



**A Framework for Defending Human Rights and the Rule of Law in the Digital Age:
Reflections and Insights from the 2019 Annual Jurists' Conference**

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Abbreviations

ACJPS	African Centre for Justice and Peace Studies
AHADI	African Hub for Accountability and Development Initiatives
AI	Artificial Intelligence
AJC	Annual Jurists' Conference
CIPESA	Collaboration on International ICT Policy for East and Southern Africa
CSO	Civil Society Organization
DRC	Democratic Republic of Congo
EU	European Union
GDPR	General Data Protection Regulation
HRC	Human Rights Council
HRD	Human Rights Defender
ICT	Information, Communication and Technology
KHRC	Kenya Human Rights Commission
MICT	International Residual Mechanism for Criminal Tribunals
NIIMS	National Integrated Information Management System
NPS	National Police Service
OHCHR	Office of the High Commissioner for Human Rights
PPP	Public Private Partnership
SDG	Sustainable Development Goals
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development

1 Introduction

On 21-22 November 2019, the Kenyan Section of the International Commission of Jurists (ICJ-Kenya) organised its 21st Annual Jurists' Conference (AJC) in Diani, Kenya. Since its inception, the AJC has consistently served as a vital and cherished forum for bringing together jurists drawn from diverse sectors of the legal profession in Kenya and beyond to reflect on critical issues of the day relating to human rights, rule of law, good governance, democracy and development. Regular participants have included members of the civil society, practising lawyers, judicial officers, state attorneys, and legal academics. Individuals from other relevant professions have always attended the conference too. Their participation means that the discussion at the AJC is, to the extent possible, multidisciplinary in nature.

The rich diversity of AJC participants speaks to ICJ-Kenya's convening power as well as its leadership role within the human rights community in Kenya. Tangible outputs of past editions of the AJC have included communiqués, conference reports, and published books. More importantly, the AJC has helped spotlight and problematize emerging human rights and rule of law issues. Several key decisions and actions that have shaped or influenced the trajectory and the landscape of human rights and democracy in Kenya and further afield have been conceived and deliberated upon at the AJC.

Entitled "*Technology, development and the rule of law: Challenges, options and emerging opportunities*", the 2019 AJC was organised with the kind support of Konrad Adenauer Stiftung (KAS), Kenya Human rights Commission (KHRC) and the Collaboration on International ICT Policy for East and Southern Africa (CIPESA). It had a special meaning and significance for ICJ-Kenya. The conference was the highlight of the series of activities and events that the organization conducted throughout 2019 to celebrate its 60th anniversary. Founded in 1959 to foster and work towards "a just, free and equitable society", ICJ-Kenya is the oldest human rights organization in Kenya. The history of the organization is closely entwined with that of the country insofar as human rights, the rule of law and democracy is concerned. The stated mission of ICJ-Kenya is to "promote human rights, justice and democracy in Kenya and around Africa through the application of legal expertise and international best practices". In pursuit of this mission, the organization has made innumerable and lasting contributions both at the national and regional levels.

Mukhisa Kituyi, Secretary General, United Nations Conference on Trade and Development (UNCTAD), delivered the opening keynote address for the conference while Mathilda Twomey, Chief Justice of Seychelles, delivered the closing address. Many other notable speakers offered their reflections and insights during the conference. They included Kivutha Kibwana, Governor, Makueni County, and Serge Brammertz, Chief Prosecutor, International Residual Mechanism for Criminal Tribunals (MICT). A total of eight substantive panel discussions and one side-event took place during the conference. Each panel was composed of a moderator and about three to five speakers who reflected on assigned topical issues related to the theme of the conference. The presentations by the speakers were then followed by a plenary discussion involving all or a section of the conference participants. The side-event was titled "*Digital rights and strategic litigation*" and organised by CIPESA.

Several developments, all recorded in the month of November, created a useful and opportune backdrop for the discussion that took place during the conference. To begin with, the Kenya Data Protection Act No. 24 of 2019 became law on 8 November 2019, barely two

weeks before the conference. Around the same time, the African Commission on Human and Peoples' Rights, the continent's premier regional human rights body, adopted the Revised Declaration of Principles on Freedom of Expression and Access to Information in Africa.¹ The Revised Declaration extends the scope of the original 2002 Declaration to include digital rights and the corresponding state obligations. Another development occurred on 22 November, the second day of the conference. The Kenya National Police Service (NPS) launched its first ever digital occurrence book at a police station in Nairobi,² marking a crucial first step towards digitizing police records and registers. The clear and unmistakable relevance of these developments to the theme of the conference confirmed its timeliness and utility.

This report presents the main thrusts and conclusions of the conference discussion. It filters out the main issues that emerged from the discussion and places them in the broader discourse on the impacts of digital technologies on human rights, rule of law, democracy and development. It also outlines the practical measures and strategies agreed upon at the conference and aimed at ensuring that ICJ-Kenya and human rights organizations and HRDs in Kenya and Africa are adequately equipped to effectively defend human rights and rule of law in the digital age. The immediate output of the conference, *The Diani Declaration*, is attached to this report as an annex.

2 The conference theme in context

The 2019 AJC focused on a timely and an ever more relevant theme. We live in a digital age, one which continues to witness unprecedented technological advances. These developments are taking place not only on an industrial scale but also at a breakneck speed. The unfolding digital revolution has brought with it immense and countless benefits for mankind. Indeed, there is no sphere of life that has been left untouched by the undeniably powerful impacts of this revolution. In the arena of human rights and democracy, digital technologies are proving to be valuable enablers of quick and instant communication and networking amongst Human Rights Defenders (HRDs), in addition to providing new tools for investigating, documenting and storing evidence of human rights violations and abuses.

Digital technologies have also transformed how and the pace at which information on human rights issues is disseminated and spread across what is increasingly becoming a true "global village". Digital technologies are also revolutionising the delivery of social goods and amenities, in effect promoting economic development and fostering the attainment of the United Nations (UN) Sustainable Development Goals (SDG).

