

**Centre for Human Rights, University of Pretoria Shadow Report for Niger, ACHPR
Submission, Session 68**



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1. Introduction

The Centre for Human Rights (the Centre) takes note of the periodic report submitted by the government of Niger to the African Commission on Human and Peoples' Rights (the Commission) covering the period from 2017 to 2019. This shadow report draws the attention of the Commission to the compliance of Niger with article 9 of the African Charter on Human and Peoples' Rights (the African Charter). It raises critical issues and highlights commendable developments in advancing the rights guaranteed under article 9 of the African Charter. This report also proposes key questions for the Special Rapporteur on Freedom of Expression and Access to Information to consider in the assessment of Niger's compliance. In conclusion, the report proposes recommendations that the Commission can consider in its concluding observations to the government of Niger.

This shadow report is guided by the provisions of article 9-related soft law instruments including the Declaration of Freedom of Expression and Access to Information (The Declaration), the Model Law on Access to Information for Africa (Model law) and the Guidelines on Access to Information and Elections in Africa (The Guidelines) in assessing Niger's compliance with article 9 of the Charter.

2. Freedom of Expression

Article 30 of the Nigerien Constitution guarantees freedom of expression to all citizens as required under article 9 of the African Charter. However, the Centre is concerned about the serious violations and threats to freedom of expression in Niger as elaborated in the analysis below.

2.1 Free Speech

The Centre notes with concern the arrests of human rights defenders who exercise their right to freedom of expression in the course of their work. The following instances are worth highlighting:

- Mahaman Lawai Mahaman Nassourou, vice-president of the Independent Thought and Orientation Committee for the Safeguard of Democratic Achievement (Comité de réflexion et d'orientation indépendant pour la sauvegarde des acquis démocratiques – CROISADE) and member of anti-corruption network Rotab was arrested on 22 April 2020. He was charged with spreading information that could disturb public order under

the cybercrime law after allegedly forwarding a message on WhatsApp from a religious organization that had denounced the closure of mosques.¹

- Garba Dan Saley Laouali, a member of the civil society group, Patriotic Movement for Responsible Citizenship (Mouvement patriotique pour une citoyenneté responsable), was arrested for a Facebook post on the detention of Nassourou and calling for the mobilization of civil society. He was charged with disturbing public order under the cybercrime law.²
- Amina Maiga, a court official, was arrested on 29 April 2020 and sentenced to a suspended prison sentence of three months and a fine of 20,000 francs CFA (approximately US\$36) on 7 May 2020 for posting a private WhatsApp message. In this message, she criticised the government's response to the COVID-19 pandemic. She was similarly charged for violating the cybercrime law.³

The charges against the above-mentioned human rights defenders violated their freedom of expression and amounted to criminalisation of freedom of expression. The Centre condemns such conduct by the government of Niger.

2.2 Media Freedoms

The Centre is appalled by the violation of media freedoms in Niger. The National Office of Publishing and Press (Office National d'Édition et de Presse - ONEP), a state-owned publisher, fired Samira Sabou, a contributor to the *Le Sahel* and *Le Sahel Dimanche* newspapers after she posted a picture of herself mimicking President Mahamadou Issoufou on her Facebook page in October 2017.⁴ This represents censorship of journalistic works. Principle 12(1) of the Declaration stipulates that states must guarantee independent media including print and broadcast media. Furthermore, in *Good v Botswana*, the Commission highlighted that 'a higher degree of tolerance is expected when it is a political speech and an even higher threshold is required when it is directed towards the government and government officials.'⁵

¹ Civicus 'Judicial harassments and arrests of activists continues unabated' (2020) <https://monitor.civicus.org/updates/2020/06/19/Judicial-harassment-arrest-activists-continues-unabated/> (accessed 6 March 2021).

² Law No. 2019-33.

³ (n 2) above.

⁴ MWFA 'State publisher sacks journalist for mimicking Head of State on Facebook' (2017) <https://www.mfwa.org/issues-in-focus/state-publisher-sacks-journalist-for-mimicking-head-of-state-on-facebook/> (accessed 7 March 2021).

