

Supreme Court of Nigeria
Yahaya Sharif-Aminu, Appellant
versus
Attorney General, Respondent

**Amicus Curiae Brief of Media Foundation for West Africa
and International Senior Lawyers Project**

May 2023

SUPREME COURT OF NIGERIA

YAHAYA SHARIF-AMINU, Appellant

versus

ATTORNEY GENERAL, Respondent

Amicus Curiae Brief of Media Foundation for West Africa and International Senior Lawyers Project

The Media Foundation for West Africa and the International Senior Lawyers Project submit the within brief to this Honourable Court in order to advise the Court of the international law which governs the disposition of this case.

SUMMARY OF ARGUMENT

Both the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples' Rights (ACHPR) bind Nigeria. Both the ICCPR and the ACHPR guarantee to the citizens of Nigeria the personal right of freedom of expression.

The case law of the European Court of Human Rights (ECtHR), the African Court of Human and Peoples' Rights (ACHPR) and the UN Human Rights Committee (HRC) establish universal norms which guarantee freedom of expression. These international norms are both explicit and unanimous: the State may never take the life of a citizen on account of his expression.

Both ICCPR Article 19 and ACHPR Article 9 require that any restrictions on freedom of expression be both “necessary” in a democratic society” and proportionate.”

The ECtHR, the ACHPR, and the HRC have each held that the imposition of prison sentences on account of controversial speech is a disproportional restriction on freedom of expression. For Nigeria to punish a defendant for his controversial speech would violate Nigeria’s treaty obligations and international norms.

If Nigeria is barred from imprisoning a defendant on account of his controversial speech, is Nigeria barred from taking the life of one of its citizens on account of his controversial speech? The question answers itself.

ARGUMENT

The Appellant, Yahaya Sharif-Aminu, was convicted of the crime of blasphemy and was sentenced to death by hanging on account of his controversial speech. He has remained on death row since 2020.

This brief is respectfully submitted by the Media Foundation for West Africa (MFWA), a not-for-profit, non-governmental organization with a network of sixteen national partner organizations devoted to freedom of expression and the development of the media, and by the International Senior Lawyers Project (ISLP), an independent, not-for-profit, non-governmental organization of 2,000 volunteer lawyers devoted on

a pro bono basis to protect and defend human rights, the rule of law, and for just, accountable and inclusive development.

I. NIGERIA'S TREATY OBLIGATIONS

In 1993, Nigeria signed and ratified the ICCPR. The paramount purpose of the ICCPR is to protect and promote “the inherent dignity and of the equal and inalienable rights of all members of the human family.”¹ Signatories to the ICCPR are committed to recognize and uphold the rights it enshrines.

Nigeria's obligations under Article 19 of the ICCPR are the focus of this brief. Article 19 protects the right of all individuals to fully enjoy and realize their freedom of expression and opinion. These freedoms are “indispensable conditions for the full development of the person [and] are essential for any society.”²

Article 19 has a parallel provision in the European Convention on Human Rights (“ECHR”), a predecessor to the ICCPR signed 16 years before the ICCPR's adoption. The same language used in the ECHR Article 10, incorporated into ICCPR Article 19³. In thousands of decisions, the prestigious ECtHR has developed case law that defines

¹ International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S 171, available at <https://www.refworld.org/docid/3ae6b3aa0.html> [access 12 November 2022] (hereinafter “ICCPR”).

² UN Human Rights Committee (HRC), *General comment no. 34, Article 19, Freedoms of opinion and expression*, CCPR/CGC/34, 12 September 2011, available at: <https://www.refworld.org/docid/4ed34b562.html> [accessed 6 June 2022].

³ Council of Europe. *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, available at: <https://www.refworld.org/docid/3ae6b3b04.html> [accessed 8 June 2022] (hereinafter “European Convention”).

the meaning of protections set out in the ECHR. These decisions represent international human rights norms.

In 1992, Nigeria ratified African Charter on Human and Peoples' Rights. Two bodies related to the African Charter are relevant to this brief.

