COMMUNITY COURT OF JUSTICE,
ECOWAS
COUR DE JUSTICE DE LA COMMUNAUTÉ,
CEDEAO
TRIBUNAL DE JUSTICA DA COMMUNIDADE,
CEDEAO

No. 10 DAR ES SALAAM CRESCENT
OFF AMINU KANO CRESCENT, WUSE
II, ABUJA-NIGERIA. PMB 567 GARKI,
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COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES

(ECOWAS)

HOLDEN IN ABUJA, NIGERIA

ON FRIDAY, JULY 10th, 2020

SUIT No ECW/CCJ/APP/53/2018

JUDGEMENT No ECW/CCJ/JUD/16/20

BETWEEN

THE INCORPORATED TRUSTEES OF LAWS AND RIGHTS AWARENESS INITIATIVES

APPLICANT

AND

THE FEDERAL REPUBLIC OF NIGERIA **DEFENDANT**

COMPOSITION OF THE COURT PANEL:

Hon. Justice Dupe ATOKI - **Presiding**

Hon. Justice Keikura BANGURA - **Member**

Hon. Justice Januária Tavares Silva Moreira COSTA- **Member/Rapporteur**

Assisted by Aboubacar DIAKITE - **Registar**

REPRESENTATION OF THE PARTIES

1. On Behalf of the Applicant:

Olumide Babalola, Esq.

2. On Behalf of the Defendant:

E.O.Omonowa

ON THE PROCEDURE

3. By means of an application initiating proceedings registered at the Registry of this Court, on November 6th, 2018, the Applicant, **THE INCORPORATED TRUSTEES OF LAWS AND RIGHTS AWARENESS INITIATIVES**, a non-governmental organization, brought the present action against the **FEDERAL REPUBLIC OF NIGERIA**, Member State of the Community, alleging violation of the fundamental rights of freedom of expression of its members, associates and employees under the provisions of Articles 1 and 9 of the African Charter on Human and Peoples' Rights and 19 of the International Covenant on Civil and Political Rights, by the Defendant, due to its implementation of Section 24 of the Cybercrime (Prohibition and Prevention, etc.) Act, 2015.

4. The Applicant gathered (3) three documents.

5. The Defendant State, that of the Federal Republic of Nigeria, was duly served on November 6th, 2018, and, on January 23rd, 2019, it requested the extension of the period of time to present its defense, which it deposited on the same date (Doc.3).

6. The Applicant was notified of the presentation of the defense, which came on February 12th, 2019, to present its reply, which was notified to the Defendant State on the same date.

7. The parties were heard on a court hearing at the sitting of this Court on 7th February 2020.

ON THE FACTS CLAIMED BY THE APPLICANT:

8. In 2015, the Defendant issued a law, entitled "Cybercrime (Prohibition and Prevention, etc.) Act, 2015", which has 59 articles.

9. In particular, Section 24 of that Act, in clear terms, limits freedom of expression on the Internet or the use of any computer device and imposes fines of 10,000,000 naira (ten million Naira) to 25,000,000 naira (twenty-five million Naira) and makes provision for penal sanction ranging from three (3) to ten (10) years in prison.

10. Since the enactment of the Act in 2015, the Defendant has religiously used the Cybercrime (Prohibition and Prevention, etc.) Act of 2015 to intimidate the Applicant, its members, associates and employees.

11. The information regarding the arbitrary use of the cybercrime (Prohibition and Prevention, etc.) Act of 2015, by the Defendant, is as follows:

i. On August 8th, 2015, Abubakar Sidiq Usman was arrested.

ii. On August 20th, 2015, Musa Babare Azare was arrested in Bauchi State by the Defendant for criticizing its Governor of State on Facebook and Twitter. He was taken to Abuja, where he was held for 36 hours.

iii. On August 25th, 2015, Seun Oloketuyi was arrested and detained and brought before the Lagos Federal Supreme Court in charge of cybercrimes and held in prison, but later he was released on bail in a sum of 3,000,000 Naira.

iv. On September 1st, 2015, Chris Kehinde Nwandu, President of the Guild of Professional Bloggers of Nigeria, was arrested for sharing a story on Facebook, brought to the Court, he was denied bail on three occasions, and remained in prison for 13 days.

v. In September 2015, Emmanuel Ojo was brought to the Court for a publication made on Facebook, and was later also brought before the Supreme Federal Court.

vi. In October 2015, Desmond Ike Chima, a blogger, was victim of cyber persecution by the Court of Justice and spent six months in prison before being released on parole.

vii. In 2017, a blogger, Kemi Olunloyo was arrested and is still in prison due to his publications on social networks.

viii. Also in 2017, Audu Maikori was arrested, prisoned and charged under the terms of the Cybercrime Law for his tweets regarding the insecurity issues in the country.

ix. In 2018, the administrator and members of a WhatsApp group were detained by the Defendant during the debates in their group, which the Defendant found to be uncomfortable.

12. The facts described above show the Defendant's application of the Cybercrime (Prohibition, Prevention, etc.) Act, 2015 to intimidate, harass, imprison and torture the Applicant's members, associates and employees, thus violating their freedom of expression and their digital rights, especially on the Internet.

13. In the document identified as "Annexure 2" are reports of the Defendant's arbitrary use of the Cybercrime (Prohibition, Prevention, etc.) Act, 2015 against Nigerians.

14. The continued execution and application of Section 24 of the Cybercrime (Prohibition, Prevention, etc.) Act, 2015 by the Defendant is a continuous violation of freedom of expression enshrined in the African Charter on Human and Peoples' Rights, as well as the Defendant's obligation under the ECOWAS Revised Treaty.

15. The Applicant further argues that Section 24 of the Cybercrime (Prohibition, Prevention, etc.) Act, 2015 violates Article 9, paragraphs 1 and 2 of the African Charter, as well as international law, since it interferes with the right to freedom of expression.

16. That Section 24 of the Cybercrime Act establishes the following:

(1) "Any person who knowingly or intentionally sends a message or other matter by means of computer systems or network that -

(a) (a) is grossly **offensive**, pornographic or of an **indecent, obscene or menacing character** or causes any such message or matter to be so sent; or

(b) (b) he knows to be false, for the purpose of causing **annoyance**, inconvenience danger, obstruction, **insult**, injury, criminal intimidation, **enmity**, hatred, ill will

or **needless anxiety** to another or causes such a message to be sent: commits an offence under this Act and shall be liable on conviction to a fine of not more than N7,000,000.00 or imprisonment for a term of not more than 3 years or to both such fine and imprisonment.

(2) Any person who knowingly or intentionally transmits or causes the transmission of any communication through a computer system or network -

(c) containing any **threat to harm the property** or **reputation of the addressee** or of another or the reputation of a deceased person or any threat to accuse the addressee or any other person of a crime, to extort from any person, firm, association, or corporation, any money or other thing of value: commits an offence under this Act and shall be liable on conviction-

(i) in the case of paragraphs (a) and (b) of this subsection to imprisonment for a term of 10 years and/or a minimum fine of N25,000,000.00; and

(ii) in the case of paragraph (c) and (d) of this subsection, to imprisonment for a term of 5 years and/or a minimum fine of N15,000,000.00.

(…) (4) A defendant who does anything which he is prohibited from doing by an order under this section, commits an offence and shall be liable on conviction to a fine of not more than **N10,000,000.00** or imprisonment for a term of not more than **3 years** or to both such fine and imprisonment […]"

17. The Applicant claims that this provision, if not resolved, it has a tendency to completely undermine the rule of law in Nigeria, all the more so as it appears to be a weapon of oppression held by the Defendant.

18. The Applicant concluded that the Defendant must be deprived of the possibility of continuing to apply the provision of Section 24 which constitutes an assault and violation of the provisions of Article 9, paragraphs 1 and 2 of the African Charter

19. The Applicant further maintains that Section 24 of the Cybercrime Act is also **unconstitutional in view of Article 39 of the Constitution of the Federal Republic of Nigeria**, as it constitutes an interference in the rights it enjoys, for the **following reasons:**

i. It is not established by law;
ii. It is not in pursuit of a legitimate objective;
iii. It is not reasonably justified because it is not a necessary or proportionate restriction on the right.

