CHAPTER 2

THE IMPACT OF THE MODEL LAW ON ACCESS TO INFORMATION FOR AFRICA

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Abstract

The year 2013 was a significant year for access to information in Africa. When the Model Law on Access to Information for Africa was formally adopted by the African Commission on Human and Peoples' Rights in 2013, four African states (Côte d'Ivoire, Rwanda, South Sudan and Sierra Leone) also subsequently passed access to information laws, the highest number ever recorded in one year. The passage of the Model Law was the culmination of a three-year process that had been championed by a core group of academic and civil society organisations. The adoption of the Model Law held the promise that the Law would guide the development and review of national access to information laws in Africa as well as serve as an advocacy tool for the adoption of new access to information laws. Since the passage of the Model Law, ten countries have passed access to information laws in Africa, namely, Burkina Faso, Côte d'Ivoire, Kenya, Malawi, Mozambique, Rwanda, Sierra Leone, South Sudan, Sudan and Tanzania. The laws in these countries were passed after several years of in-country advocacy. In the case of Mozambique, after the passage of the Model Law there was a concerted advocacy effort in the country, led by the Special Rapporteur on Access to Information in Africa, which fast-tracked the passage of the law. There were similar top-down advocacy efforts in other countries such as Kenya, Malawi, Ghana, Mauritius and Seychelles. Arguably, these developments are victories for transnational non-state civil society actors. However, to what extent can these victories be replicated in other countries where access to information laws have not yet been adopted? For some of the African countries with recent access to information laws, these developments have been isolated from the developments around the adoption of the Access to Information Model Law. The reasons for this include the unique contestations for access to information driven locally; the desire of some states to attract foreign aid through claims of transparency; and the intention to join multilateral initiatives such as the open government partnership. However, the strong appeal to protect a state's right to regulate and the preservation of sovereignty, and the internal power dynamics between the state, the citizen and institutional non-state actors are crucial factors that have the potential of resisting the advancement of access to information regulation in Africa. The aim of this chapter is to determine

whether the Access to Information Model Law for Africa, as an attempt to develop a common approach and harmonisation of access to information laws, can conquer the resistance to access to information regulation in Africa. This chapter focuses on Kenya, Ghana, Malawi, Seychelles, Mauritius and Mozambique as case study countries that were the subject of targeted advocacy visits to promote the Access to Information Model Law by the former Special Rapporteur on Access to Information and Freedom of Expression in Africa.

1 Introduction

The Model Law on Access to Information for Africa was adopted in 2013 after several years of consultations, research and drafting driven by the Special Rapporteur on Freedom of Expression and Access to Information in Africa. The Special Rapporteur's office was established by the African Commission on Human and Peoples' Rights (African Commission) in 2004.[1] The initial mandate of the Special Rapporteur was exclusively focused on promoting, protecting and monitoring freedom of expression. However, when the mandate of the Special Rapporteur was renewed in 2007 at the 42nd session of the African Commission, the mandate of the Special Rapporteur was amended to include access to information in Africa.[2] As part of the expanded mandate of the Special Rapporteur, the African Commission in 2010 authorised the Special Rapporteur to initiate the process of developing a Model Law on Access to Information for Africa.[3] To fulfil this mandate, the Special Rapporteur established a partnership with the Centre for Human Rights, University of Pretoria, to convene a panel of experts to inform the content of the Model Law and to constitute a drafting team.

During the drafting process of the Model Law, the Special Rapporteur and the panel of experts engaged in a number of continent-wide consultations that started in The Gambia at the 49th ordinary session of

1 Resolution 71 adopted at the 36th ordinary session of the African Commission.

2 To analyse national media legislation, policies and practice among member states; to monitor their compliance with freedom of expression and access to information standards, in general, and the Declaration of Principles on Freedom of Expression in Africa, in particular; and advise member states accordingly; to undertake fact-finding missions to member states from where reports of systemic violations of the right to freedom of expression and denial of access to information have reached the attention of the Special Rapporteur and make appropriate recommendations to the African Commission; to undertake promotional country missions and any other activities that would strengthen the full enjoyment of the right to freedom of expression and the promotion of access to information in Africa; to make public interventions where violations of the right to freedom of expression and access to information have been brought to her attention, including by issuing public statements, press releases, and sending appeals to member states asking for clarifications; to keep a proper record of violations of the right to freedom of expression and denial of access to information and publish this in her reports submitted to the African Commission; and to submit reports at each ordinary session of the African Commission on the status of the enjoyment of the right to freedom of expression and access to information in Africa.

3 Resolution 167 of the African Commission.

the African Commission.[4] A series of further public consultations were consequently held in Maputo, Mozambique; Nairobi, Kenya; and Dakar, Senegal, and the final consultation was held in Tunis, Tunisia, in June 2012.[5] The consultations consisted of government officials, academia, the media and civil society representatives. The aim was to obtain feedback on the draft Model Law.

In February 2013 the African Commission adopted the Model Law during its extraordinary session. The adoption of the Law was hailed as a milestone for the African Commission, as it 'provides for the first time a practical tool to assist states in complying with the obligation under article 1 of the ACHPR to adopt legislative, or other measures to give effect' to the rights in the African Charter on Human and Peoples' Rights (African Charter).[6] The specific form in which states will adjust, adapt and adopt the Model Law is left to individual member states.

The adoption of the Model Law supports the call in several regional instruments for African states to adopt access to information laws. These regional treaties have been developed for the advancement of various themes, including the advancement of democracy, the combating of corruption and the promotion of appropriate values in the public service.[7] Specifically, the Declaration of Principles on Freedom of Expression in Africa was adopted by the African Commission in 2002. The Declaration encourages states to adopt laws to protect access to information. The Model Law effectively aims to assist states in realising their obligations under the Declaration to adopt a domestic access to information law taking into account the legal systems of each country.

Prior to the adoption of the Model Law, only ten states had adopted an access to information law.[8] Since the adoption of the Model Law, 12 additional states have adopted access to information laws. These countries are Burkina Faso, Côte d'Ivoire, Kenya, Malawi, Mozambique, Rwanda, Sierra Leone, South Sudan, Sudan, Tanzania and Togo. This chapter discusses the features of the Model Law, identifies some of the influencing factors that have aided the passage of access to information laws across the African continent and evaluates the six country advocacy missions conducted by the Special Rapporteur. This evaluation is done primarily through interviews with members of the mission as well as government and civil society representatives in the respective countries. The chapter

4 http://www.saha.org.za (accessed 29 November 2015).
5 SAHA (n 4 above).
6 Interview with member of Special Rapporteur's advocacy team, Lola Shyllon, 27 November 2015.
7 African Charter on Democracy, Elections and Governance; African Union Convention on Preventing and Combating Corruption; and African Charter on the Values and Principles of Public Service and Administration.
8 Angola, Ethiopia, Guinea, Liberia, Niger, Nigeria, South Africa, Tunisia, Uganda and Zimbabwe.

concludes with a number of findings and recommendations on the future of access to information laws in Africa.

2 Salient features of the Model Law on Access to Information for Africa

The Model Law on Access to Information provides that every person has the right to access information of public bodies and relevant private bodies expeditiously and inexpensively.[9] In addition, every person has the right to access information of private bodies that may assist in the exercise or protection of any right expeditiously and inexpensively.[10]

The Model Law introduces a new category of institutions that should be subject to the principles of public disclosure. These are referred to as 'relevant private bodies', and constitute bodies that are otherwise private bodies but utilise public funds or carry out a statutory or public function or service.[11] This category of institutions is important at a time where the line between public and private institutions is becoming increasingly blurred and states are beginning to favour public-private partnerships in the execution of their functions and services.

