**AMNESTY INTERNATIONAL & ORS V THE TOGOLESE REPUBLIC**

Togo, Africa

**CLOSED**

**EXPANDS EXPRESSION**

MODE OF EXPRESSION

**Electronic**

DATE OF DECISION

**June 25, 2020**

OUTCOME

**Decision - Procedural Outcome, Application Granted, Decision Outcome (Disposition/Ruling), Injunction or Order Granted, Declaratory Relief, Violation of a Rule of International Law, ICCPR Violation, ACHPR Violation**

CASE NUMBER

**ECW/CCJ/JUD/09/20**

JUDICIAL BODY

**Sub-regional African court (ECOWAS)**

TYPE OF LAW

**International/Regional Human Rights Law**

THEMES

**Access to Public Information, Content Regulation/Censorship**

TAGS

**Internet Shutdown, National Security, Public Safety**

**CASE ANALYSIS**

**Case Summary and Outcome**

The Community Court of Justice of the Economic Community of West African States held that the Togolese Republic violated the rights of the Applicants to freedom of expression when it shut down the internet in Togo. In August 2017, the Togolese Republic had shut down internet services across Togo in response to a protest on limitation on the terms of office of the President of Togo. In arriving at its decision, the court reasoned that failure of the Government to show the law relied on to shut down the internet rendered the Togolese Republic in violation of Freedom of Expression provided for in Article 9 of the African Charter on Human and People’s Rights. In addition to the holding that the internet shutdown was a violation of Applicants’ right to freedom of expression, the court directed the Government of Togo to take all necessary steps to guarantee non-occurrence of such situation in the future. In particular, the court directed the state to enact and implement laws in accordance with international human rights towards protection of the freedom of expression of the citizens. The court subsequently ordered the Government of Togo to pay compensation of 2,000,000 CFA to each of the Applicants.

**Facts**

The first seven Applicants are Non-Governmental Organizations established and based in Togo carrying on works in relation to promotion and protection of human rights in Togo and the eight Applicant is a journalist who works as a blogger and activist in the Togolese Republic. The Respondent who is Togolese Republic is a member state of the ECOWAS Community. Sometime in August 2017, protests broke out with the citizens calling for limit to the Presidential term as based on constitutional reforms seeking to limit the Presidential term to two terms. The Applicants stated that the government banned the protest by using excessive force to quell them. That in the process of quelling the protests, some protesters we abused, maltreated and about eleven were killed. The Applicants noted that some of those who were wounded included the Secretary-General of the opposition party, Pan-African National Party (PNP). The Applicants also stated that about sixty of the protesters were also sentenced to up to sixty months of imprisonment for offences like assault, violence against public officers and aggravated disturbances. Following this development, the internet was shut down across Togo. In particular, restriction of internet services and shutdown was witnessed on September 6th to 8th which were dates planned for protest by the opposition party, Pan-African National Party. Applicants also stated that the internet shutdown did not only affect the services of the two leading internet operators, Togocel and Moov but also occasioned economic losses to the nation to the estimation of $1,800,000 as submitted by the Applicants, range of $1,700,000 to $2,700,000 as documented by the United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression. Having arbitrarily shut down the internet, the government put in motion the process of drafting a legislation to facilitate arbitrary blocking of the internet without judicial oversight afterwards. The Applicants approached the court for the following reliefs.