20. That Section 24 nº1 al. a) contains the word "offensive" without defining it or indicating its degrees and or limits, thus making it unclear to individuals who need to regulate their behavior in accordance with this provision which is susceptible to abuse. Due to the vague nature of the term, legitimate journalistic activity may be included in the scope of this provision and be subject to the threat of severe criminal sanctions, which is disproportionate and unnecessary;

21. That section 24 of the cybercrime Act is not drafted with sufficient precision to allow an individual to predict whether his behavior would constitute an offense under the provision. That as a penal provision, it should be written in a strict and unambiguous way.

22. In addition, it does not provide for safeguards against law enforcement officers, who rely on this vague language to freely exercise the discretionary power to arrest, accuse, prosecute and or convict a person.

The Applicant further claimed that the sanctions provided for in Section 24 of the Act do not constitute reasonably justified restrictions on the right to freedom of expression and press, they constitute a restriction on the right to freedom of expression that is not established by law, and do not pursue a legitimate objective and they are neither necessary nor proportional.

23. The Applicant concluded that the provisions of Section 24 do not meet the three requirements regarding the validity of laws that aim at restricting freedom of

expression, thus constituting a violation of the right to freedom of expression under the terms of Articles 19 of the ICCPR and 9 of the African Charter.

24. To support its position, the Applicant cited the case law of this Court and other international courts.

ON THE RELIEFS SOUGHT BY THE APPLICANT:

25. The Applicant concluded, requesting from the Court:

a) **A DECLARATION** that the Defendant's actions in applying the provisions of Section 24 of the Cybercrime (Prohibition, Prevention, etc.) Act, 2015, to detain and arrest the Applicant's members and associates, violate their rights under Article 9, paragraphs 1 and 2 of the African Charter on Human and Peoples' Rights.

a) **A DECLARATION** that the provisions of Section 24 of Cybercrime (Prohibition and Prevention, etc.) Act, 2015 violate Article 9, paragraphs 1 and 2 of the African Charter on Human and Peoples' Rights, as well as international law.

c) **A DECLARATION** that, with the continued application of Section 24 Cybercrime (Prohibition, Prevention, etc.) Act, 2015 the Defendant has failed to fulfill its obligations under the ECOWAS Revised Treaty and the African Charter on Human and Peoples' Rights.

d) **AN ORDER** which obligates the Defendant to eliminate the provisions of Section 24 of the Cybercrime (Prohibition, Prevention, etc.) Act, 2015 from its legislation.

e) **A PERMANENT INJUNCTION** which prevents the Defendant from continuing to give effect to the provisions of Section 24 of the Cybercrime (Prohibition, Prevention, etc.) Act, 2015.

f) **OTHER CONSEQUENTIAL ORDERS** that this Court may consider fit for the purpose.

ON THE ARGUMENTS PLEADED BY THE DEFENDANT STATE

26. The Defendant State, in its defense, admits that it approved the law entitled “Cybercrime (Prohibition, Prevention, etc.) Act, 2015” with 59 articles and that the

Section 24 of that Law, in clear terms, limits freedom of expression on the Internet or the use of any computer device and imposes fines from 10,000,000 Naira (ten million Naira) to 25, 000,000 Naira (twenty-five million) and makes provision for penalties of three (3) to ten (10) years in prison.

27. The Defendant State denies the facts claimed by the Applicant and puts the Applicant to the strictest proof of the facts contained in point 4.4. of the declaration of facts.

28. The Defendant states, in a specific response to paragraphs 4.4 of the Applicant's declaration of facts, that:

(a) It never intimidated, harassed, jailed or tortured any member of the press for exercising their freedom of expression, within the law, including the Applicant's members, associates and employees.

(b) It never violated the freedom of expression of any citizen on the Internet or anywhere.

(c) It always maintained the rule of law, while recognizing and giving effect to the human rights of its citizens, including those of the Applicant.

(d) That it legally uses its Cybercrime (Prohibition and Prevention) Act objectively, in accordance with its domestic laws and those of the International Community, without any arbitrary use.

29. That section 24 of the Cybercrime (Prohibition, Prevention, etc.) Act has never been used and will never be used as a tool to violate freedom of expression and press, legally guaranteed under the rights of the African Charter on Human and Peoples' Rights, the ECOWAS Revised Treaty and the 1999 Constitution of the Federal Republic of Nigeria (as amended).

30. The Defendant further maintained that the case brought by the Applicant revolves around the legality or not of **Section 24 of the Cybercrime (Prohibition, Prevention, etc.)Act, 2015**, which provides as follows:

(1) *"Any person who Knowingly or intentionally sends a message or other matter by means of computer system or network that:*

(a) Is grossly offensive or phonographic or an indecent obscene or menacing character or causes any such message or matter to be so sent; or

(b) *He knows to be false, for the purpose of annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred, ill will or needless anxiety to another or caused such a message to be sent: commits an offence under this act and shall be liable on conviction to fine of not more than N7,000,000.00 or imprisonment.*

(2) Any person who knowingly or intentionally transmits or causes the transmission of any communication through a computer system or network-

(a) Bully, threaten or harass another person, where such communication places another person in fear of death, violence or bodily harm or to another person;

(b) containing any threat to kidnap any person or any threat to harm the person of another, any demand or request for a ransom for the release of any kidnapped person, to extort from any person firm association or corporation any money or other thing of value; or

(c) containing any threat to harm the property or reputation of the addressee or of another or the reputation of a deceased person or any threat to accuse the addressee or any other person of a crime, to extort from any person, firm, association or corporation, any money or other thing of value;

Commits a offence under this act and shall be liable on conviction- (i) in the case of paragraphs (a) and (b) of this sub-section to imprisonment for a term of ten years and/a minimum fine of N25,000,000.00

(3) A Court sentencing or otherwise dealing with a person convicted of an offence under sub sub-section (1) and (2) may also make an order, which may for the purpose of protecting the victim of the offence or any other person mentioned in the order from further conduct which

(a) amounts to harassment; or

(b) Will cause fear of violence, death or bodily harm; prohibit the defendant from doing anything described/specified in the order.

(4) A defendant who does anything which he is prohibited from doing by an order under this section commits an offence and shall be liable on conviction to fine of not more than N10,000,000.00 or imprisonment for a term of not more than 3 years or to both such fine and imprisonment.

(5) The order made under sub-section3 of this section may have effect of a specified period or until further order as the defendant or any other person mentioned in the order may apply to the court which made the order for it to be varied or discharged by a further order

(6) Notwithstanding the powers of the court under sub-section (3) and (5) the court may make an interim order for the protection of victim (s) from further exposure to the alleged offence."

31. This provision of **Section 24 of the Cybercrime (Prohibition, Prevention, etc.) Act, 2015** deals with acts that, in the eyes of the law, are considered illegal.

32. The acts enshrined in the section invade the rights of others.

33. Citing Article 9 (2) of the African Charter, the Defendant State contends that the phrase "*within the law*" mentioned in subsection (2) of Article 9 of the African Charter on Human and Peoples' Rights means any law that passed the test of legal criteria in a democratic society, such as, for example, passing through a national assembly democratically constituted and approved by the democratically elected President of the country.

34. Ant this is the exact criterion that Section 24 of the Cybercrime (Prohibition, Prevention, etc.) Act, 2015 went through in order to become law of the Federal Republic of Nigeria.

35. Article 1 of the African Charter on Human and Peoples' Rights empowers each Member State, that is, any country that is a signatory to the Charter, the Federal Republic of Nigeria, including, to adopt legislative or other measures to give effect to the freedoms enshrined in the Charter.

36. The process that gave rise to Section 24 of the Cybercrime (Prohibition, Prevention, etc.) Act, 2015 was one of the ways to adopt legislative measures that will give effect to freedom of expression linked to Article 9 (2) of the African Charter on Human and Peoples' Rights.

37. The Section 24 of the Cybercrime (Prohibition, Prevention, etc.) Act, 2015 concerns the rights of others in the exercise of freedom of expression, in order to reduce the excesses involved, since such right to freedom of expression and press is not absolute.

38. The Applicant also made reference to Article 19 of the International Covenant on Civil and Political Rights (ICCPR), without worrying about the condition of restriction of excesses that may occur in the exercise of the right to freedom of expression contained in subsection (3) of Article 19 of the International Covenant on Civil and Political Rights (ICCPR).

39. Section 24 of the Cybercrime (Prohibition, Prevention, etc.) Act, 2015 provides restrictions that are permitted by law, with the purpose of respecting the rights and reputation of others.