The Model Law provides that the law, policy or practice creating a right of access to information must be interpreted and applied on the basis of a presumption of disclosure.[12] Non-disclosure is permitted only in exceptionally justifiable circumstances and any refusal to disclose information is subject to appeal.[13]

9 Sec 2(a) Model Law.
10 Sec 2(b) Model Law.
11 Definition section of the Model Law.
12 Sec 2(c) Model Law. In terms of the Model Law, a person who wishes to obtain access to information from an information holder (a public or private body) must submit a request in writing or orally; if a person submits a request orally, the official of the public body must reduce that oral request to writing and provide a copy to the requester; on receipt of a request, the public or private body must immediately provide a written acknowledgment of the request to the requester; a requester does not have to provide justification or a reason for requesting any information; a request must provide such detail concerning the information requested as is reasonably necessary for the information to be identified; if the requester believes that the information is necessary to safeguard the life or liberty of a person, a statement to that effect must be included, including the basis for the belief; if the request is to a private body, an explanation must be provided of why the requested information may assist in the exercise or protection of any right; identify the nature of the form and language in which the requester prefers access; and if the request is made on behalf of someone else, include an authorisation from the person on whose behalf the request is made. The Model Law further provides that information must be provided to a requester in such official language as the requester prefers. Where the information is not in the language the requester prefers, the information can be translated into the preferred language of the requester; and the reasonable costs associated with the translation can be recovered from the requester; art 22.
13 Sec 2(e) Model Law.

Given the resistance to access to information that states tend to have towards information disclosure, especially in the face of national security concerns confronting some African states, recognising the presumption of disclosure is an important expression of the inviolability of access to information as a human right.

The Model Law provides that to the exclusion of any provision in any other legislation or regulation that prohibits or restricts the disclosure of information of an information holder, nothing should limit or otherwise restrict any other legislative requirement for an information holder to disclose information.[14]

This provision relates to the necessity for access to information laws to be supreme, and what the Model Law proposes is significant given the presence of various laws on national security across African countries that limit the disclosure of information. Some of these laws are legacies of colonialism, while others are being enacted allegedly to close down access to government. An example of this is the Protection of State Information Bill in South Africa recently passed by Parliament, but awaiting presidential assent.

The Model Law provides that a decision following a request must be made within 21 days after the request has been submitted, subject to the payment of any applicable reproduction fee, translation fee and/or transcription fee.[15] In cases where the information is necessary to safeguard the life or liberty of a person, the decision has to be made within 48 hours.[16]

The validity of information is dependent on the currency and separation of ordinary requests for information, and information necessary to safeguard life or liberty is one of the unique features of the Model Law. In South Africa, the access to information law allows public and private bodies to respond to information requests within a maximum of 60 days, which in practice naturally weakens the effectiveness of South Africa's access to information law. Consequently, limiting the time period for states to provide access to information, recognising the impact of delayed access to information may have on the protection of human rights is a novel development.

The Model Law provides that a request for information should only be refused if the harm to the interest protected under the relevant exemption

14 Sec 4 Model Law.
15 Section 1.5.
16 According to the Model Law, if the request is granted, the notice must state the applicable fee, the form in which access to the information will be given; and that the requester may apply for a review of the prescribed fee or form. The Model Law recommends the non-payment of fees except for reasonable reproduction or translation fees where necessary; secs 15 & 20.

that would result from the release of the information demonstrably outweighs the public interest in the release of the information. This is called a 'public interest override'.[17]

The introduction of the public interest override reaffirms the presumption of disclosure provision by stipulating that the exemptions in the disclosure are not absolute. This provision is further reaffirmed by the heavy reliance the Model Law places on proactive disclosure of information. The Model Law has a detailed provision on proactive disclosure. The proactive disclosure clause extends to both public and relevant private bodies, and the information subject to automatic disclosure includes[18] detailed administrative information; policies; 'contracts, licences, permits, authorisations and public-private partnerships granted by the public body or relevant private body'. It also includes reports, budgets, revenues and expenditure information.

Central to the disclosure of information detailed above are the issues of how to ensure that these categories of information are accessible by members of the public; how to ensure the organisation of the information so that it is relevant to the users; and to ensure that it is complete, accurate, free, timely and re-usable. For these objectives to be met, it is necessary to explore how African states have developed their own domestic access to information laws with the aim of understanding the motive behind the adoption of these laws, the extent to which these motives reflect the practice of implementation adopted within states and whether there is a future opportunity for the Model Law to influence the further development and implementation of access to information laws in African states.

3 From Model Law to national law: Influencing factors

The origins of the passage of access to information laws in Africa are varied. There has been a strong civil society campaign for the passage of these laws. For example, in Nigeria the campaign for an access to information law lasted 18 years. Zimbabwe, Angola, Guinea and Niger adopted access to information laws independent of the democratisation process with no clear indication on what motivated this. In the case of Zimbabwe, the law is designed to do more than grant access to information and includes the control of access to information. It contains provisions

17 Sec 25. The exemptions provided in the Model Law relate to personal information of a third party; commercial and confidential information of a public or private body or a third party; protection of life, health and safety of an individual; national security and defence; international relations; economic interests of the state; law enforcement; legally-privileged documents; academic or professional examination and recruitment processes; art 27-35.

18 See sec 7 of the Model Law.

that give the government extensive powers to control the media by requiring the registration of journalists and prohibits the 'abuse of free expression'.[19]

Noting the unique field of access to information across Africa, a study of historical perspectives on transparency and secrecy in Africa is necessary. Africa's colonial rule left a lasting legacy of a culture of secrecy, largely maintained in post-colonial governance.[20] Also, former liberation movements in Africa used secrecy as a pivotal and necessary weapon to fight the former oppressive governments. Consequently, it has been suggested that in their transition into government, this tool of secrecy was carried into government which makes the continued presence of many liberation movements as present-day governments in Africa a unique challenge for access to information advocates.[21]

It is within this long history of secrecy that access to information laws have been adopted and, as a result, the implementation of access to information laws has been slow. The development of state capacity to implement access to information laws has been very poor, and sometimes this has been due to inadequate political will on the part of governments. For example, regulations to aid the implementation of the Ugandan access to information law were passed six years after the passage of the law. In Ethiopia, no such regulations currently exist. In South Africa, the country with the oldest access to information law in Africa, despite the existence of the Law for over 17 years, the annual reports of the South African Human Rights Commission, the body originally tasked with monitoring compliance with the Law, has shown that compliance with access to information obligations has been consistently low.[22]

The bureaucracy in accessing information embedded in access to information laws can resist the principle of disclosure in a number of ways. These include complicated requests for processing requests for information, such as the introduction of fees, forms in the case of South Africa, problems with the creation of records and their management, as well as dealing with the several exemptions to information disclosure.

The adoption of access to information laws hardly is the end of the road in demanding accountability from governments through accessing information. Adopting access to information laws is a means to an end, and ensuring the implementation of access to information laws requires several processes, including the training of public sector officials;

19 G Sedungwa & T O'Connor 'Global right to information update: An analysis by region' (2013) FOIAnet 16-17.
20 As above.
21 As above.
22 The level of compliance was 60% by national government departments and 8% by local governments in 2014-2015. See South African Human Rights Commission *Promotion of Access to Information Act Annual Report* (2014) 29-30.

developing effective bureaucratic systems such as records management systems; as well as the allocation of adequate resources.

Sustaining political commitment to ensure the effective implementation of access to information laws is crucial. This will be dependent on the context in which an access to information law was adopted in a country. In cases where there was no specific advocacy by civil society for an access to information law, there has been limited interest on the part of the government to implement the law.

