Comments and Input: Draft Study on Human and Peoples' Rights and Artificial Intelligence (AI), Robotics, and Other New and Emerging Technologies in Africa

I. Introduction

The International Center for Not-for-Profit Law (ICNL) is pleased to prepare this submission in response to the request for comments and input on the *Draft Study on Human and Peoples' Rights and AI, Robotics, and Other New and Emerging Technologies in Africa* posted on the website of the African Commission on Human and Peoples' Rights (ACHPR or Commission). In addition to ICNL, the following organizational members of the Digital Rights Alliance Africa (DRAA) contributed their time and expertise to this submission:

- Baseiota Foundation
- Collaboration on International ICT Policy for East and Southern Africa (CIPESA)
- Thomas & Michael Advocates/Walezi Wa Katiba
- Women of Uganda Network (WOUGNET)

We appreciate this opportunity to provide feedback. We hope the feedback will help inform the study so it can serve as a valuable and feasible foundation for the ACHPR's work on artificial intelligence (AI) moving forward. We look forward to continuing to engage with the Commission on the next steps and are available to share additional expertise and feedback.

II. Comments on the General Structure of the Draft Study

DECREASE LENGTH OF THE STUDY: ICNL commends the drafters on substantially reducing the Study's length compared to the previous versions released ahead of the Nairobi and Kigali workshops in May and September 2024, respectively. The current draft, however, could still benefit from edits to ensure the analysis is streamlined and the findings are concise, thereby enabling the Commission, civil society, and other stakeholders successfully utilize the takeaways.

The methodology, for example, can be shortened to five pages or less. A clear and concise methodology will help readers understand the problem, better convey the intent of the study, and can more effectively demystify the concepts of AI, robotics, and other new and emerging technologies in Africa. As currently written, the methodology is too general to understand what problems it seeks to address.

Additionally, rather than focusing on generalities about AI, it would be valuable to identify concrete examples of AI's potential benefits in Africa and specific harms experienced. The Study could also be richer if the drafters included the drivers of AI challenges. For example, it is noted that there are weaknesses in the content of National AI strategies, and a lack of standardisation is mentioned. Still, there is no mention of whether this is due to a lack of capacity or political will among African States.

LINK EXISTING LEGAL FRAMEWORKS IN AFRICA TO AI: Section 2 of the Draft study covers relevant African Treaties and mechanisms. While this is a good gesture and gives a firm foundation for scoping AI and

how it may potentially impact human rights and freedoms, there is a missing link between the treaties and how they connect with AI issues. For instance, the Refugee Convention, the Kampala Convention on Internally Displaced Persons (IDPs), and the Special Rapporteur on Refugees, Asylum Seekers, IDPs, and Migrants in Africa are all mentioned. Not only are these concepts of displacement significantly different, with each group experiencing AI risks differently, the Study does not explain how the aforementioned mechanisms are connected to AI. To ensure references to treaties, mechanisms, and institutions in Africa are meaningful in the context of this Study, they should, at a minimum: 1) describe the obligations they confer to stakeholders involved in the development and deployment of AI tools, 2) how AI systems might impact targeted groups, and 3) what compliance is necessary to ensure adherence with the continent's human rights norms and best practices.

LINK RECOMMENDATIONS TO STUDY FINDINGS: Following a lengthy examination of how AI impacts the individual and collective rights guaranteed by the African Charter on Human and Peoples' Rights (the African Charter), the Draft Study outlines a series of recommendations to the African Union and the Commission. However, the study does not support the recommendations it outlines. For example, the recommendations section states, "An African Framework Convention on AI and Human Rights can draw significant lessons from existing regional and international framework conventions to establish a robust and adaptable governance structure. The recently adopted Council of Europe Framework Convention on Artificial Intelligence, Human Rights, Democracy, and the Rule of Law." However, the study does not assess the Council of Europe Framework Convention before outlining recommendations. Therefore, there is no basis for asserting that this Convention would effectively mitigate AI's specific risks to individual and collective rights in Africa. While citing legal frameworks from other jurisdictions is welcome, the examples must include a more substantive description and comparative analysis to ensure that recommendations are context-specific and respond to the unique challenges highlighted in the Study.

