

**IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF
WEST AFRICAN STATES (ECOWAS) ABUJA, NIGERIA**

SUIT NO: ECW/CCJ/APP/61/18

BETWEEN:

- (1) AMNESTY INTERNATIONAL TOGO**
- (2) L'INSTITUT DES MEDIAS POUR LA DEMOCRATIE
ET LES DROITS DE L'HOMME**
- (3) LA LANTERNE**
- (4) ACTION DES CHRETIENS POUR L'ABOLITION
DE LA TORTURE**
- (5) ASSOCIATION DES VICTIMES DE TORTURE AU TOGO**
- (6) LIGUE DES CONSOMMATEURS DU TOGO**
- (7) L'ASSOCIATION TOGOLAISE POUR L'EDUCATION
AUX DROITS DE L'HOMME ET A LA DEMOCRATIE**
- (8) HOUefa AKPEDJE KOUASSI** **Applicants**

-AND-

THE TOGOLESE REPUBLIC **Respondent**

-AND-

**IN THE HUMBLE APPLICATION OF DAVID KAYE, UNITED NATIONS SPECIAL
RAPPEUR ON THE PROMOTION AND PROTECTION OF THE RIGHT TO
FREEDOM OF OPINION AND EXPRESSION** **Applicant/Amicus**

**MOTION ON NOTICE BY DAVID KAYE, UNITED NATIONS SPECIAL
RAPPEUR ON THE PROMOTION AND PROTECTION OF THE RIGHT
TO FREEDOM OF OPINION AND EXPRESSION FOR LEAVE TO MAKE
WRITTEN SUBMISSION AS *AMICUS CURIAE***

**BROUGHT PURSUANT TO THE INHERENT JURISDICTION OF THIS
HONOURABLE COURT**

PLEASE TAKE NOTICE that this Honourable Court will be moved on the __ day of ____, 2019 or so soon thereafter when counsel to the *amicus curiae* may be heard praying to this Honourable Court for leave to submit the concurrently filed *amicus curiae* brief in this matter, in relation to the areas stated below, that may assist this Honourable Court in the just and equitable determination of this matter.

GROUNDS UPON WHICH THE MOTION IS BROUGHT:

1. This request for leave to submit an *amicus curiae* brief is made by Professor David Kaye, the U.N. Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (“the Special Rapporteur”). The Special Rapporteur respectfully seeks permission to submit an *amicus* brief in the case of *Amnesty International Togo, et al. v. The Togolese Republic*, Suit No. ECW/CCJ/APP/61/18, pursuant to the inherent jurisdiction of this Honourable Court.

The mandate and work of the proposed *amicus curiae*

2. The Special Rapporteur is an independent expert appointed by the United Nations Human Rights Council. He is mandated by Human Rights Council Resolution 7/36 to, *inter alia*:¹
 - (a) gather all relevant information, wherever it may occur, relating to violations of the right to freedom of opinion and expression, discrimination against, threats or use of violence, harassment, persecution or intimidation directed at persons seeking to exercise or to promote the exercise of the right to freedom of opinion and expression, including, as a matter of high priority, against journalists or other professionals in the field of information;
 - (b) seek, receive and respond to credible and reliable information from governments, non-governmental organizations and any other parties who have knowledge of these cases; and
 - (c) make recommendations and provide suggestions on ways and means to better promote and protect the right to freedom of opinion and expression in all its manifestations.
3. The Human Rights Council has specifically requested the Special Rapporteur to focus on freedom of expression issues and challenges online. In particular, Resolution 7/36 states that the Special Rapporteur should “provide his/her views, when appropriate, on the advantages and challenges of new information and communication technologies, including the Internet and mobile technologies, for the exercise of the right to freedom of opinion and expression,

¹ http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_7_36.pdf.

including the right to seek, receive and impart information and the relevance of a wide diversity of sources, as well as access to the information society for all.”²