One of the problems related to the adoption and implementation of access to information laws by governments relates to its characterisation as a human right. This has led Darch to caution that in environments where political systems are patrimonial, bureaucracies have low capacities and politicians are largely not accountable to the citizenry, the rights character of access to information might not advance its cause.[23] Consequently, Darch has argued that while the normative claims made for access to information have not been matched with the reality, it is not necessarily the lack of political will, weak legal-administrative systems and poor implementation of the law that has caused this.[24] He argues that the inherently weak states in Africa after colonialism may be a cause for this due to the lack of well-established bureaucratic structures that might address issues of, for instance, the management of records.[25]

Despite these constraints, there has been a boom in the passage of access to information laws in Africa. The passage of the Model Law and the consequent continent-wide advocacy effort by the Special Rapporteur are some of the reasons, and are scrutinised in this chapter. In a global context, the Obama-led administration in the United States introduced the Open Government Partnership (OGP), an initiative that encourages governments to raise the level of their openness in key areas to enable public participation. One of the conditions for membership of the OGP is an access to information law.[26]

Other international organisations have also sought to use their positions to influence the adoption and implementation of access to information laws. The World Bank Institute has sponsored initiatives on the continent that favour the implementation of access to information laws among several other initiatives, including open contracting, which ensures fiscal transparency in the use of public funds for public services.[27]

23 C Darch *Access to information in Africa: Law, culture and practice* (2013) 46.
24 As above.
25 As above.
26 Kenya was exempted from this requirement.
27 https://www.open-contracting.org/about/ (accessed 6 July 2018).

Many African countries are also undergoing constitutional review processes and, in that sense, in embracing new norms and standards, there has been an internationalisation of constitutional law across African countries which includes the recognition of the right to information. Article 32 of Somalia's 2012 Constitution, for instance, recognises the right of access to information in the same language as the 2010 Kenyan Constitution, which is also the same language adopted in the 1996 Constitution of South Africa.

The next section considers the various social forces that potentially compromise the efficacy of access to information norms and standards in African countries.

3.1 Right to regulate and state sovereignty

For states, the sovereign right to regulate and govern is sacrosanct. As a result, interference in state affairs through multilateral governance is resisted because of the perceptions that these models of governance threaten state sovereignty. In recent times, states have clamped down on supranational institutions that have been perceived to interfere with state sovereignty. For example, in 2010 the summit of the Southern African Development Community (SADC) heads of state, on the recommendation of the Council of Ministers, decided to defer action against Zimbabwe for non-compliance by the state with a judgment of the SADC tribunal.[28] The summit decided rather to order a review of the role, responsibilities and terms of reference of the SADC tribunal by an independent consultant, which eventually led to the removal of the powers of the tribunal relating to human rights jurisdiction and individual access.[29] Similarly, the South African government took a decision for the powers of the International Criminal Court (ICC) to be reviewed after South Africa had refused to comply with a request for the President of Sudan to be arrested.[30] African governments have adopted the approach of opting for diplomatic missions when external influence is required in state governance. This is an approach often taken by the African Union (AU) in dealing with *coups d'état* within the region in recognition of the need to be deferential to the sovereignty of states.

Given this context, it is particularly difficult to advocate the adoption of laws that have not originated from within state structures. Indeed, this was a major reason for the strategic decision taken in Kenya during the Special Rapporteur's advocacy visit to the Minister of Information,

28 A Pillay 'SADC Tribunal dissolved by unanimous decision of SADC leaders' unpublished paper (2014) 4.
29 As above.
30 See South Africa's report to the African Commission, 57th ordinary session.

Communications and Technology not to mention Kenya adopting the Model Law on Access to Information.[31]

3.2 Power dynamics

There are several power actors in any given state with claims to legitimacy for the interests that they represent. As a result, the state competes with civil society, community groups, the media and other actors in representing various voices across society. These power dynamics also come into play where policy and regulation are concerned. Within the state itself, sub-national governments and state institutions lay claim to the mandate for policy developments seen to be within their scope of jurisdiction, while other actors contest the scope and content of these policies. These power plays manifest themselves in advocacy efforts and campaigns driven by civil society actors for access to information which often require compromises in the adoption of these laws. As a result of these unique contexts for different states, the shape of provisions in access to information laws differ from state to state depending on the way in which the power dynamics play out in the adoption of the law. The power dynamics also affect implementation in terms of the manner in which the law itself is implemented by the state, where the focus lies and the various agendas that are pushed by different actors both in usage and implementation.

3.3 Inherent states of secrecy

Other external influences that affect the passage of access to information laws involve the 'culture of secrecy' where public officials require the request for information to be justified. In a judgment passed shortly after the passage of the Nigerian Freedom of Information Act (FOIA), it was held by the court that the FOIA was flawed as it gave rights to citizens without obligations.[32] The culture of secrecy also has a different dimension. It has been suggested that 'information has a secret value in traditional African societies' and, as a result, this particular mindset has been exported into government bureaucracies.[33] Furthermore, as stated earlier, colonial legacies as well as the historical nature of liberation movements that have transformed into governments have also sustained the inherent secretive nature of African governments.

31 Oral interview with Kenyan CSO representative, Henry Maina, in Banjul, The Gambia, 6 November 2015.
32 *Paradigm Initiative Nigeria v Dr Reuben Abati* Suit FHCABJ/CS/402/2013 4.
33 See Darch (n 23 above).

3.4 National security

The state of insecurity in some African states has also heightened the need for national security which has resulted in the clampdown on information disclosure to the public. Most civil society organisations are not well equipped to handle this resistance on the part of the state and, as a result, the realisation of open democracy is much more difficult to achieve. The rise of insurgencies, terrorism, and security fragile states[34] across the continent and globally has led to heightened state secrecy aimed at safeguarding different categories of information in the interests of national security.

3.5 Role of the citizen

Ultimately, in constitutional democracies power rests with the citizen. Their votes elect and remove governments and, on a balance of ideals, the voice of the citizen is of utmost importance. However, while citizens are to be regarded as the most powerful stakeholders, they are also often the most marginalised power brokers. Various interests assume the voice of the citizen and manipulate it.[35] The desires, interests, concerns and needs of the citizen, therefore, is often muffled in the contest for power and representation. The Model Law prescribes access to information to any person and does not limit it to citizens. This is an important distinction given the fact that citizenship is often an issue of powerful contestation. Citizenship is often used to play political games. The United Nations Children's Fund (UNICEF) estimates that almost two-thirds of sub-Saharan African children are not registered and, therefore, cannot prove citizenship.[36]

An access to information regime will be successful with public pressure through usage of the law and demand for compliance by the state. While the Model Law was designed for African states, the law cannot automatically fit into different legal cultures and social relations. As a result, the adaptation of the Model Law and the success of the Law in application will be possible through every society's unique understanding and interpretation that is developed in terms of the cultures, desires, beliefs and traditions of the people because 'the more the new law interacts with society, the more it will be adapted, whether intended or not'.[37]

34 National security is a potent defence against transparency, in terms of which a state can refuse a request for access to a record if its disclosure could reasonably be expected to cause prejudice to the defence of the republic or the security of the republic. In some instances, a state can even refuse to confirm or deny the existence of a record. See sec 41 of the Promotion of Access to Information Act 2 of 2000.

35 These include civil society organisations that claim representation of public voices, in some instances with no legitimate mandate.

36 J Hartshorn 'Can the Model Law on Access to Information for Africa fulfil expectations?' ECPR Conference on Regulatory Governance, Barcelona, Spain, 2014.

