

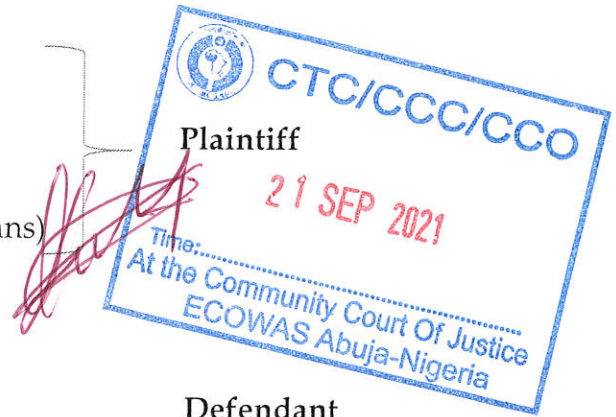
19



IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC  
COMMUNITY OF WEST AFRICAN STATES (ECOWAS)  
HOLDEN AT ABUJA, NIGERIA

SUIT No: ECW/CC/APP/23/21

THE REGISTERED TRUSTEES OF THE  
SOCIO-ECONOMIC RIGHTS AND  
ACCOUNTABILITY PROJECT (SERAP)  
(Suing for itself and on behalf of concerned Nigerians)



AND

THE FEDERAL REPUBLIC OF NIGERIA

Defendant

---

AMICUS CURIAE BRIEF SUBMITTED BY AMNESTY INTERNATIONAL  
PURSUANT TO THE INHERENT JURISDICTION OF THE HONOURABLE  
COURT

---

Table of Contents

I. INTRODUCTION ..... 1

II. INTERNATIONAL LAW ON THE RIGHT TO FREEDOM OF EXPRESSION AND  
RELATED STATES' OBLIGATIONS ..... 2

III. PERMISSIBLE RESTRICTIONS ON THE RIGHT TO FREEDOM OF  
EXPRESSION ..... 5

Conclusion ..... 10

ANNEX 1: Description and interest of Amicus ..... 12

**I. INTRODUCTION**

1. Amnesty International whose address is 1, Easton Street, London, WC1X 0DW, United Kingdom (Hereinafter referred to as "Amnesty") submits this amicus brief, pursuant to leave of this Honourable Court granted on 9th July 2021.

2. Amnesty has extensive experience in intervening before national, regional and international courts and tribunals, including on issues related to the right to freedom of expression such as the current case regarding the lawfulness of the indefinite suspension of Twitter microblogging services by the government of Nigeria. Amnesty has previously intervened in other cases before this Court, and on other issues before the African Commission on Human and Peoples' Rights, the Extraordinary African Chambers, the European Court of Human Rights, the Inter-American Commission and Court of Human Rights, as well as the International Criminal Court. Amnesty has also published research extensively on issues of human rights, including the rights to freedom of expression and access to information offline and online.<sup>1</sup>
3. This brief aims to provide the ECOWAS Court of Justice with information on the applicable international law and standards relating the rights to freedom of opinion and expression, including the right to seek, receive and impart information and ideas of all kinds offline and online. These submissions address critical questions as to the nature and extent of states' obligations under international human rights law on the right to freedom of expression, including expression shared online through platforms like Twitter.
4. Violations of the rights to freedom of expression and access to information are directly enforceable before the ECOWAS Court pursuant to the African Charter on Human and Peoples' Rights, the International Covenant on Civil and Political Rights and other international human rights treaties, as well as pursuant to Articles 9(1), 9(4) and 10(d) of the Protocol (A/P1/7/91) relating to the Community Court of Justice, as amended by the Supplementary Protocol A/SP.1/01/05.