40. Section 24 of the Cybercrime (Prohibition, Prevention, etc.) Act, 2015 is an integral part of the fundamental rights of others living in the Federal Republic of Nigeria, and anything like such adulteration of rights set out in the section above is equivalent to placing restrictions or derogation from those rights.

41. It is explicitly clear from Section 39 (3) (a) of the 1999 Constitution of the Federal Republic of Nigeria (as emended), that the Federal Republic of Nigeria has the power to legislate with the purpose of regulating telephony, wireless transmission and television.

42. Likewise, article 45 (1) (a) (b) provides that Nigeria, as an ECOWAS Member State, can make laws for the defense, public security, public order, morality, health or to protect other people's rights and freedom.

43. Such is the purpose for which Section 24 of theCybercrime (Prohibition, Prevention, etc.) Act, 2015 was enacted as a law in the Federal Republic of Nigeria, to remain as a

bulwark of society against the excesses and abuses resulting from the exercise of the right to freedom of expression legally guaranteed by the same constitution.

44. What the Applicant is doing is asking the Court to interfere in the domestic laws of a member State, namely that of the Federal Republic of Nigeria. The Section 24 of the Cybercrime (Prohibition, Prevention, etc.) Act, 2015 is under the domestic laws of Nigeria (See the case of CENTER FOR DEMOCRACY AND DEVELOPMENT & 1 OR VS MAMADOU TANJA & ANOR. NO PROCESSO Nº ECW/CCJ/APP/07/09 AND JUD Nº: ECW/CCJ/JUD/05/11).

CONCLUSIONS BY THE DEFENDANT STATE

45. The Defendant State concluded that:

ii. The Applicant did not present any actionable error committed by the Defendant State, which would justify to the Court the analysis of the reliefs sought by the Applicant.

iii. The Court should dismiss the Applicant's claim, since it is frivolous, unfounded, incompetent and interferes with the domestic laws of the Member State.

Iv. That the Court should consider the Defendant State's argument in opposition to the Applicant's application and, consequently, dismiss it, for lack of merit and cause of action, in the light of international and domestic laws.

ISSUES FOR DETERMINATION

172. It is for the Court to decide:

a) Whether it is competent to hear the cause and whether it is admissible in accordance with the provisions of Articles 9 (4) and 10 (d) of the Supplementary Protocol on the Court;
b) Whether the provisions of Section 24 of Cybercrime (Prohibition, Prevention, etc.) Act, 2015 violate Articles 9, paragraphs 1 and 2 of the African Charter on Human and Peoples' Rights and 19 of the International Covenant on Civil and Political Rights;

c) Whether the facts claimed by the Applicant constitute a violation of the right of freedom of expression of its mentioned members, associates and employees guaranteed by the provisions of Articles 1 and 9, paragraphs 1 and 2 of the African Charter on Human Rights and 19 of the International Covenant on Civil and Political Rights;

d) Consequently, whether the Defendant State must be ordered to:

   i) Remove from its legislation the provisions of Section 24 of the Cybercrime (Prohibition, Prevention, etc.) Act, 2015;

   ii) Not continue to give effect to the provisions of Section 24 of the aforementioned Law;

ANALYSIS BY THE COURT

a) On the Jurisdiction:

47. This Court ruled in its Ruling No. ECW/CCJ/JUD/10/13 of 6 November 2013, in the case. **Chude MBA v. Republic Of Ghana,** that **"**[1]*To determine if the action is admissible the Court has to determine if the subject matter is within the competence of the Court, if the parties can access the Court and if parties have the requisite standing to institute the action."*

48. Therefore, in order to determine whether this Court has or not jurisdiction, account must be taken of the legal texts governing its jurisdiction, as well as the nature of the question brought before it by the Applicant, based on the facts as alleged by the Applicant.

49. In this sense, this Court ruled in its Judgment No ECW/CCJ/JUD/03/11 of 17th March 2011, issued in the case of **Bakary Sarre and 28 Ors v. Republic Of Mali,**[2] where it stated as follows: "*The competence of the Court to adjudicate in a given case depends not only on its texts but also on the substance of the initiating application.* The Court accords every attention to claims made by applicants, the pleas-in-law invoked, and in an instance where human rights violation is alleged, the Court equally carefully considers

[1]Case ECW/CCJ/APP/09/09 (see CCJ, RL, 2011, page 67, §25). 349, §51.
[2]Case ECW/CCJ/APP/09/09 (see CCJ, RL, 2011, page 67, §25). 67,§25.

how the parties present such allegations. The Court therefore looks to find out whether the human rights violation as observed constitutes the main subject-matter of the application and whether the pleas in-law and evidence produced essentially go to establish such violation."

50. Additionally, in the above cited Judgment, delivered in the case **Mr. Chude MBA v. Republic Of Ghana**[3], the Court stated that: *"As a general rule, jurisdiction is inferred from the Plaintiffs claim and in deciding whether or not this Court has jurisdiction to entertain the present action, reliance has to be placed on the facts as presented by the Plaintiff."*

51. The jurisdiction of this Court is governed by Article 9 of Protocol A/P1/7/91 on the Court, as amended by Additional Protocol A/SP.1/01/05.

52. And the paragraph 4 of the aforementioned Article 9 provides the following:

"The Court has jurisdiction to determine the cases of human rights violations that occur in any Member State."

53. As this Court has stated in several judgments, its jurisdiction cannot be called into question whenever the facts claimed are related to human rights. Cfr. the Judgments Nos ECW/CCJ/RUL/03/2010 of 14th May, delivered in the case **Hissène Habré v. Republique du Senegal**, ECW/CCJ/JUD/05/10 of 8th November de 2010, delivered in the case **Mamadou Tandja v. Republique du Níger**, and ECW/CCJ/RUL/05/11, delivered in the case **Private Alimu AKeem v. Republic Federal of Nigeria.**[4][5][6]

54. The Court also reiterated this position in the Judgment ECW/CCJ/JUD/13/19, delivered in case of **Kareem Meissa Wade v. Republic do SENEGAL**, § 95(3), that:

[3] See the Judgment cited in the footnote 1, § 52.
[4] Suit No ECW/CCJ/APP/07/08 CCJ,RL, 2010, pag. 43, § 53-61
[5] Suit No ECW/CCJ/APP/05/09, CCJ,RL, 2011, pag. 105 ss.
[6] Suit No ECW/CCJ/APP/03/09 CCJ,RL, 2011, pag. 121 ss.

"…simply invoking human rights violation in a case suffices to establish the jurisdiction of the Court over that case."

55. In the instant case, the Applicant alleges, on the one hand, the non-compliance of Section 24 of the 2015 Cybercrime Act, adopted by the Defendant State, with the provisions of Articles 1 and 9, paragraphs 1 and 2 of the African Charter on Human and Peoples' Rights and 19 of the ICCPR, by imposing restrictions on the right to freedom of expression, on the other hand, that the Defendant State has applied and interpreted its provisions, in the sense of intimidating, harassing, jailing and torturing the Applicants' members, associates and employees, in violation of their right to freedom of expression guaranteed by the Articles of Articles 1 and 9, paragraphs 1 and 2 of the African Charter on Human and Peoples' Rights and 19 of the ICCPR.

56. The Applicant further claims that the same provision has been used to orchestrate arbitrary arrests, against its members and associates, in violation of their human rights, in violation of the provisions of Article 9 of the ACHPR and other relevant international human rights instruments.

57. Therefore, in view of this argument, it was concluded that the case brought before this Court is based on the allegation of violation of human rights, protected by the provisions of Articles 1 and 9 of the African Charter on Human and Peoples' Rights (ACHPR) and the International Covenant on Civil and Political Rights (ICCPR), legal instruments ratified by ECOWAS Member States, as is the Defendant State, which binds them and imposes on them the duty to respect and protect the rights proclaimed therein. Cfr. Judgment No ECW/CCJ/APP/01/09 delivered in the case ECW/CCJ/APP/01/09 in the case ***Amazou Henri against the Republic of Côte d'Ivoire.***

58. Thus, this Court understands that it is competent to hear the present case.

59. It is also necessary to verify, at this headquarters, whether the Court can examine the contested provisions of Section 24 of the Cybercrime Act as required by the Applicant.

