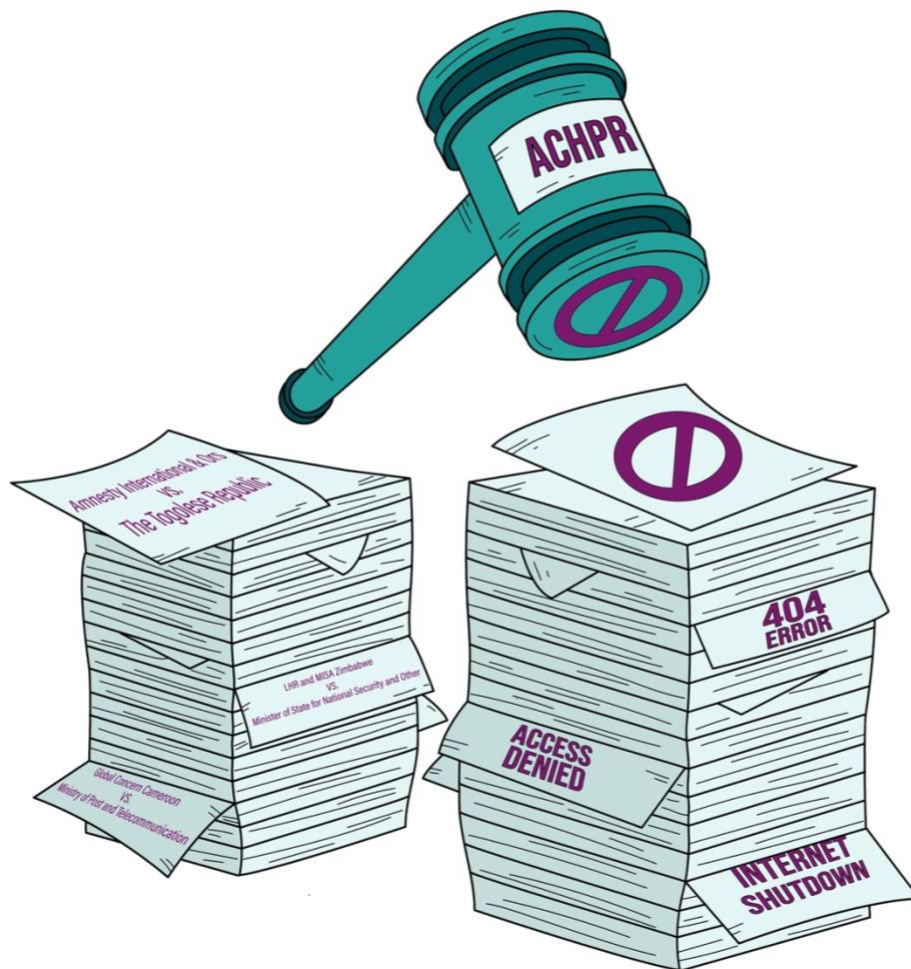


Litigating Internet Shutdowns in Africa:

A Guide on Approaching the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights

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DEFENDING THE INTERNET

WITH DATA

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Executive Summary

This Guide is developed to assist individuals, organisations and other stakeholders on how to approach the African Commission on Human and Peoples' Rights (African Commission) and the African Court on Human and Peoples' Rights (African Court) with respect to human rights violations caused by Internet shutdowns. Since February 1996 when the Zambian government removed a banned edition of The Post online and threatened to prosecute the country's main Internet Service Provider (ISP), Zamnet, African governments have made Internet restrictions, censorship and shutdowns the new normal. These shutdowns have had debilitating impacts not only on human rights but also curtailed the standards of living of many Africans.

This Guide seeks to contribute to the various resources that have been produced to help civil society, human rights defenders, and media groups in Africa advocate against shutdowns, by offering insight into how to challenge shutdowns through regional mechanisms. The Guide is divided into two broad sections. The first section introduces the Guide and highlights a brief background of the African Commission and the African Court. In addition, we analyzed the forms, causes and impacts of Internet shutdowns in Africa, outline the human rights violations resulting from Internet shutdowns, and provide an overview on the considerations and justifications for approaching the African Commission and the African Court. It examines the issues of admissibility before the African Commission and the African Court as provided for under Article 56(1-7) of the African Charter on Human and Peoples' Rights (African Charter) while also examining other justifications for approaching both institutions.

The second part of the Guide considers the procedures before the African Commission and the African Court with respect to Internet shutdowns specifically. It examines the possible remedies that could be awarded by both institutions and the possible means of enforcement. This part is further subdivided into two sections. The first section considers the African Commission's processes including its functions, procedure, follow-up, enforcement and a case study. The second focuses on the African Court and examines its brief background, access to the Court, jurisdiction, procedure before the court and enforcing the Court's judgement.

Introduction

Between 2018 and 2020, 32 out of the 87 countries that deployed Internet shutdowns were in Africa.¹ This accounts for nearly 37% of the total number of Internet shutdowns that took place within the same period. Known also as network disruptions, these shutdowns often occur during major political events like mass protests or general elections which often lead to various violations of human rights both online and offline. Several studies have documented the

¹ Access Now 'Shattered dreams and lost opportunities: A year in the fight to #KeepItOn' 2020

https://www.accessnow.org/cms/assets/uploads/2021/03/KeepItOn-report-on-the-2020-data_Mar-2021_3.pdf accessed 12 May 2021. African countries consistently recorded higher numbers of Internet shutdowns than other regions like Middle East and Northern Africa, Asia Pacific, Latin America and the Caribbean and Europe even though India has the highest number of shutdowns per country.



political,² economic³ and social impacts of Internet shutdowns.⁴ The most prominent of the findings in these studies is that when governments shut Internet access, they violate human rights and negatively impact standards of living. Given the context of the COVID-19 pandemic, shutting Internet access now poses far greater danger to human survival as societies increasingly rely on digital infrastructures and services. Therefore, in order to fight arbitrary Internet shutdowns from every possible legitimate and legal angle, there is a need for more campaigns and advocacy resources that improve interactions not only within national contexts, but also within the regional human rights contexts.

As a result, this Guide (part of a collection of advocacy resources commissioned by Internews' OPTIMA project) provides an overview of the processes involved in engaging two key regional human rights institutions — the African Commission on Human and Peoples' Rights (African Commission) and African Court on Human and Peoples' Rights (African Court) on Internet shutdowns. There have been resources on various court decisions on Internet shutdowns⁵ and digital rights litigation within the African human rights system.⁶ Adding to these resources, this Guide provides a step-by-step process in approaching both the African Commission and the African Court specifically on Internet shutdowns. So far, only one communication has been filed before the African Commission with respect to Internet shutdowns while none has been filed before the African Court. This can be attributed to various reasons including inadequate awareness of the functions and roles of both institutions in the protection of human rights, especially in the digital age in the region. Therefore, this Guide is developed to assist

² See generally R Shandler 'Measuring the political and social and consequences of government-initiated shutdowns' <<https://www.usenix.org/system/files/conference/foci18/foci18-paper-shandler.pdf>> accessed 10 April 2021; T Freyburg & F Garbe 'Blocking the bottleneck: Internet shutdowns and ownership at election times in sub-Saharan Africa' *International Journal of Communication* 12(2018), 3896–3916; D Mburu Nyokabi, N Diallo, NW Ntesang, TK White & T Ilori 'The right to development and Internet shutdowns: Assessing the role of information and communications technology in democratic development in Africa' (2019) 3 *Global Campus Human Rights Journal* 147-172.

³ DM West 'Internet shutdowns cost countries \$2.4 billion last year' October 2016 *Centre for Technology Innovation* <<https://www.brookings.edu/wp-content/uploads/2016/10/intenet-shutdowns-v-3.pdf>> accessed 12 April 2021; Collaboration on International ICT Policy for East and Southern Africa (CIPESA) 'A framework for calculating the economic impact of Internet disruptions in sub-Saharan Africa' 29 September 2017 <<https://cipesa.org/2017/09/economic-impact-of-Internet-disruptions-in-sub-saharan-africa/>> accessed 12 April 2021.

⁴ T Ilori 'Life interrupted: Centering the social impacts of network disruptions in advocacy in Africa' Global Network Initiative <<https://globalnetworkinitiative.org/wp-content/uploads/2021/03/Life-Interrupted-Report.pdf>> accessed 15 April 2021.

⁵ A Rathi & A Basu 'Dialling the law: a comparative assessment of jurisprudence on Internet shutdowns' 30 October 2020 *Association for Progressive Communications* <https://www.apc.org/sites/default/files/Internet_Shutdowns_20.11.10.pdf> accessed 15 April 2021.

