

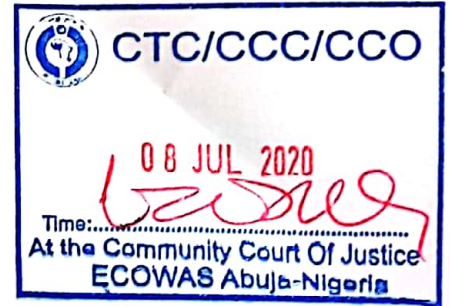


IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC
COMMUNITY OF WEST AFRICAN STATES (ECOWAS)
HOLDEN AT ABUJA, IN NIGERIA

ON 25th DAY of June, 2020

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

JUD No: ECW/CCJ/JUD/09/20



BETWEEN

1. AMNESTY INTERNATIONAL TOGO
2. L'INSTITUT DES MEDIAS POUR LA DEMOCRATIE ET LES DROIT DE L'HOMME
3. LA LANTERE
4. ACTION DES CRECHRETIENS POUR L'ABOLITION DE LA TORTURE
5. ASSOCIATION DES VICTIM DE TORTUR AU TOGO
6. LIGUE DES CONSOMMATEURS DE TOGO
7. L'ASSOCIATION TOGOLAISE POUR L'EDUCATION AUX DROITS DE L'HOMME ET LA DEMOCRATIE
8. HOUefa AKPEDA KOUASSI

- APPLICANTS

AND

THE TOGOLESE REPUBLIC

-RESPONDENT

COMPOSITION OF THE COURT

Hon. Justice Gberi-Be Ouattara

- Presiding

Hon. Justice Dupe Atoki

- Member

Hon. Justice Keikura Bangura

- Member

Assisted by:

MR TONY ANENE-MAIDOH

- CHIEF REGISTRAR

JUDGMENT

A. Parties

1. The first to seventh Applicants are:

- Amnesty International Togo,
- L'institut Des Medias Pour La Democratie et Les Droit De L'homme,
- La Lantere,
- Action Des Crechretiens Pour L'abolition De La Torture,
- Association Des Victim De Tortur Au Togo,
- Ligue Des Consommateurs De Togo
- L'association Togolaise Pour L'education Aux Droits De L'homme Et La Democratie;

Non-governmental organizations established and based in Togo and carrying work in relation to the promotion and protection of human rights in Togo. The Eighth Applicant is a Togolese journalist who works as a blogger and activist in the Togolese Republic. The Respondent is the Togolese Republic, a Member State of the Community.

B. Subject Matter of the Proceedings

2. The Application concerns the allegation by the Applicants that following a protest in Togo on the limitation of the Presidential terms the internet access was shut down and the right to freedom of expression, contrary to Article 9 of the African Charter on Human and People's Rights including other international human rights instruments.
3. The Respondent justified the shutdown in order to safeguard the national security interest of the country.

C. The Applicants' Claim

4. The Applicants' claim is that sometime in August 2017, several protests broke out in Togo with a call for term limitations of the Presidency. That these protests were widely reported in the media at home and abroad, and they prompted the African

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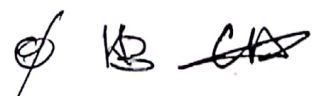
Commission to make a resolution during its Sixty-second Ordinary Session (ACHPR/Res.397 (LXII) 2018 (9 May 2018)) expressing its concerns for the protests and condemned the related human rights abuses.

5. They averred that the protests were premised on Constitutional reforms, which sought to limit the Presidential term to two terms, but the protests were banned or re-routed by the government. That following this the government proceeded to shut-down the internet and use excessive force to quell down the protests. That in quelling these protests, protesters were abused and mistreated, some eleven (11) protesters were killed which includes two members of the armed forces, three children aged 11 and 14 years respectively. That there were several wounded protesters which included the Secretary-General of the opposition party, Pan-African National Party (PNP).
6. They further averred that subsequently, about sixty of the protesters were sentenced to up to sixty months of imprisonment for offences ranging from assault, violence against public officials, aggravated disturbances of public order and aggravated theft. That due to the widespread protest the Togolese authorities restricted the right to freedom of expression by arbitrarily shutting down media outlets and arresting certain persons who had protested. That the Government, in furtherance of quelling the protests, proceeded to give instructions for the drafting of a legislation that will enable the government to block internet access at will without judicial oversight.
7. More specifically, the Applicants alleged that due to a planned three day protest by the opposition party, Pan-African National Party, from the 6th to 8th September, 2017 a well-documented restriction of shutdown and disruption of internet access was reported. The Applicants averred further that a report of a more prolonged period of shutdown was reported by some thirty-five NGOs by way of a letter.
8. The Applicants also averred that it has submitted evidence pointing to the fact that two major internet operators, Togocel and Moov, were rendered inaccessible, with sms services severely disrupted even-though they are reported as entities with control over the internet. The Applicants submitted that these operators had been ordered to leave open diplomatic and government services whilst shutting or