37 As above.

3.6 Institutional non-state actors

The discourse on accountability in African states requires a multifaceted approach and a challenge that confronts a number of states is how to promote popular participation and democratic ideals into the decision-making processes of African governments. Civil society organisations generally have a constituency base and they are obliged to communicate their constituency concerns to policy makers in government for the best decisions in the public interest to be made.[38]

With civil society influencing the adoption of access to information laws and leading the advocacy around the adoption of the law, different agendas may creep in. In Nigeria, to facilitate the adoption of the access to information law, the coalition of non-governmental organisations (NGOs) had to deliberately lessen the visibility of media rights groups to deflate the claim by government that access to information is a media issue.[39] In addition, the influence of international NGOs causes some states to be weary of the influence of foreign states and leads to NGOs occasionally being treated with suspicion.[40]

The expertise and experience of civil society organisations complement the existing gap in government and allow for practical useful solutions to problems. Civil society's role is to draw the attention of government to problems and to provide critical and constructive feedback in areas of public interest concern. Civil society organisations also act as a necessary constraint on the power of states when demanding transparency, accountability and scrutiny of government activities. However, it is important for civil society to note that their function is not to direct government but to serve as a guide in the development or implementation of initiatives that will be well received by their constituencies.[41]

3.7 The handicap of bureaucracy

For the successful implementation of an access to information law, resources are needed. These would include the appointment of officers; investment in an effective records management system; and, in some cases, the establishment of oversight institutions. Where resources are limited, the ability of the state to help the public to realise their right of access to information is hindered.

38 Darch (n 23 above) 45.
39 Media Rights Agenda *Unlocking Nigeria's closet of secrecy: A report on the campaign for a Freedom of Information Act in Nigeria* (2000) ch 2.
40 As above.
41 Harthsorn (n 36 above).

To further understand the factors influencing or hindering the adoption of access to information laws, it is necessary to contextualise these issues in the advocacy visits conducted by the Special Rapporteur across six countries to promote the adoption of the Model Law into national laws. In a series of interviews conducted with the Special Rapporteur, her advocacy team, government officials and civil society representatives that met with the Special Rapporteur during her country visits, a number of findings were made in relation to the strategies adopted in the campaign for the adoption of access to information laws and how the various factors identified above were dealt with.

4 Evaluating the access to information country advocacy missions of the Special Rapporteur

When the African Commission adopted the Model Law in 2013, it was the first time a model law on any subject had been commissioned by the Commission. The Model Law was drafted through a consultative process led by the Special Rapporteur on Freedom of Expression and Access to Information, Commissioner Pansy Tlakula, and facilitated by the Centre for Human Rights (CHR) at the University of Pretoria.

The CHR commissioned this research to assess the extent to which draft access to information legislation and recently-adopted access to information laws on the continent have been guided by the provisions of the Model Law. In order to provide empirical evidence on the use and impact of the Model Law in the drafting and adoption of these laws, the CHR sought to assess the extent to which the provisions of the Model Law had been relied upon in the adoption or development of access to information Bills on the continent; the interplay of factors that determined the decision by member states to include (or otherwise) specific provisions of the Model Law in the process of the adopting or developing access to information Bills on the continent; and an assessment of the role of the Special Rapporteur in the adoption of access to information laws. The CHR also wished to determine how effectively the advocacy visits conducted by the Special Rapporteur ensured the speedy adoption of access to information laws that conform to the standards set out in the Model Law. Ultimately, this research seeks to determine whether the advocacy engagement is a good case study for the adoption of access to information laws in Africa and, if so, why.

The Special Rapporteur's team, which consisted of members of the Working Group that drafted the Model Law, developed an advocacy strategy for the Special Rapporteur's mission. This strategy involved setting up meetings with state officials, particularly Ministers responsible for access to information issues, the judiciary, civil society organisations

and statutory bodies.[42] An environmental scoping exercise was conducted by the Special Rapporteur's team to determine the soft points of entry to win over states in the adoption of access to information laws. The Special Rapporteur led the mission to open access to government for civil society.

The mission was firstly to determine the attitude towards access to information and freedom of expression in the six countries visited. These countries were Kenya, Ghana, Malawi, Seychelles, Mauritius and Mozambique.

In the second place, the Special Rapporteur visited these countries in order to give states the encouragement and support necessary to draft and adopt access to information laws.[43] The Special Rapporteur's objective was to offer support to both states and civil society organisations.

Third, the Special Rapporteur wanted to share awareness about the work of the African Commission and the duty of states to comply with the submission of human rights reports to the Commission.[44]

In addition, the Special Rapporteur visited these countries to advocate the commencement of legal reforms in the countries and to ensure that the legal reforms are aligned with developments on the continent, such as the Model Law.[45]

4.1 Kenya: Lessons in strategic advocacy

While the campaign for the adoption of an access to information law lasted several years, there was a renewed call for the adoption of the Law following the 2008 post-election violence in Kenya.[46] One of the recommendations made by the established commission of inquiry was the adoption of an access to information law.[47] This call led to the recognition of the right of access to information during the constitutional review process that led to the adoption of the 2010 Kenyan Constitution.[48]

In Kenya, the right of access to information is officially recognised in article 35 of the 2010 Constitution. However, the access to information Bill was only introduced in 2015 and published as a private members' Bill in

42 Oral interview with member of Special Rapporteur's advocacy team, Chantal Kisoon, 28 November 2015.
43 As above.
44 As above.
45 As above.
46 Telephonic interview with Kenyan civil society member, Anne Nderi, 7 January 2016.
47 See the detailed Commission of Inquiry into Post-Election Violence Report 476, http://www.kenyalaw.org/Downloads/Reports/Commission_of_Inquiry_into_Post_Election_Violence.pdf (accessed 6 July 2018).
48 Nderi (n 46 above).

Parliament. The Bill was eventually passed into law in 2016 to give effect to article 35.

Kenya has ratified all international instruments that contain freedom of information provisions, and has included access to information in the County Government Act. At the sub-national level, three of the 47 Kenyan counties already have access to information laws.[49]

The provision of the Kenyan Constitution provides a basis for access to information. However, a legal framework to give it effect before the passage of the access to information law was lacking. In the past, the Official Secrets Act, 1992 had been used to fetter access to information in the guise that the information sought is classified information not falling within the ambit of information that can be released unless the information is declassified.[50] Also, the provisions of the Penal Code have been used by the state to fetter access to information since it provides for criminal libel, thereby making expression difficult for fear of being charged with criminal libel.[51]

In the absence of an access to information law, the state disseminated limited information and had not particularly done well on issues related to expenditure of public funds which is always shrouded in mystery.[52] However, the previous government of Kenya was responsible for Kenya's membership in the Open Government Partnership and the widely-applauded open data initiative. As a result, the presence of these initiatives was seen as subtle pressure on the government to pass the access to information Bill and maintain the political momentum.[53]

Despite the release of information under the open data initiative, information on developmental issues released by the state is regarded as partially accurate but incomplete.[54] The information gap that exists in Kenya mostly relates to planning, expenditure and government services.[55] Information on expenditure, which appears to be highly sought after in Kenya, is regarded as not always accurate or verifiable and this also applies to state plans which often have political undertones in the manner they are publicly released.[56] From a political perspective, Kenya's foreign policy in the current government has adopted a pan-African approach that has favoured a positive view towards the Model Law.[57]

49 Maina (n 31 above).
50 Questionnaire interview with Kenya Human Rights Commissioner, Shatikha S Chivusia, 13 November 2015.
51 As above.
52 As above.
53 As above.
54 As above.
55 As above.
56 As above.
57 As above.

As far as the applicability of the Model Law is concerned to the access to information process in Kenya, while there was prior knowledge of the Model Law within civil society, it was re-emphasised by the Special Rapporteur during her visit.