⁶ Media Legal Defence Initiative 'Digital Rights Litigation Guide: Litigating digital rights and freedom of expression online in East, West and Southern Africa' <<https://www.mediadefence.org/wp-content/uploads/2020/06/MLDI-Digital-Rights-Litigation-Guide.pdf>> accessed 15 April 2021; Media Legal Defence Initiative 'Mapping digital rights and online freedom of expression in East, West and Southern Africa' 2018 <https://10years.mediadefence.org/wp-content/uploads/2019/07/Mapping-digital-rights-litigation_Media-Defence_Final.pdf> accessed 18 April 2021.



organisations, individuals or any other party with bringing matters relating to Internet shutdowns before African Commission and the African Court. The objectives of this Guide are to:

- a. Seek redress for human rights violations for arbitrary network shutdowns;
- b. Develop interests in the regional quasi-judicial and judicial institutions on strategic litigation and Internet shutdowns;
- c. Contribute to judicial decisions of the national courts on Internet shutdowns; and
- d. Improve the implementation of the applicable provisions of the African Charter on Human and Peoples' Rights⁷ (the African Charter) and other human rights instruments related to Internet shutdowns.

African Commission on Human and Peoples' Rights

The African Commission is the foremost human rights body of the African Union established under Article 30 of the African Charter. The Commission is composed of 11 members⁸ who are elected by the Assembly of Heads of States of the African Union, upon their nomination by member states of the African Union. Even though the members are nominated by States, they serve in their individual capacity and are required to have expertise on human and peoples' rights, high moral integrity and impartiality.⁹

The Secretariat of the African Commission to whom cases on Internet shutdowns may be submitted to is located in Banjul, the Gambia, even though the Commission may also hold its sessions in any of the member states of the African Union, upon invitation. The Commission holds at least 4 ordinary sessions every year and may hold extraordinary sessions when requested by a majority of its members or the Chairperson of the African Union Commission.¹⁰ The sessions may be held in public or privately but at least 2 of them are required to have both public and private proceedings.¹¹ It is at these sessions that the Commissioners meet to consider cases submitted by individuals and NGOs concerning human rights violations.

The African Commission has a number of functions related to the promotion and protection of human and peoples' rights in Africa. According to Article 45 of the African Charter, the mandates of the Commission includes:¹²

- Undertaking research and collecting information concerning human rights problems on the continent and to disseminate such information through conferences, symposia and recommendations to states;
- Providing elaboration on human rights norms and guidance to governments on how to better implement their human rights obligations through soft law instruments such as resolutions, guidelines and general comments among others;

⁷ African Charter on Human and Peoples' Rights <<https://www.AfricanCommission.org/legalinstruments/detail?id=49>> accessed 22 May 2021.

⁸ Article 31 of the African Charter.

⁹ As above.

¹⁰ Rules 28 & 29 of 2020 Rules of Procedure.

¹¹ As above.

¹² Article 45 of the African Charter.



- Protect human rights, principally through adjudicating on complaints of human rights violations submitted against state parties; and
- Interpret provisions of the African Charter when requested to do so by a member state, institutions of the African Union or African organisations recognised by the African Union.

In furtherance of these mandates, the Commission engages in many activities aimed at promoting and protecting human and peoples' rights on the continent, including visiting member States to engage with stakeholders on human rights issues (promotional visits), receiving periodic reports from member States outlining the measures they have adopted to give effect to their obligations under the African Charter and receiving and adjudicating on complaints of human and peoples' rights violations made against member states.

Under Articles 48 and 49 of the African Charter, the African Commission is empowered to consider communications submitted by one State party claiming that another State party of the African Charter has violated one or more of the provisions of the Charter. In addition to this, individuals and organisations may also submit communications to the African Commission with respect to the violation of one or more rights as provided for in the African Charter.¹³ This means that only State parties, organisations and individuals may submit a Communication on Internet shutdowns before the African Commission.

The Communication may be sent by courier to the Commission's address in The Gambia or via email:

31 Bijilo Annex Layout, Kombo North District
Western Region P.O. Box 673 Banjul
The Gambia
Tel: (220) 441 05 05, 441 05 06
Cell-Phone: +220 2304361
Fax: (220) 441 05 04
E-mail: au-banjul@africa-union.org

African Court on Human and Peoples' Rights

The African Court was established through a Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights (African Court Protocol) ¹⁴ adopted in 1998 to complement and reinforce the protective mandate of the African Commission.¹⁵ The Protocol came into force in 2004 after it received the required 15 ratifications. The seat of the Court is in Arusha, Tanzania. The Protocol has been ratified by 31 countries.¹⁶ Similar to the African

¹³ Article 55 of the African Charter.

¹⁴ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (the Protocol).

¹⁵ Article 2 of the Protocol.

¹⁶ These are Algeria, Benin, Burkina Faso, Burundi, Cameroon, Chad, Cote d'Ivoire, Comoros, Congo, Gabon, Gambia, Ghana, Kenya, Libya, Lesotho, Mali, Malawi, Mozambique, Mauritania, Mauritius, Nigeria, Niger, Rwanda, Sahrawi Arab Democratic Republic, South Africa, Senegal, Tanzania, Togo, Tunisia, Uganda and Republic of Congo.
<<https://www.african-court.org/wpafc/basic-information/#establishment>>

Commission, the African Court is composed of 11 Judges nominated by State parties to the Protocol.¹⁷ Judges though nominated by States serve in their individual capacity and must be jurists with competence in human and peoples' rights.¹⁸

The Court is administered by a Registry which is responsible for receiving cases and preparing them for consideration by the judges of the Court.¹⁹ The Court holds at least four ordinary sessions²⁰ each year and may hold extraordinary sessions if requested by the President of the Court or a majority of the judges.²¹ It is at these sessions that cases are considered by the judges. Sessions of the court are usually held at its seat in Arusha or any place within the territory of a member state of the African Union (AU). In exceptional instances, virtual sessions are held by the Court as has been necessitated by the COVID-19 pandemic.²²

Before a case on Internet shutdowns against a member state can be brought before the African Court, three conditions must be complied with. First, it must be a State party to the African Charter.²³ As at June 2021, 54 out of 55 African Union member states were parties to the African Charter with the exception of Morocco.²⁴ Second, the State must have ratified the African Court Protocol. Third, such State must have made a declaration under Article 34(6) of the Court Protocol which grants the rights to individuals and NGOs enjoying observer status before the African Commission to directly access the Court.²⁵ The primary functions of the Court are to:²⁶

- a. Provide advice on any legal matter concerning the African Charter or any other relevant instrument on human rights as may be requested by the AU, its organs or an organisation recognized by the AU;
- b. Render judgements or settle matters amicable and
- c. Interpret and revise its judgments.

What are Internet shutdowns and why are they relevant to the African Commission and African Court on Human and Peoples' Rights?

The term Internet shutdown can be broadly defined as a disruption of national communication networks in part or as a whole. Specific kinds of shutdown events can be further categorized in terms of geography or location, the technical manner with which access is prevented, and the content or service that is the target of the shutdown.²⁷ In terms of definitions, there have been

¹⁷ Article 11 of the Protocol.

¹⁸ As above.

¹⁹ Article 24 of the Protocol.

²⁰ Rule 22 of 2020 Rules of Procedure.

²¹ Rule 23 of 2020 Rules of Procedure.

²² Rule 25 of 2020 Rules of Procedure.

²³ Article 6(2) of the Protocol.

²⁴ Ratification table for the African Charter <<https://www.achpr.org/ratificationtable?id=49>>

²⁵ Article 5(3) of the Protocol.

²⁶ Articles 3, 4 & 9 of the Protocol

²⁷ Internet Society 'Internet shutdowns: an Internet Society public policy briefing' 14 November 2017

<<https://www.Internetsociety.org/wp-content/uploads/2017/11/ISOC-PolicyBrief-Shutdowns-20171109-EN.pdf>> accessed 20 May 2021.

various concepts of Internet shutdowns focusing on these aspects. For example, it has been defined broadly as,

an intentional disruption 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.²⁸

With a more elaborate definition and examples of how it occurs, Freybrug and Garbe define it as,

any considerably disrupted access to the Internet in a country, including the targeted blocking of particularly prominent global platforms commonly used for mobilization and campaigning purposes (e.g., WhatsApp, YouTube, Facebook, Twitter), and the intentional slowing down of connections or of a specific protocol or resource (i.e. throttling).²⁹

According to Wagner, a shutdown can be considered more narrowly 'as intentional disconnections of digital communications by government authorities.'³⁰ However, with a more actor-centric perspective, Vargas-Leon defined it as,

- a. by governments to deprive their own population from having Internet access,
- b. by governments to deprive different populations (other than their own) from having Internet access (as tool of cyber-warfare); and
- c. by private citizens or organizations to deprive specific populations from Internet access.³¹

This definition affords a more elaborate consideration of the role of various State and non-State actors in Internet shutdowns. It presents an opportunity to consider Internet shutdowns not just as what national governments do, but also what foreign governments and private actors may cause.

In determining the kind of advocacy that follows a shutdown, it is important to note that there must be a basis for cause of action. Oftentimes, as already established by previous studies, most Internet shutdowns are deliberate and set in motion by State actors. As De Gregorio and Stremlau describe,

the intent of state actors to block access to the digital environment is crucial for understanding what is taking place. The intent around shutdowns is also what differentiates these practices from simple technical errors. In other words, Internet

²⁸ B Taye & Access Now 'Targeted, cut off, and left in the dark: The #KeepItOn report on Internet shutdowns in 2019' 2019 <<https://www.accessnow.org/cms/assets/uploads/2020/02/KeepItOn-2019-report-1.pdf>> accessed 20 May 2021.