restricting access of all others. The Applicants further aver that knowledge of the shutdown and/or the inaccessibility of the internet by the abovementioned operators was attested to by three officials in government who referred variously but more particularly as a temporary restrictive measure to reduce the flow of communication.

9. The Applicants assert that as a result of the internet shutdown and/or restrictions they were prevented from carrying out their daily work which impacted their reputation and financial circumstances. The Applicants submit that the shutdown also cost the economy of Togo up to One Million Eight Hundred Thousand Dollars (\$1,800,000) with empirical evidence from the United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression estimating the shutdown between One Million Seven Hundred Dollars (\$1,700,000) and Two Million Seven Hundred Dollars (\$2,700,000).
10. The Applicants submit that the right to freedom of expression and the press is guaranteed in Article 25 and 26 of the Togolese Constitution respectively.
11. The Applicants are therefore claiming for the following reliefs and orders:
 - a. 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 the ICCPR and the rights of journalists under Article 66 (2) (c) of the Revised ECOWAS Treaty;
 - b. A Declaration that, in shutting down the Internet, Togo violated the eight Applicant's human rights under international law, and in particular her rights as a journalist under Article 66 (c) of the Revised ECOWAS Treaty;
 - c. A Declaration that 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 more generally;



- d. An Order mandating and compelling Togo to take all necessary measures to guarantee measures of non-recurrence in order to prevent the same violations occurring again in future;
- e. An Order mandating and compelling Togo to effectively enact and implement laws, regulations and safeguards in order to meet its obligations with respect to the right to freedom of expression under international human rights law, including under the African Charter, ICCPR and the Revised ECOWAS Treaty;
- f. An Order mandating and compelling Togo to issue adequate reparations, including restitution, compensation and measure of satisfaction to the Applicants, to be specified and submitted to this Honorable Court in due course; and
- g. Such further order/s remedy and/or relief as this Honorable Court may deem fit to grant in the circumstances.

D. The Respondent's Defense

- 12. The Respondent states that there were protests since the 17th August 2017 and that the same were orchestrated by the opposition party, Le Parti National Panafrain (PNP) in conjunction with other political groups.
- 13. The Respondent also avers that even though freedom of association and peaceful demonstration is guaranteed by the constitution of Togo of 14th October 1992 the same is conditioned by law. That Law no. 2011-010 of 16 May 2011 was a means of giving effect to the constitutional provision which enables administrative authorities to regulate all public manifestations, and that the Respondent had submitted that it be adopted. That having made some observations of the itinerary proposed by the organizers an alternative itinerary was proposed by the authorities.
- 14. The Respondent avers that the PNP disregarded the proposal of the authorities and proceeded to carry on with its original proposal which resulted in skirmishes. That the opposition party formed a coalition with other political parties and demanded for a return to the Togolese Constitution of 27th September, 1992 which



stipulated a period of two terms for the office of the President and a two round majority vote in the election into this office.

15. The Respondent maintained that notwithstanding the situation at the time the government sought a solution through inclusive dialogue with members of the opposition which resulted in a draft amendment of the Constitution on the 5th September 2017. That the amendment reflected the concerns of the protesters yet when the draft amendment was tabled for a vote in parliament the opposition political parties boycotted it and continued with the protests.

16. The Respondent contend that the continuing protests led to the loss of human lives, injuries being sustained on both sides and massive destruction of public and private properties. That as a means of countering the effect of the protests the Respondent had to contend with some form of control of the internet as hate speech and incitement were becoming rife. That the fear of drifting into civil war prompted the reaction and submits evidence in support of its claim.