## II. INTERNATIONAL LAW ON THE RIGHT TO FREEDOM OF EXPRESSION AND RELATED STATES' OBLIGATIONS

5. It is universally acknowledged under international human rights law that states have obligations to respect, protect, and fulfil the right to freedom of expression. Article 19 of the Universal Declaration of Human Rights (UDHR) provides that "everyone has the right to freedom of opinion and expression" and "this right includes freedom to hold opinions without interference, and to seek, receive and

---

<sup>1</sup> Nigeria: Endangered voices: attack on freedom of expression in Nigeria (2019) <<https://www.amnesty.org/download/Documents/AFR4495042019ENGLISH.PDF>>; Statement on Freedom of Expression To The African Commission On Human And Peoples' Rights (2014) <<https://www.amnesty.org/download/Documents/4000/afr010092014en.pdf>>

impart information and ideas *through any media* and regardless of frontiers” (emphasis added).

6. Article 9 of the African Charter on Human and Peoples’ Rights, to which Nigeria is a state party, provides that every individual shall have the right to receive information and to express and disseminate their opinions within the law.
7. Article 19 (2) of the International Covenant on Civil and Political Rights (ICCPR), to which Nigeria is a party, provides that everyone shall have the right to freedom of expression, including freedom to seek, receive and impart information and ideas of all kinds, through any media of their choice.
8. The UN Human Rights Committee, the body of independent experts that monitors compliance with the ICCPR, has further considered the importance of media freedom for the advancement of human rights in any society. In its General Comment No. 34, the Committee stated that: “A free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights [...] This implies a free press and other media able to comment on public issues without censor or restraints and to inform public opinion. The public also has a corresponding right to receive media output.”<sup>2</sup>
9. The Declaration of Freedom of Expression, adopted in 2019 by four international experts on the right to freedom of expression,<sup>3</sup> emphasises the role of new digital technologies in the guarantee of the right to freedom of expression. It specifically recognises that states have an obligation to facilitate the right to freedom of expression and access to information online, regardless of frontiers.<sup>4</sup>
10. This Honorable Court held in the landmark case of **Federation of African Journalists & others v. The Republic of the Gambia (2018)** that “*Freedom of expression is a fundamental human right and full enjoyment of this right is central to achieving individual freedom. It is not only the cornerstone of democracy, but indispensable to a thriving civil society*”<sup>5</sup>

---

<sup>2</sup> See Human Rights Committee, General Comment No. 34, note 4, para 13

<sup>3</sup> The Joint Declaration on Freedom of Expression is adopted by four international experts on the right to freedom of expression, including Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples’ Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information

<sup>4</sup> See for instance *Ibid*, Paras 4 (c) and 6

<sup>5</sup> Federation of African Journalists v. The Republic of Gambia (2018) Case No. ECW/CCJ/JUD/36/15, p.32

11. The UN Human Rights Council has stressed that people have the same right to freedom of expression online as they do offline, and has condemned state “measures to intentionally prevent or disrupt access to or dissemination of information online in violation of international human rights law”.<sup>6</sup>The UN Special Rapporteur on the right to freedom of opinion and expression has also stated that the framework of international human rights law, in particular the provisions relating to the right to freedom of expression, continues to remain relevant and applicable to the Internet.<sup>7</sup>

The right to freedom of expression necessarily includes the ability of individuals to freely share their opinions through the internet and all its various sites, including **Twitter**. Article 19(2) of the ICCPR not only requires States to refrain from measures that might interfere with the independence of online media and access of individuals to such media, but it also places a positive obligation on States to ensure that people are able to access and use the Internet freely.<sup>8</sup> In this regard, the UN Human Rights Committee has stated that “State parties should take all necessary steps to foster the independence of [new online] media and to ensure access of individuals thereto”.<sup>9</sup>Twitter is a veritable means for the exercise of the right to freedom of expression, particularly for the right to seek, receive and impart information. Throughout the years, Twitter has proven to have far-reaching impact and more accessibility than many other platforms where people can exercise their right to freedom of expression, particularly amongst Nigeria’s youthful population.

