

# Advancing Strategic Litigation on Internet Shutdowns cases in Africa:

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## Promises and Pitfalls

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# Introduction

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The internet plays a crucial role in enabling rights and freedoms in various spheres, including political rights as part of electoral processes, as well as *transparency and accountability* in both the public and private sectors. Yet, internet freedom is increasingly imperiled by the tools and tactics of digital authoritarianism, which have spread rapidly in Africa. Repressive regimes, incumbents with authoritarian ambitions, and unscrupulous partisan operatives have exploited the major enablers of digital communication such as social media platforms, and converted them into *instruments for political distortion and societal control*. While social media has at times served as a platform for civic discussions, some countries are now tilting dangerously toward limiting the platforms' role as mediums for liberal organizing and expression, exposing citizens to an unprecedented crackdown on their rights and fundamental freedoms. It is in this context that **strategic litigation presents an opportunity** to promote digital rights and freedoms and hold perpetrators of rights violations accountable.

Strategic litigation can potentially promote the protection and enjoyment of human rights. It can lead to significant *legal precedents* by publicly uncovering inequalities and highlighting human rights violations, raising awareness, and bringing about reforms in legislation, policy, and practice. In recent times, strategic litigation has become essential for human rights protection at national, regional and international levels.

Globally, civil society groups and independent judicial bodies remain key pillars of strategic litigation. For instance, civil society groups in Indonesia filed a case against the government-ordered decision to enforce an internet blackout during weeks of protests in Papua and West Papua in August 2019. In June 2020, a panel of judges at the Jakarta State Administrative Court (PTUN) declared that the *internet shutdown violated the law* and the right to freedom of expression and access to information. The petitioners – the Alliance of Independent Journalists (AJI), the Southeast Asia Freedom of Expression Network (SAFE-net), and the Indonesian Legal Aid Foundation (YLBHI), among other groups said the “*blackout, which officials argued was put in place to prevent fake news from spreading, was flawed in authority, substance, and procedure.*”

This paper discusses strategic litigation experiences in digital rights and explores opportunities that could be replicated across Africa. It looks at litigation from local, regional, and international perspectives. Further, the paper discusses the comparative advantage and associated challenges of lodging digital rights cases, particularly cases arising out of internet shutdown cases before the African Court on Human and Peoples Rights (ACHPR).

# Strategic Litigation Experiences on Digital Rights in Africa



Litigation on digital rights remains a challenge across the continent *due to a lack of effective collaboration between actors such as lawyers, activists, academia, civil society organizations, and other technical experts*. Divergent interests among the different stakeholder groups, unexpected circumstances and inadequate access to public interest lawyers has been reported as hurdles. Studies also show that there is a lack *of digital rights knowledge, skills, and competencies amongst judges and lawyers*—a common challenge in Kenya, Ethiopia, Uganda, and Tanzania. Meanwhile, resources that affect evidence gathering, as well as delays in justice processes resulting from case backlogs and judicial transfers present more challenges. Nonetheless, there are cases that point to potential success, the challenges to look out for and the opportunities to explore such as in *Burundi, Kenya, Tanzania, Uganda, Cameroon, Gambia, Zimbabwe, and Sudan*.

## 1. Zimbabwe

In January 2019, after five people were killed in public protests against record-high fuel prices, Zimbabwe's government deployed the military and shut down the internet. The *Zimbabwean Lawyers for Human Rights* and the *Media Institute for Southern Africa (MISA)* filed a case before the High Court *contesting the shutdown*. The court in January 2019 ruled that the government's internet shutdown during the protests was illegal on grounds that the *government had exceeded its mandate*.

According to Kuda Hove, one of the petitioners' lawyers, the decision was not forthcoming since the case was decided on procedural grounds without addressing merits of the case such as the *right violations due to the shutdown* such as curtailing freedom of expression. Away from the ruling being based on preliminary grounds, it would have dragged on for not less than ten years as has been the case in the past had it been based on challenging the constitutionality of the shutdown.