Yet, there is no denying that the digital age is also the age of new profound and daunting challenges. Their benefits notwithstanding, digital technologies are associated with many actual and potential risks and threats to the enjoyment of human rights and the exercise of democracy. In the same way they have enhanced the capacity of human rights organizations and HRDs to conduct their work in defence and promotion of human rights, so have digital technologies boosted the ability of states and third parties to violate these very rights. The entire catalogue of human rights as enshrined in international human rights legal framework

¹ See Final Communique of the 65th Ordinary Session of the African Commission on Human and Peoples' Rights, para. 35(ix), available at <https://www.achpr.org/sessions/info?id=317> (accessed 11 February 2020).

² See 'New dawn as NPS unveils digital occurrence book' available at <http://www.nationalpolice.go.ke/2015-09-08-17-56-33/news/308-new-dawn-as-nps-unveils-digital-occurrence-book.html> (accessed 11 February 2020).

is affected, but the rights to privacy, equality and discrimination, and the freedoms of expression, assembly and association are more frequently violated and abused at a systemic level. With the frontiers of digital innovation rapidly expanding, more and more rights are likely to be affected at a similar or higher level.

A primary objective of the 2019 AJC was to develop a clearer and stronger understanding of the disruptive power of digital technologies in Kenya and Africa. The conference expectedly discussed many dimensions of this disruption, but this report narrows the focus to four dominant aspects: digital divides and economic inequalities; civic space and freedoms; privacy and surveillance; and digital justice.

3 Digital divides and economic inequalities

The digital age has created many opportunities and avenues for wealth creation, employment, economic empowerment and development. Even more, it continues to provide a wide range of new technological tools that allow for easy access or the efficient and quick delivery of social goods and amenities, such as educational and health services. In this context, digital technologies are helping drive the progress towards realizing the 2030 Agenda for SDGs. However, and as it became clear during the conference, technology is a double-edged sword. It is essential for achieving the SDGs, but it may also deepen existing societal and global divides and inequalities. The result is that many of the traditionally marginalized, especially in developing countries, risk to be left behind, and ultimately, to be denied the opportunity of reaping the fruits of the ever-expanding digital economy.

Kituyi eloquently outlined the broad contours of the discussion on this issue during the conference in his keynote address. His remarks primarily drew upon the findings of the first edition of UNCTAD's *Digital Economy Report*, which was launched on 4 September 2019. This ground-breaking report examines the implications of the digital economy for developing countries. Its findings are as insightful as they are startling. For example, it shows that half of the world remains offline, with only one in five people using the internet in least developed countries compared with four out of five in developed countries.³ The report also finds that Africa and Latin America are particularly lagging far behind in virtually all aspects of the digital economy and infrastructure, ranging from the capacity to store and process digital data to market capitalization, and from concentration of digital firms and platforms to ownership of patents related to blockchain technologies.⁴ Developing countries are essentially only marginally partaking in the digital economy. Therefore, the report warns that "if left unaddressed, these divides will exacerbate existing income inequalities".⁵

Picking the cue from Kituyi's keynote address, several panel speakers at the 2019 AJC interrogated the implications of the digital economy for the traditionally marginalized, including women, persons with disabilities, indigenous people, the elderly and the poor. Proceeding from the premise that "to ensure education for the poor is to create wealth", Macharia Munene, a professor of history and international relations at the United States International University-Africa, argued that it is in the best interests of a capitalist society to empower the poor through enforcing the right to education. In this context, it bears recalling

³ UNCTAD *Digital economy report 2019: Value creation and capture – implications for developing countries* (2019).

⁴ UNCTAD (n above).

⁵ UNCTAD (n above).

that the exponential and unbridled growth of the digital economy is driven in large part by the capitalist nature of the modern society. As it is the “single, uncontested, core command of the digital economy”,⁶ growth is pursued at whatever cost, leaving behind a long trail of digital divides and inequalities.

Other conference speakers focused on the gender dimensions of the digital economy and development. Rosemary Okello spoke on the topic “*The place of women in development*”. She drew the nexus between digital data, development and gender and criticized the fixation of data protection laws and policies on the question of national security as opposed to sustainable development. Her reflections provided a useful background for two other presentations, both by Emilia Siwingwa: ‘*Gender considerations in development decisions and practices*’ and “*Safeguarding the rights of women in development initiatives*”.

The Founder and Executive Director of the Tanzanian-based African Hub for Accountability and Development Initiatives (AHADI), Siwingwa examined the role of global financial institutions, primarily the Bretton Woods Institutions, in fostering gender equality in business and development. These institutions must ensure that the development projects they fund comply with human rights standards, and that the responsible companies advance gender equality, meaningfully consult with concerned communities, and take measures to mitigate and manage environmental and social risks of such projects.⁷

The conference discussion on the interface between the digital economy and gender neatly aligned with an already well-documented fact, that is, the uneven development of the digital economy has real life implications for the traditionally marginalised in society, especially women. The *Digital Economy Report* shows that the gender gap in internet use is widest in poor economies.⁸ In Sub-Saharan Africa where it stands at 25.3%, the gender gap increased between 2013 and 2017.⁹ The digital gender gap is also evident in relation to women’s access to and usage of a wide range of digital devices and services, including mobile smartphones. A 2016 study by the World Wide Web Foundation shows that the root causes of the wide digital gender divide in Africa include “high costs [of accessing digital devices and services], lack of know-how, scarcity of content that is relevant and empowering for women, and barriers to speaking freely and privately online”.¹⁰

With only a decade remaining for achieving the SDGs, there is an urgent need to ensure that digital technologies are human-centred and protective of the marginalised in society.¹¹ Inclusivity of the digital economy is a key consideration if the pledge by UN member states to “leave no one behind” and “reach the furthest behind first” is to be realized in practice. In this regard, speakers and conference participants emphasised the role that Public Private Partnerships (PPPs) could potentially play in fostering and at the same in undermining the realization of socio-economic rights and SDGs. The lack of transparency and accountability in the design and implementation of PPPs across Africa was particularly highlighted as a

⁶ D Rushkoff *Throwing rocks at the google bus: How growth became the enemy of prosperity* (2016) 5.

⁷ Many global financial institutions have in place guidelines which their clients must comply with. An example is the International Financing Corporation’s Performance Standards on Environmental and Social Sustainability.

⁸ UNCTAD (n above).

⁹ UNCTAD (n above) 14.

¹⁰ World Wide Web Foundation *Women’s rights online* (2016) 1 available at http://webfoundation.org/docs/2016/09/WRO-Gender-Report-Card_Overview.pdf (accessed 15 February 2020).