⁵ *Good V Republic of Botswana Communication* NO. 313/05 [2010] ACHPR 106 para 198.

As at 2 August 2018, the government of Niger had shut down nine private media outlets over tax debt allegations. It is alleged that the government of Niger granted a few of these media outlets leeway to pay back the debt but denied the same moratorium to media houses perceived to be against the state, such as *Le Courrier*. The organisation for media organisations in Niger, *Maison de la Presse (MP)*, called for an end to this alarming targeting of specific media organisations. It urged the State to adequately resolve the challenges in a way that permits the media to operate.⁶ In its State report,⁷ the government of Niger acknowledged shutting down media outlets but asserted that it was necessary to address ‘hate, revolt and incitement to violence carried by these media outfits as well as their lack of taxpayer compliance.’ From this statement, it is apparent that the shutting down of the media outlets was mainly driven by the drive to crackdown on opposition and dissenting voices. The above incidents do not align with international human rights laws and standards on limitations of rights.

On 25 March 2018, the police ordered the closure of the independent radio and tv broadcaster, *Labari* for refusing to submit an interview recording. The police went on to barricade access to the premises of *Labari*.⁸ The Centre condemns this violation of media freedoms which undermines the promotion of a diverse private media as vehicles for the development and dissemination of a variety of content in the public interest.⁹

2.3 Cybercrime Law and infringement on freedom of expression

Niger enacted its cybercrime law¹⁰ to regulate responses to cybercrimes. Addressing cybercrimes is a commendable stance, however, article 31 of the Act is a threat to human rights defenders and media practitioners. This section criminalises the ‘dissemination,

⁶ MFWA ‘Revenue Service Closes Down Media Outlets for Non-payment of Taxes’ (2018) <https://www.mfwa.org/revenue-service-closes-down-media-outlets-for-non-payment-of-taxes/> (accessed on 7 March 2021).

⁷ Fifteenth (15th) Periodic Report of the Republic of Niger on the implementation of the African Charter on Human and Peoples’ Rights covering the period 2017-2019, presented pursuant to article 62 of the said Charter’ para 88.

⁸ Niger Diaspora ‘Declaration of the African Publishers Forum on the situation of the closure of Radio and Television LABARI’ <https://nigerdiaspora.net/index.php/societe/3680-declaration-du-forum-des-editeurs-africains-sur-la-situation-de-la-fermeture-de-la-radio-et-television-labari> (accessed 7 March 2021).

⁹ Principle 14(1) ACHPR Declaration of Principles on Freedom of Expression and Access to Information.

¹⁰ Law No. 2019-33 of 3 July 2019.

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production and making available to others, data that may disturb public order or threaten human dignity through an information system,' with a likely penalty of up to three years' imprisonment.¹¹ This provision has proved to be a tool for abuse by authorities as it is broadly implemented in a way that interferes with freedom of expression.¹²

On 5 March 2020, the police arrested Kaka Touda, an independent journalist for publishing a Facebook post on a suspected COVID-19 case. He was arrested at his house and charged with disseminating data likely to disrupt public order under article 31 of the cybercrime law.¹³ The Commission has stated that freedom of expression shall not be restricted on grounds of public order and national security unless there is a real risk of harm to a legitimate interest and there is a close causal link between the risk of harm and the expression. In this case, there was no real risk of harm to a legitimate interest rather the information regarded an issue of public interest. The post by Kaka was followed by an unwarranted crackdown on his media freedom.¹⁴

Furthermore, the cybercrime law provides for criminal defamation under article 29. This is contrary to press laws in Niger. In its State report, the government of Niger denies detaining anyone for criminal defamation.¹⁵ However, the Centre notes that on 10 June 2020, a blogger, Samira Sabou, was arrested and charged with defamation by electronic means of communication under article 29 of the cybercrime law.¹⁶ This arrest was in connection with a Facebook post in which she exposed embezzlement within the Ministry of Defence. According to the cybercrime law, the defamation charge has a likely sentence of up to three years' imprisonment. The arrest of Samira Sabou contradicts Niger's press law which regulates the media and provides that journalists can only be fined for criminal defamation crimes. Samira

¹¹ Art 31 Law No. 2019-33 of 3 of 2019.

