

The right to development and internet shutdowns: Assessing the role of information and communications technology in democratic development in Africa

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Abstract: *The right to development is generally assessed as an all-inclusive right. It is regarded as a rallying right in which all other rights are mostly realised. The progressive nature of the right to development in realising other rights as a benchmark to a society's development has become popular even beyond legal jurisprudence to include other qualitative fields of knowledge. The role played by information and communications technology in the realisation of this right has also been acknowledged, particularly in the digital age. However, this progress has not been even across regions in the world. While some regions have experienced a fast-paced development due to ICT, several countries in Africa have been held back due to unfavourable state and non-state policies that have had negative impacts on human rights and democratic development on the continent. This article assesses the impact of ICT on the right to development, particularly as a rallying right, and the way in which the internet, a major component of ICT, has affected the right. The article especially considers the effects of network disruptions on human rights and democratic development that have become rife in the region. This study finds that there have been several human rights violations through ICT by many state and non-state actors in Africa. Most importantly, the article finds that these violations impede the right to development and pose threats to democratic development in the region. A conclusion is based on these findings and proffers feasible solutions to resolve the challenges posed by these violations.*

Key words: *right to development; Africa; information and communication technology; digital age; internet shutdowns; democratic development*

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1 Introduction

The advent of information and communications technology (ICT) has amplified human interaction and globalisation. Therefore, human activities in all spheres of life are becoming fast-paced and redefined due to digitisation. This has also caused several developments, some of which are commendable while some, unfortunately, are undesirable (Goldsmith & Wu 2006). The internet as a major component of survival in the digital age has undergone several phases of development and over the decades many countries have been able to latch on to these developments for their socio-economic and political benefit. However, this has not been the same experience across the board, especially in many African countries. For example, of the 267 incidents of internet shutdown between 2016 and 2019, 46 have occurred in Africa (*Access Now* 2018). Several reports have linked these shutdowns to the arbitrariness of state power and very few to technical problems (CIPESA 2019). Due to the importance of the internet in the twenty-first century, not only can human development be accelerated, but democracy and human rights also have the opportunity of being improved across the world.

In the first month of 2019, and at the time of this study, five African countries had already recorded internet shutdowns. Zimbabwe, Sudan, Cameroon, Chad and the Democratic Republic of the Congo (DRC) have all experienced a shutdown at some point during this period, and the key feature of these shutdowns, as is typical of other shutdowns, is that they occur particularly when major political events such as mass protests or elections are taking place or are about to take place. These state-sponsored internet shutdowns, therefore, have been linked to the spate of democratic development in many African countries.

As a result of this connection, the article analyses the role of ICT in human development and probes the intersections of the right to development and internet shutdowns in Africa. It then considers how the right to development is being hampered by internet shutdowns on the continent and later proffers workable solutions that can address challenges posed.

2 An overview of the right to development, information communications technology and democratic development in Africa

At a global level, the right to development was regarded more as a collective right than an individual right (Villaroman 2010). It took the United Nations (UN) Declaration on the Right to Development (RTD Declaration), adopted in 1986, to formally revisit the right to development from an individual right perspective. This also in a way paved the way for more robust Global North-Global South relations as most developing countries were only beginning to rise above several decades of political instability which had caused socio-economic distress for most of these countries (Arts & Tamo 2016). This coincided with the adoption of the African Charter for Human and Peoples' Rights (African Charter) in 1981, which later entered into force a year after the RTD Declaration. To date, the African Charter in its article 22 remains the only regional framework

that imposes a duty on member states to ensure the right to development, with important cases that expand the jurisprudence of the right by the African Commission on Human and Peoples' Rights (African Commission).

The remarkable international awareness in soft law and treaties with respect to human rights, and particularly the right to development, also preceded the period when Africa experienced the third wave of democratisation – when more African countries adopted constitutional democracies and moved away from military regimes. What could be gleaned from this wave was the new constitutional culture that was the feature in most African states which caused for new institutionalised human rights systems. Some countries were able to ensure that not only civil and political rights were guaranteed, but that socio-economic rights were also protected and justiciable under these constitutions (Kibet & Fombad 2017). On civil and political rights, most constitutions began to impose term limits on public office holders, especially Presidents, and introduced more robust provisions for fundamental human rights in their constitutions (Posner & Young 2007). At least, between that period and 2018 many African countries have not only been able to invoke the constitutional limitation on term limits to force leaders from power that have exceeded their constitutionally-provided term limits, but a country such as South Africa is also regarded as one of the most improved jurisdictions in terms of socio-economic rights.

With respect to socioeconomic development, the Millennium Development Goals (MDGs), the Sustainable Development Goals (SDGs) have been regarded as an important means of achieving even development across countries. Even though the efforts of states in the implementation of SDGs vary, there is a global consensus that these goals are necessary in pushing for a more just and equitable society (Morton et al 2017). As a result, the connection between these SDGs, therefore, is tied to human rights development (Winkler & Williams 2017). Further probing this connection with respect to African countries, the right to development as defined under the African Charter states:

- (1) All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.
- (2) States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

This provision is capable of being read outside general human rights development due to the specific mention of socio-economic rights to the exclusion of other rights. However, a close reading of the Preamble of the African Charter reveals that there is a special relationship between civil and political rights and socio-economic rights, especially as it relates to the realisation of the right to development in Africa. The African Charter points out that '[c]ivil and political rights cannot be dissociated from economic, social and cultural rights ... and that the satisfaction of economic, social, and cultural rights is a guarantee for the enjoyment of civil and political rights'.¹

1 Preamble to the ACHPR, para 8.

This settles the right to development as being not only a socio-economic right but also including civil and political rights under the African human rights system. This connection is necessary in understanding the role of ICT, as agreed to be an important aspect of human development and critical to the realisation of the right to development and the impact these have on human rights in general (Bankole et al 2001). It shows that the right to development in Africa includes the ability of citizens to access ICT for their utmost good and states' responsibility to ensure that this access is at all times guaranteed (Selian 2002). As a result, the importance of ICT in the realisation of the right to development and the right of the people to be part of such a process, including democratisation, has become an important connection to be made, especially in the digital age (Selian 2002).