¹¹ Diani Declaration, operative para 1(a).

major concern in this regard.¹²

4 Civic space and freedoms

Civic space and freedoms lie at the foundation of open and democratic societies. A free and open civic space allows citizens to define and shape their destinies, to actively and meaningfully engage in public affairs, and to challenge government policies and actions when necessary. Respect and protection of the right to freedoms of expression, assembly and association is a hallmark and a key indicator of an open civic space. These freedoms make it possible for citizens and civil society to organize, mobilize and communicate with each other as well as with state authorities and third parties. These rights are also essential for the realization of other rights and freedoms. For instance, they are prerequisites for free and fair elections and for the realization of SDGs.¹³

The digital era has not only made it dramatically easy and convenient for the freedoms of expression, assembly and association to be exercised but it has also unlocked new avenues and platforms for enjoying them. Digital technologies are both tools and spaces for organizing. Through digital technologies, individuals can connect in real time across cultural and geographical boundaries. They can also form online assemblies and associations in the same way they do offline. Indeed, the digital space is enabling citizens and the civil society to engage on a much larger platform than the physical space, as Teki Akuetteh, the Founder and Executive Director of Ghana-based Africa Digital Rights Hub, rightly observed during the conference.

Many social movements and campaigns have been initiated and/or sustained by social media. Speaking on “*Using technology and new media to expand civic space*” at the conference, Amir Suleiman, a Programme Director at the African Centre for Justice and Peace Studies (ACJPS), recounted how social media played a key role in gathering support, mobilizing and organising citizens during the 2018/2019 Sudanese revolution that resulted in the ouster of Omar al Bashir from power. Suleiman noted that social media not only sustained the revolution but it also galvanized international solidarity. Social media has also been instrumental in many other citizen-led campaigns and activism across Africa, from the #FeesMustFall movement in South Africa to #MyDressMyChoice protests in Kenya.

As digital technologies have become essential, even indispensable, tools and spaces for the enjoyment of civic freedoms and other rights, it is now recognised that human rights protection applies to “analogous interactions taking place online”,¹⁴ and that “the same rights that people have offline must also be protected online”.¹⁵ However, a rapidly shrinking or

¹² The conference presentations that dealt with the issue of PPPs were as follows: “People, power and profits: Interrogating the PPP model in development” by Akan Odon, Africa strategy and business expert, University of Lancaster, United Kingdom; “Value of Public Private Partnerships (PPPs) in the promotion of ECOSOC rights and development” by Emilia Siwingwa, Founder and Executive Director, AHADI, Tanzania; and “Impact of increasing privatization of health services” by Mike Mulongo, International health consultant.

¹³ See Report on the Linkages between the Exercise of the Rights to Freedom of Peaceful Assembly and of Association and the Implementation of the 2030 Agenda for Sustainable Development, A/73/279, 7 August 2018; Report on the Exercise of the Rights to Freedom of Peaceful Assembly and of Association in the Context of Elections, A/68/299, 7 August 2013.

¹⁴ Joint Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association and the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on the Proper Management of Assemblies, A/HRC/31/66, 4 February 2016, para 10.

¹⁵ Resolution on the Promotion, Protection and Enjoyment of Human Rights on the Internet, A/HRC/RES/20/8, 16 July 2012, para 1.

closing civic space is the new normal around the world. In 2019, only 3% of countries in the world were considered to have an open civic space.¹⁶ In the rest of the countries, civic space was either closed (27%), repressed (40%), obstructed (16%), or narrowed (14%).¹⁷ The attacks on civic space and the related crackdown on civil society, HRDs, journalists, and political opposition have a distinct digital dimension. The trends show that governments are employing all sorts of tactics and manoeuvres to restrict or completely block access to and use of digital technologies for the exercise of freedoms of expression, assembly, and association.

With several of the conference sessions dedicated to mapping out and analysing the many dimensions of the closing civic space in the digital age,¹⁸ participants discussed at great length the various forms of government attacks and restrictions on the digital civic space in Africa. In this context, a common tactic of muzzling the digital space in Africa (and indeed in many other parts of the world) is the shutting down of the internet and communications networks, especially during elections and public demonstrations. According to a February 2019 study by CIPESA, five countries (Chad, Democratic Republic of Congo (DRC), Gabon, Sudan, and Zimbabwe) ordered internet disruptions and shutdowns within the first three weeks of 2019.¹⁹ The report also shows that in the five consecutive years running to 2019, internet shutdowns had been recorded in 22 African countries and that the majority of these countries (77%) are classified as authoritarian in the Economist Intelligence Unit's Democracy Index.²⁰ These digital blackouts, effected in the name of "national security" or "public order" are patently unlawful and a blatant violation of the established international human rights law.

Other measures that governments deploy to stifle the digital civic space include but are not limited to the following: criminalising of online activities and charging individuals with vaguely defined crimes under anti-fake news, anti-terrorism, cybersecurity and anti-protest laws; censorship, including arbitrary blocking or removal of online content; imposition of hefty and punitive "social media tax"; stringent licencing rules for bloggers; and online harassment of HRDs and civil society activists.²¹

Conference speakers and participants particularly raised concern about the deteriorating online and offline operational environment for HRDs, journalists and political opposition in Tanzania. With the enactment of the Cybercrimes Act in 2015, the Media Services Act in 2016, and the Electronic Postal Communications (Online Content) Regulations in 2018, Tanzanian authorities have progressively heightened and ramped up measures aimed at policing the internet. Tens of individuals have been arrested and charged with ill-defined offences under these laws, creating a climate of fear in the country. The Online Content Regulations have been criticised for they "place broad restrictions on online content, require

¹⁶ CIVICUS *People power under attack: A report based on data from the CIVICUS monitor* (2019) 5.

¹⁷ As above.

¹⁸ The following conference presentations particularly focused on this subject: "Technology, new media and civic space" and "Closing of civic space in the digital age" both by Teki Akuetteh, Founder and Executive Director, Africa Digital Rights Hub, Ghana; "Using technology and new media to expand civic space: The case of Sudan" by Amir Suleiman, Programme Director, Africa Centre for Justice and Peace Studies, Sudan; "Threats to Digital Rights in Africa" by Rebecca Ryakitimbo, Paradigm Initiative, Nigeria; "Censorship" by Laura Tich, Founder, She Hacks Africa; and "Strengthening democracy in the digital age" by Boniface Mwangi, Socio-political activist, Kenya.

