

# MANUAL ON FREEDOM OF EXPRESSION LAW FOR SOUTH SUDAN



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## **About Albany Associates**

Albany Associates ([www.albanyassociates.com](http://www.albanyassociates.com)) is a UK-based company with significant global experience in media and communications law and policy. Albany is considered a leader in the fields of communications regulation, strategic communications, media development and training, with significant on-going experience throughout Africa. Established in 2004, Albany has led the way in providing full-spectrum comprehensive communications services in parts of the world others simply cannot reach.

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This manual has been produced under a USAID funded media development project in South Sudan. The work of the project team supports local media and citizens to advocate for and achieve a strengthened legal enabling environment for media and to defend journalists' rights in the country.

## **Authorship and acknowledgment**

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## I. INTRODUCTION

This manual has been produced by Albany Associates in the context of its press freedom programme in South Sudan. It is intended as a reference resource for lawyers undertaking media defence work in the country. It can also be used for training workshops on media and freedom of expression law in South Sudan.

The manual focuses on describing international norms and principles on the right to freedom of expression by means of international, regional and comparative standards and jurisprudence, which can be used to bolster arguments in both national and international proceedings, complemented by a discussion of the laws of South Sudan that concern freedom of expression and freedom of the media.

The manual begins by setting out the foundations of the right to freedom of expression and the grounds on which the right can be legitimately curtailed. After addressing the thematic issues of (i) defamation, (ii) national security and terrorism, (iii) hate speech and incitement to violence, (iv) protection of sources and (v) protecting the physical safety of journalists, the manual discusses how these international and comparative law standards could be used in domestic proceedings. Finally, it sets out how the three regional human rights bodies in East Africa can be seized: the African Commission on Human and Peoples' Rights, the African Court on Human and Peoples' Rights and the East African Court of Justice.

It is expected that those using the manual or participating in any workshops based on it will be primarily lawyers. Throughout the manual, important cases are cited and relevant quotes are reproduced in full. The text is extensively referenced, so any sources that are of interest for further reading or use in litigation can be accessed. The manual also contains exercises for self-reflection or for use in a training setting.



## II. FREEDOM OF EXPRESSION: UNDERLYING PRINCIPLES AND SOURCES

### A. The importance of freedom of expression

“There can be no doubt that the freedom of expression, coupled with the corollary right to receive and impart information, is a core value of any democratic society deserving of the utmost legal protection. As such, it is prominently recognised and entrenched in virtually every international and regional human rights instrument.”<sup>1</sup>

*Madanhire and another v. Attorney General*

The importance of freedom of expression has been underlined in national constitutions, declarations, and judgments from national and international courts. With the formation of the United Nations and the construction of a human rights regime under international law, the right to freedom of expression became universally acknowledged.

Article 19 of the 1948 Universal Declaration of Human Rights (the “UDHR”) states:

“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”<sup>2</sup>

Subsequently, this right was enshrined in binding treaty law in Article 19 of the International Covenant on Civil and Political Rights (the “ICCPR”).<sup>3</sup> This was adopted by the UN General Assembly in 1966 and came into force a decade later. Article 19 echoes the wording of the UDHR, but adds some explicit grounds on which the right may be limited:

- “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, regardless 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) For respect of the rights or reputations of others;
  - (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.”<sup>4</sup>

The regional human rights treaties also provide binding protection of freedom of expression.

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<sup>1</sup> Zimbabwean Constitutional Court, *Madanhire and another v. Attorney General*, Judgment No. CCZ 2/14, par. 7.

<sup>2</sup> UN General Assembly, *Universal Declaration of Human Rights*, Resolution 217 A (III) (10 December 1948) (“UDHR”).

<sup>3</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, Resolution 2200A (XXI) (16 December 1966) (“ICCPR”).

<sup>4</sup> *Id.*, Art. 19.

The African Charter on Human and Peoples' Rights (also known as the Banjul Charter, African Charter or "ACHPR") guarantees the right to freedom of expression in Article 9:

- "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."<sup>5</sup>

Article 9(2) states that every individual has the right to express and disseminate their opinions "within the law." However, the African Commission on Human and Peoples' Rights ("African Commission") has made the important point that "the law" that, according to Article 9(2), may limit the rights contained in the African Charter is to be read as international human rights law rather than domestic laws dictated by the State's political authority. Therefore, the international law principles of necessity and proportionality apply to all limitations of rights contained in the African Charter.<sup>6</sup>

**Key cases on interpretation of "within the law" under Article 9(2) of the African Charter (otherwise known as a "claw-back clause") include:**

- *Sir Dawda K. Jawara v. the Gambia*<sup>7</sup>
- *Media Rights Agenda and Others v. Nigeria*<sup>8</sup>
- *Konaté v. Burkina Faso*<sup>9</sup>

Another example of a regional norm on protection of the right is Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (also known as the European Convention on Human Rights or the "ECHR"), which protects freedom of expression in the following terms:

- "1. 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 and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or

<sup>5</sup> Organization of African Unity ("OAU"), *African (Banjul) Charter on Human and Peoples' Rights*, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986 ("African Charter").

<sup>6</sup> Article 60 of the African Charter explicitly requires the African Commission to draw inspiration from international treaties, which would include the principles of necessity and proportionality: "The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on Human and Peoples' Rights, the Charter of the United Nations, the Charter of the Organisation of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of Human and Peoples' Rights, as well as from the provisions of various instruments adopted within the Specialised Agencies of the United Nations of which the Parties to the present Charter are members."

<sup>7</sup> African Commission on Human and Peoples' Rights ("African Commission"), *Sir Dawda K. Jawara v. the Gambia*, Communication 147/95-149/96 (2000).

<sup>8</sup> African Commission, *Media Rights Agenda and Others v. Nigeria*, Communication 224/98 (2000).

<sup>9</sup> African Court on Human and Peoples' Rights ("African Court"), *Konaté v. Burkina Faso*, Application No. 004/2013 (2014).



penalties as are prescribed by law and are necessary in a democratic society, in the 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.”<sup>10</sup>

As with Article 19 of the ICCPR, Article 10 also details a number of grounds on which the right to freedom of expression may be limited under Article 10(2).

The American Convention on Human Rights (the “ACHR”, sometimes known as the Pact of San José) guarantees the right to freedom of expression in terms very similar to the UDHR and ICCPR, allowing limitations identical to those in the latter. It also provides some additional explicit protections, ruling out the use of prior censorship or the use of indirect methods.

Article 13 of the Convention states:

“1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.

2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:

- a. respect for the rights or reputations of others; or
- b. the protection of national security, public order, or public health or morals.

3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.

4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.

5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, colour, religion, language, or national origin shall be considered as offenses punishable by law.”<sup>11</sup>

While freedom of expression is clearly protected by a considerable body of treaty law, it can also be regarded as a principle of customary international law, given how frequently the principle is enunciated in treaties, as well as other soft law instruments. Most human rights treaties, including those dedicated to the protection

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<sup>10</sup> Art. 10, The Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, Rome, Italy (“ECHR”).

<sup>11</sup> Art. 13, Organization of American States (OAS), *American Convention on Human Rights*, Inter-American Specialized Conference on Human Rights, 22 November 1969, San José, Costa Rica (“ACHR”).

of the rights of specific groups – such as women, children and people with disabilities – also make explicit mention of freedom of expression.

In addition, freedom of expression is protected in almost every national constitution. This obviously means that it will have supremacy within the law of the land, but also suggests that it should be seen as a general principle of law, applicable in all circumstances.

B. Why is freedom of expression important?

**Brainstorm**

Make a list of reasons why freedom of expression is an important human right.

Your list probably starts with freedom of expression as an *individual* right. It is closely connected to the individual's freedom of conscience and opinion (see the wording of Article 19 in both the UDHR and the ICCPR). However, the list very quickly broadens out into issues where freedom of expression is thought to have a general social benefit. In particular, this is a right that is seen to be crucial for the functioning of democracy as a whole. It is a means of ensuring an open flow of ideas and holding authorities to account.

Freedom of expression is not just an individual right; it also has a strong *societal* aspect. It addresses both the right of someone to express an opinion or a fact and the right of others to hear that opinion or fact. The Inter-American Court of Human Rights (the "IACtHR") has repeatedly addressed this dual aspect:

"It requires, on the one hand, that no one be arbitrarily limited or impeded in expressing his own thoughts. In that sense, it is a right that belongs to each individual. Its second aspect, on the other hand, implies a collective right to receive any information whatsoever and to have access to the thoughts expressed by others".<sup>12</sup>

The African Commission cited the Inter-American Court of Human Rights jurisprudence, in *Law Office of Ghazi Suleiman v. Sudan*<sup>13</sup> where the Commission acknowledged that "when an individual's freedom of expression is unlawfully restricted, it is not only the right of that individual that is being violated, but also the right, of all others to 'receive' information and ideas."<sup>14</sup>

The Supreme Court of Zimbabwe has stated the following:

"Freedom of expression has four broad special objectives to serve:  
(i) It helps an individual to obtain self-fulfilment,  
(ii) It assists in the discovery of truth and in promoting political and social participation,  
(iii) It strengthens the capacity of an individual to participate in decision making, and

<sup>12</sup> Inter-American Court of Human Rights ("IACtHR"), *Herrera-Ulloa v. Costa Rica* Judgment, Series No.107 (2004)

<sup>13</sup> African Commission, *Ghazi Suleiman v. Sudan*, Comm. No.228/099 (2003).

<sup>14</sup> African Commission, *Ghazi Suleiman v. Sudan*, Comm. No.228/099 (2003), par. 50.

(iv) It provides a mechanism by which it would be possible to establish a reasonable balance between stability and change.”<sup>15</sup>

The African Commission has made a number of important decisions relating to the freedom of expression, and has confirmed the importance of free speech and the media in a democracy:<sup>16</sup>

“Freedom of expression is a basic human right, vital to an individual's personal development and political consciousness, and to his participation in the conduct of public affairs in his country. Individuals cannot participate fully and fairly in the functioning of societies if they must live in fear of being persecuted by state authorities for exercising their right to freedom of expression. The state must be required to uphold, protect and guarantee this right if it wants to engage in an honest and sincere commitment to democracy and good governance.”<sup>17</sup>

And in *Ghazi Suleiman v. Sudan*<sup>18</sup> the Commission said that it was “a cornerstone of democracy and ... a means of ensuring respect for all human rights and freedoms.”<sup>19</sup> The Constitutional Court of South Africa, *Print Media South Africa & Another v. Minister of Home Affairs & Another*, recognized the role played by the right in realizing other human rights and freedoms:

“[freedom of expression] is closely linked to the right to human dignity and helps to realise several other rights and freedoms. Being able to speak out, to educate, to sing and to protest, be it through waving posters or dancing, is an important tool to challenge discrimination, poverty and oppression. This Court has emphasised the importance of freedom of expression as the lifeblood of an open and democratic society.”<sup>20</sup>

The Ugandan Supreme Court in *Charles Onyango-Obbo and Another v. Attorney General* also recognised the intrinsic link between freedom of expression and democracy:

“Protection of the fundamental human rights ... , is a primary objective of every democratic constitution, and as such is an essential characteristic of democracy. In particular, protection of the right to freedom of expression is of great significance to democracy. It is the bedrock of democratic governance. Meaningful participation of the governed in their governance, which is the hallmark of democracy, is only assured through optimal exercise of the freedom of expression.”<sup>21</sup>

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<sup>15</sup> Supreme Court of Zimbabwe, *Mark Giva Chavunduka and Another v. The Minister of Home Affairs and another*, Supreme Court Civil Application No. 156 (1999).

<sup>16</sup> E.g. African Commission, *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v. Nigeria*, Communications 140/94, 141/94 and 145/95 (1999).

<sup>17</sup> African Commission, *Zimbabwe Lawyers for Human Rights and Associated Newspapers of Zimbabwe v. Zimbabwe*, Communication 284/03 (2009), par. 92.

<sup>18</sup> African Commission, *Ghazi Suleiman v. Sudan*, Comm. No.228/099 (2003).

<sup>19</sup> African Commission, *Ghazi Suleiman v. Sudan*, Comm. No.228/099 (2003) at par. 40.

<sup>20</sup> Constitutional Court of South Africa, *Print Media South Africa & Anor v. Minister of Home Affairs & Anor*, (2009) ZACC 22, par. 93.

