

**IN THE COMMUNITY COURT OF JUSTICE OF THE
ECONOMIC COMMUNITY OF WEST AFRICAN STATES**

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

**STATEMENT OF INTERVENTION
ON BEHALF OF INTERVENERS**

Introduction

1. This statement is respectfully submitted by the Interveners,¹ together with their application to intervene pursuant to Article 89(1) of this Court's Rules of Procedure. In the event that this Court grants leave to intervene, the Interveners submit that this statement addresses the criteria set out in Article 89(5)(a)-(c) of the Rules of Procedure and invites this Court to admit this statement accordingly.
2. This case raises issues of considerable public importance with respect to the impact of the Respondent's conduct in shutting down the Internet in Togo during September 2017 on the right to freedom of expression under Article 9 of the African Charter on Human and Peoples' Rights ('African Charter') and Article 19

¹ The Interveners are civil society organizations with expertise on the issues in this case. Further details of the Interveners are set out in Appendix I.

of the International Covenant on Civil and Political Rights ('ICCPR'), as well as the rights of journalists under Article 66(2)(c) of the Revised ECOWAS Treaty. The Interveners support, but do not seek to duplicate, the Applicants' arguments, and support the form of order sought by the Applicants.

3. Drawing on their particular expertise, the Interveners seek to advance three submissions, with a view to assisting this Court in its consideration of the present case. In particular, it is submitted that:

3.1. First, the extent of the internet shutdown in Togo in September 2017 is very significant, even when compared with the wider disturbing trend of intentional government disruption of digital networks, applications, and services in ECOWAS and African nations in recent years;

3.2. Secondly, the human rights impact of the internet shutdown in Togo is not limited to the violations of the African Charter, ICCPR, and Revised ECOWAS Treaty relied upon in the Application, and extends to a range of rights protected under the International Covenant on Economic, Social and Cultural Rights ('ICESCR'),² to which the Respondent is a party; and

3.3. Thirdly, there is a consistent position adopted at the United Nations level, in opposition to the use of internet shutdowns on the basis that they are incompatible with international human rights standards and democratic debate.

Submission 1: Regarding the Togo Shutdown in Context

4. Recent years have seen a concerning prevalence of internet shutdowns as a measure used by governments within the ECOWAS Community and Africa more widely. And already in 2019, substantial government-directed internet disruption has occurred in:

² UN General Assembly, International Covenant on Economic, Social and Cultural Rights (opened for signature 19 December 1966, entered into force 3 January 1976) 993 UNTS 3.

- 4.1. Gabon (where the internet was shut down for approximately 28 hours at around the time of a purported coup attempt);³
- 4.2. The Democratic Republic of Congo (where major disruption was caused nationwide to internet and phone services as citizens went to the polls for the presidential election);⁴
- 4.3. Sudan (where access to social media sites were blocked for more than a month following marches calling for the resignation of President Omar al-Bashir);⁵
- 4.4. Chad (where a block on social media sites has been in place for a year following protests against constitutional amendments allowing for the extension of President Idriss Déby's term to 2033);⁶
- 4.5. Benin (where the internet was shut down following parliamentary elections);⁷ and
- 4.6. Zimbabwe (where internet access was disrupted for a day following public protests against substantial fuel price increases).⁸

³ See Al Jazeera, 'Internet shut down in Gabon following attempted coup' (8 January 2019), available at: <https://www.aljazeera.com/news/2019/01/internet-shut-gabon-attempted-coup-190108072246896.html>

⁴ See BBC News, 'DR Congo election: Internet shut down after presidential vote' (31 December 2018), available at: <https://www.bbc.co.uk/news/world-africa-46721168>

⁵ See Quartz, 'Sudan's anti-government protests face a total power outage and social media shutdown' (8 April 2019), available at: <https://qz.com/africa/1589356/sudan-protests-cuts-off-electricity-social-media-shutdown/>

