

AFRICAN SOFT LAWS... BETWEEN EXPECTED ROLES AND COMPLIANCE CHALLENGES RESOLUTION 472/2020 AS A CASE STUDY



Introduction

Soft or non-binding laws are fundamental components of human rights laws and obligations, serving as the initial step and primary foundation of international human rights law. This is reflected in Universal Declaration of Human Rights, adopted on December 10, 1948, and incorporated into various international and regional human rights agreements, including those in Africa.

In this context, and in alignment with vision of Maat for Peace, Development, and Human Rights, Maat has undertaken tireless efforts to enhance the legal and jurisprudential framework of the African continent. It aims to raise awareness regarding African Soft decisions. The Foundation presents its study titled "African Soft Laws: Between Expected Roles and Compliance Challenges—Resolution 472/2020 as a Case Study." This study seeks to clarify ambiguities surrounding African Soft laws and addresses three main axes: Nature of Soft laws and their expected roles; Nature of Resolution No. 472 and challenges of its implementation; and Maat vision regarding necessary interventions to activate decision.

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First Axis: Nature of African Soft Laws and Their Roles in Enhancing Human Rights in Africa

Soft laws play a significant role in enhancing human rights at all legal and applied jurisprudential levels. This axis addresses the following:

Nature of Soft Laws:

Soft or non-binding legal instruments often provoke debate within legal and jurisprudential circles. They are commonly referred to as "soft rules" found in non-binding or voluntary decisions, recommendations, codes of conduct, standards, guidelines, and comments, as well as "normative provisions contained in non-binding texts."¹

In Africa, African Commission on Human and Peoples' Rights serves as the primary body for issuing soft laws. Under its mandate, it adopts various soft and non-binding legal instruments, including guidelines, declarations, decisions, and general comments. These instruments address human rights issues, representing the official position of the Commission, and call for specific measures in accordance with established standards. Statistics indicate that African Commission adopted approximately 376 decisions from September 2017 to 2020, covering substantive issues related to justice system, elections, governance, discrimination, the rights of vulnerable groups, freedom of expression, social and economic rights, the death penalty, torture, and issues of conflict and terrorism.²

Expected Roles Enhancing Human Rights Jurisprudence in Africa

African Soft laws play a crucial role in enhancing human rights jurisprudence on the continent. They are considered one of the main pillars supporting the legal and legislative framework for human rights in Africa, serving as building blocks for the human rights obligations of African states. Soft laws contribute to this framework through a set of expected roles, which can be summarized as follows:

A. Normative and Reference Role

Soft and non-binding legal instruments, including those from Africa, play a significant normative role. They serve as a legal framework that enables the African Commission and member states to evaluate human rights issues, assess violations, and measure adherence to the human rights obligations outlined in the African Charter. Together, the

¹ Oxford Academic, What is 'Soft' Law? An Analysis of the Concept of Non-Binding Instruments and Provisions in International Law, December 2021, <https://bitly.co/RL5h>

² Pulp, Model Law on Access to Information for Africa and other regional instruments: Soft law and human rights in Africa, access date July 2024, <https://bitly.co/RL45>

Commission and states help establish new legal standards—both binding and non-binding—that are not explicitly included in existing binding laws.³ This is particularly evident in the role of the Guiding Principles on Right to Water, which serve as a primary legal reference for assessing progress toward the goals of African Union Agenda 2063 and Sustainable Development Goal 6. These goals aim to ensure "equitable and sustainable use and management of water resources for social, economic, and regional development." Cooperation and Environment" and "Access to Water for All".⁴

B. Interpretive Role

Soft law instruments contribute to the development, clarification, and explanation of legal and human rights standards by providing clearer definitions of their meanings and the scope of states' obligations. They can be cited in court or referenced in treaties or domestic laws. This is exemplified by the general comments issued by the African Commission, notably General Comment No. 5 on the African Charter⁵ on Human and Peoples' Rights, which interprets Article 12 regarding the right to freedom of movement and residence, and General Comment No. 3, which interprets Article 4 concerning right to life. Commission aims to provide states, national human rights institutions, and civil society with useful guidance on the application of these articles.⁶

C. Developmental Role

These instruments help fill legal vacuums or address emerging issues not covered by existing legal precedents. For instance, the Declaration of Principles on Freedom of Expression and Access to Information in Africa, issued in 2019, replaced the 2002 Declaration on Freedom of Opinion and Expression to reinforce developments related to freedom of expression and access to information.⁷ Similarly, the African Commission's Resolution on the Protection of Women from Digital Violence in Africa, issued in August 2022, called on African states to review their legislative frameworks to eliminate discriminatory laws exacerbating violence against women and to criminalize digital violence against women in national laws.⁸ More recently, African Commission Resolution