<sup>21</sup> Uganda Supreme Court, *Charles Onyango-Obbo and Anor v. Attorney General* (Constitutional Appeal No.2 of 2002), 13.

In South Africa, Judge Cameron (then in the Johannesburg High Court) emphasised the links between freedom to criticise those in power and the success of a constitutional democracy, stating that “the success of our constitutional venture depends upon robust criticism of the exercise of power. This requires alert and critical citizens.”<sup>22</sup>

The Supreme Court of Appeal in South Africa also commented on why the right is so intrinsic to democracy and development.

“The importance of the right to freedom of expression has often been stressed by our courts. Suppression of available information and of ideas can only be detrimental to the decision-making process of individuals, corporations and governments. It may lead to the wrong government being elected, the wrong policies being adopted, the wrong people being appointed, corruption, dishonesty and incompetence not being exposed, wrong investments being made and a multitude of other undesirable consequences. It is for this reason that it has been said ‘that freedom of expression constitutes one of the essential foundations of a democratic society and is one of the basic conditions for its progress and the development of man’.”<sup>23</sup>

The Supreme Court of India, in *Gandhi v. Union of India*, provided a concise summary of the inter-relationship between freedom of expression and democracy.

“Democracy is based essentially on a free debate and open discussion for that is the only corrective of government action in a democratic set up. If democracy means government of the people by the people, it is obvious that every citizen must be entitled to participate in the democratic process and in order to enable him to intelligently exercise his right of making a choice, free and general discussion of public matters is absolutely essential.”<sup>24</sup>

The benefits of freedom of expression are not only in the sphere of democratization and politics. The Nobel prize-winning economist Amartya Sen even went as far as to say that countries with a free press do not suffer famines.<sup>25</sup> Whether or not that claim is literally true, the general point is that freedom of expression – encompassing media freedom – is a precondition for the enjoyment of other rights.<sup>26</sup>

### C. Freedom of expression and access to information

The very first session of the UN General Assembly in 1946 put it thus:

“Freedom of information is a fundamental human right and... the touchstone of all of the freedoms to which the UN is consecrated.”<sup>27</sup>

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<sup>22</sup> High Court of Johannesburg, *Holomisa v. Argus Newspapers Ltd*, (2) SA 588 (W) (1996), p. 609.

<sup>23</sup> South African Supreme Court of Appeal, *Hoho v. The State*, Case No. 493/05 (2008), par. 29.

<sup>24</sup> Supreme Court of India, *Maneka Gandhi v. Union of India*, SCR 597 (1978), p. 621.

<sup>25</sup> Amartya Sen, *Democracy as a Universal Value*, (1999) Vol. 10 No. 3 Journal of Democracy, p. 3-17.

<sup>26</sup> UN Human Rights Committee (“UNHRC”), *General Comment No. 34, ICCPR, Article 19: Freedoms of opinion and expression*, UN Doc. No. CCPR/C/GC/34 (12 September 2011), par. 3 and 4 (“General Comment 34”).

<sup>27</sup> UN General Assembly Resolution 59(I) (14 December 1946).

Freedom of information is understood here to be an inseparable part of freedom of expression – as in the “freedom to seek, receive and impart information” contained in Article 19 of the UDHR.

The right to freedom of expression is now widely interpreted as including the right of access to information held by or under the control of public authorities.<sup>28</sup> The UN and the African Union (“AU”) have conventions that address the right of the public to obtain information about public officials:

- The United Nations Convention Against Corruption requires that the public has “effective access to information” (Article 13), as well as adopting procedures or regulations to allow the public to obtain information about the “organization, functioning and decision-making processes of its public administration and, with due regard for the protection of privacy and personal data, on decisions and legal acts that concern members of the public” (Article 10).<sup>29</sup>
- The United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters requires both that States respond to public requests for information about environmental issues (Article 4) and that they publish information (Article 5).<sup>30</sup>
- The AU’s 2003 Convention on Preventing and Combating Corruption requires States to “adopt such legislative and other measures to give effect to the right of access to any information that is required to assist in the fight against corruption and related offences,”<sup>31</sup> (Article 9) and States are required to “[c]reate an enabling environment that will enable civil society and the media to hold governments to the highest levels of transparency and accountability in the management of public affairs...” (Article 12).
- The African Commission’s Declaration of Principles on Freedom of Expression in Africa affirms the right to access to information (Principle IV).

The African Commission has drafted a Model Law on Access to Information for Africa. As the Special Rapporteur on Freedom of Expression and Access to Information explains in her foreword to the Model Law, this is a non-binding document that can act as a guide for legislators seeking to adopt access to information laws in African countries.<sup>32</sup>

In connection with the right to access information, the European Court of Human Rights (“ECtHR”) has emphasised that the right to gather information is “an essential preparatory step in journalism and is an inherent, protected part of press freedom.”<sup>33</sup> The Grand Chamber of the ECtHR (which can hear cases that raise serious questions of interpretation and application of the ECHR, a serious issue of general importance, or cases which may depart from previous caselaw) has stated that the principle of public access to official documents, allowing for the public, and the media, to exercise

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<sup>28</sup> See e.g. European Court of Human Rights (“ECtHR”), *Társaság a Szabadságjogokért v. Hungary*, Application No. 37374/05 (2009); ECtHR, *Youth Initiative for Human Rights v. Serbia*, Application No. 48135/06 (2013).

<sup>29</sup> United Nations Convention Against Corruption, adopted 2003, entered into force 2005.

<sup>30</sup> Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, adopted 1998, entered into force 2001.

<sup>31</sup> African Union Convention on Preventing and Combating Corruption, adopted 2003, entered into force 2006.

<sup>32</sup> The Model Law can be found here: [http://www.achpr.org/files/news/2013/04/d84/model\\_law.pdf](http://www.achpr.org/files/news/2013/04/d84/model_law.pdf)

<sup>33</sup> ECtHR, *Társaság a Szabadságjogokért v. Hungary*, Application No. 37374/05 (2009), par. 27

control over the State, and other parts of the public sector, contributes to “the free exchange of opinions and ideas and to the efficient and correct administration of public affairs.”<sup>34</sup>

The UN Human Rights Committee (“UNHRC”), which is the UN treaty body that considers complaints and offers authoritative interpretation of the ICCPR, commented that included in this right is the right of the media to access information on public affairs and of the public to receive media output.<sup>35</sup> Individuals should also be able to “ascertain which public authorities or private individuals or bodies control or may control his or her files,”<sup>36</sup> and be able to have any incorrect personal information corrected. It also remarked that prisoners do not lose entitlements to access medical records.

The UNHRC has set out a number of principles that need to be followed to properly give effect to the right of access to information. It has stated that State Parties to the ICCPR should:

- Proactively put in the public domain Government information of public interest;
- Make every effort to ensure easy, prompt, effective and practical access to such information;
- Enact the necessary procedures to access information, such as by means of legislation, which provide for timely processing of requests for information;
- Not charge fees that constitute an unreasonable impediment to access of information;
- Provide reasons for any refusal to provide access to information;
- Have arrangements in place to appeal refusals as well as address the failure to respond to requests.<sup>37</sup>

In *Gauthier v. Canada*<sup>38</sup> the UN Human Rights Committee said that the ICCPR’s protection of freedom of expression “implies that citizens, in particular through the media, should have wide access to information and the opportunity to disseminate information and opinions about the activities of elected bodies and their members.”<sup>39</sup> This was in reference to its General Comment 25 on the right of all people to take part in the conduct of public affairs, the right to vote, and the right to have access to public service.

In *Toktakunov v. Kyrgyzstan* the UNHRC looked at whether the right of individuals to access State-held information imposed a corollary obligation on the State to provide that information:

“In this regard, the Committee recalls its position in relation to press and media freedom that the right of access to information includes a right of the media to have access to information on public affairs and the right of the general public to receive media output. The Committee considers that the realisation of these functions is not limited to the media or professional

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<sup>34</sup> ECtHR, *Gillberg v. Sweden*, Application No. 41723/06 (2013), par. 95.

<sup>35</sup> General Comment 34, par. 18.

<sup>36</sup> General Comment 34, par. 18.

<sup>37</sup> General Comment 34, par. 19.

<sup>38</sup> UNHRC, *Robert W. Gauthier v. Canada*, Communication No 633/1995, U.N. Doc. CCPR/C/65/D/633/1995 (5 May 1999).

<sup>39</sup> UNHRC, *Robert W. Gauthier v. Canada*, Communication No 633/1995, U.N. Doc. CCPR/C/65/D/633/1995 (5 May 1999), par. 13.4



journalists, and that they can also be exercised by public associations or private individuals.”<sup>40</sup>

In 2006, the Inter-American Court of Human Rights handed down a landmark judgment in which they held that the American Convention’s protection of freedom of thought and expression (in Article 13 ACHR) protects the right of access to State-held information. This was the first time an international court explicitly found that the right to freedom of expression contains a standalone right of access to information.<sup>41</sup>

In 2012, when there was no formal access to information legislation in Kenya, the High Court of Kenya considered the obligation on State bodies to give effect to the constitutional right of access to information in *Famy Care Ltd. v. Public Procurement Administrative Review Board*:

“The right of access to information is one of the rights that underpin the values of good governance, integrity, transparency and accountability ... It is based on the understanding that without access to information the achievement of higher values of democracy, rule of law, social justice ... cannot be achieved unless the citizen has access to information.”<sup>42</sup>

### **Point for discussion**

Given the importance of freedom of expression, one approach might be to say (as the US Supreme Court often does) that it has a higher status than other rights. Would you agree with this approach? Do other judicial or international bodies share this view? And what might be the drawbacks?

### **D. Freedom of expression and media freedom**

The role of the media is of particular importance in realising the right to freedom of expression. The media play a central role in allowing the right to freedom of expression to contribute fully to democracy, transparency, and accountability. The South African Constitutional Court commented that:

“In considering the comprehensive quality of the right, one also cannot neglect the vital role of a healthy press in the functioning of a democratic society. One might even consider the press to be a public sentinel, and to the extent that laws encroach upon press freedom, so too do they deal a comparable blow to the public’s right to a healthy, unimpeded media.”<sup>43</sup>

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<sup>40</sup> UNHRC, *Toktakunov v. Kyrgyzstan*, CCPR/C/101/D/1470/2006.

<sup>41</sup> IACtHR, *Claude Reyes et al v. Chile*, Merits, reparations and costs, IACHR Series C no 151, IHRL 1535 (2006).

<sup>42</sup> High Court of Kenya, *Famy Care Ltd. v. Public Procurement Administrative Review Board*, (2012) eKLR2, par. 16.

<sup>43</sup> South Africa Constitutional Court, *Print Media South Africa and Another v. Minister of Home Affairs and Another (Justice Alliance of South Africa and another as amici curiae)* 2012 (12) BCLR 1346 (CC), par. 54.

The East African Court of Justice (“EACJ”) has held that “the principles of democracy must of necessity include adherence to press freedom ... [A] free press goes hand in hand with the principles of accountability and transparency.”<sup>44</sup>

The ECtHR has stressed the media’s role of “public watchdog” on many occasions:

“Not only does [the press] have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of ‘public watchdog’.”<sup>45</sup>

The ECtHR has also stated the following:

“Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.”<sup>46</sup>

The South African High Court also remarked on the role of the press as a “watchdog”:

“The role of the press in a democratic society cannot be understated. The press is in the front line of the battle to maintain democracy. It is the function of the press to ferret out corruption, dishonesty and graft wherever it may occur and to expose the perpetrators. The press must reveal dishonest mal and inept administration. It must also contribute to the exchange of ideas already alluded to. It must advance communication between the governed and those who govern. The press must act as the watchdog of the governed.”<sup>47</sup>

This notion of “public interest” has now become widely used in case law on freedom of expression. This judgment of the South African Supreme Court of Appeal articulates the concept particularly well:

“[W]e must not forget that it is the right, and indeed a vital function, of the press to make available to the community information and criticism about every aspect of public, political, social and economic activity and thus to contribute to the formation of public opinion. The press and the rest of the media provide the means by which useful, and sometimes vital information about the daily affairs of the nation is conveyed to its citizens—from the highest to the lowest ranks. Conversely, the press often becomes the voice of the people—their means to convey their concerns to their fellow citizens, to officialdom and to government.”<sup>48</sup>

The South African Constitutional Court noted that the primary role played by the media comes with duties and responsibilities:

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<sup>44</sup> East African Court of Justice (“EACJ”), *Burundi Journalists’ Union v. Attorney-General of the Republic of Burundi*, Ref No 7 of 2013, 15 May 2015, par. 82-83.