²⁹ T Freyburg & L Garbe 'Blocking the bottleneck: Internet shutdowns and ownership at election times in sub-Saharan Africa' (2019) 12 *International Journal of Communications* 3904.

³⁰ Freyburg & Garbe (n 9 above) 3918.

³¹ P Vargas-Leon 'Addressing the ultimate form of cyber security control: a multiple case study for the Internet kill switch' (2016) *iConference* <<https://www.ideals.illinois.edu/bitstream/handle/2142/89412/Vargas-Leon565.pdf?sequence=1&isAllowed=y>> accessed 20 May 2021.



shutdowns do not involve technical problems to the national infrastructure potentially limiting access or connectivity, but rather the voluntary action of a state blocking the digital environment.³²

To think through a cause of action in terms of Internet shutdowns means to think of the intention behind them. What this suggests is that while accidental and unforeseen disruptions could be a cause of action depending on the scale of impacts and agreement between end users and Internet Service Providers (ISPs), unjustified, deliberate and illegal disruption of Internet access is a reasonable ground for cause of action.

These definitions and perspectives point to Internet shutdowns as intentional disruptions to communication access which could be limited or partial in scope, reach and impacts. It also points to State actors as being majorly responsible for Internet shutdowns thereby raising questions as to their propriety and justifications.

Therefore, while this Guide focuses on initiating a cause of action before both the African Commission and the African Court, it does not limit such cause of action to arise only from shutdowns caused by State actors. This is because States have the primary responsibilities of protecting human rights and provisioning socio-economic opportunities under the African Charter, therefore, whether accidental or deliberate, States can be held responsible for Internet shutdowns. As a result, it is preferable that States are brought as parties before both institutions instead. As is the current norm and practice of international human rights courts and treaty bodies, only the State can be brought before both institutions as the respondent to allegations of human rights violations.

Forms, Causes, Prevalence of Internet Shutdowns in Africa

In understanding Internet shutdowns, especially within the African context, it is important to understand the diverse ways a shutdown can take place. In some instances, a government can target a shutdown in terms of location i.e. a part of the country or geographical location. Some of the African countries that have carried out such shutdowns include Nigeria,³³ Cameroon,³⁴ and Ethiopia.³⁵ It could also be partial in terms of the access blocked, meaning that the entire network is not cut off but that certain social media platforms or specific applications are widely blocked.³⁶

³² G De Gregorio & N Stremlau 'Internet shutdowns and the limits of law' 14 *International Journal of Communications* 4236.

³³ See generally JU Jacob & I Akpan 'Silencing Boko Haram: Mobile phone blackout and counterinsurgency in Nigeria's Northeast region' (2015) 4 *Stability: International Journal of Security and Development* 1-17 <<https://www.stabilityjournal.org/articles/10.5334/sta.ey/>> accessed 20 May 2021.

³⁴ A Dahir 'This documentary tells the story of Africa's longest Internet shutdown' 6 August 2018 *QUARTZ* <<https://qz.com/africa/1349108/camerouns-Internet-shutdown-in-blacked-out-documentary/>> accessed 21 May 2021.

³⁵ YE Ayalew 'Rights deplumed: Mapping the human rights impacts of Internet shutdowns in Africa' May 2021 *Centre for Advancement of Rights and Democracy* <https://www.cardeth.org/wp-content/uploads/2021/06/CARD_RIGHTS_DEPLUMED_V11.pdf> accessed 31 May 2021.

³⁶ J Fisayo-Bambi 'Uganda, the 15th country in Africa to restrict social media due to elections' 14 January 2021 *Africa News* <<https://www.africanews.com/2021/01/14/uganda-the-15th-country-in-africa-to-restrict-social-media-due-to-elections-report/>> accessed 3 May 2021.



This is a popular form of shutdown and has been used by governments in Burundi,³⁷ Equatorial Guinea,³⁸ Gabon,³⁹ Uganda,⁴⁰ Tanzania⁴¹ and others. On the other hand, a shutdown can be “total” in that all access to the full network and all Internet services are completely blocked off and citizens are unable to access them. This has occurred in Zimbabwe,⁴² Togo,⁴³ Chad,⁴⁴ and Benin,⁴⁵ among others. In many instances, shutdowns begin first by the slowing down of Internet traffic (a type of shutdown that is called “bandwidth throttling”), which can often lead to a complete block to access the Internet altogether.⁴⁶

In terms of its causes, Internet shutdowns are largely attributable to State directives to ISPs to shut Internet access.⁴⁷ In the past, African governments who have given such orders do not rely on any relevant law and often give such orders discreetly to ISPs.⁴⁸ It is important to note that while States do not directly carry out Internet shutdowns as they do not often have the technical capabilities to do so, they are directly responsible as a result of their directives to ISPs to block Internet access. Most of the directives are often issued through executive orders or requests from telecommunications regulatory institutions or authorities.⁴⁹ As a result, governments carry

³⁷ Committee to Protect Journalists (CPJ) ‘Burundi blocks social media access during presidential elections’ 20 May 2020 <<https://cpj.org/2020/05/burundi-blocks-social-media-access-during-presiden/>> accessed 12 May 2021.

³⁸ F Anthonia & B Taye ‘A broken promise to #KeepItOn: Guinea cuts Internet access and blocks social media on referendum day’ 24 March 2020 *Access Now* <<https://www.accessnow.org/a-broken-promise-to-keepit-on-guinea-cuts-Internet-access-and-blocks-social-media-on-referendum-day/>> accessed 15 May 2021.

³⁹ News 24 ‘Internet restored, social media still blocked in Gabon’ 5 September 2016 <<https://www.news24.com/news24/Africa/News/Internet-restored-social-media-still-blocked-in-gabon-20160905>> accessed 15 May 2021.

⁴⁰ Reuters ‘Uganda orders all social media to be blocked - letter’ 12 January 2021 <<https://www.reuters.com/article/uk-uganda-election-social-media-idUSKBN29H1EB>> accessed 15 May 2021.

⁴¹ D Sakpa ‘Tanzania restricts social media during election’ 29 October 2020 <<https://www.dw.com/en/tanzania-restricts-social-media-during-election/a-55433057>> accessed 14 May 2021.

⁴² Al Jazeera ‘Zimbabwe imposes Internet shutdown amid crackdown on protests’ 18 January 2019 <<https://www.aljazeera.com/news/2019/1/18/zimbabwe-imposes-Internet-shutdown-amid-crackdown-on-protests>> accessed 12 May 2021.

⁴³ J Nanfuka ‘Good News, bad news: A story of Internet shutdowns in Togo And Ethiopia’ 16 July 2020 <<https://cipesa.org/2020/07/good-news-bad-news-a-story-of-Internet-shutdowns-in-togo-and-ethiopia/>> accessed 15 May 2021.

⁴⁴ Amnesty International ‘Chad: Internet shutdowns impeding freedom of expression’ 9 April 2021 <<https://www.amnesty.org/en/latest/news/2021/04/tchad-les-coupires-Internet-une-entrave-la-liberte-dexpression/>> accessed 15 May 2021.

⁴⁵ Amnesty International ‘Benin: Internet shutdown on election day is a blunt attack on freedom of expression’ 28 April 2019 <<https://www.amnesty.org/en/latest/news/2019/04/benin-Internet-shutdown-on-election-day-is-a-blunt-attack/>> accessed 15 May 2021.

⁴⁶ E Marchant & N Stremmlau ‘A spectrum of shutdowns: Reframing Internet shutdowns from Africa’ 2020 14 *International Journal of Communications* 4336-4337.

⁴⁷ As above 4221.

⁴⁸ T Walton ‘Navigating litigation during Internet shutdown in Southern Africa’ June 2019 <<https://www.southernafricalitigationcentre.org/wp-content/uploads/2019/08/SALC-Internet-Shutdown-Guide-FINAL.pdf>> 8-10 accessed 15 May 2021.

⁴⁹ As above.

out shutdowns through proxy – giving orders to ISPs to carry out such shutdowns – who through their business arrangements with the governments as their primary licensors of spectrum give in to such orders.

