

The Universal Periodic Review and digital rights protection in Nigeria and South Africa



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DEDICATION

This is dedicated to everyone waking up each day to defend civic liberty and promote social justice, innovation and inclusion in our digital world.

ABBREVIATIONS

African Charter	African Charter on Human and People's Rights
AI	Amnesty International
APC	Association for Progressive Communication
ARISA	Advancing Rights in Southern Africa
AU	African Union
CIPESA	Collaboration on Internet Policy in East and Southern Africa
CIVICUS	World Alliance for Citizens participation
CSO	Civil Society Organisations
COE	Council of Europe
ECOWAS	Economic Community of West Africa
EU	European Union
HRC	Human Rights Council
HURISA	Human Rights Institute of South Africa
ICCPR	International Covenant on Civil and Political Right
LRC	The Legal Resource Center
MISA	Media Institute of Southern Africa
MLDI	Media Legal Defense Initiative
NGO	Non-Governmental Organisations
NHRI	National Human Rights Institutions
NIMC	National Identity Management Commission
OAU	Organisation for African Unity
OTT	Over the top services
OHCHR	Office of the High Commissioner for Human Rights
PIN	Paradigm Initiative
PI	Privacy International
POPIA	Protection of Personal Information Act
POSIB	Protection of State Information Bill
SARS	Special Anti-Robbery Squad
SAHRC	South African Human Rights Commission
SuR	State Under Review
Troika	The name given to the three rapporteurs that are assigned to facilitate the preview process at the UPR.
UN	United Nations
UDHR	Universal Declaration of Human Rights
UNHRC	United Nations Human Rights Council
UPR	Universal Periodic Review
USA	United States of America
USSD	Unstructured Supplementary Service Data

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CHAPTER ONE: INTRODUCTION

1.1 Background and Context

Since the adoption of the Universal Declaration of Human Rights (Universal Declaration) in 1948, the protection of human rights has taken the center stage in international law and diplomacy. While the ability to enjoy these rights depends on multiple actors and factors, the responsibility to protect and enforce these rights rests on the State.¹ The State has a duty to ensure that people are able to enjoy their rights.² The State carries out this duty by enacting relevant laws and putting systems in place that ensure that human rights are respected, promoted and protected.

The Universal Periodic Review (UPR) is a mechanism of the United Nations that involves a review of the human rights records of all UN Member States to improve them.³ The UPR provides the opportunity for States to communicate the actions they have taken to improve the human rights situations in their countries and to fulfill their human rights obligations within the period under review in comparison with the recommendations from previous UPR sessions.⁴

The UPR is also used to monitor compliance to international human rights treaties that UN member states are party to. It provides a unique insight into States' perceptions of international human rights law.⁵ The UPR has a unique approach to monitoring human rights implementation because it is based on cooperation, dialogue, and inclusion.⁶ The HRC Resolution 5/1 states that states are required to undergo a wide consultation with all stakeholders in preparation of their human rights records.⁷ This approach is important because it validates States' commitment to the UPR process. Also, consulting widely with these stakeholders gives the States a better

¹ M Krajewski 'The State duty to protect against human rights violations through transnational business activities' (2018) 23 *Deakin Law Review* 3.

² Social Protection and Human Rights 'Responsibility of the State' <https://socialprotection-humanrights.org/key-issues/governance-accountability-and-democracy/responsibility-of-the-state/> (accessed 14 September 2021).

³ UNHRC 'Basic facts about the UPR' <https://www.ohchr.org/en/hrbodies/upr/pages/basicfacts.aspx> (accessed 26 October 2021).

⁴ UNHRC (n 3 above).

⁵ S Shah & S Sivakumaran 'The use of international human rights law in the Universal Periodic Review' (2021) 21 *Human Rights Law Review* 264 -301.

⁶ D Etone *The human rights council; The impact of the Universal Periodic Review in Africa* (2020) 2.

⁷ Resolution 5/1 UN Doc A/HRC/RES/5/ 1 para 15(a).

understanding of underlying human rights issues within their jurisdiction.⁸ This type of consultation is contained in the introductory paragraph of the final report.⁹

However, the UPR is a different approach to external accountability because it is persuasive and non-confrontational. It offers a mutually-respecting approach and a peer-review mechanism approach in which states are held accountable in a way that recognises the sovereignty of each UN member State and avoids the confrontational nature of naming and shaming, adjudication and sanctions. There are views that the confrontational approaches are inherently limited and do not capture the subtle and significant ways in which the UPR can contribute to human rights changes within states and that the approach can be as, if not more, effective than coercive mechanisms.¹⁰ Meanwhile, the UPR is not perfect. It has indeed been thoroughly analysed by scholars.

1.2 Justification for Country Focus

Nigeria and South Africa are two key African countries with rich history and huge significance to the continent. This history includes Nigeria traditionally having a leadership role in West Africa, just like South Africa in Southern Africa.¹¹ Their economies and human rights records are significant too.

The two countries have some of the highest numbers of Internet users on the continent.¹² There were 30 million social media users in South Africa in 2019, and the figure is projected to grow to 40.77 million users in 2026.¹³ Nigeria is listed among the top countries in the world with active participation on social media according to a report published by Statista, a research company with specialty in market and consumer data in December 2020. The report states that users are spending more than three hours and 40 minutes on social media on a daily basis.¹⁴ From the

⁸ LA Nordager et al; *Universal Periodic Review First Cycle: Reporting methodologies from the position of the state, civil society, and National Human Rights Institutions* (2011) 200.

⁹ Nordager et al (n 8 above).

¹⁰ Etone (n 6 above) 3.

¹¹ S Gelb *South Africa's role and importance in Africa and for the development of the African Agenda* (2001) 38.

¹² Statista 'Number of internet users in selected countries in Africa as of December 2020, by country' (March 2021) <https://www.statista.com/statistics/505883/number-of-internet-users-in-african-countries/> (accessed 20 September 2021).

¹³ Statista 'South Africa number of social network users 2017-2026' 06 August 2021 [statista.com/statistics/972776/number-of-social-network-users-in-south-africa/](https://www.statista.com/statistics/972776/number-of-social-network-users-in-south-africa/) (accessed 06 November 2021).

¹⁴ 'Average time per day spent by online users on social media in 4th quarter 2020, by territory' Statista (accessed 28 September 2021).

foregoing, it is clear that the two countries have a booming digital economy and South Africa was Africa's biggest economy until recently when it was overtaken by Nigeria.¹⁵

The Digital Rights landscape in the two countries have seen concerning developments in recent times. In the freedom on the net report, an annual survey and analysis of internet freedom around the world,¹⁶ Nigeria saw a declining trajectory in its internet freedom scores in the past three years scoring 64, 60 and 59 respectively in 2019, 2020 and 2021.^{17 18 19} Although, South Africa has not fared badly under the freedom on the net metrics, scoring a total of 73 in 2021 after initially declining from its 2019 score of 72 in 2020 when it scored 70.^{20 21 22} The surveillance regime in South Africa has however raised concerns in the digital rights space.²³ It was a subject of litigation in the South African constitutional court recently.²⁴

1.3 Problem Statement

The UPR was created to strengthen human rights monitoring, reporting and accountability.²⁵ By the end of the year 2021, all UN member states would have gone through three full cycles of the UPR.²⁶ However, its impact on digital rights is not immediately evident in Africa. There are

¹⁵ Brinknews (29 December 201). 'This country recently became Africa's largest economy. now it's too big for businesses to ignore' <https://www.brinknews.com/this-country-recently-became-africas-largest-economy-now-its-too-big-for-businesses-to-ignore/> (accessed 20 September 2021).

¹⁶ <https://freedomhouse.org/reports/freedom-net/freedom-net-research-methodology> (accessed 27 December 2021).

¹⁷ Freedom House 'Freedom on the net report 2019: Nigeria' <https://freedomhouse.org/country/nigeria/freedom-net/2019> (accessed 27 December 2021).

¹⁸ Freedom House 'Freedom on the net report 2020: Nigeria' <https://freedomhouse.org/country/nigeria/freedom-net/2020> (accessed 27 December 2021).

¹⁹ Freedom House 'Freedom on the net report 2021: Nigeria' <https://freedomhouse.org/country/nigeria/freedom-net/2021> (accessed 27 December 2021).

²⁰ Freedom House 'Freedom on the net report 2021: South Africa' <https://freedomhouse.org/country/south-africa/freedom-net/2021> (accessed 27 December 2021).

²¹ Freedom House 'Freedom on the net report 2019: South Africa' <https://freedomhouse.org/country/south-africa/freedom-net/2019> (accessed 27 December 2021).

²² Freedom House 'Freedom on the net report 2020: South Africa' <https://freedomhouse.org/country/south-africa/freedom-net/2020> (accessed 27 December 2021).

²³ Daily Maverick 'Surveillance laws are failing to protect privacy rights: what we found in six African countries, including South Africa' 08 November 2021 <https://www.dailymaverick.co.za/article/2021-11-08-surveillance-laws-are-failing-to-protect-privacy-rights-what-we-found-in-six-african-countries-including-south-africa/> (accessed 27 December 2021).

²⁴ Privacy International 'South African Constitutional Court declares bulk surveillance powers unlawful' 04 February 2021 <https://privacyinternational.org/news-analysis/4416/south-african-constitutional-court-declares-bulk-surveillance-powers-unlawful> (accessed 27 December 2021).

²⁵ J Vengoechea-Barrios *Universal Periodic Review: a new hope for international human rights law or a reformulation of errors of the past?* (2008) 106.

²⁶ UNHRC 'Cycles of the Universal Periodic Review' <https://www.ohchr.org/EN/HRBodies/UPR/Pages/CyclesUPR.aspx> (Accessed 02 May 2021).

questions about the impacts and relevance of the UPR to general human rights protection in Africa. There are insinuations that the African bloc protect one another from real scrutiny.²⁷

From a digital rights perspectives, the latitude provided for human rights defenders, activists, and other stakeholders to participate and lobby recommending states to include their specific areas of human rights work in their recommendations to the state under review (SuR) remains less than impressive.²⁸ Meanwhile, digital rights being a relatively new space has fewer actors engaging in the space and this potentially has implications for digital rights and general human rights protection on the continent. Specifically, the lack of broad representation by civil society organisations working on digital rights in Africa and lack of quality engagements of the UPR may have made the UPR less useful for digital rights protection in Africa.²⁹

However, the rights to freedom of expression and right to privacy are protected under international human rights law and the Constitutions of Nigeria and South Africa. Despite the provision of these rights under international law such as the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on human and human rights (African Charter) and their ratification by both countries, these rights have not been adequately protected as this research will demonstrate. This research therefore is an attempt to explore the UPR mechanism as a potential platform to ensure the protection of the right to privacy and the right to freedom of expression as major forms of digital rights in Nigeria and South Africa.

1.4 Research Objective

The objective of this research is to assess the effectiveness of the UPR mechanisms in South Africa and Nigeria and its relevance for the protection of digital rights in both countries. The research will examine the engagements of the two countries with the UPR mechanism and propose ways to effectively leverage the UPR to protect and promote digital rights in the two countries.

²⁷ Etone (n7 above) para 53.

²⁸ Association for Progressive Communications <https://www.apc.org/en/news/internet-freedom-africa-and-universal-periodic-review> 13 June 2018 (accessed 15 September 2021).

²⁹ UNHRC ‘Universal Periodic Review - Nigeria: hematic list of recommendations’ (06 November 2018) <https://www.ohchr.org/EN/HRBodies/UPR/Pages/NGindex.aspx> (accessed 02 May 2021) See Theme D43; Freedom of Expression in Matrix of Recommendations.

1.5 Research Questions

The research will seek to answer the main question: ‘In what ways can Nigeria and South Africa improve digital rights protection through the Universal Periodic Review?’ To answer this question, the following will be addressed:

- a. What is Digital Right and the Universal Periodic Review
- b. What are the roles of the state, civil society organisations and human rights institutions involved in the Universal Periodic Review in ensuring digital rights protection in African countries?
- c. In what ways has the Universal Periodic Review improved digital rights protection in Africa?
- d. How can these actors maximise the Universal Periodic Review for digital rights protection in Nigeria and South Africa?

1.6 Methodology

The approach will assess academic works on the UPR, international human rights monitoring systems, journal articles, relevant websites, reports from organisations, analysis of relevant reports available at the Human Rights Council’s (HRC) Website and the submission made by relevant stakeholders to the UPR.

1.7 Literature Review

Etone assessed the effectiveness of the United Nations Human Rights Council’s UPR mechanism in the context of Nigeria, Kenya, the Gambia, Uganda, and South Africa.³⁰ He admitted the general effectiveness of the UPR as a non-confrontational system.³¹ He argued that the UPR had limited engagements based on a detailed analysis of the way African states have engaged in the UPR process over its three cycles and the way in which they have responded to UPR recommendations.³² Etone cites Nigeria as an example of good practice in relation to the pre-review national consultation process.

³⁰ Etone (n 7 above) 3.

³¹ Etone (n 7 above) 51.

³² Etone (n 7 above).

In his assessment of Nigeria's engagement of the UPR process, he concluded that the quality of Nigeria's pre-review consultation process has improved across the three cycles of the UPR.³³ These improvements were seen in the quality of Nigeria's consultation process and the time frame for the consultation. However, he faulted the quality of South Africa's national consultation process because of the absence of an NGO coalition as was seen in Nigeria and Kenya for its first two UPR cycles which he argued was not good for an effective engagement.³⁴ He also criticised South Africa's quality of delegation to Geneva and concluded that South Africa saw the UPR as a foreign affair issue and noted it was less committed to the process.

Abebe noted that the African states have engaged in politics of bargaining by not criticizing one another during the review of African States.³⁵ According to Abebe, the tendency of African states to use their alliance to bypass real scrutiny of their human rights situation signals an ominous sign for the success of the UPR mechanism.³⁶

The UPR has seen more African states willingly engaging the process.³⁷ Bulto noted that African states engage more with the UPR mechanism than other human rights mechanisms because of the control they have in the process.³⁸ He argued further that although African states engage in the UPR, their engagement lacks genuine commitment and is a manifestation of rights ritualism.³⁹ He supports this argument by pointing out that African states lobbied for a state-driven system that majorly reduces NGO participation and by their failure to be critical of the human rights situation of fellow African states, therefore agreeing with Abebe.⁴⁰

Valentina considered the performance of the UPR and the state reporting procedure.⁴¹ The study concluded that the UPR's greatest usefulness is to the extent that it is strong in generating peer and public pressure on states.⁴² The research made a number of recommendations to promote the effectiveness of the UPR mechanism in improving human rights domestically, including a

³³ Etone (n 7 above) 62.

³⁴ Etone (n 7 above) 153.

³⁵ AM Abebe 'Of Shaming and Bargaining: African States and the Universal Periodic Review of the United Nations Human Rights Council' (2009) 1 *Human Rights Law* 20.

³⁶ Abebe (n 35 above) 35.

³⁷ TS Bulto (2015) '*Africa's engagement with the Universal Periodic Review: Commitment or capitulation*' 235

³⁸ Bulto (n 37 above).

³⁹ Bulto (n 37 above) 36.

⁴⁰ Bulto (n 37 above).

⁴¹ V Cararro 'Promoting compliance with human rights: The performance of the United Nations' Universal Periodic Review and Treaty Bodies' (2019) 63 *International Studies Quarterly* 1079 - 1093.

⁴² Cararro (n 46 above).

guide for states, toward implementation, and recommendations that are feasible. He argues that recommendations that are realistic, specific, and measurable are more likely to be implemented.