The Special Rapporteur undertook an advocacy visit to Kenya in August 2015, accompanied by a delegation of three members of the Working Group that developed the Model Law, to meet with government officials and other stakeholders. During the visit, the Special Rapporteur met with the Cabinet Secretary for Information, Communication and Telecommunications, the Attorney-General, and the Solicitor-General.[58] As far as the judiciary is concerned, the Special Rapporteur met with the Deputy Chief Justice and the Director of the Judiciary Training Institute. The delegation also met the Chairperson and members of the Senate Committee on Information and Technology, as well as the Committee on Legal Affairs and Human Rights.[59]

The Special Rapporteur also visited other government institutions, including the Constitution Implementation Commission; the Kenyan National Commission on Human Rights; the Commission on Administrative Justice; and the National Gender and Equality Commission.[60] The Special Rapporteur also had the opportunity of meeting civil society and the media to brief them on the outcome of her meetings and to formulate strategies for sustained advocacy towards a speedy adoption of the access to information law.[61]

Culturally, in Kenya there are challenges as a result of language barriers and the need for information dissemination in Swahili.[62] In addition, public servants display a negative attitude towards releasing information to the public.[63] During the Special Rapporteur's visit, she emphasised the need for public servants to change their attitudes to ensure that citizens are able to receive information they desire once they have submitted a request.[64] The government appeared to appreciate these challenges with the Cabinet Secretary in charge of Information and Technology, acknowledging the fact that information may be available but not accessible.[65] It was also suggested by the ICT Minister during the Special Rapporteur's visit that the media needs to be more responsible with the handling and dissemination of information. This suggests the perception within the state that access to information is still narrowly viewed as an issue of media freedom.

58 Shyllon (n 7 above).
59 As above.
60 As above.
61 As above.
62 Chivusia (n 50 above).
63 As above.
64 Maina (n 31 above).
65 As above.

During the visit of the Special Rapporteur, she was informed that the Kenyan Cabinet had approved the access to information Bill and recommended to the Minister of ICT that it be forwarded to Parliament for consideration.

One of the outcomes of the Special Rapporteur's visit was that it allowed a multi-stakeholder engagement and resulted in the judiciary agreeing to conduct access to information training for all magistrates and High Court judges.[66]

The success of the open data process in Kenya allowed the sustained resistance on the part of government to the development of an access to information law. Also, perceptions about corruption in Kenya was suggested as a disincentive for the passage of an access to information law as a result of concerns that 'it will be used as a rope to hang politicians'.[67] However, following the Special Rapporteur's visit, five meetings were held between the access to information coalition and Members of Parliament. These led to greater awareness on access to information issues within Parliament, and the law was eventually passed in September 2016.

Previously, there was opposition to an access to information law in Kenya as initial attempts on the Bill had been made from the ranks of opposition parties. However, the private members' Bill that eventually became law was tabled by a member of the ruling coalition. Eighteen organisations form the Kenyan access to information coalition and these organisations sustained the necessary political will for the law after the Special Rapporteur's visit.[68] The meetings with the Members of Parliament were choreographed around the strengths of the different organisations and targeted various issues and groups.[69]

Another interesting strategy was developed after the Special Rapporteur's visit. The Kenyan access to information coalition, which was established in 2007, used the government's argument against it by making the claim that the intention of the government, to create the office of an information ombudsman – a decision seen as intended by government to have a measure of control as opposed to placing oversight within the Commission on Administrative Justice, which is an independent constitutional body – was too expensive.[70]

A deliberate strategic decision was taken in Kenya not to encourage the adoption of the Model Law during the Special Rapporteur's meetings with the executive.[71] This was a cautious decision not to undermine the

66 As above.
67 As above.
68 As above.
69 As above.
70 As above.
71 As above.

sovereignty of Kenya. The Special Rapporteur's overall message during her visit to Kenya was to offer her support to any state processes to pass the law.[72]

The access to information law that was eventually passed, adopted some of the provisions in the Model Law which includes the definition of relevant private bodies, the primacy of the law as well as some of the exemptions in the Model Law. These are considered in more detail below.

4.1.1 Comparing Kenya's access to information law with the Model Law

The Model Law provides a guide for the interpretation of access to information laws. This approach has been adopted in the Kenyan access to information law, where the interpretation is based on a duty to disclose.[73] The Kenyan law is consistent with the Model Law by maintaining that nothing in the Act shall limit or restrict any other legislative requirement for a public entity or a private entity to disclose information.

Right of access to information

The Kenyan law provides for the right of access to information from any state body, and from any person where the information is required for the exercise of any right or fundamental freedom. This is not fully in line with the Model Law, which provides for the unconditional right of access to information from any public body, private body as well as 'relevant private body'.

Proactive disclosure

The Kenyan law provides for a lengthy list of information which 'may' be proactively disclosed in terms of section 5. Whilst the language is conditional, the list of information is consistent with section 7 of the Model Law.

Public interest override

While the Kenyan law provides for public interest override in the application of an exemption for disclosure, the wording of the law in section 6 is such that it is not mandatory: A body '*may* be required to disclose information where the public interest in disclosure outweighs the harm to protected interests'. This discretion is absent in the Model Law.

72 Chivusia (n 50 above).
73 Sec 4(4).

Designation of information officers

Under section 7, the Kenyan law provides only for the designation of information officers for public entities. There is no mention of designation for private bodies. This is inconsistent with the Model Law, which provides for the designation of information officers for both public and private bodies.

Processing of information request applications

In keeping with the Model Law, section 9 of the Kenyan law provides that 'where the information sought concerns the life or liberty of a person, the information shall be provided within forty-eight hours of receipt of the application or not later than fourteen working days where the application is complex or relates to a large volume of information'. The latter aspect of this clause regarding the 14 days' extension for complex requests, however, is not a provision of the Model Law.

Penalties for information officers

Sections 9 and 10 of the Kenyan law provide that an information officer who does not respond to an information request in the prescribed time is guilty of an offence and liable to a fine or imprisonment. Whilst this is not a provision of the Model Law, this certainly demonstrates the seriousness with which this law will be implemented in Kenya.

Commission on Administrative Justice

The Kenyan law provides for the Commission on Administrative Justice (as previously established) as the oversight mechanism in respect of this Act. The Commission's powers include the review of access to information decisions made by a public or private body; the investigation of complaints made by any person regarding a violation of the provisions of the Act; requesting and receiving reports from public entities; conducting education programmes on the right of access to information and the right to protection of personal data; and the monitoring of state compliance with relevant international treaty obligations.

The Commission is further required to submit an annual report to Parliament which includes an overall assessment of compliance with the Act by government. In addition, the Commission is mandated to receive reports from public entities regarding information requests received in the year under review. This is in line with section 67 of the Model Law.

It is important to note that the Commission's powers are limited only to private bodies, which is not consistent with the Model Law.

Internal review

The Kenyan law does not provide for an internal review process, as outlined in the Model Law.

Protection of person making disclosure

The Kenyan access to information law provides that anyone making a public information disclosure in the public interest shall not as a result be penalised. While this is not outrightly provided for under the Model Law, section 87 of the Model Law provides protection against civil and criminal liability for the disclosure of information in good faith.

Record management

Section 17 of the Kenyan law provides for the keeping and maintenance of records, which also includes the creation and preservation of records 'as are necessary to document adequately its policies, decisions, procedures, transactions and other activities'. This is consistent with section 6 of the Model Law.

4.1.2 Emerging outcomes in Kenya

The Kenyan judiciary has been liberal in terms of its willingness to adjudicate strategic litigation cases to test the content and limits of the constitutional right of access to information, especially in the Kenyan context where terrorism is a significant threat and national security a potential hindrance to access to information.[74] The state also regarded itself as open and providing access to information to the public, especially given its robust open data initiative that has been a model in Africa.

Kenya's open data initiative and some of the robust judicial defences to the right of access to information certainly signifies an important reference point for the future development of access to information, particularly in the East African region.

4.2 Ghana: Slow but steady

Article 21(1)(f) of the 1992 Ghanaian Constitution provides that 'all persons shall have the right to information, subject to such qualifications and laws as are necessary in a democratic society'. Despite the absence of an access to information law, there are sectoral laws in Ghana that grant access to information. This primarily is the Local Government Act 462 of

74 Maina (n 31 above).

1993 which provides extensive provisions for public access to information from local governments. The passage of Ghana's Right to Information (RTI) Bill has been pending in Parliament since 2010. Recent legislative amendments were considered as proposed by the relevant parliamentary committee, and the Bill underwent its second reading in Parliament in November 2015.