60. As we have seen, in terms of human rights violations, the jurisdiction of this Court is regulated by Articles 9 (4) and 10 (d) of the Supplementary Protocol on to the Court.

61. In this case, the Applicant maintains that the provisions of Section 24 of the 2015 Cybercrime Act violates the right to freedom of expression of its members and associates and that the continued enforcement of these provisions violates the rights of its members and associates to freedom of expression.

62. The Defendant State appears to intend to question the jurisdiction of this court to examine the national legislation of a Member State, namely its own.

63. Therefore, the question that arises is whether the Court can examine Section 24 of the Cybercrime Act to see whether such legislation contradicts and violates the rights of the Applicant's members and associates as guaranteed by the Universal Declaration of Human Rights, African Charter and the International Covenant on Civil and Political Rights or others, of which the Defendant State is a party.

64. In this regard, this Court in the case ***Hissien Habré Vs. Senegal***[7]***,*** *stated that: "That to decide whether or not it has jurisdiction to hear a case, it has to examine if the issue submitted deals with the rights enshrined for the benefit of the human person and arising from the international or community obligation of the state as human rights to be observed, promoted, protected and enjoyed and whether the alleged violations were committed by a member state of the community." (page 65).*

And in the case **Hadijatou Mani Koraou v. Republic. Of Niger.**[8]

66. Yet, in this case ***Federation of African Journalist v. The Republic of the Gambia,*** *this Court, based on its own jurisprudence, reiterated that "it will not examine the laws of Member Sates in abstract since it is not a constitutional court but, once human rights violation are alleged, it invokes its jurisdiction to examine whether or not there has been violation." (page 31)*

[7] CCJERL (2010) pag. 65.
[8] CCJELR (2004-2009) pag.232 §60.

67. *It further emphasized in this Judgment that:* ***"Freedom of expression is a fundamental human right and full enjoyment of this right is central to achieving individual freedoms and to developing democracy. It is not only the cornerstone of democracy but indispensable to a thriving civil society.***

Having reiterate the courts´competence on human rights cases, it therefore implies that this court in exercising its jurisdiction, has the powers to go into root of the violation i.e., those laws which the applicants are contesting to stablish whether or not they are contrary to the provisions of international human right laws on freedom of expression."

68. The Court thus concludes that it is competent to examine a law of the Member State under which an allegation of human rights violation falls.

On the Admissibility

69. In terms of access to the Court, the Article 10 of the same Protocol establishes that "*Can access the Court (...) d) Anyone who is a victim of human rights violations. The request submitted for this purpose:*

i) must not be anonymous;

ii) *will only be submitted to the Community Court of Justice if it has not been submitted to another Competent International Court (...)"*

70. That is, to justify an action regarding the violation of human rights, it is necessary that the applicant is a victim, and that the Defendant State is responsible for the alleged violations. (See, among others, Ruling No. ECW/CCJ/RUL/03/14, delivered in the case, ***The Registered Trustees of the Socio-Economic Rights & Accountability Project (SERAP) v. Federal Republic of Nigeria & Anor*** and Judgment No. ECW/CCJ/JUD/06/19 of February 26th, 2019, in this case ***Rev. Fr. Solomon MFA & 11 Ors v. Federal Republic of Nigeria)***

71. Therefore, the essential criterion for human rights claims is that the applicant is a victim of the violation of human rights, while it is up to him to prove his *locus standi* in

the case.[9] (See Ruling No. ECW/CCJ/RUL/05/11, of June 1st, 2011 in the case ***Private Alimu Akeem v. Federal Rebublic of Nigeria*** and Ruling No. ECW/CCJ/RUL/07/12, of March 15th, 2012, in the case ***Alhaji Muhammed Ibrahim Hassan v. Governor of Gombe State & Federal Government of Nigeria***)

72. The Human rights laws refer to the victim as the person whose rights have been violated.A victim is the person who suffered, directly or indirectly, any damage or pain (physical or mental injury), emotional suffering (for loss of family member or relative), economic loss (loss of property) or any other damage that can be classified as a violation of human rights.[10]

73. This concept was defined in principle 8 of the "***Basic Principles And Guidelines on the Right to a Remedy and Reparation… " of the United Nations,*** *as being "*persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term "victim" also includes the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization."

74. This Court, like other international Courts[11], has adopted a flexible and broad approach to *locus standi*, allowing others not directly affected by the alleged violation, to have access to the court in representation of the victims.

[9] Suit No ECW/CCJ/APP/03/09, (2011) CCJELR pags. p.128 e 129,§28 e 29;
Suit No ECW/CCJ/APP/03/10, in (2011) CCJELR p. 96, § 46.

[10] See the aforementioned Judgment between Rev. Fr. Solomon MFA & 11 Ors v. Federal Republic of Nigeria.

[11] Article 34 of the European Convention on Human Rights; Article 1 of the Supplementary Protocol to the International Covenant on Civil and Political Rights; Article 44 of the Inter-American Convention on Human Rights.

75. In this sequence and and as mentioned above, this Court has already stated several times that a non-governmental organization (NGO), duly registered in its country, can, on behalf of the victim, take legal action for violation of human rights.

76. Likewise, the Court considered that, according to the *actio popularis* principle, the Applicant has the *locus standi* to institute actions on behalf of the victims, without the need to demonstrate that he has a specific mandate by the victims.

77. In this sense, this Court highlighted in the case ***The Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v. Federal Republic of Nigeria and 8 Ors,*** when ruling that: *"Based on those authorities, and taking into account the need to reinforce the access to justice for the protection of human and people's rights in the African context, the Court holds that an NGO duly constituted according to national law of any ECOWAS Member State, and enjoying observer status before ECOWAS institutions can file complaints against Human Rights violation in cases that the victim is not just a single individual, but a large group of individuals or even entire communities. Thus in considering the social purposes of the Plaintiff and the regularity of its constitution it does not need any specific mandate from the people of Niger Delta to bring the present law suit to the Court for the alleged violation of human rights that affect people of that region.*" (§ 61).

78. So, in a "actio popularis", the Applicant needs only to demonstrate that there is a public interest worthy of protection that has been allegedly violated; that the matter in question is judicious and that the legal action is not brought for the personal benefit of the applicant, that is, that the sought reliefs must not be for the applicant's own benefit, and the identification of the victims is not an essential requirement for the action to be brought before the court.

79. This position was held by this Court in **Judgment No. ECW/CCJ/JUD/06/19,** delivered **in the case REV.** FR. SOLOMON MFA & 11 Ors v. FEDERAL REPUBLIC OF NIGERIA, while mentioning that:

"*However there are two conditions in the implementation of this principle, the first is that the action must be awarded on public interest. Following from the above, is the*

second ingredient which is that reliefs sought must not be for the benefits of the Applicant." (paragraph 63)

80. In this case, the Applicant, a Non-Governmental Organization, constituted in accordance with the laws of the Federal Republic of Nigeria (a fact shown in the document that constitutes annexure 1) may bring an action in the name or interest of its members, associates and employees, allegedly victims of human rights violations, provided that they observe the following criteria: That the action has in its essence a public interest and that the requests made are not for the specific benefits of the Applicant.

81. It should be noted that, in public interest litigation, the Applicant does not need to demonstrate that he has suffered any personal damage or that he has a special interest that needs to be protected, in order to have legitimacy to take an action.

82. This progressive and broad construction of the concept of *locus standi* was also declared by the Court in the case of ***Media Foundation for West Africa v. Republic of the Gambia***, in the following terms:[12]

"*With respect, the narrow construction with respect to locus standi has progressively given way to a wider construction of the doctrine especially in human rights causes and thus a Plaintiff ought not to prove that he has directly suffered the breach of a legal right."*

83. In the instant case, from the analysis of the application initiating proceedings, it is evident that the action is based on public interest and that none of the claims formulated by the Applicant is aimed at obtaining a particular benefit in its favor.

84. On the other hand, there are no reports in the case-file that this same issue is pending before another international court.

85. Consequently, as the Applicant is a Non-Governmental Organization, duly registered, litigating in the public interest, based on the allegation of human rights violations

[12]Ruling no. ECW/CCJ/APP/RUL/02/12 of 7 February 2012, delivered in the Suit no. ECW/CCJ/APP/05/10, (2012) CCJELR p. 54, §29.

committed by the Defendant State against its members and associates, this Court, pursuant to Article 10 (d) of the Supplementary Protocol mentioned above and based on its jurisprudence, declares that the present action is admissible.