As a critical and primary component in the democratisation process, the organisation of elections in Africa has played a significant role in driving democratic governments in countries such as South Africa, Senegal, Cape Verde and Mauritius. This has propelled the human rights project, particularly that of civil and political rights, because historically, the political transition in African states was a source of tensions, civil wars and military *coups* (Brown & Kaiser 2007). More recently, these elections, which in the past have been marred by violence and fraud, have been made forcefully transparent at least in the electoral process by the use of technologies (Nyabola 2018). The recently-concluded 2019 general elections in Nigeria were projected to the world by the active citizenry just as the case was in the 2015 and 2011 elections (Paradigm Initiative 2019). The same was the case in Uganda, Zimbabwe and the DRC, despite state-sponsored disruptions and attacks calculated at reducing the use of these technologies by citizens. Although the way in which digital technologies were able to play a role during these periods vary, it made the process more participatory because of the way citizen media was able to play a key role in urging political and governance audits during the elections.

These bold steps by citizens in getting more involved in the political process of their countries and also demanding more people-focused public policies may be regarded as a nuanced interpretation of the protection of the right to development. Through the enablement of ICT, many citizens have had the opportunity to demand more direct participation in governance by being able to assess power through hashtags and citizen media. What seemed to be a watershed moment for many African countries and digital technology was the Arab Spring which, through the brave act of one man, spread like wildfire across North Africa and some Middle East countries (Nyabola 2018). The effective spread of protests across the regions, made more global through the use of platforms such as Twitter, signalled the beginning of the end to a seemingly docile African citizen (Papacharissi 2014). The awakening, amplified by the internet, caused many autocratic leaders to become anxious and they have since chosen to respond in kind. Their response, together with the physical mauling of protesters and activists for more open and democratic systems, were internet shutdowns.

With Egypt also facing its fair share of the effects of the Arab Spring, it introduced a disingenuous means of stifling dissent following the footsteps of Guinea in 2007, through internet shutdowns (Ilori 2019). The importance of the internet as causing a people-focused and mass-driven

democratic development was captured by the state by the disruption of the infrastructure providing for such organisation against autocratic states. Due to the remnants of militarisation that remained in existence in most African countries despite the post-1990 constitutionalisation processes, many states also took to shutting down the internet, mainly during protests, to discourage people-centred organisations, and also during elections to assert information controls usually calculated to encourage electoral fraud and political violence (Ilori 2019).

A study recently conducted has revealed that of the 22 countries that have shut down the internet during the past five years, 77 per cent were autocratic regimes (CIPESA 2019). What this means is that there is a direct link between political underdevelopment and internet shutdowns in Africa. This has been able to link the longest-serving leaders in Africa, especially those averse to the introduction of the new features in the post-1990 constitutionalisation processes, such as Uganda, The Gambia, Egypt, DRC, Sudan and many more to the whimsical use of state powers to order internet shutdowns.

3 Conceptualising internet shutdowns

Internet shutdowns or network disruptions have been defined as ‘the intentional disruption of internet or electronic communications, rendering them inaccessible or effectively unusable for a specific population within a location’ (Freyburg & Garbe 2018). Technically, the internet cannot be shut down due to its complex architecture, making the term ‘network disruption’ being preferred in some circles compared to internet shutdown. Internet shutdowns have been described as ‘the most brute force method of internet control’ (Freyburg & Garbe 2018). As explained earlier, the peculiarities of internet shutdowns in Africa have been linked to countries with records of human rights violations and protracted authoritarian practices in the region. For example, since 28 March 2018 Chad has enforced an internet shutdown lasting more than a year (Association for Progressive Communications 2019). Cameroon has also done the same due to the ongoing humanitarian crisis in the country for more than a year with huge human rights and economic costs to the country. Uganda has also at some stages carried out internet shutdowns, during either protests or general elections. In all these countries and others, the connection has been a leader who will not relinquish power and who, therefore, has grown more powerful and later fearful of the rallying power of the internet for citizens’ organisation against their rule.

The manifestation of internet shutdowns occurs and has severe effects, including preventing:

ordinary internet users from accessing any websites including social media platforms; hindering access of online mapping and coordination tools, and crippling anti-censorship tools which circumvent social media blocks such as The Onion Router (TOR) (Freyburg and Garbe 2018: 3900).

Many of the arguments against internet shutdowns have been the inability of most African countries to situate their actions within the law for legitimacy. Even though international, regional and domestic laws do not contain established sets of guidelines to engage violations of rights that occur due to the intersection of new technologies, democratic governance

and public policy, existing international law instruments have at one point or another given directions on how both state and non-state actors must approach human rights in the digital age. As will be discussed further, it has been shown that in the process of African governments shutting down the internet for justifications such as national security or public order, international law principles established through several intergovernmental and supranational bodies have held that these shutdowns occur without compliance with international human rights standards.

Together with these challenges, Africa has the most expensive mobile data in the world with users spending approximately 8,76 per cent of their monthly income to purchase one gigabyte of mobile data. This is way above the United Nations Broadband Commission recommendation of 2 per cent monthly income (Kazeem 2018). This is contrary to the principle that access to the internet should be ‘affordable and available for all persons without any discrimination on any ground whatsoever’, and adversely affects the right to development on the continent as envisioned in the African Declaration on Internet Rights and Freedoms (African Internet Declaration).² The lack of access in Africa due to gender inequality, the high costs of access imposed by governments, the arbitrary imposition of internet taxes and the lack of adequate infrastructure have been termed a form of censorship and impediment to the realisation of the right to development by the UN Human Rights Council (Paradigm Initiative 2017).

3.1 Justifications for internet shutdowns

There have been several justifications for internet shutdowns. Some of the prominent justifications include national security (the DRC and Uganda); elections and protests (Mali, Uganda, Ethiopia, the DRC, Chad, and Cameroon); and school examinations (Ethiopia and Algeria) (*Access Now* 2016). Governments are likely to enforce shutdowns ‘when laws are outdated or overbroad; when laws are not transparent, and when international standards do not clearly disallow shutdowns’ (*Access Now* 2016). The term ‘national emergency’ or ‘national security’ often is defined very broadly, resulting in the abuse of state of emergency declarations, as has been the case in Ethiopia and the Central African Republic (*Access Now* 2016). In Ghana, Uganda and, more recently, in Zimbabwe, governments have threatened shutdowns without making any specific reference to law, citing undefined issues such as public order, safety and destabilisation (*Access Now* 2019). Telecommunications regulators also oblige internet service providers to sign restrictive non-transparent contracts, which service providers cite as justification for compliance with shutdown orders (Ilori 2019).