In addition, Para equally stressed the potential of the UPR as a regulatory mechanism. He specifically identified the role of CSOs and National Human Rights Institutions (NHRIs) in awareness-raising and social mobilization towards the promotion of public debate, understanding and as a catalyst to create country-wide campaigns and grassroots movement around the world.⁴³ He stressed the importance of the UPR beyond the procedure involved and argues that the UPR is an international mechanism whose greater potential is in the national context. This, he argues can be ensured through the active participation of CSOs and NHRIs as catalyst for social obligation and change, notably through dialogue, awareness-raising and public debate.⁴⁴ This, he concludes, will ensure the realisation of the fundamental objective of improving the human rights situation in the State under Review (SuR).⁴⁵

Edward and Marta also posit that State behaviour at the UPR is largely determined by the extent to which states emphasise a universal human rights approach to international relations, against the idea of cultural relativism. They analysed state and regional behavior and found that, while long-standing North-South differences regarding definition and protection of human rights remain, the global increase of democratic states modestly attenuates this dichotomy.⁴⁶

The literature reviewed so far have either praised the UPR, critiqued its effectiveness or made proposition for its effective use by states. The relationship between individual state's commitment to the process and better outcomes from the process were also spotlighted. These helped to put the issues in perspectives and dissuade any impression that the UPR is being touted as a perfect mechanism.

However, it is worth considering whether the UPR has or can serve to advance specific types of rights in specific jurisdiction. It may be more useful to interrogate the relevance of the UPR to specific human rights topics, therefore narrowing down the analysis. None of the literature reviewed did this. While they engage the UPR and in some cases, with specific reference to Africa, contextual analysis was missing. For example, there has been an assessment of the UPR and the

⁴³ J Para *Beyond the Procedure: The Universal Periodic Review as a catalyst for public debate on human rights* (2016) 8.

⁴⁴ Para (n 43 above) 64.

⁴⁵ Para (n 43 above) 7.

⁴⁶ E McMahon & M Ascherio 'A Step Ahead in Promoting Human Rights? The Universal Periodic Review of the UN Human Rights Council' (2012) 18 *Global Governance* 231 – 248.

death penalty in the USA⁴⁷ and Pakistan.⁴⁸ Statelessness and the UPR in the United Kingdom have also been assessed in the work of Waas and Verbeek.⁴⁹

The study seeks to assess the effectiveness of the UPR in the protection of digital rights in two specific countries. It is the first attempt to isolate digital rights issues in Africa and assess how the UPR has been useful and can be used to potentially improve and protect digital rights in Africa.

1.8 The limitation of the study

The research anticipates challenges with respect to finding information about the lobbying activities of non-government organisations and other stakeholders. This means that this research may not be able to assess efforts made by these stakeholders, towards influencing the recommendations by recommending states to the SuR. Given that digital rights have not significantly featured in UPR recommendations to African States until the second cycle, there may not be sufficient examples of how stakeholders have been able to ensure the inclusion of digital rights issues in recommendations to SuR in Africa by recommending states. The research will however explore lessons from how non-governmental stakeholders have been able to mainstream related human rights issues in the final recommendations to SuR.

1.9 Structure

This mini-dissertation has five chapters. The first chapter provides the general background and context for the research. Chapter two will provide an overview of the UPR and digital rights and the procedure and the processes involved. Chapter two attempts to answer sub questions (a) and (b) by defining the UPR and digital rights and the role of the various actors in the UPR process. Chapter three questions in what ways has the UPR enhanced digital rights in South Africa? Chapter four questions in what ways has the UPR enhanced digital rights in Nigeria. Finally, chapter 5 will question the ways that various stakeholders involved in the UPR Review can enhance digital rights protection in Nigeria and South Africa using the UPR mechanism. The

⁴⁷ A Nazir 'The Universal Periodic Review and the Death Penalty: A Case Study of Pakistan' (2020) 1 *RSIL Law Review* 138.

⁴⁸ Unpublished: AL Storey 'An Assessment of the Effectiveness of the UN Universal Periodic Review: Towards the Abolition of the Death Penalty in the United States of America' Unpublished PhD thesis University of Birmingham (2008) 228.

⁴⁹ L Waas and I Verbeek *Statelessness and Human Rights; The Universal Periodic Review* (2017) 17.

chapter, therefore, lists the findings of the report, draw its conclusion and make recommendations towards how stakeholders involved in the UPR can maximise it for digital rights protection in Nigeria and South Africa.

CHAPTER TWO: DIGITAL RIGHTS AND THE UNIVERSAL PERIODIC REVIEW

2.1 Introduction

In order to establish the relevance of the UPR to digital rights protection in Africa, this chapter looks at the UPR as a mechanism of the United Nations Human Rights Council (UNHRC). This chapter answers the first and second research sub-question on what the Universal Periodic Review (UPR) and digital rights means. It also identified the role of various actors in the UPR. It aims at providing an understanding of the UPR mechanism in order to situate the argument for the protection of digital rights with the mechanism.

The chapter defines the context of digital rights as an evolving space and narrows its focus on two forms of digital rights, namely; freedom of expression online and the rights to privacy in the digital age. It explains how the advent of new media and technologies have since deregulated access to information and grown with the evolution of human rights along the decades and ultimately expanded the ideas upon which most of human rights are based.⁵⁰ The chapter discusses how the UPR mechanism potentially adds value to digital rights advocacy. Majorly, this chapter explores these issues and lays the basis for the analysis in the subsequent chapters.

2.2 Overview of the UPR

The UPR has a unique approach to monitoring human rights implementation because it is based on cooperation, dialogue, and inclusion.⁵¹ The UPR was created to respond to criticisms that previous UN processes focused mainly on certain regions. Hence, the UPR was designed to be universally and equally applied.⁵² The UPR was created through the UN General Assembly along with the Human Rights Council on 15 March 2006 by resolution 60/251.⁵³ The Council was mandated to:⁵⁴

⁵⁰ Unpublished: OT Ilori 'Digital rights in Africa: Perspectives from Nigeria and Uganda' Unpublished LLM thesis University of Pretoria 2018 5.

⁵¹ Etone (n 7 above).

⁵² T Bejar (2010) *A practical guide to the united nations' universal periodic review (upr)* 6.

⁵³ Human Rights Council, GA Res 60/251, UN GAOR, 60th session, 72nd plen mtg, Agenda Items 46 and 120, UN Doc A/Res/60/251 (3 April 2006) ('Resolution 60/251') para 5 (e).

⁵⁴ n 53 Para 5 (e).

undertake a universal periodic review, based on objective and reliable information, of the fulfillment by each state of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all states.

The UPR is a key feature of the council and reminds member states of their duty to uphold and implement all fundamental freedoms and human rights. Through the UPR, the Human Rights Council periodically (every 4.5 years) reviews the fulfillment by each of the UN's member states to the protection of human rights.⁵⁵ The UPR was founded on key principles of universality, cooperation, complementarity, and the equal treatment of all member states in monitoring human rights compliance.⁵⁶ This is to address the allegations of double standards and politicisation from the process of reviewing the human rights records of member States leveled against the previous UN Commission on Human Rights, with the goal of improving the human rights situation of everyday people.⁵⁷

The main goals of the UPR are to address inequalities and all forms of discrimination, advance the human rights situation for all, push governments to fulfill their human rights obligations and commitments, review positive developments and challenges faced by countries and share best practices between the countries and stakeholders.⁵⁸ It is a cooperative mechanism which is a departure from former human right monitoring mechanisms as States get to willingly report on themselves. Countries seem to be more responsive to this review process as during the first review cycle (2008-2011), all member States submitted their review and member States are on track to do the same in the second cycle.⁵⁹

Critics of the UPR believe that it is too weak to hold States responsible for their human rights failings and can barely serve to improve the human rights situation on the ground, arguing that the UN has little need for another toothless mechanism for 'cooperative dialogue' and called on council members to 'fashion a mechanism that will, in a fair manner, apply real scrutiny, to hold governments to account for violations and abuse'.⁶⁰ However, no system is perfect. The

⁵⁵ 'The Universal Periodic Review of the UN Human Rights Council – An NGO perspective on opportunities and shortcomings' 2008 26 *Netherlands Quarterly of Human Rights* 311-314.

⁵⁶ D Etone 'African States: Themes emerging from the human rights council's Universal Periodic Review' (2018) 62 *Journal of African Law* 201-223.

⁵⁷ Institution Building of the United Nations Human Rights Council, HRC Res 5/1, UN HRC OR, 5th sess. Annex [IB], UN Doc A/HRC/RES/5/1, annex (18 June 2007) ('Resolution 5/1') para 2.

⁵⁸ UPR Info 'A Practical guide to the United Nations Universal Periodic Review' (January 2010).

⁵⁹ UPR-Info and NGO group for the CRC Fact Sheet 1 "The Universal Periodic Review, Information for NGOs", page 1. Available at URL: <http://www.upr-info.org/-UPR-Process-.html> (accessed 20 September 2021).

⁶⁰ UN Watch (15 May 2006) 'Statement on the UN Human Rights Council'.

effectiveness of any system depends on many factors including the extent to which the system is effectively explored. As this work will attempt to demonstrate, the UPR is yet to be fully and effectively exploited in many cases, therefore it may be premature to dismiss it as a toothless mechanism.

2.2.1 The procedure and processes of the UPR

The UPR works in three main stages generally called the UPR cycle which include the preparation of state reports, review of the State under review (SuR), in Geneva, and the follow-up process.⁶¹ These reviews take place every year initially allowing for forty-eight States to be reviewed annually during the UPR Working Group sessions.⁶² This changed in 2012 in order to give proper time for each member states to be properly reviewed, the review still happens every year but instead of forty-eight states being reviewed it is now forty-two.⁶³

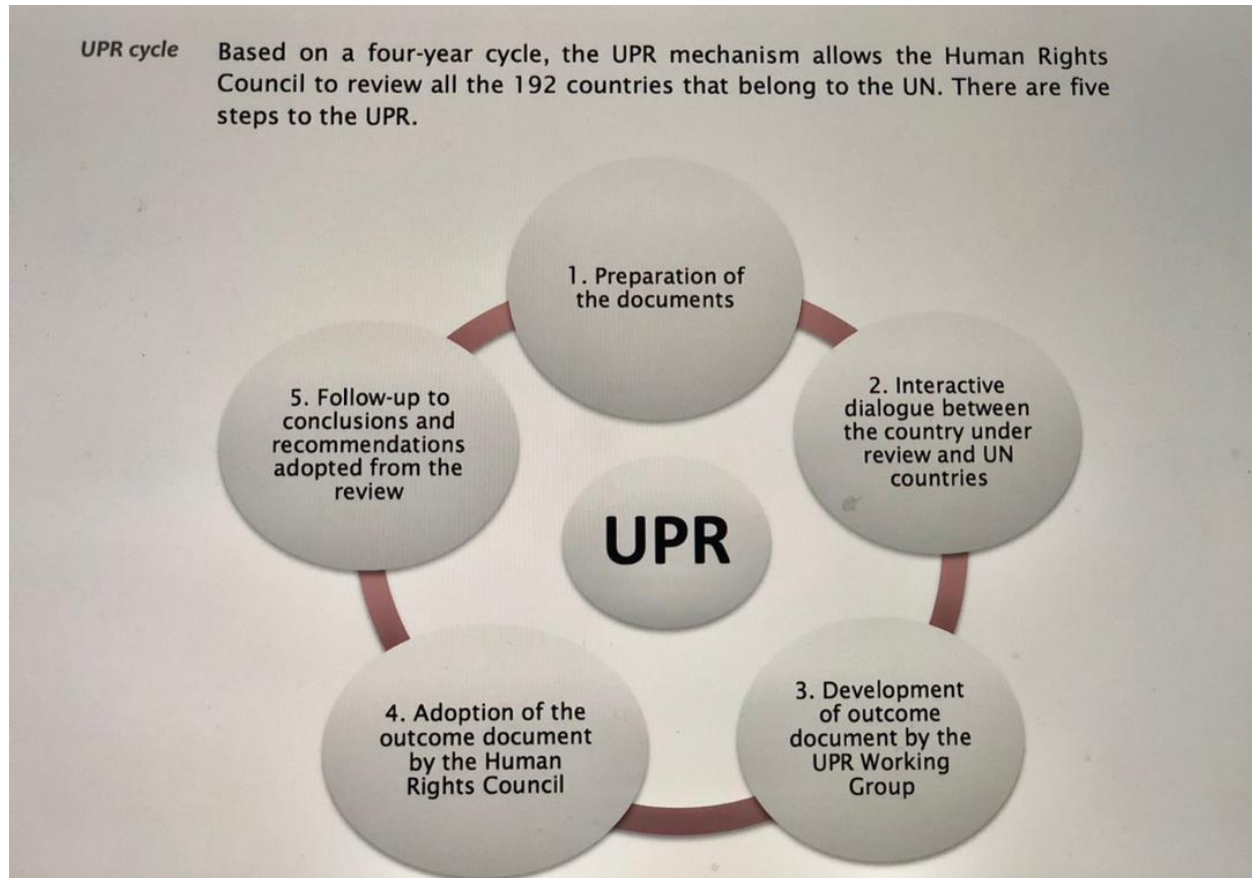
The UPR is a rounded process including preparation for the review and reporting on implementation, review of the human rights situation of the SuR, and adoption of the report, and implementation of recommendations and reporting at mid-term.⁶⁴ The review period is every four to five years starting from 2008. The first cycle ended in the year 2012, while the second and third cycle ended the year 2016 and 2021 respectively. The fourth cycle will run from 2022-2026. The diagram below highlights what happens in a UPR cycle:

⁶¹ S Gujadhur & M Limon (2016) *Towards the third cycle of the UPR: stick or twist?* 19.

⁶² Human Rights Council, Resolution 5/1, para. 14.

⁶³ Human Rights Council, Resolution 16/21, para. 3.

⁶⁴ UPR Info 2008 - 2021 'What is UPR?' <https://www.upr-info.org/en/upr-process/what-is-it> (accessed 09 May 2021).



Source: *UPR Info* (2016)

The UPR is based on the information prepared by the SuR, other stakeholders and Information contained in the reports of treaty bodies, special procedures, including observations and comments by the state concerned, and other relevant official United Nations documents, compiled in a report prepared by the OHCHR.⁶⁵

The UPR differs from other review processes as it is not conducted solely by independent experts and it is primarily a peer review mechanism. This mechanism is a dialogue between the country that is being reviewed and other member states.⁶⁶ Questions are asked and recommendations are given to the SuR by other UN member States. This dialogue is followed by an informal adoption of an outcome document which includes the presentation and the recommendations given to the country under review by the *troika* (group of three) of council member states with the involvement

⁶⁵ OHCHR 'UPR; A practical guide of civil society' (2014) 4.

⁶⁶ Human Rights Project 'A practical guide to the United Nations Universal Periodic Review' January 2010 5.

of the State under review and assistance from the OHCHR.⁶⁷ This outcome document is then officially adopted at the next Human Rights Council regular session. UPR Working Group comprising of all 47 Council Member States conducts the UPR reviews. The Working Group reviews UPR reports in UPR sessions three times per year in Geneva, with up to 14 countries undergoing review per session. The UPR process is open to involvement by all UN Member states as well as non-governmental organisations but it is mainly facilitated by the troika.⁶⁸

The UPR process can be summarized as preparation and submission of written (sometimes, oral) reports by the state under review, treaty bodies, special procedures, Office of the High Commissioner for Human Rights (OHCHR) including reports by other relevant stakeholders;⁶⁹ oral presentation of the reports; preparations of the summary report of the UPR session with comments and recommendations by the troika; submission and adoption of the submitted report by council and implementation report by the State during the next cycle.⁷⁰

2.3 Defining Digital Rights

To understand the term digital rights, it is necessary to provide some background to the development of the term. The use and adoption of digital technologies are impacting legal systems and civil liberty. There are currently about 4 billion people online according to the International Telecommunication Union (ITU),⁷¹ and as more people come online and use digital technologies, the conception of civil liberties and fundamental rights will be redefined by these new realities. It is within this context that the term ‘digital rights’ became prominent.