## 2. Kenya

A *Petition* filed by the *Bloggers Association of Kenya (BAKE)* in April 2018 challenged the *Computer Misuse and Cybercrimes Act, 2018* on grounds that it violated, infringed, and threatened fundamental freedoms protected in the *Bill of Rights of the Constitution of Kenya, 2010*. The law was challenged for contravening constitutional provisions on freedom of opinion, freedom of expression, press freedom, the security of the person, right to privacy, right to property, and the right to a fair trial. *In the order issued on May 29, 2018 the judge certified BAKE's petition as urgent and stated that respondents (who included the Attorney General, the Speaker of the National Assembly, the head of the National Police Service, and the Director of Public Prosecutions) be served immediately*. An interim order was issued to end the enforcement of the law. This temporary measure was later lifted and finally dismissed by the High Court which declared that the Act is valid in its entirety. The court further stated that *the 26 sections of the Act that were contested by BAKE were 'constitutional'*. Though the initial temporary measure that suspended the act was a positive step, the High Court's decision to uphold the act was a blow to the digital rights work in Kenya and beyond.

### 3. Uganda

On July 2, 2018, Cyber Law Initiative (Uganda) Limited and four others – Opio Daniel Bill, Baguma Moses, Okiror Emmanuel, and Silver Kayondo – *sued* the Attorney General, the Uganda Communications Commission (UCC); and the Uganda Revenue Authority (URA) in the Constitutional Court over the introduction of the Over-The-Top (OTT) tax, commonly known as the social media tax. The applicants sought the *court's declaration that the new law was unconstitutional and infringed on economic rights, freedom of expression and information, freedom of assembly, and other political rights and freedoms.*

The applicants argued that the Excise Duty (Amendment) Act, 2018, which imposed the social media tax, violated constitutional provisions. Later, the Network for Public Interest Lawyers (NETPIL), which is adjacent to the Public Interest Law Clinic - Makerere University, assisted in a litigation surgery to strategize on the steps to undertake for positive results in the case. Amongst the strategies used was to *collect signatures to push for cause listing of the case for hearing.* To date, there has been no progress on the case and the social media tax was dropped in July 2021 and replaced with a *12% levy on data.*

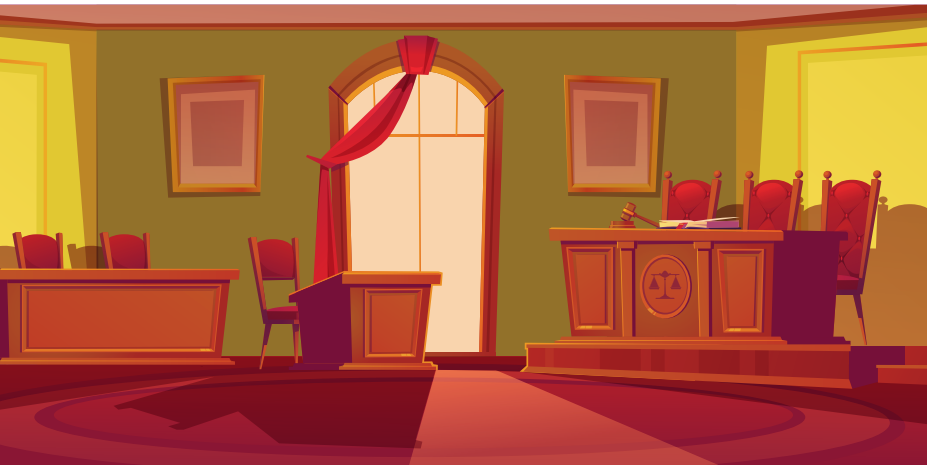
Beyond individual countries, there have been attempts to utilise regional courts using strategic litigation to address digital rights issues such as internet shutdowns. Despite these efforts, the opportunity is still under-utilized.

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## 1. ECOWAS Community Court of Justice (ECOWAS Court)

The *Economic Community of West African States* (ECOWAS) is a 15-member regional group with a mandate of promoting economic integration in all fields of activity of the constituent member countries. *In Manneh v The Gambia*<sup>7</sup> (*Manneh*), the ECOWAS Court found that the arbitrary, *incommunicado detention and disappearance of a journalist* violated the right to liberty; and the right to a fair trial.

In *Hydara Jr v the Gambia*<sup>8</sup> (*Hydara*), the ECOWAS Court held that a failure to investigate the killing of Deyda Hydara, a journalist and co-founder of “**The Point**” Newspaper in the Gambia, *was a violation of the positive obligation to investigate and prosecute arising from the right to life*. The ECOWAS Court also held that failure to protect media practitioners, including those critical of the regime, *is a violation of international and treaty obligations, as freedom of expression also includes freedom to criticize the government and its functionaries subject to limitations imposed by the law*.