⁶ See CNN, 'Chadians feel "anger, revolt" as they struggle without internet for one year' (25 April 2019), available at: <https://edition.cnn.com/2019/04/24/africa/chad-internet-shutdown-intl/index.html>

⁷ See Quartz, 'Benin's government has shut the internet ahead of an election that has no opposition' (28 April 2019), available at: <https://qz.com/africa/1606670/benin-shuts-internet-blocks-whatsapp-facebook-ahead-of-election/>

⁸ See Al Jazeera, 'Zimbabwe imposes internet shutdown amid crackdown on protests' (18 January 2019), available at: <https://www.aljazeera.com/news/2019/01/zimbabwe-imposes-total-internet-shutdown-crackdown-190118171452163.html>

5. The Interveners note that the Applicants have drawn this Court's attention to the condemnation of such steps by the African Commission on Human and Peoples' Rights ('ACHPR'), the UN Human Rights Council, and the UN General Assembly, as well as the joint declaration of Special Rapporteurs from the UN, ACHPR, Organization for Security and Co-operation in Europe, and Organization of American States.
6. The internet is increasingly essential to fundamental societal systems, including finance, business, and banking, health and education, public administration, and social and cultural life. In terms of civil and political rights, any State-sponsored intentional disruption to internet access is a severe restriction on the right to freedom of expression. A disruption prevents citizens from accessing information and engaging in public debate, and hampers journalists' ability to investigate and report upon matters in the public interest. As such, an internet shutdown is a disproportionate interference with the right to freedom of expression. The Interveners note that, even taking into account the disturbing prevalence of such disruptive activity, the deployment of a total internet shutdown affecting all web addresses and maintained for multiple days (as occurred in Togo in September 2017) remains an exceptional interference on the part of the state, one that violated the rights of Togolese citizens to seek, receive, and impart information and ideas of all kinds, regardless of frontiers.
7. According to independent analysis released in February 2019 by the leading NGO the Collaboration on Internet ICT Policy for East and Southern Africa ('CIPESA'),⁹ among the fifteen ECOWAS Member States in the last five years, ten Member States (Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, Ghana, Guinea, Guinea-Bissau, Liberia, Nigeria, and Senegal) had not sought to disrupt internet access. Of the five Member States (including Togo) to do so, the Internet disruptions carried out in Niger (in 2015) and Mali (in 2017 and 2018) were more targeted, applying to social media sites only. Subsequent to the CIPESA data, Benin has joined this group of Member States, as set out above, when in late

⁹ Collaboration on Internet ICT Policy for East and Southern Africa, 'Despots and Disruptions: Five Dimensions of Internet Shutdowns in Africa' (February 2019), available at: https://cipesa.org/?wpfb_dl=283

April 2019 the government ordered a total internet shutdown during protests ahead of the nation's flawed legislative elections.¹⁰

8. Accordingly, the Internet shutdown perpetrated in September 2017 placed Togo in a very small subset of ECOWAS Member States – along with The Gambia and Sierra Leone – responsible for the most extreme form of Internet disruption, namely a total Internet shutdown. Unfortunately, as demonstrated by the recent shutdown in Benin, the activity in Togo, while out of step with dominant ECOWAS State practice, may form part of a concerning trend towards greater disregard for internet freedom, indicating the timeliness of this case.

Submission 2: Regarding ICESCR Rights

9. The Interveners support the Applicants' findings and arguments regarding the interference caused by the internet shutdown to the Applicants' rights under the African Charter, ICCPR, and Revised ECOWAS Treaty. In addition, the Interveners invite this Court to consider the interference caused by the Togo internet shutdown to the rights guaranteed to Togolese citizens by ICESCR, to which the Respondent acceded on 24 May 1984.
10. Human rights guaranteed under ICESCR fall within the jurisdiction of this Court. Under Article 3(4) of this Court's Supplementary Protocol, this Court *'has jurisdiction to determine case[s] of violation of human rights that occur in any Member State.'* The Supplementary Protocol does not itself define the scope of the *'human rights'* which may be argued before the Court.
11. But Article 1(h) of the ECOWAS Protocol on Democracy and Good Governance, includes, in a list of principles which *'shall be declared as constitutional principles shared by all Member States'* the principle that *'rights set out in the African Charter on*