Digital technologies have expanded the ability of people to exercise their rights and created new platforms of expressions. These technologies also make it possible to bypass national limitations to rights. However, the enjoyment of such rights is also under constant assault by the newfound ability of states to both suppress and control individual rights through the application of these same digital technologies.⁷² Digital rights is basic human rights that strengthens the

⁶⁷ S Rana Review or Rhetoric? *An Analysis of the United Nations Human Rights Council’s Universal Periodic Review* (2015) 32.

⁶⁸ <https://ijrcenter.org/un-human-rights-council/un-universal-periodic-review/> (accessed 24 October 2021).

⁶⁹ United Nations Human Rights Council: Documentation by countries

<https://www.ohchr.org/en/hrbodies/upr/pages/documentation.aspx> (accessed 02 November 2021).

⁷⁰ UNHRC: Basic facts about the UPR <https://www.ohchr.org/en/hrbodies/upr/pages/basicfacts.aspx> (Accessed 26 October 2021).

⁷¹ ITU ‘Statistics’ <https://www.itu.int/en/ITU-D/Statistics/Pages/stat/default.aspx> (accessed 02 October 2021)

⁷² M Klang & A Murray *Human Rights in the Digital Age* (2005) 8.

realisation of other rights, as the enabler of human right in the digital world and spaces. The right to have access to the internet is synonymous to right to life in the context of the digital space. This is why digital rights can be the basis for the enjoyment of rights in the digital age.⁷³

The Association for Progressive Communications (APC) – an international network of civil society organisations dedicated to empowering and supporting people working for peace, human rights, development and protection of the environment, through the strategic use of information and communications technologies defines digital rights as human rights established by the Universal Declaration of Human Rights (UDHR) and other legal instruments, codified or uncodified, international or domestic, as they are invoked in digitally networked spaces.⁷⁴ In order to clearly encapsulate the concept of digital rights, one must understand that digital rights do not establish new human rights but simply refer to the application of pre-recognised rights in the digital space. Summarily, it is the application of human rights in the conduct of human interactions on the internet.

These rights have been recognised by the United Nations Human Rights Council.⁷⁵ They are derived from instruments such as the International Covenant on Civil and Political Rights (ICCPR), and the African Charter on Human and People’s Rights (African Charter). The Declaration of Principles on Freedom of Expression and Access to Information in Africa 2019 addressed the interface between the right to free expression and the internet.⁷⁶ Apart from these international instruments, one of the most distinct initiatives to guide the efforts of those working to promote digital rights enforcements through advocacy and other means is the African Declaration on Internet Rights and Freedoms.⁷⁷ Although the Declaration is not a binding document but a persuasive guide, it can help nations to strengthen their legal jurisprudence to address digital rights issues.

⁷³ OF Akeredolu ‘Digital Right Advocacy: Advocacy for life in the digital world’ (2021) 12 *International Journal of Social Science and Human Research* 3473.

⁷⁴ G Khandhadai *et al*; *Unshackling expression: A study on laws criminalising expression online in Asia* 12 https://www.apc.org/sites/default/files/giswspecial2017_web.pdf (accessed 20 July 2018).

⁷⁵ Human Rights Council, ‘Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development: The promotion, protection and enjoyment of human rights on the Internet’ <https://documents-dds-ny.un.org/doc/UNDOC/LTD/G16/131/89/PDF/G1613189.pdf?OpenElement> (accessed 15 June 2021).

⁷⁶ ACHPR ‘Declaration of Principles on Freedom of Expression and Access to Information in Africa 2019’ <https://www.achpr.org/presspublic/publication?id=80> (accessed 29 October 2021).

⁷⁷ African Declaration on Internet Rights and Freedoms <https://africaninternetrights.org/> (accessed 12 October 2021).

A former UN Special Rapporteur on freedom of expression, Frank William La Rue explained in one of his reports that digital rights include but are not limited to, freedom of expression online, privacy in the digital age, right to information online, network neutrality, and others.⁷⁸ It is within this explanation that this mini-dissertation will focus on the two thematic subject of freedom of expression online and privacy in the digital age and how the UPR mechanisms can be used to strengthen these two important subsets of digital rights in Nigeria and South Africa.

2.3.1 Freedom of Expression Online

Along with several legal instruments that define the right to freedom of expression, the Universal Declaration of Human Rights (UDHR) in Article 19 states that:⁷⁹

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions with- out interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 19(1) of the International Covenant on Civil and Political Rights (ICCPR) states that ‘everyone shall have the right to hold opinions without interference.’ It further states in Article 19(2) that:⁸⁰

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

It is clear from this that internationally, the right to freedom of expression exists within the digital space. Additionally, the United Nations Human Rights Committee, has established that the right to freedom of expression is a precondition for the full development of a human being and it is essential to every democratic society.⁸¹

General Comment No. 34 further explains that Article 19(2) includes Internet-based modes of communication.⁸² Within this context, the right to express opinions and disseminate them applies regardless of state boundaries and borders. Dissemination platforms include all forms and

⁷⁸ F La Rue ‘Report of the Special Rapporteur on promotion and protection of the right to freedom of opinion and expression’ Human Rights Council A/HRC/17/27.

⁷⁹ Universal Declaration of Human Rights Article 19.

⁸⁰ International Covenant on Civil and Political Rights (ICCPR) Article 19 (1&2).

⁸¹ UNHR Committee Article 19: Freedoms of opinion and expression ‘UN Doc CCPR/C/GC/34 (2011)

⁸² MLDI ‘key principles of international law and freedom of expression: Summary modules on litigating digital rights and freedom of expression online’ (2020)

modes of audio-visual, electronic, and internet-based expression, as well as spoken, written, and sign language and non-verbal expression such as images and objects of art.⁸³

Liberal theorists identified freedom of expression as essential to democracy and good governance.⁸⁴ Freedom of Expression has been described as a multiplier or meta right because it facilitated the enjoyment of other rights such as freedom of assembly, political participation, and cultural rights.⁸⁵

Therefore, any action that hinders directly or indirectly the free flow of information, ideas, or opinions on the digital space may be considered a violation of digital rights. It is important to note that this right is not absolute and does not cover child pornography; direct and public incitement to genocide; advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence; and incitement to terrorism.⁸⁶ Article 19(3a&b) of the ICCPR makes provision for these limitations by providing that:⁸⁷

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (ordre public), or of public health or morals.

Meanwhile, legitimate online expression is being criminalised through the application of existing criminal laws to online expression, or through the creation of new laws specifically designed to criminalise expression on the internet. This is despite international human rights obligations highlighted above, and applicable bill of rights in different countries.⁸⁸ There have been more than 250 Internet shutdowns across the world. Internet shutdowns have been described as instances where government in many regions intentionally disrupts access to services that citizens use to communicate, share ideas and communicate.⁸⁹ The advocacy behind the protection of the right to freedom of expression online is therefore a part of the reactions to a trend of clampdown on online expression across the globe.

⁸³ K Bresner *Understanding the rights to freedom of expression* (2015)28.

⁸⁴ P Norris *Driving Democracy: Do Power-Sharing Institutions Work?* (2008) 186.

⁸⁵ M O'Flaherty 'Freedom of Expression: Article 19 of the International Covenant on Civil and Political Rights and the Human Rights Committee's General Comment No 34' (2012) 638.

⁸⁶ 'Promotion and protection of the right to freedom of opinion and expression: Note by Secretary General' UNGA (2011) A/66/290.

⁸⁷ Article 19(3) n80 above.

⁸⁸ G Hariharan 'Understanding international standards for online freedom of expression' (2017) 18.

⁸⁹ Unpublished: Ilori OT 'Digital Rights in Africa: Perspectives from Nigeria and Uganda; Unpublished LLM thesis University of Pretoria 2018 6.

2.3.2 Right to privacy in the digital age.

Privacy is a fundamental human right and it is at the center of human dignity and other key values such as freedom of association and freedom of speech. It is arguably the most important human rights issues of this age.⁹⁰ Privacy protection can be seen as a way of drawing the line at how far society can intrude into a person's affairs; communication, personally identifiable information, physical space. It is a state which can be lost, whether through the choice of the person in that state or through the action of another person.⁹¹

While the advancement of technology has led to several positive developments in the way of life of individuals, it has simultaneously introduced several challenges to citizens' right to privacy. The right to privacy is one that is constantly under threat in the digital sphere. This threat is succinctly described in a report produced by the Center for Technology Innovation and published by the Brookings Institute:⁹²

More and more data about each of us is being generated faster and faster from more and more devices, and we can't keep up. It's a losing game both for individuals and for our legal system.

Privacy is an enabler of an individual's autonomy, dignity, and freedom of expression.⁹³ The right to privacy is therefore very important. It is provided for in many international human rights instruments such as the UDHR (Article 12), ICCPR (Article 17), part 4 of the African Union's 'Declaration of Principles on Freedom of Expression and Access to Information in Africa 2019', prepared pursuant to Article 45 (1) of the African Charter on Human and Peoples' Rights (African Charter), and the constitution of about 130 countries in the world.⁹⁴ At least 25 jurisdictions in Africa have the right to privacy guaranteed in their constitution including South Africa and Nigeria.⁹⁵

⁹⁰ Privacy International 'Privacy and Human Rights: An International Survey of Privacy Laws and Practice' para 1 <http://gilc.org/privacy/survey/intro.html> (accessed 29 October 2021).

⁹¹ Privacy International (n90 above) para 22 & 28.

⁹² Brookings Institute 'Why protecting privacy is a losing game today—and how to change the game' 12 July 2018 <https://www.brookings.edu/research/why-protecting-privacy-is-a-losing-game-today-and-how-to-change-the-game/> (accessed 29 October 2021).

⁹³ Internet Society 'Policy Brief: Privacy' 30 October 2015 <https://www.internetsociety.org/policybriefs/privacy/> (accessed 24 October 2021).

⁹⁴ Privacy International 'What is Privacy: An explainer' 23 October 2017 <https://privacyinternational.org/explainer/56/what-privacy> (accessed 29 October 2021).

⁹⁵ JA Mavedzenge 'The right to privacy v national security in Africa: Towards a legislative framework which guarantees proportionality in communications surveillance' (2020) 21 *African Journal of legal studies* 361.

Violations of the right to privacy in the digital context, can take the form of illegal search and or seizure of digital property, surveillance and communication interception, misuse of biometric data, censorship, etc. Huge amounts of personal data can be collected and stored unlawfully. These technologies (surveillance, digital Identification, interception) can exert a powerful ‘chilling effect’ on those who ‘might wish to take a dissenting view and fewer will be willing to risk exercising their right to democratic protest’.⁹⁶ As Privacy International, a United Kingdom based charity that defends and promotes the right to privacy across the world observed, ‘in the absence of meaningful legal or constitutional protections, such technology is inimical to democratic reform. It can certainly prove fatal to anyone 'of interest' to a regime’.⁹⁷

Despite the presence of international, regional frameworks for digital privacy, national frameworks remain in short supply and where available, have too many loopholes. For example, Only 28 African countries have a data protection and privacy law or a resemblance of it.⁹⁸ Many of these countries still have challenges with the enforcement of their privacy obligations, as authorities seek to catch up with the latest technological advances.⁹⁹ One of the most common and widely accepted reasons for communication interception and other privacy violations by the government is crime and terrorism prevention.¹⁰⁰ This consequently raises the issue of legally balancing crime prevention and individual right to privacy. It is also useful note that that privacy provisions are often scattered across other laws serving other objectives like cybercrimes, electronic transaction and consumer protection, healthcare, financial services etc. Taking Nigeria as a case study, there are privacy and data protection provisions in the Cybercrimes Act 2015, the National Identity Management Commission Act 2007, the Child Rights Act, 2003, the National Health Act 2014, the Credit Reporting Act 2017 etc.¹⁰¹ This decentralization may provide some insight into why there are challenges with the enforcement of the rights to privacy in African countries.

⁹⁶ JW Penney ‘Internet surveillance, regulation, and chilling effects online: a comparative case study’ (2017) 6 Journal on Internet Regulation 22.

⁹⁷ (n 96 above).

⁹⁸ UNCTAD ‘Data protection and privacy legislation worldwide’ <https://unctad.org/page/data-protection-and-privacy-legislation-worldwide> (Accessed 28 October 2021).

⁹⁹ UNCTAD ‘Digital Economy Report: Value creation and capture, implications for developing countries’ (2019)

¹⁰⁰ OJ Rydzak ‘Disconnected: A human rights-based approach to network disruptions’ (2016) Global Network Initiative 8.

¹⁰¹ A Adegoke Digital Rights and Privacy in Nigeria (2020) 18.

It is imperative to establish that right to privacy in the digital context deserve the concern of broad human rights assessment mechanisms such as the Human Rights Council's Universal Periodic Review (UPR). Indeed, the United Nations Special Rapporteur on the right to privacy has a mandate to review government policies and laws on the interception of digital communications and collection of personal data. The mandate includes identifying actions that intrude on privacy without compelling justification, including assisting government in ensuring that surveillance is within the context of the rule of law and according to International human rights obligations.¹⁰²

2.4 The UPR and digital rights in African countries

The need for the protection of digital rights, especially the right to freedom of expression online and the right to privacy through the UPR to promote change is glaring from the preceding paragraphs. Narrowing down the scope of digital rights violations to Africa, evidence abounds that in several African countries, the governments have played a key role in violating these rights. A clear example is the case of the internet shutdown by many African countries including Nigeria which will be discussed in the next chapter. Another illustration is Uganda where the Ugandan government shut down the internet during the 2016 elections, a clear violation of the right to freedom of expression.¹⁰³

Also, in 2018, the Ugandan government introduced OTT (Over the Top) tax, a daily levy to tame 'idle talk' online.¹⁰⁴ Digital taxation has been identified as one of the ways that African governments are using to restrict digital rights.¹⁰⁵

The global freedom of expression organisation, Article 19, observed that a total of 35 recommendations related to the right to freedom of expression, access to information and media freedom were made during Rwanda's third review under the UPR. It also noted that Rwanda supported only 14 of these recommendations including recommendations to eliminate legislative provisions that undermine the right to freedom of expression.

¹⁰² OHCHR 'Special Rapporteur on the right to privacy' <https://bit.ly/31GnAvf> (accessed 30 October 2021).

¹⁰³ <https://cipesa.org/2019/10/championing-internet-freedom-and-universal-periodic-review-upr-at-fifafrica2019/> (Accessed 28 September 2021).

¹⁰⁴ (n 68 above).

¹⁰⁵ Reuters 'Digital authoritarianism' threatening basic rights in Africa, study says' 04 March 2021 <https://www.reuters.com/article/us-rights-privacy-africa-trfn-idUSKBN2AW0YS> (accessed 29 October 2021).

The organisation expressed concerns that the government only noted the other 21 recommendations, including the one asking it to repeal provisions on defamation and false information in the revised Penal Code, impeding a vital opportunity to enhance its human rights environment, online and offline.¹⁰⁶ It is very feasible for African stakeholders to leverage the UPR for digital rights protection and this is an ongoing work. This can be seen in the submission for the third cycle of the UPR where recommendations were made to Zimbabwe regarding digital rights.