In *Federation of African Journalists and Others v the Gambia* (*Federation of African Journalists*), the ECOWAS Court *ordered the government to pay compensation to four journalists for violating their rights and subjecting them to torture*, and, further required the government to immediately repeal or modify its laws on *criminal defamation, sedition and false news* in line with its obligations under international law.

A recent experience that calls for celebration is the June 2020 decision of the ECOWAS Court of justice which held that the

*‘September 2017 internet shutdown ordered by the Togolese government during protests was unlawful and an outrage to applicant’s right to freedom of expression.’* This case was filed by Amnesty International Togo with the support of Access Now. The case also involved the Association for Progressive Communications (APC), ARTICLE 19, Collaboration on International ICT Policy in East and Southern Africa (CIPESA), the Committee to Protect Journalists (CPJ), Internet Freedom Foundation (IFF), the Net Blocks Group, and Paradigm Initiative (PI), who joined as “*friends of the court*,” or amici curiae. This decision will have a significant contribution particularly within Regional Economic Communities (RECs) as it clearly recognized access to the internet as a human right with legal obligations especially on governments of member states.

## 2. The East African Court of Justice (EACJ)

The East African Court of Justice (EACJ) is one of the organs of the East African Community (EAC) and is *established under Article 9 of the Treaty for the Establishment of the EAC (EAC Treaty)*. The major responsibility of the EACJ is to guarantee respect to law in the interpretations and application of, and compliance with, the EAC Treaty. It is a judicial organ which *serves the partner states of the EAC - Burundi, Kenya, Rwanda, South Sudan, the United Republic of Tanzania, and Uganda*.

It is worth noting the EACJ's admissibility requirements. For instance, there is no requirement that an applicant must first exhaust domestic remedies before taking cases to the EACJ. *This is based on the argument that the EACJ has primacy in interpreting the EAC Treaty (which is an overt rejection of the subsidiarity principle)*.

The EACJ has held that *this jurisdiction is not voluntary* and that once an applicant can show an alleged violation of the EAC Treaty, the EACJ must exercise jurisdiction. *Article 37 of the EAC Treaty* states that every party may be represented by a representative entitled to appear before a superior court of any of the partner states. According to *Rule 17(1) of the EACJ Rules*, a party to any case in the EACJ Court may appear in person or by an agent and may be represented by an advocate.

*If the EACJ believes that the application is justified, the amicus curiae will have the opportunity to submit a statement of intervention* in line with the timeframes indicated by the EACJ. *The EACJ has noted that it has a broad discretion to ask for the assistance of amici curiae* if it considers that the interests of justice would be served. As far as strategic litigation is concerned, two cases of strategic litigation at the East African Community Court of Justice are worth mentioning.

In **Burundi Journalists V A.G. of the Republic of Burundi**, the EACJ accepted that it had jurisdiction over freedom of expression matters, and held that various provisions of Burundi's Press Law of 2013, including Article 19(b), (g), (i), and part of (j), Article 20 violated contravened the *Treaty for the Establishment of the EAC (EAC Treaty) as it violated the right to a free press*.

The EACJ ruled that sections of *Article 19 placed an impermissible restriction on journalists* by preventing them from spreading information related to the stability of the currency, offensive reports on public or private persons, information that may affect the credibility of the State and its national economy, and records of diplomatic activities and scientific research. *It also held that it was unreasonable under Article 20 to force journalists to reveal their sources of information concerning state security, public order, defense secrets, and the moral and physical integrity of individuals*. The EACJ further reasoned that *"there is no doubt that freedom of the press and freedom of expression are essential components of democracy."* It noted that "under Articles 6(d) and 7(2) of the EACJ treaty, democracy must include abiding to freedom of the press" and a "free press goes closely with the principles of accountability and transparency which are also included in Articles 6(d) and 7(2)".

Similarly, in the *Media Council of Tanzania & 2 others v The Attorney General of the United Republic of Tanzania*, the East African Court of Justice (EACJ) on March 28, 2019, held that different provisions of the *Tanzanian Media Services Act 120 of 2016 violated articles 6(d) and 7(2) of the EAC Treaty*, as well as the right to freedom of expression. Consequently, *the EACJ ordered the Tanzanian government bring the Act in line with the EAC Treaty*.