17. In addition to the defense, the Respondent challenged the First to the Seventh Applicants that they did not have locus standi on the following grounds:

- That the First to the Seventh are not natural persons
- That they are not victims
- That with respect to the Eighth Applicant the Respondent submitted that she had not stated the capacity in which she is bringing the action.

18. The Respondent sought from the Court the following reliefs:

- a. To strike out simply and purely all claims made by Plaintiff/Applicants;
- b. To order Plaintiff/Applicants to bear all costs;

E. The Applicants' Reply

19. Responding to the objection by the Respondent, the Applicants submitted that they are non-governmental organizations working for the protection of human rights and that the tool of their work is through access to internet. They further submitted that where such access to internet is denied their right to work and their right to freedom of expression is adversely affected.

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20. In view of the Applicant's response to the objection by the Respondent the Applicant prayed to the Court to dismiss the objection by the Applicants and declare the Application admissible.

21. The Eighth Applicant in her response claimed that the shutting down of internet access denied her the right to work as a journalist and also her right to freedom of expression and prayed to the dismiss the Respondent's objection and grant the reliefs sought in the Initiating Application.

F. Issues for determination

- Whether the Court has jurisdiction to hear and determine this application
- Whether the Applicants have locus standi *institute this action*
- Whether the Applicants' right to freedom of expression was violated

G. ISSUE 1: *Whether the Court has jurisdiction to hear and determine this application*

22. The Applicants filed their claim 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.

23. The Court notes that the shutting down of internet access rendered internet services inaccessible consequent upon which the Applicants are alleging that it violated their rights to freedom of expression. The allegations in themselves (being grounded in allegations of human rights violations) constitutes grounds for the Court to assume jurisdiction pursuant to Article 9 (4) of the Supplementary Protocol of the Court 2005 which provides that:

"The Court has jurisdiction to determine case of violation of human rights that occur in any Member State."

24. This Court has repeatedly maintained that applications made pursuant to a violation or an alleged violation of human rights will be heard if it complies with the admissibility criteria laid down in Article 10 (d) of the Supplementary Protocol. In the case of *Moussa Leo Keita V. Republic of Mali (2007) ECW/CCJ/JUD/03/07*, the Court held that it had the required competence to adjudicate matters involving the violation of human rights within its Member States. The threshold, as was



established in this case, was that simply clothing a claim with an allegation of human rights made it necessary for the Court to act pursuant to Article 9 (4) of the Supplementary Protocol.

25. Based on the above analysis, the Court therefore holds that it has jurisdiction to hear the application brought forward by the Applicants in accordance with the provisions of Article 9 (4) of the Supplementary Protocol of the Court 2009.

H. ISSUE 2: Whether the Applicants have locus standi to institute this action

26. The Respondent as part of its defense sought to challenge the locus standi of the First to Seventh Applicants on the following grounds:

- 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 of 2005 lack the locus standi to initiate this action. As by this provision only victims can institute action for violation of their human rights.*
- c. *That the Seven Applicants have not stated to the Court the capacity in which they are bringing this action.*

27. In view of the above, the Respondent sought the following reliefs from the Court:

- i. The Court to declare the application is inadmissible.
- ii. The Applicants to bear their own costs of the action.

28. With respect to the Eighth Applicant, the Respondent submitted that she is a natural person but that her claim should be declared inadmissible for lack of quality to act.

29. The records show that in answer to the Respondent's objection on the grounds of locus standi, the Applicants submitted that they are initiating the application because their right to freedom of speech was violated by the Respondent, which said right is an interest to be protected. The Applicants therefore urged the Court to dismiss the submission by the Respondent and proceed to hear the application on its merits.

30. The Court having examined the submissions of the Respondent on grounds of locus standi and the reply of the Applicant will now consider the law as provided for in the Protocol and the Supplementary Protocol of the Court of 2005.

