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Any opinion expressed in this book is solely that of the authors and is not necessarily that of the institutions they represent.

This book aims to inform ongoing scholarly debates about the value and impact of soft law standards.

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# PREFACE

Access to information, like many other rights, is a right in and of itself as well as an enabling right – a right that is necessary for the realisation of other human rights. Article 9 of the African Charter on Human and Peoples' Rights (African Charter) guarantees the right of every individual 'to receive information'. This provision, although initially exclusively regarded as providing for the right to freedom of expression, has now been interpreted as the foundation of the right of access to information in the African human rights system.

The Declaration of Principles on Freedom of Expression in Africa adopted by the African Commission on Human and Peoples' Rights (African Commission) in 2002 to further elaborate on the right to freedom of expression includes a principle that sets out core elements of the right of access to information. The Declaration, together with the expansion of the mandate of the Special Rapporteur on Freedom of Expression (Special Rapporteur) to include access to Information in 2007, further cemented the recognition of access to information as a distinct right.

Despite these significant efforts by the African Commission to strengthen the normative and monitoring framework, there was no corresponding progress in the promotion and protection of access to information in Africa. In numerous state parties only a handful of access to information laws remained and several Bills were pending at various stages of the legislative process. The majority of these laws and Bills did not conform to regional and international standards.

This state of affairs was in sharp contrast to the prevailing atmosphere post the third wave of democratisation in Africa, when state parties had individually and collectively committed to good governance, respect for the rule of law, and adherence to democratic ideals. The renewed emphasis by states on openness, transparency and accountability, all of which lie at the heart of the right of access to information, was in essence not translating into the adoption and implementation of laws and policies in furtherance of this right. The role of legal frameworks on access to information in the realisation of socio-economic rights, whether as a tool for fighting corruption or in preventing the mismanagement of public funds, also seemingly was not a priority for addressing Africa's dire socio-economic situation.

Rather, what prevailed was a culture of secrecy which had been introduced by colonial powers and further strengthened by post-colonial governments as a means of exerting power and control over citizens. Added to this was the preoccupation of states with the issue of national security and the misconception that access to information was inimical to national security. There was also the widespread perception that access to information is a right exclusively for journalists and that enacting laws giving effect to this right would give media practitioners the freedom to disseminate unfavourable and even outright falsehoods about political figures, especially those in power.

The work of access to information advocates thus was cut out for them. It was essential to show governments that they hold information ‘not for themselves but as custodians of the public good’; that proactive disclosure of information is not a privilege but an obligation owed by elected representatives to the people; and that the creation and proper management of information not only was beneficial for the citizenry, but also imperative for the development and effective implementation of laws and policies. It was with this in mind that the African Commission authorised the Special Rapporteur to develop a Model Law on Access to Information for Africa (Model Law) in November 2010, and adopted it in February 2013.

The adoption of the Model Law was a landmark event in the access to information trajectory on the African continent. In many ways it was a first. It was the first time the African Commission had adopted a model law on any subject matter. It was also the first time that the African Commission had engaged in such extensive public consultations with high-level stakeholders prior to the adoption of a soft law instrument. Finally, it was the first time that the African Commission had launched an intensive advocacy campaign to create awareness and build capacity for the implementation of a soft law document that involved high-level meetings with the African Union Commission, regional economic communities and policy makers in state parties.

And so, there are many lessons to be learnt and questions to be asked about these ‘firsts’ of the Model Law in relation to other soft law instruments. Are there specific human rights issues that are best addressed through the development of a model law? Is multi-stakeholder participation in the development of a soft law instrument a necessary condition for its legitimacy and, by extension, a prerequisite for state compliance? Should a treaty body actively engage in advocacy efforts in support of a soft law it has adopted to supplement existing hard law? This book answers these questions and many more on soft law and human rights within the African human rights system.

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# ABBREVIATIONS AND ACRONYMS

|        |   |
|--------|---|
| ATI    | access to information   |
| AIPPA  | Access to Information and Protection of Privacy Act                           |
| AFIC   | Africa Freedom of Information Centre  |
| APRM   | African Peer Review Mechanism   |
| AU     | African Union   |
| AUC    | African Union Commission  |
| AUCIL  | African Union Commission on International Law                                 |
| APT    | Association for the Prevention of Torture                                     |
| CSOs   | civil society organisations   |
| CSPRI  | Civil Society Prison Reform Initiative  |
| CPTA   | Committee for the Prevention of Torture in Africa                             |
| CHRI   | Commonwealth Human Rights Initiative  |
| CAT    | Convention against Torture  |
| CEDAW  | Convention on the Elimination of All Forms of Discrimination against Women    |
| ESCR   | economic, social and cultural rights  |
| FIAPI  | Federal Institute for Access to Public Information                            |
| IMPI   | Information and Media Panel of Inquiry  |
| IDEA   | Institute for Democracy and Electoral Assistance                              |
| IDPs   | internally-displaced persons  |
| ICISS  | International Commission on Intervention and State Sovereignty                |
| ICRC   | International Committee of the Red Cross                                      |
| ICJ    | International Court of Justice  |
| ICCPR  | International Covenant on Civil and Political Rights                          |
| ICESCR | International Covenant on Economic, Social and Cultural Rights                |
| FIACAT | International Federation of Action by Christians for the Abolition of Torture |
| MIC    | Media and Information Commission  |
| NDC    | National Democratic Congress  |
| NHRIs  | national human rights institutions  |
| NPP    | National Patriotic Party  |
| NGOs   | non-governmental organisations  |
| OGP    | Open Government Partnership   |
| OAU    | Organisation of African Unity   |
| OAS    | Organisation of American States   |
| PAP    | Pan-African Parliament  |
| PAN    | Partido Acción Nacional   |
| PRI    | Partido Revolucionario Institucional  |
| PAIA   | Promotion of Access to Information Act  |
| PNDCL  | Provisional National Defence Council  |
| RECs   | Regional economic communities   |
| RTI    | right to information  |
| RIG    | Robben Island Guidelines  |
| SMC    | Seychelles Media Commission   |
| SAHRC  | South African Human Rights Commission   |
| SADC   | Southern African Development Community  |
| STAR   | Strengthening Transparency, Accountability and Responsiveness                 |
| SERAC  | Social and Economic Rights Action Centre                                      |

|        |   |
|--------|---|
| SDGs   | Sustainable Development Goals                         |
| TRIPS  | Trade-Related Aspects of Intellectual Property Rights |
| UHRC   | Uganda Human Rights Commission                        |
| UN     | United Nations  |
| UNHCR  | United Nations High Commissioner for Refugees         |
| UNAIDS | United Nations Programme on HIV/AIDS                  |
| UDHR   | Universal Declaration of Human Rights                 |
| VCLT   | Vienna Convention on the Law of Treaties              |
| ZMC    | Zimbabwe Media Commission                             |