3.2 Implications of internet shutdowns on human rights and development in Africa

Internet shutdowns are a form of technology-enabled authoritarianism and are not justifiable under international law (Ilori 2019). Internet shutdowns

2 The African Declaration on Internet Rights and Freedoms is a persuasive set of principles that looks to guide states and non-state actors in Africa on how to protect human rights in the digital age and ensure rights-respecting technology and public policy initiatives.

severely affect freedom of expression, which is a precondition for the exercise of all the other rights (*Access Now* 2016). Shutdowns are prohibited on any grounds, including national security, public order and conflict (African Declaration 2014). The Special Rapporteur on Freedom of Expression and Access to Information in Africa has bemoaned recent shutdowns in Zimbabwe, Gabon, the DRC, Sudan, and Chad and has noted that '[i]nternet and social media shutdowns violate the right to freedom of expression and access to information contrary to article 9 of the African Charter' (African Commission 2019). African governments are mandated to 'promote the establishment of the necessary conditions to foster citizen participation, transparency, access to information, freedom of the press and accountability in the management of public affairs' (African Charter 1981). African governments order internet shutdowns without complying with the standard three-part test for human rights limitations, namely, that the limitation should be anchored by law; it must be necessary in a democratic society; and it must be in pursuit of a legitimate aim (Ilori 2019). These orders by governments not only violate international law but also do great and avoidable damage to the socio-economic prospects of most of these African countries.

Internet shutdowns have been regressive for democratic development in Africa. They cause irreversible damage to political participation and freedom of expression (*Access Now* 2016). The malaise of internet shutdowns in Africa is alarming in the context of the dismal performance of sub-Saharan Africa in the Democracy Index of 2018 with only one full democracy; seven flawed democracies, 14 hybrid regimes; and 22 authoritarian regimes (CIPESA 2019). The question of whether there are political restrictions on access to the internet features in the Democracy Index survey (The Economic Intelligence Unit 2019). It is not surprising that countries that have experienced shutdowns, such as Ethiopia, Congo (Brazzaville), Cameroon, Zimbabwe, Togo, Central African Republic and the DRC, are ranked as authoritarian and have the lowest scores in the Democracy Index (The Economic Intelligence Unit 2019).

In a few exceptional cases, internet shutdowns have had the reverse effect of a surge in democratisation due to an increase in public participation. The national internet shutdown in Egypt during the Arab Spring caused street protests to spiral beyond Cairo to large sections of the population in other urban districts, suggesting that a disruption of central communication can result in unconventional local leadership of protests. In Zimbabwe, the #ShutDownZimbabwe2016 was 'the first digital campaign whereby online mobilisation resulted in offline action' (CIPESA 2019). The exceptions, however, are outliers as the impact of shutdowns on democratisation is mostly detrimental. There is a need for coordinated multi-stakeholder resistance to internet shutdowns by citizens, civil society coalitions, courts, legislators and international institutions to ensure that the dream of a democratic Africa, as envisioned by the African Charter on Democracy, Elections and Governance (African Democracy Charter), does not sink into oblivion.

Due to the lack of a go-to international instrument on a category of rights accruable in the digital age, there has been a reluctance to define new technologies, specifically the internet, as a right. Instead, the internet has been viewed as an 'enabler' of other rights (Cerf 2012). It is seen as a means of promoting already-existing rights, rather than a stand-alone right

in and of itself. This position has been shared by the United Nations General Assembly (UNGA) by stating that ‘the same rights that people have offline, must be protected online’ (General Assembly 2018). Rights accruable on the internet are regarded as not being distinctly different from the rights already provided for offline and in existing applicable international human rights law principles. This position is further cursorily considered below.

3.2.1 *The nature of internet shutdowns as violations of the right to development in Africa*

The internet has provided novel and impactful avenues for the exposure of political misbehaviour and human rights violations to internal and international audiences (Freyburg & Garbe 2018). Authoritarian governments in Africa are paranoid at the force of the internet and have resorted to using internet shutdowns as an avenue for states to assert control over digital communication and information. Since many governments get away with internet shutdowns, this emboldens other governments to resort to internet shutdowns, which are often a disproportionate mechanism of dealing with political unrest (CIPESA 2016). In countries such as Cameroon and the DRC, the governments enforced two internet disruptions within two months, showing the eagerness of governments to resort to shutdowns and how this is perceived as a go-to solution in resolving internal strife (Paradigm Initiative 2016). These shutdowns as a result are particularly egregious as they fortify access barriers on a continent that is already lagging behind in terms of access provision.

Mobile shutdown orders are often issued by national or regional judicial or executive authorities compelling internet service providers to suspend services, citing clauses in the country’s communication laws or criminal codes (Rydzak 2018). In extreme cases, verbal orders are issued by telephone followed by a written order upon demand by the internet service provider. The actual links connecting the service providers to the outside world are not terminated, but services such as specific communication applications, mobile data, SMS/texting and calls are made unavailable (Rydzak 2018). The overwhelming majority of shutdown orders target mobile networks, but a small percentage ‘entail the suspension of fixed internet access as happened in Togo in 2017’ (Rydzak 2018). Governments are often hesitant to shut down fixed lines as government offices’ operations depend on fixed and leased lines.

The technical aspects of large-scale internet shutdowns normally involve manipulating the Border Gateway Protocol (BGP), which routes the global internet traffic, by withdrawing country routes from the global routing table, as happened in Egypt when it withdrew approximately 3 500 routes accounting for 88 per cent of its internet traffic; the sabotage of infrastructure and cable cuts, which is rare as it is self-defeating for governments, but is occasionally used to justify acute disruptions, as happened in Zimbabwe in November 2017; and bandwidth throttling which is the ‘intentional slowdown of network traffic’, as happened in Gabon (Rydzak 2018; Maurushat et al 2014). A prominent feature of internet shutdowns also is that they are often bogged down by the lack of corporate or government transparency (Access Now 2016).