The access to information regime in Ghana has been rather weak despite the recognition of access to information as a human right in the Constitution. A reason for this includes the bureaucratic processes and infrastructure in Ghana which have been limiting. Records are sometimes not created and information released may be incomplete.[75] In addition, public officers do not understand their role in terms of the release of information as they do not regard information disclosure as a right of the public.[76] As a result, changing the civil service culture and investing in data and records management are important considerations that need to be prioritised in Ghana if the access to information Bill currently under consideration is to be effective.

In July 2014 the Special Rapporteur undertook a three-day advocacy mission to Ghana. The Special Rapporteur met with the Speaker of Parliament as well as other parliamentary leaders, including the members of the select committee on constitutional legal and parliamentary affairs who are responsible for the access to information Bill.[77] The Special Rapporteur also met with the Minister of Information and the Minister for Gender, Children and Social Protection. The Special Rapporteur received assurances that an access to information law would be passed before the expiration of the tenure of the present government in 2016.[78]

During the country advocacy mission to Ghana, there was notable resistance to the idea of the access to information law. However, this changed significantly after the Special Rapporteur's visit. The access to information Bill of Ghana was amended after the visit of the Special Rapporteur in 2014 and incorporated some of the salient features of the Model Law which are considered below. The visit of the Special Rapporteur was important as it challenged access to information as a foreign concept and presented access to information as a 'homegrown' initiative.[79] As a result, after the Special Rapporteur's visit, the Ghanaian access to information Bill was amended to introduce areas that were not previously covered in the Bill, such as the public interest override provision. It is understood that the Special Rapporteur as an external voice

75 Oral interview with Ghana civil society representative, Ugonna Ukaigwe, in Mexico City, 29 October 2015.
76 As above.
77 As above.
78 As above.
79 As above.

played a role of mediation that soothed the strained relations between civil society and government.

The Special Rapporteur met with the Chairperson of the special committee in Parliament considering the Bill and created a platform for civil society in Ghana to share the Model Law with members of Parliament. During her visit, The Special Rapporteur's main message was the need for the RTI Bill to be amended in line with the Model Law.[80]

A prominent cultural issue in Ghana is the attitude of public servants towards non-disclosure of information. In response to this issue, the Special Rapporteur dealt with the idea of information being held for the public good and subject to information disclosure.[81]

With elections in Ghana in 2016, it was perceived that there might be an incentive for Parliament and the government to pass the access to information Bill before their term ended to bolster public legitimacy. However, this did not occur. In addition to this, Ghana is a member of the OGP, and political incentives such as these sustain the momentum for transparency in the country. However, concerns remain in Ghana regarding the perception of the access to information Bill as a media law. In a recent statement by the President, it was stated that the access to information Bill would not change the media landscape fuelling concern regarding government's view about the law.[82]

Significantly, the visit of the Special Rapporteur to Ghana was seen as giving significant support to the work of the CSO Coalition. In the past, the coalition had been the only voice calling for the review of the access to information Bill. Civil society organisations took advantage of the visit and engaged the Special Rapporteur on some of the advocacy challenges, including the need to enhance the quality of the access to information Bill with particular reference to the Model Law.[83] Apparently, Parliament also gave reasons for the extended delay of the passage of the law, which included the prevailing misconception about the access to information Bill as a media law; inadequate public education on the Bill and its relevance; the poor record-keeping systems in government which would affect the implementation of the law; the prevailing culture of apathy among citizens; as well as the perception that the law would be used to witch-hunt political leaders.[84]

However, in the report of the parliamentary committee presented to Parliament in December 2014, the committee made extensive references to

80 As above.
81 As above.
82 https://www.ghanamma.com/2015/10/11/information-bill-wont-transform-media-landscape-mahama/ (accessed 6 July 2018).
83 Ukaigwe (n 75 above).
84 As above.

the Model Law and the Declaration of Principles on Freedom of Expression in Africa. In recognising and acknowledging the value of the Model Law, the Committee quoted the following message by the Special Rapporteur:[85]

> While the Declaration of 2002 and other such laws adopted by the AU Commission have expanded on state parties' obligations under the African Charter, they do not specifically provide guidance on the form and content of the legislation to be enacted to give effect to these obligations at the domestic level. The AU Commission on Human and Peoples' Rights has therefore gone further to provide a Model Law on Access to Information for Africa.

4.3 Malawi: Deepening understanding of using access to information to realise other rights

4.3.1 Advocacy visit

Section 37 of the Malawian Constitution provides that '[e]very person shall have the right to access all information held by the state or any of its organs at any level of government in so far as such information is required for the exercise of rights'.

Despite the recognition of a right to access to information, there are laws – such as the Official Secrets Act – that prevent disclosure of certain categories of information held by the government. Against this background, the government had an incentive to embrace transparency imperatives in Malawi in order to fulfil the ruling party's manifesto which promised the constitutional principles of good governance and transparency.[86] There was also a drive by the media and development partners to see the access to information law passed.[87]

In Malawi, the public need for information primarily lies with the public interest in the expenditure of public funds, the status of high-profile criminal cases and the current status of healthcare facilities. Consequently, the campaign for an access to information law in Malawi started as far back as 2003. However, the Cabinet did not until 2014 adopt an access to information policy to clear the way for the drafting of the law. The access to information law was eventually passed in February 2017.

In May 2015 the Special Rapporteur embarked on an advocacy visit to Malawi and was accompanied by four members of the working group that developed the Model Law. During her visit, the Special Rapporteur met

85 P Tlakula in her preface to the Model Law on Access to Information for Africa, http://www.achpr.org/files/news/2013/04/d84/model_law.pdf (accessed 6 July 2018).
86 Questionnaire interview with Legislative Counsel, Ministry of Justice and Constitutional Affairs of Malawi, Kahaki Jere, on 5 November 2015.
87 As above.

with the Minister of Information, Tourism and Civic Education and the Minister of Justice and Constitutional Affairs.[88] In Parliament, the Special Rapporteur met with the Speaker of Parliament, the Chairperson and members of the Committee on Media and Communication.[89] Other government institutions visited during the visit included the Malawi National Human Rights Commission, the Office of the Ombudsman and the Malawi Law Reform Commission.

The Special Rapporteur also met with a delegation of civil society organisations. Media organisations in Malawi have been central to the access to information advocacy in Malawi. The access to information law emanated from media organisations and had reached an advanced stage of drafting before the Special Rapporteur's visit. During the drafting process, the Model Law was used as a point of reference and some provisions were adapted to fit the context in which the law would be implemented.[90]

Culturally, in Malawi the public is suspicious of government and a measure of political apathy exists.[91] While this is changing, the process remains slow with civil society organisations taking an active role in creating public awareness and protecting human rights.[92]

Despite this, Malawian civil society organisations have developed an understanding of the role of access to information in the realisation of other human rights and, as a result, they used the Special Rapporteur's visit to further canvass the usage of access to information in also realising other rights. The Special Rapporteur, in partnership with the Media Institute of Southern Africa and the Centre for Human Rights, had previously held a meeting with local stakeholders on the utility of access to information for the realisation of the sexual and reproductive health rights of women in Malawi.[93]

After the Special Rapporteur's visit, the momentum to pass the access to information law increased, especially with the subsequent meetings of Parliament. The Malawian access to information law adopted some features of the Model Law and discarded others, such as the provision for an independent oversight mechanism as recommended in the Model Law, primarily as it is not economically feasible to create a new institution.[94] These are considered in more detail below.

88 Shyllon (n 7 above).
89 As above.
90 Jere (n 86 above).
91 As above.
92 As above.
93 As above.
94 As above.

4.3.2 Comparing Malawi's access to information law to the Model Law

Access to information as a human right

Notably, the law does not expressly conceive of the right of access to information as a human right. This is significant given that article 37 of the Malawian Constitution recognises access to information as a human right.