This Court has previously found that blocking the internet constitutes a violation of the right to freedom of expression. Amnesty submits to the Court that blocking an internet platform where people share their opinions online equally constitutes a violation of the right, since as this Court found in the case of *Amnesty International Togo & Ors vs. The Togolese Republic*, internet service provides a platform to enhance the exercise of freedom of expression, which necessarily requires social media platforms to become the vehicle on which internet moves.<sup>10</sup>

---

<sup>6</sup> UN Human Rights Council, Resolution 32/13 on the promotion, protection and enjoyment of human rights on the Internet UN Doc A/HRC/RES/32/13 (1 July 2016), para 10

<sup>7</sup> UN General Assembly, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and of expression UN Doc A/66/290 (10 August 2011), para 14.

<sup>8</sup> See for example UN Special Rapporteur on Freedom of Opinion and Expression, OSCE Representative on Freedom of the Media, OAS Special Rapporteur on Freedom of Expression and ACHPR Special Rapporteur on Freedom of Expression and Access to Information, Joint Declaration on Freedom of Expression and the Internet (1 June 2011) , para 6(a).

<sup>9</sup> UN Human Rights Committee, General Comment No 34: Article 19: Freedoms of opinion and expression UN Doc CCPR/C/GC/34 (12 September 2011), para 15

<sup>10</sup> Amnesty International Togo and Ors v. The Togolese Republic, Case No. ECW/CCJ/JUD/09/20, Para. 38



12. In the above case of this Court clearly underlined the close connection between access to internet (and by necessary implication, Twitter) and the right to freedom of expression. In particular, this Court found that:

*“Access to internet is not stricto sensu a fundamental human right but since internet service provides a platform to enhance the exercise of freedom of expression, it then becomes a derivative right that it is a component to the exercise of the right to freedom of expression. It is a vehicle that provides a platform that will enhance the enjoyment of the right to freedom of expression. Right to internet access is closely linked to the right of freedom of speech which can be seen to encompass freedom of expression as well. Since access to internet is complementary to the enjoyment of the right to freedom of expression, it is necessary that access to internet and the right to freedom of expression be deemed to be an integral part of human right that requires protection by law and makes its violation actionable. In this regards, access to internet being a derivative right and at the same time component part of each other, should be jointly treated as an element of human right to which states are under obligation to provide protection for in accordance with the law just in the same way as the right to freedom of expression is protected. Against this background, access to internet should be seen as a right that requires protection of the law and any interference with it has to be provided for by the law specifying the grounds for such interference”*

The four special mandates on freedom of expression similarly held in a Joint Declaration on Freedom of Expression on the Internet that mandatory blocking of entire websites is an extreme measure analogous to banning a newspaper or a broadcaster, which can only be justified in accordance to international standards.<sup>11</sup>

In the case of *Cengiz & Others v. Turkey*, the European Court found that the ban constituted an interference with the applicants’ right to freedom of expression and was unlawful.<sup>12</sup> The case related to the decision to block all access to the popular video-sharing social website **YouTube** under a law “prohibiting insults to the memory of Atatürk”. The order to block access to YouTube followed the decision of a domestic court to ban access to the social media platform due to about ten videos that the authorities deemed to be insulting to Atatürk. The European Court took the view that the ban on YouTube made inaccessible a popular platform crucial for political discourse, which displayed specific information that could not be easily accessed by other means.<sup>13</sup> Although the blocking of YouTube had not directly targeted the applicants, the ban had affected their right to seek, receive and impart information and ideas, and therefore the Court deemed the order to be unlawful.<sup>14</sup>

### III. PERMISSIBLE RESTRICTIONS ON THE RIGHT TO FREEDOM OF EXPRESSION

---

<sup>11</sup> Joint Declaration on Freedom of Expression and the Internet, June 2011 para 3.a; Available at <https://www.osce.org/files/f/documents/e/9/78309.pdf>

<sup>12</sup> *Cengiz and Others v. Turkey*, 1 December 2015; *Applications Nos. 48226/10 and 14027/11*

<sup>13</sup> *Ibid*, para. 51

<sup>14</sup> *Ibid*, para 53-55

13. International human rights law is clear that the right to freedom of expression is not absolute, and that States can legitimately impose certain restrictions in narrowly construed circumstances.