1. A Declaration that, in shutting down the internet, Togo violated its human rights obligations under international human rights law, in particular, the right to seek and receive information and to express and disseminate opinions under Article 9 (1) and 9(2) of the African Charter, to freedom of expression under Article 19 (2) of IICCPR, and the rights of journalist under Article 66 (2) (c) of the Revised ECOWAS Treaty.
2. A Declaration that, in shutting down the internet, Togo violated the Eight Applicant’s human rights under international human rights law, in particular, her right as a journalist under Article 66 (2) (c) of the Revised ECOWAS Treaty.
3. A Declaration the development of a draft law on cyber criminality giving the Togolese government power to shut down the internet whenever it wishes represents an undue restriction with the right to freedom of expression and has a chilling effect on the Applicants and on press freedom generally.
4. An Order mandating and compelling Togo to take all necessary measures to guarantee measures of non-recurrence in order to prevent the same violation occurring in the future.
5. An Order mandating and compelling Togo to effectively enact and implement laws, regulations and safeguards in order to meet its obligations with respect to right to freedom of expression under international human rights law, including under the African Charter and the Revised ECOWAS Treaty.
6. An Order mandating and compelling Togo to issue adequate reparations, including restitutions, compensation and measure of satisfaction to the Applicants, to be specified and submitted to this Honourable Court in due course; and
7. Such further order/s, remedy and/or relief s this Honourable Court may deem fit to grant in the circumstance. [Pg.4-5]

The crux of the Respondent’s defence was that on August 17th, 2017 a protest orchestrated by the opposition party –Pan-African National Party and other political groups broke out in Togo and was about degenerate to civil war as it led to loss of lives and injuries, when the Respondent had to shut down the internet as online hate was fuelling the unrest. The Respondent further averred that it made efforts to resolve the matter by way of dialogue which efforts led to draft amendment of the constitution on September 5th, 2017. The Respondent further submitted that despite the fact that the amendment reflected the concerns of the protesters, the protesters boycotted vote in the parliament and continued with the protests. In response to the Applicants’ application and in particular their reliefs, the Respondent challenged the Applicants that firstly, the First to Seventh Applicants are not natural persons and are not victims. It also submitted that the Eight Applicant did not disclose the capacity in which she brought the action. In effect, the Respondent asked the court strike out simply and purely all claims made by the Plaintiffs/Applicants. In response to the objection, the Applicants submitted that they are Non-Governmental Organizations working to protect human rights with internet being the tool of their work and shutting down of the internet adversely affected their work. The Eight Applicant in response stated that she is a journalist and when internet was shut down her right to work was affected and her right to freedom of expression was violated.

**Decision Overview**

Ouattara J led the three-man panel, comprised Ouattara, Atoki and Bangura. The three issues for determination are: (i) Whether the Court has jurisdiction to hear and determine this application (ii) Whether the Applicants have *locus standi* to institute this action. (Whether the Applicants’ right to freedom of expression was violated [pg.7].

*On the Jurisdiction of the Court*

The Applicants had brought their suit pursuant to Articles 9(1), 9(4), and 10(d) of the Protocol (A/P1/7/91) relating to the Community Court of Justice as amended by the Supplementary Protocol A/SP/1/01/05. The court noted that the Applicants alleged violation of their right to freedom of expression when the respondent shut down the internet and made internet services inaccessible across Togo. The court therefore noted that the Allegation in itself being grounded in violation of human rights constitute enough ground for the court to assume jurisdiction pursuant to Article 9 (4) of the 2005 Supplementary Protocol of the Court as amended which provides that *“The Court has jurisdiction to determine cases of violations of Human Rights* *that occur in any Member State.”*

The court reiterated the position that any application made in respect of violation or alleged violation as long as it complied with the criteria laid down in Article 10 (d) of the 2005 Supplementary Protocol. In approval, the court cited the case of ***Moussa Leo Keita V Republic of Mali (2007) ECW/CCJ/JUD/03/07*** where the court held that mere clothing a claim with an allegation of violation of human rights made it necessary for the court to assume jurisdiction as pursuant to Article 9 (4) of the 2005 Supplementary Protocol. The court therefore held that it has jurisdiction over the matter as brought by the Applicants.