Moreover, the recommendations section asserts that existing legal frameworks in Africa (e.g., national data protection laws) are insufficient to address the risks of AI, thereby necessitating a comprehensive AI convention and national AI governance frameworks. However, the study does not closely examine if and how existing governance frameworks address the risks of AI, what the gaps in regulation are, and if those gaps are most effectively remedied by amending existing laws and regulations, improving enforcement of existing laws, or drafting a new, standalone AI law. In short, the Draft Study could be greatly enhanced by ensuring that it presents more robust evidence in the study's main body for the recommendations it issues for various stakeholders in Africa.

III. Comments on the Importance of Civic Participation

EMPHASIZE THE ROLE OF CIVIL SOCIETY IN AI POLICYMAKING: While the Draft discusses the influence of AI on electoral participation in several sections, there is a missed opportunity in the Study to emphasize the fundamental importance of civic involvement in the drafting of national AI strategies, the development of regional and national AI governance frameworks, and the implementation of AI oversight and monitoring mechanisms. As has been observed throughout Africa, civil society and the communities most impacted by AI systems have not been inclusively engaged in AI policymaking. Civic participation in governance is essential to channeling the views and interests of local communities,

including marginalised and at-risk groups, to inform the work of policymakers, thereby increasing the utility, legitimacy, and transparency of decision-making. Including diverse voices in policymaking ensures that decision makers adopt rights-based frameworks while increasing public buy-in and understanding of new policies, laws, and regulations for sustainable impact. To be effective, opportunities for participation need to be provided at the inception of policymaking and throughout implementation through meaningful public oversight.

As an example of good practice, in Uganda, civil society participated in developing the Data Protection and Privacy Act by actively providing input to the draft law, attending consultative workshops, and sending written submissions to the Committee on legal and Parliamentary affairs. The Study should draw on best practices from the Continent and explain States' obligations to facilitate public participation as a core and integral element of AI regulation. Other resources that the drafters of the Study can draw upon include: ICNL and ECNL's report, E-Consultation Mechanisms in Legislative and Regulatory Decision-Making, ECNL's summary of Guidelines for States on the Effective Implementation of the Right to Participate in Public Affairs, and ECNL's report, ECNL, New Dimensions for Public Participation.

It should be noted that AI systems can impact individuals even if they do not understand the underlying technology and how it has been deployed. Thus, there may be significant barriers between those most affected by AI and their ability to participate in policy making processes. These barriers are most acute in the divide between rural and urban and the divides across regions and marginalized communities. To address these barriers, there should be investment in digital and AI literacy for policymakers, civil society groups, and impacted communities. Literacy on AI can better ensure all relevant constituencies can effectively participate, so that regulatory discussions are not dominated by large corporations.

IV. Comments on Part III - Civil and Political Rights in the Charter

INCLUDE SUBSTANTIVE EXAMPLES: In the section on civil and political rights, the study does not offer specific examples of how the deployment of AI in Africa has impacted the rights described, diminishing the utility of this section. An improvement could be to use the same structure in this section on Civil and Political Rights as was used in other sections of the Study. For example, the Socio-Economic and Cultural section lists specific AI opportunities and risks for each listed right. Such examples make the Study more concrete and help guide decisionmakers on the most relevant harms in the African context.

Moreover, to the extent possible, substantive examples should be localised to provide a firm basis on which to appraise proposed recommendations. For instance, there have been attempts to use AI technology specifically during electoral processes and policing assemblies in South Africa, Kenya and Uganda with adverse consequences on individuals' civic freedoms. These can be the basis for important recommendations which will contribute to progressive reforms in AI utility in the exercise of civil and political rights.