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31. Article 10 (d) of the Supplementary Protocol of the Court 2005 provides as follows:

"Individuals on application for relief of violation of their human right the submission of which shall

- I not be anonymous; nor*
- II be made whilst the same matter has been instituted before another international court for adjudication;"*

32. From the above stated Article it is clear that for anyone to initiate an application before the Court, such an Applicant must possess the locus standi failing which he will be deemed inadmissible. Locus standi as used in this sense simply means an interest or a right to be protected. In the case of *Alhaji Mohamed Ibrahim Hassan v Governor of Gambia State v Federal Republic of Nigeria (2012) EGV/00/JRUI/07/12 @ page 83 (5)* the Court had this to say:

"Applicants not being a victim or relation to a victim of the violation of human rights has no locus to institute the action."

33. With the decision referenced above, this Court has made it abundantly clear that for any action by any individual to succeed the Applicant will be required as a matter of law to establish the status of either a victim or an indirect victim. Responding to the submission by the Respondent, the Applicant submitted that they are non-governmental organizations working to protect human rights and the tool of their work is through access to internet services. The Applicant claim that where such access to internet is denied the right to work is adversely affected. In view of the above, the Court is of the opinion that the Applicant has established an interest and a right worthy to be protected. The Court therefore holds that the First to the Seventh Applicant possess the locus standi and are entitled as such.

34. With respect to the submission by the Respondent that the First to the Seventh Applicants are non-natural persons and therefore lack the locus standi to bring this action. They submitted that they brought this action before this Court against the Respondent to seek declaration to the extent that the shutting down of the internet access by the Respondent violated their right to freedom of expression especially

the right to search, receive, and share information. In analyzing the submission from the parties, the Court is guided by the recent decision in the case of *Dexter Oil v Republic of Liberia* (2019) ECW/CCJ/JUD/03/19 where the Court determined the issue of whether non-natural persons can maintain an action for violation of human rights under Article 10 (d). The Court had this to say:

"Human rights simply imply the rights that belong to all human beings irrespective of their nationality, race, caste, creed and gender amongst others like right to life, right to health and right against torture inhuman and degrading treatment which are specific to human beings on the other 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; right rights that are fundamental rights not dependent on human rights and they include right to fair hearing right to property and right to freedom of expression."

35. From the above stated authority, the Court made it abundantly clear that non-natural persons can enjoy freedom of expression including other rights that are not dependent on human rights (i.e. derivative) and can initiate an action to protect those rights if they are violated. Therefore, the First to Seventh Applicants though not natural persons, have the locus standi to initiate the action as victims where the rights conferred on them as corporate bodies or legal persons are either violated or threatened without any lawful justification. The Court therefore holds that the First to the Seventh Applicant in this action have the locus standi in the application in spite of not being natural persons.

36. With respect to the Eighth Applicant, she being a natural person and having claimed that the shutting down of the internet access denied her the right to carry out her career as a journalist is sufficient grounds for the Court to believe that she

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is a victim and as such has the locus standi to bring this action in her own right. The Court so holds that the Eighth Applicant possesses locus standi.

I. **ISSUE 3: Whether the Applicants rights to freedom of expression has been violated by the Respondent**

37. Before analyzing this question of whether the Respondent violated the Applicants right to freedom of expression, the Court finds it imperative to firstly determine whether access to internet is within the contemplation of violation to right to freedom of expression.

38. Access to internet is not *stricto sensu* a fundamental human right but since internet service provides a platform to enhance the exercise of freedom of expression, it then becomes a derivative right that it is a component to the exercise of the right to freedom of expression. It is a vehicle that provides a platform that will enhance the enjoyment of the right to freedom of expression. Right to internet access is closely linked to the right of freedom of speech which can be seen to encompass freedom of expression as well. Since access to internet is complementary to the enjoyment of the right to freedom of expression, it is necessary that access to internet and the right to freedom of expression be deemed to be an integral part of human right that requires protection by law and makes its violation actionable. In this regards, access to internet being a derivative right and at the same time component part of each other, should be jointly treated as an element of human right to which states are under obligation to provide protection for in accordance with the law just in the same way as the right to freedom of expression is protected. Against this background, access to internet should be seen as a right that requires protection of the law and any interference with it has to be provided for by the law specifying the grounds for such interference.

39. Having determined that access to internet is a right within the context of the right to freedom of expression, the Court will now proceed to address the question as to whether the shutting down of access to internet by the Respondent violated the Applicants' right to freedom of expression.