Private bodies

The Malawian law[95] does not extend the right of access to information to private bodies to the same degree as the Model Law. Section 5 of the Malawian law only extends the right to public and relevant private bodies in so far as they are required for the exercise of rights, and to private bodies who hold information about the person requesting.

Duty to keep records

While the Model Law provides for a duty upon information holders to create, keep, organise and maintain its information, section 13 of the Malawian law provides only for a duty to maintain and keep records but does not provide a duty to create records.

Information Commission

Sections 7 and 8 of the Malawian law designate the National Human Rights Commission as the body responsible for overseeing the implementation of the law and as being responsible for raising awareness, advising government, reviewing the decisions of information holders and making recommendations to government.

Exemptions

As far as public bodies are concerned, the Malawian law provides for exemptions along the lines of personal information; national security or defence; information necessary to preserve life, health and the safety of a person; legally-privileged information; ongoing academic and recruitment processes; international relations; and the protection of commercial and confidential information of a third party.[96] The exemptions in the Malawian law are broader than the provisions of the Model Law and potentially create loopholes to perpetuate a culture of secrecy.

95 Act 13 of 2017.
96 Sects 28-35.

Request procedure

The provisions in the Malawian law relating to the request procedure are largely in line with the Model Law. Where the Model Law provides for a 21-day response to an information request, section 19 of the Malawian law in fact provides that within 15 days of the request having been received, the public authority must provide written notice to the requester as to whether the record exists and whether it will be disclosed. It also provides for information to be disclosed within 48 hours if it relates to the life or liberty of an applicant. The Malawian law also provides that requests may be submitted orally or in writing.

4.3.3 Eventual outcomes in Malawi

Although Malawi is a poor country heavily dependent on aid, resources were not of significant concern in the passage of the access to information law. Malawi was more concerned with soliciting technical assistance in using article 37 of the right to access information in the absence of an access to information law.[97] As a result, specialised advocacy projects were favoured in Malawi to, for example, litigate for access to information on the basis of the right.[98]

In Malawi, as in the case of the other countries visited by the Special Rapporteur, there was a great deal of awareness within civil society organisations, especially those working on media freedom issues. The civil society organisations had a deeper understanding of the relationship between access to information and human rights and were able to make linkages between access to information and the right to health, in particular.[99] One of the significant outcomes of the Special Rapporteur's visit was successfully convincing the Malawi Human Rights Commission to take on the oversight role once the access to information law had been passed.

The political incentive for an access to information law has been high in Malawi given the recent transition in government and the desire to change the old order in favour of better good governance practices. However, this political incentive was perceived as fading, given the initial decision of Parliament to withdraw the tabled Bill. The ambiguous reason given for the decision was that the Bill was flawed with several inconsistencies and needed to be redrafted.[100] This occurred after the delay in tabling the Bill before Parliament because of the initial lack of an access to information policy which was necessary before a law could be

97 Kisoon (n 42 above).
98 As above.
99 As above.
100 Jere (n 86 above).

passed.[101] However, the Malawian press reported that the passage of the access to information law was one of the conditionalities imposed by the World Bank for the reinstatement of foreign aid. This suggests that external forces may have had a hand in the eventual re-introduction and the ultimate passage of the access to information law.

4.4 Mozambique: A case study in perseverance

4.4.1 Advocacy visit

A right to information law was passed in Mozambique on 31 December 2014. The adopted access to information law of Mozambique was drafted and tabled before Parliament by a group of civil society organisations coordinated by the Media Institute of Southern Africa (MISA) – Mozambique in 2005. The process of adopting the access to information law lasted 10 years from preparation to draft, deposit, discussion and adoption by Parliament. Since the passage of the law, there have been various challenges in implementation, which include a lack of public awareness on the law and a deficit in training of public officials to implement the law. However, in October 2015 Mozambique's Council of Ministers adopted a regulation to implement the law, which should aid the effective implementation of the law.

Prior to passage of the law, in June 2014 the Special Rapporteur embarked on an advocacy mission for the speedy adoption of the access to information Bill that at the time was before Parliament. During the visit, the Special Rapporteur met with the Chairperson of the Committee on Public Administration and Social Communication, which was responsible for the access to information Bill, the Minister of Justice and the president of the Supreme Court of Mozambique.[102] The meeting with the Chairperson of the Public Administration Committee led to a personal undertaking by the Chairperson to ensure that the Bill was passed into law during the current sitting of Parliament.[103] He also requested that the Special Rapporteur and her team provide technical assistance in the form of providing feedback on the Bill, ahead of the debate in Parliament in relation to the Bill.[104] Despite the short window period available for the feedback, a comprehensive analysis of the Bill was provided by the Special Rapporteur and her technical team. However, only a few of the recommendations were adopted because the access to information Bill had reached an advanced stage in the parliamentary process, thus making it difficult to effect substantial changes.[105]

101 As above.
102 Shyllon (n 7 above).
103 As above.
104 As above.
105 As above.

In Mozambique the influence of the Model Law extends beyond the advocacy visit of the Special Rapporteur. As part of the consultative process prior to its adoption, a regional consultation for Southern Africa on the Model Law had been held in Maputo in June 2011. The consultation had in attendance various stakeholders, including government officials and civil society organisations, and was held in collaboration with the Centre for Human Rights at the Eduardo Mondlane University. This fact ensured that in the run-up to the finalisation of the Bill by Parliament in 2014, local stakeholders who had been part of the June 2011 consultation, especially the Centre for Human Rights and the Eduardo Mondlane University, played an active role in ensuring that the Model Law was used as the template for the development of the Mozambican access to information Bill.[106]

The imminent elections in Mozambique probably also aided the passage of the access to information law in December 2014. There was a concerted advocacy effort in Mozambique that resulted in several trips to the country to offer technical as well as political support to the state process of passing the access to information law. The good working relationship between government and civil society also aided the successful passage of the access to information law. The view by the government that it was already open also aided the passage of the law with little resistance from the government, which in fact initiated the passage of the law.

4.4.2 Comparing Mozambique's access to information law to the Model Law

Access to information as a human right

The opening provision of the law expressly states that the law is adopted 'in support of the constitutional principle of consistent democratic participation of citizens in public affairs and in establishing other related fundamental rights'.

Scope of application

The law applies to both public and private bodies. In particular, it applies to state organs and institutions, incorporated within the state's direct and indirect administration, its foreign-based representation and local authorities. It also applies to private entities, legally or contractually bound to carry out activities of general interest or that are in receipt of public funds regardless of the source, as well as those holding information of public interest.

106 As above.

Proactive disclosure

All private and public entities are to publish public interest information in their possession. Specific categories of information requiring publication include the content of decisions that impact on the rights and freedoms of citizens; work plans and annual budgets; reports of audits, inquiries and inspections; environmental assessment reports; minutes of proceedings for public tenders; and contracts concluded, including relevant income and expenditure accounts.

Process of accessing information

According to article 15, requests for information can be submitted in writing or orally. Where the request is made in writing, the information must be recorded in writing and a copy given to the requester. Persons with disabilities must also be assisted while ensuring that their request is processed. A requester also need not give reasons for a request, which request must be responded to within 21 days.

Public interest override

There is no public interest override provision in the law.

Appeals

According to sections 34 to 36, an appeal may be lodged first with the official who refused access to the information and thereafter through a hierarchical appeal within the same institution. However, the hierarchical appeal must be preceded by an opinion of the document review committee. Thereafter, an appeal can be lodged to the administrative courts.

Oversight of the law

The oversight responsibility for the law is shared jointly by the Ombudsman and the governing body of the State Archives National Information System (SANIS). The SANIS is responsible for preparing a report on the implementation of the law, which is then transmitted to the Ombudsman for inclusion in its annual report to Parliament.