<sup>45</sup> ECtHR, *Thorgeir Thorgeirson v. Iceland*, Application No.13778/88 (1992), par. 63.

<sup>46</sup> ECtHR, *Castells v. Spain*, Application No. 11798/85 (1992), par. 43.

<sup>47</sup> South Africa High Court, *Government of the Republic of South Africa v. “Sunday Times” Newspaper and Another* 1995 (2) SA 221 (T) at 227H - 228A.

<sup>48</sup> South Africa Supreme Court of Appeal, *National Media Ltd and Others v Bogoshi* 1998 (4) SA 1196 (SCA) at par. 24.

“In a democratic society, ... the mass media play a role of undeniable importance. They bear an obligation to provide citizens both with information and with a platform for the exchange of ideas which is crucial to the development of a democratic culture. As primary agents of the dissemination of information and ideas, they are, inevitably, extremely powerful institutions in a democracy and they have a constitutional duty to act with vigour, courage, integrity and responsibility. The manner in which the media carry out their constitutional mandate will have a significant impact on the development of our democratic society. If the media are scrupulous and reliable in the performance of their constitutional obligations, they will invigorate and strengthen our fledgling democracy. If they vacillate in the performance of their duties, the constitutional goals will be imperilled. The Constitution thus asserts and protects the media in the performance of their obligations to the broader society”.<sup>49</sup>

What this means – a point made both by courts around the world – is that the right to freedom of the press does not only benefit individual journalists. As we have seen, it is an important aspect of the right that the public receive the messages that journalists communicate. The French *Conseil Constitutionnel*, for example, has said that this right is enjoyed not only by those who write, edit and publish, but also by those who read.<sup>50</sup>

In a famous advisory opinion on press freedom, the IACtHR said:

“When an individual’s freedom of expression is unlawfully restricted it is not only the right of that individual [journalist] that is being violated, but also the right of all others to ‘receive’ information and ideas.”<sup>51</sup>

The UN Human Rights Committee in its General Comment 34, which offers an authoritative interpretation of Article 19 ICCPR, said:

“The Covenant embraces a right whereby the media may receive information on the basis of which it can carry out its function. The free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion. The public also has a corresponding right to receive media output.... As a means to protect the rights of media users, including members of ethnic and linguistic minorities, to receive a wide range of information and ideas, States parties should take particular care to encourage an independent and diverse media.”<sup>52</sup>

A number of domestic courts have considered the practical benefits that derive from the free media as a “public watchdog”, relaying information and ideas that the public does not always have the capacity or resources to seek out themselves. The UK House of Lords in *McCarton Turkington Breen (a firm) v. Times Newspapers Ltd.* put it thus:

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<sup>49</sup> South Africa Constitutional Court, *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC).

<sup>50</sup> Conseil Constitutionnel, *Décision No. 86-210 DC* (1986), par. 16.

<sup>51</sup> IACtHR, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 (1985), par. 30.

<sup>52</sup> General Comment 34, par. 20.

“In a modern, developed society it is only a small minority of citizens who can participate directly in the discussions and decisions which shape the public life of their society ... It is very largely through the media ... that they will be so alerted and informed.”<sup>53</sup>

In this way, the media can act as an incredibly valuable educational tool. This was recently recognized in the High Court of South Africa decision granting the broadcast media access to Oscar Pistorius’ murder trial:

“it is in the public interest that ... the goings on during the trial be covered ... to ensure that a greater number of persons in the community who have an interest in the matter but who are unable to attend these proceedings ... are able to follow the proceedings wherever they may be. Moreover, in a country like ours where democracy is still somewhat young and the perceptions that continue to persist in the larger section of South African society, particularly those who are poor and who have found it difficult to access the justice system, that they should have a first-hand account of the proceedings involving a local and international icon.”<sup>54</sup>

E. How may freedom of expression be legitimately limited?

Freedom of expression is not an absolute right. It is a general principle of human rights law, found in the UN instruments, the African Charter (Article 27(2)), the ECHR (Article 17), and the ACHR (Article 29) and that human rights may not be exercised in a manner that violates the rights of others. Article 19 of the ICCPR lays out a number of purposes for which freedom of expression may be limited:

“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) For respect of the rights or reputations of others;

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

The ACHR offers the same possible grounds for restriction,<sup>55</sup> while the ECHR expands the list:

“The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the 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.”<sup>56</sup>

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<sup>53</sup> House of Lords, *McCarton Turkington Breen (a firm) v. Times Newspapers Ltd.*, (2001), 2 AC 277.

<sup>54</sup> High Court of South Africa, *Multichoice (Proprietary) Limited and Others v. National Prosecuting Authority and Another, In re: S v. Pistorius, In re Media 24 Limited and Others v. Director of Public Prosecutions North Gauteng and Others*, (2014) ZAGPPHC 37, par. 27.

<sup>55</sup> African Charter, Art, 13(13).

<sup>56</sup> ECHR, Art. 10(2).

The African Court on Human and Peoples' Rights ("ACtHPR") and the African Commission have stated that the only legitimate reasons that can be relied on to limit the right to freedom of expression under Article 9 of the African Charter are those set out in Article 27(2) of the African Charter, namely that rights "shall be exercised in respect of the rights of others, collective security, morality and common interest."<sup>57</sup>

The list of potential limitations is a long one and perhaps, from the perspective of a journalist or other defender of media freedom, it is a rather frightening one. However, the process of limiting freedom of expression (or any other human right) is not a blank cheque. It is not sufficient for a government simply to invoke "national security" or one of the other possible limitations and then violate human rights.

There is a well-established process for determining whether the right to freedom of expression (or any other human right) may be limited. The process takes the form of a *three-part test*:

Step 1: Any restriction on a right must be prescribed by law.

Step 2: The restriction must serve one of the prescribed purposes listed in the text of the human rights instrument.

Step 3: The restriction must be *necessary* to achieve the prescribed purpose.

It is important to note that all three parts of the three-part test must be met in order for a restriction to the right to freedom of expression to be permissible under international law. If only one of the requirements is not met, the infringement on the right to free speech constitutes a human rights violation. The steps are elaborated on below.

### Exercise

Before applying the three-part test, it is important to begin by identifying the specific interference(s) and restriction(s) of the right to freedom of expression that are at issue. Examples are: arrest, detention, imprisonment, fine, injunction, damages, closure, failure to investigate etc.

Make a list of all the types of infringements of the right to freedom of expression you can think of.

#### *Step 1: Prescribed by law*

This is simply a statement of the *principle of legality*, which underlies the concept of the rule of law. The term "law" does not simply mean that the interference/restriction must have a legal basis, the law must meet some minimum qualitative requirements. Specifically, the law should be clear, unambiguous and non-retrospective.

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<sup>57</sup> African Court on Human and Peoples' Rights ("ACtHPR"), *Konaté v. Burkina Faso*, Application 004/2013, par. 35; African Commission, *Media Rights Agenda, Constitutional Rights Project v. Nigeria*, Communication 105/93-128/94-130/94-152/96, par. 68.

The UNHRC adds that any law restricting freedom of expression must comply with the principles in the ICCPR as a whole, and not just Article 19. In particular, this means that restrictions must not be discriminatory and the penalties for breaching the law should not violate the ICCPR.<sup>58</sup> The law must be precise and accessible to the public, and the “law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution.”<sup>59</sup>

The ECtHR has said that to be prescribed by law a restriction must be “adequately accessible” and “formulated with sufficient precision to enable the citizen to regulate his conduct.”<sup>60</sup>

In Zimbabwe, the Constitutional Court in *Chimakure v. Attorney-General of Zimbabwe* held that for a limitation to satisfy the principle of legality it must “specify clearly and concretely in the law the actual limitations to the exercise of freedom of expression.”<sup>61</sup> This is to “enable a person of ordinary intelligence to know in advance what he or she must not do and the consequences of disobedience.”<sup>62</sup>

That same Court in *Chavunduka and Choto v. Minister of Home Affairs & Attorney General* held that the offence of publishing “false news” in the Zimbabwean criminal code was vague and over-inclusive. The offence included statements that “might be likely” to cause “fear, alarm or despondency,” without any requirement to demonstrate that they actually did so. In any event, as the Court pointed out: “[A]lmost anything that is newsworthy is likely to cause, to some degree at least, in a section of the public or a single person, one or other of these subjective emotions.”<sup>63</sup>

In 2016, the High Court of Kenya (Constitutional and Human Rights Division) considered the constitutionality of section 29 of the Kenya Information and Communication Act which provided for an offence where a person uses a telecommunications system to (i) send a message that is grossly offensive or of an indecent, obscene or menacing character; or (ii) send a message that the sender knows to be false for the purpose of causing annoyance, inconvenience or needless anxiety to another person. The High Court found that the provision violated the requirements with regard to “law” that carries penal consequences. The High Court first noted that there was no statutory definition provided for the words used in section 29:

“Thus, the question arises: what amounts to a message that is ‘grossly offensive’, ‘indecent’ obscene’ or ‘menacing character’? Similarly, who determines which message causes ‘annoyance’, ‘inconvenience’, ‘needless anxiety’? Since no definition is offered in the Act, the meaning of these words is left to the subjective interpretation of the Court, which means that the words are so wide and vague that their meaning will depend on the subjective interpretation of each judicial officer seized of a matter.

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<sup>58</sup> General Comment 34, par. 26.

<sup>59</sup> General Comment 34, par. 25.

<sup>60</sup> ECtHR, *The Sunday Times v. the United Kingdom*, Application No. 6538/74 (1979), par. 49.

<sup>61</sup> Zimbabwe Constitutional Court, *Chimakure v. Attorney-General of Zimbabwe*, Application No. CCZ 247/09, Judgment No. CCZ 6/201411 (2014), par. 24.

<sup>62</sup> *Id.*, par. 26.

<sup>63</sup> Zimbabwe Supreme Court, *Mark Giva Chavunduka and Another v. The Minister of Home Affairs and Another*, Supreme Court Civil Application number 156 of 1999, par. 14.



It is my view, therefore, that the provisions of section 29 are so vague, broad and uncertain that individuals do not know the parameters within which their communication falls, and the provisions therefore offend against the rule requiring certainty in legislation that creates criminal offences.”<sup>64</sup>

### **What is a “law” that can restrict the right to freedom of expression?**

A “law” restricting the right to freedom of expression will usually be a written statute, although common law restrictions are also allowed. According to UNHRC General Comment 34 “a norm, to be characterized as a ‘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 unfettered discretion for the restriction of freedom of expression on those charged with its execution.”<sup>65</sup> The UNHRC has also noted that, given the serious implications of limiting free expression, it is not compatible with the ICCPR for a restriction “to be enshrined in traditional, religious or other such customary law.”<sup>66</sup>

#### *Step 2: Serving a legitimate purpose*

The list of legitimate purposes for which rights may be restricted in each of the human rights instruments is an exhaustive one. Article 19(3) of the ICCPR provides for the following possible types of restriction:

“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) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.”

As mentioned above, the African Charter under Art. 27(2) allows for restrictions on the grounds of “the rights of others, collective security, morality and common interest.”

There are no possible purposes for which freedom of expression may be limited, beyond those set out above. However, the term *ordre public* has a broad meaning (which the English translation of “public order” does not fully capture). The seven possible restrictions permitted under Article 10(2) of the ECHR are examples of these *ordre public* criteria (with the exception of the reputation and rights of others, which corresponds to Article 19(3)(a) of the ICCPR):

- interests of national security;
- territorial integrity or public safety;
- prevention of disorder or crime;
- protection of health or morals;

<sup>64</sup> High Court of Kenya, *Geoffrey Andare v. Attorney General and Director of Public Prosecutions*, (2016) eKLR, par. 77 and 78.

<sup>65</sup> General Comment 34, par. 25.

<sup>66</sup> General Comment 34, par. 24.