ON THE MERIT

86. The Court now verifies:

a) Whether the provisions of Section 24 of Cybercrime (Prohibition, Prevention, etc.) Act, 2015 violate the right to freedom of expression enshrined in Articles 9, paragraphs 1 and 2 of the African Charter on Human and Peoples' Rights and 19 of the International Covenant on Civil and Political Rights.

87. The section 24 of the "Cybercrime (Prohibition, Prevention, etc.) Act, 2015", which provides as follows:

> ***(1) "****Any person who Knowingly or intentionally sends a message or other matter by means of computer system or network that:*
>
> *(a) Is* ***grossly offensive*** *or phonographic or an* ***indecent*** *obscene or* ***menacing character*** *or causes any such message or matter to be so sent; or*
>
> ***(b)*** *He knows to be false, for the purpose of* ***annoyance****,* ***inconvenience,*** *danger, obstruction,* ***insult,*** *injury, criminal intimidation,* ***enmity****hatred,* ***ill will*** *or* ***needless anxiety*** *to another or caused such a message to be sent: commits an offence under this act and shall be liable on conviction to fine of not more than* ***N7,000,000.00 or imprisonment.***
>
> *(2) Any person who knowingly or intentionally transmits or causes the transmission of any communication through a computer system or network-*
>
> ***(a)*** *Bully, threaten or harass another person, where such communication places another person in fear of death, violence or bodily harm or to another person****;***
>
> ***(b)*** *containing any threat to kidnap any person or any threat to harm the person of another, any demand or request for a ransom for the release of*

any kidnapped person, to extort from any person firm association or corporation any money or other thing of value; ***or***

(c) *containing any* ***threat to harm*** *the property or* ***reputation of the addressee*** *or of another or the reputation of a deceased person or any threat to accuse the addressee or any other person of a crime, to extort from any person, firm, association or corporation, any money or other thing of value;*

Commits a offence under this act and shall be liable on conviction-

(i) in the case of paragraphs (a) and (b) of this sub-section to imprisonment for a term of ***ten years*** *and/a minimum* ***fine of N25,000,000.00 and***

(ii) *in the case of paragraph (c) and (d) of this subsection, to imprisonment for a term of* ***5 years*** *and/or a minimum fine of* ***N15,000,000.00.***

(3) A Court sentencing or otherwise dealing with a person convicted of an offence under sub sub-section (1) and (2) may also make an order, wchich may for the prupose of protecting the victim of the offence or any other person mentioned in the order from further conduct which

(a) Amounts to harassment; or

(b) Will cause fear of violence, death or bodily harm; prohibit the defendant from doing anything described/specified in the order.

(4) A defendant who does anything which he is prohibited from doing by an order under this section commits an offence and shall be liable on conviction to fine of not more than ***N10,000,000.00 or imprisonment*** *for a term of not more than* ***3 years*** *or to both such fine and imprisonment.*

(*…)"*

88. The Applicant claims that:

89. The provisions of Section 24 of the Cybercrime Act violate Articles 9 of the ACHPR, 19 of the ICCPR and 39 of the Constitution of Nigeria, inasmuch as, on the one hand,

they contain vague concepts, such as the term "*grossly offensive*" that the law does not materialize, giving rise to arbitrary interpretation and application, making it a low quality Law, and on the other hand, the *restrictions imposed by it* to the right to freedom of expression are not established by law, are not reasonably justified, do not pursue legitimate objectives, are neither necessary nor proportionate.

90. Due to the vague character of the term, legitimate journalistic activity can be included in the scope of this provision and be subject to the threat of severe criminal sanctions, which is disproportionate and unnecessary.

91. Section 24 of the Cybercrime Act is not drafted with sufficient precision to allow an individual to predict whether his behavior would constitute an offense under the provision. That as a penal provision, it should be written in a strict and unambiguous way.

92. In addition, it does not provide for safeguards against law enforcement officers, who rely on this vague language to freely exercise the discretionary power to arrest, accuse, prosecute and or convict a person.

93. The sanctions provided for in Section 24 of the Law constitute restrictions on the right to freedom of expression and press not reasonably justified, which are not established by law, do not pursue a legitimate objective and are neither necessary nor proportionate.

94. The Applicant concluded that the provisions of Section 24 do not meet the three requirements regarding the validity of laws aimed at restricting freedom of expression, thus constituting a violation of the right to freedom of expression under the terms of Articles 19 of the ICCPR and 9 and 1 and 2 of the African Charter.

95. On its turn, the defendant State maintained that:

96. Article 1 of the African Charter empowers each Member State, including the Federal Republic of Nigeria, to adopt legislative or other measures to enforce the freedoms enshrined in the Charter.

97. The process that gave rise to Section 24 of the Cybercrime (Prohibition, Prevention, etc.) Act, 2015 was one of the ways to adopt legislative measures that will give effect to freedom of expression linked to Article 9 (2) of the African Charter.

98. The phrase "*within the law*" mentioned in subsection (2) of Article 9 of the African Charter on Human and Peoples' Rights means any law that passed the test of legal criteria in a democratic society, such as, for example, passing through a national assembly democratically constituted and approved by the democratically elected President of the country.

99. This is the same criterion that Section 24 of the Cybercrime (Prohibition, Prevention, etc.) Act, 2015 went through to become law of the Federal Republic of Nigeria.

100. The Section 24 of the Cybercrime (Prohibition, Prevention, etc.) Act, 2015 concerns the rights of others in the exercise of freedom of expression, in order to reduce the excesses involved, since such right to freedom of expression and press is not absolute.

101. Section 24 of the Cybercrime (Prohibition, Prevention, etc.) Act, 2015 provides restrictions that are permitted by law with the objective of respecting the rights and reputation of others.

102. Section 24 of the Cybercrime (Prohibition, Prevention, etc.) Act, 2015 is an integral part of the fundamental rights of others living in the Federal Republic of Nigeria, and anything like such adulteration of rights set out in the section above is equivalent to placing restrictions or derogation from those rights.

103. The Defendant concluded that the Law in question was adopted in accordance with the provision of Section 39 (3) of the Constitution of the Republic of Nigeria, as amended in 1999, and that, therefore, it is in accordance with the law and in compliance with Articles 1 and 9 of the ACHPR.

✓

104. Freedom of expression is guaranteed by article 19 of the **Universal Declaration of Human Rights (1948) (UDHR)** which has:

1. "*Everyone has the right to freedom of opinion and expression, which implies the right not to be disturbed by their opinions and to seek, receive and disseminate, regardless of borders, information and ideas by any means of expression."*

105. Article 19 of the International Covenant on Civil and Political Rights (ICCPR) also states that:

"1. *Everyone shall have the right to hold opinions without interference.*

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regard less of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. *The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*

(a) *(a) For respect of the rights or reputations of others;*

(b) *(b) For the protection of national security or of public order (ordre public), or of public health or morals."*

106. In turn, the Article **1 of the African Charter on Human and Peoples' Rights (ACHPR),** provides that**:**

"The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them."

107. And its article 9, establishes the following:

"1. *Every individual shall have the right to receive information.*

2. Every individual shall have the right to express and disseminate his opinions within the law.

108. As highlighted by this Court in Judgment No. ECW/CCJ/JUD/04/18, delivered in the case **Federation of African Journalists and others v. Republic of The Gambia**, *"Freedom of expression is a fundamental human right and full enjoyment of this right is central to achieving individual freedoms and to developing democracy. It is not only the cornerstone of democracy, but indispensable to thriving civil society."*

109. Also, in reference to this right, the African Court in the case **Ingabire Victoire Umuhoza v. Republic of Rwanda,**[13] highlighted that: "*The right to freedom of expression is one of the fundamental rights protected by international human rights law the respect of which is crucial and indispensable for the free development of the human person and to create a democratic society. lt comprises inter alia, the freedom to express and communicate or disseminate information, ideas or opinions of any nature in any form and using any means, whether at national or international level. The right to free expression requires that States protect this right from interferences regardless of whether the interferences originate from private individuals or government agents. While freedom of expression is as important as all other rights for the self-development of individuals within a democratic society, it is not a right to be enjoyed without limits*."