Given the provisions of the African Charter, the right to development, coupled with the enjoyment of civil and political rights, includes the right to work and enjoy socio-economic benefits. Internet shutdowns, however, have been shown to have had dire implications for socio-economic rights. The digital economy is projected to contribute US \$300 billion to Africa's gross domestic product (GDP) by 2025 (Ilori 2019). The repercussions of internet shutdowns are often acute due to the importance and popularity of mobile services in Africa, an industry that raised \$13 billion in taxes, generated \$110 billion in economic value, and provided 3,5 million jobs (Ilori 2019). As of 2016, 140 mobile money and banking services operated 280 million registered accounts across 39 countries including Uganda, resulting in a significant erosion of the economic rights of citizens during the internet shutdown in Uganda of 2016.

The internet offers incredible avenues, resources and innovation opportunities for a continent with the highest youth population in the world, which faces various socio-economic challenges, including unemployment (Ilori 2019). Agenda 2063 of the African Union anchors technology as a tool for the elimination of youth unemployment, guaranteeing full access to economic opportunities (AU 2063 Agenda 2013). It is estimated that shutdowns in Africa resulted in a loss of US \$237 million between 2015 and 2017 (Ilori 2019). As of February 2019, internet shutdowns had resulted in a cumulative loss of US \$267,2 million (Ilori 2016). Youth unemployment is likely to be exacerbated rather than redressed. Shutdowns undeniably put socio-economic rights at a grave irreversible risk.

3.2.2 *The violation of freedom of expression*

Article 19 of the Universal Declaration of Human Rights (Universal Declaration 1948), the foundational, but not binding, document for other human rights covenants, provides that '[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers'. It has been suggested that this article is neutral in its use of the word 'media', thereby making it possible to include the internet as a means through which one can express themselves (Joyce 2015). This notion was buttressed by a resolution passed by the Human Rights Council where the internet was included in the recognition of all forms of media (UN Human Rights Council 2016). As an improvement on the provisions of the Universal Declaration, article 19 of the International Covenant on Civil and Political Rights (ICCPR), which entered into force in 1976, amplified the provisions of freedom of expression to accommodate key but lean restrictions. Article 19 of ICCPR guarantees:

- (1) Everyone shall have the right to hold opinions without interference.
- (2) 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.
- (3) 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.

A close reading of the provisions of the ICCPR shows that while freedom to hold an opinion is an unqualified right, freedom of expression is restricted based on certain exceptions. While these rights are not necessarily different, it may be argued that both rights can be used interchangeably and the berth afforded the right to opinion as a result can be extended to freedom of speech.

Freedom of expression as a qualified right is limited in three parts. This test provides that for the right to freedom of expression to be limited, whether offline or online, it must be provided for by law, pursue a legitimate aim and be necessary in a democratic society. These three limitative tests as restrictions on the right to freedom of expression is imposed on states under international human rights law, occur together and must be jointly satisfied. These principles enunciated by the test are further considered below.

Legality

The laws that African governments use to enforce shutdowns are not compliant with the requirements of clearly-enumerated behavioural norms as well as the limits of governmental power in enforcement. There is no delineation on the public instances in which lawful shutdown can be ordered in vague national security and emergency laws; the duration of shutdowns often is arbitrary; and the laws are silent on how long shutdowns should last. Procedurally, such laws are quickly passed without substantial input on constitutionality by legislators and the public. In *Cengiz & Others v Turkey* (Cengiz case), the European Court of Human Rights (ECtHR) held that blocking access to YouTube was illegal as there was no domestic law allowing for blanket orders blocking access to the internet.

Legitimate aim

The reasons for shutdowns, such as for slowing rumours, for ending cheating during examinations and for disrupting public protests, do not meet the limitation requirements of article 19 (3) of ICCPR. Legitimate aims should be construed narrowly, a criterion that is not met by the vague references made by African governments. Article 25 of the African Union Convention on Cyber Security and Personal Data Protection stipulates that

[i]n adopting measures in the area of cyber security and framework for implementation, state parties shall ensure that the measures adopted will not infringe in the rights of citizens guaranteed under the national constitution and internal laws, and protected by international conventions, particularly the African Charter, and other basic rights such as the freedom of expression.

Necessity and proportionality

The necessity of shutdowns cannot be proven as no transparent information exists as to the actual harm state officials intend to prevent and, where there is such, internet shutdowns have not been demonstrated to help mitigate these harms. The proportionality threshold is breached by the fact that shutdowns impact everyone within the targeted area, not only

those people engaging in a proscribed or prohibited activity. Proportionality does not only involve the number of people affected but also the severity and extent of infringement of the human rights of each individual. In *Ahmet Yildirim v Turkey* the ECtHR held that the judicial blocking of access to Google sites for hosting a website belonging to a person facing criminal proceedings was a violation of the right to freedom of expression since it blocked the access of other internet access and that less restrictive means could have been used.

Perhaps one of the most instructive legal expositions to create a causal link between the international law use of 'any other media' is the United States Supreme Court case of *ACLU v Reno*.³ In this case a formally-recognised connection was established between the internet as being a medium of expression, thereby qualifying as a form of media that can be subsumed under the international law jurisprudence of freedom of expression in the digital age.

Furthermore, Special Rapporteur Frank la Rue stated that the internet was a crucial method through which persons can exercise their right to freedom of opinion and expression.⁴ Most importantly, it may be argued that article 19 of the Universal Declaration at the time of its drafting had envisaged future changes in forms through which persons can assert their right to freedom of expression and opinion. This is one of the most prominent arguments for the internet to be regarded as one of such 'any other media' due to one of its key features being a medium of communication (Land 2008).

Article 9 of the African Charter provides for an unqualified right to access information and qualified right to freedom of expression and opinion as follows:

- (1) Every individual shall have the right to receive information.
- (2) Every individual shall have the right to express and disseminate his opinions within the law.

Under other regional human rights instruments, the right to freedom of expression is qualified just as it is under international law. However, the African Charter is the only instrument that does not qualify the right to freedom of expression, at least not explicitly or directly. As a buffer to the provisions of article 9 of the African Charter, the Declaration on the Principles of Freedom of Expression and Access to Information was adopted in Banjul in 2002. The Preamble to the Declaration emphasises the importance of respecting and promoting human rights through the use of ICT which includes the internet.