4. In discharging his mandate, the Special Rapporteur has collected and continues to collect evidence, and to report on the extent, nature and severity of violations of freedom of expression relating to government control of information, such as Internet shutdowns. His mandate rests in part upon Article 19 of the International Covenant on Civil and Political Rights (“the ICCPR”), which, similar to Article 9 of the African Charter on Human and Peoples’ Rights (“African Charter”), protects, *inter alia*, the right “to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”

For example:

- (a) the Special Rapporteur prepares and publishes thematic reports. His reports to the Human Rights Council and the General Assembly have examined the duty of States to refrain from excessive censorship and to protect and promote a free, open, and safe Internet. One such report published in 2016 considered the legality of national legislation that broadly defined key terms such as “terrorism” and “national security” and failed to limit the discretion of executive authorities, as required by Article 19 the ICCPR. The report also highlighted the importance of judicial or other independent review mechanisms with the authority necessary to evaluate alleged violations. In particular, the report expressed concern regarding state-ordered disruptions of Internet and telecommunications services in the name of broad justifications, such as national security and public order.³ In a subsequent report on the subject, the Special Rapporteur documented the increasing use of vaguely formulated laws and regulations as a purported basis to restrict access to certain websites and platforms or entire networks.⁴ The report concluded that States “bear the primary duty to remediate business-related human rights abuses, particularly those they instigate, such as overbroad content restriction, unlawful user data requests and disproportionate surveillance.”⁵ The Special Rapporteur continues to collect evidence on and document the use of ambiguous national laws to allow disproportionate measures like website blocking, and the lack of effective remedies that result in continuous violations of freedom of expression.

² *Id.*

³ <https://docs.google.com/viewerng/viewer?url=http://freedex.org/wp-content/blogs.dir/2015/files/2017/05/FOE-worldwide-report.pdf&hl=en>, at 9.

⁴ <https://docs.google.com/viewerng/viewer?url=http://freedex.org/wp-content/blogs.dir/2015/files/2017/05/AHRC3522.pdf&hl=en>, at 5.

⁵ <https://docs.google.com/viewerng/viewer?url=http://freedex.org/wp-content/blogs.dir/2015/files/2017/05/AHRC3522.pdf&hl=en>, at 20.

- (b) the Special Rapporteur also addresses communications and urgent appeals to Member States regarding particular cases of restrictions on freedom of expression. Between August 2014 and October 2019, the Special Rapporteur issued at least 1,272 communications and urgent appeals to United Nations Member States. Six of these communications and urgent appeals have been directed to the Togolese Republic. The Special Rapporteur sent an urgent appeal to the Togolese Republic on 28 September 2017, expressing grave concern about the human rights implications of the State's reported Internet shutdowns that are at issue in the matter pending before this Honourable Court.⁶ The Special Rapporteur has communicated similar concerns to many other States, including Egypt,⁷ Lebanon,⁸ Cameroon,⁹ and Malaysia.¹⁰
- (c) the Special Rapporteur submits *amicus* briefs and expert testimony in key cases that raise issues of freedom of expression. In *Federation of African Journalists, et al. v. The Republic of Gambia*, Suit No. ECW/CCJ/APP/36/15, the Special Rapporteur sought and obtained leave to submit an *amicus* brief to this Honourable Court.¹¹ His *amicus* filing provided relevant background information and analysis of defamation, false news, and anti-sedition laws under the ICCPR.¹²
- (d) the Special Rapporteur conducts fact-finding country visits to Member States to survey the state of freedom of expression in those States.