4.5. Mauritius and Seychelles: Island states with resource constraints

Both Mauritius and Seychelles are island states in Africa with low population levels and limited resources in terms of capacity as well as finances. Both states were yet to draft access to information Bills but had

expressed a commitment and willingness to adopt access to information laws, thus leading to the visits undertaken by the Special Rapporteur. However, despite the enthusiasm expressed in both countries for the adoption of access to information laws, this enthusiasm has to be balanced with the reality that in both countries, access to information may not be considered a priority given the limited resources available. The visit of the Special Rapporteur possibly was also symbolic for both countries as both states had previously felt neglected in AU processes. It was revealed that both island states were unaware of the Model Law prior to the visit of the Special Rapporteur.

During the Special Rapporteur's visit to Mauritius, she met with the Prime Minister; the Speaker of Parliament; the Ministers of Technology, Communication and Innovation; social security, national solidarity and reform institutions; social integration, empowerment and training as well as labour, industrial relations, employment and training. The Special Rapporteur also met with the Chief Justice of the Supreme Court; the Acting Attorney-General, the Chairperson of the Mauritius National Human Rights Commission- the Electoral Commission- as well as civil society organisations. The adoption of an access to information law is in the manifesto of the ruling party, and this commitment was used by the Special Rapporteur to canvass for the quick development and adoption of the law.[107]

The Special Rapporteur also undertook an advocacy mission to Seychelles in January 2015. The Special Rapporteur during her visit met with the President of Seychelles, Ministers, Members of Parliament and civil society organisations. The Special Rapporteur secured the commitment of the President towards the adoption of an access to information law.[108] A major outcome of the visit was the agreement by stakeholders, including the President, to have a national consultative meeting to discuss the need for the adoption of an access to information law and the scope and content of the law. Thus, on 25 and 26 May 2015, a symposium on developing an access to information law for Seychelles was organised by the Seychelles Media Commission and the Special Rapporteur.[109] At this symposium, the first day was devoted to demystifying the concept of access to information, while the second day involved in-depth discussions on the content of the Model Law as a template for an access to information law for Seychelles. With an imminent change in leadership in Seychelles, it appeared that there was an added political motive which influenced the commitment to adopt an access to information law.

107 As above.
108 As above.
109 As above.

In November 2016 the Seychelles government introduced an access to information Bill in the form of a White Paper. The Bill was modelled very closely along the lines of the Model Law and underwent several processes of consultation with stakeholders even after the change of leadership in government. The Bill was eventually approved by Cabinet in May 2018 and signed into law in July 2018.

5 Conclusion: Findings and recommendations

5.1 Findings

The emphasis of the Special Rapporteur was to present the Model Law as an ideal and did not prescribe to the states what they should do. There was general consensus in all states involved and among all participating stakeholders that the advocacy mission of the Special Rapporteur had been successful and effective. However, it should also be noted that it is difficult to assess the Special Rapporteur's missions, given the way in which both state and civil society parties played a 'good and cooperative' card during the missions. The missions gave the in-country efforts for the adoption of access to information laws a form of legitimacy and validation. Country governments had a renewed appreciation for the importance of access to information as a human right and were given fresh political incentives to adopt access to information laws. There were commonalities among the six states, which are worth highlighting below.

5.1.1 Differing perspectives on openness

From the perspective of the Special Rapporteur and her team, it was suggested that all six state governments viewed themselves as open and providing access to information to the public. For civil society organisations, however, the view was different, demonstrating the dynamics in the supply and demand for information. This heightened the need for targeted advocacy on portraying access to information as a human rights issue where the scope and content of the right should not be determined by the state but by the rights holders.

5.1.2 Distinctions between access to information and media freedom

Most states still regarded access to information as a media issue, although there was a deeper understanding of the relationship between access to information and other human rights. This understanding is not prevalent in state structures where access to information law is still seen as a nuisance law, which created the differing perspectives on the realisation of the right. The Special Rapporteur's success hinged on her emphasis that access to information was more than a media freedom issue and was linked

to socio-economic development. Despite this, however, in some of the states visited by the Special Rapporteur, media organisations were taking the lead in advocating the adoption of access to information laws, and they were far more sensitised on access to information issues than other civil society organisations. The role and relevance of the media in the access to information campaign, therefore, cannot be underestimated. The media coverage of the Special Rapporteur's visit also steered the public discourse towards the issue of access to information in the respective countries.

5.1.3 State security remains a significant obstacle

Across all states, state security remains a significant issue that is used by states to express concern on the levels of openness that should be acceptable. As a result, there will always be a need to balance the competing tensions between access to information and state security. During the Special Rapporteur's missions, the emphasis was on the reception of the state for the foundational idea of adopting an access to information law, and issues regarding implementation were not addressed in detail. Therefore, for states, balancing these competing issues still need to be addressed.

5.1.4 Hindrance of state bureaucracy

Across all states, the poor state of record management was highlighted as a significant hindrance to access to information. The sentiments expressed by non-state actors was the difficulty that governments would be confronted with when an access to information law is adopted in terms of providing information in the absence of the creation and organisation of records. Overall, the direct interaction with law makers, state officials and civil society gave a new meaning to regional integration and regional commitments that helped support and, in some cases, actualise the efforts for the adoption of access to information laws in different countries.

5.2 Recommendations

The Organisation of American States (OAS) was the first regional body that adopted a model law on access to information. The process of adopting the law began around the same period that the Model Law process began. However, the African Commission process took much longer as a result of the extensive consultative process that was undertaken, as indicated at the beginning of this article. With the benefit of more years

of using the Model Law as an advocacy tool, there are several lessons to be learnt from the OAS process.[110]

5.2.1 Harnessing the role of regional civil society organisations

For the OAS, the establishment of a Regional Alliance for the Freedom of Expression and Information,[111] a network of 23 CSOs from 19 different American countries that was created in October 2005, helped promote access to information through different activities, such as strategic litigation, training and technical assistance, advocacy, and applied research. A similar organisation exists in Africa, namely, the Africa Freedom of Information Centre,[112] an organisation that was established to play a continental role on access to information advocacy in Africa. While the organisation's role has largely been limited to advocacy for the adoption of access to information laws, it is important that it is co-opted to start playing a more significant coordination role for advocacy and implementation.

5.2.2 Continued support for the Special Rapporteur on Access to Information and Freedom of Expression

The Special Rapporteur's work so far has been aided by the support of external grants. While such continued external funding is required, the AU and the African Commission need to further strengthen the capacity of the Special Rapporteur through the political endorsement of her work. With the number of African states with access to information laws well below half, it is important that this political support is given for the adoption of laws as well as effective implementation.

5.2.3 Development of an implementation guide

The OAS developed an implementation guide for the Model Law to assist member states with implementation concerns that would otherwise not be included in the Model Law.[113] At the national level, the idea of an implementation guide was useful in Nigeria for institutions to successfully implement the Nigerian FOIA. It is recommended that a similar approach should also be adopted for the Model Law.

110 A Sears & M Barreto 'Implementing a Model Access to Information Law in Africa: Lessons from the Americas' Conference paper at Model Law Conference, University of Pretoria, South Africa, December 2015.

111 Sears & Barreto (n 111 above); http://www.alianzaregional.net/. Perhaps a comparative institution in Africa would be the African Platform on Access to Information, http://www.africanplatform.org/ (accessed 6 July 2018).

112 https://africafoicentre.org/ (accessed 6 July 2018).

113 Sears & Barreto (n 111 above).

5.2.4 Strategic litigation and advocacy

It is important for civil society organisations to form strategic partnerships across states and within states to develop advocacy strategies that respond to the contexts of the various countries for the adoption and implementation of laws. These can also include, where necessary, strategic litigation at a national and regional level to raise awareness and increase pressure on member states as well as for the AU to prioritise access to information matters in Africa.