3.2.3 *The violation of freedom of association and peaceful assembly*

Association is a key component of any modern society. Political parties, private organisations and interest groups have become important aspects of social engineering through which socio-political socio-economic formations take place. These formations are an integral part of any

3 51 US 844.

4 Human Rights Council Resolution: Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Frank La Rue, A/HRC/26/30/Add.2.

democratic society due to the participation and involvement they generate in democratisation processes. The right to freedom of association and assembly, as a twin right used interchangeably, therefore solidifies the rights of citizens to join associations of their choice and also to organise for the general good of their interests, especially as established under ICCPR and the African Charter. The internet in its formation has become important in this regard. Hashtags are used politically to organise protests or create awareness on public policy concerns while people of common interests are encouraged to associate with people of like interests and views.

Due to the rallying characteristics of these two rights in the way in which they unify voices across the board and encourage diverse views on issues, the internet, being home to several of such diverse perspectives, was able to amplify and connect the public beyond physical boundaries. This organisation and association online, therefore, has led to several projections of violations of human rights and dwindling democratic fortunes in many countries in Africa. The affectation that connects the public has galvanised several movements beyond the reach of most African governments, in effect resulting in more political and economic changes in countries.

For example, during a nationwide protest in Uganda in 2016, the state ordered multiple shutdowns at different times in order to quell dissent during protests. Also, in Zimbabwe the government recently ordered an internet shutdown when citizens protested the hike in fuel prices in which many people lost their lives. Similarly, in Sudan the state ordered the cutting of communications networks in the country due to protests over the prolonged rule of Omar Al-Bashir, who eventually was toppled even in the absence of internet networks. This has also been the case in countries such as Cameroon, Egypt, Togo, Algeria, the DRC and many other countries. The right to peaceful assembly and association on the internet is one of the most potent rights that are infringed and violated by many autocratic states because of the power of new technologies to demand change in the most unified and persistent manner.

3.2.4 The violation of the right to political participation and access to public service

Shutdowns during elections and protests infringe on the right to direct political participation. In Gabon, the Republic of Congo, the DRC, Uganda and Chad, shutdowns resulted in less visibility for the opposition during or after the elections (Rydzak 2018). Additionally, the internet has offered new opportunities for governments to communicate with people (African Declaration on Internet Principles 2014). Seventy-one per cent of African political leaders and governments had a presence on Twitter as of June 2014 (Scott 2014). Political leaders and governmental institutions are increasingly using social media to pass on critical information that is essential for accessing public service. E-governance encompassing digitisation of the public service infrastructure has grown significantly in countries such as Kenya, Uganda and Nigeria as citizens access critical services and documents through online portals. Shutdowns, therefore, are likely to sever critical access to governmental platforms and services. During the shutdown in Zimbabwe, the government could not get critical information across to Zimbabweans. President Mnangagwa appealed for

calm on his Facebook and Twitter accounts, but the message could not reach Zimbabweans as the internet had been blocked (*Aljazeera* 2019).

Internet shutdowns sometimes are strategically executed to disenfranchise marginalised religious or ethno-linguistic minorities as a form of collective punishment. This occurred in Ethiopia where the Oromo ethnic group in Oromia was specifically targeted by internet slowdowns and shutdowns in March and August 2016 due to their long-term grievances against the government. In Cameroon, the internet shutdown was specifically extended in the country's Anglophone region where the President faced vocal opposition. Vulnerable groups such as migrants, refugees and women experience further intersectional barriers (Rydzak, 2018).

3.2.5 *The violation of the right to life, bodily integrity and security of the person*

Internet shutdowns are often used by governments to perpetrate impunity by causing gross human rights violations, violations of the laws of war and violence to be invisible to civil society, activists and the international community. Large shutdowns are often accompanied by paramilitary and military operations, making it difficult for documentation by citizen journalists and reporters, as happened in 2015 in Port-Gentil, Gabon and the Pool Region of the Republic of Congo in October 2015. In Sudan during the 2013 shutdown, dozens of protesters were killed during a crackdown after the shutdown had been enforced (*Access Now* 2016). Digital sieges often put vulnerable groups at risk of further violence from the military and militias and have led to the emergence of internet refugees, as people endanger their safety by undertaking hazardous journeys to areas with internet access, as happened in Anglophone Cameroon.

3.2.6 *The violation of the right to mental and physical health*

Internet shutdowns cause significant disruptions in the areas of emergency and healthcare services, resulting in the violation of the right to the 'highest attainable standard of physical and mental health' under article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). In 2017 a three-week disruption in Somalia hindered the delivery of critical medical paperwork involving crucial cases in addition to obstructing humanitarian assistance (Rydzak 2018). There have been reports of delays in life-saving procedures when medical specialists have been unable to contact one another as well as service breakdowns in hospitals that rely on digital technology. Disruptions would be particularly catastrophic if they were to coincide with a natural disaster.

3.2.7 *The violation of the right to education*

The right to education is a fundamental right as it enables effective participation of all in an open and democratic society, promotes tolerance and diversity, and furthers the maintenance of peace. The role of the internet in education has become increasingly significant as resources become digitised. Internet shutdowns to stem leaks and cheating during school examinations have undercut educational opportunities for all groups in the DRC, Ethiopia and Algeria. Internet disruptions impact

vulnerable populations disproportionately, particularly women and girls, especially in the area of Science, Technology, Engineering and Mathematics (STEM), as happened in Cameroon.

4 Democratisation and information and communications technology in Africa

As a precondition to good governance, human rights cannot be disregarded in analysing democracy in Africa. The role played by human rights in an African context reveals a positive change in most African governance systems. The introduction of international democratic standards to ensure and enhance political and civil rights has given a more holistic approach to democracy. In fact, human rights have offered a set of performance norms and different mechanisms to measure the integration and implementation of democratic principles such as accountability, transparency, impartiality and participation. As a result, in Africa most domestic and regional policies, such as the African Charter, have been drafted to protect and fulfil fundamental human rights. Hence, at the continental level there is also the African Charter on Democracy, Elections and Good Governance (African Democracy Charter) with its articles 2, 3, 4 and 5 which provide that state parties have the duty to ensure that the rule of law, human rights and democratic principles are protected and respected.