The Association for Progressive Communications (APC), The Media Institute of Southern Africa (MISA) Zimbabwe Chapter, the Zimbabwe Lawyers for Human Rights and many more related organizations co-authored the submission leading to the recommendations.¹⁰⁷ In their submission, the organisations noted that during the second cycle of UPR in Zimbabwe, the state received 260 recommendations from 86 countries, 16 of which referred to freedom of expression, three of which focused on the right to access of information, and two which referenced the right of privacy.¹⁰⁸

The submission also highlighted the updates since the last review which included the enactment of the Freedom of Information Act in July 2020 pursuant to the previous recommendations and made clear recommendations regarding digital rights in Zimbabwe. At least two of these recommendations were recognised in the list of recommendations supported and noted by Zimbabwe. These include recommendations to remove restriction on freedom of expression and the other on the need to safeguard the right to privacy.¹⁰⁹

Despite the long list of outlined digital issues yet to be resolved, it is evident that recommendations by the UPR were increasingly focusing on digital rights and may have created and encouraged some initiatives to take action to rectify the issues regarding digital rights. If recommending states make more digital rights recommendations to African countries during the Universal Periodic Review (UPR), perhaps, it could be effective in instituting change and progress in digital rights protection on the continent. Many digital rights related recommendations have already been made. Some of these recommendations are broad and were only extrapolated from

¹⁰⁶ Article 19 ‘Rwanda: Implement UPR recommendations on free expression’ 09 July 2021 <https://www.article19.org/resources/rwanda-implement-upr-recommendations-on-free-expression/> (Accessed 28 October 2021).

¹⁰⁷ https://www.apc.org/sites/default/files/DigitalRightsInZimbabwe_UPRSubmission.pdf (Accessed 20 September 2021).

¹⁰⁸ United Nations Human Rights Council, ‘Universal Periodic Review: Zimbabwe (2016)’ <https://www.ohchr.org/EN/HRBodies/UPR/Pages/ZWindex.aspx> (accessed 10 October 2021).

¹⁰⁹ See A/HRC/34/8/Add.1 - Para. 17.

broad recommendations on human rights provisions. The next challenge for stakeholders is to work on increasing the number and specificity of relevant recommendations made, in order to make it less difficult to hold government accountable especially when they support such recommendations.

2.5 Conclusion

This chapter sought to answer the question about what digital rights and the UPR means. The chapter also answered sub-question 2 about the actors involved in the UPR towards digital rights protection. It provided examples from Rwanda and Zimbabwe to address the question and proposed how to improve on the wins achieved so far. In addition, the chapter provided an overview of the UPR and explained the term ‘digital rights’ including freedom of expression online and the right to privacy in the digital age.

CHAPTER THREE: UPR AND DIGITAL RIGHTS PROTECTION IN NIGERIA

3.1 Introduction

Nigeria has gone through three cycles of the UPR and received recommendations from member states which have either been accepted, noted, or rejected. Subsequently, since the first UPR, Nigeria has received tremendous recommendations bordering on the need to strengthen its human rights enforcement and legal frameworks. As at the second UPR, it began to receive specific recommendations touching on digital rights.¹¹⁰

This chapter interrogates digital rights and the UPR in Nigeria and assesses the efficacy of the UPR mechanism in Nigeria in response to the third sub question of this research on how the UPR has enhanced the UPR from a Nigerian context.

Journalists and human rights defenders have been known to work in an antagonistic environment, suffering from being subjected to intimidation, harassment, and imprisonment in Nigeria.¹¹¹ The recent Twitter ban is an example of Nigeria's infringement of her citizens' freedom of expression online.¹¹² This shows that despite the recommendation that Nigeria has supposedly adopted on digital rights, it is still stalling in its implementation.

The aim of this chapter is to discuss the overview of the UPR process in Nigeria, analyzing the relevant recommendations of the UPR to Nigeria by other countries concerning digital rights and to what extent has Nigeria implemented this recommendation.

3.2 Overview of the UPR process in Nigeria

During the preparation of the first UPR cycle, Nigeria formed a National Consultative Forum. This was an association of stakeholders made up of representatives of ministries, human rights NGOs, professional bodies, National Human Rights Commission (NHRC), and faith-based

¹¹⁰ Frontline Defenders, 'UPR Submission- Nigeria' 2008 <http://www.frontlinedefenders.org/en/statement-report/upr-submission-Nigeria-2018> (accessed 21st October 2021).

¹¹¹ 'Nigeria suffering from human rights violations despite democratic process' *Premium Times* 15 June 2021.

¹¹² Amnesty International, 'End Twitter suspension in Nigeria' <http://www.amnesty.org/en/petition/en-twitter-suspension-in-nigeria> (accessed 24th October 2021).

organisations.¹¹³ This was arranged with the support of the NHRC, under the chairmanship of the Director of the Ministry of Foreign Affairs.

The Forum was tasked to prepare a draft which would then be presented at a two-day workshop and submitted by the state.¹¹⁴ The support demonstrated by the Nigerian government was expressed by the active participation of the Foreign Minister during this workshop where all human rights issues like digital rights, police brutality, gender-based violence were discussed extensively. Also, the fact that the Nigerian Ambassador Martin Ihoeghian Uhomoiubi was the serving President of HRC acted as a major incentive for Nigeria to participate in the pre-review.

Although the introduction of the two-day workshop was a pragmatic initiative by the government, it has been criticised on a number of grounds. First, that the period is too short for stakeholders to extensively discuss human rights challenges. Also, judicial personnel were not actively involved to criticise available laws and advocate for law reforms.¹¹⁵ Juxtaposing the approach taken by Nigeria and other states; a key proposition is to set up a committee with representatives from the three branches of government and from the NGO and Civil Societies ecosystem.¹¹⁶

Furthermore, during the second UPR cycle, Nigeria augmented the time frame of the consultation process. It founded the Inclusive National Committee which included eight representatives from various federal ministries and two representatives from Non-Governmental Organisations.¹¹⁷ Their main role was to conduct a national UPR Consultation process and prepare and analyze state reports.¹¹⁸ The meeting was presided over by the Solicitor General who acts in the capacity of the Attorney General of the Federation and the Minister of justice. In addition, the

¹¹³ Working Group on the Universal Periodic Review, national report submitted in accordance with para 15(a) of the annex to Human Right Council resolution 5/1- Nigeria, 4TH session UN Doc/A/HRC/WG.6/NGA/1.

¹¹⁴ Unpublished: D Etone 'African States and the Universal Periodic Review Mechanism: A Study of Effectiveness and the Potential for Acculturation' Unpublished PhD thesis, University of Adelaide 2017 94.

¹¹⁵ Damien (n 71 above) 94.

¹¹⁶ Working Group on the Universal Periodic Review, national report submitted in accordance with para 15(a) of the annex to Human Right Council resolution 5/1 Kenya 21st session, UN Doc A/HRC/WG.6/21/KEN/1

¹¹⁷ Working Group on the Universal Periodic Review, National Report submitted in Accordance with para 15(a) of the Annex to Human Right Council resolution 5/1- Nigeria, 17th session UN Doc/A/HRC/WG.6/NGA/1 (30 July 2013).

¹¹⁸ Members of Inter- Ministerial Committee on the UN Universal Periodic Review reporting process (International and Comparative Law Department 2016).

time frame for the consultation process was extended to 12 months making this act a major improvement from the first UPR Cycle.¹¹⁹

Subsequently, Nigeria showed a good understanding of the consultative process both in the first and second UPR cycles. In the past, Nigeria has been endorsed positively by Algeria who advocated that Nigeria should consider making the National Consultative Forum an annual event that will serve as an instrument to promote awareness and to be kept abreast of all human rights issues.¹²⁰ Unfortunately, there have also been problems that have affected the UPR process in Nigeria. The civil society organisations who are part of the Inclusive National Committee have made little to no effort to engage the government or to partake in the UPR process.¹²¹ In April 2008, the Nigeria CSO coalition was formed and it comprises seven organizations.¹²² The coalition was tasked with the submission of its UPR report. Upon submission, the report failed to address the various existing human rights issues thereby rendering the report incomprehensive. The Coalition was disbanded because it failed to investigate and oversee the implementation of the first UPR recommendation or to submit the second UPR report for Nigeria.¹²³

Consequently, a new coalition was established with the goal of following up on the implementation of recommendations and championing various human rights advocates to participate in the UPR process. Although this coalition was more functional than its predecessor, it had little to no representation. The majority of their representatives were from the South-Western part of the country and were exposed to only a fraction of broader human rights issues plaguing the country. This Coalition cannot be considered as encompassing when evaluating the plurality and diverse background of Nigeria which has numerous human rights organizations representing their interest. Even the factional UPR coalitions such as the Nigeria Delta UPR Coalition and the UPR Coalition of Southeast Nigeria are grossly misrepresented as their membership span between only two to five organisations.¹²⁴

¹¹⁹ Members of Inter- Ministerial Committee on the UN Universal Periodic Review reporting process (International and Comparative Law Department 2016).

¹²⁰ Human Rights Council UPR I Report- Nigeria UN Doc A/HRC/11/26, Para27 other states who appreciated the consultative process including Algeria, Turkey, Iran

¹²¹ Etone (n 7 above) 96.

¹²² Constitutional Rights Projects (CRP) & others 'Universal Periodic Review of Nigeria: A Nigerian civil society coalition report' (2008).

¹²³ n 78 above.

¹²⁴ Etone (n 7 above) 98.

3.3 Digital Rights in Nigeria

Digital rights are rights that enable users to access, create, publicize digital media and access the use of computers and the internet.¹²⁵ The Nigerian government openly recognised the link between digital rights and human rights when in July 2016 it joined 52 other countries including the United States, Canada, Germany and others to endorse an updated 2012 resolution which affirmed human rights online.¹²⁶ The 2012 United Nations resolution affirmed that civil, political, economic, and social rights enjoyed offline must be protected online.¹²⁷

3.3.1 The Right to Privacy

The right to privacy is enshrined in Chapter 4 of the 1999 Nigeria Constitution (as amended) which recognizes the right to privacy and freedom of expression as a fundamental human right.¹²⁸ Section 37 states that an individual is entitled to the privacy of their homes, correspondence, telephone conversation, and telegraphic communications.¹²⁹ In addition to this, there are many privacy related provisions in laws addressing other subjects such as cybercrime, financial services, child rights, Identity management etc. in Nigeria.¹³⁰

However, many laws, policies have since emerged that raised concerns about the vulnerability of its citizens' privacy and even freedom of the press to criticise the government without any form of repercussion or arbitrary arrest.

There are other areas of concern with regard to the right to privacy in Nigeria. First, on the issue of surveillance law and practice, there are two major legislations permitting communication surveillance in Nigeria: The Terrorism (Prevention) Act 2011 and the Cybercrimes (Prohibition, prevention,) Act 2015.¹³¹

The Terrorism (Prevention) Act 2011 states that law enforcement agencies, with the approval of the Attorney General and the Coordinator on National Security, may apply to the judge for the interception of communication order for the purpose of preventing a terrorist act or

¹²⁵ S Oladejo *Digital Rights: Nigeria and the World* Academia (2007) 5.

¹²⁶ UN Human Rights Council, The Promotion and Enjoyment of Human Rights on the Internet: Resolution Adopted by Human Rights Council, July 2016, A/HRC/RES/32/13.

¹²⁷ UN Human Rights Council, The Promotion and Enjoyment of Human Rights on the Internet: Resolution Adopted by Human Rights Council, July 2016, A/HRC/RES/32/13
<http://www.article.19.orf/data/files/internet.statment.adopted.pdf> (accessed 25 October 2021).

¹²⁸ The 1999 Constitution of the Federal Republic of Nigeria, 1999 (as set out in Chapter IV).

¹²⁹ n 128 above (Section 37).

¹³⁰ n 101 above.

¹³¹ The Terrorism (Prevention) Act 2011 and the Cybercrimes (Prohibition, prevention,) Act 2015.

prosecuting offenders under the act.¹³² Upon receiving the order, they can ask the communication service provider to intercept and retain specified communications (subject to the period specified by the judge)¹³³ or they can be permitted to enter any premises to install any device for interception and retention.¹³⁴ The Cybercrimes Act 2015 in section 39 (a & b) provides that a judge may on the basis of information provided on oath that there's reasonable suspicion that an electronic communication is suspicious and a subject of criminal investigation:¹³⁵

- (a) order a service provider, through the application of technical means to intercept, collect, record, permit or assist competent authorities with the collection or recording of content data and/or traffic data associated with specified communications transmitted by means of a computer system; or
- (b) authorize a law enforcement officer to collect or record such data through application of technical means.

International human rights standards require that every communication surveillance is subject to the test of necessity and must be proportionate to the aim pursued. Neither the Terrorism (Prevention) Act nor the Cybercrimes (Prohibition, Prevention) Act provides a test of necessity or proportionality. Instead, it is left to the discretion of the judge to order surveillance measures.¹³⁶ The Act states that the judge is authorized to issue an order for 'intelligence gathering', yet the act fails to define what could constitute intelligence gathering.¹³⁷ If the phrase 'intelligence gathering' is read as information relating to offences contained within the act, these include acts of terrorism,¹³⁸ assistance, facilitation, or organization of persons or organisations engaged in terrorism.¹³⁹ The definition of acts of terrorism is broad and could mean a wide of act, therefore making it susceptible to abuse.¹⁴⁰

Although certain safeguards were built into the two laws, both laws contain inadequate protection of the right to privacy because they do not conform to internationally recognised

¹³² Terrorism (Prevention)Act 2011(as amended by Terrorism (Prevention)Amendment Act 2013 s29(1).

¹³³ Terrorism (Prevention)Act 2011(as amended by Terrorism (Prevention)Amendment Act 2013 s29 (2)(a).

¹³⁴ Terrorism (Prevention)Act 2011(as amended by Terrorism (Prevention)Amendment Act 2013 s29 (2)(b).

¹³⁵ Cybercrimes Act 2015 s39 (a & b).

¹³⁶ Paradigm Initiative, 'Stakeholder's report on the Universal Periodic Review 31st Session: The right to privacy in Nigeria' (2018).

¹³⁷ Terrorism (Prevention)Act 2011, s1A (3).

¹³⁸ Terrorism (Prevention)Act 2011, S2(a).

¹³⁹ Terrorism (Prevention)Act 2011, S2(f).

¹⁴⁰ Terrorism (Prevention)Act 2011, S 29(referencing s1).

principles to which surveillance policies and practices must adhere.¹⁴¹ These include; legality, necessity, legitimate aim, proportionality, judicial authorisation, effective independent oversight, transparency and user notification among others.¹⁴²

According to international human rights standards, all persons under surveillance must be informed of all decisions to authorise surveillance. Delays can only be justified in certain circumstances such as when notification will seriously compromise the purpose of the surveillance and for a limited time usually until the reason for the delay no longer exists.¹⁴³ However, there is no provision in any of the legislation requiring authorities to notify individuals that they are under surveillance.¹⁴⁴ Applications under this act are *ex parte* meaning that the person or group in question is not informed about the process or represented in it.¹⁴⁵

As a result, people are only aware of surveillance if they are charged with a crime and evidence obtained through the surveillance is presented to the court.¹⁴⁶ This means that there is no official way to be informed of the surveillance decision which seriously undermines the possibility of appeal in case of illegal surveillance in the court.¹⁴⁷

International human rights standards emphasize on the importance of transparency in communications surveillance determinations, by publishing records containing information on authorisations and public oversight through an independent oversight mechanism that will hold the authorities accountable.¹⁴⁸ Neither of the two legislations provides for transparency or the establishment of an independent oversight mechanism.¹⁴⁹ There is no public record or statement on the number of times orders have been made under the Acts or in relation to the number of people affected.

Furthermore, concerns have been raised about indiscriminate data retention. The Cybercrimes (Prohibition, Prevention) Act requires services providers to ‘keep all traffic data and

¹⁴¹ The international principles on the application of human rights to communication surveillance; private international guide to international law and surveillance 2017 <http://privacyinternational.org.feature/993/guide-international-lawandsurveillance> (Accessed 23 October 2021).

¹⁴² n 141 above.

¹⁴³ User notification, international principles on the application of human rights to communications surveillance.

¹⁴⁴ n 136 above.

¹⁴⁵ Terrorism (Prevention) Act 2011, S 29(1), Cybercrimes (Prohibition, Prevention, Etc. Act 2015 s 45(1)

¹⁴⁶ n 136 above.

¹⁴⁷ n 136 above.

¹⁴⁸ See ‘Transparency’ and ‘Public Oversight’ ‘international principles on the application of human rights to communication surveillance.