¹⁰ See Quartz, 'Benin's government has shut the internet ahead of an election that has no opposition' (28 April 2019), available at: <https://qz.com/africa/1606670/benin-shuts-internet-blocks-whatsapp-facebook-ahead-of-election>. For the civil society response, see Access Now, 'Benin heads to elections without social media and opposition parties' (28 April 2019) available at: <https://www.accessnow.org/benin-heads-to-elections-without-social-media-and-opposition-parties>.

Human and Peoples' Rights and other international instruments shall be guaranteed in each of the ECOWAS Member States...' (emphasis added).¹¹

12. This Court has referred to that Protocol, in the cases of *Amazou v Côte d'Ivoire* and the second *SERAP v Nigeria* case in 2010, and concluded that the Protocol obliges Member States as a matter of ECOWAS law (quite apart from their obligations as a matter of general public international law) to give effect to their human rights treaty obligations within their territories, and to be accountable to the Court as a matter of ECOWAS law for failing to do so.¹²

13. This Court's jurisprudence has similarly made clear that the subject matter scope of its competence with respect to human rights is broad, noting in its judgment in the third *SERAP v Nigeria* case in 2012 that:¹³

'the sources of law that the Court takes into consideration in performing its mandate of protecting human rights are ... the international instruments to which [the Member] States voluntarily bound themselves at the international level, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the African Charter on Human and Peoples' Rights.'

14. As the Court made clear in the third *SERAP v Nigeria* case also, the obligations of a Member State under ICESCR are justiciable before this Court at the level of international law even if the internal constitutional or legislative arrangements

¹¹ Protocol on Democracy and Good Governance, A/SP.1/12/01.

¹² ECW/CCJ/JUG/04/09 *Amazou and 5 others v Côte d'Ivoire* (Judgment of 17 December 2009), [59]; and ECW/CCJ/APP/08/09; Ruling No ECW/CCJ/APP/07/10 *The Socio-Economic Rights and Accountability Project (SERAP) v Federal Republic of Nigeria* (Preliminary Objections Ruling of 10 December 2010), [63].

¹³ ECW/CCJ/JUD/18/12 *SERAP v Federal Republic of Nigeria* (14 December 2012) ('*SERAP (No 3)*'), [35]. The Court specifically noted that, in the case before it, it '*has jurisdiction to adjudicate on the alleged violations of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights*' at [120].

mean that such economic, social, and cultural rights would not be justiciable by an individual before domestic courts. As this Court put it:¹⁴

'once the concerned right for which protection is sought before the Court is enshrined in an international instrument that is binding on a Member State, the domestic legislation of that State cannot prevail on the international treaty or covenant, even if it is [the Member State's] own Constitution.'

15. In this case, the Togo internet shutdown in September 2017 has an adverse impact on a range of rights protected under ICESCR, including: the right to work in Article 6; the right to health in Article 12; the right to education in Article 13;¹⁵ and the right to take part in cultural life and to enjoy the benefits of scientific progress and its application in Article 15.¹⁶

16. Internet shutdowns infringe upon the right to work, protected by Article 6, through directly disrupting the digital economy and all businesses which rely upon internet communications for sales, orders, and communication with partners. The Interveners submit that the best estimate of the direct impact of the September 2017 shutdown on the Togolese economy is that provided in research carried out by CIPESA in September 2017,¹⁷ which concluded that the economic effect of disruption to the internet and the online app sectors was greater than US\$300,000 *per day* of disruption. Given the size of Togo's GDP at around US\$4.5 billion in 2017, even a six-day disruption amounting to US\$1.8 million in lost

¹⁴ *SERAP (No 3)*, [36].

