

**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  
RAPPORTEUR ON THE PROMOTION AND PROTECTION OF THE RIGHT TO  
FREEDOM OF OPINION AND EXPRESSION** **Applicant/Amicus**

***AMICUS CURIAE* SUBMISSION PURSUANT TO THE INHERENT JURISDICTION OF  
THIS HONOURABLE COURT**

## **Introduction**

1. Professor David Kaye, United Nations (“U.N.”) Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (the “Special Rapporteur”) respectfully submits this *amicus curiae* brief in the case of *Amnesty International Togo, et al. v. The Togolese Republic*, Suit No. ECW/CCJ/APP/61/18.
2. The Special Rapporteur sets forth his analysis regarding the impact of certain kinds of Internet restrictions on the right to freedom of expression. In light of the alarming global trend of Internet shutdowns, this submission will describe State obligations with respect to freedom of expression under international human rights law, in particular, Article 19 of the International Covenant on Civil and Political Rights (“ICCPR”).<sup>1</sup>
3. Specifically, this submission sets 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; provides observations on the interpretation and application of Article 19 of the ICCPR to the Internet shutdowns; offers 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. The Special Rapporteur does not introduce new arguments to the case or recapitulate the arguments advanced by the parties. Rather, he offers relevant information and analysis to assist this Honourable Court in rendering a just and equitable determination.

## **Background**

### *The Special Rapporteur and this Amicus Brief*

5. The Special Rapporteur is an independent expert appointed by the U.N. Human Rights Council. He is mandated by Human Rights Council Resolution 7/36 to, *inter alia*: (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.

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<sup>1</sup> International Covenant on Civil and Political Rights, 999 U.N.T.S .171 (1966) (“ICCPR”). This Honourable Court properly considers and applies the ICCPR in this matter, pursuant to, *inter alia*, Article 1(h) of the ECOWAS Protocol on Democracy and Good Governance. See *SERAP v. Federal Republic of Nigeria*, ECW/CCJ/JUD/18/12 (14 December 2012) (specifically observing that this Honourable Court “has jurisdiction to adjudicate on the alleged violations of the International Covenant on Civil and Political Rights”). Togo concedes the ICCPR’s applicability by engaging with the treaty in its briefing. See Statement in Defence: Republic of Togo (filed 19 February 2019) § II.A-C.

6. The Special Rapporteur’s mandate draws upon ICCPR Article 19, which protects the right to hold opinions without interference and 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.” Togo acceded to the ICCPR in 1984.<sup>2</sup>
7. The U.N. Human Rights Committee (“Committee”), the expert body that monitors compliance with and issues interpretations of the ICCPR, has emphasized the fundamental nature of rights to freedom of opinion and expression, stating:

Freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society. They constitute the foundation stone for every free and democratic society. The two freedoms are closely related, with freedom of expression providing the vehicle for the exchange and development of opinions . . . Freedom of expression is a necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights.<sup>3</sup>

The Committee has further stated that the “freedoms of opinion and expression form a basis for the full enjoyment of a wide range of other human rights.”<sup>4</sup> As one example, “freedom of expression is integral to the enjoyment of the rights to freedom of assembly and association.”<sup>5</sup>

### *The Global Trend of Internet Restrictions*

8. Internet shutdowns have been usefully defined as “intentional disruption[s] of internet or electronic communications, rendering them inaccessible or effectively unusable, for a specific population or within a location, often to exert control over the flow of information.”<sup>6</sup> Restricting Internet access results in tremendous individual and societal harms.
9. Restricting Internet access seriously impairs journalistic activity. A free and independent media is a key democratic principal that reinforces accountability mechanisms and fosters “dialogue, peace, and good governance.”<sup>7</sup> Although the function of journalism is “shared by a wide range of actors,” there is a common reliance on Internet-based communication networks.<sup>8</sup> In 2018, the Human Rights Council passed a resolution stating that it:

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<sup>2</sup> “Ratification of 18 International Human Rights Treaties.” *United Nations Office of the High Commissioner for Human Rights*, <https://indicators.ohchr.org/>.