Also, many risks specific to women and children are not fully captured. This includes the use of AI-enabled deep fake technology to create non-consensual and sexually explicit videos to attack and humiliate women and girls, particularly who are human rights defenders, journalists, politicians, or

have any other prominent or influential position in society. Examples of how these technologies have been weaponized and the ease with which they can be used would highlight key regulatory needs and challenges to address. Other key groups for the ACHPR are indigenous communities, elder persons, and IDPs, refugees and asylum-seekers. The specific risks related to their civil and political rights have not been addressed in this section.

ADDRESS PRIVACY RIGHTS, INCLUDING DATA PROTECTION AND SURVEILLANCE RISKS: According to researchers, technical experts, and human rights organizations, AI poses a substantial existential threat to privacy rights. Privacy rights are threatened throughout the AI lifecycle, from the system's design, development, and training to its ultimate deployment and use. Although the Charter does not directly provide for the right to privacy, the Commission has repeatedly affirmed that the right to privacy is implied by other rights outlined in the Charter, such as the right to freedom of opinion and expression. For example, ACHPR Resolution 362 on the Right to Freedom of Information and Expression on the Internet outlines 43 principles relevant to the right to freedom of information and expression through internet access, including privacy protections and communication surveillance. Furthermore, ACHPR Resolution 573 calls for States to refrain from deploying targeted mass communications surveillance against human rights defenders and the media because such actions are disproportionate restrictions of the right to privacy. As is, the Draft Study does not adequately address the risks AI poses to individual and collective privacy rights in Africa. The risks are numerous such as the arbitrary use of invasive AI tools during law enforcement and military operations without adequate oversight and accountability in decision making.

Personal data protection principles and AI are substantially connected. Vague or poor data protection frameworks and enforcement enable commercial entities to exploit the personal data of Africans to develop AI systems without consent. One example is the use of AI to automatically create realistic fake or cloned accounts on social media that can, in effect, steal a person's identity and likeness, resulting in extremely intrusive violations of personal data laws. There is also a link between vague or poor data protection schemes and AI technologies. The Study should explore "the black hole" of personal data collection online – when inputting personal data on social media, websites, and other platforms, where does it goes, how it is processed and stored, and was it used to develop or train AI systems?

INCLUDE RISKS TO FREEDOM OF ASSOCIATION: One of the subsections under Civil and Political Rights is "AI and right to freedom of association and assembly." In this subsection, however, only the right to assembly is studied. The impact of AI on the right to freedom of association is not addressed and needs further examination. For example, non-governmental organisations can use AI technologies to enhance their connection with like-minded individuals and groups based on shared interests and values. But AI can also be used to monitor, censor and control association (formation of organizations, their activities and internal regulation). AI algorithms could filter or suppress online content or user accounts related to particular topics or groups, making communicating or disseminating information about their work difficult. The technology could also be used to track activities and funding of groups that critique government policy. The draft Study could benefit from a closer examination of how AI might impact aspects of association and assembly rights, as outlined in the ACHPR's Guidelines on Freedom of Association and Assembly in Africa.

ADDRESS THE LINK BETWEEN AI AND ACCESS TO INFORMATION: Related to the right to freedom of expression is the right to access to information. The Draft Study does not address many concerns about access to information in governments' development, procurement, and deployment of AI. These include gaps in procurement rules that require transparent reporting on the sources of AI tools and assessment of specific human rights risks prior to procuring such tools; verification of human rights safeguards in the development of AI tools to mitigate potential harm and regular review of the AI tools once deployed to address any emerging violations and harm to individuals and communities.

V. Comments on Part V – Peoples' Rights

ADDRESS THE DIGITAL DIVIDE: his section rightly attempts to address the impact of AI on vulnerable groups, including, children, persons with disabilities, the elderly, and women. This is a step in the right direction. However, we note the non-inclusion of rural dwellers as a specific category of vulnerable groups. While they are mentioned under different sections, we recommend a particular section addressing the circumstances and drivers of their digital exclusion, such as a lack of reliable electricity and the social infrastructure, that stymies connectivity and access to the potential benefits of AI. It should be noted that rural and marginalized communities may be impacted by the government's or private sector's use of AI systems for predictive decision-making and surveillance regardless of whether they are connected to the internet; however, the digital divide creates obstacles for communities to acquire digital literacy skills and understand the risks and the avenues for mitigation and remedy.