¹⁴⁹ n 148 above.

subscriber information for a period of 2 years.¹⁵⁰ They are also to comply with the requests of law enforcement agencies or relevant authorities for preservation and release of data.¹⁵¹ Pan-African Digital Rights organisation, Paradigm Initiative and other CSOs criticised and challenged the constitutionality of this provision in court but the case still pending at the Nigeria's supreme court.¹⁵² Collection of data such as traffic data, which among other things may contain information that identifies individuals and their location, is just as intrusive as collecting and analyzing the content of communications.¹⁵³ The mandatory obligation of telecommunication companies and internet services providers to store their subscribers data selectively and indiscriminately, violates human rights standards.

Nigeria does not have a general data protection law; an authority has not yet been charged for the administration of the general data protection regime in the country.¹⁵⁴ Best practices suggest that an effective data protection regime depends on comprehensive data protection laws and the presence of an independent authority with sufficient resources to ensure consistent application of rules and maintain accountability of relevant data processing entities.¹⁵⁵ Information gathering agencies like the National Identity Management Commission and Central Bank of Nigeria have differing standards on data collection and processing and as such fail to meet international best practices on data protection.¹⁵⁶

Aside the identified legislations that have provisions that raise privacy protection concerns, there have been violations by state institutions. Law enforcement agencies like the Special Anti-Robbery Squad (SARS) have been criticised for abuse of power; They profile young Nigerian youths according to their looks and dressing, indiscriminately access their phones under duress and harassment without a judicial order and extort them as a condition to prevent arrest.¹⁵⁷ The trends of such unlawful access to electronic devices, arrests, intimidation, brutality, and extra-

¹⁵⁰ Cybercrimes (Prohibition, Prevention, Etc. Act 2015, s38 (1).

¹⁵¹ Cybercrimes (Prohibition, Prevention, Etc. Act 2015, s38 (2).

¹⁵² Paradigm Initiative 'Legal battle over Cybercrimes Act moves to the Supreme Court <https://paradigmhq.org/legal-battle-over-cybercrimes-act-moves-to-the-supreme-court/> 02 August 2018 (Accessed 27 October 2021).

¹⁵³ n 110 above.

¹⁵⁴ n 110 above.

¹⁵⁵ n 110 above.

¹⁵⁶ n 110 above.

¹⁵⁷ Amnesty International 'Nigeria: Horrific reign of impunity by SARS makes mockery of anti-torture law' 26 June 2020 <https://www.amnesty.org/en/latest/news/2020/06/nigeria-horrific-reign-of-impunity-by-sars-makes-mockery-of-anti-torture-law/> (accessed 02 December 2021).

judicial killings culminated into the #EndSARS protest that reverberated to every corner of the world in the year 2020.¹⁵⁸

In 2018, the Nigeria Federal Executive Council announced the implementation of a digital identity ecosystem.¹⁵⁹ A subsequent investigation revealed that USSD codes (A Global System for Mobile Communications protocol that is used to send text messages), that Nigerians were given to access their National Identity Number (NIN) lacked appropriate digital security safeguard and could be compromised by anyone in possession of a citizen's date of birth and last name.¹⁶⁰ When the USSD code was revealed to be porous, the National Identity Management Commission (NIMC) was urged to suspend implementation.¹⁶¹ This incident revealed the extent of Nigerians' vulnerability to data breaches as well as the non-existence of legislative protection in the event of such breaches.

3.3.2 Freedom of Expression Online

Furthermore, there have been consistent attacks on freedom of information, freedom of expression, and media freedom in Nigeria. Journalists and media activists have continued to be attacked by security enforcement agencies like the Nigerian Army and the Department of State Service.¹⁶² Sometimes, journalists who report on sensitive government issues are criminalised and they are occasionally threatened and arrested if they do not reveal their sources.¹⁶³ ¹⁶⁴. This happens especially when stories and reports on corruption, election, and armed conflict are published.¹⁶⁵ The government has failed to investigate cases of indiscriminate arrest, detention, and prosecution of journalists and media practitioners ensuring that perpetrators are held accountable for these

¹⁵⁸ #EndSars is a movement that emerged from Nigeria and gained global prominence in October 2020 calling on the Nigerian government to end a police unit (SARS), notable for extortion, extra judicial killings, extorting.

¹⁵⁹ National Identity Management Commission 'FEC Approves Implementation of Strategic Roadmap for Digital Ecosystem in Nigeria (2014)' <https://www.nimc.gov.ng/fec-approves-implementationofstrategic-roadmap-digital-identity-ecosystem-in-nigeria> (accessed 23 October 2021).

¹⁶⁰ Anderson Tax 'Federal High Court Affirms the Data Privacy Rights of Nigeria Citizens' 30 August 2019 <https://andersontax.ng/federal-high-court-affirms-the-data-privacy-rights-nigeria-citizens/> (accessed 23 October 2021).

¹⁶¹The Guardian 'Paradigm Initiative urges NIMC to suspend NIN enforcement' (09 January 2019) <https://guardian.ng/news/paradigm-initiative-urges-nimc-to-suspend-nin-enforcement/> (accessed 29 October 2021).

¹⁶² Amnesty International 'Endangered Voices: Attack on freedom of expression in Nigeria' (2019).

¹⁶³ Committee to Protect Journalists 'Nigerian journalist jailed for refusing to reveal source' <https://cpj.org/2018/08/nigerian-journalist-jailed-for-refusing-to-reveal/> 16 August 2018 (accessed 16 August 2018).

¹⁶⁴ United States Department of State '2019 country reports on Human Rights Practices: Nigeria' <https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/nigeria/> (accessed 25 October 2021).

¹⁶⁵ n 164 above

human rights violations. Victims who suffered arbitrary arrest and detention recounted their ordeal to Amnesty International that they were tortured and pressured to write confessional statements without the counsel or presence of a lawyer and these confessional statements were used to prosecute them.¹⁶⁶ Many of them faced indiscriminate charges such as defamation, terrorism, and cyberstalking while some were prosecuted under the Terrorism (Prevention) (Amendment) Act 2013 which carries the death penalty, if found guilty.¹⁶⁷

Apart from journalists and bloggers, opposition politicians, civil society activists, protesters, and critics are also vulnerable to the abuse of power by the government.¹⁶⁸ Nigeria's state and the federal government have a history of enacting questionable applications of law to act against groups under a disguise of national security.¹⁶⁹ An example is the Internal Security and Enforcement Law which was enacted as an anti-kidnapping measure in Akwa Ibom State in 2009 but has been used to suppress government critics. Section 6(1), which talks vaguely about 'public disturbance' has been used to jail government critics.¹⁷⁰ In 2014, a newspaper editor was secretly abducted and then charged under this law for publishing stories critical of the then Governor Godswill Akpabio.¹⁷¹

There has been an increase in monitoring of online activities, particularly on social media by the government. On August 23, 2017, the Director of Defense Information announced the military's plan to monitor social media activities.¹⁷² This, he said will enable the military to 'sieve out and respond to speeches that are anti-government, anti-military, and anti-security.'¹⁷³ This announcement came two days after President Muhammadu Buhari condemned an online speech as crossing redlines.¹⁷⁴ In January 2018, the Minister of Defense issued a directive ordering

¹⁶⁶ n 117 above

¹⁶⁷ Cybercrime Act 2015 and Terrorism (Prevention) (Amendment) Act 2013

¹⁶⁸ A Adegoke, *Digital rights and privacy in Nigeria* (2020).

¹⁶⁹ n 121 above.

¹⁷⁰ Internal Security and Enforcement Law s 6(1).

¹⁷¹ Premium Times 'Akwa Ibom secretly arraigns abducted Editor for publishing story critical of Governor Akpabio' 04 July 2014 <https://www.premiumtimesng.com/news/164361-akwa-ibom-secretly-arraigns-abducted-editor-for-publishing-story-critical-of-gov-akpabio.html> (accessed 02 October 2021).

¹⁷² The Defender 'Military now monitoring comments on social media' 2017 <http://www.thedefender.com/military-now-monitoring-comments-on-social-media-defence-spokesman/> (accessed 23rd October 2021).

¹⁷³ n 126 above.

¹⁷⁴ Sahara Reporters 'Transcript of president Buhari's speech: Nigeria's unity settled' (21 August 2017) <http://saharareporters.com/2017/08/21/transcript-president-buharis-speech-nigeria%E2%80%99s-unity-settled> (accessed 09 November 2021).

security agencies to combat the spread of hate speech on social media.¹⁷⁵ These events contribute to creating the fear of surveillance, particularly in relation to speech-related arrests.¹⁷⁶ An example was when the Department of State Service (DSS), Nigeria's secret Police outfit, arrested and detained a man called Chisom Anaele at his home for allegedly making an unknown and unrevealed statement on social media.¹⁷⁷

Nigeria civil society groups have expressed concern about this trend. The Association for Media and Democracy, for example, criticized the military's decision to monitor social media as an abuse of power and a violation of the fundamental rights of Nigerians.¹⁷⁸ The government has defined communications that justify monitoring in vague terms and given little to no definition of the meaning of phrases such as 'hate speech' and 'redlines'. Additionally, the power to monitor online activity is shared among multiple agencies such as DSS and the military, without any indication that their conduct will be adequately reviewed by supervision, raising concerns that monitoring will not comply with international best practices.¹⁷⁹ Government and corporations argue that monitoring social media and other information that people post online has little to no impact because they rely on information that is publicly available.¹⁸⁰ This inaccurate representation does not take into account the intrusive nature of data collection and the disclosure of personal data obtained through social networks. For instance, posts on Instagram reveal the location and their content and feeds can also reveal individual opinions and information about the person's preferences, health, and sexual orientation.

The Nigerian government announced that it was suspending the activities of the social media, micro-blogging site, Twitter after the platforms deleted a tweet by the country's president

¹⁷⁵ Pulse 'Security agencies to monitor and tackle spread on social media' (25 January 2018) <https://www.pulse.ng/news/local/hate-speech-security-agencies-to-monitor-and-tackle-spread-on-social-media/k7qq0hn> (accessed 20 November 2021).

¹⁷⁶ n 168 above.

¹⁷⁷ Tori.ng 09 August 2017 'How DSS Arrested Man Over Social Media Comment and Kept him in Custody for over 3 months' <https://www.tori.ng/news/70214/how-ds-arrested-man-over-social-media-comment-and.html> (accessed 23 October 2021).

¹⁷⁸ Sahara Reporters 'Media rights group condemns Nigerian government's threat to monitor social media' 31 August 2017 <http://saharareporters.com/2017/08/31/media-rights-group-condemns-nigerian-government%E2%80%99s-threat-monitor-social-media> (accessed 20 October 2021).

¹⁷⁹ n 178 above.

¹⁸⁰ n 175 above.

in June 2020.¹⁸¹ Twitter said the tweet violated its policy. Nigeria's Information minister blames the use of the platform for 'activities capable of undermining Nigeria's corporate existence'.¹⁸²

Social media platforms such as Twitter, serves as a platform to access information, to exchange ideas and has been used for advocacy including for holding government accountable. The human rights community have been unanimous in their criticism of the ban. A statement by 41 civil society and human rights organizations and religious groups condemned it.¹⁸³ Section 45 of the Nigerian constitution gives the government the power to derogate from constitutionally guaranteed rights such as the rights to freedom of expression.¹⁸⁴ However, the Nigerian government did not adhere to the requirement laid by the constitution for derogation or restriction of freedom of expression to be permissible.¹⁸⁵ The Constitution clearly stipulates that such derogation must be provided for in law. The Nigerian government did not enact nor rely on any law to order the suspension of twitter in Nigeria. The Twitter ban in Nigeria did not meet the test of legality, necessity and proportionality as observed by Ayoade.¹⁸⁶

In addition to the constitution of the federal republic of Nigeria, as a state party to international laws such as the ICCPR and the African charter, Nigeria has a duty to oblige by International human rights standards in the unlikely occurrence of needing to derogate from these guaranteed rights. The African Commission Declaration of Principles on Freedom of Expression and Access to Information in Africa prohibits states from interfering with the right of individuals to seek, receive and impart information through any means of communication and digital technologies, through measures such as the removal, blocking or filtering of content, unless such interference is justifiable and compatible with international human rights law and standards.¹⁸⁷ It

¹⁸¹ Guardian 'Nigeria suspends Twitter access after president's tweet was deleted' (04 June 2021) <https://www.theguardian.com/world/2021/jun/04/nigeria-suspends-twitter-after-presidents-tweet-was-deleted> (accessed 08 December 2021)

¹⁸² Washington Post 'Nigeria suspends Twitter after the social media platform freezes president's account' (04 June 2021) (accessed 08 December 2021)

¹⁸³ Daily Trust '41 CSO's flays Buhari Twitter Ban' (05 June 2021) <https://dailytrust.com/41-csos-flay-buharis-twitter-ban> (accessed 09 December 2021).

¹⁸⁴ The Constitution of the Federal Republic of Nigeria Section, 1999 s45.

¹⁸⁵ O Ayoade. Twitter Ban in Nigeria: Legal impacts and implications on the right to freedom of expression (2021) *Research Gate* 6.

¹⁸⁶ Ayoade (n 185 above) 10.

¹⁸⁷ Declaration of Principles on Freedom of Expression and Access to Information in Africa (Principle 37 (1&2) & 38 (1&2)).

is important to note that as the time of writing this dissertation, the issue of Nigeria's Twitter ban is currently being litigated.¹⁸⁸

3.4 An analysis of digital rights-related recommendations of Universal Periodic Review to Nigeria in previous cycles

CSOs working on digital inclusion and digital rights like Paradigm Initiative, Fantsuam Foundation, and Association for Progressive Communications submitted joint UPR reports on the review of digital rights and freedom during Nigeria's second review.¹⁸⁹ They advocated for the proper awareness of the protection of human rights, particularly the freedom of expression, rights to privacy, and protecting rights regarding surveillance and interception of information.¹⁹⁰ The report provided insightful information about digital rights concerns as regards the proposed legislation such as Copyright Amendment Bill, the Telecom Facilities(Lawful Interception of Information) Bill, Telephone Consumer Protection Bill.¹⁹¹

Furthermore, Paradigm Initiative collaborated with the United Kingdom-based Privacy International and Small Media to submit reports proposing specific recommendations regarding freedom of expression online and the right to privacy in the digital age. In the proposed recommendations, the organisations asked the Nigerian government to pass a bill on digital rights and freedom which was already being considered at Nigeria's National Assembly at the time of Nigeria's third review.¹⁹² The bill was passed by the National Assembly; both chambers of Nigeria's bicameral legislature, but the country's president refused to sign the bill into law, citing technical issues and on the ground that the scope of the bill was broad and should be limited to the protection of human rights within the digital environment.¹⁹³ This bill has since been redrafted based on the president's feedback, isolating the two important subjects; data protection for another bill that was at the country's National Assembly, and provisions concerning surveillance and

¹⁸⁸ Premium Times 'NBA sues Buhari, NCC, others over #Twitter ban' 27 July 2021 <https://www.premiumtimesng.com/news/headlines/475980-nba-sues-buhari-ncc-others-over-twitter-ban.html> (accessed 08 December 2021)

¹⁸⁹ M Nwobodo 'Nigeria and the UPR: Human rights and the internet' (2014) <https://www.apc.org/en/blog/Nigeria-and-upr-human-rights-internet> (Accessed 25 October 2021).

¹⁹⁰ n 134 above.

¹⁹¹ n 172 above.

¹⁹² Policy and Legal Advocacy Center, Digital Rights and Freedom Bill Analysis, 2016 <http://plaabillstrack.org/views.php?getid=1801>.