Under the mandate of the East African Court of Justice, it is clear that *cases focusing on journalists relate to the principles of democracy, rule of law, accountability, transparency, social justice, and so on*. This might extend to *digital rights including internet shutdown cases*. As observed in the above cases, the *EACJ* has labored to implement its mandate and has volunteered to extend its human rights jurisdiction within the scope of the *EAC Treaty*.



### 3. The Southern African Development Community Tribunal (SADC Tribunal)

The SADC Tribunal was established under the terms of the Treaty of the Southern African Development Community (SADC Treaty), and the composition, powers, functions, and procedures of the SADC Tribunal are set out in the Protocol Pertaining to the Tribunal (SADC Tribunal Protocol). In the period 2007-2010, the tribunal *adjudicated 18 disputes*. Cases tended to fall within one of the three categories: individuals versus SADC itself (employment disputes), incorporated companies versus national governments (commercial disputes), and *individuals versus national governments (human rights cases)*. The Tribunal has ruled that it has jurisdiction to hear human rights complaints, but its exercise of this mandate led to a *SADC-ordered revision of the Tribunal's role* and functions in 2010, leading to the temporary cessation of its activities. Through a decision to suspend the SADC Tribunal in 2012, the SADC states changed an important pillar and eradicated *protections for private individuals*.



Following the decision, civil society organizations and human rights lawyers filed complaints in various African countries. For example, the Constitutional Court of South *Africa* in 2018 stated that the judgment by former President Jacob Zuma to sign on behalf of South *Africa* on a SADC judgment suspending *the tribunal was unconstitutional*. This decision was made based on a complaint *submitted by the Law Society of South Africa*. In addition to holding that the then president's decision was unconstitutional, the court also ordered the president to withdraw his signature. A similar decision was made in 2019 by the High Court of Tanzania in *Tanganyika Law Society v Ministry of Foreign Affairs and International Cooperation of the Republic of Tanzania*. Despite the encouraging pushback at the local level to lift the suspension, at the time of the writing, the tribunal remains suspended.

# A Case of the African Court on Human and Peoples Rights (ACHPR)

In 1998, the *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights* was adopted, thereby establishing a *complementary counterpart to the African Commission on Human and Peoples' Rights that could issue binding decisions*. The Court was established by virtue of Article 1 of the Protocol and came into force on January 25, 2004. The Court became operational in 2008. *To date*, 30 States have ratified the Protocol. These are Algeria, Benin, Burkina Faso, Burundi, Cameroon, Chad, Côte d'Ivoire, Comoros, Congo, Gabon, The Gambia, Ghana, Kenya, Libya, Lesotho, Mali, Malawi, Mozambique, Mauritania, Mauritius, Nigeria, Niger, Rwanda, Sahrawi Arab Democratic Republic, South Africa, Senegal, Tanzania, Togo, Tunisia, and Uganda. However, *only six* countries had made the declaration recognizing the mandatory jurisdiction of the court. These six States are Burkina Faso, Tunisia, The Gambia, Ghana, Mali, and Malawi. **Article 34(6)** of the African Court's Protocol stipulates that *"at the time of ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under Article 5(3) of this Protocol. The Court shall not receive any petition under Article 5(3) involving a State which has not made such a declaration."* Accordingly, the African Court has been *strict in its interpretation of who has the right to file petitions under its mandate*. The African Court has so far only allowed a right for NGOs to file an application when they have permission by the African Union, and *not when they are permitted by an organ of the AU such as by the African Commission on Human and Peoples' Rights*.

An important point worth exploring under the African Court is the requirement of exhaustion of local remedies i.e. demanding individuals to look for redress for any harm caused by a state within its domestic legal system. Under cases brought to its jurisdiction, the African court has dealt with the issue of exhaustion of local remedies. For instance, in *Tanganyika Law Society v Tanzania, (Tanganyika Law Society)*, the court decided that local remedies will generally be judicial remedies, and do not include remedies provided by parliamentary or administrative bodies. In *Zongo*, the African Court stated that, where local remedies are unduly delayed, they do not need to be exhausted. In *Chacha v Tanzania (Chacha)*, the majority decision in the African Court confirmed that it will apply the same rules on exhaustion of local remedies as the African Commission on Human and Peoples' Rights.