³ OXFORD ACADEMIC, The Role and Use of Soft Law Instruments in the African Human Rights System, November 2016, <https://bitly.co/RL3w>

⁴ ACHPR, Guidelines on the Right to Water in Africa, 31 July 2023, <https://bitly.co/RL33>

⁵ ACHPR, General Comment No.5 on the African Charter on Human and Peoples' Rights: The Right to Freedom of Movement and Residence (Article 12(1)), 10 November 2023, <https://bitly.co/RL2y>

⁶ ACHPR, General Comment No. 3 On The African Charter On Human And Peoples' Rights: The Right To Life (Article 4), 12 December 2015, <https://bitly.co/RL38>

⁷ ACHPR, Declaration of Principles on Freedom of Expression and Access to Information in Africa 2019, 10 November 2019, <https://achpr.au.int/index.php/en/node/902>

⁸ ACHPR, Resolution on the Protection of Women Against Digital Violence in Africa - ACHPR/Res. 522 (LXXII) 2022, 11 August 2022, <https://shorter.me/Wpmsl>

No. 586 of 2024 advocated for the formulation of comprehensive guidelines on the right to development, tailored to Africa's specific context, serving as a reference for its implementation and promotion across the continent.⁹

D. Complementary Role

Soft law instruments, including those from Africa, extend beyond rigid legal frameworks. They can address international actors other than states, such as commercial enterprises and private security companies, which may influence the enjoyment of human rights on a global scale. This is particularly evident in the 2011 Guiding Principles on Business and Human Rights, which establish the human rights responsibilities of business enterprises. In Africa, the Guiding Principles on Human Rights of All Migrants, Refugees, and Asylum Seekers play a significant role. These principles work in conjunction with the African Convention Governing Refugee Problems¹⁰, complementing and supporting it, along with the Guidelines on Access to Information, Guidelines on African Elections, Guidelines on Freedom of Association and Assembly in Africa, and the Guidelines on Prohibition and Prevention of Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment in Africa. All these principles address human rights issues in Africa and are supported by binding legal texts.

Third: Enhancing Roles of African States Responses

Despite the non-binding nature of soft law tools, their impact and influence on determining states' responses, particularly in Africa, have been demonstrated in practice. The areas of influence of these instruments on states' responses can be outlined as follows:

a. Enhanced Cooperation with African Commission

As issued by a treaty body, the African Commission, these instruments enhance cooperation among African states, especially concerning humanitarian and medical issues, human rights, refugee crises, environmental concerns, and cybercrimes.

b. Reinforcement of African States Obligations

African soft law instruments do not create new obligations for states; rather, they reinforce existing obligations. Their formulation requires states to implement them, as they have pledged to uphold the African Charter, which established the African Commission. This is consistent with Article 1 of the Charter, where member states

⁹ ACHPR, Resolution on the preparation of a General Comment on the right to development in Africa - ACHPR.Res.586 (LXXIX) 2024, 10 June 2024, <https://bit.ly.co/RL3j>

¹⁰ ACHPR, African Guiding Principles on the Human Rights of All Migrants, Refugees and Asylum Seekers, 8 November 2023, <https://bit.ly.co/RL2t>

recognize the rights set forth and undertake to take legislative or other measures to give effect to them. Commentators agree that the reference to “other measures” in Article 1 is broad enough to encompass compliance with and implementation of the African Commission’s recommendations.¹¹

c. Enhanced Technical and Legal Assistance

African states are encouraged and assisted in updating and developing their legislative and legal frameworks related to human rights. This is evident in the contribution of the Declaration of Principles on Freedom of Expression and the Model Law on Access to Information. Prior to their adoption, only four African states had legislation on access to information. However, following their adoption, African states promptly enacted access to information laws and integrated them into their domestic legal systems, as seen in countries such as Malawi, Nigeria, Mozambique, and Seychelles. Additionally, the United Nations Guiding Principles on Internal Displacement have prompted several African states, including Angola, Burundi, Kenya, Liberia, Sierra Leone, Sudan, and Uganda, to enact laws protecting internally displaced persons.¹²

d. Guiding Role in Disputes and Negotiation Processes

Soft law instruments can serve as a suitable option for negotiations that may stall if legally binding commitments are sought, particularly when it is not feasible for the negotiating parties to make significant commitments due to political or economic reasons. These instruments allow for negotiations to continue in good faith while deferring binding agreements.