¹⁹³ A Adegoke (2020) *Digital Rights and Privacy in Nigeria* 20.

interception to the ambit of existing regulatory bodies.¹⁹⁴ Despite the adjustments, however, this bill is yet to be passed nor signed into law.¹⁹⁵

Nigeria had received recommendations from Cameroon, Senegal, Syria, Chad, Romania, and some other countries at its third UPR cycle, asking it to strengthen its legal framework for the protection of human rights.¹⁹⁶ The aforementioned bill provided an opportunity for Nigeria to update and strengthen its legal framework for the protection of digital rights but it is yet to fully embrace this opportunity. The disappointment following this outcome has been aptly captured in the Nigerian Guardian Newspaper:¹⁹⁷

The Digital Rights and Freedom Bill has repeatedly gone through an arduous legislative process. The greater the adoption of technology, the more the government should act on protecting the rights of users. If the president refuses to sign the bill, the country will miss an opportunity to protect the rights of Nigerians and this will speak volumes about the government's concern for the protection of its citizens.

Also, the issue of the right to privacy was included in the third UPR cycle where Chile recommended that Nigeria should adopt legislations that control the functioning of Nigeria's Security agencies by limiting their powers, establishing laws consistent with international human rights, and protecting the right of privacy.¹⁹⁸ Nigeria adopted this recommendation but is yet to enact a privacy law to make the recommendations operational. In March 2014, the Association for Progressive Communication (APC) collaborated with various civil society organisations to develop a verbal statement on the adoption of the UPR report. They appealed to the government to reconsider policies and practices that violate human rights and also urged for the reform of internet intermediary liability and copyright laws.¹⁹⁹ They encouraged other civil society stakeholders like CIVICUS and Pen Nigeria to set up a follow-up meeting on the adoption of UPR recommendation.²⁰⁰

¹⁹⁴ U Onwuaso Digital Rights Bill passes first reading at the House of Representative 2019. <https://nigeriacommunicationsweek.com.ng/digital-rights-bill-passes-first-reading-at-the-house-of-the-representatives> (accessed 25 October 2021).

¹⁹⁵ n 194 above.

¹⁹⁶ 'UPR 31: Nigeria's responses to recommendations' UPR Info 26 December 2018 https://www.upr-info.org/sites/default/files/document/nigeria/session_31_-_november_2018/2rps_nigeria_31upr.pdf (accessed 26 October 2021).

¹⁹⁷ The Guardian 'Why Nigeria needs to sign Digital Right and Freedom Bill' 2 July 2020.

¹⁹⁸ Report of the Working Group on the Universal Periodic Review Nigeria A/HRC/WG.6/31/NGA3.

¹⁹⁹ APC 'Universal Periodic Review' 2018 <https://www.apc.org/en/project/universal-periodic-review> (accessed 25th October).

²⁰⁰ n 199 above.

Front Line Defenders, the Irish based international foundation for the protection of human rights submitted a UPR report on the abuse of human rights defenders in Nigeria. They addressed the recommendation given to Nigeria in the previous UPR cycle where Nigeria accepted 175 of the 219 recommendations made by other countries.²⁰¹ Among these recommendations referenced in the report were clear-cut recommendations on the protection of human rights defenders. France recommended that Nigeria should ensure that freedom of expression is respected and preserved and that journalists may take on their mission of providing information without suffering harassment and intimidation.²⁰² Canada recommended that journalists have the right to report and critique the government publicly and freely without the fear of arbitrary arrest.²⁰³

The Front Line Defenders report discussed some key issues concerning specific targeting of human rights activists and journalists based on their legitimate and peaceful work, how restriction of freedom of expression prevents human rights activists from working, the use of legislation to restrict and obstruct the ability of NGOs and journalists.²⁰⁴ An example is the draft NGO regulatory bill, containing seven chapters and 58 clauses.²⁰⁵ Clause 8 of that bill ‘binds the NGOs’ interest to the state,²⁰⁶ thereby ripping them of their autonomy, dictating their work and leaving little breathing space for the exercise of fundamental freedom, particularly the right to freedom and expression and the right to peaceful assembly and association under section 39 or 40 of the 1999 constitution(as amended).²⁰⁷

Subsequently, CIVICUS submitted a follow-up report to the UPR on Nigeria, based on the previous UPR cycle and efforts the government made to implement the recommendations given to it by other member states.²⁰⁸ They stated that during the previous UPR process, Nigeria received eight recommendations on the protection of human rights activists, journalists, and civil society members. Though the country adopted all the recommendations and vowed to create a safe

²⁰¹ Front Line Defenders, ‘UPR Submission Nigeria 2018’ <https://www.frontlinedefenders.org/en/statement-report/upr-submission-nigeria-2018> (accessed 25 October 2021).

²⁰² Nigeria: Universal Periodic Review (UPR)Session 31 Digital Rights Advocacy briefing document by Collaboration on Internet Policy for East and Southern Africa (CIPESA), Paradigm initiative (PIN) & Small Media.

²⁰³ Report of the Working Group on the Universal Periodic Review Nigeria A/HRC/WG.6/31/NGA3.

²⁰⁴ Front Line Defenders, ‘UPR Submission Nigeria 2018’ <https://www.frontlinedefenders.org/en/statement-report/upr-submission-nigeria-2018> (accessed 25 October 2021).

²⁰⁵ International Service for Human Rights, ‘Nigeria: Secure an enabling environment for defenders’ (2019) <http://ishr.ch/latest-update/nigeria-secure-enabling-environment-defenders> accessed 23 October 2021.

²⁰⁶ Draft NGO Regulatory Bill Clause 8.

²⁰⁷ The Constitution of the Federal Republic of Nigeria, 1999 s39 & 40.

²⁰⁸ CIVICUS, Joint submission to the UN Universal Periodic Review: 31th session of the UPR Working Group (2018).

environment in order to perform their duties and also adequately train police officers.²⁰⁹ The government has implemented only two recommendations out of the eight that were given.²¹⁰

Also, under the 2nd UPR cycle, the government received a recommendation on the importance of freedom of expression and access to information. It vowed to implement this recommendation by providing a safe space for journalists and other civil society actors but Nigeria is yet to implement it.²¹¹ The country instead vowed to treat hate speech as an act of terrorism without an explicit definition on what hate speech in the Nigerian context is.²¹²

3.4.1 The efficacy of the Universal Periodic Review recommendations on digital rights to Nigeria

Since the introduction of UPR, it has been used as a tool to hold the government accountable for all human rights issues. There have been major improvements from the first UPR cycle to the third UPR cycle.

During the third UPR cycle, Nigeria accepted 175 out of the 219 recommendations made by the recommending states.²¹³ The most pointed recommendation to Nigeria from a digital rights perspective was offered by Chile when it urged Nigeria to ‘adopt legislation that regulates the functioning of Nigeria’s security agencies by limiting their powers, establishing oversight mechanisms consistent with international human rights standards and safeguarding the right to privacy.’ Unfortunately, Nigeria did not support this recommendation but noted it.²¹⁴ Closer to this was Italy’s recommendations asking Nigeria to protect and promote freedom of expression, association and peaceful assembly in order to create a safe and favourable environment for human rights defenders, journalists and civil society. This was supported by Nigeria.

Many of the recommendations fitting into the digital rights objectives have an overall relevance for human rights. Perhaps, because many of the recommending states prefer to make broad recommendations that many human rights issues can fit into. Some of the relevant recommendations were those covering the right to freedom of expression, particularly for

²⁰⁹ UPR Info <http://www.upr-info-org/database> accessed 25th October 2021.

²¹⁰ n 208 above.

²¹¹ n 208 above.

²¹² ‘Activists Seeks FG explanation of hate Speech’ Vanguard 28 August 2017.

²¹³ Front Line Defenders, ‘UPR Submission Nigeria 2018’ <https://www.frontlinedefenders.org/en/statement-report/upr-submission-nigeria-2018> accessed 25th October 2021.

²¹⁴ EACRN ‘Nigeria UPR Reports’ (15 August 2021)

<https://www.cottmatrix.net/cott-matrix-posts/nigeria-upr-reports/> (Accessed 24 October 2021).

journalists and human rights activists. The recommendations were to provide a safe climate for the aforementioned classes for people to practice their activities and work.²¹⁵ Other recommendations urged the Nigerian government to strengthen or update its legal framework for the protection of human rights. There were six recommendations to this effect in the third cycle. Nigeria also supported Canada's recommendation urging it to ensure that fundamental rights to freedom of association and peaceful assembly are respected and protected for all Nigerians without distinction of any kind and in accordance with the Constitution. Another multiple recommendation received and supported by Nigeria are those asking it to align national laws to International human rights standards that Nigeria has acceded to. One recommendation from Estonia asked Nigeria to refrain from adopting legislative or policy steps that would restrict the civil society space.

The extent to which Nigeria has implemented the recommendations received so far may depend on who you ask. For example, over the three cycles, Nigeria received recommendations to investigate allegations of abuse and extrajudicial killings by Nigerian law enforcement agencies and strengthen accountability around law enforcements. In 2020, it set up a panel in this regard.²¹⁶ Some may argue that the panel was set up solely as a reaction to the #EndSars protest. It is a fact that Nigeria received and supported recommendations calling on actions regarding police brutality in Nigeria.²¹⁷ However, there are still reported cases of police brutality till date²¹⁸ and there is a presence of threats to journalists and bloggers by the Nigerian Government.²¹⁹ ²²⁰ Also, in recent times there has been a spike in clampdowns as reported by local and international human and digital rights organisations, including Amnesty International, Paradigm Initiative and Human Rights Watch. This looks like the reversal of the gains that might have been won earlier.

²¹⁵ n 214 above.

²¹⁶ Naira Metrics 'EndSARS: National Human Rights Commission sets up independent investigative panel' 17 October 2020 <https://nairametrics.com/2020/10/17/endsars-national-human-rights-commission-sets-up-independent-investigative-panel/> (Accessed 28 October 2021).

²¹⁷ A/HRC/40/7 See Res 25, 145, 146, and 173.

²¹⁸ ThisDay 'Despite #EndSARS, Nigeria Records 164 Extra-judicial Killings' 16 October 2021 <https://www.thisdaylive.com/index.php/2021/10/17/despite-endsars-nigeria-records-164-extra-judicial-killings/> (Accessed 07 November 2021).

²¹⁹ Aljazeera 'SARS is no more, but Nigerians say police abuse still here' <https://www.aljazeera.com/news/2021/2/13/sars-is-no-more-but-nigerians-say-police-abuse-still-here> 13 February 2021 (accessed 13 October 2021).

²²⁰ Sahara Reporters (12 August 2021); 'How Nigeria Police detained blogger, Balogun who exposed Pastor Suleman's miracle money scam—Lawyer' <http://saharareporters.com/2021/08/12/how-nigeria-police-detained-blogger-balogun-who-exposed-pastor-sulemans-miracle-money> (Accessed 12 November 2021).

Nigeria also stated in the second cycle that the press was free and that as a result, the press in Nigeria has indeed published critical content directed at the government's policies without any consequences.²²¹ Although the reality on the ground suggests otherwise, the Nigerian government has penalised leading critical media platforms regularly in recent times and has proposed new laws to further restrict freedom of expression including press freedom.²²² The role of the press in the nation is very important and the 2011 Freedom of Information Act which gives the right to access public information, has been passed.²²³ Although the Act has been in existence for the past ten years, it is reportedly ineffective as a result of non-response by public entities to information requests. Nigeria's freedom of information watchdog, Media Rights Agenda details how public institutions routinely fail to comply with the provisions of the law.²²⁴

Also, in the third cycle, Nigeria stated that it is currently working on a cyber-security strategy to prepare Nigeria for global economic competitiveness and that the key component of this strategy is data protection and privacy.²²⁵ Meanwhile, it has failed to enact a data protection and privacy law, years after.

So far, Nigeria has taken part in three cycles of UPR and has adopted recommendations from other countries. The country however has failed to demonstrate strong political will towards the implementation of the recommendations it voluntarily adopted. This calls Nigeria's commitment to the UPR mechanism into question.

3.5 Conclusion

This chapter attempted to answer one of the key questions posed by this research that in what ways has the Universal Periodic Review enhanced digital rights in Africa. It identified the progress made so far from the first to the third UPR cycle in Nigeria. It highlights the key and relevant recommendations made on digital rights to date and to what extent they are being implemented.

The chapter also discussed the overview of the UPR process in Nigeria and analysed relevant digital rights recommendations made to and adopted by Nigeria. The chapter also detailed the efforts that civil society organisations have made to encourage Nigeria to implement digital

²²¹ Report of the Working Group on the Universal Periodic Review A/HRC/25/26 2013.

²²² 'NPC, NBC amendment bills draconian, anti-free press — Guild of Editors' Vanguard 23 June 2021.

²²³ Report of the Working Group on the Universal Periodic Review A/HRC/25/26 2013.

²²⁴ MRA 'FOI Hall of Shame' <https://mediarightsagenda.org/category/foi-hall-of-shame/> (Accessed 24 October 2021).

²²⁵ Report of the Working Group on the Universal Periodic Review 4th session A/HRC/40/7/ 2018.

rights recommendations to the extent of drafting and proposing a Digital Rights and Freedom Bill.²²⁶

Furthermore, because there has not been an update to the human rights legal framework as recommended by a number of recommending states to Nigeria, the problem of digital rights infringement continues to persist in the country. This section is narrowed down to the need for Nigeria to enact the Digital Rights and Freedom Bill into law to reflect implementation of many of the recommendations asking the Nigerian government to strengthen its legal framework for human rights protection.

²²⁶ YNaija '@pinigeria and partners launch #NetRightsNG campaign towards a Digital Rights and Freedom Bill for Nigeria' 12 November 2014 <https://ynaija.com/pinigeria-partners-launch-netrightsng-campaign-towards-a-digital-rights-and-freedom-bill-for-nigeria/> (Accessed 15 November 2021).

CHAPTER FOUR: UPR AND DIGITAL RIGHTS IN SOUTH AFRICA

4.1 Introduction

Just like other member states of the United Nations, South Africa has gone through the Universal Periodic Review which occurs every four-and-half year period three times. The country has been regarded as one of the longest-serving members of the Human Rights Council (HRC).²²⁷ South Africa has shown support to the UPR mechanism used by the HRC. In elucidating its support to the HRC, South Africa described it as a ‘body with first instance’ responsibility for the universal enforcement of human rights and the UPR as the ‘hallmark of the council’s work’.²²⁸ This basically connotes that South Africa is impressed with the unique nature of the Universal Periodic Review. Like the other African States, South Africa is inclined to support the UPR mechanism because of its cooperative, collaborative and inclusive nature to human rights implementation.²²⁹

Furthermore, the justification of the adoption of the Universal Periodic Review in South Africa just like other member States is to diminish the rights violations faced by citizens in the country. These violations include but are not limited to; xenophobia and violence against non-nationals, issues of privacy and freedom of expression, excessive use of force by enforcement personnel, tackling poverty and improving the educational sector, torture whilst in detention, employment issues, and sexual violence amongst others.

Nonetheless, this chapter seeks to provide an overview of the preparatory process of the UPR, the reception of the Universal Periodic Review in South Africa and how it has evolved and improved the human rights of over time. The chapter will also analyse the relevant recommendations that have been given in each cycle, its impacts on digital rights and the efficacy of the recommendations on digital rights. This chapter responds to the third sub-question about the ways in which the Universal Periodic Review has enhanced digital rights in South Africa.

²²⁷ Unpublished: Etone D ‘African States and the Universal Periodic Review Mechanism: A study of effectiveness and the potential for acculturation’ Unpublished PhD thesis, University of Adelaide 2017.

²²⁸ Statement by Ambassador Baso Sangqu, permanent representative of South Africa on the report of the Human Rights Council to the 42nd plenary meeting of the United Nations General Assembly, UN GAOR, 65th Sess, 42nd plen mtg (2010)http://www.southafrica-network-newyork.net/speeches_pmun/view_speech.php?speech=3810844 (accessed 21 October 2021).

²²⁹ Etone n 227 above.