¹⁵ The impact of internet shutdowns on access to employment, healthcare and emergency services, and educational services has been considered in a range of case studies in the civil society sector, including: Institute for Human Rights and Business, 'Security v Access: The Impact of Mobile Network Shutdowns' (Case Study Number 3, September 2015), available at: https://www.ihrb.org/uploads/reports/201509%2C_IHRB_Report%2C_Security_v_Access_-_The_Impact_of_Mobile_Network_Shutdowns.pdf and S Ngassa, 'The Damage Caused by the 93-Day Internet Blackout in Cameroon,' *Slate* (17 August 2017), available at: <https://slate.com/technology/2017/08/the-damage-caused-by-cameroon-s-93-day-internet-blackout.html>

¹⁶ The treaty body interpreting the ICESCR, the Committee on Economic, Social, and Cultural Rights, has recommended that states improve internet access and access to information on the internet. *See, inter alia*, the concluding observations of Cameroon (E/C.12/CMR/CO/4), Libya (E/C.12/LYB/CO/2), South Africa (E/C.12/ZAF/CO/1), and Sudan (E/C.12/SDN/CO/2).

¹⁷ CIPESA, 'The Economic Impact of Internet Disruptions in Sub-Saharan Africa' (September 2017), available at: https://cipesa.org/?wpfb_dl=249

economic activity accounts for almost half a percentage point of the Respondent's entire annual GDP.

17. At the same time, internet disruption interferes with the flow of capital into a country, including remittances paid from the Togolese diaspora, cutting off a major source of funds for the domestic economy. The Togolese remittance market is one of the largest in Africa, amounting to around \$400 million in 2018, and accounting for around 8% of the Togo GDP (placing Togo in the top ten African countries for remittance income).¹⁸ Given that remittance payments rely almost exclusively upon reliable internet connectivity, the Togo shutdown has directly disrupted this important cornerstone of the Togo economy and the ability of its citizens to have access to the capital required to develop and operate their businesses.
18. Article 15 of ICESCR provides, *inter alia*, that States Parties '*recognize the right of everyone: (a) to take part in cultural life; [and] (b) to enjoy the benefits of scientific progress and its applications...*'¹⁹ In the modern era when by far the most convenient and economical mechanism for access to cultural products (literature, news content, popular entertainment, etc.) and scientific progress and its applications (scientific literature, computer coding and Web development resources and repositories, open source data for experimentation purposes) is provided by the internet, it follows that State disruption of that means of access constitutes an interference with the Article 15 affirmation of cultural rights. That is particularly the case given the longstanding position of UN institutions, expressed for instance in the UNESCO Recommendation Concerning the Most Effective Means of Rendering Museums Accessible to Everyone,²⁰ that States ought to take proactive steps to render cultural access affordable to all persons.

¹⁸ See Togo First, 'Togo: Remittances expected to exceed \$400 million in 2018, according to the World Bank' (17 December 2018), available at: <https://www.togofirst.com/en/economic-governance/1712-2217-togo-remittances-expected-to-exceed-400-million-in-2018-according-to-the-world-bank>

¹⁹ ICESCR, Article 15(1)(a)-(b).

²⁰ UNESCO, Recommendation Concerning the Most Effective Means of Rendering Museums Accessible to Everyone (14 December 1960), [7].

Relatedly, Togo has expressed support for the UN 2030 Agenda for Sustainable Development, which includes 17 Sustainable Development Goals (SDGs).²¹ Among those goals include commitments to promote *'universal access to information and communications technology,'* and to bringing the internet to all persons in least developed countries by 2020.²² While the Goals themselves are not directly justiciable, Togo's conduct in implementing a total shutdown to internet access is clearly inconsistent with both the spirit and the letter of these international undertakings.