*In the Omary v United Republic of Tanzania*, the African Court stated that local remedies would not be considered attempted in circumstances where the application was not presented to the domestic court of appeal on its substance if circumstances for the delay in the completion of the case relate to internal matters of the parties to the case and not that of the court. As it relates to decisions for rights violations, *in Konaté, the applicant requested the immediate release of a journalist who was in detention*. The applicant also requested for a temporary measure or adequate medical care. The African Court found that granting an immediate release corresponds with the right to expression. The Court also stated that the applicant had a right to be provided with the required medical care and consequently to be ordered to take temporary actions. Despite these positive developments, current trends are discouraging as a number of countries such as Benin, Cote d'Ivoire, Rwanda and Tanzania, *have since withdrawn* from the court's declaration.





# Key Challenges Faced at the African Court on Human and Peoples Rights

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## A. Limited direct access to the court and narrow standing

Unlike the African Commission on Human and People's Rights, the African Court has relatively narrow standing provisions limiting the submission of applications on strategic litigation issues including on digital rights. This is clearly discussed under Article 5 of the African Court Protocol which provides the names of *entities who can submit cases to the African Court*. Access to the court by individuals and NGOs is further limited because of the limited number of states that *have accepted the Court's jurisdiction* in accordance with Article 34(6) of the protocol. This has created challenges to NGOs and individuals taking on strategic litigation cases before the court.

Though the Court has decided a higher *number of contentious cases when compared with* other regional human rights courts, in many of the cases, it decided that it lacked jurisdiction over matters because of *restrictions under Article 34(6)*. In contentious matters, only the African Commission on Human and People's Rights, member states of the African Union, and that of intergovernmental institutions in Africa bring cases to the court. It is based on voluntariness and its decisions are based on declarations made by the state. NGOs and individuals can also submit their cases to the court. In connection with this, several efforts were made by individuals and organizations to address this limitation. The cases of *Femi Falana v African Union*, *Atabong Denis Atemnkeng v African Union*, and *Youssef Ababou v Kingdom of Morocco* can be mentioned in this regard but restrictions persist. Shockingly, States withdrawing from the Court or not signatory are among *those notorious for restricting and curtailing internet freedoms*.

## B. Lack of political will

The African court as discussed has rendered decisions that have significant *relevance to right violations including that of digital rights*. Though the court's decisions are binding on offending states according to *article 30 of the Court's protocol*, they are hardly respected by member states. There is also limited willingness on the part of member states to report to the General Assembly on the progress made. Member states subject to the Court's jurisdiction must obey judgments of cases to which they were party within the time period provided by the Court. They are also responsible for securing the execution of Court judgments. If a state fails to comply, this failure is reflected in the Court's report to the Assembly, as stipulated under Article 31 of the Protocol. Reports however show that there is still reluctance by the *African Union assembly of heads of states in taking actions towards those states that do not adhere to the court's decisions*.

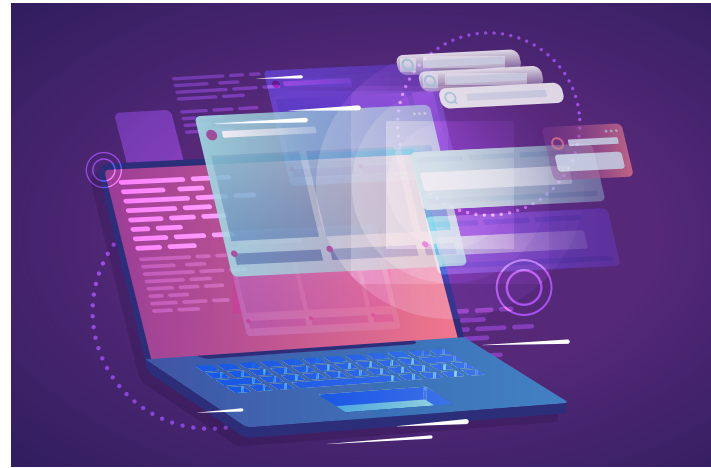
## C. Exhaustion of local remedies

Similar to the rules of procedure of the commission, *Rule 40(5) of the African Court* demands that applicants exhaust all available local remedies before seeking the intervention of the Court. This means that a strategic litigation case *must be heard from the lowest court of jurisdiction* to the highest appellate court even if the applicant is confident that the case will be unsuccessful before the domestic courts.