It is important to distinguish causes from reasons in this context as they may not necessarily be the same. For example, the cause of an Internet shutdown could be deliberate or accidental. It is deliberate when directly carried out by the government through proxy and they are often accidental when caused by technical challenges including undersea cable cuts or substantial damage to telecommunications infrastructure.⁵⁰

Governments justify internet shutdown orders through a number of legal bases such as protecting national security, mitigating online harms like hate speech⁵¹ or restoring public order during major political events like elections or public protests.⁵² Some have also given reasons for shutdowns as necessary in order to prevent students from cheating during examinations.⁵³ Oftentimes however, the causes and reasons for these shutdowns do not find any basis in law and where such laws exist, they are not necessary nor proportionate remedies to these policy and political challenges, and they are not in compliance with international human rights standards.⁵⁴

With respect to prevalence in African countries, at least 31 African countries have shut Internet access since the first instance of online censorship in Africa in 1996 when Zambia restricted its first website.⁵⁵ Most shutdowns have occurred from 2011 onward. Perhaps one of the most notable incidents of Internet shutdowns could be traced to the Arab Spring which took place in North African countries like Egypt and Libya. Since then, Internet shutdowns have made a steady but inglorious increase while having several debilitating impacts. A study that focuses on some of the underlying causes of Internet shutdowns carried out by the Collaboration on International ICT Policy for East and Southern Africa (CIPESA) noted that States who have long-serving leaders tend to shut Internet access more compared to those that do not.⁵⁶ The report which profiled 22

⁵⁰ African News 'Internet slows across Africa as major undersea cables falter' 17 January 2021 <<https://www.africanews.com/2020/01/17/africa-internet-outage-after-cable-issue/>> accessed 15 May 2021.

⁵¹ Al Jazeera 'Chad slows down Internet to curb 'hate speech' on social media' 4 August 2020 <<https://www.aljazeera.com/news/2020/8/4/chad-slows-down-internet-to-curb-hate-speech-on-social-media>> accessed 15 May 2021.

⁵² C Giles & P Mwai 'Africa Internet: Where and how are governments blocking it?' 14 January 2021 <<https://www.bbc.com/news/world-africa-47734843>> accessed 16 May 2021.

⁵³ E Sayadi & D Samaro 'Internet shutdowns in Algeria and Sudan: damaging practices during exceptional circumstances' <<https://www.accessnow.org/Internet-shutdowns-in-algeria-and-sudan-damaging-practices-during-exceptional-circumstances/>> accessed 16 May 2021.

⁵⁴ Y Eneyew Ayalew 'Assessing the limitations to freedom of expression on the Internet in Ethiopia against the African Charter on Human and Peoples' Rights' (2020) 20 *African Human Rights Law Journal* 315-345.

⁵⁵ S Burnheim 'The right to communicate' February 1999 <<https://www.article19.org/data/files/pdfs/publications/africa-internet.pdf>> accessed 15 May 2021.

⁵⁶ Collaboration on International ICT Policy for East and Southern Africa (CIPESA) 'Despots and disruptions: Five dimensions of Internet shutdowns in Africa' (2019) <https://cipesa.org/?wpfb_dl=283> accessed 21 May 2021.



countries from 2014 to 2019 showed that 17 of those countries had carried out Internet shutdowns.

Since the African Commission and the African Court both have the primary mandate of protecting the rights contained in the African Charter, the scope of this Guide is limited to the human rights provided for in the Charter and other treaties⁵⁷ in force as affected by Internet shutdowns. This is because there is a more important need to reconsider how these shutdowns can be addressed through legal redress not only within national contexts but also through regional human rights institutions like the African Commission and the African Court. This is because there is a direct obligation by African Union member states particularly with respect to the African Charter in protecting the rights provided in it as it has been established by many studies that Internet shutdowns have debilitating impacts on human rights especially as enjoyed online.⁵⁸

Human Rights Violations Resulting from Internet Shutdowns

There have been various studies which detail the negative impacts of Internet shutdowns. For example, shutdowns' impacts on human rights have been detailed in a report produced by the Global Network Initiative (GNI). In addition to this, the social impacts of these network shutdowns especially in Africa are examined in another recent report also published by the GNI.⁵⁹ In a research paper, the impacts of network disruptions on the right to development have also been considered.⁶⁰ In many of these studies and reports, findings show that not only are Internet shutdowns ineffective for the reasons given by most State actors who have been found to be the major causes behind them, they are often deployed arbitrarily and without a legal, legitimate or proportionate basis.

[Under the African Charter, States are the primary duty and responsibility to respect, protect and fulfil the human rights outlined.⁶¹] In order to ensure that these duties and responsibilities are carried, the African Commission and the African Court, through their mandates and various mechanisms ensure that States comply with the rights provided for under the African Charter.

In making a case for litigating Internet shutdowns at both institutions, there are various factors that should be considered by prospective complainants. This is because online rights (or digital rights) are the same offline and when violated constitutes a basis for enforcing the rights under the African Charter. Therefore, the various rights provided for under the African Charter are extended the same level of protection as if they were enjoyed offline. Given the increasingly blurred lines between offline rights and online rights, especially considering the new reality of

⁵⁷ See generally C Heyns & M Killander *Compendium of key human rights documents of the African Union* (2013) <<https://www.pulp.up.ac.za/component/edocman/compendium-of-key-human-rights-documents-of-the-african-union-fifth-edition>> accessed 21 May 2021.

⁵⁸ J Rydzak 'Disconnected: A human rights-based approach to network disruptions' (2018) *Global Network Initiative* <<https://globalnetworkinitiative.org/wp-content/uploads/2018/06/Disconnected-Report-Network-Disruptions.pdf>> accessed 22 May 2021. Though not specific to the African Charter, this report examines the various impacts of Internet shutdowns on human rights that are also provided for under the African Charter.

⁵⁹ Ilori (n 4 above).

⁶⁰ Nyokabi et al (n 2 above).

⁶¹ Article 1; article 25 of the African Charter.



Africans as having to rely on digital technologies during the COVID-19 pandemic, it has become necessary to ensure all avenues for the facilitation and operationalisation of the human rights provided for under the African Charter are explored.

As previously highlighted, Internet shutdowns largely impede the enjoyment of human rights. In situating Internet shutdowns within the African Charter, it is important to consider the various generations of rights protected under the charter. The African Charter, so far, is the only primary and regional human rights instrument that provides for the three major generations of human rights namely civil and political rights, socio-economic rights and collective rights in one document. It provides for civil and political rights including freedom of conscience (article 8); right to access information and freedom of expression (art 9); right to freedom of association (art 10); right to freedom of assembly (art 11); and the right to participate in government (art 13). With respect to socio-economic rights, it provides for the right to property (article 14); right to work (art 15); right to health (art 16) and the right to education (art 17). It also provides for collective rights through the right to family and vulnerable groups (art 18); right of all peoples and equality rights (art 19); right to self-determination (art 20), right to economic, social and cultural development (art 22).

Each of these rights are therefore either promoted when there is Internet access or violated when it is illegally shut down. As most Internet shutdowns occur during political events in Africa, civil and political rights are often the first and most direct casualty. For example, the ability to communicate, inform and express online during elections is restricted when Internet shutdowns occur. In addition to this, protests, which now have both offline and online manifestations, cannot be carried out when access to the Internet is shut, which impacts on the right to freedom of assembly and association. Equally important, the right to access public information, or information for private use by citizens is grossly violated during Internet shutdowns.

In terms of socio-economic rights, particularly because Africa is the continent with the youngest population⁶², reliant on technologies for finding and maintaining employment, Internet shutdowns illegally and illegitimately restrict the enjoyment of the right to work. This is because more Africans, buoyed by old and new technologies now use the Internet as one of their primary modes of business, political participation and other legitimate purposes. More Africans now have more Internet access than they did in the last two decades with the possibility of such numbers doubling as life continues to move online.⁶³ Shutting Internet access therefore does not only slow down such possibility, it actively violates other socio-economic rights such as the right to education online, sexual and reproductive health online and even access to online financial services.⁶⁴

In addition, shutting access can also affect the enjoyment of collective rights. For example, Cameroon blocked Internet access to Southern Cameroon which makes up the Anglophone-

⁶² J Myers '19 of the world's 20 youngest countries are in Africa' 30 August 2019 World Economic Forum <<https://www.weforum.org/agenda/2019/08/youngest-populations-africa/>> accessed 22 May 2021.

⁶³ Ilori (n 4 above), 14.

⁶⁴ Ryzak (n 39 above).



speaking region for more than a year as a result of their call for the right to self-determination. This also impacts the right to economic, social and cultural development in no small measure as persons living in such regions are unable to ply their trade online or enjoy the social and cultural rights enabled by Internet access.⁶⁵ All of these when compared to various aspects of collective rights therefore limit the full enjoyment of various groups or persons online.

As noted above, Internet shutdowns negatively impact the enjoyment of human rights provided for under the African Charter. It is however important to note, that while the African Charter forms the primary basis upon which a matter may be brought before both institutions on the human rights violations caused by Internet shutdowns, various thematic human rights treaties that are in force within the African human rights system could also be a basis for approaching both institutions. Therefore, it has become necessary to explore the various opportunities of seeking redress and holding States more accountable with respect to their obligations not only under the African Charter, but also under other treaties that make up the African human rights system. However, in doing this, there are various issues that should be considered before approaching both the African Commission and the African Court on Internet shutdowns in order to protect the rights provided for under the African Charter.

Setting the Stage: Considerations and Justifications for Bringing a Matter Before the African Commission and the African Court on Internet Shutdowns

There are a number of issues that need to be considered in order to bring a matter on Internet shutdown before both the African Commission and the African Court as well as a number of justifications for doing so. It is important to note that these considerations and justifications apply to both institutions. The issues include admissibility, need for states to carry out their obligations as provided for under the African Charter, seeking remedies for human rights violations and setting precedence for Internet shutdown violations through both institutions.