The African Commission on Human and Peoples' Rights ("ACHPR") was founded by mandate of the African Charter and inaugurated on November 2, 1987. The ACHPR is mandated to promote and protect human and peoples' rights in Africa, as well as to interpret the provisions of the African Charter. The protection of human and peoples' rights is ensured through a variety of means, including through the settlement of disputes and urgent appeals.⁴

The African Court of Human and Peoples' rights (ACtHPR), established through additional protocol of the African Charter. The ACtHPR issues legally binding decisions regarding violations of the African Charter. These decisions reinforce the ACHPR. Nigeria recognizes the competence of the court, including its ability to receive cases directly from NGOs and individuals.⁵

This brief will describe the limitations on punishment imposed by the above international human rights bodies. We will provide an overview of ECtHR jurisprudence on ECHR Article 10, which provides parallel and duplicate protections of ICCPR Article 19. The brief will additionally draw on authority for the African

⁴ History, African Commission on Human and Peoples' Rights, <https://www.achpr.org/history> (last visited Nov. 10, 2022).

⁵ Welcome to the African Court, African Court on Human and Peoples' Rights, <http://www.african-court.org/wpafc/welcome-to-the-african-court/> (Nov. 10, 2022).

Commission and the ACHPR, which directly interpret Nigeria's obligations as a member of the African Charter.

II. FREEDOM OF EXPRESSION PROTECTIONS UNDER ARTICLE 19

In 1993, Nigeria signed the International Covenant on Civil and Political Rights (ICCPR). One of the primary rights afforded and protected by the ICCPR is the right of all individuals to fully enjoy and realize their freedom of expression. Article 19 of the ICCPR guarantees “the right to freedom of expression,” including the “freedom to...impart information and ideas of all kinds.” ICCPR Art 19(2). As article 19 explains, these freedoms are “indispensable conditions for the full development of the person and that such freedoms are essential for any society.”

Under the ICCPR, freedom of expression “may be subject to certain restrictions” only in extremely limited circumstances, namely “as are provided by law and are necessary.” ICCPR Art. 19(3). These standards are parallel to the standards protecting freedom of expression under other international treaties. For example, Article 10 of the European Convention on Human Rights (ECHR) guarantees freedom of expression, and it contemplates restrictions on this freedom only “as are prescribed by law and are necessary in a democratic society.” ECHR Art. 10(2). Based on the parallel between the ICCPR and ECHR’s standards, decisions by international courts under the ECHR are highly instructive in interpreting the ICCPR’s analogous provision.

Nigeria signed the African Charter on Human and Peoples’ Rights (the “African Charter”) in 1992. Article 9(2) of the African Charter guarantees: “Every individual shall have the right to express and disseminate his opinions within the law.” The African

Charter reaffirms the fundamental importance of freedom of expression and information as an individual human right.

The European Court of Human Rights has, in over 1,000 judgements, developed Article 10 case law which is highly protective of criticism. The African Court on Human and Peoples' Rights rendered at least one impactful decision involving freedom of expression. These courts offer compelling insights into the international standards to which Nigeria is obligated under its treaties and international norms.

III. PUNISHING CONTROVERSIAL EXPRESSION VIOLATES THE INTERNATIONAL “NECESSARY AND PROPORTIONATE” STANDARD

Article 19(1) of the ICCPR provides that “[e]veryone shall have the right to hold opinions without interference.” Article 19(2) guarantees “the right to freedom of expression,” including “freedom to...impart information and ideas of all kind...” Article 19(3) provides that the exercise of these rights “may...be subject to certain restrictions, but these shall only be such as provided by law and are necessary” for, among other things, “the protection of national security or of public order.” The UN Human Rights Committee, which is responsible for monitoring the implementation of the ICCPR, has emphasized the limited scope of Article 19’s allowance for restrictions on the freedom of expression under Article 19. Those restrictions must be limited to circumstances where such restrictions are provided by law and necessary. Interpreting the test under Article 19, the Human Rights Committee has explained that any

restriction on free expression “must conform to the strict tests of necessity and proportionality.”

Article 10 of the ECHR, which contains parallel language to Article 19 of the ICCPR, has been interpreted as limiting restrictions on free expression to circumstances where restrictions are necessary and proportionate. ECHR Article 10 incorporates the same protections for freedom of expression as ICCPR Article 19. Article 10(1) guarantees: “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority...” Article 10(2) of the ECHR parallels ICCPR Article 19(3) by requiring that “restrictions...placed on the exercise of these rights are prescribed by law and are necessary in a democratic society...for the prevention of disorder...for the protection of the rights of others...”

All the relevant international treaties guarantee freedom of expression. While they contemplate that there may be limited circumstances in which restrictions are allowed, these exceptions must narrowly construed. By limiting these restrictions to those “prescribed by law,” the treaties demand that a restriction must be clear, precise, and accessible, so that a citizen can regulate his conduct to foresee the consequences that a given action may entail. Vague or imprecise laws tend to chill legitimate expression and violate Article 10. A restriction is “necessary” only when it satisfies three requirements: First, it must correspond to a “pressing social need,” which must be

“convincingly established,” second, it must be “proportionate to the legitimate aim pursued” and, third, it must be is the least restrictive means to achieve that aim.