Submission 3: Regarding the International Position Against Internet Disruption

19. The Interveners note that the Applicants have drawn the Court's attention to a range of international statements condemning the intentional use of internet disruptions worldwide leading up to, and including, the November 2016 Resolution of the ACHPR.

20. In the interests of ensuring that this Court has before it all relevant international materials, the Interveners set out the following additional statements which demonstrate the international community's continued opposition to blanket restrictions on internet access, such as internet shutdowns, and its ongoing commitment to the open exchange of information via the internet:

20.1. In 2017, the UN General Assembly, in its Resolution passed by consensus on the *'safety of journalists and the issue of impunity,'* stated that it *'condemns unequivocally measures in violation of international human rights law aiming to or that intentionally prevent or disrupt access to or dissemination of information online and offline, aiming to undermine the work of journalists in informing the public, and calls upon all States to cease and refrain from these measures, which cause irreparable harm to efforts to build inclusive and peaceful knowledge societies and democracies;'*²³

²¹ See General Assembly of the United Nations 'H.E. Mr. Robert Dussey, Minister for Foreign Affairs, Cooperation and Regional Integration' (27 September 2018), available at: <https://gadebate.un.org/en/73/togo>.

²² The Global Goals for Sustainable Development, (September 2018), available at: <https://www.globalgoals.org/9-industry-innovation-and-infrastructure>.

²³ UN General Assembly, Resolution on the Safety of Journalists and the Issue of Impunity (19 December 2017), UN Doc. A/RES/72/175, [12].

- 20.2. The need for States to refrain from intentional internet disruption was reinforced by the UN General Assembly in late 2018, in its Resolution on the *'[p]romotion and protection of human rights and fundamental freedoms, including the rights to peaceful assembly and freedom of association,'* which *'[c]all[ed] upon all States to ensure that the same rights that individuals have offline, including the rights to freedom of expression, of peaceful assembly and of association, are also fully protected online, in accordance with human rights law, particularly by refraining from Internet shutdowns and content restrictions on the Internet that violate international human rights law...'*²⁴ and
- 20.3. The UN Human Rights Council has similarly, in two resolutions adopted by consensus in 2018, expressed concern about *'the emerging trend of ... undue restrictions preventing Internet users from having access to or disseminating information at key political moments'*²⁵ and deep concern at *'measures in violation of international human rights law that aim to or that intentionally prevent or disrupt access to or dissemination of information online,'*²⁶ has *'condemn[ed] unequivocally measures in violation of international human rights law that prevent or disrupt an individual's ability to seek, receive or impart information online,'*²⁷ and has called upon States to *'refrain from and cease measures, when in violation of international human rights law, seeking to block Internet users from gaining access to or disseminating information online.'*²⁸

Conclusion

21. For the reasons set out above, the Interveners support, in its entirety, the form of order sought by the Applicants.

²⁴ UN General Assembly, Resolution on the Promotion and Protection of Human Rights and Fundamental Freedoms, Including the Rights to Peaceful Assembly and Freedom of Association (17 December 2018), UN Doc. A/RES/73/173, [4].

²⁵ UN General Assembly, Human Rights Council, Resolution on the Promotion and Protection of Human Rights in the Context of Peaceful Protests (6 July 2018), UN Doc. A/HRC/RES/38/11 ('Peaceful Protests Resolution'), p2.

²⁶ UN General Assembly, Human Rights Council, The Promotion, Protection and Enjoyment of Human Rights on the Internet (5 July 2018), UN Doc. A/HRC/RES/38/7 ('Internet Resolution'), p3.

²⁷ Internet Resolution, [13].

²⁸ Peaceful Protests Resolution, [9]; and see Internet Resolution, [13].

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Appendix I: About the Interveners

Access Now (www.accessnow.org) is an international civil society organization that defends and extends the digital rights of users at risk. Through policy development and advocacy, grant making, multi-stakeholder convenings like RightsCon, and direct technical support through a Digital Security Helpline, the organization works through staff in more than twelve countries to monitor, investigate, and prevent violations of digital rights worldwide. Access Now coordinates the international 'KeepItOn' campaign, which tracks and decries intentional disruptions of internet access through a global coalition of civil society organizations.