Admissibility of Communications Before the African Commission and the African Court

Admissibility of possible communications before the African Commission and the African Court with respect to Internet shutdowns constitute a major consideration. The issue of admissibility of communications is provided for under Article 56(1-7) of the African Charter.

Complainants' identity

In order for a communication on Internet shutdown violation to be admissible, such communication, as provided for under Article 56(1) must indicate their authors even if they require anonymity. In *Diomessi and Others v Guinea*,⁶⁶ this has been interpreted by the African Commission to mean that authors or parties involved in the case should give their full identity. This is also provided under Rule 115(2)(a)(c) of the 2020 Rules of Procedure that such identity

⁶⁵ Association for Progressive Communications 'APC's statement on the Internet shutdown in Cameroon' 18 August 2017 <<https://www.apc.org/en/pubs/apcs-statement-Internet-shutdown-cameroon>> accessed 15 May 2021.

⁶⁶ Communication 70/92, Seventh Annual Activity Report.



will include the name, nationality, signature, address and contact details of the person filing for it.⁶⁷

This is necessary for two main reasons. First, it is necessary to be able to connect the rights violated to either a natural or legal person for either the African Commission or African Court to be able to give enforceable decisions. Second, it is necessary in order to allow the institution in question to be able to follow up with the complainant with respect to the progress of the Communication. However, under Rule 115(b) of the Rules, a complainant may request that they wish for their identity to be withheld and such request depending on the reasons provided may be granted. It has however been pointed out that individuals may choose to approach the institutions through an NGO instead rather than through their personal capacity.⁶⁸

Rights violated must be found under the African Charter

In addition, for a matter on Internet shutdown to be brought before both the African Commission and the African Court, they must have infringed on the rights provided for under the African Charter as provided for under Article 56(2). This is particularly important as it foregrounds the basis of adjudication of the African Commission and the African Court on a matter with respect to Internet shutdowns. For example, a claim for violation of one or two more rights, as highlighted above under the African Charter may be brought before either of the institutions and such will suffice as compliance with the provisions of Article 56(2) of the African Charter.

On who can bring a matter such as violation of human rights through Internet shutdowns before both institutions, Article 56 of the African Charter refers to an ‘author’ without a clear reference as to who such author could be. However, Rule 115 of the new Rules of Procedure provides that ‘a Communication submitted under Article 55 of the African Charter may be addressed to the Chairperson of the Commission through the Secretary by any *natural* or *legal* person.’ Therefore, an individual may bring a matter against a State with respect to Internet shutdown before both institutions. As Gumedze points out,

besides natural persons, any NGO, whether or not it has observer status before the Commission, may be classified as an individual for purposes of litigating before the Commission. In most instances, NGOs submit communications on behalf of natural persons. However, this does not mean that NGOs cannot bring communications on their own behalf for violation of human and people’s rights in Africa. As a matter of practice, NGOs may bring a communication on behalf of other NGOs.

One of the justifications for considering a matter on Internet shutdowns before both institutions is to ensure that States respect, protect and fulfil their human rights obligations under the African Charter. As highlighted above, the negative impacts of Internet shutdowns cuts across all the

⁶⁷ *Centre of the Independence of Judges and Lawyers v. Algeria* App. Nos. 104/94-109/94 & 126/94, Af. Comm. H.P.R. (Apr. 27, 1994), para. 6. The African Commission refused this Communication because it did not provide these details.

⁶⁸ S Gumedze ‘Bringing communications before the African Commission on Human and Peoples’ Rights’ (2003) 3 *African Human Rights Law Journal* 129.



generations of rights provided for under the African Charter. These rights are primarily the responsibilities of the States in terms of how they are enjoyed. Therefore, NGOs and individuals have the basis for a cause of action to bring a matter on Internet shutdowns before the African Commission and the African Court where its requirements to receive communications have been complied with.

Communication must not include disparaging or insulting language

Under Article 56(3), in order for a Communication to be brought before both the African Commission and the African Court, they must not include disparaging or insulting language. This requirement is particularly problematic as it does not explicitly define what such language may mean. However, the African Commission has given a general direction as to interpreting such language. In *Ligue Camerounaise des Droits de l'Homme v Cameroon* the African Commission held that language used must contain a certain degree of specificity.⁶⁹ What this suggests is that the language to be included in a communication must be such that is abundantly verifiable and factually relevant. Therefore, the use of words that do not directly address the claims of human rights violations, in their exact meanings and occurrence may constitute such disparaging or insulting language.

Exhaustion of local remedies

One of the primary pre-conditions for considering a matter before the African Commission or African Court for example is the need for a complainant to have exhausted local remedies under Article 56(5) of the African Charter. Oftentimes, the NGOs or private individuals who bring a case before both institutions are always presented with an opportunity to air their grievances before a competent national judicial institution before bringing such matters before both regional institutions. The idea behind this is to ensure that the State in question is presented with an opportunity to address the alleged human rights violation before approaching a regional or international human rights body. This is in line with state sovereignty and the recognition of national institutions as the primary implementers and enforcers of international human rights obligations. In many instances, both institutions have ruled on the inadmissibility of a matter because it did not comply with the exhaustion of local remedies principle.

However, there are three pivotal principles that must be complied with before an applicant will be compelled to comply with the requirement of exhausting local remedies. They are the availability, effectiveness and sufficiency principles. In essence, local remedies must be available, effective and sufficient for an applicant to be required to exhaust them. Local remedies are said to be available if they can be accessed by the complainant without any challenges, effective if it offers a chance of success and sufficient if it is capable of addressing the case for redress to make adequate and enforceable decisions. This position has been affirmed by the African Commission in *Jawara v The Gambia*⁷⁰ where it held that,

⁶⁹ Communication 65/92, Tenth Annual Activity Report.

⁷⁰ Communications 147/95 & 149/96, Annual Activity Report, para 35.



remedy is considered available if the petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint.

It went further to state that in paragraphs 33-38 of the case that,

A remedy is considered available only if the applicant can make use of it in the circumstance of his case. Remedies, the availability of which is not evident, cannot be invoked by the State to the detriment of the complainant. Therefore, in a situation where the jurisdiction of the courts has been ousted by decrees whose validity cannot be challenged or questioned, as is the position with the case under consideration, local remedies are deemed not only to be unavailable but also non-existent.

Even though the African Commission would consider the various circumstances adduced before it in reaching a conclusion as to whether local remedies were exhausted or not, the working general principle is that a complainant must make efforts to present their case before a national judicial institution within a legal order and see it through to a conclusion. The conclusion should be the end of the proceedings of the judicial institution with an outcome of the case and the decisions of appellate judicial authorities where such are available.

However, where a complainant is unable to do such, it must present an abundantly clear proof that such efforts were made but have been frustrated by the unavailability, ineffectiveness or insufficiency of the remedies. Therefore, before a matter on Internet shutdowns can be brought before the African Commission and the African Court, the applicant must have exhausted local remedies. In addition, applicants may also state that local remedies have been exhausted when they are unduly prolonged. Such long periods may include the case pending before national courts or instances where it is impractical to exhaust local remedies because of the large number of victims involved.

Communication must be brought within a reasonable period

An additional requirement before submitting a communication on Internet shutdown before the African Commission and the African Court is that the period in which it occurred and when it is brought before both institutions is reasonable under Article 56(6). Like the requirement under Article 56(3), a 'reasonable time' is not defined by the African Commission and is left to it to decide. However, what appears to be the case is that the African Commission would consider the surrounding circumstances of a particular communication in resolving whether it was brought before it or the African Court within a reasonable time. For example, a ten-year lapse between when an Internet shutdown has occurred and when it is brought before the African Commission or the African Court may constitute an unreasonable time. However, where the delay was as a result of prolonged and undue delay in the exhaustion of local remedies, both institutions may reconsider the reasonability requirement.

Communication must not have been decided before the UN or AU's dispute resolution mechanisms



Where the same matter on Internet shutdown to be brought before the African Commission and the African Court has been decided before the United Nations' or African Union's dispute resolution mechanism, such communication will most likely be ruled inadmissible by either institution. This rule as provided for under Article 56(7) of the African Charter however is not particularly clear as to whether such communication is still foreclosed if only a part of the claim made was addressed or whether the complainant still feels aggrieved. It is mostly clear that the essence of the requirement may be to avoid the duplication of communications with respect to the same matter that addresses the same issues.

Setting Precedence for Litigation of Violations of Digital Rights and Specifically Internet Shutdowns Under the African Charter

Additionally, the African Charter as the primary human rights instrument in the region is required to be tested from time to time on its relevance in solving contemporary human rights issues. One of such issues is Internet shutdowns. Given the rich jurisprudence of the African Commission and the African Court on various topical human rights issues under the African Charter, it has become important to consider the possibility of both institutions hearing a matter on digital rights violations including Internet shutdowns.

Seeking Redress and Justice Violation for Rights

Since human rights violations can exist as claims, and claims can be addressed by seeking redress, Internet shutdowns constitute claims of violation of various human rights and should therefore exist as claims before the competent regional human rights institutions vested with such responsibility like the African Commission and the African Court.