The standards under international treaties within Africa are similarly protective of free expression. These even go beyond the African Charter’s guarantee the “[e]very individual shall have the right to express and disseminate his opinions within the law.” The African Commission on Human and Peoples’ Rights has adopted a declaration holding that any restriction in freedom of expression shall be provided by law, serve a legitimate interest and be necessary and in a democratic society, and freedom of expression should 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.” Another declaration requires that “laws limiting rights be clear, precise and accessible...serve a legitimate aim...to be the least restricted means of achieving the aim, and be necessary and proportionate...where the benefit of protecting the interest outweighs the harm to the expression...”

ICCPR Article 19, ECHR Article 10, and the African Charter require that any restriction on freedom of expression must be “necessary in a democratic society.” As the ECtHR has explained, this principle requires, in turn, that any punishment related to expression be proportionate and the least restrictive means to achieving a legitimate aim.

The Human Rights Committee, under Article 5(4) of ICCPR Optional Protocol I, considered the communication in Berik Zhagiparov v. Kazakhstan. As the editor of

a regional newspaper, Zhagiparov had published articles rallying workers to attend protests for which no permit had been issued. Zhagiparov was prosecuted for causing “social unrest” and sentenced to 22 days of administrative arrest. Zhagiparov filed a communication to the Committee claiming that the government had violated his rights. The State invoked ICCPR Article 19(3) to justify the restriction. The HRC adopted the views that “restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated...it is for the State party to demonstrate that the restrictions on...rights under Article 19 of the Covenant were necessary and proportionate.” The HRC stated that “penalization of a journalist solely for being critical of the Government or the political system espoused by the Government can never be considered to be a necessary restriction of freedom of expression.”

In Ingabire Victoire Umuhoza v. Rwanda⁶, the ACtHPR considered a challenge to a criminal conviction under a Rwandan law that limits speech in denial of the history of genocide. Umuhoza had made a public speech at the Kigali Genocide Memorial, which, the state argued, “sought to...incit[e] citizens to turn against the government” and “create divisions and internal strife among the people of Rwanda.” The ACtHPR examined Umuhoza’s statements, observing that they “may be offensive and could have potential to discredit the integrity of public officials and institutions of the State in the

⁶ App. No. 003 / 2014 Judgement, (24 November 2013)

eyes of the citizens.” The ACtHPR analyzed the conviction under the well-established standard, requiring the “restrictions...on the freedom of expression” must be “necessary and proportional as may be expected in a democratic society.” Analyzing the Umuhoza’s conviction the ACtHPR concluded that her statements are of the kind that is expected in a democratic society and should thus be tolerated, especially when they original from a public figure.” The ACtHPR therefore held that the Republic of Rwanda had violated Article 9(2) of African Charter and Article 19 of ICCPR for the criminal conviction.

In Stern Taulats and Roura Capellera v. Spain⁷, the ECtHR held that the criminal conviction for burning Spanish royalty in effigy constituted an unlawful infringement on the freedom of expression, because restricting this speech was neither proportionate to any legitimate aim nor necessary in a democratic society. Anti-monarchists had set fire to a large photograph of the royal couple and were convicted of insulting the crown. On appeal in Spain, the conviction was upheld, based on the government’s arguments that the actions constituted incitement to hatred and violence and that they therefore constituted a threat to democracy. The ECtHR held the opposite: setting fire to the photograph was symbolic political critique and merely uses “a certain permissible degree of provocation to transmit a critical message.” Further, the ECtHR stated that the disputed act could not reasonably be construed as incitement to hatred or violence.

⁷ Judgement, (13 March 2018)

Moreover, the criminal penalty imposed on the applicants – a prison sentence of 15 months, to be executed in the event of failure to pay the fine of 2,700 euros—amounted to an interference with freedom of expression which had been neither proportionate to the legitimate aim pursued nor necessary in a democratic society.”

In Otegi Mondragon v. Spain⁸, an activist denounced the King of Spain at a press conference, as “the person in command of torturers, who defends torture and imposes his monarchic regime on our people through torture and violence.” The activist was imprisoned for serious insult to the King. The ECtHR found although provocative, the language was of general political interest and did not incite violence and did not amount to hate speech. The court held that the sanction was disproportionate and violated Article 10.