¹⁹ CIPESA *Despots and disruptions: Five dimensions of internet shutdowns in Africa* (2019) 2.

²⁰ CIPESA (n above) 4.

²¹ For a comprehensive analysis of the measures resorted to by governments to impede access to and use of the digital civic space see Report on the rights to freedom of peaceful assembly and of association in the digital age, A/HRC/41/41, 17 May 2019.

bloggers to register and permit intrusive surveillance of cybercafés without judicial oversight”.²²

Uganda similarly came under the spotlight during the conference for its introduction of a social media tax in July 2018. This tax was introduced to ostensibly discourage what authorities consider as “gossip” or “idle talk” on social media platforms such as Facebook, Twitter and WhatsApp. Ugandans are thus required to pay a daily tax of 200 Ugandan Shilling (approximately USD 0.05) to access social media platforms. The imposition of this tax had an immediate negative impact. In about three months after it was introduced, the number of internet subscriptions to social media platforms drastically fell by more than 2.5 million.²³ The poor are most likely to have disproportionately borne the brunt of the tax. In September 2018, two UN Special Rapporteurs observed that the tax was unduly restricting individuals’ right to freedoms of expression, assembly, association, and that the poor, “for whom purchasing a 1 GB of data per month will cost nearly 40% of their average monthly income”, were being specifically affected.²⁴

5 Privacy and surveillance

Like civic space and freedoms, the right to privacy is a prerequisite for any open and democratic society. It is protected and enshrined in international and regional human rights treaties, which mainly draw inspiration from Article 12 of the Universal Declaration of Human Rights (UDHR). Article 12 provides that “no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation” and that “everyone has the right to the protection of the law against such interference or attacks”. The right to privacy is essential to the realization of other human rights, especially the right to freedoms of expression, assembly and association. It is also important, as the UN Human Rights Council (HRC) has noted, to the “free development of an individual’s personality and identity, and an individual’s ability to participate in political, economic, social and cultural life”.²⁵

Arguably for more than any other human right, the digital age has had far-reaching implications and consequences for the enjoyment of the right to privacy. Digital technologies have bolstered the capacity of states and third parties (individuals, companies, corporations, etc.) to engage in surveillance, interception and data collection. Factors such as time and space are increasingly of little constraining effect on the capacity of states and global telecommunication giants to conduct mass surveillance and collect colossal amounts of personal data relating to individuals. Digital surveillance of nearly all aspects of the day-to-day lives of populations all over the world has thus become ubiquitous. In 2014, a report of the UN Office of the High Commissioner for Human Rights (OHCHR), observed that

²² Amnesty International *The price we pay: Targeted for dissent by the Tanzanian state* (2019) 20. See also Human Rights Watch “*As long as I am quiet, I am safe: Threats to independent media and civil society in Tanzania* (2019).

²³ ‘Millions of Ugandans quit internet services as social media tax takes effect’ available at <https://www.theguardian.com/global-development/2019/feb/27/millions-of-ugandans-quit-internet-after-introduction-of-social-media-tax-free-speech> (accessed 17 February 2020).

²⁴ Urgent Action Sent to the President of the Republic of Uganda by the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Special Rapporteur on the rights to freedom of peaceful assembly and of association, OL UGA 3/2018, 11 September 2018, available at <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=24420> (accessed 17 February 2019).

²⁵ Human Rights Council Resolution A/HRC/Res 34/7.

“examples of overt and covert digital surveillance in jurisdictions around the world have proliferated, with governmental mass surveillance emerging as a dangerous habit rather than an exceptional measure”.²⁶ The concerns described in the report prompted the HRC to establish the mandate of the Special Rapporteur on the right to privacy in April 2015.

As in other parts of the world, mass surveillance and other privacy-intrusive practices remain a grave concern in Africa. The 2019 AJC provided the space for a critical look at the trends in the region, with specific scrutiny being directed at the protection of privacy in Kenya. George Kegoro’s presentation, “*Transparency and accountability in government technology*”, provided an overview of the privacy concerns raised around the biometric mass registration exercise that took place in Kenya during 2019. In initiating the exercise, the government had two broad intentions. First, it intended to create a central repository of personal data of citizens, both at home and abroad, and of foreigners resident in the country. This data would be recorded and stored in the National Integrated Information Management System (NIIMS). Second, the government intended to issue citizens and foreign residents with a new digital identity card containing a unique registration number to be known as “Huduma Namba”. Access to crucial public services and facilities would be conditional on obtaining this card and the registration number.

A diversity of stakeholders raised numerous concerns prior to the commencement of the mass biometric registration exercise.²⁷ Several civil society organizations (CSOs), including the KHRC, went ahead to mount a judicial challenge against the exercise in the High Court, arguing that it posed serious risks to the right to privacy. The question of digital data security was especially concerning because under NIIMS, the government had intended to collect a wide range of an individual’s sensitive personal information, including unique identifiers such as Deoxyribonucleic Acid (DNA) and Global Positioning System (GPS) coordinates of residential homes. Another major ground relied upon to impugn the exercise included that the country lacked a comprehensive data protection law to regulate the processing, access to and storage of digital data. Rather than anchoring NIIMS on a proper Act of Parliament, the government had chosen to establish it through a Miscellaneous Amendments Act, a routine piece of legislation that introduces minor amendments to numerous Acts of Parliament all at once.

Although the High Court did not halt the mass registration exercise in its entirety, it issued interim orders that restrained the government from doing the following: (a) collecting data relating to DNA and GPS; (b) compelling individuals to participate in the exercise; (c) setting the registration as condition precedent to accessing public services and facilities; (d) placing restrictions and timelines for the registration; and (e) sharing the collected data with “any other national or international government or non-governmental agencies or any person”.²⁸ In the final judgment issued on 30 January 2020, the High Court stopped the collection of DNA and GPS data, noting that such collection would be “intrusive and unnecessary”, and a violation of the right to privacy.²⁹ The High Court also allowed the full implementation of NIIMS but only after the government has enacted “an appropriate and comprehensive regulatory framework on the implementation of NIIMS that is compliant with the applicable

²⁶ OHCHR, The right to privacy in the digital age, A/HRC/27/37, 30 June 2014, para 3.