110. The Human Rights Committee, in its ***Comment No. 34 Article 19 on freedom of opinion and expression,*** *noted that Article 19 (2) requires that "States parties to guarantee the right to freedom of expression including the right to seek, receive and impart information and ideas of all kinds regardless of frontiers.* This right includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others … "(Paragraph 11); that paragraph 2 "*protects all forms of expression and the means of their dissemination." And* that the exercise of the right to freedom of expression entails special duties and responsibilities and therefore, "*two limitative areas of restrictions on the right are permitted which may report either to respect of the rights or reputations of others or to the protection of national security or of public order (order public) or of public health or morals*. *"* (paragraph 21)

[13] Application No. 0003/2014, of November 24, 2017, paragraphs. 132 and 133.

111. It also underlined that the No. 3 of the Article 19 (3) sets out the specific conditions under which restrictions must be imposed. That is: " *the restrictions must be "provided by law"; they may only be imposed for one of the grounds set out in subparagraphs (a) and (b) of paragraph 3. And they must conform to the strict tests of necessity and proportionality ".* (paragraph 22)

112. And highlighted, however, that when the State party imposes certain restrictions on the exercise of freedom of expression, they should not undermine the right itself (paragraph 21).

113. In turn, the norm of Article 9 of the ACHPR, with regard to freedom of expression, contains a clause that referrers the exercise of this right to the legal system of the States Parties, by stipulating that the exercise of the right must occur "**in accordance with the law".**

114. From the analysis combined with the norm of Article 27 (2) of the ACHPR, it follows that the right to freedom of opinion and expression should be exercised within the framework of the law and with due respect for the rights of others, collective security, morality and common interest.

115. This means that it is up to the State Member to define the conditions for exercising the right to freedom of expression, which is not absolute.

116. As stated by the Human Rights Committee, "*For the purposes of paragraph 3, a norm, to be characterized as "law", must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public. A law may not confer unferred discretion for the restriction of freedom of expression on those charged with its execution. Law must provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not (paragraph 25).*

117. Also, the African Commission, in its ***Declaration of Principles of Freedom of Expression and Access to Information in Africa***, adopted at its 65th Ordinary Session, held from 21 October to 10 November 2019, in Banjul, Gambia, and which replaced the previous Declaration of 2002, established, as **Principle 9,** the conditions for a justifiable limitation of the exercise of the right to freedom of expression and access to information, prescribing the following:

"1.States may only limit the exercise of the, if the limitation:

a. *is prescribed by law;*
b. *serve a legitimate aim; and*
c. *is a necessary and proportionate means to achieve the stated aim in a democratic society.*

2. *States shall ensure that any law limiting the rights to freedom of expression and access to information:*

a. *is clear, precise, accessible and foreseeable;*
b. *is overseen by an independent body in a manner that is not arbitrary or discriminatory; and*
c. *effectively safeguards against abuse including through the provision of a right of appeal to independent and impartial courts.*

3. *A limitation shall serves a legitimate aim where the objective of the limitation is:*

a. *to preserve respect for the rights or reputations of others; or*
b. *to protect national security, public order or public health.*

4. *To be necessary and proportionate, the limitation shall:*

a. originate from a pressing and substantial need that is relevant and sufficient
b. *have a direct and immediate connection to the expression and disclosure of information, and be the least restrictive means of achieving the stated aim; and be such that the benefit of protecting the stated interest outweighs the*

harm to the expression and disclosure of information, including with respect to the sanctions authorized."

118. According to the African Court, in the case **Lohé Issa Konaté v. Burkina Faso**[14]:

"*Though in the African Charter, the grounds of limitation to freedom of expression are not expressly provided as in other international and regional human rights treaties, the phrase "Within the law" under the Article 9 (2) provides a leeway to cautiously fit in legitimate and justifiable individual, collective and national interests as grounds of limitation. Here the* phrase "within the law" must be interpreted in reference to international norms which can provide grounds of limitations on freedom of expression." [15]

119. Further, as held by the European Court of Human Rights in the case of **BREYER v. GERMANY**[16]**,** that: *"In accordance with the law" does not only mean that the measure in question should have some basis in domestic law, but also that the law should be accessible to the person concerned and foreseeable as to its effects."*

120. Therefore, it follows from the above that, in order to avoid being in contravention of human rights, a "Law" should not be arbitrary, it should be predictable, reasonable, proportionate and pursue legitimate objectives.

121. The Court then proceeds to verify whether the restrictions on the exercise of freedom of expression imposed by the Defendant State through the provisions of Section 24 of the "Cybercrime Act 2015" are provided for by "Law" of international standard, whether they pursue legitimate objectives and whether they are necessary and proportionate to achieve the objectives pursued.

[14] Application No. 004/2013.

[15] See African Court, Ingabire Victoire Umuhoza v. Republic of Rwanda, application 003/2014, judgment 24 november 2017; African Commission, communication nº 313/05, Kenneth Good v. The Republic of Botswana. parag. 188.

[16] *50001/12/Judgment (Merits and Just Satisfaction)/Court (Fifth Section) 1/30/2020.*

1. **Legal Provision**

122. In the instant case, the Court finds that the restrictions on freedom of expression contained in the provisions of Section 24 form part of the Act governing the Cybercrime in the Defendant State. It means that such restrictions are established by law.

123. However, the Applicant alleged that the provisions of Section 24 of the "Cybercrime Act" are not only incompatible with Human Rights instruments on freedom of expression but also violate the interpretation of what "in accordance with law" means by containing vague concepts, such as the expression "grossly offensive" that was not defined to establish the parameters that allow the individual to regulate his conduct in accordance with the law.

124. The Applicant concluded that the vague concept, such as the expression "grossly offensive", has allowed an arbitrary interpretation and application of such provisions.

125. On its turn, the Defendant State has not responded to the Applicant's claim that the provisions of Section 24 of the Cybercrime Act are not clearly defined in order to establish the parameters on what constitutes the expression "*gross offense"*.

126. As mentioned, it is not enough that the restrictions are established by law, it must be formulated with sufficient precision, that is, it must be sufficiently clear to allow the individual to adapt his conduct to its predictions and still allow the enforcers of the rule to determine which forms of expression are legitimately restricted and which are unduly restricted.

127. The provisions of Section 24 of the law in question typify criminal conduct and define the applicable sanctions. For this reason, in all its ramifications it must be legally well written and its elements clearly defined to avoid any ambiguity in their meanings.

128. In this sense, the Inter-American Court of Human Rights, in the case **Usón Ramírez Vs. Venezuela**, Judgment of November 20th, 2009, declared that *"It is the law which shall establish the restrictions to the freedom of information. To that end, any limitation or restriction to such freedom shall be established by the law, both from the formal and from the standpoint material… This involves a clear definition of the incriminatory behavior, setting its elements, and defining the behaviors that are not punishable or the illicit behaviors that can be punishable with non-criminal measures… In this case, the Court observes that the criminal codification of Article 505 of the Organic Code of Military Justice, 49 does not establish the elements that may offend, slander, or disparage***."**

129. With a similar understanding, the European Court of Human Rights**,** in case ***KHODORKOVSKIY AND LEBEDEV v. RUSSIA***[17] maintained that: "*When speaking of "law" it alludes to the very same concept as that to which the Convention refers… elsewhere when using that term, a concept which comprises statutes as well as bylaws and case-law and implies qualitative requirements, including those of accessibility and foreseeability. It follows that the offenses and the relevant penalties must be clearly defined in law. This requirement is satisfied when the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it or by way of appropriate legal advice, to a degree that is reasonable in the circumstances, what acts and omissions will make him criminally liable."*

130. Still in the aforementioned case, **Ingabire Victoire Umuhoza v. Republic of Rwanda,** paragraph 136, the African Court reiterated that *"The Court recalls its established jurisprudence that the reference to the 'law' in Article 9 (2) of the Charter and in other provisions of the Charter must be interpreted in the light of international human rights standards, which require that domestic laws on which restrictions to rights and freedoms are grounded must be sufficiently clear, foreseeable and compatible with*

[17] Application No 11082/06 13772/05, Judgment (Merits and Just Satisfaction), Court (First Section) 25/07/2013.

the purpose of the Charter and international human rights conventions and has to be of general application."

131. From the exposed above, it can be concluded that when a law does not define the parameters or elements of the crime that it typifies, it cannot pass the test of legality since, by its nature, it will be arbitrary.

132. The Applicant claims that the expression "gross offense" is vague and imprecise and allows arbitrary interpretation and application.