¹¹ Cambridge, The Implementation of the Findings of the African Commission on Human and Peoples' Rights, May 2015, <https://doi.org/10.1017/CBO9781107294943>

¹² University Bristol, AN EXAMINATION OF THE ROLE OF SOFT LAW IN INTERNATIONAL HUMAN RIGHTS LAW: THE ROBBEN ISLAND GUIDELINES ON THE PREVENTION OF TORTURE IN AFRICA, access date July 2024, <https://bityl.co/RL4V>

Second Axis: Limits of Implementing Resolution 472 Between Content Requirements and Compliance Issues

Resolution 472 on the prevention of trade in torture instruments is classified as one of the most prominent Soft legal tools addressing pressing and current issues on the African continent. This can be examined as follows:

First: Nature of Resolution 472 and Its Provisions

In December 2020, at its 67th Ordinary Session, African Commission on Human and Peoples' Rights issued a resolution prohibiting the use, production, export, and trade of instruments used in torture. This resolution affirmed its guidance from Articles 4, 5, and 6 of African Charter, which pertain to the right to life, personal integrity, respect for the inherent dignity of the human person, and the prohibition of all forms of torture, cruel, inhuman, or degrading treatment or punishment, as well as arbitrary arrest and detention. The Commission also took into account the 2004 Robben Island Guidelines, particularly the obligation under Guideline 14 that states shall prohibit and prevent the use, production, and trade of equipment or materials designed to inflict torture or ill-treatment, as well as the misuse of any other equipment for these purposes. In this context, African Commission called on African States to:

- a. Utilize provisions of Robben Island Guidelines to address gaps in existing laws, policies, and practices aimed at prohibiting and preventing the use, production, export, and trade of equipment designed to inflict torture or ill-treatment.
- b. Provide full support and participation in the ongoing process of the United Nations General Assembly to study the feasibility, scope, and criteria for possible common international standards, and support the Group of Governmental Experts in this regard.
- c. Prohibit use of chains, handcuffs, or other restraints that are inherently degrading or painful.
- d. Submit a report to Commission on status of the use, production, export, and trade of law enforcement equipment and develop guidelines for States Parties to the African Charter to effectively regulate the trade and production of such equipment, to be submitted at its sixty-eighth Ordinary Session.¹³

¹³ Resolution on the prohibition of the use, production, export and trade of tools used for torture, December 2020, <https://shorter.me/QiwKH>

Second: Challenges in Implementing Resolution No. 472

Despite African Commission on Human and Peoples' Rights' efforts, particularly in implementing Resolution 472 on the prevention and prohibition of the trade in instruments of torture, practical application has been lacking among African States. The resolution has not been fully or effectively implemented. This study identifies several challenges that have hindered its application, including:

a. Non-binding Nature of Decision

The reluctance and failure to implement African Commission Resolution 472 can be attributed, in part, to its Soft and non-binding nature. The resolution serves as one of the Commission's soft tools, similar to guidelines and informal resolutions, which provide only principles and guidance to states. Consequently, failure to comply with the resolution does not lead to legal consequences, nor does it include mechanisms to hold states accountable or enforce deterrent sanctions.

b. Lack of Review and Oversight

The content of Resolution 472 lacks any clauses or paragraphs indicating a mechanism for its implementation or for measuring and monitoring the extent of its application by countries. Therefore, similar to other Soft and non-binding African tools, it does not include a follow-up and review process. As a result, African countries are not subject to any review regarding their progress, success, or commitment to implementing the resolution, which has contributed to the failure to activate or enforce it.

c. Limited Knowledge of Resolution

African Commission faces a significant challenge: the lack of awareness regarding its decisions. This issue arises from insufficient marketing and the widespread dissemination of these decisions, as well as a lack of cooperation with civil society organizations and stakeholders responsible for informing governments across the continent. For example, decisions often emerge during the Commission's sessions—whether special or general—where it adopts between five to ten decisions in a single session. This leads to inadequate dissemination and insufficient reminders to countries. The Commission typically publishes decisions only after the session concludes, without promoting them through social media.

d. Promotion and Marketing of Torture Tools

The African continent, like other regions, is experiencing the promotion and marketing of repressive and torture instruments by manufacturing companies. This occurs through social media and international exhibitions, where Africa hosts annual events to showcase

weapons and related equipment. African countries also participate in international exhibitions on other continents, where deals for the sale and trade of these tools are made without adequate supervision, undermining their commitment to Resolution 472.¹⁴

e. Flows of Less-Lethal Weapons

In the Middle East and Africa, the trade in torture tools—often under various names—represents a significant market, projected to reach approximately 9,027.4 million USD in 2024, with an expected compound annual growth rate of about 6.08%.¹⁵

f. Continued Practices of Torture and Death Penalty

Despite existing commitments and frameworks, African nations struggle to deter the practices of the death penalty and torture. Currently, only 24 African countries have abolished the death penalty for all crimes, while four countries have done so for ordinary crimes, and 15 countries maintain a moratorium on executions.¹⁶ Regarding torture, as of July 2024, 52 African countries have ratified Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and 24 have ratified Optional Protocol to the same Convention according to July 2024 updates.¹⁷

g. Declining Role of Civil Society

There is a noticeable decline in the roles of African civil society organizations in combating the trade in torture tools. Their influence and contributions are limited due to a lack of sufficient information about these tools and their impact on people's rights.