²⁷ See eg N Nyabola ‘If you are a Kenyan citizen, your private data is not safe’ available at <https://www.aljazeera.com/indepth/opinion/kenyan-citizen-private-data-safe-190221150702238.html> (accessed 22 February 2020).

²⁸ *Nubian Rights Forum & 2 Others v Attorney General & 7 Others*, Consolidate Petitions 56, 58 & 59 of 2019.

²⁹ *Nubian Rights Forum & 2 Others v Attorney General & 6 Others* (2020) eKLR, para 1047.

constitutional requirements”.³⁰ In this context, it is noteworthy that the government had in July 2019 published the Huduma Bill, kick-starting the process that would possibly see the enactment of a specific and elaborate law on which NIIMS and the Huduma Namba would be anchored. As at the time of writing, the Huduma Bill had yet to be enacted into law, but the government had two published two relevant draft regulations: the Data Protection (Civil Registration) Regulations, 2020 and the Registration of Persons (National Integrated Information Management System) Regulations, 2020.³¹

In addition to stimulating a national debate on the threats posed to the right to privacy in the digital era, the court case challenging the constitutionality of the mass biometric registration exercise helped to expedite the enactment of a data protection law in Kenya. As indicated earlier, this law – the Data Protection Act No. 24 of 2019 – became operational from 8 November 2019. Its contents and legal ramifications were the subject of discussion in Maria Mbeneka’s presentation, titled “*The regulatory regime, data privacy and protection*”. As Mbeneka observed in her presentation, the Data Protection Act draws inspiration from the European Union (EU) General Data Protection Regulation (GDPR). Amongst other objectives, it seeks to protect the privacy of individuals and to establish the legal and institutional mechanism for the processing and protection of personal data.³²

With the entry into force of the Data Protection Act, the focus now shifts to its implementation and enforcement. This is a task that the Act assigns to the Office of the Data Protection Commissioner,³³ which was yet to be established as at the time of writing. The future success of the Data Protection Act will largely depend, as Mbeneka argued, on strict observance of its provisions. The rule of law must be embedded in all aspects relating to the implementation and enforcement of the Act. In the 30 January 2020 judgment on the constitutionality of the mass biometric registration exercise, the High Court took judicial notice of the enactment of the Data Protection Act but equally called for its speedy operationalization.³⁴

Apart from examining specific examples of states’ assaults on privacy, the 2019 AJC discussed the role of private entities in facilitating state surveillance. As far back as 2014, the OHCHR had lamented that “there is strong evidence of a growing reliance by Governments on the private sector to conduct and facilitate digital surveillance”.³⁵ The conference discussion on private sector collusion in state surveillance was made all the more important because on the eve of the conference, Facebook published its annual transparency report which revealed that the Kenyan government had on five separate occasions during the first half of 2019 requested private information of select citizens from the technology company.³⁶ Four of the five requests were on an emergency basis, meaning that the due process of the law had not been followed. The conference discussion also covered the engagement technology companies in surveillance and data collection and analysis in their private capacities. Through digital technologies, such as artificial intelligence (AI), machine learning, and data analytics, technology companies now have immense capacity to track

³⁰ As above.

³¹ For the texts of the draft regulations see <https://ict.go.ke/downloads-2/> (accessed 22 February 2020).

³² Data Protection Act, Sec 3.

³³ Data Protection Act, Sec 8.

³⁴ Nubian Rights Forum & 2 Others v Attorney General & 6 Others (2020) eKLR, para 853.

³⁵ OHCHR, The right to privacy in the digital age, A/HRC/27, 30 June 2014, para 42.

³⁶ See ‘State demands Kenyans’ data from Facebook’, 20 November 2019, available at <https://www.standardmedia.co.ke/article/2001350078/state-demands-kenyans-data-from-facebook> (accessed 23 February 2020).

peoples' lives online. They collect and analyse personal data of individuals for commercial and other private purposes.

Data collection and analysis is indeed central to the business model of most technology companies, especially the so-called “Big Five” (Facebook, Amazon, Apple, Microsoft and Google).³⁷ This trend has resulted in what the UN Special Rapporteur on the right to privacy has referred to as “commodification of personal data”.³⁸ According to the Rapporteur, the use and exploitation of personal data by technology companies is “one of the world’s largest industries, generating revenues calculated in hundreds of billions of dollars, most usually in the form of targeted advertising”.³⁹ Although it is largely unregulated, this industry holds mind-boggling volumes of personal data of millions upon millions of individuals across the world, almost always without their consent and knowledge and in utter violation of their right to privacy.

At the 2019 AJC, two specific presentations focused on privacy issues arising from the activities of technology companies. These are: “*Significance of new technologies e.g. artificial intelligence, blockchain and machine learning for jurists*” by Teki Akuetteh; and “*Impact of artificial intelligence on human rights*” by Linda Anene. Both presentations pointed to the necessity of strong data protection laws as well as independent regulators of data processors and controllers. A good number of African countries do not have in place a data protection law. According to UNCTAD, 28 African states have enacted data protection laws while six others are in the process of doing so.⁴⁰ The 2019 AJC called on the rest of the African states that are yet to enact data protection laws to do so urgently and to promptly follow such enactment with the establishment of “independent data protection regulators with powers to investigate violations and abuses by technology companies and hold them accountable”.⁴¹ The conference also called upon technology companies to “ensure that human rights are at the front and centre of their operations, and specifically, that their human rights due diligence policies and practices address the human rights impacts of their business and operations”.⁴²

Plenary discussions following the two presentations by Akuetteh and Anene further highlighted how artificial intelligence, machine learning and data analytics have implications for a longer list of human rights and not just the right to privacy. In particular, the discussion brought to the fore the role of these specific digital technologies in reinforcing and perpetuating discrimination. The sophisticated algorithms embedded in them have been found, for example, to draw upon and reflect the gender biases and attitudes of their creators.⁴³

³⁷ See e.g. Amnesty International *Surveillance giants: How the business model of Google and Facebook threatens human rights* (2019).

³⁸ Report of the Special Rapporteur on the right to privacy, A/HRC/31/64, 24 November 2016, para 8.