<sup>3</sup> U.N. Human Rights Committee, General Comment No. 34, CCPR/C/GC/34 (2011) (“General Comment 34”), paras. 2-3.

<sup>4</sup> *Id.*, para. 4.

<sup>5</sup> *Id.*

<sup>6</sup> “What is an internet shutdown?” *Access Now*, <https://www.accessnow.org/keepiton/>. This definition was developed in 2016 by a diverse set of stakeholders from across the globe, including North America, Asia, Africa, Latin America, and Europe. *Access Now*, <https://www.accessnow.org/no-internet-shutdowns-lets-keepiton/>.

<sup>7</sup> U.N. Doc. A/RES/68/163, preamble (21 February 2014); *see* General Comment 34, para. 44.

<sup>8</sup> *Id.*

[c]ondemns 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, which undermine the work of journalists in informing the public, including measures to unlawfully or arbitrarily block or take down media websites. . . and calls upon all States to cease and refrain from these measures, which cause irreparable harm to efforts at building inclusive and peaceful knowledge societies and democracies.<sup>9</sup>

10. Shutdowns damage not only people's access to information, but also their access to basic services. For example, shutdowns deprive people of essential online medical information and care. Importantly, network connectivity during emergencies and periods of unrest can mitigate public safety concerns and help to restore and maintain public order.<sup>10</sup>
11. During Internet shutdowns, members of vulnerable groups endure disproportionate hardships. For example, people living with disabilities, women, migrants, racial minorities, and members of communities based on sexual orientation or gender identity often depend on critical online resources.<sup>11</sup> The ability to connect to safe and reliable communities or resources through the Internet provides lifelines that would otherwise be inaccessible.
12. State and global economies rely on steady Internet access for daily activities, and even where shutdowns only last for a few hours or simply slow access, they can cause commercial harm. Businesses reliant on electronic transactions are particularly affected.<sup>12</sup> The Brookings Institution, a prominent American research and policy institute, calculated that shutdowns across nineteen countries over the course of one year cost a total of \$2.4 billion.<sup>13</sup>
13. Notwithstanding these and many other detrimental effects, recent years have seen an upward trend in State interference with communications networks.<sup>14</sup> In this year alone, several States within the ECOWAS community and African region have imposed Internet shutdowns, including: Gabon,<sup>15</sup> the Democratic Republic of Congo,<sup>16</sup> Sudan,<sup>17</sup> Chad,<sup>18</sup> Benin,<sup>19</sup> and

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<sup>9</sup> U.N. Doc. A/HRC/39/L.7, para. 6 (21 September 2018).

<sup>10</sup> See U.N. Doc. A/HRC/35/22, para. 14. (30 March 2017).

<sup>11</sup> See "Where We Call Home: LGBT People in Rural America," *Movement Advancement Project* (April 2019), <http://www.lgbtmap.org/file/lgbt-rural-report.pdf>.

<sup>12</sup> See "Policy Brief: Internet Shutdowns," *Internet Society* (13 November 2017), <https://www.Internetsociety.org/policybriefs/Internet-shutdowns>.

<sup>13</sup> See West, Darrel. "Internet shutdowns cost countries \$2.4 billion last year," *Center for Technology Innovation at Brookings* (October 2016), <https://www.brookings.edu/wp-content/uploads/2016/10/intenet-shutdowns-v-3.pdf>

<sup>14</sup> See "What is an internet shutdown?" *Access Now*, <https://www.accessnow.org/keepit/>.

<sup>15</sup> See "Internet shut down in Gabon following attempted coup," *Al Jazeera* (8 January 2019), <https://www.aljazeera.com/news/2019/01/internet-shut-gabon-attempted-coup-190108072246896.html>.

<sup>16</sup> See "DR Congo election: Internet shut down after presidential vote," *BBC News* (31 December 2018), <https://www.bbc.com/news/world-africa-46721168>.

<sup>17</sup> See "Sudan's anti-government protests face a total power outage and social media shutdown," *Quartz* (8 April 2019), <https://qz.com/africa/1589356/sudan-protests-cuts-off-electricity-social-media-shutdown/>.