- protection of the reputation or the rights of others;
- preventing the disclosure of information received in confidence; and
- maintaining the authority and impartiality of the judiciary.

*Step 3: Necessary in a democratic society*

Most limitations to the right to freedom of expression require that the limitation be “necessary”, or “reasonably justifiable” in a democratic society, or another similar formulation. This stresses the presumption that the limitation of a right is an option of last resort and must always be proportionate to the aim pursued. “Necessary” is a stronger standard than merely “reasonable” or “desirable,” although the restriction need not be “indispensable.”<sup>67</sup>

The UNHRC has emphasized the importance of the proportionality of restrictions:

“[R]estrictive measures must conform to the principle of proportionality; they 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.”<sup>68</sup>

In General Comment 34, the UNHRC additionally noted:

“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>69</sup>

In *Marques de Morais v. Angola*, the UNHRC said that the “requirement of necessity implies an element of proportionality, in the sense that the scope of the restriction imposed on freedom of expression must be proportional to the value which the restriction serves to protect.”<sup>70</sup>

The nature of the restriction proposed is also an important consideration. The UNHRC has stated that restrictions on freedom of expression “may not put in jeopardy the right itself.”<sup>71</sup> In a similar vein, the Constitutional Court of Zimbabwe has stated that “[t]o control the manner of exercising a right should not signify its denial or invalidation.”<sup>72</sup>

The EACJ has also emphasized the proportionality argument:

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<sup>67</sup> ECtHR, *Handyside v. the United Kingdom*, Application No. 5493/72 (1976), par. 48-50; ECtHR, *The Sunday Times v. United Kingdom*, Application No. 6538/74 (1979), par. 62.

<sup>68</sup> UNHRC, *General Comment No. 27 on Article 12*, 55th Session, Supplement No. 40, vol. I (A/55/40 (Vol. I)), annex VI, sect. A (“General Comment 27”).

<sup>69</sup> General Comment 34, par. 35.

<sup>70</sup> UNHRC, *Marques de Morais v. Angola* (2005) AHRLR 3 (HRC 2005), par. 6.8.

<sup>71</sup> General Comment 34, par. 21.

<sup>72</sup> Zimbabwe Constitutional Court, *Chimakure v. Attorney-General of Zimbabwe*, Application No. CCZ 247/09, Judgment No. CCZ 6/201411 (2014), p. 17.

“A government should not determine what ideas or information should be placed in the market place ... and we dare add, if it restricts that right, the restriction must be proportionate and reasonable.”<sup>73</sup>

The IACtHR has stated that “it must be shown that a [legitimate aim] cannot reasonably be achieved through a means less restrictive of a right protected by the Convention.”<sup>74</sup>

The United States Supreme Court has stated that any limitation on freedom of expression must be the least restrictive possible:

“Even though the Government’s purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.”<sup>75</sup>

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 v. Attorney-General of Zimbabwe* there is an acknowledgement 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>76</sup> It is therefore not an adequate response when explaining that a limitation is justified that it 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.”<sup>77</sup>

Expression should also be allowed to offend, shock, and disturb. Although referring specifically to criticism of judges, English Judge Mumby of the Family Division of the High Court said that language used should not overrule the content of a statement:

“[T]hat which is lawful if expressed in the temperate or scholarly language of a legal periodical or the broadsheet press does not become unlawful simply because expressed in the more robust, colourful or intemperate language of the tabloid press or even in language which is crude, insulting and vulgar.”<sup>78</sup>

Lord Justice Sedley of the Court of Appeal of England and Wales (sitting as a High Court Judge) put it succinctly that “freedom to speak inoffensively is not worth having.”<sup>79</sup> Or, in the words of a South African judge:

“Although conscious of the fact that I am venturing on what may be new ground I think that the courts must not avoid the reality that in South Africa political matters are usually discussed in forthright terms. Strong epithets are

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<sup>73</sup> EACJ, *Burundi Journalists’ Union v. The Attorney General of the Republic of Burundi*, Reference No. 1 of 2014 (2015), par. 98.

<sup>74</sup> IACtHR, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85, Series A No. 5, 7 HRLJ 74 (1986), par. 30.

<sup>75</sup> United States Supreme Court, *Shelton v. Tucker*, 364 US 479 (1960), p. 488.

<sup>76</sup> Zimbabwe Constitutional Court, *Chimakure v. Attorney-General of Zimbabwe*, Constitutional Application No. SC 247/09, par. 57.

<sup>77</sup> Zimbabwe Constitutional Court, *Chimakure v. Attorney-General of Zimbabwe*, Constitutional Application No. SC 247/09, par. 56.

<sup>78</sup> United Kingdom Family Division, *Harris v. Harris: Attorney-General v. Harris*, 2001, 2 FLR 395.

<sup>79</sup> High Court of England and Wales, *Redmond-Bates v DPP*, (1999) 163 JP 789, par. 20.

used and accusations come readily to the tongue. I think, too, that the public and readers of newspapers that debate political matters, are aware of this. How soon the audiences of political speakers would dwindle if the speakers were to use the tones, terms and expressions that one could expect from a lecturer at a meeting of the Ladies Agricultural Union on the subject of pruning roses!”<sup>80</sup>

In assessing the legitimacy of restrictions, the ECtHR allows a “margin of appreciation” to the State. This means that there is a degree of flexibility in interpretation, which is especially applicable if the restriction relates to an issue where there may be considerable differences among European States – particularly on issues such as the protection of morals, where standards differ from country to country. The margin of appreciation will be less when the purpose of the restriction is more objective in nature (such as protecting the authority of the judiciary).<sup>81</sup> The ECtHR has explicitly stated that there is little scope under the ECHR for restrictions on matters of public interest, suggesting a much narrower margin of appreciation in cases concerning such speech.<sup>82</sup>

By contrast, the UNHRC explicitly rules out the possibility of such flexibility:

“The Committee reserves to itself an assessment of whether, in a given situation, there may have been circumstances which made a restriction of freedom of expression necessary. In this regard, the Committee recalls that the scope of this freedom is not to be assessed by reference to a “margin of appreciation” and in order for the Committee to carry out this function, a State party, in any given case, must demonstrate in specific fashion the precise nature of the threat to any of the enumerated grounds listed in paragraph 3 that has caused it to restrict freedom of expression.”<sup>83</sup>

Also the IACtHR has ruled out the concept by stating the following:

“When a State has ratified an international treaty such as the American Convention, its judges, as part of the State, are also bound by such Convention. This forces them to see that all the effects of the provisions embodied in the Convention are not adversely affected by the enforcement of laws which are contrary to its purpose and that have not had any legal effects since their inception. In other words, the Judiciary must exercise a sort of “conventionality control” between the domestic legal provisions which are applied to specific cases and the American Convention on Human Rights. To perform this task, the Judiciary has to take into account not only the treaty, but also the interpretation thereof made by the Inter-American Court, which is the ultimate interpreter of the American Convention.”<sup>84</sup>

Hence, the concept of awarding States a margin of appreciation is unique for the ECtHR.

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<sup>80</sup> South Africa High Court, *Pienaar v. Argus Printing and Publishing Company Ltd* 1956 (4) SA 310 (W), at 318 C-E.

<sup>81</sup> ECtHR, *Handyside v. United Kingdom*, Application No. 5493/72 (1976), par. 48; ECtHR, *The Sunday Times v. United Kingdom*, Application No. 6538/74 (1979), par. 79-81.

<sup>82</sup> ECtHR, *Sürek v. Turkey (No. 1)*, Application No. 26682/95 (1999), par. 61.

<sup>83</sup> UNHRC, *General Comment No. 34, ICCPR, Article 19: Freedoms of opinion and expression*, UN Doc. No. CCPR/C/GC/34 (12 September 2011), par. 36.

<sup>84</sup> IACtHR, *Almonacid-Arellano et al v. Chile*, Preliminary Objections, Merits, Reparations and Costs (2006), par. 124.

**Case scenario**

A newspaper publishes details of the business interests of the Minister of Defence – he owns a shoe factory.

The editor of the newspaper is arrested and charged with offences against national security. The prosecutor argues that intrusive reporting about the Minister responsible for the nation's defences will give succour to the country's enemies.

What do you say?

**Case scenario**

An opposition organization publishes a series of satirical cartoons about the President on its website. He is portrayed as a sloth, an alcoholic and a would-be ruler for life.

The prosecutor initiates a criminal enquiry, claiming that the cartoons have defamed the President.

If you were the judge, what view would you take?

**F. Protection of freedom of expression in South Sudan**

Freedom of expression is protected by Section 24 of the Constitution of South Sudan,<sup>85</sup> which deals with “freedom of expression and media”:

- “(1) Every citizen shall have the right to the freedom of expression, reception and dissemination of information, publication, and access to the press without prejudice to public order, safety or morals as prescribed by law.
- (2) All levels of government shall guarantee the freedom of the press and other media as shall be regulated by law in a democratic society.
- (3) All media shall abide by professional ethics.”

The Government further enacted three Media laws: (1) the Broadcasting Corporation Act 2013; (2) the Media Authority Act 2013; and (3) the Right of Access to Information Act 2013. These three pieces of legislation provide the legal basis for the protection of freedom of expression and the media in South Sudan.

Section 3 of the Media Authority Act<sup>86</sup> provides for the regulation and development of the media in South Sudan with a view to promoting an independent pluralistic media in the public interest. It further establishes an autonomous regulatory authority to oversee the media industry in South Sudan.

Section 6 of the Media Authority Act lists 14 “guiding principles”, a number of which are relevant to freedom of expression and freedom of the media. Section 6(13)(a) provides for the protection of press freedom and independent media:

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<sup>85</sup> Transitional Constitution of the Republic of South Sudan, 2011.

<sup>86</sup> Media Authority Act 2013

“free media representing all groups and divisions of society shall be promoted as essential to democracy, giving independent scrutiny and comment on the works of government and institutions, serving as the public watchdog and advocate, providing a free flow of information and diverse opinions.’

Section 6(13)(b) of the Media Authority Act provides that mass media shall be protected from censorship by any official or non-official authority.

Freedom of expression on the internet and “new media” are also protected by the Act under Section 6(14). Section 6(14)(a) states that the use of internet and new media shall include the promotion of freedom of expression, open standards and open access to such internet and new media.

Article 7(3)(a) of the Broadcasting Corporation Act<sup>87</sup> states that the Broadcasting Corporation shall strive, among others, to provide a service that is “independent from political and economic control of the government and reflects editorial integrity.”

#### **Point for discussion**

Do you think the legal protection of freedom of expression and freedom of the press in South Sudan is sufficient?

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<sup>87</sup> Broadcasting Corporation Act 2013.



### III. DEFAMATION

#### A. What is defamation?

In terms of modern human rights law, defamation can be understood in terms of Article 17 of the ICCPR as the protection against “unlawful attacks” on a person’s “honour and reputation”. Article 11 of the ACHR also protects against “unlawful attacks on his honor or reputation”, although neither the European nor African regional instruments mentions this.

Defamation continues to fall within the criminal law in a majority of States, although in many instances criminal defamation has fallen into disuse. Defamation as a tort, or civil wrong, continues to be very widespread. In Africa, a number of countries, such as Cote d’Ivoire, Togo and Burkina Faso, have scrapped imprisonment for defamation from the statute books. Ghana repealed its criminal defamation law in 2001. At the occasion, Ghana’s Ministry of Justice said:

“[These laws] were meant to be weapons in the armoury of British imperialism in its attempt to stifle and suppress the growth of Ghanaian nationalism... The laws have come to symbolise authoritarian, anti-democratic, anti-media impulses within our body politic... Designed to frustrate our freedom and perpetuate our servitude, these laws should have been repealed at independence.”

#### B. The right to protection against attacks on reputation?

Article 12 of the Universal Declaration of Human Rights provides that:

“No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”<sup>88</sup>

This is echoed in identical words in Article 17 of the ICCPR (and hence is binding law upon States that are party to that treaty) and, as we have already seen, there is also a separate reference in Article 19 of the ICCPR to protection of “the rights and reputation” of others as a legitimate grounds for restricting freedom of expression.

The African Charter refers to “the rights of others” without mentioning reputation.