In Cumpana and Mazare v. Romania⁹, the Grand Chamber of the European Court unanimously held that imprisonment of journalists for publishing insults against public officials was disproportionate and not necessary in a democratic society, and thus violated Article 10. The court explained that criminal sanctions create a chilling effect on speech. The court notes that it must “exercise the utmost caution where the measures taken, or sanctions imposed by the national authorities are such as to dissuade the press from taking part in the discussion of matters of legitimate public concern.”

⁸ App. No. 2034/07, Judgement (7 March 2011)

⁹ App. No. 2034/07, Judgement (17 December 2004)

In Sahin Alpay v. Turkey¹⁰, the ECtHR overturned the conviction of a journalist who had published newspaper articles in support of a political movement. In defending the conviction, the government argued that members of the movement had staged a coup d'état, leading to a national state of emergency. During that state of emergency. The prosecutor submitted that Alpay's newspaper articles were not mere expressions of opinion, but rather, endangered social peace and public order. The prosecutor argued that the applicant had called for a military coup. The ECtHR found that, notwithstanding the national emergency, the detention of the applicant after he had expressed his opinions exceeded any necessary and proportionate interference in a democratic society. It reasoned that the pre-trial detention and prosecution of an individual who expressed critical views would chill dissenting opinion. On this basis, the court found that Alpay's detention violated Article 10. The ECtHR emphasized that "the existence of a 'public emergency threatening the life of the nation' must not serve as a pretext for limiting freedom of political debate."

The ECtHR has applied identical reasoning regarding the proportionality and necessity of criminal convictions relating to online speech. In Savva Terentyev v. Russia¹¹, the ECtHR held that a sentence of a one year suspended prison term for insulting online comments directed at police officers was disproportionate to the legitimate aim invoked. While offensive, the comments were entitled to protection

¹⁰ App. No. 16538, Judgement (20 June 2018)

¹¹ App. No. 10692/09, Judgement (28 August 2018)

because they were part of the public discussion, did not promote violence or justify hatred, and were directed at official authorities, who must tolerate a wider scope of criticism. The ECtHR reiterated the criminal-law provisions, especially those related to hate crimes, must clearly and precisely define the scope of relevant offenses, in order “to avoid a situation where the State’s discretion to prosecute for such offenses becomes too broad and potentially subject to abuse through selective enforcement”, and amounting to a violation of the right to freedom of expression under Article 10 of the ECHR.

In Konate’ v. Burkina Faso¹², the African Court of Human and Peoples’ Rights delivered a landmark judgement on freedom of expression. Interpreting ACHR Article 9, the judgement reversed the conviction of the journalist, Lohe’ Issa Konate’, who had been sentenced to prison for criminal defamation of a public official. He had accused the prosecutor of corruption. The African Court also found that the conviction and sentence was disproportionate interference with the journalist’s rights to freedom of expression guaranteed under ACHPR Article 9. The African Court also found that Burkina Faso had violated its treaty obligations under ICCPR Article 19.

CONCLUSION

¹² App. No. 004 / 2015, ACtHPR, Judgement (15 December 2014)

As a signatory of the ICCPR and African Charter, Nigeria is subject to limitations on punishment for expression. The substance of rights granted in the ICCPR is demonstrated through comparison to equivalent rights enshrined in the European Convention, as interpreted by the prestigious ECtHR. This in turn informs the formation of international human rights norms which bear on the continuous interpretation and implementation of these influential human rights instruments. We submit that the Court should weigh the State's actions against (1) the human rights guarantees which Nigeria made in ratifying the ECtHR, an international treaty, (2) international norms found in the case law of the ECtHR and (3) the guarantees which Nigeria made in ratifying the African Charter.

When those in authority deploy criminal actions to punish controversial speech ostensibly to vindicate their honor, dignity, deeply held principles, reputation or to preserve order, a more realistic view holds that their purpose and certainly their effect is to intimidate and silence others. Such actions raise the stakes against the prospect of future controversial speech. What suffers is the free flow of information that is vital to vigorous community discourse. If such expression is to be protected effectively, the rules governing litigation against such speakers are critically important.

When the extent of an individual's right to engage in controversial speech is called into question, the State has a heightened responsibility to ensure that proper treatment and protection of that individual's rights is upheld.

Finally, no international court has ever held that the State may imprison a defendant for having uttered controversial speech.

More importantly, no international court has ever held that the State may take the life of a citizen for having uttered controversial speech.

Respectfully submitted,

Media Foundation for West Africa

International Senior Lawyers Project

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