# Opportunities for Strategic Litigation of Digital Rights Cases

## I. Submission of technical evidence on strategic litigation before the court.

Article 26(1) of the African Court Protocol provides that the African Court “shall hear submissions by all the parties and if deemed necessary, hold an inquiry.” *Rule 45 of the African Court* further provides that the court may ask for submission of evidence based on a request by a third party or by its own. The court can also request for the hearing of witnesses and expert’s statements. These unrestricted powers of the court also apply to institutions who could be asked to express their opinion or submit their reports. This procedure of evidence gathering is undertaken mostly by members of the court who could be tasked to carry out a visit to a specified scene and collect required evidence. Through these processes, the court has made it easier for organisations that are advocating for the protection of digital rights to provide expert advice and evidence particularly on the technical merits of a case during strategic litigation.



## II. Broader application of sources of law (Jurisdiction)

*Article 7 of the African Court’s Protocol* provides that the African Court “shall apply the provisions of the [African] Charter and any other relevant human rights instrument ratified by the state concerned”. This means that the Court can resort into other key sources of law including *the new Declaration of Principles on Freedom of Expression in Africa*, and jurisprudence from the African Commission on Human and People’s Rights and other regional and international mechanisms including those established by the Regional Economic Communities (RECs) on strategic litigation in addition to its own jurisprudence. The court can also consider international standards and principles to support complaints before it. According to Article 7 of the protocol, the court can also consider court decisions that are relevant from different jurisdictions. The unique mandate of the court comes from the fact that it entertains matters that are based not only on conventions by the African Union but also on those human rights instruments that are developed by the United Nations and other human rights bodies and are ratified by the defendant state.

## III. Admission of Amicus Curiae

Under *Rule 45(1) of the African Court*, there is a possibility of admitting *amicus curiae* (Friends of the Court) in the cases brought before it. The rule provides that the African Court may decide to hear “as a witness or expert or in any other capacity any person whose evidence, assertions or statements it deems likely to assist it in carrying out its task”. This has become an effective mechanism, and there have already been *a number of successful amici curiae applications filed by NGOs*. The African Court is also empowered under Rule 45(2) to ask any person or institution to obtain information, express an opinion, or submit a report to it at any point. Under the court’s rules of procedure in addition to providing written submissions, amici curiae could also be invited for oral interventions at the hearing of the matter. Through this process, the court has made it easier for organisations that are advocating for the protection of digital rights to make their own interventions both orally and through a written submission.

#### IV. Direct access by Individuals and NGOs

Despite the hurdles discussed, under article 34/6, direct access to the court is possible for NGOs who have observer status before the court, and who have deposited their declaration on the protocol. This is an effective way to access the Court without any procedural difficulties that might arise while using the African Commission on Human and People's rights to access the court. This way the court was *able to receive various cases*. The Court has also identified violations of other human rights instruments including the *UDHR and the ICCPR*. Another excellent area to explore within the mandate of the court is that of the *provisional measures* given by the court when there are cases of gravity and urgency and 'when necessary to avoid irreparable harm to persons' and 'necessary to adopt in the interest of the parties or of justice.'

#### V. Indirect Access to the African Court through the African Commission's Referral of Communications to the Court

Under *rule 118 of the African Commission's Rules of Procedure*, it is permitted that the Commission submits cases to the African Court in respect of all state parties to the African Court's Protocol when four circumstances are satisfied. These are (i) where a State has not complied or is unwilling to comply with the Commission's recommendations; (ii) where a State has not complied with the Commission's request for provisional (interim/precautionary) measures; (iii) situations involving serious or massive violations of human rights; and (iv) if the Commission 'deems necessary' to refer a communication to the Court at any stage (Commission's admissibility and merits finding). In all these cases the Commission represents the interest of the applicant before the Court. But when the case is transferred to the Court it will have the discretion to hear 'any person' including the original complainants before the Commission and their representatives as well as amici curiae. The commission and the court work together and the commission seize the court for contentious matters. The commission also looks for opinions from the court including on admissibility. There are also harmonized relationships due to the rules both the court and the commission abide by. The two mechanisms also hold joint meetings on relevant issues.

#### VI. Binding Decisions and Effective Remedies

So far the African Court on Human and People's Rights has received *268 applications from individuals, 14 applications by NGOs, and 3 cases referred* by the African Commission on Human and People's Rights on contentious matters. The court has also submitted *13 advisory opinions on cases that came under its advisory jurisdiction*. With its mandate, the African Court is in a unique position to issue binding decisions on human rights violations under treaties for which this normally is not possible, for example, the *bodies overseeing the various UN human rights treaties* have no binding decision-making powers. The Court has applied these powers in a number of cases so far, such as the case of *Konaté v. Burkina Faso*, where it found a violation of the right to freedom of expression under Article 9 of the African Charter, Article 19 *ICCPR* and Article 66 of the *Revised ECOWAS Treaty*, and the case of *APHD v. Cote d'Ivoire*, where it found violations of the right of equality before the law under not only the African Charter and the *ICCPR*, but also the *African Charter on Democracy, Elections and Governance* and the *ECOWAS Protocol on Democracy and Good Governance*.