Article 19(3) ICCPR clearly states that restrictions must be provided by law and must be necessary and proportionate to one of the limited legitimate aims set out in the Covenant, such as the respect of the rights of others or the protection of national security, public order, or public health

This means that it is imperative that any restriction limiting the exercise of the right to freedom of expression must be formulated with sufficient precision to enable an individual to regulate their actions accordingly.<sup>15</sup> When the state imposes any restriction on this right, they must demonstrate that there is a pressing social need, that the restriction is relevant and sufficient and the least intrusive measure to achieve the legitimate aim. Restrictions must be specific and individualized while establishing a connection between the expression and the threat that is supposed to address.<sup>16</sup> Most importantly, these requirements must be cumulatively fulfilled.

The principles of legality, legitimate aim, necessity and proportionality have been further developed by regional and international human rights mechanisms, as enumerated below:

#### **A. LEGALITY**

To comply with international human rights law, any restriction or limitation to the right to freedom of expression must be provided by law. According to the UN Human Rights Committee, this requires the measure to be imposed pursuant to a law that (i) is accessible to the public, (ii) is formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly, and (iii) provides adequate safeguards against unfettered discretion for the restriction of freedom of expression on those charged with its execution.<sup>17</sup> The restricting law must have been duly passed, following the due legislative process of law making in the particular state, which usually allows for transparent participation of the general public. Such law must be precise and not measured by the whims, caprices and sensitivities of state officials.

The ECOWAS Court also stated in the Amnesty International case<sup>18</sup> that,

---

<sup>15</sup> Human Rights Committee, General Comment No. 34, note 4, para 25.

<sup>16</sup> See Human Rights Committee, General Comment No. 34, note 4, paras 34 and 35.

<sup>17</sup> Source: UN Human Rights Committee, General Comment No 34: Article 19: Freedoms of opinion and expression UN Doc CCPR/C/GC/34 (12 September 2011), para 25.

<sup>18</sup> *Infra*

*“..failure of the Respondent to provide the said law is evidence that their action was not done in accordance with the law and therefore, supports the Latin maxim “Ex turpi causa non oritur actio.” in the circumstances as analyzed it is clear that in the absence of any law the Respondent is in violation of Article 9 of the African Charter on Human and People’s Rights. The Court therefore holds that the act of the Respondent in shutting down internet access is a violation of the Applicants right to freedom of expression.”*

## **B. LEGITIMATE AIM**

Under international human rights law, any restriction on the right to freedom of expression must pursue at least one of the legitimate aims exhaustively listed under Art. 19 of the ICCPR and Art. 27(2) of the African Charter. According to Article 19(3) of the ICCPR, restrictions or limitations on the right to freedom of expression can only be used for the purpose of respecting the rights or reputations of others, or for the purpose of protecting national security, public order, public health or public morals.<sup>19</sup> Article 27(2) of the African Charter, on the other hand, states that the right to freedom of expression may only be restricted or limited to ensure the right is exercised with due regard to the rights of others, collective security, morality and common interest.<sup>20</sup>

Therefore, where called upon to enforce a legal provision which would in any way interfere with the freedom of expression, the courts should identify the aim pursued by the respective provision and check if that aim is one of those enumerated in Article 19 (3) (a) and (b). Only if the answer is affirmative may the courts apply that provision to the individual concerned.

### ***Legitimate National Security Interest***

Given the importance of this aim and the very wide nature of it as it relates to the instant case, we provide a little expansion.

Any restriction on expression or information that a government seeks to justify on grounds of national security must have the genuine purpose and demonstrable effect of protecting a legitimate national security interest.<sup>21</sup>

The UN Special Rapporteur on Freedom of Expression expressed concern in 2013 over “vague and unspecified” notions of “national security” that have been

---

<sup>19</sup>Regional human rights treaties contain very similar provisions regarding the limitations of the right to freedom of expression. For example, Article 10 ECHR states that the right to freedom of expression can only be limited “interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary”. Similarly, Article 13 IACHR (refers to respect for the rights or reputation of others, the protection of national security, public order, or public health or morals.