For example, when a State-ordered Internet shutdown without any reasonable justification has occurred and NGOs or individuals feel aggrieved by it, they have the right to approach both institutions for redress while also following the various rules of admissibility in both institutions. For example, for the African Commission, the provisions of Article 56 of the African Charter must be complied with while for the African Court, the Declaration of Article 34(6) of the Court's Protocol must have been made by the country in question before an NGO or individual can bring such case before the Court.

The African Commission on Human and Peoples' Rights

The processes before the African Commission have been streamlined with the introduction of the 2020 Rules of Procedure (RoPs). In the previous (2010) rules, applicants had to first make an application to the Commission outlining the preliminary issues such as jurisdiction and admissibility, which had to be first ruled on by the Commission before submissions on the merits were made.⁷¹ This led to inordinate delays in many instances, prompting the Commission to simplify and clarify some of the processes in the 2020 RoPs.

⁷¹ See Media Legal Defence Initiative 'Digital rights litigation guide'¹⁸ <https://www.mediadefence.org/wp-content/uploads/2020/06/MLDI-Digital-Rights-Litigation-Guide.pdf>.



A communication may be submitted in any of the working languages of the African Union.⁷² Communications submitted to the Commission are confidential and are considered by the Commission in private.⁷³ The applicant cannot disclose the content of the complaint publicly or to other people who are unrelated to the complaint. Individuals or NGOs that submit communications to the Commission may appear in person or be represented by someone nominated to appear on their behalf.⁷⁴

A communication must be in writing, submitted to the Chairperson of the Commission through the Secretary.⁷⁵ The communication must at minimum contain certain information before it will be registered by the Secretary. These include:⁷⁶

- The name(s), nationality and signature of the applicant(s) or their representative;
- A declaration on whether the applicant wishes to have their identity withheld; This may be necessary in situations where revealing the identity of the applicant to the state party may result in reprisals;
- The correspondence address of the applicant(s), including where available, telephone, fax and email address;
- An account of the factual situation which necessitated the complaint, including dates, time, place and the nature of the violations being alleged;
- The name(s) of the victim(s) and in cases where the complainant is not the victim, evidence must be submitted that the victim(s) consent to the application being submitted unless the applicant can provide justification for their inability to obtain consent. In the context of internet shutdowns which usually affect masses of people, this requirement may not be necessary and a justification should be easily crafted;
- The name of the State(s) that are responsible for the internet shutdown.

If the Secretary is satisfied that the relevant information has been submitted, he or she will notify the applicant that the Commission has been seized by the Commission. Otherwise, the Secretary may request the applicant to furnish any missing information before deciding to be seized of the Communication.

Once the Commission is seized of the Communication, it has 60 days to notify the parties of this decision, after which the applicant will be invited to make further submissions on admissibility and merits of the case within 60 days.⁷⁷ In practice, it may be useful for the applicant to make a comprehensive submission on seizure, admissibility and merits from the beginning so as to avoid the delays that are usually occasioned by failure to make submissions within prescribed timelines. The applicant's submissions will be transmitted to the respondent state within 14 days, and the state has 60 days to respond. The applicant may reply to the response of the state, where

⁷² Rule 89 of 2020 rules of procedure.

⁷³ Rule 90 of 2020 rules of procedure.

⁷⁴ Rule 91 of 2020 Rules of Procedure.

⁷⁵ Rule 115 of 2020 Rules of Procedure.

⁷⁶ As above.

⁷⁷ Rule 116 of 2020 Rules of Procedure.



necessary and the Commission may request that the parties make further submissions of furnish relevant documentation.

In accordance with Rule 117 of the 2020 Rules of Procedure, the parties may raise any preliminary objections within 30 days of being notified by the Secretary to make submissions of admissibility and merits. The Commission is obliged to make a determination on preliminary objections before deciding on admissibility and merits of the case.

Once the parties have submitted their pleadings, the Commission will make a decision on admissibility. If the respondent state does not make any submissions, the Commission will make a decision on default on the basis of information before it. The case will be declared admissible if it satisfies the seven cumulative requirements of article 56 of the African Charter, which were earlier outlined.⁷⁸ While the Commission is obliged to notify the parties of its decision on admissibility, the decision must remain confidential pursuant to Article 95 of the African Charter until the Activity Report of the Commission has been considered by the Assembly of Heads of States of the African Union.⁷⁹

If the Communication is declared inadmissible, the applicant has 180 days upon the discovery of new facts to request the Commission to review its decision on admissibility. A request for review cannot be made after three years of a decision declaring a communication inadmissible.⁸⁰ On the other hand, where the communication is declared admissible, the respondent state has 60 days from being notified of the decision to make a request for review, if it has discovered new facts which were not know to it at the time of making earlier submissions and the lack of knowledge was not due to negligence.⁸¹ The Commission will subsequently consider the merits of the case and after deliberations of the submissions of both parties make a decision on the merits. The decision will be made by default if the respondent state does not make any submissions.⁸²

Either party may request or the Commission on its own initiative may hold oral hearings during the consideration of admissibility or merits of the case. Such a request must be made at least 90 days before the session of the Commission at which the communication is scheduled for consideration.⁸³ Hearings are conducted in private. The Commission may also allow the testimony of witnesses or experts, where necessary,⁸⁴ even though communications are usually decided on the basis of written submissions.

Once the Commission has made a decision on the merits it may make reparation orders or defer the examination of reparations and costs to a different day. If the examination of reparations and costs is deferred to a different date, the Commission may request the parties to make further

⁷⁸ Rule 118 of 2020 Rules of Procedure.

⁷⁹ Rule 118(4) of 2020 Rules of Procedure.

⁸⁰ Rule 119(1) of 2020 Rules of Procedure.

⁸¹ Rule 119(2) & (3) of 2020 Rules of Procedure.

⁸² Rule 120 (1) & (2) of 2020 Rules of Procedure.

⁸³ Rule 102 of 2020 Rules of Procedure.

⁸⁴ Rule 103 of 2020 Rules of Procedure.

submissions and may hold oral hearings on these issues.⁸⁵ A decision on the merits may be reviewed within 3 years if a party submits a request for review within 180 days discovering decisive new facts which were not available to the party at the time pleadings were filed.⁸⁶

Amicable Settlement

The Communication may on its own initiate or at the request of any of the parties facilitate the amicable settlement of the dispute. Any amicable settlement reached must be consented to by all the parties, be human rights compliant and include an undertaking by the parties to implement terms of the settlement. Where the Commission is satisfied with the terms of amicable settlement reached between or among the parties, it is required to confirm the settlement as its decision which requires implementation and follow-up.⁸⁷

Provisional Measures

One of the ways through which an applicant may receive interim relief while a communication is pending before the Commission is to apply for provisional measures. A request for provisional measures can be made at any time after a complaint has been made or may be submitted jointly with the complaint. Provisional measures are meant to preserve the status quo and prevent irreparable harm being caused to the victims of human rights violations.⁸⁸ Provisional measures enable the Commission to request that the state party engage in or refrain from engaging in certain conducts while the case is pending. For instance, if an Internet shutdown is still persisting at the time the communication is filed, an applicant may apply to the Commission to request the state restore the Internet pending the determination of the complaint. Provisional measures are not meant to prejudice the ultimate outcome of the complaint but to ensure that irreparable harm is not caused while the complaint is pending for determination.

Investigative Measures

When a complaint is submitted for adjudication, the applicant may request the Commission to adopt an investigative measure aimed at ascertaining or clarifying the facts.⁸⁹ If the Commission agrees to the request, it may call witnesses, experts or request information from relevant organisations or individuals to submit documentation that could assist the Commission in its examination of the communication. It may also conduct an investigative mission to the state party to ascertain or clarify the facts.

Amicus Intervention

One of the issues that has received some clarity in the 2020 Rules of Procedure is the procedure for intervention as *amicus curiae*. Amicus applications enable individuals or organisations to intervene in on-going litigation to provide information that may assist the Commission in reaching a decision. This may relate to facts or law. The Commission may request individuals or

⁸⁵ Rule 121 of 2020 Rules of Procedure.

⁸⁶ Rule 122 of 2020 Rules of Procedure.

⁸⁷ Rule 123 of 2020 Rules of Procedure.

⁸⁸ Rule 100 of 2020 Rules of Procedure.