The ECHR, as we have seen, contains a reference to “reputation and rights” as legitimate grounds for restrictions to Article 10(1). In recent years the ECtHR has begun to regard “honour and reputation” as a substantive right contained within Article 8, as if the wording of that Article were the same as Article 17 of the ICCPR:

“The Court considers that a person’s reputation, even if that person is criticised in the context of a public debate, forms part of his or her personal identity and psychological integrity and therefore also falls within the scope of his or her “private life”. Article 8 therefore applies.”<sup>89</sup>

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<sup>88</sup> UDHR, *supra* note 2, Art.12.

<sup>89</sup> ECtHR, *Pfeifer v. Austria*, Application No. 12556/03 (2007), par. 35.

The ECtHR has not been entirely consistent in its jurisprudence and has slightly modified this approach on occasion, acknowledging that Article 8 does not “expressly” provide for a right to reputation. In *Karako v. Hungary* the ECtHR underlined this by saying that the relevant defamation in issue must constitute “such a serious interference with [a person’s] private life as to undermine his personal integrity.”<sup>90</sup>

### **What is reputation?**

The concept of “reputation” is unclear, perhaps dangerously so, given that it can be used as the basis for limiting human rights. For example, what does it have to do with public profile or celebrity? Does a public figure have a greater reputation than an ordinary member of the public? Is reputation connected with how many people have heard of you? If the answer is yes, then presumably the damage to reputation will be much greater for such people. This opens up the possibility of abuse of defamation law by public figures.

Perhaps a better approach is to tie the concept of “reputation” to human dignity. Human rights law has as its purpose the protection of dignity – equally for all people, whether they are celebrities or not. This would mean that the ordinary person, whose first appearance in the media occurred when their reputation was attacked, would be as worthy of protection as the public figure whose activities are reported every day.

### **Question**

What do you think: is reputation an objective phenomenon?

### **C. Criminal defamation**

Many defamation laws originated as part of the criminal law of the State. This suggests that there is perceived to be a public interest in the State initiating criminal prosecutions against journalists or others – something that goes beyond the right of the individual to protect his or her reputation. It is closely related to the concept of sedition (“seditious libel” in the common law), which penalizes speech and other expression that is critical of government or the State. Yet, increasingly, the whole notion of criminal defamation is seen as antiquated and anachronistic.

### **Question**

Do you know of a case in which a journalist was convicted for criminal defamation?

What were the facts, what was the penalty?

Do you think the conviction was justified?

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<sup>90</sup> ECtHR, *Karako v. Hungary*, Application No. 39311/05 2009), par. 23.

The offence of criminal defamation is clearly a limitation on the right to freedom of expression, seeking to pursue the legitimate aim of protecting the rights and reputation of others (step 2 of the three-part test). However, that does not automatically make the limitation permissible. In the Zimbabwean case of *Madanhire v. Attorney General*, the Court pointed out that the key question is whether the limitation is justifiable.

“It certainly cannot be gainsaid that the offence of criminal defamation operates to encumber and restrict the freedom of expression enshrined in s 20(1) of the former Constitution. On the other hand, it is also not in doubt that the offence of criminal defamation falls into the category of permissible derogations contemplated in s 20(2)(b)(i), as being a provision designed to protect the reputations, rights and freedoms of other persons. What is in issue for determination by this Court is whether or not it is a limitation that is reasonably justifiable in a democratic society.”<sup>91</sup>

The UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression is among a number of international and regional bodies that have been arguing that “criminal defamation laws should be repealed in favour of civil laws as the latter are able to provide sufficient protection for reputations”.<sup>92</sup> He has further observed the widespread international condemnation of custodial sanctions in cases involving speech and stated that “[c]riminal defamation laws represent a potentially serious threat to freedom of expression because of the very sanctions that often accompany conviction.”<sup>93</sup>

The African Commission, in Resolution 169, called on all States to “repeal criminal defamation laws or insult laws which impede freedom of speech, and to adhere to the provisions of freedom of expression, articulated in the African Charter, the Declaration, and other regional and international instruments.”<sup>94</sup>

The UNHRC has recommended that:

“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. It is impermissible for a State party to indict a person for criminal defamation but then not to proceed to trial expeditiously – such a practice has a chilling effect that may unduly restrict the exercise of freedom of expression of the person concerned and others.”<sup>95</sup>

There are a number of very strict protections that should apply when a criminal defamation law remains on the statute books:

- If defamation is part of the criminal law, the criminal standard of proof – beyond a reasonable doubt – should be fully satisfied.<sup>96</sup>

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<sup>91</sup> Zimbabwe Constitutional Court, *Madanhire and another v. Attorney General* Judgment No CCZ 2/14, 8.

<sup>92</sup> UN Commission on Human Rights, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, Mr. Abid Hussain, E/CN.4/2000/63 (18 January 2000) par 52.

<sup>93</sup> *Id.*, par. 48.

<sup>94</sup> African Commission, Resolution 169 on Repealing Criminal Defamation Laws in Africa, 48<sup>th</sup> Ordinary Session, Banjul, 10-24 November 2010.

<sup>95</sup> General Comment 34, par. 47.

<sup>96</sup> IACtHR, *Kimel v. Argentina*, Merits, Reparations and Costs, Series C No. 177 (2008).

- Convictions for criminal defamation should only be secured when the allegedly defamatory statements are false, and when the mental element of the crime is satisfied, i.e. when they are made with the knowledge that the statements were false or with reckless disregard as to whether they were true or false.
- Penalties should not include imprisonment,<sup>97</sup> nor should they entail other suspensions of the right to freedom of expression or the right to practice journalism.
- States should not resort to criminal law when a civil law alternative is readily available.<sup>98</sup>

The ACtHPR, in *Konaté v. Burkina Faso*, found the State to be in violation of both the African Charter and the ECOWAS Treaty because of the existence of custodial sentences for defamation in its laws in addition to the fact that it was imposed on Mr Konaté. The Court made the same finding in relation to excessive fines and costs imposed upon him.<sup>99</sup>

The danger with criminal defamation – and one of the many reasons why defamation should be a purely civil matter – is that the involvement of the State in prosecuting alleged defamers leaves the laws open to being used for punishing dissent. It may also be used to give additional and excessive protection to officials and government.

The United States Supreme Court grappled with this issue in *Garrison v. Louisiana*.<sup>100</sup> Garrison had been convicted of criminal libel after criticizing judges for a backlog in cases (caused he said by inefficiency, laziness and too many vacations). The Court rejected the idea that a true statement could ever be libellous, whether made with malice or not, and that even a false criticism of a public official could only attract sanction if it was made with “actual malice” – in other words with the knowledge that it was false or with reckless disregard as to its truth.

In concurring opinions, two of the Justices rejected the idea of criminal defamation altogether:

“[U]nder our Constitution, there is absolutely no place in this country for the old, discredited English Star Chamber law of seditious criminal libel.”<sup>101</sup>

The IACtHR has argued that the use of criminal law to protect fundamental rights must be a last resort:

“The broad definition of the crime of defamation might be contrary to the principle of minimum, necessary, appropriate, and last resort or *ultima ratio* intervention of criminal law. In a democratic society punitive power is exercised only to the extent that is strictly necessary in order to protect fundamental legal rights from serious attacks which may impair or endanger them. The opposite would result in the abusive exercise of the punitive power of the State.”<sup>102</sup>

<sup>97</sup> ACtHPR, *Konaté v. Burkina Faso*, Application No. 004/2013 (2014).

<sup>98</sup> See e.g. ECtHR, *Amorim Giestas and Jesus Costa Bordalo v. Portugal*, Application No. 37840/10 (2014), par. 36.

<sup>99</sup> ACtHPR, *Konaté v. Burkina Faso*, Application No. 004/2013 (2014).

<sup>100</sup> United States Supreme Court, *Garrison v. Louisiana* 379 US 64 (1964).

<sup>101</sup> *Id.*, p.81 (Mr. Justice Black and Mr. Justice Douglas, concurring opinion).

<sup>102</sup> IACtHR, *Kimel v. Argentina*, Merits, Reparations and Costs, Series C No. 177 (2008).

Another danger with the existence of the criminal defamation offence is the “chilling effect” it has on the practice of journalism: journalists fear reporting on sensitive or controversial stories out of concern that they may be charged with defamation and face a criminal trial. This was recognised by the ECtHR in *Dilipak v. Turkey*<sup>103</sup> where the Court remarked that damages awarded against two journalists placed a heavy burden on the journalists themselves (one had had his house seized) but also had a chilling effect on all journalists.

The Zimbabwean Constitutional Court acknowledged the potential chilling effect of criminal defamation laws on the press as well:

“It is inconceivable that a newspaper could perform its investigative and informative functions without defaming one person or another. The overhanging effect of the offence of criminal defamation is to stifle and silence the free flow of information in the public domain. This, in turn, may result in the citizenry remaining uninformed about matters of public significance and the unquestioned and unchecked continuation of unconscionable malpractices.”<sup>104</sup>

While stopping short of finding criminal defamation in violation of the right to freedom of expression as such, all regional human rights courts and many national courts around the world have said that criminal law should only be used in the context of defamation in extreme circumstances. The Inter-American Court of Human Rights argued that the use of criminal law to protect fundamental rights must be a last resort, as “[i]n a democratic society punitive power is exercised only to the extent that is strictly necessary in order to protect fundamental legal rights from serious attacks which may impair or endanger them”.<sup>105</sup>

#### **Caselaw highlight: *Konaté v. Burkina Faso***

In August 2012, journalist Lohé Issa Konaté wrote two articles for his newspaper *L'Ouragan* (“the Hurricane”), in which he accused a public prosecutor of corruption. In response, the prosecutor filed a complaint against Mr Konaté for defamation, public insult, and contempt of court, which resulted in Mr Konaté’s criminal prosecution. The prosecutor also filed a civil damages claim.

In October 2012, Mr Konaté was found guilty by the Ouagadougou High Court and sentenced to 1 year imprisonment, a fine of US \$3,000, and US \$9,000 in damages to be paid to the prosecutor. The court also suspended Mr Konaté’s newspaper for 6 months. The Ouagadougou Court of Appeal upheld the decision.

An application was filed before the ACtHPR on Mr Konaté’s behalf, arguing that the excessive penalties provided for under Burkinabé criminal defamation laws and the imposition of those penalties violated his rights under Article 9 ACHRP, Article 19 ICCPR and Article 66(2) of the ECOWAS Treaty.

The Court stated that criminal penalties as such should only be used in extreme circumstances, especially if civil remedies were available. Imprisonment for defamation can never be an acceptable penalty:

<sup>103</sup> ECtHR, *Dilipak and Karakaya v. Turkey* (application Nos. 7942/05 and 24838/05).

<sup>104</sup> Zimbabwe Constitutional Court, *Madanhire and another v Attorney General* Judgment No CCZ 2/14, 11.

<sup>105</sup> IACtHR, *Vélez Loor v. Panama* at par. 170.

“In essence, the Court notes that, for now, defamation is an offense punishable by imprisonment in the legislation of the Respondent State, and that the latter failed to show how a penalty of imprisonment was a necessary limitation to freedom of expression in order to protect the rights and reputation of members of the judiciary. ...

Apart from serious and very exceptional circumstances for example, incitement to international crimes, public incitement to hatred, discrimination or violence or threats against a person or a group of people, because of specific criteria such as race, colour, religion or nationality, the Court is of the view that the violations of laws on freedom of speech and the press cannot be sanctioned by custodial sentences, without going contrary to the above provisions.”<sup>106</sup>

The Court found that the penalties imposed on Mr Konaté were not proportionate, especially since the person claiming to have been defamed was a public figure:

“In assessing the need for restrictions on freedom of expression by the Respondent State to protect the honour and reputation of others, this Court also deems it necessary to consider the function of the person whose rights are to be protected; in other words, the Court considers that its assessment of the need for the limitation must necessarily vary depending on whether the person is a public figure or not. The Court is of the view that freedom of expression in a democratic society must be the subject of a lesser degree of interference when it occurs in the context of public debate relating to public figures. Consequently, as stated by the [African] Commission, “people who assume highly visible public roles must necessarily face a higher degree of criticism than private citizens; otherwise public debate may be stifled altogether”.