On *locus standi* of the Applicants

In challenging the *locus standi* of the Applicants, the court noted the respondent’s argument about the first seven Applicants that:

*“a. That the first to Seventh are not natural persons*

*b. That the First to Seventh Applicants are not victims and are therefore in accordance with Article 10(d) of the Supplementary Protocol 2005 lack the locus standi to initiate this action. As by this provision only victims only victims can institute action for violation of their human rights.*

*c. That the Seventh Applicant has not stated to this court the capacity in which they are bringing this action”*

In respect of the Eight Applicant, the respondent submitted that even though she is a natural person, but for the fact that she lacks the quality to act her claim should be declared inadmissible. In all, the respondent then asked the court to declare the Application inadmissible and that parties should bear their respective costs. The court noted that the Applicants’ response by way of Reply arguing that the action was initiated based on the violation of their right to freedom of expression and that the court should dismiss the Respondent’s objection and proceed to hear the matter on merit. In deciding this issue of *locus standi*, the court now proceeded to consider the provisions of Article 10 (d) of the Supplementary Protocol 2005. The Article provides that:

 *“Individuals on application for relief for violations of their Human Rights; the* *submission of application for which shall:*

1. *not be anonymous; nor*
2. *(ii) be made whilst the same matter has been instituted before another international court for adjudication”* [Pg.9]

Distilling from the above provisions of Article 10(d), the court summed the crux of the provisions to bother on interest of the Applicant or right to be protected as entitling any Applicant to access to the court. The court cited the case of ***Alhaji Mohammed Ibrahim Hassan V Governor of Gombe State V Federal Republic of Nigeria (2012) ECW/CCJ/RUL/07/12* at page 83 where the court held that:**

***“Applicants not being a victim or relation to a victim of the violation of human rights has no locus to institute the action”*** [Pg.9]

The decision above therefore now places a burden to be discharged on an Applicant in order to exhibit *locus standi*, which burden must be that of a victim or relation to a victim. In the Applicants’ response to the submission of the respondent, the Applicants made it clear that they work to protect human rights and their work is carried out through access to internet services. The court noted that the Applicants claimed that where the internet is denied the right to work is therefore adversely affected. In the light of the above, the court found that the Applicants have “established an interest and a right worthy to be protected” The court consequently held that the First to Seventh Applicant indeed possess *locus standi* to institute the action.

On the argument of the respondent as to First to Seventh Applicants not being natural persons and therefore lack locus standi. The court noted that the Applicants brought this action for the court to declare that the shutting down of the internet by the respondent is a violation of their right to freedom of expression and in particular the right to “search, receive and share information”. In resolving the claim on whether a non-natural person can institute the action or not, the court was guided by its recent decision in *Dexter Oil V Republic of Liberia (2019) ECW/CCJ/JUD/03/19* where the court held that:

*“Human Rights simply imply the rights that belong to all human beings, irrespective of their nationality, race, caste, creed and gender among others like the right to life, right to health and right against torture, inhuman and degrading treatment which are specific to human beings on the one hand, right of a corporate body which a legal entity can enjoy and be deprived of, for example right to freedom of speech as the corporation is entitled to speak about its product, right to property as the corporation generates profits in shares and/or cash and is entitled to the quiet possession of same. The established exception under which corporate bodies can ground an action are; rights that are fundamental rights not dependent on human rights and they include right to fair hearing, to property and to freedom of expression”* [Pg.10]

The holding of the court in the case above evidences the *locus standi* of non-natural persons in cases of human rights including right to freedom of expression and other rights can be exercised by natural persons. In any case, ability to exercise the rights portends the right to challenge an infringement of it. The court therefore holds that the First to Seventh Applicants can bring application in this case regardless of not being natural persons. As to the Eight Applicant, having claimed that she relies on the internet for her work as a journalist and shutting down of internet thereby grounded her *locus standi.*

*On Violation of Applicants’ rights to Freedom of Expression*

To determine whether there was violation of Applicants’ right to freedom of expression in this case, the court needed to first determine whether access to internet is within the contemplation of freedom of expression. The court noted that while access to internet may not strictly be a fundamental human right, the internet provides a platform for exercise of right to freedom of expression. Given that access to internet aids exercise of right to freedom of expression, the two are clearly therefore inseparable. Enjoying access to internet is therefore complimentary to enjoyment freedom of expression. The court put it succinctly when it held that “*access to internet should be seen as a right that requires protection of the law and interference with it has to be provided for by the law specifying the grounds for such interference*” [Pg.11]

Having established that access to internet is an integral part of freedom of expression, the court therefore proceeded to determine whether shutting down of the internet by the Togolese Government violated the Applicants’ right to freedom of expression.