VI. Comments on the Recommendations Section

ENSURE RECOMMENDATIONS ARE SPECIFIC AND FEASIBLE: As stated in the introduction, one of the primary objectives of the study is to guide the Commission's future actions on AI (Objective 5: "*Identify the various ways through which the mandates and human rights promotion and protection instruments and tools of the African Commission, such as the communications procedure and state reporting as well as special mechanisms, can be leveraged for harnessing the contribution of these technologies for human rights and for mitigating, if not, resolving their adverse impacts*." and Objective 6: "*Develop recommendations to inform the thinking and action of the ACHPR not only in updating its protection and promotion work but also in the tools, and processes that it may wish to put in place for advancing human and peoples' rights in the context of the rapid advancement and tremendous impact of these technologies.*") Therefore, every recommendation should be specific and feasible, outlining the steps the Commission should take to ensure the recommendation's effective implementation and the tools that the Commission can leverage to mitigate harm. Instead, set forth actions that would be difficult for the Commission to directly undertake (e.g., the African Union's adoption of an African Framework Convention on AI and Human Rights). Furthermore, the recommendations section does not list what existing mechanisms the Commission could reasonably employ to ensure the adoption of the recommendations listed. For example, the recommendations could address how to strengthen cooperation between Commission and other AU bodies that focus on AI. If the drafters of the study gave more consideration to the specificity and feasibility of the recommendations, the Study could serve as an excellent roadmap for the Commission's next steps.

RECOMMEND ENGAGEMENT WITH OTHER STAKEHOLDERS: In addition to how the Commission should utilize existing mechanisms within the African system, the recommendations section could describe

how the Commission should engage with other stakeholders to address the human rights risks and opportunities of AI, including stakeholders that have not been involved in the topic of emerging technologies in Africa to date. For example, this could include National Human Rights Institutions (NHRIs) and non-governmental organizations (NGOs), two of the Commission's key constituencies. NHRIs have a vital role in promoting and protecting human rights in their respective countries; however, they have not been actively monitoring or addressing fundamental digital rights concerns like internet access and online privacy, let alone the problems posed by advanced technologies like AI. Furthermore, how could the Commission engage with NGOs that are not within Africa's digital rights community but represent the interests of impacted groups, such as women and persons with disabilities? What avenues could the Commission employ to increase buy-in among the AI developers in the private sector in its work on the intersection of AI and digital technologies? And based on the Study's findings, what should NHRIs and NGOs be doing to advance rights-based approaches to AI? By answering such questions and giving concrete recommendations to the Commission and to its NHRI and NGO constituents, the Study could provide out-of-the-box ideas that more holistically address the complexities relevant to AI.

Further, the Commission should engage with Academic Institutions that are heavily invested in AI for teaching, specifically in the development of AI tools through innovation hubs and other initiatives, for example, the University of Pretoria's Innovation Africa, where Innovations on AI in farming are underway. Partnerships with research institutions are equally useful to foster meaningful regulation and documenting gaps that need to be addressed regularly.

INCLUDE RECOMMENDATIONS ON PRIVACY PROTECTIONS: As noted above, the Study does not adequately address privacy given the tremendous challenges that AI systems pose to this right, from their design to their training and deployment. In addition to addressing privacy rights issues like surveillance and personal data protection in the body of the report, we also urge the drafters to include recommendations on privacy in this section, such as a Pan-African data protection and AI governance framework that includes robust oversight mechanisms, accessible remedies, and transparency are essential in this regard. In addition, the Study should call on governments to cease using facial recognition and similar AI-enabled technologies until comprehensive safeguards are in place to prevent abuse and ensure compliance with human rights standards.