40. In the determination of the question the Court will be guided by the provisions of Article 9 (1) & (2) of the African Charter on Human and People's Rights which provides as follows:

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.*

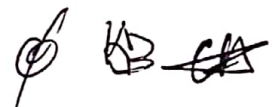
41. The Applicants brought this action before this Court against the Respondent state of the Republic of Togo. The basis of their claim is that following the internet shutdown that took place in Togo, their right to freedom of expression especially the right to search and receive information freely was violated by the Respondent. For an action to succeed under this head, the Applicants must establish two key elements as follows:

- 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.*

42. The Applicants submitted that the Respondent shut down the internet access thereby denying them the right to exercise their right to freedom of expression and that the shutting down was an interference.

43. The Applicants further submitted that at the time of the shutdown of the internet by the Respondent, there was neither a law in force that gave the mandate to shut down internet access nor can the Respondent rely on subsequent legislations to justify the shutdown of internet access. The Respondent did not deny the shutting down but sought to rely on national security interest in its defense as justification for the shutdown.

44. At this point, the Applicants having challenged the Respondent firstly, that there was no law pursuant to which the shutdown was effected, secondly that subsequent law legislated by the Respondent cannot be sufficient grounds to serve as justification for the shutting down and thirdly that there was no emergency existing in the state to warrant shutting down as claimed by the Respondent. This



means that the onus of rebutting the response by the Applicant squarely lies on the shoulders of the Respondent.

45. The Court notes that the Respondent's attempt to justify the action of the state of Togo in shutting down the internet access based on the protest that took place in there. According to the Respondent, the said protests had the potential to degenerate into a civil war and therefore it was imperative for the State to protect the national security of the country. While this argument has merit and has been internationally recognized as a valid defense to derogate from certain rights, the fundamental basis of the exercise of this power of derogation is that it must be done in accordance with the law. In other words, there must exist a national legislation guaranteeing the exercise of this right whilst providing the conditions under which it can be derogated from. Such conditions may include but is not limited to public interest, national security, public health, public order etc. The Court therefore opined that the Respondent has not shown up either by reference or otherwise the evidence of any such law. On this note, the Court concludes that failure of the Respondent to provide the said law is evidence that their action was not done in accordance with the law and therefore, supports the Latin maxim "*Ex turpi causa non oritur actio.*" in the circumstances as analyzed it is clear that in the absence of any law the Respondent is in violation of Article 9 of the African Charter on Human and People's Rights. The Court therefore holds that the act of the Respondent in shutting down internet access is a violation of the Applicants right to freedom of expression.

46. In the course of analyzing the application the Court took note of the opinions expressed by various experts in the Amicus curiae briefs. Whilst they are instructive, the Court notes that the parties have adequately espoused the relevant opinion which sufficiently guided the Court to reach an informed decision.

J. Decision

47. For the reasons stated in the judgment, the Court sitting in public after hearing the parties, and their submissions including documents filed hereby declares as follows:

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- i. It has jurisdiction to hear and determine the application and it is hereby declared admissible.
- ii. That the Applicants have locus to initiate this application.
- iii. That the shutting down of internet access by the Respondent state of Togo violated the rights of the Applicants to freedom of expression.
- iv. The relief in paragraph C is hereby refused.
- v. Directs the Respondent State of Togo to take all necessary measures to guarantee non-occurrence of this situation in the future.
- vi. Directs the Respondent State of Togo to enact and implement laws, regulations and safeguards in order to meet its obligations with respect to the right of freedom of expression in accordance with international human rights instruments.

48. The Court hereby orders:

- i. That the Respondent to pay to each of the Applicants the sum of 2,000,000.00 CFA (Two Million CFA) as compensation for the violation of their right to freedom of expression.
- ii. The Chief Registrar is ordered to assess the cost of the action.

Thus pronounced and signed on this 25 Day of June 2020 at the Community Court of Justice, ECOWAS, Abuja, Nigeria.


HON. JUSTICE Gberi-Be OUATTARA – Presiding


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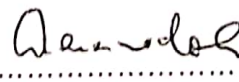
HON. JUSTICE Dupe ATOKI - Member


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HON. JUSTICE Keikura BANGURA – Rapporteur


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Mr. Tony ANENE-MAIDOH – Chief Registrar


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