Significance of the issues raised by this matter and the scope of the proposed *amicus curiae* brief

5. In reaching its judgment on the case of *Amnesty International Togo, et al. v. The Togolese Republic*, this Honourable Court may be called upon to consider and determine, amongst other issues, critical issues of relevance to the work of the Special Rapporteur (as summarised above). This Honourable Court's judgment on these issues is likely to be relevant and influential to the interpretation and application of international human rights standards on freedom of expression, including Article 9 of the African Charter and Article 19 of the ICCPR.
6. In light of the above, the Special Rapporteur seeks leave to submit the concurrently filed *amicus* brief in order to assist this Honourable Court by:

⁶ <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=23362>

⁷ <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=24560>

⁸ <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=24560>

⁹ <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=20955>

¹⁰ <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=24680>

¹¹ <https://freedex.org/wp-content/blogs.dir/2015/files/2017/05/CONSOLIDATED-BRIEF-FINAL-May-18-C1.pdf>.

¹² *Id.* at 12-15.

- (a) setting forth relevant factual material relating to the phenomenon of Internet shutdowns and website blocking in Togo and other States, as well as documented impacts of such government actions on the exercise of freedom of expression;
- (b) providing observations on the interpretation and application of Article 19 of the ICCPR to Internet shutdowns;
- (c) offering analysis of the limited circumstances in which States may restrict freedom of expression and the three-pronged test for determining whether a restriction complies with Article 19; and

It is respectfully suggested that this *amicus* brief would be of benefit to this Honourable Court in discharging its functions.

- 7. If this Honourable Court decides to grant the Special Rapporteur's request to submit an *amicus* brief, the Special Rapporteur shall of course abide by any terms attached to that decision and by the Rules of Procedure.
- 8. The proposed *amicus* brief for consideration by the Community Court of Justice of the Economic Community of West African States (ECOWAS) was drafted on a voluntary basis and should not be considered as a waiver, express or implied, of the privileges and immunities of the United Nations, its officials and experts on missions, pursuant to the 1946 Convention on the Privileges and Immunities of the United Nations. Authorization for the positions and views to be expressed by the Special Rapporteur, in full accordance with his independence, was neither sought nor given by the United Nations, the Human Rights Council, the Office of the High Commissioner for Human Rights, or any of the officials associated with those bodies.



David Kaye
UN Special Rapporteur on the Right to
Freedom of Opinion and Expression

**Counsel for the Amicus
Curiae**

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In accordance with Article
33-3 of Regulation of the
Court of Justice of
ECOWAS, notifications
interesting the advice of the
eventual amicus curiae can be
sent to the following emails:
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FOR NOTIFICATION/SERVICE:

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MINISTERE DE LA JUSTICE ET DES RELATIONS AVEC LES INSTITUTIONS DE LA
REPUBLIQUE
CABINET
BOULEVARD DE LA NOUVELLE PRESIDENCE
BP 121
LOME, TOGO

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Applicant/Amicus

AFFIDAVIT IN SUPPORT OF MOTION ON NOTICE

I, Adamma Isamade, female, citizen of Nigeria, of D5, Same Global Estate, Abuja, do hereby make an oath and state as follows:

1. That I have the authority of the *amicus curiae*, United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, to depose this affidavit.

2. That I provide this affidavit in support of the Motion on Notice of the *amicus curiae* in this matter.
3. That, if granted leave in the above matter, the *amicus curiae* submission will focus on three broad points: *First*, the submission will set forth relevant factual material relating to the phenomenon of Internet shutdowns and website blocking in Togo and other States, as well as documented impacts of such government actions on the exercise of freedom of expression. *Second*, the submission will provide observations on the interpretation and application of Article 19 of the ICCPR to Internet shutdowns. *Third*, the submission will offer analysis of the limited circumstances in which States may restrict freedom of expression and the three-pronged test for determining whether a restriction complies with Article 19.
4. That I believe as a matter of fact that it is in the interest of justice to grant this Motion on Notice.
5. That I believe as a matter of fact that the parties will not be prejudiced by the grant of this Motion on Notice.
6. That I make this declaration in good faith, believing same to be true in accordance with the Oath Act.

Deponent

**SWORN TO AT THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC
COMMUNITY OF WEST AFRICAN STATES (ECOWAS) ABUJA, NIGERIA**

DATED THIS _____ DAY OF _____ 2019