<sup>20</sup>See also African Court on Human and Peoples’ Rights, Konaté v Burkina Faso App no 004/2013 (5 December 2014), para 134

<sup>21</sup> Principle 1.2 The Johannesburg Principles on National Security, Freedom of Expression and Access to Information.

unduly used to justify laws and orders limiting the rights to freedom of expression, without adequate safeguards.<sup>22</sup>

According to the Johannesburg Principles on National Security, Freedom of Expression and Access to Information, “A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government.

In particular, a restriction sought to be justified on the ground of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest.”<sup>23</sup>

The Johannesburg Principles further state that “expression may not be prevented or punished merely because it transmits information issued by or about an organization that a government has declared threatens national security or a related interest”.<sup>24</sup> Thus, such government censorship which seeks to prevent publication of news about proscribed organisations, would not be covered under “legitimate national security” aim.

### C. NECESSITY AND PROPORTIONALITY

International human rights law mandates that restrictions or limitations on the right to freedom of expression be strictly necessary to achieve a legitimate aim and that it be proportionate to the interest to be protected.<sup>25</sup> This strict test requires that measures be the least intrusive instrument amongst those which might achieve this interest. Furthermore, the restriction or limitation cannot be overbroad.

---

<sup>22</sup> A/HRC/23/40, report of 17 April 2013, at para. 58, available at: [http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.40\\_EN.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.40_EN.pdf)

<sup>23</sup> Principle 2 of The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, P.8- These Principles have been endorsed by Mr. Abid Hussain, the UN Special Rapporteur on Freedom of Opinion and Expression, in his reports to the 1996, 1998, 1999 and 2001 sessions of the United Nations Commission on Human Rights, and referred to by the Commission in their annual resolutions on freedom of expression every year since 1996.

<sup>24</sup> Principle 8, The Johannesburg Principles on National Security, Freedom of Expression and Access to Information

<sup>25</sup> UN Human Rights Committee, General Comment No 34: Article 19: Freedoms of opinion and expression UN Doc CCPR/C/GC/34 (12 September 2011), para 22.



14. The UN Human Rights Committee has made clear its view that the requirement under Article 19 (3) ICCPR that a measure limiting the right to freedom of expression be ‘necessary’, imposes a substantial burden of justification on the government. In terms of the requirements of necessity and proportionality, the Committee has explicitly stated that restrictions:

*“must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest to be protected[...]*The principle of proportionality has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law. The principle of proportionality must also take account of the form of expression at issue as well as the means of its dissemination. For instance, the value placed by the Covenant upon uninhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in the public and political domain.”<sup>26</sup>

The Committee further stated that:

*“When a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.”*<sup>27</sup>

The Grand Chamber of the Court of Justice of the European Union, applying the strict test in the case of *Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources and Others*,<sup>28</sup> in the context of retention of communications data, held that, although the Directive of the EU Parliament on retention of certain classes data, was for the legitimate aim of combating “serious crime,” the blanket nature of the obligation entailed “an interference with the fundamental rights of practically the entire European population,” including “persons for whom there is no evidence capable of suggesting that their conduct might have a link, even an indirect or remote one, with serious crime.”<sup>29</sup>

The principle of proportionality often involves a balancing exercise between the rights of an individual and the rights of a community. The Zimbabwe Constitutional Court in *Chimakure* stated that “[t]he purpose of the proportionality test is to strike a balance between the interests of the public and the rights of the individual in the exercise of freedom of expression.”<sup>30</sup>

---

<sup>26</sup> Human Rights Committee, General Comment No. 34, note 4, para 34, emphasis added.