⁸⁹ Rule 101 of 2020 Rules of Procedure.



organisations to make oral or written amicus interventions ‘to assist the Commission in determining a factual or legal issue.’⁹⁰ On the other hand, individuals and organisations may request to intervene as amicus by submitting an application of not more than 10 pages, highlighting contact details and the proposed contribution.⁹¹ Once the Commission grants the application, it will share the pleadings of the parties with the amicus and request the amicus to make submissions within 30 days. The amicus is required to observe the confidentiality rules and may not share the pleadings of the parties.⁹²

Third Party Intervention

Third party intervention is another innovation introduced by the 2020 rules of procedure. Through this process, a third party with direct interest in an on-going litigation may apply to the Commission to intervene if the outcome of the case will directly confer a benefit or occasion a loss to the intervener. Application for third party interventions may be submitted at any time before the Commission considers a communication on its merits.⁹³

Follow-up and Enforcement

While the African Charter is silent on the nature of reparations that may be adopted by the Commission, the Commission’s jurisprudence bears evidence that it has recommended a broad range of reparations including monetary compensation, repeal or reform of legislation and various corrective measures to remedy violation. In terms of article 59 of the African Charter, the recommendations of the Commission are confidential until the Activity Report has been considered by the Assembly of Heads of States. In the event of a decision that requires the respondent state to take specific measures to remedy the violation, Rule 125 requires the parties to inform the Commission of the measures taken by the state to implement the decisions within 180 days.

The Commission may also request the national human rights institution of the respondent state to monitor or facilitate the implementation of the decision. The Commission is required to report on the implementation of the decision at each ordinary session and may engage in other follow up activities to monitor the state’s implementation of the decision. Issues of non-compliance with decisions of the Commission may be referred to the policy organs of the African Union for enforcement.

While the 2010 rules of procedure provided an avenue for the Commission to refer cases of non-compliance to the African Court for judicial enforcement, that possibility no longer exists under the 2020 rules, as the Commission may now only refer cases to the Court before it makes a decision on admissibility.⁹⁴

Case Study

⁹⁰ Rule 104 of 2020 Rules of Procedure.

⁹¹ Rule 104 of 2020 Rules of Procedure.

⁹² Rule 105 of 2020 Rules of Procedure.

⁹³ Rule 106 of 2020 Rules of Procedure.

⁹⁴ Rule 130 of 2020 Rules of Procedure.



The African Commission has not yet decided any Internet shutdown case on its merits. There has however, been one case on Internet shutdowns which was rejected by the Commission for failing to meet the test for seizure which is not quite an onerous task. This case provides an example of what applicants must avoid and the necessary details that must be included in an application for the Commission to even consider itself seized of the matter before the respondent state(s) will be called on to defend the claim.

*African Freedom of Expression Exchange and 15 others vs Algeria and 27 others*⁹⁵

The Communication was brought by a number of NGOs against 28 African Countries which were alleged to have at one point or another intentionally interfered with Internet services or limited access to some Internet platforms between 2011 and 2019. The Communication was submitted to the African Commission in February 2020, at the beginning of the COVID-19 pandemic. The applicants alleged that the respondent states had in various instances instructed ISPs to block access to the Internet altogether or limit access to certain websites, in violation of the right to information and freedom of expression (article 9), freedom of association (article 10) and freedom of assembly (article 11) guaranteed in the African Charter.

The applicants asked for a declaration that the respondent states had violated these rights by the unlawful and unjustified Internet shutdowns or restrictions to Internet access and for the issue to be brought to the attention of the Assembly of Heads of States and Governments of the African Union (the highest decision making body of the Union) so that appropriate action can be taken by the AU to curb Internet shutdowns by member states. The Commission first had to dispose of preliminary issues of seizure in accordance with its 2020 Rules of Procedure to ascertain whether this a claim properly made so that the respondent states may be called upon to defend the claim.

One of the preliminary issues that had to be dealt with was whether all the respondent states were member states of the African Charter entitling the Commission to receive complaints submitted against them. Notably, Somaliland which is neither a member state of the African Union nor a party to the African Charter was one of the respondents against whom the communication was filed. On this account, the Commission ruled that it had no jurisdiction to entertain a claim against the Somaliland Republic. Similarly, Morocco which even though had rejoined the African Union, had not ratified the African Charter was one of the respondent states cited by the applicants. In equal measure, the Commission ruled that it had no jurisdiction to entertain a claim brought against Morocco in terms of article 115(2)(g) of the 2020 Rules of Procedure.

It is important for applicants to bear in mind that the African Commission has jurisdiction over state parties to the African Charter or other AU human rights instruments which designates the African Commission as the supervisory body. This will involve confirming with the AU treaty

⁹⁵ Communication number 742/20

https://www.achpr.org/public/Document/file/English/Decision%20on%20Comm%20742_eng.pdf.



database,⁹⁶ if the state they wish to proceed against has indeed ratified the African Charter or other relevant treaty over which the African Commission has supervisory authority and is entitled to receive complaints from individuals and NGOs against member states.

Concerning the remaining 26 states, the Commission had to decide whether a *prima facie* case had been made against them, for which they must be called upon to respond. The Commission's jurisprudence suggests that a *prima facie* case is made when the applicant(s) has adduced sufficient facts upon which 'a decision or conclusion could be reached from preliminary observation of an issue or a case without deeply scrutinizing or investigating into its validity or soundness'.⁹⁷

This means that the applicant must adduce facts which on the surface at least raise a rebuttable presumption that the respondent state has violated rights guaranteed in the African Charter. On this point, the Commission ruled that the applicants made vague allegations against the respondent states without evidence or information on the specific incidents of the alleged violations. The Commission was for instance concerned that no information had been provided on the authorities or institutions responsible for the alleged Internet disruptions nor information on the specific incidents and the consequences of the disruptions. The Commission therefore refused to be seized of the case on the grounds of vagueness and therefore did not call on the respondent states to defend the claim.

The important lesson here is that while Commission does not require that all the evidence or information concerning a claim must be provided on the first filing of a communication, there must be at least sufficient information or evidence detailing, for instance, the authority or institution responsible for ordering the Internet disruption (in order to decide if the disruption is *prima facie* attributable to the respondent state), and information relating to the impact of the disruption on affected individuals or groups. Additionally, network measurements during the shutdowns can be presented as evidence of such disruption. Thus, it is not only important to lead evidence that an internet disruption occurred but that the disruption was as a result of the conduct of the respondent state and that there was no reasonable justification for the disruption. The need to provide evidence on the impact of the disruptions is also to enable the Commission to determine whether indeed any rights had been violated on account of the disruption -- merely stating that there has been a violation of a particular provision of the African Charter is not enough.

In essence, while one could argue that the Commission had the option of requesting the applicants to provide better details of the claims as allowed under rule 115(4)-(6) of the 2020 Rules of Procedure, the Commission has by this ruling indicated that it may refuse to accept a communication that does not provide sufficient details of the alleged violations rather than ask for further details from the applicant. Applicant(s) must therefore make sure that an application

⁹⁶ <https://au.int/en/treaties>.

⁹⁷ Paragraph 42.



submitted to the Commission contains sufficient details which on the face of it links the respondent state to the Internet disruption (not merely that a disruption occurred) as well as the impact of the disruption on affected individuals or communities to enable the Commission to decide whether a *prima facie* case has been made for it to be seized of the Communication for further consideration. Where possible, applicant(s) may submit affidavits from individuals on how the Internet disruption impacted them negatively, submit expert evidence network measurements as evidence of Internet shutdowns and the general impact of the disruption. Information can also be requested from Internet service providers on the circumstances surrounding the Internet disruption where there are no publicly available records of the government indicating that the disruption was at its instruction.

The African Court on Human and Peoples' Rights (African Court)

Access to the Court

Unlike the African Commission, access to the African Court is quite restricted. Specifically, individuals and NGOs (with observer status before the African Commission) can only file cases at the Court if the state concerned has, in addition to ratifying the Protocol, made a declaration in terms of article 34(6) allowing direct access to the Court.⁹⁸ Of the 31 states that have ratified the Protocol, 10 states⁹⁹ have previously made the article 34(6) declaration, allowing direct access by individuals and NGOs. Pushback from States has resulted in at least four¹⁰⁰ of the 10 states withdrawing their article 34(6) declarations.

As a result, currently cases can be directly brought to the court against only six states – Burkina Faso, Gambia, Ghana, Malawi, Mali and Tunisia. Apart from direct access to the Court by individuals and NGOs there are a number of entities that have direct access to the Court without the need for the respondent state to make a special declaration. These include the African Commission, State parties, and African intergovernmental organisations.¹⁰¹

Jurisdiction of the Court

While the African Court exists to complement the protective mandate of the African Commission, its material jurisdiction is much wider than that of the Commission. In particular, while the Commission may only make pronouncements on specific African Union human rights instruments that specifically designate the Commission as the supervisory body, the Court may adjudicate on disputes relating to alleged violations of all human rights instruments ratified by the respondent state,¹⁰² including instruments adopted by the United Nations and Regional Economic Communities. Thus, an applicant challenging an Internet shutdown before the African Court can

⁹⁸ Article 5(3) of the Protocol.

⁹⁹ These are Benin, Burkina Faso, Cote D'Ivoire, Gambia, Ghana, Malawi, Mali, Rwanda, Tanzania and Tunisia.

¹⁰⁰ Benin, Cote D'Ivoire, Rwanda and Tanzania.

¹⁰¹ Article 5(1) of the Protocol.

¹⁰² Articles 3(1) and 7 of the Protocol.



allege violations of not only African Union human rights instruments but any other human rights treaty ratified by the respondent State, including the covenants on civil and political rights and economic, social and cultural rights.