<sup>18</sup> See "Chadians feel 'anger, revolt' as they struggle without internet for one year," *CNN* (25 April 2019), <https://www.cnn.com/2019/04/24/africa/chad-internet-shutdown-intl/index.html>.

<sup>19</sup> See "Benin's government has shut the internet ahead of an election that has no opposition," *Quartz* (28 April 2019), <https://qz.com/africa/1606670/benin-shuts-internet-blocks-whatsapp-facebook-ahead-of-election/>.

Zimbabwe<sup>20</sup>. The Special Rapporteur has addressed Internet shutdowns across the globe; for example, he has condemned wholesale or partial shutdowns in Egypt,<sup>21</sup> Lebanon,<sup>22</sup> Cameroon,<sup>23</sup> Malaysia,<sup>24</sup> and, most recently, India.<sup>25</sup> Despite repeated condemnation by the U.N. and civil society, many States continue to impose and even increase their use of shutdowns.

### The September 2017 Internet Disruptions in Togo

14. For background, the Special Rapporteur has been familiar with the September 2017 internet disruptions in Togo.

According to information received, Togo shut down the Internet from the evening of 5 September until 10 September 2017 and again from 19 September to 21 September 2017.<sup>26</sup> Togo has asserted that two laws were in place to justify these shutdowns: the Law on the Information Society and the Law of 2011.<sup>27</sup>

On 28 September 2017, the Special Rapporteur sent an urgent appeal to Togo, expressing grave concern about the human rights implications of the State's reported Internet shutdowns.<sup>28</sup> Togo responded on 23 October 2017 without denying these facts or providing substantive justification.<sup>29</sup>

15. On 11 September 2019, the Special Rapporteur and three other U.N. Special Rapporteurs sent a communication to Togo, expressing concern that the Law of 2011 restricts freedom of expression, assembly, and association in violation of Togo's international human rights obligations.<sup>30</sup>

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<sup>20</sup> See "Zimbabwe imposes internet shutdown amid crackdown on protests," *Al Jazeera* (18 January 2019), <https://www.aljazeera.com/news/2019/01/zimbabwe-imposes-total-internet-shutdown-crackdown-190118171452163.html>.

<sup>21</sup> See U.N. Doc. AL LBN 3/2019 (10 May 2019), <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=24560>.

<sup>22</sup> See *id.*

<sup>23</sup> U.N. Doc. MYS 3/2015 (18 August 2015), <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=20955>.

<sup>24</sup> U.N. Doc. AL CMR 4/2019 (2 July 2019), <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=24680>.

<sup>25</sup> "UN rights experts urge India to end communications shutdown in Kashmir," (22 August 2019) <https://ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24909&LangID=E>.

<sup>26</sup> As the Applicants have pointed out, the parties agree on these basic facts and Togo does not deny responsibility for the shutdowns. See Response to Respondent's Special Brief and Statement of Defence (filed 18 March 2019), para. 15; Statement of Defence: Republic of Togo (filed 19 February 2019) § I.

<sup>27</sup> See Statement in Defence: Republic of Togo (filed 19 February 2019) § II.B.

<sup>28</sup> U.N. Doc. UA TGO 1/2017 (28 September 2017), <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=23362>.

<sup>29</sup> 003/MPT/GE/SKF/17 (10 January 2017), <https://www.ohchr.org/Documents/Issues/Expression/Telecommunications/Togo.pdf>

<sup>30</sup> U.N. Doc. OL TGO 1/2019 (11 September 2019), <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=24836>.