In determining the violation of freedom of expression of the Applicants the court was guided by the provisions of Article 9(1) and (2) of the African Charter on Human and People’s Rights (ACHPR). Article 9 (1) and (2) of ACHPR provide that:

1. *Every individual shall have the right to receive information.*
2. *Every individual shall have the right to express and disseminate his opinions within the law”*[Pg.12]

The court emphasized that for the Applicants to succeed in their application, two key elements must be established and they are:

. *i. That the right to freedom of expression has been interfered with or disrupted*

*ii. That the interference or disruption, as the case may be, were not sanctioned or done in accordance with the law.* [Pg.12]

The court noted that the Applicants in this case submitted that the Respondent shut down the internet in the state of Togo which was an interference of their right to freedom of expression. The Applicant further submitted that as at the time the internet was shut down there was no law in place relied on by the Respondent and that the Respondent could not rely on any legislation enacted afterwards. The Applicants also submitted that there was no emergency in the state to warrant the shutdown. In all, the Respondent did not deny the shutting down of the internet but only gave National Security as the justification for shutting down the internet. The court noted the argument of the Respondent that it had to shut down the internet as the protest that broke out had the potential to result into a civil war. While the court noted that national security can be a valid reason to shut down the internet and other reasons like public health, public order or public interest may be valid too, the court emphasized that the only lawful way the Respondent could justify the shutdown is to show the law it relied on to effect the shutdown. The failure to show the law the respondent relied on for the internet shutdown is a proof that the shutdown was down not in accordance with any law, in support, the court quoted the Latin maxim *“Ex turpi causa non oritur actio”* In all, the court held that in the absence of a law backing the internet shutdown as at the time of the shutdown, the Respondents indeed violated the Applicants’ right to freedom of expression.

Finally, the court held that it had jurisdiction to hear and determine the application and it is hereby declared admissible. It further held that the Applicants had *locus standi*. The court also stated that the Respondent should take all necessary measures to guarantee non-occurrence of such situation in the future including enactment and implementation of laws and regulations for protection of freedom of expression in accordance with international human rights instruments. Court finally ordered the Respondent to pay each of the Applicants a compensation of N2,000,000 CFA.

**DECISION DIRECTION**

### Expands Expression

This decision expands Freedom of Expression as it found that that Togolese Republic violated Applicants’ right to freedom of expression when it shut down the internet. This decision also required that Togolese Government take all necessary actions to prevent re-occurrence of shutting down the internet in the future and such steps should include enacting and implementing legislation, regulations and safeguards to meet Togo’s obligations in upholding the right to freedom of expression according to international human rights standards. The court, commendably awarded compensation of 2,000,000 CFA to each of the Applicants against the Togolese Government. In all, the court admirably interpreted and applied the provisions of the African Charter on Human and People’s Rights (ACHPR).

**GLOBAL PERSPECTIVE**

### Table of Authorities

### Related International and/or regional laws

**African Charter on Human and People's Rights, Art. 9**

**ECOWAS, Dexter Oil V Republic of Liberia (2019) ECW/CCJ/JUD/03/19**

[**ECOWAS,**](http://prod.courtecowas.org/wp-content/uploads/2019/02/ECW_CCJ_JUD_04_18.pdf) **Moussa Leo Keita V Republic of Mali (2007) ECW/CCJ/JUD/03/07**

**ECOWAS, Alhaji Mohammed Ibrahim Hassan V Governor of Gombe State V Federal Republic of Nigeria (2012) ECW/CCJ/RUL/07/12**

**National Standards, Laws or Jurisprudence**

**Togo, Law No. 2011-010 of 16 May, 2011**

**CASE SIGNIFICANCE**

The decision establishes influential or persuasive precedent outside its jurisdiction.

**OFFICIAL CASE DOCUMENTS**

The Judgment