³⁹ As above.

⁴⁰ UNCTAD ‘Data protection and privacy legislation worldwide’ available at [https://unctad.org/en/Pages/DTL/STI and ICTs/ICT4D-Legislation/eCom-Data-Protection-Laws.aspx](https://unctad.org/en/Pages/DTL/STI%20and%20ICTs/ICT4D-Legislation/eCom-Data-Protection-Laws.aspx) (accessed 22 February 2020).

⁴¹ Diani Declaration, operative para 1(b) & (c).

⁴² Diani Declaration, operative para 2(a).

⁴³ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/73/348, 29 August 2018, paras 36-38.

6 Digital justice

The digital era has heralded the rise of e-governments. Across the world, interactions between governments and citizens are taking place online. Many governments have moved away from manual or analogue processes and systems. Services or processes that have been digitized include voting in local or national elections, filing tax returns, applying for visa and other immigration documents, participation in population census, and payment for delivery of social goods and amenities. The globe is also witnessing the emergence of “digital welfare states” in which “systems of social protection and assistance are increasingly driven by digital data and technologies that are used to automate, predict, identify, surveil, detect, target and punish”.⁴⁴

The 2019 AJC focused on the question of digitization of justice systems and its impact on access to justice. Speakers and participants discussed the major trends and experience in the use of technology by judiciaries across the region. Speaking on “*Incorporating technology in the administration of justice*” Christopher Akiwumi, Director Legal and Regulatory Affairs, Microsoft, noted that many judiciaries around the world have embraced digital case management systems. They have also developed online databases of cases (e.g. South Africa and Kenya), making it easy for lawyers and citizens alike to access caselaw. The presentation by Serge Brammertz, “*Use of technology to protect victims of crime*”, provided examples of the use of technology to investigate and document evidence of crimes under international law, identify suspects, and protect the identity of victims and witnesses where necessary.

The 2019 AJC called on African states that have not yet done so to “incorporate digital technology in the administration of justice with a view to enhancing access to justice especially for the most marginalized in society”.⁴⁵ Access to justice remains a major challenge in many African countries. A common problem relates to the existence of huge backlog of cases and long delays in disposal of cases due to multiple factors, including the lack of efficient case management systems. Digitizing court processes and case management systems have proven to be useful in ensuring disposal of cases within reasonable time as it enhances case management and ensures predictability.

In digitizing court processes and systems, however, governments should pay attention to the specific needs of the traditionally marginalized in society to ensure that such processes do not, inadvertently or otherwise, reinforce discriminatory practices and attitudes. There is also a need to focus more attention and channel more resources to non-adversarial or alternative dispute resolution processes, such as mediation. Examples of mediating conflicts in Kenya were recounted at the conference in two specific presentations delivered by Justice Anne Claire of Jones Day, United States of America, and Francis Kairuki, an alternative dispute resolution expert based at Strathmore University.

7 Defending human rights and the rule of law: Commitments and undertakings

Each edition of the AJC gives participants an opportunity to discuss and reflect on their role and contribution in addressing the critical issues and concerns of the day relating to the

⁴⁴ Report of the Special Rapporteur on extreme poverty and human rights, A/74/493, 11 October 2019, para 3.

⁴⁵ Diani Declaration, operative para 1(d).

promotion and protection of human rights, rule of law, good governance, democracy and development. This practice and tradition ensures that the AJC is not a mere talk shop, but a forum in which ideas and solutions to pressing societal challenges are mooted and crafted. It also allows for follow-up mechanisms to be established and the discussions of the AJC to be translated into tangible actions, sometimes with lasting impacts. In this context, participants of the 2019 AJC considered how they could contribute to ensuring that digital technologies are a force for good and their adverse effects are prevented or minimised. Participants made many valuable suggestions, but this report collapses them into the four broad commitments and undertakings that emerged from the conference and as articulated in the *Diani Declaration*.

7.1 Assessment of impacts

The 2019 AJC participants committed and undertook to “continuously assess the impacts of digital technology on the enjoyment of human rights with a view to ensuring that the highest protection of human rights is guaranteed and offered during the present digital era”.⁴⁶ This commitment acknowledges both the vast scale and the rapid speed of technological changes and the need to keep pace with these changes in terms of evaluating their impacts, whether positive or negative, on human rights, rule of law, democracy, and development. At the conference, and as reflected in the preceding sections of this report, participants discussed the many ways in which digital technologies have disrupted and revolutionized the world. Studies and reports of a diverse range of actors have also documented the disruptive power of digital technologies. Yet, it remains the case that the full extent to which digital technologies affect our world today and how they will affect our future is yet to be completely understood. The following words contained in the Declaration of the Digital Interdependence, drafted by the UN Secretary General’s High-Level Panel on Digital Cooperation, are instructive of present and future challenges:

Humanity is still in the foothills of the digital age. The peaks are yet uncharted, and their promise still untold. But the risks of losing our foothold are apparent: dangerous adventurism among states, exploitative behaviour by companies, regulation that stifles innovation and trade, and an unforgivable failure to realise vast potential for advancing human development. How we manage the opportunities and risks of rapid technological change will profoundly impact our future and the future of the planet.⁴⁷

The Panel recommended that “as any new technology is developed, we should ask how it might inadvertently create new ways of violating rights – especially of people who are already often marginalised or discriminated against”.⁴⁸ In order to ask and adequately answer this question, jurists, human rights CSOs and HRDS will need to build and enhance their understanding and knowledge of digital technologies. In this context, conference participants acknowledged the limited knowledge of jurists on many subjects related to digital technologies, with one of them noting that “technology confounds most of us” and another observing that “if you are really bad in technology, you study law”.

This state of affairs should not be a cause for alarm. Instead, it should challenge and motivate lawyers, especially those in the human rights sector, to deliberately invest in building or enhancing their capacity to engage in issues related to digital technologies. In the words of Michelle Bachelet, the UN High Commissioner for Human Rights, “we should not feel

⁴⁶ Diani Declaration, para 3(a).

⁴⁷ UN Secretary General’s High-Level Panel on Digital Cooperation *The age of interdependence* (2019) 8.