133. The Court admits that the expression "***gross offense***" on its own, may effectively be subject to varied interpretation.

134. It is noted also that some other expressions contained in the provisions of the aforementioned Section 24 are shown in a generic way (see expressions such as ***indecent; obscene;*** *or* ***menacing character; annoyance, inconvenience, insult, enmity, ill will*** *or* ***needless anxiety,*** *mentioned in the cited law.)*

135. However, considering the margin of appreciation enjoyed by the State in the definition and prohibition of certain conduct, which it qualifies as crimes in its national legislation, and also taking into account that the interpretation of the aforementioned provisions occurs within the scope of the current criminal legal system, the Court considers that the provisions in question provide adequate information to individuals to adapt their conduct accordingly.

136. Thus, the Court concludes that the aforementioned Section 24 of the "Cybercrime Act" meets the "Law" requirement stipulated in Article 9 (2) of the African Charter.

2. Legitimate Objectives

137. The Defendant State, in its defense, maintained that Section 24 of the "Cybercrime (Prohibition, Prevention, etc.) Act, 2015 is concerned with the rights of others in the exercise of the freedom of expression in order to reduce the excesses involved, since this right to freedom of expression and press is not absolute; it provides restrictions that are permitted by law with the objective of respecting the rights and reputation of others.

That Section 24 is an integral part of the fundamental rights of others living in the Federal Republic of Nigeria.

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138. As seen, contrary to Article 19 (3) of the ICCPR, Article 9 of the African Charter does not establish a list of legitimate purposes that legitimize restrictions on freedom of expression. However, the general limitation clause contained in paragraph 2 of Article 27 of the Charter requires that all rights and freedoms be exercised "*[…] with due regard to the rights of others, collective security, morality and common interest.*"

139. The African Court underlined in the case **Issa Konoté** v. **Burkina Faso** that restrictions on freedom of expression can be imposed to safeguard the rights of others, national security, public order, public morals and health (see paragraph 128).

140. Therefore, restrictions on the exercise of the right to freedom of expression can only be based on the reasons provided for in Articles 27 (2) of the Charter and 19 (3) of the ICCPR.

141. In this case, the Court finds that the objectives pursued by the provisions of the aforementioned Section 24 prove to be legitimate, since they fall within the motives provided for in Articles 19 (3) of the ICCPR and 27 (2) of the ACHPR and aim at safeguarding due regard to the rights of others, collective security, morality and common interest.

3. Necessity and Proportionality for the Intended Purposes

142. The Applicant claims that due to the vague nature of the term "offensive", legitimate journalistic activity can be included in the scope of this provision and be subject to the threat of severe criminal sanctions, which is disproportionate and unnecessary; that the sanctions provided for in section 24 of the law do not constitute

restrictions on the right to liberty that are reasonably justified and are neither necessary nor proportionate;

143. The Defendant State has not made any pronouncements on this aspect.

✓

144. The Principle 1 of the Declaration of Principles of Freedom of Expression and Access to Information in Africa[18], cited above, reiterates the importance of the right to freedom of expression and access to information as fundamental rights protected by the African Charter and other human rights instruments, and underlines the importance of respecting, protecting and promoting these rights as crucial and indispensable for the free development of the human person, the creation and strengthening of democratic societies and to allow the exercise of other rights.

145. The **Principle 1 paragraph 2** imposes on States Parties the obligation to: "*create an enabling environment for the exercise of freedom of expression and access to information, including by ensuring protection against acts or omissions of non-State actors that curtail the enjoyment of freedom of expression and access to information."*

146. The **Principle 5** enshrines the protection of the right to freedom of expression and access to information online, stating that: "*The exercise of the rights to freedom of expression and access to information shall be protected from interference both online and offline, and States shall interpret and implement the protection of these rights in this Declaration and other relevant international standards accordingly."*

147. Furthermore, **Principle 6** extends the protections granted in this Declaration to journalists and other media professionals, to every human rights defender and any other individual or group who exercises their rights to freedom of expression and access to information by any means.

[18] Adopted by the African Commission at its 65th Ordinary Session, held from 21 October to 10 November 2019 in Banjul, Gambia.

148. The Part II of the ***Declaration,*** devoted to the Right to Freedom of Expression, establishes in the **Principles 10 to 25** the guarantees and conditions for exercising that right, which it considers as "*a fundamental and inalienable human right and an indispensable component of democracy."*

149. Thus, the **Principle 21,** with the title "***Protecting reputations*****",** provides the following:

"1.States shall ensure that laws relating to defamation in accordance with the following standards:

a. *No one shall be found liable for true statements, expressions of opinions or statements which are reasonable to make in the circumstances.*
b. *Public figures shall be required to tolerate a greater degree of criticism.*
c. *Sanctions shall never be so severe as to inhibit the right to freedom of expression.*

2. *Privacy and secrecy laws shall not inhibit the dissemination of information of public interest."*

150. And **Principle 22,** with the title "*Criminal measures*", provides that:

"1. States shall review all criminal restrictions of content to ensure that they are justifiable and compatible with international human rights law and standards.

2. States shall repeal laws that criminalize sedition, insult and publication of false news.

3. States shall amend criminal laws on defamation and libel in favor of civil sanctions which must themselves ***be necessary and proportionate.***

4. The imposition of custodial sentences for the offenses of defamation and libel are a violation of the right to freedom of expression.

5. Freedom of expression shall not be restricted on public order or national security grounds 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."

151. In the same vein, the Human Rights Committee, in its " ***General Comments nº 34 "*,** noted that "*Restrictions must be "necessary" for a legitimate purpose."* (see paragraph 33)

152. The African Court also maintained in the aforementioned case, **Issa *Konoté v. Burkina*** (para. 145) that in order to consider the need to restrict freedom of expression *"[…] such a need must be assessed within the context of a democratic society*" and … *this assessment must ascertain whether that restriction is a proportionate measure to achieve the set objective namely, the protection of the rights of others."*

153. The same Court also underlined, in the aforementioned case, ***Ingabire Victoire Umuhoza v. Republic of Rwanda*** that *"[...] the determination of necessity and proportionality in the context of freedom of expression should consider that some forms of expression such as political speech, in particular, when they are directed towards the government and government officials, or are spoken by persons of special status, such as public figures, deserve a higher degree of tolerance than others*." (para. 142)

154. In the same vein, the African Commission stated that "*Any restriction on freedom of expression must be…. Necessary in a democratic society*."[19]

155. In law, the principle of proportionality or proportional justice is used to describe the idea that the punishment of a particular criminal offense must be proportional to the seriousness of the criminal offense itself.

156. The principle of proportionality seeks to determine whether, through the action of the State, a fair balance has been achieved between the protection of the rights and freedoms of the individual and the interests of society as a whole.

157. The African Court wrote in the aforementioned case ***Issa Kanote***, "*As concerns proportionality of punishment against the right to freedom of expression, in its decision of 3 April 2009 on Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v. Zimbabwe, the Commission considered that even when a State is concerned*

[19] Communication No. 284/03, Zimbabwe Lawyers for Human Rights and other v. Zimbabwe, para. 176.

with ensuring respect for the rule of law, it should nevertheless adopt measures that are commensurate to this objective."

158. It further stressed, in the same Judgment, that "*in law the principle of proportionality or proportional justice is used to describe the idea that the punishment for a particular offense should be proportionate to the gravity of the offense itself. The principle of proportionality seeks to determine whether, by State action, there has been a balance between protecting the rights and freedoms of the individual and the interest of society as a whole*." (paragraph 149)

159. Also the Human Rights Committee, in its ***General Comments 34***, noted that: "*Defamation Laws must be crafted with care to ensure to ensure that they comply with paragraph 3, and that do not serve, in practice, to stifle freedom of expression. All such laws in particular penal defamation laws, should include such defense as the defense of truth and they should not be applied with regard to those form of expression that are not of their nature, subject to verification. (...). care should be taken by states parties to avoid excessively punitive measures and penalties (…) States parties should consider the decriminalization of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty*." (see paragraph 47)

160. With the same understanding, this Community Court of Justice, in the aforementioned case, ***Federation of African Journalist and others v. Republic of The Gambia,*** *wrote that "The jurisprudence of freedom of expression suggests that the erosion of freedom of expression by indirect means as the above provisions seem to have done suggests that finding of violation is obvious.* The existence of criminal defamation and insult or sedition laws are indeed unacceptable instances of gross violation of free speech and freedom of expression. It restrictions the right of access to public information."