The non-binding nature of decisions made by the African Commission on Human and People rights was the major reason for establishing the African Court on Human and People's Rights. In addition, the African Court, as a full judicial structure with a binding decision-making mandate, is more likely to '*grant more effective remedies than for example, the African Commission*'. It can order specific amounts of compensation, give supervisory interdicts that require the state party to report on the implementation of the remedy, and require positive action to deter future violations. The court is also contributing to jurisprudence on human rights though not clearly referencing internet shutdowns. Thus far, it has contributed to issues of freedom of association, expression, and also to the right to form a political party.

As far as enforcing judgments is concerned, there is an accord between the executive council of the AU and that of the court to report and monitor the court's decisions on member states by approaching the AU executive council two times a year and at any time when the court desires. The report by the court to the AU executive council has been used as an effective monitoring strategy.

# Conclusion

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This article discussed strategic litigation experiences in digital rights and identified opportunities that could be explored in Africa. It highlighted litigation experiences from local, regional, and international perspectives. Further, the article discussed the comparative advantage of lodging digital rights cases particularly on internet shutdown before the African Court on Human and Peoples Rights and the associated challenges.

In recent times, several strategic litigation cases against internet shutdowns have been lodged to international, regional, and national mechanisms with the aim of promoting the protection and respect of the right of access to information. Both the judiciary and civil society have played a central role in the enforcement of digital rights and freedoms including on access to information. Best experiences show that under the different mandates of the Regional Economic Communities, and the African Court on Human and People's Rights, strategic litigation cases resulted in positive outcomes when they are pursued through collaborative efforts of likeminded organizations. This was the case under the recently applauded decision of the ECOWAS court. Decisions within the mandate of the Regional Economic Communities also set positive policies on access to information and freedom of expression. They contributed to creating accountability and implementation modalities on digital rights cases.

There are however several obstacles to the successful litigation of internet shutdown cases including those that relate to the submission of applications by CSOs and individuals, the lack of political will, and the requirements of exhaustion of local remedies. Other obstacles include case backlogs that impede timely execution of the petition.

Strategic Litigation of a case including one that focuses on Internet Shutdowns cannot happen in vacuum and cannot occur independently. One way of persuading member states in Africa on strategic litigation is connecting regional strategic litigation efforts with other continental initiatives instead of focusing on the intrinsic value of human rights in isolation. These continental integration initiatives aim to bring the continent on the forefront of the global environment as one single nation rather than as an individual state.

# Recommendations

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## **The International Community**

- Institutionalize capacity building efforts within the mandate of the different stakeholders working on access to information.
- Create synergies among the different patrons to support public interest programming that includes undertaking a capacity-building intervention for judges and legal staff of the African Court on Human and Peoples' Rights, on trial advocacy, and participate in the promotional activities of the Court.
- Create effective collaboration among human rights lawyers, activists, and CSOs who work on digital rights issues including those focusing on access to the internet at the local and regional level by training and building capacity of the key stakeholders on the continent.

## **Independent Bar Associations, Academic Institutions, And Human Rights Commissions**

- Organize sensitization campaigns on the need for the ratification of the protocol to the court and declaration per article 34/6 of the protocol.
- Push to amend article 34/6 of the African Court's Protocol. Alternatively, the fact a state has ratified the African Charter on Human and People's Rights can be made adequate to lodge an application to the African Court by local and international NGOs and individuals. As set under other regional human rights systems, NGOs with observer status could be required to satisfy only the procedural standing requirements for filing a strategic litigation case before the court.
- Develop training and awareness-raising programs for law enforcement and media authorities on digital rights focusing on local, regional, and international human rights law.
- Build the capacity of judges and the judiciary as an institution particularly at the local level on digital rights issues including through awareness raising programs on human rights.

## **National Governments**

- Commit to adhering with the decisions of national, regional, and international courts to ensure protection and promotion of human rights.
- Stop all action that undermine access to the internet and social media such as internet shutdowns, social media blockages and internet throttling.



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