The Court considers that there is no doubt that a prosecutor is a "public figure"; as such, he is more exposed than an ordinary individual and is subject to many and more severe criticisms. Given that a higher degree of tolerance is expected of him/her, the laws of States Parties to the Charter and the Covenant with respect to dishonouring or tarnishing the reputation of public figures, such as the members of the judiciary, should therefore not provide more severe sanctions than those relating to offenses against the honor or reputation of an ordinary individual.”<sup>107</sup>

The Court concluded that Burkina Faso had violated its obligations under the African Charter, ICCPR and ECOWAS Treaty:

“[T]he Court opines that sections 109 and 110 of the Information Code and section 178 of the Penal Code of Burkina Faso on the basis of which the Applicant was sentenced to a custodial sentence is contrary to requirements of article 9 of the Charter and article 19 of the Covenant. The Applicant having also mentioned article 66 (2) (c) of the Revised ECOWAS Treaty under which States parties undertake to "respect the rights of journalists", the Court finds that the Respondent State also failed in its duty in this regard in that the custodial sentence under the above legislation constitutes a disproportionate interference in the exercise of the freedom of expression by

<sup>106</sup> ACtHPR, *Konaté v. Burkina Faso*, Application No. 004/2013 (2014), par. 163 and 165.

<sup>107</sup> ACtHPR, *Konaté v. Burkina Faso*, Application No. 004/2013 (2014), par. 155-156.



journalists in general and especially in the Applicant's capacity as a journalist."<sup>108</sup>

Consequently, Burkina Faso was ordered to (i) amend its legislation on defamation in order to make it compliant with article 9 of the Charter, article 19 of the Covenant and article 66 (2)(c) of the Revised ECOWAS Treaty, (ii) repeal custodial sentences for acts of defamation; and (iii) amend its legislation to ensure that other sanctions for defamation meet the test of necessity and proportionality, in accordance with its obligations under the Charter and other international instruments."<sup>109</sup>

Burkina Faso removed imprisonment as a penalty for defamation from its laws in 2015.

#### D. Civil defamation

There is broad agreement that some sort of remedy should be available for those who believe that their reputation has been unfairly undermined. This should take the form of a civil suit by the person who claims that their reputation has been damaged.

But even given this consensus, the actual practice of defamation law throws up a number of potential issues.

#### E. What is the right way to deal with defamation?

When a person is found to have been defamed, they are entitled to a remedy. The problem – and the reason that defamation law has such notoriety among journalists – is that the remedies imposed are often punitive and disproportionate.

We have already seen that sentences of imprisonment for criminal defamation are regarded as disproportionate due to their impact on freedom of expression. Likewise, heavy fines, whether in criminal or civil cases, are aimed at punishing the defamer rather than redressing the wrong to the defamed.<sup>110</sup> In *Konaté v. Burkina Faso*, the ACtHPR stated that all sanctions of a criminal nature, including civil and administrative fines, are subject to the criteria of necessity and proportionality under international law.<sup>111</sup>

The ridiculous sums awarded in defamation damages in some jurisdictions have led to the phenomenon of “libel tourism”, whereby plaintiffs shop around to find the most lucrative jurisdiction in which to file their suit. The special mandates of the UN, OSCE, African Commission, and OAS have established a rule against “libel tourism”:

“Jurisdiction in legal cases relating to Internet content should be restricted to States to which those cases have a real and substantial connection, normally because the author is established there, the content is uploaded there and/or the content is specifically directed at that State. Private parties should only be

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<sup>108</sup> ACtHPR, *Konaté v. Burkina Faso*, Application No. 004/2013 (2014), par. 164.

<sup>109</sup> ACtHPR, *Konaté v. Burkina Faso*, Application No. 004/2013 (2014), par. 176.

<sup>110</sup> ACtHPR, *Konaté v. Burkina Faso*, Application No. 004/2013 (2014).

<sup>111</sup> *Id.*, par. 166.

able to bring a case in a given jurisdiction where they can establish that they have suffered substantial harm in that jurisdiction.”<sup>112</sup>

Whenever possible, redress in defamation cases should be non-pecuniary and aimed directly at remedying the wrong caused by the defamatory statement. Most obviously, this could be through publishing an apology or correction.

Applying a remedy can be considered as part of the “necessity” consideration in the three-part test for limiting freedom of expression. A proportional limitation – which can be justified when defamation has been proved – is one that is the least restrictive to achieve the aim of repairing a damaged reputation.

Monetary awards – the payment of damages – should only be considered, therefore, when other lesser means are insufficient to redress the harm caused. Compensation for harm caused (known as pecuniary damages) should be based on evidence quantifying the harm and demonstrating a causal relationship with the allegedly defamatory statement.

#### F. Types of defamatory material

##### *(1) Opinions versus facts*

Discussion so far has focused on factual statements that may be defamatory, but what about expressions of opinion?

The ECtHR has taken a very robust view of this: no one can be restricted from expressing opinions. An opinion is exactly that; it is the journalist or writer’s view, based upon their understanding of the facts. It is something different from the facts themselves.

However, countries with “insult” laws may penalize these expressions of opinion. When a political campaigner called the French President a “sad prick,” he was found guilty of insult. The ECtHR found that this verdict had violated his right to freedom of expression.<sup>113</sup>

We discussed how a defence of truth should be absolute in defamation cases. That is to say that if you write that the Minister embezzled his expenses, then you cannot have defamed him if this can be shown to be true. What happens, however, if your allegedly defamatory statement was not a fact that could be proved or disproved, but an opinion?

The ECtHR has a long established doctrine that distinguishes between facts and value judgements:

“[A] careful distinction needs to be made between facts and value-judgements. The existence of facts can be demonstrated, whereas the truth of value-judgements is not susceptible of proof ... As regards value judgements

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<sup>112</sup> The UN Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples’ Rights Special Rapporteur on Freedom of Expression and Access to Information, *Joint Declaration on Freedom of Expression and the Internet*, par. 4(a).

<sup>113</sup> ECtHR, *Eon v. France*, Application No. 26118/10 (2013).

this requirement [to prove their truth] is impossible of fulfilment and it infringes freedom of opinion itself”.<sup>114</sup>

This was elaborated further in the *Thorgeirson* case. Thorgeirson, an Icelandic journalist who wrote about police brutality, had not himself documented such instances, but commented on other accounts of police violence. Even though some of the evidence on which Thorgeirson had based his argument proved to be incorrect, some of it was true. The fact that this was also a matter of considerable public concern meant that the burden of establishing a connection between his value judgment and the underlying facts was light.<sup>115</sup>

In its critically important judgment in *The 1978 Citizen v. McBride*, the South African Constitutional Court considered the contours of the fair comment defence in defamation cases:

“[T]o dub the defence “fair comment” is misleading. If, to be protected, comment has to be “fair”, the law would require expressions of opinion on matters of fact to be just, equitable, reasonable, level-headed and balanced. That is not so. An important rationale for the defence of protected or “fair” comment is to ensure that divergent views are aired in public and subjected to scrutiny and debate. Through open contest, these views may be challenged in argument. By contrast, if views we consider wrong-headed and unacceptable are repressed, they may never be exposed as unpersuasive. Untrammelled debate enhances truth-finding and enables us to scrutinise political argument and deliberate social values.

Protected comment need thus not be “fair or just at all” in any sense in which these terms are commonly understood. Criticism is protected even if extreme, unjust, unbalanced, exaggerated and prejudiced, so long as it expresses an honestly-held opinion, without malice, on a matter of public interest on facts that are true.”<sup>116</sup>

So, if you called the Minister “corrupt,” would that be defamatory? One avenue open to you is obviously to prove that this is factually true (he fiddled his expenses). But if there are other reports of his embezzlement, you could argue that your opinion that he is corrupt is a value judgment with a factual basis – without yourself having to prove its accuracy.

Which raises the question: can a true statement be defamatory? Put that way, the answer is clear. Of course, when we talk about protecting reputations, we only mean reputations that are deserved. It follows, therefore, that if a statement is actually true, then it cannot be defamatory. (Although, in the common law of criminal seditious libel, truth is not a defence – which so appalled the United States Supreme Court in the *Garrison* case). This is the position taken by the UNHRC in General Comment 34, where it stated that:

“All [defamation laws], in particular penal defamation laws, should include such defences as the defence of truth and they should not be applied with regard to those forms of expression that are not, of their nature, subject to verification.”<sup>117</sup>

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<sup>114</sup> ECtHR, *Lingens v. Austria*, Application No. 9815/82 (1986), par. 46.

<sup>115</sup> ECtHR, *Thorgeir Thorgeirson v. Iceland*, Application No. 13778/88 (1992).

<sup>116</sup> South African Constitutional Court, *The Citizen 1978 Ltd v. McBride*, (2011) ZACC 11, par. 82 and 83.

<sup>117</sup> General Comment 34, par. 47.

Hence proving the truth of an allegation should always be an absolute defence to a defamation suit. Furthermore, domestic courts should admit evidence that defendants seek to rely on to demonstrate the truth of their impugned statements, and should not frustrate attempts at raising such a defence.<sup>118</sup>

The African Commission on Human and Peoples' Rights in the Declaration of Principles on Freedom of Expression in Africa has also recognised the importance of the defence of truth in defamation claims:

“No one shall be found liable for true statements, opinions or statements regarding public figures which it was reasonable to make in the circumstances.”<sup>119</sup>

The question presents itself what happens if a statement is untrue. If it is damaging to a person's reputation, does this automatically mean that it is defamatory?

The past half century has seen a developing trend in which reasonable publication is not penalized, even if it is not completely accurate. The term “reasonable publication” encompasses the idea that the author took reasonable steps to ensure the accuracy of the content of the publication, and also that the publication was on a matter of public interest. The Supreme Court of Canada, in *Grant and Anor. v. Torstar Corporation and Ors*, has explained the rationale behind the development of such a defence:

“Freedom does not negate responsibility. It is vital that the media act responsibly in reporting facts on matters of public concern, holding themselves to the highest journalistic standards. But to insist on court-established certainty in reporting on matters of public interest may have the effect of preventing communication of facts which a reasonable person would accept as reliable and which are relevant and important to public debate. The existing common law rules mean, in effect, that the publisher must be certain before publication that it can prove the statement to be true in a court of law, should a suit be filed. Verification of the facts and reliability of the sources may lead a publisher to a reasonable certainty of their truth, but that is different from knowing that one will be able to prove their truth in a court of law, perhaps years later. This, in turn, may have a chilling effect on what is published. Information that is reliable and in the public's interest to know may never see the light of day.”<sup>120</sup>

In *Trustco Group International Ltd and Others v. Shikongo*, the Namibian Supreme Court looked at the defence of reasonable publication:

“The defence of reasonable publication holds those publishing defamatory statements accountable while not preventing them from publishing statements that are in the public interest. It will result in responsible journalistic practices that avoid reckless and careless damage to the reputations of individuals. In so doing, the defence creates a balance between

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<sup>118</sup> UNHRC, *Marques de Moraes v. Angola* (2005) AHRLR 3 (HRC 2005), par. 6.8; ECtHR, *Castells v. Spain*, application 11798/85 (1992), par. 48.

<sup>119</sup> African Commission on Human and Peoples' Rights, *Declaration of Principles on Freedom of Expression in Africa*, 32nd Session, 17 - 23 October, 2002, Banjul, The Gambia (“Declaration of Principles on Freedom of Expression in Africa”).