Other forms of jurisdiction that must be considered by the Court include:

Personal jurisdiction

Involving the standing or capacity of an individual or NGO to institute cases at the African Court. As indicated above, an individual or NGO must institute the case against a State that has made the article 34(6) declaration allowing direct access. NGOs must satisfy the additional requirement of having observer status before the African Commission before filing a matter on Internet shutdowns.¹⁰³

Temporal jurisdiction

Involving the time frame within which the alleged violations were committed. In essence, the applicant must satisfy the Court that the alleged violations took place after the respondent state had ratified the African Charter and the Protocol. Violations like Internet shutdowns that occur before the ratification of the relevant human rights instrument may still be litigated before the Court if the violations or their impact are continuing subsequent to the ratification of the relevant human rights instrument.¹⁰⁴

Territorial jurisdiction

Relating to the territory within which the alleged human rights violations took place. The applicant must show that the Internet shut down took place within the jurisdiction of the respondent State.

Procedure Before the Court

Submissions to the Court must be written in any of the official languages of the Court¹⁰⁵ which are designate as 'Arabic, English, French, Portuguese, Spanish, Kiswahili and any other African language'¹⁰⁶ even though the court usually works with Arabic, English, French and Portuguese.¹⁰⁷ Submissions may be allowed in other languages if necessary and the Court is obliged to provide interpretation services in such instances.¹⁰⁸ Written submissions must include the pleadings of the parties and supporting documents.¹⁰⁹ The application should ideally contain a summary of

¹⁰³ Article 5(3) and article 34(6) of the Protocol.

¹⁰⁴ *Mtikila v Tanzania*.

¹⁰⁵ Rule 40 of 2020 Rules of Procedure.

¹⁰⁶ Rule 27(1) of 2020 Rules of Procedure.

¹⁰⁷ Rule 27(2) of 2020 Rules of Procedure.

¹⁰⁸ Rule 27(3) of 2020 Rules of Procedure.

¹⁰⁹ Rule 30 of 2020 Rules of Procedure.



the facts relied on, the alleged violations supported by evidence and indication on the exhaustion of domestic remedies (supported by exhibition of the relevant decisions, where available) or justifications for the failure to exhaust those remedies.¹¹⁰

The other admissibility requirements of Article 56 of the African Charter must also be satisfied. If the applicant desires to request for reparations in accordance with Article 27 of the Protocol, this must be indicated in the submissions.¹¹¹ The Court accepts electronic filing of applications even though the original copies of the application must be subsequently delivered to the registry of the Court.¹¹² Where it is in the interest of justice, the Court may upon request or on its own initiative provide applicants with legal aid to enable them pursue their claims before the Court.¹¹³

Requirements on disclosure of identity and contact details of the applicant(s) are similar to those observed by the African Commission even though anonymity may be requested where necessary.¹¹⁴ Once the application is filed and transmitted to the respondent state, the state has 90 days to respond to the allegations of the applicant after which the applicant may reply to the submissions of the state within 45 days of being furnished with the same.¹¹⁵ The time limits may be extended by the Court upon application by a party.¹¹⁶ The parties may also seek leave from the court to amend their pleadings, if necessary.¹¹⁷

When pleadings are closed, the Court will examine the jurisdiction and admissibility of the case,¹¹⁸ and may on its own initiative or at a request of a party decide to hold oral hearings, which must be held in public unless there are good reasons to hold the hearing in camera.¹¹⁹ Hearings are presided over by the President, Vice President or other judge as the Court may designate.¹²⁰ The Court may obtain evidence and allow the examination of witnesses, including expert evidence if necessary.¹²¹

Parties may raise preliminary objections which are usually considered and as part of the court's decision on merits.¹²² A preliminary objection therefore does not work as a bar to the court

¹¹⁰ Rule 40 of 2020 Rules of Procedure.

¹¹¹ As above.

¹¹² As above.

¹¹³ Rule 31 of 2020 Rules of Procedure.

¹¹⁴ Rule 41 of 2020 Rules of Procedure.

¹¹⁵ Rule 44 of 2020 Rules of Procedure.

¹¹⁶ As above.

¹¹⁷ Rule 47 of 2020 Rules of Procedure.

¹¹⁸ Rules 49 and 50 of rules of Procedure.

¹¹⁹ Rule 52 of 2020 Rules of Procedure.

¹²⁰ Rule 54 of 202 Rules of Procedure.

¹²¹ Rules 55 and 56 of 2020 rules of Procedure.

¹²² Rule 60 of 2020 Rules of Procedure.



continuing with the examination of the case.¹²³ If a party fails to make submissions before the Court, a default decision may be made by the court on its own initiative or at the request of the other party.¹²⁴ On the other hand, if parties have made relevant submission, the Court proceeds to deliberate on the submissions and make the relevant ruling, judgement or order. Decisions of the Court are legally binding on the parties.¹²⁵ The decision of the Court may be reviewed if a party makes a request within five years of a decision and six within months of discovering new facts which were not available to the party or could not be procured with due diligence during the trial.¹²⁶

Provisional measures

Similar to proceedings before the African Commission, the Court may make interim orders on its own initiative or at a request of a party ‘in case of extreme gravity and urgency and where necessary to avoid irreparable harm to persons.’¹²⁷ This provides an avenue for an applicant to obtain interim relief against on-going Internet shutdowns while the case is pending before the Court. In case of emergency, the provisional measures may be issued by the President of the Court, without the need for the full court to meet to examine the application.¹²⁸

Amicable Settlement

A process of amicable settlement similar to those offered by the African Commission are available before the African Court. Any agreement reached by parties amicably is examined by the Court and if accepted, is adopted by the Court and enforceable as a judgement of the Court.¹²⁹

Enforcing the Court’s Judgement

In terms of Article 27(1) of the Protocol, the Court has wide discretion to ‘make appropriate orders to remedy violation, including the payment of fair compensation or reparation.’ The Court may therefore issue any orders it deems necessary to remedy the violation, including ordering a respondent state to restore the internet to affected populations. State parties have an obligation to guarantee the execution of the judgement within the time frame stipulated by the Court.¹³⁰

The Executive Council of the African Union is required to be notified of a judgement of the Court in order to monitor its implementation.¹³¹ Rule 31 of the 2020 Rules of Procedure also allows the Court to hold implementation hearings to ascertain the measures taken by the respondent state to implement a judgement. The Court may issue further orders after the implementation hearing

¹²³ As above.

¹²⁴ Rule 63 of 2020 Rules of Procedure.

¹²⁵ Rules 67-72 of 2020 Rules of Procedure.

¹²⁶ Rule 78 of 2020 Rules of Procedure.

¹²⁷ Rule 59 of 2020 Rules of Procedure.

¹²⁸ As above.

¹²⁹ Rule 64 of 2020 Rules of Procedure.

¹³⁰ Article 30 of the Protocol.

¹³¹ Article 29 of the Protocol.



any may refer cases of non-compliance to the Assembly of Heads of States of the African Union for enforcement.¹³² So far, there no case has been filed before the Court with respect to Internet shutdowns.

While no matter has been filed before the African Court with respect to Internet shutdowns, at least six African states, Burkina Faso, Gambia, Ghana, Malawi, Mali and Tunisia have ratified the African Court Protocol and made the article 34(6) declaration. All of these states have carried out Internet shutdowns at one point or the other in the past save for Ghana. Therefore, individuals and NGOs in these countries can approach the African Court directly with respect to Internet shutdowns.

Conclusion

In summary, Internet shutdowns are violations of the rights provided for under the African Charter and other major human rights treaties in Africa. In addition to this, its prevalence in the region and far-reaching adverse impacts on the lives of many Africans require that all lawful means are explored. This includes advocacy strategies like filing communications on Internet shutdowns before the African Commission and the African Court. In doing this, this Guide is developed to provide direction for individuals and NGOs to approach both institutions where the requirements have been complied with. Some of these requirements include those provided for under Article 56(1-7) of the African Charter and the rules of procedure before the African Commission and the African Court. It is hoped that this Guide will add to the ongoing efforts to combat Internet shutdowns not only in national or sub-regional courts but also within the regional human rights system.

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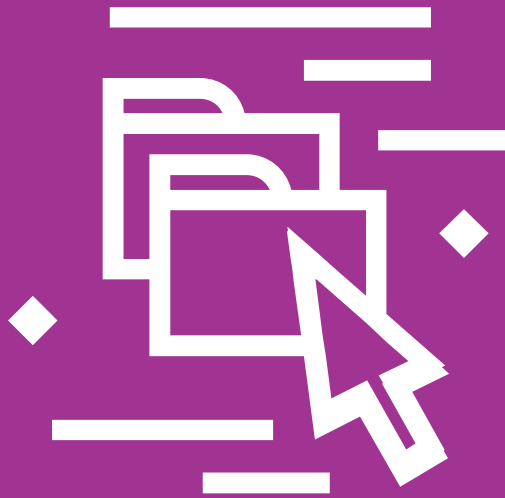
¹³² Rule 81 of 2020 Rules of Procedure.



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Contextualizing Your Data

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