¹² Amnesty International 'Niger. Cybercrime law is an instrument to suppress dissenting voices' (2020) <https://www.amnesty.org/fr/latest/news/2020/05/niger-la-loi-sur-la-cybercriminalite-est-un-instrument-de-repression/> (accessed 22 February 2021).

¹³ CPJ 'Journalist Kaka Touda Mamane Goni arrested in Niger over COVID-19 report' (2020). <https://cpj.org/2020/03/journalist-kaka-touda-mamane-goni-arrested-in-nige/> (accessed 7 March 2021).

¹⁴ <https://www.facebook.com/kakatouda.mamanegoni/posts/3551796718224111> (accessed 7 March 2021).

¹⁵ Republic of Niger 'Fifteenth (15th) periodic report of the Republic of Niger on the implementation of the African Charter on Human and Peoples' Rights covering the period 2017-2019, presented pursuant to article 62 of the said Charter' para 89.

¹⁶ Article 19 'NIGER: Release journalist and blogger Samira Sabou unconditionally' (2020) <https://www.article19.org/resources/niger-release-journalist-samira-sabo/> (accessed 6 March 2021).

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Sabou was acquitted on 28 July 2020 after spending 47 days in the civil prison in Niamey.¹⁷ Criminal penalties on expression have the chilling effect of deterring journalists from exposing corruption and wrongdoing by the government. This restricts the exercise of their watchdog function, and denies the public information of public interest.¹⁸

Article 29 of Niger's cybercrime law also infringes on freedom of expression. Its penalties have a deterrent effect on journalists seeking to disseminate information of public interest. International law and standards require States to amend criminal laws on defamation and libel in favour of civil sanctions. Therefore, custodial sentences for defamation and libel are a violation of freedom of expression.¹⁹ It is also unfortunate that criminal defamation laws continue to operate in Niger despite the President of Niger being the first to endorse the Table Mountain Declaration calling for the repeal of criminal defamation and insult laws in Africa in 2007.²⁰

Another issue of concern arising from the arrest of Samira Sabou is the failure by the Nigerien government to protect whistleblowers who disclose information of public interest. No one should be subjected to civil or criminal sanctions or harm for releasing information in the public interest.²¹ In line with this principle, journalists or any member of the public should be free to expose corruption without fear of reprisals. Thus, Niger should establish a whistleblower protection mechanism to protect those who disclose information in the public interest.²²

While the Centre commends Niger for adopting measures to curb crimes in cyberspace, the Centre notes with concern the failure to balance the need to curb cybercrime and protection of human rights.

¹⁷ MFWA 'Journalist Freed after 47 Days in detention over Facebook Post' (2020) <https://www.mfwa.org/country-highlights/journalist-freed-after-47-days-in-detention-over-facebook-post/> (accessed 7 March 2021).

¹⁸ *Lohé Issa Konaté v. The Republic of Burkina Faso* App. No. 004/2013.

¹⁹ Principle 22(4) The Declaration.

²⁰ World Association of News Publishers 'President of Niger Endorses Table Mountain Declaration, Calls for Repeal of Criminal Defamation' <https://archive.wan-ifra.org/articles/2011/11/30/president-of-niger-endorses-table-mountain-declaration-calls-for-repeal-of-crimi> (accessed 7 March 2021).

²¹ Principle 35(1) The Declaration.

²² As above.

2.4. Privacy and freedom of expression

The Centre welcomes the enactment of Law No. 2017-028, 2017 on the protection of personal information. International human rights law and standards requires states to adopt laws for the protection of personal information.²³ The Centre hopes that through this privacy law, Niger will provide an enabling environment for the enjoyment of freedom of expression.