<sup>120</sup> Supreme Court of Canada, *Peter Grant and Anor v. Torstar Corporation and Ors*, (2009) 3 S.C.R. 640, par. 53.

the important constitutional rights of freedom of speech and the media and the constitutional precept of dignity.”<sup>121</sup>

The South African Supreme Court of Appeal ruled on the question of whether strict liability in defamation was compatible with the constitutional protection of the right to freedom of expression, and concluded that it was not. In its place, the Court considered an alternative approach of allowing a defence in defamation cases of “reasonable publication:”

“[W]e must adopt this approach by stating that the publication in the press of false defamatory allegations of fact will not be regarded as unlawful if, upon a consideration of all the circumstances of the case, it is found to have been reasonable to publish the particular facts in the particular way and at the particular time.”<sup>122</sup>

Various factors should be considered to determine whether any given publication is reasonable:

“In considering the reasonableness of the publication account must obviously be taken of the nature, extent and tone of the allegations. We know, for instance, that greater latitude is usually allowed in respect of political discussion, and that the tone in which a newspaper article is written, or the way in which it is presented, sometimes provides additional, and perhaps unnecessary, sting. What will also figure prominently, is the nature of the information on which the allegations were based and the reliability of their source, as well as the steps taken to verify the information. Ultimately there can be no justification for the publication of untruths, and members of the press should not be left with the impression that they have a licence to lower the standards of care which must be observed before defamatory matter is published in a newspaper ... I have mentioned some of the relevant matters; others, such as the opportunity given to the person concerned to respond, and the need to publish before establishing the truth in a positive manner, also come to mind. The list is not intended to be exhaustive or definitive.”<sup>123</sup>

The ECtHR often refers to public interest as a factor to be weighed against restrictions on freedom of expression, when it considers whether a restriction is “necessary in a democratic society.” It often stresses the importance of the role of the media as a “public watchdog.”<sup>124</sup> When looking at whether a journalist has acted responsibly, the ECtHR has developed criteria that may be taken into account:

- The nature and degree of the defamation;<sup>125</sup>
- The extent to which the newspaper could have reasonably regarded its sources as reliable (e.g. the authority of the source);<sup>126</sup>
- Whether the newspaper had conducted a reasonable amount of research before publication;<sup>127</sup>

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<sup>121</sup> Namibia Supreme Court, *Trustco Group International Ltd and Others v. Shikongo* 214 (2010) AHRLR 200 (NaSC 2010) at par. 56.

<sup>122</sup> South African Supreme Court of Appeal, *National Media Ltd and Others v. Bogoshi* (1999) LRC 616.

<sup>123</sup> *Id.*, p. 631-632.

<sup>124</sup> See e.g. ECtHR, *The Sunday Times v. United Kingdom*, Application No. 6538/74 (1979); ECtHR, *Thorgeir Thorgeirson v. Iceland*, Application No.13778/88 (1992).

<sup>125</sup> ECtHR, *Bladet Tromsø and Stensaas v. Norway*, Application No. 21980/93 (1999), par. 66.

<sup>126</sup> *Id.*

- Whether the newspaper presented the story in a reasonably balanced manner;<sup>128</sup>
- Whether the newspaper gave the defamed person an opportunity to defend themselves.<sup>129</sup>

The ECtHR has also warned against placing too many hurdles before journalists can be deemed to have acted “responsibly”:

“If the national courts apply an overly rigorous approach to the assessment of journalists’ professional conduct, [journalists] could be unduly deterred from discharging their function of keeping the public informed. The courts must therefore take into account the likely impact of their rulings not only on the individual cases before them but also on the media in general.”<sup>130</sup>

The argument is that media freedom would be hampered – and the public watchdog role undermined – if journalists and editors were always required to verify every published statement to a high standard of legal proof. It is sufficient that good professional practice be exercised, meaning that reasonable efforts were made to verify published statements. Journalists’ honest mistakes should not be penalized in a way that limits media freedom.

## (2) Humour

When Hervé Eon designed his insulting placard calling the French President a “sad prick”, the point of its content was not a gratuitous insult to the French President. It was a repetition of the words that Sarkozy himself had used. Since the public generally recognized the words, their repetition was humorous. President Sarkozy clearly did not get the joke, and nor did the French courts. But the ECtHR, on this occasion, did and found Eon’s conviction for insult a violation of his right to freedom of expression.<sup>131</sup>

It is surprising how often public figures seem to lose their sense of humour. An article in an Austrian newspaper mused in satirical manner on the national angst surrounding their national ski champion, Hermann Maier, who had broken his leg in a traffic accident. The sole exception, according to this article, was his friend and rival Stefan Eberharter, whose reaction was, “[g]reat, now I’ll win something at last. Hopefully the rotten dog will slip over on his crutches and break his other leg too.”<sup>132</sup>

There followed a series of increasingly incredible developments:

- alone in the whole of Austria, Eberharter did not realize this was a joke;
- he went to a lawyer who did not tell him to go home and get a life;
- the lawyer took the case to court, where Eberharter won a defamation action against the newspaper;
- the Vienna Court of Appeal upheld the conviction.

The judgment in the ECtHR was one of its shorter ones. Its conclusion can be summarized as “It’s a joke!”:

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<sup>127</sup> ECtHR, *Prager and Oberschlick v. Austria*, Application No. 15974/90 (1995), par. 37.

<sup>128</sup> ECtHR, *Bergens Tidende and Others v. Norway*, Application No. 26131/95 (2000), par. 57.

<sup>129</sup> *Id.*, par. 58.

<sup>130</sup> ECtHR, *Kasabova v. Bulgaria*, Application No. 22385/03 (2011), par. 55.

<sup>131</sup> ECtHR, *Eon v. France*, Application No. 26118/10 (2013).

<sup>132</sup> ECtHR, *Nikowitz v. Austria*, Application No. 5266/03 (2007), par. 6.

“The article, as was already evident from its headings and the caption next to Mr Maier's photograph, was written in an ironic and satirical style and meant as a humorous commentary. Nevertheless, it sought to make a critical contribution to an issue of general interest, namely society's attitude towards a sports star. The Court is not convinced by the reasoning of the domestic courts and the Government that the average reader would be unable to grasp the text's satirical character and, in particular, the humorous element of the impugned passage about what Mr Eberharter could have said but did not actually say.”<sup>133</sup>

The ECtHR awarded all claimed damages and costs.

This was neither the first nor the last time that a plaintiff in a defamation action managed to undermine his own reputation.

The ECtHR has maintained a consistent position of allowing greater latitude for humorous and satirical comment. In a number of its judgments, the ECtHR has expanded on the inherent value of satirical expression:

“Satire is a form of artistic expression and social commentary and, by its inherent features of exaggeration and distortion of reality, naturally aims to provoke and agitate. Accordingly, any interference with an artist's or social commentator's right to such expression must be examined with particular care.”<sup>134</sup>

However, the mere fact of an alleged defamatory statement being published in a satirical magazine would not be enough to protect it. In a Romanian case, a politician named *Petrina* applied successfully to the ECtHR, claiming that his Article 8 rights had been violated by the false allegation that he was a former member of the notorious Communist secret police, the *Securitate*. The fact that the publication was in a satirical magazine was irrelevant. The message of the article was “clear and direct, devoid of any ironic or humorous element.”<sup>135</sup>

The protection of satire has also been emphasised by courts elsewhere. For example, the Malaysian Court of Appeal has stated that:

“No reasonable person will read a cartoon with the same concentration, contemplation and seriousness as one would when reading a work of literature. Cartoons exaggerate, satirize and parody life, including political life ... The political cartoonist, unlike the serious political pamphleteer, seeks to ridicule persons and institutions with humour to deliver a message. It will be most exceptional if a political cartoon will have the effect of disrupting public order, security or the safety of the nation.”<sup>136</sup>

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<sup>133</sup> *Id.*, par. 25.

<sup>134</sup> ECtHR, *Instytut Ekonomicznych Reform, TOV v. Ukraine*, Application No. 61561/08 (2016), par. 46; ECtHR, *Vereinigung Bildender Künstler v. Austria*, Application No. 68354/01 (2007), par. 33.

<sup>135</sup> ECtHR, *Petrina v. Romania*, Application No. 78060/01 (2008), par. 44.

<sup>136</sup> Malaysian Court of Appeal, *Zulkiflee Bin SM Anwar Ulhaque v. Arikrishna Apparau (Zunar Case)*, Civil Appeal No. W-01-500-2011 (2014).

### Question

Consider the case scenario above about the cartoons about the President again. Do you hold the same view as before?

#### *(3) Statements of others*

How far is a journalist responsible for the (possibly defamatory) things that someone else says? Most journalists spend a large part of their time reporting the words of others or, in the case of broadcasting, giving others a platform to speak through interviews and discussions.

The ECtHR has considered several cases in which national courts have held journalists liable for statements made by others. This is evidence that many national jurisdictions still tend to regard journalists as responsible for reporting the words of others. The ECtHR's reasoning, however, gives greater cause for hope. Most notably the ECtHR's recognition of that news reporting based on interviews "constitutes one of the most important means whereby the press is able to play its vital role of "public watchdog".<sup>137</sup>

Greek broadcaster Nikitas Lionorakis was found liable for defamation and ordered to pay damages to an individual who was insulted by a studio guest interviewed in a live radio broadcast. The ECtHR found several grounds for determining that Lionarakis' Article 10 rights had been violated, giving particular emphasis to the interviewer's lack of liability for the live remarks of an interviewee. It also reiterated a point to be found in a number of its judgments on media cases:

"[R]equiring that journalists distance themselves systematically and formally from the content of a statement that might defame or harm a third party is not reconcilable with the press's role of providing information on current events, opinions and ideas."<sup>138</sup>

In other words, it should be taken as given that a journalist is not automatically associated with the opinions stated by others, and it is unnecessary for this to be repeated in relation to each reported opinion or fact.<sup>139</sup> Journalists should however be careful not to "adopt" a defamatory statement (i.e., repeating it as their own, or clearly agreeing with it).<sup>140</sup>

#### G. Defences to defamation suits

From what has already been said, it is clear that there are a number of possible defences to a suit of defamation:

- *Truth*: Truth should be an absolute defence to a suit of defamation. That is, if something is true it cannot be defamatory.

<sup>137</sup> ECtHR, *Jersild v. Denmark*, Application No. 15890/89 (1994), par. 35.

<sup>138</sup> ECtHR, *Lionarakis v. Greece*, Application No. 1131/05 (2007). See also ECtHR, *Jersild v. Denmark*, Application No. 15890/89 (1994).

<sup>139</sup> See also ECtHR, *Filatenko v. Russia*, Application No. 73219/01 (2007).

<sup>140</sup> ECtHR, *Europapress v. Croatia*, Application no. 25333/06 (2009), par. 60.



- *Reasonable publication*: If a publication is *reasonable* then it may be justified even if it is not wholly true. These are some of the elements that might go to define “reasonableness”:
  - The journalist made good faith efforts to prove the truth of the statement and believed it to be true.
  - The defamatory statements were contained in an official report with the journalist not being required to verify the accuracy of all statements in the report.
  - The topic was a matter of public concern and interest.
- *Opinion*: The statement complained of was not a statement of fact but an expression of opinion. Alternatively, in the case of satire and other humorous expression, it could be argued that a statement was not intended seriously and no reasonable person would understand it as such.
- *Absolute privilege*: If the defamatory statement was reported from parliament or judicial proceedings, it would normally be absolutely privileged. That is, neither the original author of the statement nor the media reporting it could be found to have defamed. This rule may also apply to other legislative bodies and other quasi-judicial institutions (such as human rights investigations).
- *Qualified privilege*: There is a degree of protection for media reporting other types of statements, even if they do not enjoy the privilege accorded to parliament or the courts. This might apply to, for example, public meetings, documents and other material in the public domain.
- *Statements of others*: Journalists cannot be responsible for the statements of others, provided that they have not themselves endorsed them. This would apply, for example, in the case of a live interview broadcast.

#### H. Whose burden of proof?

“If I sue you, then I will have to prove my case against you if I want to win.”

While this generally applies in civil matters, in the case of defamation this principle is usually wrong. In many (but not all) legal systems, the burden of proof lies not with the claimant – the person who says that they were defamed – but with the defendant. In any other civil action seeking redress for an alleged tort, it would automatically be the responsibility of the person who had been wronged to prove that:

- The defendant had carried out the action (made the defamatory statement in this case).
- That the action was a wrong against the claimant (that it damaged his/her reputation).

However, in defamation cases, this burden is reversed on the second point (there is a presumption of damage). If the claimant can demonstrate that the defendant made the statement – usually fairly straightforward – it then becomes a matter for the *defendant* to show that the statement was true, and therefore not defamatory.

The striking exception to this rule is the United States. In the celebrated case of *New York Times v. Sullivan*, the United States Supreme Court corrected the anomaly of the burden of proof in libel cases brought by public officials. In a later case this new rule was extended to all public figures.<sup>141</sup>

Of course, this new rule does not absolve journalists of the responsibility of reporting accurately – these matters may still be debated in court, after all – but it does allow them to be bolder in pursuing matters of public interest.