This new approach to democracy has globally assisted in monitoring inequalities at the continental level. As a consequence, human rights, especially civil and political rights, are more respected, and individuals are now empowered in many African countries. People are aware of their rights and benefit from an enabling legal framework to claim their human rights. Human rights have become an ultimate weapon for citizens with respect to government accountability, which enhances democracy.

The fundamental principles of human rights being designed to inform the legislative, judicial and executive frameworks, its implementation requires a stable and enabling context. However, in Africa, despite efforts made to harmonise domestic laws with international standards of human rights and democracy, the continent still encounters discrepancies between national and regional policies and the implementation system. Hence, designed to guide policies and programmes, in Africa human rights are yet to be incorporated in the system of governance because of the absence of strong enforceable measures.

As an example, elections, which are usually the first step towards democratisation, are often the period during which serious human rights violations occur. During the past decade, elections in Africa have generated several controversies regarding management and process (Adejumobi 2000). In fact, during the different stages from preparation, the actual elections to the post-electoral period, cases of serious violations of human rights have been recorded. Unfortunately, these common practices, such as election rigging, clientelism, unlawful constitutional amendments and last-minute delays or cancellations, reveal the weakness of African democracy (Adejumobi 2000). These irregularities often cause frustrations among populations. As a result, protests ensue offering

grounds for serious violations of human rights by the state through its so-called security agents.

Having a primary duty to respect, protect and fulfil rights, some African states have become perpetrators of violence or enhance its permissibility by the absence of sanctions in situations of violations of human rights. Therefore, although many states identify their respective countries as being democratic, it appears that in some countries only the concept has been added to the official name of the state without reflecting the country's political reality (Wiseman 1990). Due to the illegitimacy of electoral processes, the issue of the legitimacy of some governments in Africa often is questionable. The process of state building and democratisation requires the integration of the social, political and economic dimension of a specific country. However, as post-colonial states, African countries inherited their political systems from their previous colonisers and, therefore, they have missed the opportunity to build their own systems of democracy based on African values and standards of democracy.

For that reason, the AU takes democracy seriously by adopting the AU Constitutive Act 2000, 'to promote and protect human and peoples' rights, consolidate democratic institutions and culture, and to ensure good governance and the rule of law'.⁵ Therefore, since human rights are meant to empower people, African states have the responsibility to respect and protect human rights with sustainable strategies, especially in the age of new technologies that can represent both a threat to and an asset for democracy.

Articles 5, 6 and 7 of the African Democracy Charter deal with member states' responsibility to ensure adequate changes of government with transparency without failing to protect human rights. Additionally, article 8(1) goes further by insisting on the suppression of all forms of discrimination based on political opinion.⁶ In other words, the state is under the obligation to provide a democratic environment to its citizens where every individual has the liberty to choose and support a political party without fear of encountering discrimination or violence from the state or its agents.

The majority of these rights fall under civil and political rights that allow individuals to enjoy the inherent right to engage in public affairs by participating in the election of members of the government.⁷ These rights can only be exercised through a conducive political and electoral environment. With human rights activists raising the importance of holding free, fair and transparent elections with respect to the rule of law, technology becomes a strong tool and a means to protect human rights. In fact, it appears that with digital technology, exercising the rights cited above not necessarily requires the implication of the government.

In African countries, for instance, digital technology has enabled individuals to become aware of their fundamental rights and has created diverse channels to claim these rights through social media platforms. In addition, technology has been used in both advocacy and awareness-raising activities as well as fund-raising platforms to enhance human

5 Preamble of the African Union Consecutive Act.

6 Arts 5,6,7, 8(1) of the African Charter on Democracy, Elections and Good Governance.

7 UNHR Report, Monitoring Human Rights in a Context of Elections, ch 23.

rights. As far as transparency and accountability are concerned, technology has allowed people to monitor electoral processes in many African countries. Information concerning countries' budget allocations and international policies are also available and accessible to the public.

Technology has helped to build transnational movements and networks aimed at denouncing human rights violations at the international level. Technology, therefore, has removed boundaries and facilitated the realisation of the rights to freedom of expression, access to information and participation (Banisar 2010). At the continental level, during the past years, digital technology has contributed to enhancing peace, which has created a positive change regarding democracy, especially with respect to electoral processes. Digital technology has enabled the creation of advanced electoral monitoring systems, such as the biometric system, to ensure transparency and platforms the mapping of violence breakouts. This reveals governments' engagement and cautiousness in ensuring participation and accountability as a result of digital technology. In addition, digital technology has helped to reduce corruption with the adoption of electronic systems of public administration.

Therefore, it is important for Africa, moving forward with development, to design strategies to navigate in a context of digital technology by adopting a governance framework within which democracy and technology can coexist with the objective of protecting human rights (Banisar 2010). Developing strategies at both national and continental levels will enable Africa to be better prepared in dealing with the advantages and threats of digital technologies.

Therefore, despite the advancement in technological development, the stage of democracy in Africa is described to have deteriorated in the past years due to several violations of human rights in the digital age. The use of the human rights framework in the digital age to analyse democratic development in Africa reveals that many rights have been violated. For instance, 28 out of 54 countries have enacted legislation to address cybercrime, and a recurring feature of these laws is that they impede internet freedoms and human rights.⁸ This shows an adverse use of law and policy on digital technology in governance systems in Africa as a region.

Specifically, in some countries these laws are used as a legal basis for human rights abuses by states. In many instances, digital technologies have been used to repress people's rights to freedom of expression or to participate in public affairs. In countries such as Ghana, Liberia, Nigeria, Somalia, South Africa, South Sudan, Uganda and Zimbabwe, states have used measures such as an increase in the cost of data, internet shutdowns and surveillance, among others, to deprive citizens of the right to freedom of expression (MFWA, 2018). Additionally, regarding the rights to privacy, states have been using ICT as a means of collecting personal data for surveillance purposes to track down opponents. This often leads to the unwarranted arrest of civil society members or citizens based on

8 United Nations Conference on Trade and Development, *Cybercrime Legislation Worldwide* https://unctad.org/en/Pages/DTL/STI_and_ICT/ICT4D-Legislation/eCom-Cybercrime-Laws.aspx (last visited 20 March 2019).

information shared on social media or communication networks (IGF 2018).