¹⁴ UN expert urges end of torture-tools trade amid global spike in torture, <https://shorter.me/aiUf->

¹⁵ UN expert urges end of torture-tools trade amid global spike in torture, <https://shorter.me/aiUf->

¹⁶ ACHPR, Working Group on the Death Penalty, Extrajudicial, Summary or Arbitrary killings and Enforced Disappearances in Africa - 790S, 23 May 2024, <https://bitly.co/RL6I>

¹⁷ ACHPR, The declaration of 26 June - International Day in Support of Victims of Torture, 26 June 2024, <https://bitly.co/RL6G>

Third Axis: Maat's Vision Regarding Possible Interventions to Activate Resolution 472

Considering the challenges and compliance issues with Soft and non-binding laws in Africa, key stakeholders—including the African Commission on Human and Peoples' Rights, African countries, and civil society organizations—must undertake a series of interventions to activate these soft laws, particularly Resolution No. 472 on the prevention of trade in torture instruments. These interventions can be outlined as follows:

First: Interventions Expected from African Commission on Human and Peoples' Rights

The context of Resolution 472 outlines several roles and interventions that African Commission can perform to reactivate and implement resolution:

A. Mobilization and Advocacy Interventions

African Commission can enhance mobilization and advocacy efforts to prevent the trade in torture instruments and implement Resolution No. 472 by:

1. Encouraging countries to submit periodic review reports to ensure transparency and accountability, thereby supporting the implementation of the Commission's resolution and enhancing regional cooperation and monitoring mechanisms.
2. Urging governments to enact national laws, regulations, and other measures to prohibit and prevent the production, trade, possession, stockpiling, and use of prohibited goods, while regulating trade in controlled items that could be misused for torture and ill-treatment.
3. Encouraging organizers of arms trade and promotional exhibitions to conduct periodic assessments of their activities, including risk evaluations and screenings of potential exhibitors to identify those who may trade or promote prohibited equipment, and to reject those with poor human rights records.
4. Promoting the submission of periodic reports by companies regarding the manufacture and trade of controlled items, including licenses and permits, as well as any suspensions or terminations due to risks associated with torture or ill-treatment.

B. Technical Assistance

The African Commission should intensify its technical assistance efforts to the governments of the African continent in order to implement Resolution No. 472. This can be achieved through:

1. Establishing a team of experts from the African Commission to develop controls on the trade in torture instruments and to create effective national and multilateral measures to implement Resolution 472, thereby prohibiting the trade in inherently inhumane equipment and regulating law enforcement equipment that could be misused for torture.
2. Developing principles, guidelines, and measures that govern technical assistance services, including instructions, training, and knowledge transfer regarding the use of law enforcement goods and equipment, which will help prevent the provision of technical assistance and training that could facilitate torture or other forms of ill-treatment.

Second: Interventions Hoped for by African Countries

The implementation of Resolution No. 472 calls on African countries to adopt a series of measures aimed at accelerating its enforcement and enhancing voluntary commitment to it. The foremost of these measures include:

- A. Revise and update the legislative and legal framework to tighten control over the trade in torture instruments and prohibit brokerage services carried out by legal or natural persons, as well as by resident or established companies. This includes regulations regarding goods and instruments that may be used for torture, repression, intimidation, or other forms of cruel, inhuman, or degrading treatment or punishment in countries outside the customs territory of the Union.
- B. Review national laws and procedures in line with the African Commission to enhance their consistency and compatibility with relevant decisions.
- C. Provide training for law enforcement personnel on the proper use of equipment, ensuring that any misuse is reported, investigated, and that perpetrators are prosecuted.

Third: Interventions Hoped for by African Civil Society

Civil society can undertake several interventions to activate Resolution 472, particularly the following:

- A. Collaborate with international and African mechanisms to provide technical support services to governments, enabling them to develop and update legislative and legal systems aimed at preventing the trade in torture instruments and fulfilling their international and regional obligations.
- B. Intensify efforts to establish an African instrument for torture-free trade, aligning with international initiatives to develop a global instrument in this regard.

- C. Conduct assessments and statistical studies on the prevalence, forms, and characteristics of the trade in torture tools across the African continent. This research will help in understanding the phenomenon and identifying appropriate measures and policies.
- D. Launch an African Initiative to prevent the trade in torture tools. This initiative can highlight the risks associated with such trade within African countries and promote African Commission Resolution No. 472 to enhance awareness of the resolution, similar to other soft laws.