<sup>27</sup> Human Rights Committee, General Comment No. 34, note 4, para 35

<sup>28</sup> Consolidated Cases CH293/12 and CH594/12, 8 April 2014

<sup>29</sup> *Ibid*, para 58 and 65

<sup>30</sup> Zimbabwe Constitutional Court: *Chimakure v Attorney-General of Zimbabwe*, Constitutional Application No SC 247/09 (2014)

The fact that the exercise of the right may cause some form of harm is not sufficient, on its own, to justify the limitation. In *Chimakure*, the Court acknowledged that the free expression of ideas may cause harm – but that only serious harm can lead to a limitation of the right. Malaba DCJ stated that “[t]he exercise of the right to freedom of expression is not protected because it is harmless ... It is protected despite the harm it may cause.”<sup>31</sup> It is therefore not an adequate response when explaining that a limitation is justified, that the exercise of the right sought to be limited may cause some form of harm. The Constitutional Court emphasised that “[t]he Constitution forbids the imposition of a restriction on the exercise of freedom of expression when it poses no danger of direct, obvious, serious and proximate harm to a public interest listed in section 20(2)(a) of the Constitution.”

## Conclusion

The present case directly engages Articles 1, 2, and 9 of the African Charter on Human and Peoples’ Rights and other similar provisions of international and regional human rights treaties that Nigeria is party to. This Brief aims to assist the Honourable Court in its determination of the scope of these and other similar restrictions in terms of the rights guaranteed and the obligations imposed on states parties.

Amnesty notes that Article 14(g) of the Revised Treaty of the Economic Community of West African States provides for the recognition, promotion and protection of human and peoples’ rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights.

Amnesty submits that international human rights law and standards highlighted above support and guarantee the rights to freedom of expression and access to information, including through Twitter, and any restriction of the right must be in compliance with the principles of legality, legitimate aim, necessity and proportionality. This Court has itself determined that a State was in violation of these fundamental principles in several cases, including in *Amnesty International Togo v The Togolese Republic*, cited above.

In this sense, Amnesty wishes to emphasize that the suspension of Twitter in Nigeria without any legal justifications represents a violation of Nigeria’s obligations under the African Charter on Human and Peoples’ Rights and the International Covenant on Civil and Political Rights.

The present case offers the Honourable Court a significant opportunity to clarify the legal obligations relating to the rights to freedom of expression and access to information online, and to reaffirm its ground-breaking judgment in the case of *Amnesty International Togo v The Togolese Republic*.

---

<sup>31</sup>*Ibid*, p.57

Amnesty appreciates the opportunity granted to us to submit this Brief and recognises the importance of this Court's jurisprudence in shaping human rights norms and practices in ECOWAS countries and across Africa, and globally.

DATED this .....17th..... day of .....September..... 2021



**Counsel for Amicus Curiae**

Dr. Kolawole Olaniyan

Osai Ojigho,

Dr. Seun Bakare,

**DejiAjare**

Nanpon B. Wuyep

Miriam Orika

Oluwafisayomi S. Aina

Address for Service

Sterling Solicitors

Plot 920C Senanga Street,

Off Accra Street, Zone 5,

Wuse, Abuja, FCT, Nigeria

08036239465

[dejiajare@yahoo.com](mailto:dejiajare@yahoo.com)



**FOR SERVICE ON:**

**1. The Plaintiff:**

C/O Counsel,  
FemiFalana, SAN  
18, Bamako Street  
Wuse Zone 1  
FCT, Abuja.

**2. Defendant**

C/o its Counsel  
Attorney-General of the Federation

Civil Litigation and Public Law Department,  
Federal Ministry of Justice,  
Maitama, Abuja.  
Email: [litigation.dept@justice.gov.ng](mailto:litigation.dept@justice.gov.ng)

### **ANNEX 1: Description and interest of Amicus**

Amnesty International is a global movement of more than 10 million people who take injustice personally. We are campaigning for a world where human rights are enjoyed by all. The organization works for respect and protection of internationally recognized human rights principles. The organization is independent of any government, political ideology, economic interest, or religion. It bases its work on international human rights instruments adopted by the United Nations and regional bodies.

As part of Amnesty International's mission to take action to prevent grave abuses of human rights, the organization has a particular interest in the application of international human rights standards on the rights to freedom of expression and access to information.