## State Obligations to Respect and Ensure Freedom of Expression Online

16. All States are obligated to respect and ensure the human rights guaranteed under applicable international instruments. As this Honourable Court noted in *SERAP v Nigeria*, ECOWAS Member States are required to give effect to human rights treaties through legislative means, while ensuring access to an effective remedy.<sup>31</sup> Togo, as a party to the ICCPR, is required to abide by Article 19, which, similar to Article 9 of the African Charter on Human and Peoples' Rights, protects the right to freedom of expression.<sup>32</sup>
17. The U.N. General Assembly has broadly condemned undue restrictions that prevent Internet users from having access to or disseminating information, because these restrictions are often linked with governmental attempts to stifle pro-democracy movements or to disrupt peaceful protests.<sup>33</sup> Human Rights Council Resolution 24/5 “reminds States of their obligation to respect and fully protect the rights of all individuals to assemble peacefully and associate freely, online as well as offline.”<sup>34</sup> Indeed, the General Assembly and Human Rights Council have both recognized that the “same rights that individuals exercise offline must also be protected online.”<sup>35</sup>
18. The Committee has emphasized that “[a]ny restrictions on the operation of websites, blogs or any other Internet-based, electronic or other such information dissemination system, including systems to support such communication, such as Internet service providers or search engines, are only permissible to the extent that they are compatible with [Article 19(3)].”<sup>36</sup> Any such restriction must not put the right itself in jeopardy, and “the relation between right and restriction and between norm and exception must not be reversed.”<sup>37</sup> Importantly, the Committee has found that “generic bans” that are not content-specific are not compatible with Article 19.<sup>38</sup>
19. To be consistent with ICCPR Article 19(3), any restriction on the right to freedom of expression must be (i) provided by law; (ii) serving a legitimate purpose; and (iii) necessary and proportional to such purpose.<sup>39</sup> The State bears the burden to show that it has met all three of these conjunctive requirements.<sup>40</sup>

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<sup>31</sup> *Socio-Economic Rights and Accountability Project (SERAP) v. Federal Republic of Nigeria and Universal Basic Education Commission*, No. ECW/CCJ/APP/0808.

<sup>32</sup> ICCPR Article 19 also protects “the right to hold opinions without interference.” Internet shutdowns infringe on this right, in addition to the right to freedom of expression, because they interfere with the formulation and development of opinions by preventing the exchange and receipt of information and ideas.

<sup>33</sup> U.N. Doc. A/HRC/RES/38/11 (16 July 2018), <https://undocs.org/A/HRC/RES/38/11>.

<sup>34</sup> U.N. Doc. A/HRC/RES/24/5 (8 October 2013), <https://undocs.org/en/A/HRC/RES/24/5>.

<sup>35</sup> U.N. Doc. A/RES/68/167, 3 (18 December 2013), <https://undocs.org/en/A/RES/68/167>; U.N. Doc. A/HRC/RES/26/13, at 1 (14 July 2014), <https://undocs.org/en/A/HRC/RES/26/13>.

<sup>36</sup> General Comment 34, para. 43. The Committee has also stated that “States parties should take all necessary steps to . . . ensure access of individuals [to the Internet].” *Id.*, para. 15.

<sup>37</sup> U.N. Human Rights Committee General Comment No. 27, U.N. Doc. CCPR/C/21/Rev.1/Add.9 (2 November 1999) (“General Comment 27”).

<sup>38</sup> General Comment 34, para. 43.

<sup>39</sup> See ICCPR, art. 19.

<sup>40</sup> See, e.g., General Comment 34, para. 27.

The State Requirement to Show the Legality of Each Restriction

20. The first criterion, provision by law, requires each State to ground any restriction in its domestic law. The law must “not confer unfettered discretion” but instead “provide sufficient guidance to those charged with [its] execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not.”<sup>41</sup> Also, the law must avoid unnecessary vagueness and be formulated with “precision to enable an individual to regulate his or her conduct accordingly.”<sup>42</sup> It is not enough for States to simply cite to a law purportedly authorizing the restriction; States must ensure that any law restricting expression is in no way arbitrary or unreasonable and meets well-established standards of transparency.<sup>43</sup>
21. Further, State laws used to justify restrictions must ensure access to a remedy.<sup>44</sup> As the former mandate holder explained, State laws must provide “adequate safeguards against abuse, including the possibility of challenge and remedy against its abusive application.”<sup>45</sup>
22. Togo cites the Law of 2011<sup>46</sup> and the Law of Information Society as legal justifications for the shutdowns.<sup>47</sup> Any law that is vague and overbroad may allow for excessive discretion without sufficient guidance for the imposition of a restriction. Additionally, any law that does not provide access to a remedy, including judicial review, raises concerns pursuant to the stringent requirements of legality under Article 19(3).