Association for Progressive Communications (APC) is both a network and a non-profit organisation. APC members are groups and individuals working in their own countries to advance APC's mission to empower and support organisations, social movements and individuals, in and through the use of information and communication technologies (ICTs), to build strategic communities and initiatives for the purpose of making meaningful contributions to equitable human development, social justice, participatory political processes and environmental sustainability. As of August 2017, APC has 57 organisational members and 35 individual members active in 72 countries.

ARTICLE 19 is an independent human rights organisation that works around the world to protect and promote the right to freedom of expression and the right to freedom of information. It monitors threats to freedom of expression in different regions of the world, as well as national and global trends and develops long-term strategies to address them and advocates for the implementation of the highest standards of freedom of expression, nationally and globally. ARTICLE 19 has considerable experience in the field of digital rights. We have developed policy briefs and submitted third-part interventions on website blocking before the European Court of Human Rights and the French Conseil d'Etat. We have also contributed to the elaboration of standard-setting instruments on internet shutdowns at the UN level.

Collaboration on International ICT Policy in East and Southern Africa (CIPESA) was established in 2004 in response to the findings of the Louder Voices Report for DFID, which cited the lack of easy, affordable and timely access to information about ICT related issues and processes as a key barrier to effective and inclusive ICT policy making in Africa. CIPESA thus works to enable various stakeholders to use ICT to improve governance and livelihoods. We currently approach our work through four different but interrelated

thematic areas – namely promoting online freedom (or digital rights), ICT for democracy and civic participation, open data and the right to information, and advancing the multi-stakeholder internet governance model at national, regional and global level. We do this through research and contributing to the availability of information on the policy, legislative and practice environment affecting ICT in Africa; advocacy and awareness raising on threats to free speech, access to information, privacy and security online; spurring multi-stakeholder conversations on protecting and promoting internet rights; and knowledge and skills development in digital rights policy engagement, digital literacy, digital security, social accountability and human rights monitoring.

The Committee to Protect Journalists (CPJ) is an independent, nonprofit organization that promotes press freedom worldwide and defends the right of journalists to report the news without fear of reprisal. Around the world, CPJ has documented the negative impact of internet shutdowns on journalists' ability to publish online, conduct thorough investigations, and communicate securely with their sources.

Internet Freedom Foundation (IFF) is an Indian digital liberties organisation that seeks to ensure that technology respects fundamental rights. IFF's goal is to ensure that Indian citizens can use the Internet with liberties guaranteed by the Constitution. IFF's expertise in free speech, digital surveillance and privacy, and net neutrality helps the organization to champion freedom in the digital age. IFF spurs grassroots membership through public campaigns and takes them towards institutional engagement with regulators, legislative bodies and courts. IFF is incorporated as a public charitable trust registered in New Delhi.

The NetBlocks Group is a civil society group working at the intersection of digital rights, cyber-security and internet governance. Independent and non-partisan, NetBlocks strives for an open and inclusive digital future for all.

The Paradigm Initiative (PI) is a pan-African social enterprise that builds an ICT-enabled support system and advocates digital rights across the continent in order to improve livelihoods for under-served youths. The organisation's portfolio includes digital inclusion programs and a digital rights program. With offices in Nigeria, Tanzania, Zambia, Togo and Cameroon, Paradigm Initiative works to advance internet freedom with media and human rights defenders globally. PI is the convener of Digital Rights and Inclusion Forum (DRIF), formerly known as internet Freedom Forum, an annual forum designed to bring together internet freedom advocates, policymakers, the technical community, and business groups

from all over the world with the aim to hold discussions, enrich and broaden the conversation issues on internet freedom and digital rights in Africa.