5 Combating internet shutdowns

When used effectively, an internet ‘kill-switch’ can paralyse a protest. It can leave activists unable to mobilise, and enable state agents to perform a wider range of human rights violations, comfortable in the knowledge that these overreaches will never make it to the wider global public. Given the far-reaching political and economic consequences of an internet blackout, there is an urgent need to recruit effective counter-activities to quell the issues posed by internet shutdowns. Some of these counter-activities are discussed below.

5.1 Judicial recourse

In order to make governments protect human rights in the digital age, national courts have become involved with internet shutdowns. For example, the High Court of Zimbabwe recently held that the Minister of State ‘did not have the power to switch off the internet’ (Swart & Mahere 2019). In Egypt, the Supreme Administrative Court imposed a fine of EGP 200 million on the President, on the Prime Minister EGP 300 million, and on the Interior Minister EGP 40 million for the 2011 internet shutdown, although these fines were later set aside (Sutherland, 2018). In Kenya, the High Court revoked a government order shutting down three television stations for broadcasting the inauguration of the opposition leader as the alternative President upon the latter disputing the process of conduct of the elections.

Traditionally, law and technology in Africa have interacted in a strange, recurring cycle. First there was the rapid development of impressive technologies that pushed the boundaries of cellular and internet communications. Then followed a series of belated legal reforms to regulate new industries and tame innovation. As innovation improves on the continent, respect for digital rights crawled behind at the lazy pace of the legislative process (Palmerini 2013). This cycle, however, is slowly being disrupted by efforts at strategic litigation, which has already secured key victories in several jurisdictions. By litigating important ‘test cases’ in national (and, later, supranational) judicial systems, activists for online freedom are able to effect long-lasting change ‘both inside and outside’ the courtroom (Open Society Justice Initiative, 2018).

A novel test on issues of network disruptions and human rights development came up in Zimbabwe in *Zimbabwe Lawyers for Human Rights (ZLHR) and Media Institute for Southern Africa Zimbabwe (MISA Zimbabwe) v Minister of State for National Security & Others* after local civil society took the government to court to declare an internet shutdown during

protests last year illegal.⁹ The High Court ruled against the government, setting aside an internet shutdown directed under Zimbabwe's Interception of Communications Act even though the decision was arrived at based on technicality. Despite justifications by the Minister for State Security, the Court decided for the petitioners, and ordered the state to 'unconditionally resume the provision of full and unrestricted internet services' – a major victory for internet freedom.¹⁰

A similar legal challenge gripped Uganda, after a targeted blackout had hit Kampala in May 2016 (Taye 2018). As voters took to the polls for the elections, they were hit by a 72-hour social media shutdown of sites including Twitter, Facebook and WhatsApp (Golooba-Mutebi 2011). Since the 2016 elections, the internet has become the newest feature of President Yoweri Museveni's efforts to silence growing opposition. In July 2018, the government introduced a 'social media tax' in a bid to increase domestic revenue and stop online 'gossip' (Al Dahir 2018). According to early reports, however, the tax is 'holding back' economic growth, shrinking profits, and placing thousands of jobs in jeopardy (Research ICT Africa 2018). To oppose the tax, and the recent spate of shutdowns in Uganda, Unwanted Witness – a local non-governmental organisation (NGO) – filed a petition before the Constitutional Court in December 2018 claiming, among others, a violation of article 29(1) of the 1995 Ugandan Constitution (BBC News 2018).¹¹ While the Court is yet to rule on the matter, this case highlights the emergence of new energies in the legal fight against internet shutdowns.

Similar legal proceedings have been instituted in Cameroon, Chad and Pakistan as internet freedom advocates cover more ground in the battle against shutdowns (*Access Now* 2018; *BBC News* 2018; *Telegeography* 2018;). Incremental as these efforts may seem, this gradual exhaustion of domestic remedies will unlock access to regional courts and other oversight mechanisms. If these tribunals rule that internet shutdowns are illegal, internet activists would make a significant step towards protecting internet freedom in Africa and elsewhere. While exploring the avenue of strategic litigation, digital rights advocates should involve the ICT sector in their strategies to combat internet shutdowns.

5.2 Mobilising the private sector

Resisting shutdown orders is potentially risky for internet service providers as they are bound by the laws governing their countries of operation, and non-compliance may result in licence revocations, fines, threats, or gateway shutdowns (Association for Progressive Communications 2019). Telco representatives have reported threats to employees on grounds of non-compliance with shutdown orders, as happened in Ethiopia (Ilori 2019). In Zimbabwe, the director of Econet wireless claimed that he had to comply with a shutdown directive from the

9 Case 265/19 (Provisional Order) 21 January 2019 (*Zimbabwe Shutdown Provisional Order*) <http://www.veritaszim.net/node/3396> (last visited 20 March 2019).

10 *Zimbabwe shutdown Provisional Order* (n 10) 2.

11 Which guarantees the rights to 'freedom of speech and expression which shall include freedom of the press and *other media*' (our emphasis). Sec 29(1) Constitution of the Republic of Uganda 1995.

government or face three years' imprisonment for non-compliance (Association for Progressive Communications 2019).

Over the past 50 years, Africa has leapt from the outdoor market to the online store, as internet access reoriented economic activities on the continent (Ernst & Young 2016). Tax benefits aside, the ICT sector makes a significant contribution to the micro- and macro-economies of African states, unlocking opportunities for inclusive growth and larger markets for local entrepreneurs (Bankole et al 2011). Abrupt disconnections are frustrating these opportunities, driving down profits and overall GDP (CIPESA 2018). Although a few studies suggest that strategies of political repression are implemented more effectively if the government controls the infrastructure, the role of telecommunication companies in enabling or disabling network disruptions has not yet been sufficiently explored (Weber 2011). To limit the impact of unlawful disconnection orders, companies should establish procedures (internally, for their boards of directors, and externally, for the ICT industry itself) to ensure accountability and enforce transparency in the event of an internet shutdown (Access Now 2016). By employing a combination of these strategies, the private sector can prove to be a powerful ally in the fight against internet shutdowns.