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<sup>41</sup> U.N. Doc. A/HRC/14/23 (20 April 2010),

<https://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/a.hrc.14.23.pdf>; General Comment 34, para. 25.

<sup>42</sup> *Id.*

<sup>43</sup> See *Sunday Times v. United Kingdom (No. 1)*, 26 Apr. 1979, no. 6538/74, § 48.

<sup>44</sup> See ICCPR, art. 2. Article 2(3) requires States: “(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted.”

<sup>45</sup> U.N. Doc. A/HRC/17/27 (16 May 2011), paras. 24, 69, <https://undocs.org/en/A/HRC/17/27>; see also “Promotion and protection of the right to freedom of opinion and expression” U.N. Doc. A/67/357 (7 September 2012), para. 42, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N12/501/25/pdf/N1250125.pdf?OpenElement>.

<sup>46</sup> See OL TGO 1/2019 (11 September 2019). As noted above, multiple U.N. Special Rapporteurs recently sent a communication to Togo expressing concerns regarding the Law of 2011 and its pending amendments. The Special Rapporteurs questioned the law’s legality and proportionality under Article 19(3).

<sup>47</sup> See Statement in Defence: Republic of Togo (filed 19 February 2019) § II.B.

*The State Requirement to Show that Each Restriction Serves a Legitimate, Enumerated Purpose*

23. With respect to the second Article 19(3) requirement, each State must provide a legitimate purpose for restricting freedom of expression under one of the articulated aims: respect for the rights and reputations of others or protection of national security, public order, public health or morals.<sup>48</sup> This criterion “may never be invoked as a justification for the muzzling of any advocacy of multi-party democracy, democratic tenets, and human rights.”<sup>49</sup> Notably, all public institutions and figures, including heads of State and Government, “are legitimately subject to criticism and political opposition.”<sup>50</sup>
24. The former mandate holder stressed that the “use of an amorphous concept [such as] national security to justify invasive limitations on the enjoyment of human rights is of serious concern.”<sup>51</sup>
25. Governments often assert that the purpose of its restrictions are to protect national security and public order.<sup>52</sup> Protecting national security and public order is a legitimate purpose under Article 19(3). Also, the Committee has found that “on the basis of maintenance of public order it may, for instance, be permissible in certain circumstances to regulate speech-making in a particular public place.”<sup>53</sup>
26. However, given the extremely political environment in which shutdowns typically occur, a State must demonstrate that its Internet shutdowns are in fact motivated by legitimate concerns regarding national security and public order and not by an attempt to “muzzle” dissent for the sake of political dominance.<sup>54</sup>

*The State Requirement to Show the Necessity and Proportionality of Each Restriction*

27. Lastly, under Article 19(3), each State must ensure restrictions are not overbroad by meeting the strict tests of necessity and proportionality. Restrictions must be “implemented narrowly.”<sup>55</sup> States must “demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.”<sup>56</sup>
28. In the context of countering online extremism, the U.N. High Commissioner for Human Rights has explained that States obstructing communications networks must:

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<sup>48</sup> See ICCPR, art. 19.

<sup>49</sup> General Comment 34, para. 23.

<sup>50</sup> *Id.*, para. 37.

<sup>51</sup> U.N. Doc. A/HRC/23/40/Add.1 (23 March 2013), <https://undocs.org/A/HRC/23/40/Add.1>.

<sup>52</sup> See Statement in Defence: Republic of Togo (filed 19 February 2019) § I.

<sup>53</sup> General Comment 34, para. 31.

<sup>54</sup> See Response to Respondent’s Special Brief and Statement of Defence (filed 18 March 2019), paras. 16-17 (noting that Togo’s alleged evidence was not filed with the Court, nor provided to Applicants).