However, the Centre is concerned by some of the provisions of the Intercepting Electronic Communications Act relating to security threats.²⁴ This law was enacted to respond to terrorism but in its current form, the law grants extensive powers to the government to intercept communications.²⁵ In addition, the power to authorise interception is vested in the president under article 2 of Law No. 2018-23 of 2018 and not the judiciary.²⁶ The challenge with such a provision is that it is susceptible to abuse in the absence of independent judicial oversight to assess the reasonableness of an order to intercept communications. Also, network operators may be approached under the Act without the option of challenging the legality of interception orders given by the government.²⁷ This presents a likelihood of the government using this law arbitrarily to violate privacy and freedom of expression rights of citizens.

As established under international human rights law and standards, states shall engage in targeted surveillance of communications that is authorised by the law and the surveillance shall be premised on the 'reasonable suspicion that a crime has been or is being carried out or for any other legitimate aims'.²⁸ States should not condone targeted collection, storage, analysis or sharing of a person's communications unless surveillance is authorised by laws that conform to international standards. Therefore, any surveillance on communications must among other things be authorised by an independent and impartial judicial authority.

²³ Principle 42 The Declaration.

²⁴ Law No. 2018-23 of 2018.

²⁵ S Toussi & T Robertson 'Niger Passes New Law on Interception of Communications' (2020) <https://www.africafex.org/access-to-information/niger-passes-new-law-on-interception-of-communications> (accessed 27 March 2021).

²⁶ Privacy International 'The Nigerien bill giving broad powers to intercept communications' <https://privacyinternational.org/news-analysis/3854/nigerien-bill-giving-broad-powers-intercept-communications> (accessed 22 February 2021).

²⁷ Law No. 2018-23 of 2018 arts 24, 32 & 33.

²⁸ Principle 41(2 & 41(3) Declaration.

3. Access to Information

Article 9(1) of the African Charter provides that every individual shall have the right to receive information. Niger has an access to information law which guarantees the right of access to information.²⁹ However, Ordinance No. 2011-22 of 2011 provides in article 28 that the Ombudsman has the role of overseeing access to information in Niger. The Centre is concerned that this vesting of the oversight function in the Ombudsman may not achieve full protection of the right of access to information as the Ombudsman has other roles to perform such as oversight over public administration.³⁰ The Commission, in elaborating on article 9 of the African Charter, developed a Model Law on Access to Information for Africa, that recommends the establishment of an independent and impartial oversight mechanism comprising information commissioners for promotion, monitoring, and protection of the right of access to information.³¹ Having an independent oversight mechanism for access to information will enhance information disclosure by private and public bodies.

3.1 Internet Access

Niger's internet penetration rate is low and currently stands at 13.6%.³² The Centre commends Niger for the *Smart Village Blueprint* program jointly implemented by the National Agency for the Information Society (ANSI) and the International Telecommunication Union (ITU) to promote meaningful connectivity and digital transformation in low-income areas. The Smart Village Blueprint program, piloted in Niger, is a tool for establishing connected villages in Niger through access to digital devices in marginalised communities. It is hoped that this program will enhance digital infrastructure in rural areas and ensure internet access to marginalized communities. In giving effect to access to the internet which in turn promotes access to information, the Commission urges States to take specific measures to ensure that marginalised groups enjoy their rights online without discrimination.³³ Increasing internet access for persons with disabilities, women and children is most pertinent during the COVID-

²⁹ Ordinance No. 2011-22 of 2011.

³⁰ See Law No. 2011-18 of 8 August 2011. The duties include oversight over public administration and defence of children and the vulnerable.

³¹ ACHPR Model Law on Access to Information.

³² S Kemp 'Digital 2021: Niger' (2021) <https://datareportal.com/reports/digital-2021-niger#:~:text=There%20were%203.36%20million%20internet,at%2013.6%25%20in%20January%202021> (accessed 27 March 2021).

³³ Art 37(4) The Declaration.

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19 pandemic and is most critical in ensuring access to information on health and for education purposes. The *Smart Village Blueprint* program is useful for the implementation of the Niger 2.0 Smart Villages project, which focuses on enhancing broadband infrastructure to improve internet access in rural and remote parts of the country.³⁴ Enhanced digital infrastructure promotes access to information. However, despite these positive developments, the cost of data (US\$3,39 for 1 gigabyte) is exorbitant and this is a barrier to internet access generally and specifically for vulnerable groups.³⁵ Reduced costs of data will help bridge the digital divide that currently exists.