161. This judgment cited, among others, the jurisprudence of the European and Inter-American Courts, where it was concluded that the existence of laws that criminally penalize defamation, insult, false news, etc., disproportionately violate the right to

freedom of expression (See, for example, the ECHR judgment, ***Castells v. Spain*** application No. 11798/85 and IACHR in the case **Kimel v. Argentina**).

162. European and inter-American jurisprudence has pointed out that States should only use criminalization as a last resort and when there is a serious threat to the enjoyment of other human rights. They argue that States should make preferential use of civil procedure rather than criminal procedure. They still reject the penalization of the crime of defamation with imprisonment, considering it disproportionate and in violation of freedom of expression (See ECHR Judgment Gavrillovic v. Moldavia application nº 25464/05 (para. 60) Lehideux et Isorni v. France para. 57; IACHR Trisant *Donoso v. Panama*, para. 20; Herrera Ulloa v. Costa Rica (para. 124-135)

163. In the instant case, the Defendant State, while alleging the need to place restrictions on freedom of expression to protect the rights of others, has established penal punishment for conducts that it considers offensive to honor, consideration, reputation, morals, etc., with high penalties of fine (between N7000.000,00 to N25.000.000,00) and imprisonment (between 5 to 10 years) as results from the analysis of the provisions of the invoked Section 24 of the "Cybercrime Act".

164. Thus, the Court understands that such provisions are not necessary in a democratic society and disproportionately violate the right to freedom of expression, guaranteed by Articles 9 (2) and ACHPR and 19 of the ICCPR.

165. Therefore, the Court concludes that, in this regard, the provisions of Section 24 of the Cybercrime (Prohibition, Prevention, etc.) Act, 2015 are shown to be in violation of Articles 9 (2) and the ACHPR and 19 of the ICCPR.

d) Whether the facts invoked by the Applicant constitute a violation of the right of freedom of expression of its mentioned members, associates and employees as guaranteed by the provisions of Articles 1 and 9, paragraphs 1 and 2 of the African Charter on Human Rights and 19 of the International Covenant on Civil and Political Rights;

166. The Applicant claimed that since the law came into effect in 2015, the Defendant State has religiously used the Cybercrime (Prohibition, Prevention, etc.) Act, 2015 to intimidate the Applicant, its members, associates and employees.

167. It listed nine names of its alleged employees and stated that they were arrested and detained as a result of enforcement of the provisions of Section 24 of the "Cybercrime (Proibition, Prevention, etc.) Act, 2015".

168. It prays the Court to declare that the rights of its members, associates and employees to freedom of expression, as guaranteed by Article 9 of the African Charter, have been violated by the Defendant State.

169. The list of the nine victims of alleged human rights violations was provided with the place and date of the arrest, with the Court's decision/order for each of the victims.

170. It gathered a document "Annexure 2" as reports of the Defendant's arbitrary use of the Cybercrime (Prohibition, Prevention, etc.) Act, 2015 against Nigerians.

171. The Defendant State, in its defense, denied the facts and put the Applicant to the strictest evidence thereof and also reaffirmed that it never intimidated, harassed, jailed or tortured any member of the press for exercising their freedom of expression within the law, including the Applicant's members, associates and employees; that it has never violated the freedom of expression of any citizen on the Internet or anywhere; that it has always maintained the rule of law, while recognizing and giving effect to the human rights of its citizens, including those of the Applicant; That is legally uses the "Cybercrime (Prohibition, Prevention, etc.) Act, 2015" objectively, in accordance with its domestic laws and those of the International Community, without any arbitrary use.

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172. However, it should be noted that the general principle of proof imposes the burden of proof on the person making the allegations. It is true that this rule is reversed when there is a legal presumption, exemption or release of the burden of proof, situations in which such burden happens to fall on the opposing party.

173. Thus, in a proceeding where the party to whom the burden of proof is to be imposed complies with it, such party shall enjoy the benefit of the presumption and, as such, it will be for the counterpart to counteract the evidence produced.

235 - In this case, having the defendant State contradicted the alleged facts, the burden of proof rests with the applicant, who must show the facts it has pleaded, using all legal means and providing all the evidence, and there must be a link between that and the alleged facts that make them convincing.

175. Indeed, in this regard, the Court wrote in the judgment ECW/CCJ/JUD/01/10, delivered in the case **Daouda Garba v. Republic of Benin**[20] that: "cases of violation of human rights must be backed by indications of evidence which will enable the Court to find that such violation has occurred in order for it to proffer sanctions if need be." And further noted that *"It is a general rule in law that during trial the party that makes allegations must provide the evidence, The onus of constituting and demonstrating evidence is therefore upon n the litigating parties. They must use all the legal means available and furnish the points of evidence which go to support their claims. The evidence must be convincing in order to establish a link with the alleged fact."*

176. Also in Judgment ECW/CCJ/JUD/02/12, delivered in the case ***Femi Falana & Anor v. Republic of Benin & 2 Ors***[21], the Court wrote that: "*As always, the onus of proof is on the party who asserts a fact and who will fail if that fact failed to attain the standard of proof that would persuade the Court to believe the statement of the claim…*"

177. It is a settled case-law that the facts can be proved by supporting documents.

178. In this case, the applicant gathered "Annexure 3" as a document to demonstrate its allegations of violation of its associates' rights to freedom of expression, when they were arrested and detained based on interpretation and enforcing of the provisions of Section 24 of the aforementioned law.

[20] Suit No ECW/CCJ/APP/09/09 (in CCJLR 2010), pag.12 parag.35.
[21] Suit No ECW/CCJ/APP/10/07 (2012) pag. 34. e 35.

179. As mentioned by the Applicant, it listed nine names of alleged associates who allegedly were arrested at various locations, dates and times and who were taken to court, some released on bail and others detained by the order of national courts until bail was paid.

180. In addition to this list of names, this an opinion article attached to the case-file as Annexure 3, extracted from the website: http://saharareporters.com, with the title "*How Nigeria´s Cybercrime Act is Been used to Try to Muzzle The Press", reporting on the alleged arrests and detentions of the alleged victims of the Cybercrime Act.*

181. The Court notes, however, that the Applicant has not offered any other means of evidence, namely the testimony of the alleged victims, to corroborate the alleged violations. That is, to confirm the arrests, imprisonments, and clarify the conditions and motivations underlying them, so that the Court can assess whether the alleged human rights violations actually occurred.

182. The evidence, documentary or testimonial, to be convincing must establish a relationship with the alleged fact.

183. In this case, no evidence was produced by the Applicant to demonstrate that the right to freedom of expression of its members, associates and employees has been violated by the Defendant State, as it has not proved in a way to convince that the alleged arrests or prisonment were motivated by the interpretation and application of the provisions of said Section 24 of the aforementioned law, made by agents of the Defendant State.

184. Consequently, in this part, the Court understands that the Applicant's claim must be dismissed.

DECISION:

185. **Therefore, for these reasons, the Court decides to declare:**

a) It is competent to examine the cause, considering that it is admissible.

b) That the Defendant State, by adopting the provisions of Section 24 of Cybercrime (Prohibition, Prevention, etc.) Act, 2015, violates Articles 9 (2) of the African Charter on Human and Peoples' Rights and 19 (3) of the International Covenant on Civil and Political Rights.

c) That the Applicant has not proved that the right of its members, associates and employees to freedom of expression has been violated by the Defendant State.

186. Consequently, it orders the Defendant State to repeal or amend Section 24 of the Cybercrime Act 2015, in accordance with its obligation under Article 1 of the African Charter and the International Covenant on Civil and Political Rights.

187. The Court dismisses the remainder of the Applicant's claims.

On the Expenses:

362. Under Article 66 of the Rules of Procedure of the Court, each party shall bear its own expenses.

324. This Judgment was delivered and pronounced in a public court hearing held in Abuja by the Court of Justice of the Community on the 10th day of July 2020.

By the Judges:

Hon. Justice Dupe **ATOKI** - Presiding_____

Hon. Justice Keikura **BANGURA**- Member _____

Hon. Justice Januária T. S. Moreira **COSTA**- Member/Rapporteur _____

Assisted by Aboubacar **DIAKITE** - Registar_____