reliance on dated data protection standards from other regions

African data protection standards are drawn from older standards of other regions that have since been strengthened. EU Regulations- right to data portability, extra-territorial applicability, proactive disclosure of information to data subjects, speedy notification of security breaches and encryption of personal data.

Lack of Regional Mechanism to Monitor Implementation



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Recommendations

International

53 States are Party to the International Covenant on Civil and Political Rights. CSOs especially those in countries with no data protection regimes or laws with problematic provisions or poorly implemented can do the following

i. Engagement with the state reporting process of the Human Rights Committee

The submission of shadow reports on the periodic reports of African Member States of the ICCPR is useful for highlighting shortcomings with respect to the legal framework and/or implementation of the right to privacy in the context protection of personal information.

ii. Engagement with the Special Rapporteur on the Right to Privacy

Develop a working relationship with the Special Rapporteur, to draw attention to challenges to the adoption and implementation of data protection laws in compliance with relevant normative standards of the UN on privacy.

iii. Engagement with the Universal Periodic Review Process

A process of the UN HRC that involves the periodic review of the human rights record of Member States. Shadow reports on the adequacy of data protection laws and policies and implementation can be prepared.



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Recommendations

Regional

Only Morocco is not a party to the African Charter.

i. Development of a Model Law on Data Protection for Africa

The African Commission could adopt a Model Law on personal information, using as its basis the provision in the Declaration on the right to 'access and update or otherwise correct personal information' or Pan African Parliament or AU International Law Commission

ii. Infusing data protection issues into State Reporting process of the African Commission

Every two years States submit reports on steps taken to implement obligations under the African Charter.

iii. Adoption of a resolution on protection of personal information by the African Commission

The adoption of a Resolution by the African Commission on data protection can serve the dual purpose of increasing the consciousness of the African Commission on the issue, while at the same time creating awareness for Member States, civil society organisations and other stakeholders.

iv. Engaging other relevant African human rights mechanisms

The African Committee of Experts on the Rights and Welfare of the Child; The African Court on Human and Peoples' Rights and the AU Commission on International Law,



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Recommendations

African Network of Data Protection Authorities (ANDPA)

In the absence of any African Union mechanism to oversee uniform compliance with data protection laws within member states, the Network could potentially provides a useful entry point to guide implementation of data protection laws.



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Recommendations

National-Nigeria

Adoption of a comprehensive data protection law that:

- Borrows from most recent legal frameworks on data protection such as the EU Guidelines 2016 and revised OECD standards 2013.
 - Takes into account Nigeria's international obligations on privacy and other human rights, especially under ICCPR
 - Takes into account domestic laws, Constitution, the FOI Act and other relevant laws
 - Takes into account international best practice on privacy e.g. consider combining implementation of FOI Act and the Data Protection Law by the same institution.
- consider



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The Right to Privacy and the Protection of Personal Information in Africa: Challenges and Prospects

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