⁴⁸ UN Secretary General’s High-Level Panel on Digital Cooperation *The age of interdependence* (2019) 17.

overwhelmed by the scale or pace of digital development, but we do need to understand the specific risks”.⁴⁹ Or as the UN Secretary General’s High-Panel on Digital Cooperation puts it: “We all need to deepen our understanding of the political, social, cultural and economic impacts of digital technologies and what it means to use them responsibly”.⁵⁰ There is also the need to partner with technology experts and leverage their knowledge in defence of human rights, rule of law, and democracy.

7.2 Advocating for transparency and accountability

The second commitment expressed by the 2019 AJC participants is to “continuously advocate for and demand transparency and accountability both from states and technology companies in respect of the design, development and implementation of digital technologies”.⁵¹ Transparency and accountability is important in this field not simply because the international human rights framework demands for these principles to be implemented in practice, but also because most digital technologies, such as AI, algorithms, data analytics, machine learning and blockchain, are by design complex and too technical for laymen and the general population. Therefore, transparency and accountability are some of the most crucial safeguards for ensuring digital technologies reinforce rather than imperil human rights. In the context of AI, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has explained the relevance of transparency as follows:

Transparency does not stop with the disclosure to individual users about the existence of AI technologies in the platforms and online services they use. Companies and Governments need to embrace transparency throughout each aspect of the AI value chain. Transparency need not be complex to be effective; even simplified explanations of the purpose, policies, inputs and outputs of an AI system can contribute to public education and debate. Rather than grapple with the predicament of making convoluted technical processes legible to lay audiences, companies should strive to achieve transparency through the provision of non-technical insights into a system. To that end, the focus should be on educating individual users about an AI system’s existence, purpose, constitution and impact, rather than about the source code, training data and inputs and outputs.⁵²

During the 2019 AJC, the importance of transparency and accountability in governance in the digital era was well articulated and emphasised by Kivutha Kibwana, Governor, Makeni County. Speaking on “*Sustainable development: A people centred approach*”,

As the frontiers of the digital era expands, the role and challenge of jurists, human rights CSOs, and HRDs is to ensure that human rights principles, including transparency and accountability, are at the heart of this expansion. The experience of KHRC and other human rights CSOs in successfully challenging the collection of DNA and GPS data as part of the mass biometric registration exercise in Kenya lends credence to the critical role that CSOs can play in ensuring digital technologies do not violate human rights standards. This role can be greatly enhanced if human rights CSOs and HRDs deliberately forge strong networks with other relevant actors, such as journalists. The specific benefits of partnering with journalists

⁴⁹ ‘Human rights in the digital age: Can they make a difference?’, keynote speech by Michelle Bachelet, UN High Commissioner for Human Rights, New York, 17 October 2019, available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25158&LangID=E> (accessed 22 February 2020).

⁵⁰ UN Secretary General’s High-Level Panel on Digital Cooperation *The age of interdependence* (2019) 19.

⁵¹ Diani Declaration, operative para 3(b).

⁵² Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/73/348, 29 August 2018,

were clearly outlined during the conference by John Allan Namu in his presentation titled “*Role of the media in promoting transparency and accountability in governance*”. The founder of Africa Uncensored, Namu described how the organization has successfully partnered with select human rights CSOs to deploy digital technologies to document and report human rights violations and abuses in Africa.

Demand for transparency, accountability and respect for human rights should also target technology companies, which now dominate the field of digital technologies. Governments are increasingly outsourcing and delegating their core mandates to technology companies. Actually, the power that these companies hold has in certain respects surpassed that of states. For instance, technology companies now have in their possession much more personal data of individuals than states. In this context, stricter regulation of technology companies and thorough application of the international human rights framework on their operations is warranted more than ever before. The starting point is to demand that technology companies comply with the relevant provisions of the UN Guiding Principles on Business and Human Rights. Technology companies should also be encouraged to subscribe to existing guidelines which speak directly to the nexus between digital technologies and human rights, such as the *Toronto Declaration: Protecting the right to equality and non-discrimination in machine learning systems*.

7.3 Enhanced use of digital technologies

It is not enough that jurists, human rights CSOs and HRDs continuously assess the human rights impacts of digital technologies. They should also use these technologies to advance the cause of human rights. In this regard, the AJC participants committed to “enhance our deployment of digital technology to foster the promotion and realization of human rights, justice, accountability and the rule of law”.⁵³ As discussed above, actors in the human rights community are already deploying digital technologies to communicate and document human rights violations and abuses. What needs to be done is to enhance this deployment for optimal impact and to incorporate the latest technological innovations into the digital toolbox of human rights campaigning and activism.

However, deployment of digital technologies in defence of human rights should not necessarily replace the traditional methods of human rights activism and campaigning, such as peaceful street protests. The new and the old should complement each other. In his presentation during the conference, “*Strengthening democracy in the digital era*”, Boniface Mwangi, a leading socio-political activist in Kenya, warned that the human rights community should be wary of the potential of digital technologies to sow the seeds of apathy amongst individuals and citizens. With the advent of “clicktivism”,⁵⁴ individuals may easily feel that since they have taken an action online, then they do not need to take a subsequent action offline. As a result, observed Mwangi, while there is an awakened Kenyan citizenry online, it is increasingly more difficult to “get boots in the streets”, to make individuals take a human rights action offline and beyond what they say or do online.

⁵³ Diani Declaration, para 3(c).

⁵⁴ “Clicktivism” refers to “action intended to achieve political aims that uses the internet and social media, for example to create petitions or organize protests”. See <https://dictionary.cambridge.org/dictionary/english/clicktivism> (accessed 22 February 2020).

7.4 Strengthening networks and collaborations

Lastly, 2019 AJC participants committed to “strengthen civil society solidarity, networks and collaborations across national and regional boundaries”.⁵⁵ Digital technologies have made it dramatically easy for human rights CSOs and HRDs to connect, network and collaborate. Yet, assaults and crackdowns on digital rights and spaces are on the rise across the world. This trend makes collaboration amongst CSOs even more relevant in the digital age. As Mukhisa Kituyi told the conference participants in his opening keynote address, major social changes and disruptions that are being witnessed in the digital age are products or functions of collaboration rather than competition. In rallying CSOs to forge closer collaborative ties, Mukhisa drew upon the findings and arguments of Heimans and Timms in their 2018 book *“New power: How’s it’s changing the 21st century and why you need to know”*.