4.2 An overview of the UPR process in South Africa

South Africa was a member of the Human Rights Council (HRC) in 2008 when it went through the first Universal Periodic Review and the second subsequently in 2012 and the third cycle in 2017. Just like every other country going through the review, the prerequisite for the UPR include documentation (SuR, treaty bodies and other stakeholders), the working group on the UPR, the outcome of the working group on the state under review, the adoption of the outcome by the HRC and follow-up reviews.²³⁰ The documentation process involves a national consultation that commences with the preparation and submission of the UPR state report and other stakeholders UPR report.²³¹ It is also required that States consult relevant stakeholders. However, during the first UPR for South Africa, it was observed that no consultation was made in the preparation of the UPR state report. South Africa was the only member state that did not tender any written report prior to the first UPR.²³² According to Resolution 5/1, UPR State Reports are usually due six months before the review.²³³ South Africa's state report was due in January but was submitted on 15 April 2008, on the day of the review in Geneva and the report failed to meet some guidelines of the State Report.²³⁴ The implication of the aforementioned is that South Africa may have not properly prepared for the first Universal Periodic Review.

Consequently, after the South African Human Rights Commission (SAHRC) reprimanded the South African government for its inadequacies in the reporting process. There were commendable improvements in the second UPR, as the state report was submitted on time and the guidelines were complied with. The state report gave information for the nature of the national consultation process but the process did not provide a broad and representative UPR consultation. Hence, although South Africa did not duly prepare for the first review tremendous improvements were observed from the second review.²³⁵

South Africa accepted 22 recommendations in its first UPR in 2008, most of which revolved around human rights issues in general, discrimination against women, and HIV/AIDS-

²³⁰ Universal Periodic Review, 'A Handbook for Civil Society'

<https://www.ohchr.org/Documents/Publications/NgoHandbook/ngohandbook7.pdf> accessed 21 October 2021.

²³¹ Etone Damian, 'African States and the Universal Periodic Review Mechanism: A Study of Effectiveness and the Potential for Acculturation' (Ph.D. Thesis, University of Adelaide 2017).

²³² Lilian Chenwi, *South Africa: State of State Reporting under International Human Rights Law* (Community Law Centre 2010) 64.

²³³ Resolution 5/1, UN Doc A/HRC/RES/5/1, para. 17.

²³⁴ Etone (n 231 above) 216.

²³⁵ Etone (n 231 above) 222

related difficulties²³⁶. Thus, there was no recommendation that was specifically related to digital rights. As against the norm, South Africa did not directly clarify or state its position concerning any of the 22 recommendations while adopting its UPR I outcome report.²³⁷

During the second UPR, 151 recommendations were given to South Africa by sixty-seven (67) States.²³⁸ There was an improvement in the response to the recommendations. Statistics show that South Africa responded directly to 90% of the recommendations. Although the country still failed to clarify its position on about 10% of the recommendations. 80% of the recommendations were declared ‘acceptable’, 9% ‘not acceptable’ and less than 1% ‘rejected’.²³⁹

The examination of South Africa’s receptiveness of the Universal Periodic Review mechanism can be viewed as one that has improved over time across UPR I & II. Just like Nigeria and Kenya, South Africa has accepted a high percentage of the UPR II recommendations.²⁴⁰ Hence there was also an improvement in the third cycle of the UPR which was held in 2017.

4.3 Digital Rights in South Africa

South Africans have effectively used mobile devices and social media platforms for civic and advocacy demands with hashtags such as #FeesMustFall to protest the prohibitive cost of university tuition and #RhodesMustFall, a broader movement for the decolonisation of education across the country gaining global momentum and forcing online actions.²⁴¹ These reflect the extent to which digital platforms have become essential to the exercise of the rights to expression and protest in South Africa.

In the latest Freedom on Net Report by the global Internet Freedom watchdog, Freedom House, Digital Rights declined in South Africa during the coverage period. Emergency regulations imposed in response to the COVID-19 pandemic enabled the government to exercise control over

²³⁶ J Venegoechea-Barrios, ‘The Universal Periodic Review: A new hope for international human rights law or a reformulation of errors of the past?’ (2008) *Edicion Especial* 101-116.

²³⁷ Report of the HRC on its 8th Session, UN Doc A/HRC/8/52, paras 562-592.

²³⁸ Etone (n 231 above).

²³⁹ UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review – South Africa-Addendum*, 21st session, Agenda Item 6, UN Doc A/HRC/21/16/Add.1 (2012).

²⁴⁰ Etone (n 231 above) 228.

²⁴¹ ZI Dlamini *et al* ‘Social Media Advocacy in the #MustFall campaigns in South Africa’ (2018) http://researchspace.csir.co.za/dspace/bitstream/handle/10204/10357/Dlamini_21129_2018.pdf?isAllowed=y&sequence=1 (accessed 25 October 2021).

online expression.²⁴² The report noted self-censorship and the prevalence of online harassment. It also expressed concerns about South Africa's surveillance capabilities. However, the report observed that there were no reported instances of blocking or filtering and no restrictions on the use of social media for online mobilization. Overall, South Africa was rated as 'free' based on the indicators used.

The Digital Right in South Africa Report published by Paradigm Initiative observed that South Africa still faces substantial hurdles in advancing digital rights. The report pointed out that many of the existing inequalities, barriers to access, and structures of discrimination in South Africa have been magnified by the global pandemic. The report recommended that efforts towards effectively advancing meaningful access and digital literacy need to be prioritised with universal, meaningful access for all persons in South Africa being the target. The report also proposed that laws must be reformed to reflect these new challenges and realities.²⁴³ For the sake of this research, the freedom of expression and privacy landscape is briefly examined.

4.3.1 Freedom of Expression Online

The South African Constitution provides that the right to freedom of expression guarantees the right to receive information and ideas but does not extend protection to propaganda for war, incitement to imminent violence, and hate speech which is described as the advocacy of hatred based on race, gender, religion, ethnicity and speech that constitutes incitement to cause harm.²⁴⁴

Internet access has rapidly increased in South Africa and according to the South African national census report, the portion of households owning mobile phones had increased from 32 percent to 89 percent between 2001 and 2011.²⁴⁵ This implies the high rate of the use of mobile devices and the use of the internet. The country has experienced rapid growth in digital citizenship and this was facilitated by the use of social media applications such as Facebook and Twitter to create new digital civic platforms to advocate for change.²⁴⁶

²⁴² Freedom House 'Freedom on the net 2020: South Africa'. <https://freedomhouse.org/country/south-africa/freedom-net/2020> (Accessed 20 October 2020).

²⁴³ T Power 'Digital Rights in Africa report' In Londa (2020), PIN.

²⁴⁴ Constitution of the Republic of South Africa No.108 1996 16.

²⁴⁵ T Bosch & T Roberts, 'Digital Rights in closing civic space: lessons from ten African countries' (2020) <https://www.google.com/search?q=digital+rights+in+south+Africa&oq=digital+rights+in+south+Africa&aqs=chrome..69i57j33i22i29i30i4.11639j0j4&client=ms-android-oppo-rvo3&sourceid=chrome-mobile&ie=UTF-8> . (Accessed 23 October 2021).

²⁴⁶ n 245 above.

In South Africa unlike many other African countries including Nigeria, the government has not sought to limit the civic space with laws. There have not been widespread cases relating to arrest and detention of citizens for expressing or voicing their opinions online or even considered shutting down the internet space. However, in the wake of the COVID-19 pandemic, South Africa introduced regulations restricting social and economic activities in order to stem the tide of the spread of the virus.

The South African Disaster Management Regulations has provisions that criminalise the publication of ‘any statement through any medium including social media, with the intent to deceive. A provision that civil society organisation, Article 19 described as concerning. The organisation says it follows a dangerous pattern of using COVID-19 to enforce ‘false information laws’ in Africa.²⁴⁷ The development of the regulation had significant impact on the ability of journalists to do their work in South Africa.²⁴⁸

Moreover, some foundational issues exist. There is an uneven distribution to smartphone ownership, affordable data, and even access to the internet amongst the population.²⁴⁹ Thus, it could be depicted that the right to freedom of expression online, and digital rights generally are unevenly enjoyed in South Africa.

Without access to digital devices, many South Africans are unable to exercise digital rights like some others. The Implication of digital blackout is huge in a digital age. Digital platforms serve the purpose of amplifying oppressed voice and helps bring attention to core societal issues such as the #FeeMustFall and #RhodesMustFall campaign referenced earlier in this research.

In urban areas, access to the internet is easier, but this is not the case in rural areas. Also, gender gaps, as well as considerable gaps between population groups and educational levels, were found in internet and computer use, mobile ownership, and access to mobile internet and accessing news via the internet.²⁵⁰

²⁴⁷ Article 19 ‘South Africa: Prohibitions of false COVID-19 information must be amended’ <https://www.article19.org/resources/prohibitions-of-false-covid-information-must-be-amended/> 23 April 2021 (Accessed 26 October 2021).

²⁴⁸ T Mawarire ‘Covid-19 effects on freedom of expression in southern africa, 2020 research report’ (2020) published by Advancing Rights in Southern Africa (ARISA) and Internews.

²⁴⁹ n 248 above.

²⁵⁰ E Bornman (2016) Information society and digital divide in South Africa: results of longitudinal surveys, 19 *Information, Communication & Society* 264 – 278.

Therefore, analysing freedom of expression issues in South Africa must factor this as an underlying issues requiring government actions so that all voices get to be heard including those living in rural areas and other demography highlighted above.

Generally, there is a level of freedom of the media in South Africa. Nonetheless, under the past administration, journalists faced threats and harassment both online and offline.²⁵¹ Again, this undermines the rights of the citizens to freedom of expression online. The general guarantee of freedom of the media has been established in the case between *South African National Editors Forum v. Black Land First*, where the High Court of South Africa granted orders forbidding the Black Land First organization from engaging in amongst others acts of intimidation, harassment, and threats directed to certain journalists. The court also stated that the journalists had a right to be protected and to carry out their profession according to their freedom of expression.²⁵²

4.3.2 The right to privacy in South Africa

The right to privacy is protected under section 14 of 1996 South African Constitution. The provision is part of the human rights provision in the constitution's bill of rights and it safeguards and protect citizens information.²⁵³ Both state and non-state actors are bound by the provision.²⁵⁴ The right of privacy is further protected by the through the Protection of Personal Information Act (POPIA) 2013. Therefore, unlike Nigeria, South Africa has enacted a law specifically to address privacy issues in the digital age. The extent to which the law has been implemented may be a subject of debate as the law was not meant to come into effect fully until the year 2020.²⁵⁵

Also, South Africa's Constitutional Court in a landmark judgment in favor of privacy declared the bulk interception of communications by the country's spy agencies unlawful. It was further argued that the Regulation of Interception of Communications Act of 2002 (RICA) and the National Strategic Intelligence Act 39 of the 1994 (NSIA) violates the right to privacy.²⁵⁶

²⁵¹ The Conversation, 'Media freedom remains fragile in South Africa' 2017 <http://theconversation.com/why-media-freedom-remains-fragile-in-south-africa-85868> (accessed 24 October 2021).
<https://globalfreedomofexpression.columbia.edu/cases/south-african-national-editors-forum-v-black-first-land-first/> (accessed 24 October 2021).

²⁵³ The Constitution of the Republic of South Africa, 1996 s14.

²⁵⁴ (n 253 above) s8.

²⁵⁵ 'An update on South Africa's 2013 Protection of Personal Information Act' Global Policy Watch

²⁵⁶ T Okunoye, 'What happened with digital rights in Africa in Q1 2021?' <https://medium.com/berkman-klein-center/what-happened-with-digital-rights-in-africa-in-q1-2021-93a890cf3e2d> (accessed 25 October 2021)

On the downside, however, there has been the low implementation of the Protection of Personal Information Act, 2013 as the substantive part of the Act remains inactive until July 2021.²⁵⁷ Hence, the right to privacy online and data protection in South Africa cannot be said to be completely guaranteed in practice since it only became fully effective recently and it'd be premature to assess the effectiveness of enforcements of its provisions.

Unlawful surveillance in South Africa is also a huge concern for the citizens' right to privacy.²⁵⁸ Therefore, it can be concluded that the interception of technologies and the increased use of surveillance by the government is questionable because it conflicts with the citizens right to privacy online and there is yet an enabling Act to provide a legal framework around it.

Basically, South Africa from the analysis so far. can be partially commended for the efforts made in promoting and protecting digital rights particularly the right to privacy and freedom of expression online, but there is a lot of room for improvement especially with respect to digital equality among different demographics of the society. Addressing the urban-rural gaps, the gender divide etc. are critical to the ability of many South Africans to fully enjoy digital rights because digital rights are essential human rights in a world where technology has become an integral part of daily lives and the UPR provides an important platform to push this improvement.

4.4 Analysis of digital rights related recommendation to South Africa in previous cycles.

As established earlier, there were no digital rights-related recommendations to South Africa during its first Universal Periodic Review. By the second review, however, it received a considerable number of relevant recommendations for digital rights. Therefore, this section will focus on the 2nd and third cycles of the review

4.4.1 UPR, South Africa and Digital Rights in the 2nd Cycle

A group of prominent civil society organisations, working on human rights and communication submitted a joint report to the United Nations Human Rights Council through the Universal

²⁵⁷ J Duncan 'Monitoring and defending freedom of expression and privacy on the internet in South Africa' (2011)<https://giwatch.org/en/country-report/freedom-expression/monitoring-and-defending-freedom-expression-and-privacy-internet> (accessed 24 October 2021).

²⁵⁸ G Mutung'u 'Surveillance law in Africa: a review of six countries: South Africa country report' (2021) *Institute Development Studies*.

Periodic Review process ahead of the 2nd cycle. The group challenged the South African government to meet its commitment to guarantee freedom of expression according to the constitution. The group raised concerns about universal, equitable, and affordable internet access; internet penetration in South Africa, and online content diversity and language including concerns about the right to privacy and the regulation of the interception of communications. They also highlighted concerns about the freedom of expression and impending legislative restrictions as well as about access to information and protections for whistle-blowers. They concluded their report by making relevant recommendations within each context.²⁵⁹ This effort yielded positive outcome as shown in the recommendations received by South Africa at the 2nd cycle particularly touching on the rights to privacy and the freedom of expression online. These include:²⁶⁰

- To strengthen freedom of expression and access to public domain information especially at the community level and government departments.
- To ensure that domestic laws with the right to access information and freedom of expression be complied with.
- The Protection of State Information Bill, when enacted, should comply with the international human rights law.
- To ensure that the Protection of State Information Bill and other statutory measures do not violate the right to freedom of expression or unjustifiably impede access to the public domain information.
- To reexamine the Protection of State Information Bill to establish its conformity with the ICCPR, specifically by removing excessive punishments for the publication of classified information and the inclusion of public interest defense.
- Amendment of the draft bill on the Protection of State Information to ensure that the freedom of the press is not curtailed in a disproportionate manner.
- To keep promoting freedom of expression, at national and international levels and to review the Protection of State Information Bill.

²⁵⁹ GenderIT.org ‘UPR of South Africa: Connecting the right to communication to women’s rights’ (15 June 2012).

²⁶⁰ Human Rights Council, ‘Report of the Working Group on the Universal Periodic Review: South Africa (2012) <https://www.ohchr.org/EN/HRBodies/UPR/Pages/Documentation.aspx> (accessed 22 October 2021).