A failure to respond adequately to even a brief internet shutdown can have serious implications for a company's bottom line. In 2015 millions of Brazilians downloaded the mobile messaging application Telegram after a 24-hour court-ordered shutdown of WhatsApp (Griffin 2015). Those customers that defected are not returning to WhatsApp (Wong 2016). Profit motive aside, internet shutdowns carry with them reputational and other non-tangible costs that far exceed the financial implications of a temporary disconnection. Taking all these risks into consideration, companies have an obvious motivation for forming their own response to internet shutdowns. This response should be guided by the United Nations Guiding Principles on Business and Human Rights (UNGPs) which, despite well-deserved criticism, represent international consensus on the *minimum* obligations of companies to respect human rights (Okoloise 2017).¹²

According to the UN Guiding Principles, a company's responsibility to respect human rights applies in all situations and 'exists independently' of whether the state meets its own human rights obligations (UN Guiding Principles 2011). Furthermore, these responsibilities require companies to 'avoid infringing on the human rights of others' and 'address adverse human rights impacts' (UN Guiding Principle 2011). Citing this obligation as justification, 2016 saw telecommunications companies Millicom and Orange refuse government demands for internet shutdowns that were not made according to proper procedures under domestic law (Telecommunications Industry Dialogue 2016). In 2012 the Vodafone group and Orange, in response to shutdown orders in Egypt in 2011, established the Telecommunications Industry Dialogue (TID) to help

12 United Nations Human Rights Council 'Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie – Guiding Principles on Business and Human Rights: Implementation of the United Nations "Protect, Respect and Remedy" Framework' UN Doc A/HRC/17/31 (21 March 2011).

prevent future abuses (*Access Now* 2016). Since then, membership has swelled to include AT&T, Millicom, along with various members of international civil society.¹³ To focus its efforts, the TID established its own set of Guiding Principles (TID Guiding Principles) which address the corporate responsibility of telecommunications companies to respect human rights. Among others, the TID Guiding Principles require members to '[a]dopt, where feasible, strategies to anticipate, respond and minimise the potential impact on freedom of expression ... where a government demand or request is received that is unlawful' (TID Guiding Principles 2011).

More recently, ICT companies have encircled their weapons to better respond to demands of unlawful disconnection. Through the Global Network Initiative (GNI), companies such as Ericsson, Google and Nokia worked together with the TDI to issue a Joint Statement on Network and Service Shutdowns. The statement declares internet shutdowns to be a threat to public safety and freedom of expression, with the further danger of restricting access to vital payment and health services in the event of an emergency. In a similar vein, the Global System for Mobile Communications Association (GSMA), one of the world's largest technology associations, has laid out strict standards for orders issued to telecommunications companies to terminate service, relegating them to 'exceptional and pre-defined circumstances, and only if absolutely necessary and proportionate to achieve a specified and legitimate aim consistent with internationally recognised human rights and relevant laws' (GNI & TID 2016).

Companies in the ICT sector are catching on, and are beginning to realise that internet shutdowns are as bad for business as they are for human rights. While the outbreak of these new democratic pushbacks seems exciting, the private sector needs to implement broader reforms to comply with their obligations under international human rights law. Internet service providers and telecommunication operators should endeavour to uphold the rule of law by challenging illegal requests from governments (Glans & Markoff 2011).¹⁴ They should also be transparent with their customers around the sources of shutdown requests and communicate how long these disruptions are likely to occur. Further, when looking for opportunities to invest, venture capitalists should integrate shutdowns into their risk assessment to discourage investments in states that too hastily resort to internet shutdowns.

In many cases, an alliance with the private sector can be a formidable weapon in the hands of activists of digital freedoms. At the same time, however, human rights practitioners should be cautious in their engagement with telecommunications sector while noting that monopolies in the African telecommunications sector also pose threats to the rights to freedom of expression and privacy due to market dominance.

13 <http://www.telecomindustrydialogue.org/about/> (last visited 20 March 2019).

14 Vodafone, eg, resisted demands by Egyptian authorities for service interruptions until 'it was obliged to comply'; J Glanz & J Markoff 'Egypt leaders found "off" switch for internet' *The New York Times* 15 February 2011.

5.3 Multi-stakeholder approach

Several approaches are involved in engaging internet governance challenges. There have been the traditional and state regulatory means through which state authorities use laws and policies to determine the direction of internet governance. There has also been the private sector attempt at self-regulation, which looks to put private companies involved in internet governance as duty bearers in upholding human rights. However, all these models have failed mainly because of from where they emanate and how democratically the processes that inform their decisions are made (Garton Ash 2016). Since the internet is a collaborative system of networks, a policy initiative from one aspect of its stakeholder is bound to be mono-themed and unrepresentative.

This is one of the main motivations for the multi-stakeholder approach to internet governance, which looks to make the internet more open, people-focused and all-stakeholder-driven (Graham & MacLellan 2018). This approach registers the importance of the internet as technically democratic in design and functionally representative with respect to the policies that shape it. It allows for not only state and private businesses to come together to design approaches to internet governance challenges, but affords civil society, the academia and a broader spectrum of stakeholders to be involved in designing lasting policies for internet governance.

In resolving the challenges posed by internet shutdowns, a multi-stakeholder approach lends a good governance approach to assessing threats and managing risks associated with internet regulation. There are instances when restrictions of human rights through ICT could be justified, but such limitation must be narrowly construed, comply with international law standards and must be as a result of a multi-perspective deliberations.

6 Conclusion

It is undeniable that we are living in an era driven by clicks of the mouse and virtual interactions. Digital technologies have permeated our everyday lives – including the exercise, enjoyment and fulfilment of human rights. Human development across countries is tied to how much technology a society can adapt to its society to ensure improved living standards. While the study of ICT and the right to development is still growing, the maximisation of available ICT resources is currently on full throttle in many societies. However, the same cannot be said of other countries, especially in Africa. These challenges faced by many African countries include the violation of human rights; affordability of internet access; state-sponsored censorship; internet taxation; and network disruptions. These disruptions together with the other problems have hampered democratic development and pose huge threats to the right to development in the region. It is important, now more than before, for state and non-state actors to commit to a standardised set of rules, perhaps a model law on key thematic areas of digital rights in the region that involves all stakeholders including the courts, private businesses and civil society to engage the challenges of internet shutdowns in Africa.

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