Heimans and Timms argue that the digital age presents us with a “battle of mobilization” and that organizations and individuals that are “best able to channel the participatory energy of those around them” are the most likely to win the battle.⁵⁶ To win the battle of mobilization, organizations need to embrace “new power models” which at their best “reinforce the human instinct to cooperate (rather than compete) by rewarding those who share their own assets or ideas, spread those of others, or build on existing ideas to make them better”.⁵⁷ Like Heimans and Timms, the UN Secretary General’s High-Level Panel on Digital Cooperation has made a strong case for collaboration amongst stakeholders in the digital space. According to the Panel, “if we want to use digital technologies to improve life for everyone, we will have to go about it consciously and deliberately – with civil society, companies and governments recognising their interdependence and working together”.⁵⁸

8 Conclusion

The 2019 AJC offered a much-needed space for a critical assessment of the manifold impacts of digital technologies on human rights, rule of law, democracy and development in Kenya and Africa. What is more, the conference allowed for a rich and intense discussion on the role of various state and non-state actors, including civil society, in ensuring that digital technologies are a force for good and that the associated risks and threats are addressed, prevented, and mitigated. The conference participants thus committed to take specific measures to defend human rights and the rule of law in the digital age in four specific ways: continuously assessing the human rights impacts of digital technologies; continuously demanding transparency and accountability from states and technology companies; enhancing the deployment of digital technologies in defence of human rights and the rule of law; and forging closer ties and collaborations amongst CSOs.

⁵⁵ Diani Declaration, para 3(d).

⁵⁶ J Heimans & H Timms *New power: How it’s changing the 21st century and why you need to know* (2018) 10.

⁵⁷ Heimans & Timms (n 56 above) 21.

⁵⁸ UN Secretary General’s High-Level Panel on Digital Cooperation *The age of interdependence* (2019) 7.

Annex 1: Diani Declaration



2019 ANNUAL JURISTS' CONFERENCE (AJC)

Technology, Development and the Rule of Law: Challenges, Options and Emerging Opportunities

Communiqué/Diani Declaration

The Kenyan Section of the International Commission of Jurists (ICJ-Kenya) meeting in Diani, Kenya, for its 21st Annual Jurists' Conference (AJC), convened under the theme “*Technology, development and the rule of law: Challenges, options and emerging opportunities*”, and attended by jurists drawn from diverse sectors of the legal profession in Kenya and beyond;

Acknowledging with appreciation the kind support of Konrad Adenauer Stiftung (KAS), the Kenya Human Rights Commission (KHRC) and the Collaboration on International ICT Policy for East and Southern African (CIPESA) in convening the AJC;

Recalling the past 60 years of ICJ Kenya's existence and its innumerable and significant contributions to the promotion of human rights, justice, accountability and the rule of law in Kenya and beyond;

Acknowledging the essential value of digital technology in the enjoyment of human rights and realization of development, including its vital role in enhancing communication and networking between Human Rights Defenders (HRDs) across the globe, providing tools for investigating, documenting and storing evidence of human rights violations and abuses, spreading and disseminating information on human rights, and fostering the delivery and attainment of the Sustainable Development Goals (SDGs);

Noting that although digital technology has revolutionised the world in an unprecedented scale and brought with it countless benefits for mankind, it has a dark side which enables human rights violations and abuses at a systemic level, with the most affected rights being the right to privacy, freedoms of expression, assembly and association, and the right to equality and non-discrimination;

Deeply concerned by the uneven development of the digital economy, the direct implication of which is that many developing countries, including and/or especially in Africa, risk to be left behind, further deepening the existing and longstanding global divides and inequalities;

Deeply concerned by the recent wave of internet shutdowns in parts of Africa, including in Algeria, Ethiopia, Cameroon, Chad, Democratic Republic of Congo (DRC), Sudan, Togo, and Zimbabwe, and states' unlawful and unwarranted restrictions on access and use of the internet and social media platforms, including the imposition of a social media tax in Uganda and the requirement for licensing of bloggers in Tanzania;

Deeply concerned by the increasing systematic use of digital technology by states to conduct mass surveillance of populations, a practice that is characterised by intercepting, processing and storing data regarding individuals without their consent or awareness and in the absent of proper safeguards;

Deeply concerned by the deployment of data analytics, algorithms, artificial intelligence and machine learning tools by technology companies to harvest, accumulate and analyse vast amounts of data about individuals in violation of the right to privacy;

Welcoming the enactment into law of the Kenyan Data Protection Act No. 24 of 2019 on 8 November 2019 and the adoption of the Revised Declaration of Principles on Freedom of Expression and Access to Information in Africa by the African Commission on Human and Peoples' Rights during its 65th ordinary session held in Banjul, The Gambia, from 21 October to 10 November 2019;

Acknowledging the role and efforts of jurists and HRDs across Africa in formulating and shaping human rights compliant laws, regulations and policies relating to digital technology;

Recognising the importance and centrality of human rights, justice, accountability and the rule of law in digital technology and development;

WE DO HEREBY:

1. Call upon African states to:
 - a. ensure that digital technologies are human-centered and protective of the most marginalised in society, including women, children and indigent persons;
 - b. enact and implement, if they have not done so yet, strong data protection laws with human rights at the core and in keeping with best practices and international standards;
 - c. establish independent data protection regulators with powers to investigate violations and abuses by technology companies and hold them accountable; and
 - d. incorporate digital technology in the administration of justice with a view to enhancing access to justice especially for the most marginalized in society.
2. Call upon technology companies operating in Africa to:
 - a. ensure that human rights are at the front and centre of their operations, and specifically, that their human rights due diligence policies and practices address the human rights impacts of their business and operations.
3. Commit and undertake to:
 - a. continuously assess the impacts of digital technology on the enjoyment of human rights with a view to ensuring that the highest protection of human rights is guaranteed and offered during the present digital era;
 - b. continuously advocate for and demand transparency and accountability from both states and technology companies in respect of the design, development and implementation of digital technologies;
 - c. enhance our deployment of digital technology to foster the promotion and realization of human rights, justice, accountability and the rule of law; and
 - d. strengthen civil society solidarity, networks and collaborations across national and regional boundaries.

Adopted in Diani, Kenya, 22 November 2019