4.4.2 UPR, South Africa and Digital Rights in the 3rd Cycle

In 2017, the third cycle recommendations on digital rights were also proffered to continue to uphold digital rights in South Africa. In the outcome document of the recommendations received by South Africa in UPR 3, relevant recommendation noted by South Africa was the need to engage NGOs and the media to seek common ground on the draft hate crimes bill. The UPR 3 had more recommendations bordering on freedom of expression and opinions. The recommendation came from the United States. The table below gives a graphical presentation of the recommendations bordering on freedom of expression and the right to privacy that were supported by South Africa:²⁶¹

S/N	Recommendations	Recommending State	Theme
1	Continue its efforts to ensure the right to access to information and freedom of expression by adopting regulations that would be in accordance with both the South African Constitution and the international treaties and commitments of South Africa	Poland	Freedom of expression and opinion
2	Safeguard journalists and writers, especially those working for State-owned media houses or public broadcasters, so they can work freely and without fear of reprisal for expressing critical opinions or covering subjects that the Government may find sensitive	Sweden	Freedom of expression and opinion
3	Review the current text of the Protection of State Information Bill in order to remove any limitations on freedom of expression, including the unwarranted persecution of whistle-blowers	Sweden	Freedom of expression and opinion
4	Continue to revise the Protection of State Information Bill so that it fully respects international human rights law, in particular the right to freedom of opinion and expression	Switzerland	Freedom of expression and opinions
5	Take the necessary steps to ensure that all the operations of intelligence agencies are monitored by an independent oversight mechanism	Liechtenstein	The right to privacy
6	Ensure that all communications surveillance requires a test of necessity and proportionality	Liechtenstein	The right to privacy

²⁶¹ UPR Info “UPR of South Africa (3rd Cycle – 27th session) ‘Thematic list of recommendations’” info.org/sites/default/files/document/south_africa/session_27_may_2017/matricerecommendationssouthafrica.pdf (accessed 05 November 2021).

These recommendations are proof that the UPR has progressed from the first cycle to the third with respect to the recognition of digital rights, although the recommendations have not been fully utilised in South Africa. It is a work in progress and should improve with the subsequent cycles. This research will propose useful steps in taking this win forward in its recommendations.

4.4.3 The Effectiveness of UPR Recommendations on Digital Rights in South Africa

The National report and stakeholder information submitted ahead of each UPR cycle provides an insight into steps that were taken and progress made between two consecutive cycles of the UPR for any SuR. From the stakeholder's information submitted ahead of South Africa's third UPR, concerns were raised by non-government stakeholders about the non-implementations of some previous recommendations to South Africa.

There was a consensus that the recommendations received during the previous UPR which addressed the Protection of State Information Bill (POSIB) were noted. This consensus was reflected in two different joint submissions. The first was jointly submitted by Privacy International (PI) and Rights to know (R2K). The second, by the World Alliance for Citizen Participation (CIVICUS) and the Human Rights Institute of South Africa (HURISA). South African based, CSO, The Legal Resource Centre (LRC) stated that since the previous review, improvement have been made to POSIB by the South African government but that key substantive concerns had still not been addressed. LRC then urged South Africa to 'establish a multi-stakeholder approach to revise POSIB in line with domestic and international law; and refer the final text of POSIB to the Constitutional Court to consider the constitutionality thereof'.²⁶²

The joint submission by PI and R2K also noted that noted that the apartheid-era 'Key Points Act' which has glaring legal deficits, including the criminalisation of divulging information considered compromising to national security, had not been repealed or sufficiently amended.²⁶³ LRC noted a trend to regulate the internet, taking note in particular of the draft Online Regulation Policy and the Cybercrimes and Cybersecurity Bill. PEN South Africa and PEN Afrikaans based in the United Kingdom recommended amending the bill so that it achieves the protections sought,

²⁶² UNHRC 'Universal periodic Review, South Africa – Summary of stakeholders information' A/HRC/WG.6/27/ZAF/3 (2017) para 46.

²⁶³ UNHRC (n 262 above) Para 47.

taking into consideration the freedom of expression clauses in the constitution and protection of the public interest.²⁶⁴

On the right to privacy, CIVICUS and HURISA in their joint submission raised concerns about the low burden of proof required by legislation for covert surveillance and recommended that the Regulation of Interception of Communications and the Provision of Communication-Related Information Act be reviewed to ensure that it is consistent with the Constitution. They also urged the government to refrain from engaging in mass surveillance; and increase the transparency of its surveillance policy.²⁶⁵ LRC drew attention to reports of state surveillance of prominent investigative journalists, which it said seriously inhibited the media's ability to function freely and independently.

There is no doubt that the Universal Periodic Review in so many ways promote human rights best practices across the globe. The performance of South Africa at the various cycles of the UPR in 2008, 2012, and 2017 have over time improved respectively. The same applies to the reflection of digital rights by recommending states in their recommendations to South Africa.

From the above, it is obvious that there was advancement in the recommendations given to South Africa from UPR II as digital rights were put into consideration. While there are recorded dissatisfaction by stakeholders, some actions have been taken on a key recommendation that featured in both UPR II and III. The emphasised that the POSIB is continuously revised to remove any limitations on freedom of expression.²⁶⁶ As at June 2020, South Africa's President asked the National Assembly to reconsider the bill due to lingering questions about the constitutionality of the current draft of the bill.²⁶⁷ Also, in response to the recommendation by the United States in the third UPR on the need for South Africa to engage NGO's and the media to seek common ground on the hate crimes bill, the Portfolio Committee on Justice and Correctional Services have called for written submissions on the draft Prevention and Combating of Hate Crimes and Hate Speech Bill in August 2021.²⁶⁸

²⁶⁴ UNHRC (n 262 above) Para 48.

²⁶⁵ UNHRC (n 262 above) Para 51.

²⁶⁶ UNHRC, *Report of the working group on the Universal Periodic Review – South Africa- Addendum*, 21st session, Agenda Item 6, UN Doc A/HRC/21/16/Add.1 (2017).

²⁶⁷ Michalsons 'Protection of State Information Bill – POSI Bill'

<https://www.michalsons.com/blog/protection-of-state-information-bill-posi/18015> (Accessed 05 November 2021).

²⁶⁸ P Singh 'Call for comment: Prevention and combating of hate crimes and hate speech bill' (27 August 2021) <https://powersingh.africa/about/#about> (accessed 29 October 2021).

Therefore, the UPR has been useful for digital rights in South Africa. Admittedly, this is still work in progress but the growth trajectory is evident and can be sufficiently built on to achieve greater effectiveness for the protection of digital rights in South Africa

4.5 Conclusion

This chapter attempted to answer the question about the ways in which the Universal Periodic Review has enhanced digital rights in South Africa. It observed that the reflection of digital rights in recommendations to South Africa improved considerably over time. This chapter has in a nutshell discussed the Universal Periodic Review and all its cycles in South Africa, digital rights in South Africa, and has buttressed it with the effectiveness of the UPR on digital rights in South Africa.

CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

5.1 Summary of Findings

This study set out to answer salient questions regarding ways Nigeria and South Africa can improve digital rights protection through the Universal Periodic Review. The study additionally explored ways in which the Universal Periodic Review enhanced digital rights in the two countries so far. Additionally, the roles of the state, civil society organisations, and human rights institutions involved in the Universal Periodic Review in ensuring its success in African countries were identified. It also answers the question about how these actors maximise the Universal Periodic Review for digital rights protection in their respective countries. These questions were answered by analysing the concept of the Universal Periodic Review and the effect it has had in the promotion of digital rights protection mechanisms in South Africa and Nigeria through its recommendations while emphasising the possible ways these recommendations can change the course of digital rights protection in these countries and the hindrances that have stalled its progress so far.

This research began with an overview of the UPR, its origin, the reason for its creation, and its processes. The principles of UPR were identified to include universality, cooperation, complementarity, and the equal treatment of all member states in monitoring human rights compliance. It was also found that African states engage more with the UPR mechanism than with other human rights mechanisms because of the control they have in the process. This was followed by the establishment of digital rights as human rights simply in the digital space. The codification of these rights in various international instruments was examined. The scope of the study was narrowed down to freedom of expression and the right to privacy online.

It was established that due to the digital age we are currently in, there is a need to ensure these rights are protected and citizens feel safe both offline and online. Despite this established need, research showed that legislative frameworks to ensure the protection of these rights are either nonexistent or ineffective. Instances in several African countries were highlighted such as the 2016 internet shutdown in Uganda, the ongoing Twitter ban in Nigeria, and ongoing surveillance and interception in South Africa. The UPR was also identified as a powerful tool in the improvement of human rights online and offline.

In the analysis of the effectiveness of UPR recommendations in tackling the digital rights issues in Africa, this research examined Nigeria and South Africa as case studies. In the study of Nigeria's UPR preparation for its first cycle, it was discovered that the process was riddled with several issues such as lack of representation from critical stakeholders in the pre-review process. While the issue of representation was improved in the 2nd cycle, the coalition created to oversee the implementation of UPR 1 recommendations and submit the report for Nigeria for UPR 2 was disbanded due to incompetence. The new coalition created though still in existence and functioning is almost as incompetent as its predecessor.

The Digital Rights and Freedom Bill was recommended by several NGOs in a joint UPR report to protect the right to freedom of expression, right to privacy, and other digital rights but the bill is yet to be passed into law due to the reluctance of the Nigerian government. Conversely, bills that have broad provisions to hurt digital rights are being considered by the Nigerian government. After several attempts, the Nigerian government has failed to pass a Data Protection bill into law to protect the right to privacy. It was found in this research that although Nigeria accepts UPR recommendations in large numbers (175 accepted recommendations out of 219) at the last cycle, it barely implements nor enforces them. It was also established that there is no general data protection law in Nigeria.

Chapter Four which focused on digital rights in South Africa and the effectiveness of the UPR process in furthering digital rights protection analysed South Africa's domestic digital right protection laws, the actions of the UPR during its 3 cycles and the country's reception of UPR recommendations. It was found that while recommendations were not made regarding digital rights in UPR's 1st cycle, UPR 2 suggested several areas for improvement in digital rights protection. It covered areas such as the freedom of expression, strengthening citizens' access to information and ensuring national laws such as the Protection of State's Information bill do not violate these rights. Subsequently, recommendations made in the 3rd cycle held in 2017 focused its digital rights made clear recommendations on the right to privacy. The chapter also analysed the extent to which digital rights are protected under South Africa domestic laws. Some laws analysed includes the South African bill of rights which protects citizens access to information and the Protection of Personal Information bill which protects citizens' privacy. Commendably, the South African government has not taken steps to restrict its citizens' freedom of expression. While

in South Africa, there is progress still to be made on digital rights, the recommendations of UPR have made an impact and encouraged digital rights protection to a great extent.

5.2 Recommendations

While there are no methods to force recommending states to include specific recommendation to the state under review or for a state to adopt such recommendations or to implement the recommendations, several steps can be taken to increase the chances of achieving and foster protection of digital rights through the UPR through the recommendations below;

5.2.1 The UPR must be engaged as a cycle and not a Geneva event: The UPR is a cycle and not just the Geneva event. To maximise its potential gains, actors must seek to leverage the entire cycle and engage across all elements of the cycle for an effective outcome. While the Geneva event receives attention from a broad range of stakeholders, the preparatory and follow-up process barely receives the same level of attention. Meanwhile, the quality of the pre- and post-review activities are what leads to real changes. A stronger follow-up mechanism is required to ensure that accepted recommendations are implemented. An effective engagement must involve action taken before, during and after the review in Geneva. Civil society stakeholders have a role in this process to follow up after each review session, advocating for implementation. As seen in the second UPR cycle on Nigeria, the APC collaborated with various civil society organisations such as CIVICUS, PEN Nigeria, and the Paradigm Initiative to develop a verbal statement on the adoption of the UPR report which egged the government to reconsider the policies and practices that violate the human rights and also urged for reform of internet intermediary liability and copyright law. This type of coordination will always be required for a meaningful engagement of the UPR process. Granted that they do not necessarily guarantee enforcements, but they increase the potential for enforcement significantly.

5.2.2 Broad Consultation at the National Level: From the analysis done so far, it is clear that the government needs to do more in preparing its report in accordance with the Human Rights Council guidelines for the UPR and open broad consultations with civil society, including stakeholders, NGOs, and National Human Rights Institutions (NHRIs) before drafting its report. Through this effort, these stakeholders are able to provide independent feedback and ensure all relevant issues are addressed. Failing to open a broad consultation defeats the objectives of the review and limits the capacity of the process to effect any meaningful change

5.2.3 Digital rights and human rights organisation must work together across borders: In order to be able to use the UPR as a mechanism to safeguard digital rights, organisations working specifically on digital rights and those who have been working on human rights, particularly on

freedom of expression, press freedom, and the rights to privacy offline must work more together, not just within the same country but across the border. In the second UPR cycle, the Association for Progressive Communications APC based in South Africa collaborated with organisations in Nigeria to prepare reports on digital rights in Nigeria and made a joint stakeholder submission for Nigeria. This type of collaboration helps to facilitate greater output and mentorship for organisations with lesser experience in the workings of the UPR.

5.2.4 Specific and action-oriented recommendations: Recommending states must endeavor to provide more action-oriented recommendations; There's a need to make specific reference to the need to protect freedom of expression online and clearly urge states under review to respect digital rights. The point being made here is on the need to limit ambiguous recommendations that cannot be clearly measured.

5.2.5 Identify and work with strategic partners: One of the strategic action African human and digital rights stakeholders can do to improve the chances of getting recommending states to make specific digital rights recommendations, is to engage more with recommending states that have made such recommendations to other countries over the three concluded cycles. For example, this research identified how China has received recommendations bordering specifically on digital rights from countries such as France, Luxembourg, Sweden, Estonia, and Mozambique.²⁶⁹ Therefore a clear engagement plan with these countries to make the case for clear digital rights recommendations to African countries will serve to push the subject to the forefront of recommendations received by African states under review.

5.2.6 Expand the scope of human right protection laws to include the digital space: There is a lot of focus on human right protection and the establishment of laws to that effect. Instead of drafting new laws to cover digital rights, the existing laws should be revised and expanded to reach the scope of the internet. Hence, all human rights provided for in a law, act or bill will apply to the digital space. As a result, whether the violation occurred physically or digitally, the law will cover the situation and proffer solutions. Digital Rights stakeholders can build their UPR advocacy around this principle and have a uniform approach, working with other CSO's from across the globe. The uniformity of demands can propel the issue to the forefront of considerations by member states

²⁶⁹ UNHRC 'Universal Periodic Review - China' <https://www.ohchr.org/EN/HRBodies/UPR/Pages/CNindex.aspx> (Accessed 02 August 2021).

5.2.6 Enactments of legislations for the protection of digital rights: Alternately to expanding the scope of existing laws, brand new legislation may be drafted for the protection of digital rights. In the case studies analysed in chapters 3 and 4, both countries have bills on digital laws. In South Africa, the Protection of Personal Information law (Went into full implementation in July 2021 and in Nigeria, the draft Digital rights and Freedom bill <Awaiting passage and Presidential assent>). If these legislations are passed into law and enforced, they will create a platform for penalising digital rights violations and complement international frameworks and the constitution that already safeguards these rights. In addition, they will provide additional basis for NHRIs, NGOs and Civil Society organisations to advocate for specific digital rights recommendations at the UPR.

5.3 Conclusion

This mini-dissertation attempted to answer the questions posed at section 1.5. The second chapter answers sub questions (a) and (b) by defining the UPR and digital rights and the role of the various actors in the UPR process in ensuring digital rights protection in Africa. Chapter three questions in what ways has the UPR enhanced digital rights in South Africa? Chapter four questions in what ways has the UPR enhanced digital rights in Nigeria. These two chapters answered sub question (c). Finally, chapter 5 questioned the ways that various stakeholders involved in the UPR can enhance digital rights protection in Nigeria and South Africa and by extension, Africa, using the UPR mechanism.

The quality of engagements by civil society and human rights institutions in the UPR can be improved upon. There is more to do with regards to capacity building and understanding the process. This played a role in the volume, quality and relevance of recommendations both Nigeria and South Africa have received in the UPR cycles. It is hoped that the recommendations provided in this research contributes to strengthening the capacity of relevant stakeholders to leverage the UPR mechanisms to protect digital rights in Africa.

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