<sup>55</sup> “Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms” U.N. Doc. A/71/373 (6 September 2016), para. 7, <https://undocs.org/en/A/71/373%20>.

<sup>56</sup> General Comment 34, para. 35.



provide evidence-based justifications of the necessity and proportionality of such interference with freedom of expression. They must demonstrate how the perceived benefits of these measures outweigh the importance of the Internet as a tool to maximize the number and diversity of voices in the discussion of numerous issues. Any lack of transparency with regard to blocking or content removal measures renders it difficult to assess whether such restrictions were really necessary for the purported aim. Consequently, there is a need for much greater transparency by States to clarify what content they are filtering, blocking or removing and on what basis.<sup>57</sup>

The principle of proportionality applies to the law that frames the restrictions, as well as the administrative and judicial authorities enforcing the law.<sup>58</sup>

29. Moreover, State restrictions “must be the least intrusive instrument amongst those which might achieve their protective function [and] they must be proportionate to the interest to be protected.”<sup>59</sup> If a State’s interference could have been achieved by any other means that would have resulted in less restriction of expression, that State is in violation of Article 19.<sup>60</sup>
30. The Committee has explained that “[t]he principle of proportionality must also take account of the form of expression at issue as well as the means of its dissemination”; for example, “the value placed by the Covenant upon uninhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in the public and political domain.”<sup>61</sup>
31. Internet shutdowns typically obstruct general access to all Internet-based sites and applications. “Restrictions must not be overbroad,”<sup>62</sup> yet it is difficult to imagine a broader measure than a wholesale shutting down of the Internet. Indeed, disabling access to the entire Internet is a ‘generic ban’ that never operates in the least restrictive means possible.<sup>63</sup> A coalition of international human rights organizations and experts, including the Special Rapporteur, have issued a joint declaration stating that “[f]iltering of content on the Internet, using communications ‘kill switches’ (i.e. shutting down entire parts of communications systems) . . . are measures which can never be justified under human rights law.”<sup>64</sup>

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<sup>57</sup> U.N. Doc. A/HRC/33/29, paras. 53-54 (21 July 2016), [https://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/HRC/33/29](https://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/33/29).

<sup>58</sup> See General Comment 34, para. 34.

<sup>59</sup> General Comment 27, para. 14.

<sup>60</sup> See Communication No. 359, 385/89, *Ballantyne, Davidson and McIntyre v. Canada*.

<sup>61</sup> General Comment 34, para. 34.

<sup>62</sup> General Comment 34, para. 34.

<sup>63</sup> According to Barbora Bukovska of the international freedom of expression organization ARTICLE 19, Internet shutdowns “are always a disproportionate restriction on the right to freedom of expression, and have serious repercussions for the protection of other human rights” Woodhams, Samuel. “Contesting the Legality of Internet Shutdowns,” *Just Security* (1 October 2019), <https://www.justsecurity.org/66317/contesting-the-legality-of-internet-shutdowns/>.

<sup>64</sup> Joint Declaration on Freedom of Expression and Responses to Conflict Situations, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15921&LangID=E>.

32. “Blackouts” or widespread shutdowns of communication networks have even been deemed a form of collective punishment based on their inconsistency with the fundamental norms of necessity and proportionality.<sup>65</sup> Preventing all access to the Internet spreads confusion, distrust, and instability, impacting many vulnerable groups in severe and irreparable ways. Notwithstanding a State’s *purported* motivation to protect national security and public order, its actions may have had the opposite effect.

### Conclusion

33. This case presents the Honorable Court with the opportunity to reaffirm the basic right of freedom of expression, as the use of Internet shutdowns by States proliferates, within ECOWAS and across the globe. As a general matter and as discussed above, Internet shutdowns perpetrated by any State cannot satisfy the stringent requirements of Article 19(3).

34. This *amicus* brief is submitted to this Honourable by the Special Rapporteur 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.



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

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<sup>65</sup> “UN rights experts urge India to end communications shutdown in Kashmir,” *OHCHR* (22 August 2019), <https://ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24909&LangID=E>.