Finally, the Centre notes with concern the occurrence of internet disruptions in Niger. Internet disruptions are deplorable and a disproportionate means of maintaining peace and order. Further, internet shutdowns are a barrier to the enjoyment of freedom of expression and access to information.³⁶ The Centre condemns the internet disruption which followed the presidential elections on 21 February 2021.³⁷ The conduct of the government of Niger in disrupting the internet hindered the free flow of information during the elections. The Guidelines on Access to Information and Elections in Africa, reiterates the importance of access to credible information in ensuring the transparency and credibility of an election, which enables the effective exercise of the right to vote. The government of Niger should be reminded of the Commission's guidance on access to information during elections that calls on States to desist from internet shutdowns. The Guidelines urge bodies responsible for the regulation of broadcast media and provision of telecommunication services to refrain from internet shutdowns during the electoral process. It provides that in exceptional cases where an internet shutdown may be permissible in international law, the State should proactively disclose the reasons for the shutdown. Further, this restriction should meet the three-part test for limitation

³⁴ S Achanya 'Niger 2.0 – Digital Gateway to Sustainable Development' (2020) <https://www.itu.int/en/myitu/News/2020/06/12/13/32/Niger-launches-Smart-Village-project> (accessed 27 March 2021).

³⁵ P Gilbert 'The Most Expensive Data Prices in Africa' (2019) http://www.connectingafrica.com/author.asp?section_id=761&doc_id=756372 (accessed 27 March 2021).

³⁶ *Amnesty International Togo and Ors v. The Togolese Republic* ECW/CCJ/JUD/09/20.

³⁷ Access Now 'Niger blacks out internet after presidential runoff election' <https://www.accessnow.org/niger-election-internet-blackout/> (accessed 27 March 2021).

of rights: legality, legitimacy, and necessity and proportionality.³⁸ Internet disruptions violate access to information and freedom of expression.

4. Question

- What steps are in place to ensure that interception of communications orders are subject to judicial authorisation in conformity with principle 41(3)(a) of the Declaration?
- What steps are being taken to ensure that public service media have editorial independence?
- What measures have been taken by the government of Niger to ensure protection of whistleblowers?
- What measures has the State taken to ensure it resolves disputes with the media in an amicable way that allows for a conducive operating environment for private media?

5. Recommendations to the government of Niger

- Niger should amend article 2 of Law No. 2019-33 to ensure the interception of communications orders are subject to judicial authorisation in conformance with principle 41(3)(a) of the Declaration.
- Niger should put in place measures to balance the need for surveillance of communications against the protection of the privacy of persons who are surveilled.³⁹
- The government of Niger should repeal article 29 of Law No. 2019-33 on defamation in favour of reasonable civil sanctions.
- The government of Niger should drop all charges against journalists and civil society actors arrested on criminal defamation charges.
- The government of Niger should compensate Samira Sabou for arbitrary detention on defamation charges.
- Niger should refrain from targeting critics of the government and criminalising dissent in violation of article 9 of the African Charter.
- The Nigerien government should refrain from relying on article 31 of Law No. 2019-33 to violate freedom of expression and balance preventing cybercrimes with promoting freedom of expression.

³⁸ Guidelines 26 & 27 ACHPR Guidelines on Access to Information and Elections in Africa.

³⁹ *Amabhungane Centre for Investigative Journalism & Another v Minister of Justice and Correctional Services* Case No: 25978/201 <http://www.saflii.org/za/cases/ZAGPPHC/2019/384.pdf> (accessed 27 March 2021).

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- The Nigerien government should come up with a law that protects whistleblowers.
- Niger should refrain from internet disruptions in violation of freedom of expression and access to information.
- Niger should consider amending article 28 of the Ordinance No. 2011-22 of 2011 by removing the oversight function on access to information from the office of the Ombudsman and vesting it in an independent and impartial oversight mechanism with this specific role and function in line with the Model Law on Access to Information.⁴⁰

⁴⁰ Part V Model Law.