On this point, the difference between United States defamation law and elsewhere is striking. While the common law jurisdictions (United Kingdom and the Commonwealth) follow the anomalous tradition of English law, civil law jurisdictions derive their approach from Roman law, which has a slightly different approach, although with similar effect. The Roman law principle is that the burden should lie on the party that can prove the affirmative. This derives from the supposed difficulty of proving a negative. In the case of defamation proceedings, this will mean, of course, that the onus of proving that a statement is true will lie with the defendant.

### Point for Discussion

What do you think? Should the burden of proof in defamation cases be reversed?

The ECtHR has been completely unpersuaded by arguments to shift the burden of proof. While it has been influenced by other aspects of the evolving United States jurisprudence on defamation, it has explicitly set its face against the new rule from *New York Times v. Sullivan* and subsequent American cases.

In *McVicar v. United Kingdom*, the ECtHR was asked to adjudicate on the *Sullivan* rule, as part of the claim by a British journalist that he should not have been required to prove the truth of allegations about drug use by a well-known athlete. The Court concluded that:

“[it] considers that the requirement that the applicant prove that the allegations made in the article were substantially true on the balance of probabilities constituted a justified restriction on his freedom of expression under Article 10(2) of the Convention...”<sup>142</sup>

The ECtHR underlined this position in a later case, *Kasabova v. Bulgaria*, applying it even in criminal defamation cases. This is in contrast to the position taken by the IACtHR in *Kimel v. Argentina*, discussed above.<sup>143</sup> Where the two regional courts are united, however, is in their finding that it is “particularly important for the courts to examine the evidence adduced by the defendant very carefully.”<sup>144</sup>

### I. Remedies/penalties

One reason why defamation suits – whether criminal or civil – are so feared is the impact of the penalties or awards often made against the media in such cases. Reference is often made to the “chilling effect” of heavy penalties or large defamation

<sup>141</sup> United States Supreme Court, *Gertz v. Robert Welch, Inc.* 418 US 323 (1974).

<sup>142</sup> ECtHR, *McVicar v. United Kingdom*, Application No. 46311/99 (2002), par. 87.

<sup>143</sup> IACtHR, *Kimel v. Argentina Merits, Reparations and Costs*, Case No. 12.450 (2008).

<sup>144</sup> ECtHR, *Kasabova v. Bulgaria*, Application No. 22385/03 (2011), par. 59.

awards. As that phrase makes clear, the concern is not only for the journalist involved in any particular case, but also the deterrent that defamation law can pose to vigorous, inquiring journalism.

As discussed above, international bodies have focused their concern on criminal defamation and the danger that journalists might be imprisoned for performing their professional obligations and exercising their freedom of expression.

No international human rights court has ever upheld a custodial sentence on a journalist for a ‘regular’ defamation case. The ACtHPR has held that:

“Apart from serious and very exceptional circumstances for example, incitement to international crimes, public incitement to hatred, discrimination or violence or threats against a person or a group of people, because of specific criteria such as race, colour, religion or nationality, the Court is of the view that violations of laws on freedom of speech and the press cannot be sanctioned by custodial sentences.”<sup>145</sup>

The ECtHR has considered a number of cases involving criminal defamation and although, as noted above, the ECtHR will not rule out criminal defamation in principle, it has commented several times on the penalties imposed, as in this Romanian case:

“The circumstances of the instant case – a classic case of defamation of an individual in the context of a debate on a matter of legitimate public interest – present no justification whatsoever for the imposition of a prison sentence. Such a sanction, by its very nature, will inevitably have a chilling effect, and the fact that the applicants did not serve their prison sentence does not alter that conclusion, seeing that the individual pardons they received are measures subject to the discretionary power of the President of Romania; furthermore, while such an act of clemency dispenses convicted persons from having to serve their sentence, it does not expunge their conviction...”<sup>146</sup>

In this case the ECtHR was also highly critical of an order imposed on the journalists, as part of the sentence for their conviction, prohibiting them from working as journalists for a year:

“[T]he Court reiterates that prior restraints on the activities of journalists call for the most careful scrutiny on its part and are justified only in exceptional circumstances ... The Court considers that ... [the order prohibiting the applicants from working as journalists for one year] was particularly severe and could not in any circumstances have been justified by the mere risk of the applicants’ reoffending.”

...

The Court considers that by prohibiting the applicants from working as journalists as a preventive measure of general scope, albeit subject to a time-limit, the domestic courts contravened the principle that the press must be able to perform the role of a public watchdog in a democratic society.”<sup>147</sup>

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<sup>145</sup> ACtHPR, *Konaté v. Burkina Faso*, Application No. 004/2013 (2014), par. 155.

<sup>146</sup> ECtHR, *Cumpăna and Mazare v. Romania*, Application No. 33348/96 (2004), par. 116.

<sup>147</sup> *Id.*, par. 118-19.

In civil defamation cases, the principal cause of the “chilling effect” is large monetary awards against the media in favour of defamation claimants. In a civil suit, the purpose of the award is not to punish the defendant (the defamer), but to compensate the plaintiff, the person who was defamed, for any loss or damage caused by the defamation. It follows that the claimant should be able to prove that there was actual loss or damage as part of their suit. If this cannot be demonstrated, then it is unclear why there should be any monetary award. Usually a defamatory statement could be rectified by a correction or an apology.

The problem often comes in the area of non-pecuniary damages. This refers to monetary awards made to compensate losses that cannot be accurately calculated in monetary terms – such as loss of reputation, anxiety and emotional distress. Courts should take into account not only the damage to reputation, but also the potential impact of large monetary awards on the defendant – and also more broadly on freedom of expression and the media in society.

The ECtHR has been critical of large non-pecuniary monetary awards, even on occasions finding them to be a violation of Article 10. The landmark case was that of *Tolstoy Miloslavsky*, who was author of a defamatory pamphlet confronted with damages of £1.5 million (in 1989) awarded by a British libel jury. The ECtHR found the award grossly disproportionate and that Tolstoy Miloslavsky’s right to freedom of expression had therefore been violated, even though the fact that he had committed libel was not in dispute.<sup>148</sup>

In the case of *Steel and Morris v. the United Kingdom* (the so-called “McLibel” case), the ECtHR concluded that the size of the award of damages had to take into account the resources available to the defendants. Although the sum awarded by the British court was not very large “by contemporary standards,” it was “very substantial when compared to the modest incomes and resources of the [...] applicants ...”<sup>149</sup>

In the case of *Filipovic v. Serbia*, the ECtHR recalled its conclusions in *Tolstoy Miloslavsky* and *Steel and Morris* that the award should be proportionate to the moral damage suffered, and also to the means available to the defendant. In *Filipovic*, although the defendant had incorrectly accused the plaintiff of “embezzlement,” it was nevertheless a fact that the plaintiff was under investigation for tax offences. Hence the moral damage was not great. The ECtHR found that the award by the court, which was equivalent to six months of the defendant’s salary, was excessive and a violation of Article 10.<sup>150</sup>

### **Case scenario for discussion**

A journalist gets hold of an official report from the Ministry of Defence, which is highly critical of the work of the procurement office. The new infantry rifle purchased by the army is substandard – it often gets jammed and will not fire when it is used repeatedly. The report states that the procurement office in the Ministry carried out inadequate checks before agreeing the contract. The journalist’s newspaper publishes a story based on the report.

The head of the procurement office files a suit for defamation. He claims that the newspaper story portrays him as negligent and fails to take account of a series of points that he had made within the Ministry in response to the critical

<sup>148</sup> ECtHR, *Tolstoy Miloslavsky v. United Kingdom*, Application No. 18139/91 (1995).

<sup>149</sup> ECtHR, *Steel and Morris v. United Kingdom*, Application No. 68416/01 (2005), par. 96.

<sup>150</sup> ECtHR, *Filipovic v. Serbia*, Application No. 27935/05 (2007).

report, which contained factual inaccuracies.

Is the story defamatory of the head of the procurement office? Is the newspaper article a statement of fact or opinion (or does it even matter)? Is there a sufficient factual basis to the statement?

### **Case scenario for discussion**

Mr Kondeh runs a weekly newspaper of which he also is the main contributor. One day, he hears about an interesting story: a local politician has been accepting payment in order to encourage the local city council to take favourable decisions on requests for licenses for local shops, etc. The most recent case, his source tells him, is that of Mr Jawara, who recently opened a big grocery shop at an enviable location at the centre of town. Mr Kondeh tries to get the politician and Mr Jawara to comment, but neither is willing to speak with him. Others, however, confirm the story.

Mr Kondeh decides to report the story in his paper. He tells the story and closes it with a final paragraph, in which he gives his personal opinion in a passionate way, saying that corruption is “an outrage” and “anyone who is corrupt should be put behind bars”.

The politician and Mr Jawara do not take the publication very well and file a complaint against Mr Kondeh. The case is taken up by the public prosecutor and Mr Kondeh ends being sentenced to 4 months imprisonment. He also has to pay damages to both the politician and Mr Jawara of USD 4,000 each.

### **Question**

Mr Kondeh has taken his case before an international court.

Was there a violation of Mr Kondeh’s right to freedom of expression? Look at both the substance of the case and the penalty imposed. Motivate your viewpoint as if you were the lawyer of Mr Kondeh/the Respondent State.

## **J. Protection of Political Speech and Criticism of Public Officials**

Historically, the law has offered great protection to public officials from criticism, whether in the form of “insult” laws, defamation, sedition laws or other means of preventing unruly subjects from criticising their superiors. In a modern age of democracy and human rights, the principle has been reversed, with special emphasis on the importance of protecting the right of political criticism. In the words of the Ugandan Constitutional Court, public figures need “harder skins”.<sup>151</sup>

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<sup>151</sup> Ugandan Constitutional Court, *Andrew Mujuni Mwenda & Anor v. Attorney General*, Consolidated Constitutional Petitions, No. 12 of 2005 and No. 3 of 2006 (2006).

## Political speech

We saw how the arguments in favour of freedom of expression are not only about the individual right, but also the social and political benefit of openness, free debate and accountability.

### **Caselaw highlight: Bombay High Court, *Binod Rao v. M R Masani***

“True democracy can only thrive in a free clearing-house of competing ideologies and philosophies - political, economic and social - and in this the press has an important role to play. The day this clearing-house closes down would toll the death knell of democracy.”<sup>152</sup>

The ECtHR concluded in one of its landmark Article 10 judgments, that “[F]reedom of political debate is at the very core of the concept of a democratic society.”<sup>153</sup> As it elaborated in a judgment from 2001:

“The Court emphasises that the promotion of free political debate is a very important feature of a democratic society. It attaches the highest importance to the freedom of expression in the context of political debate and considers that very strong reasons are required to justify restrictions on political speech. Allowing broad restrictions on political speech in individual cases would undoubtedly affect respect for the freedom of expression in general in the State concerned...”<sup>154</sup>

This principle is considered so fundamental that it can be found in the judgments of superior courts at the national level. Spain’s Constitutional Court, for example, underlined the importance of freedom of political expression:

“Article 20 of the Constitution [on freedom of expression] ... guarantees the maintenance of free political communication, without which other rights guaranteed by the Constitution would have no content, the representative institutions would be reduced to empty shells, and the principle of democratic legitimacy ... which is the basis for all our juridical and political order would be completely false.”<sup>155</sup>

### **Caselaw highlight: Supreme Court of Sri Lanka, *M Joseph Perera & Ors v. Attorney-General***

“Freedom of speech and expression consists primarily not only in the liberty of the citizen to speak and write what he chooses, but in the liberty of the public to hear and read what it needs... The basic assumption in a democratic polity is that government shall be based on the consent of the governed. The consent of the governed implies not only that consent shall be free but also that it shall be grounded on adequate information and discussion aided by the widest possible dissemination of information from diverse and antagonistic sources ... There must be untrammelled publication of news and views and of the

<sup>152</sup> Bombay High Court, *Binod Rao v. M R Masani*, 78 Bom. LR 125 (1976).

<sup>153</sup> ECtHR, *Lingens v. Austria*, Application No. 9815/82 (1986), par. 42.

<sup>154</sup> ECtHR, *Feldek v. Slovakia*, Application No. 29032/95 (2001), par. 83.

<sup>155</sup> Tribunal Constitucional, Sala Segunda. *Recurso de amparo n.º 211/80. Sentencia* (1981).

opinions of political parties which are critical of the actions of government and expose its weakness. Government must be prevented from assuming the guardianship of the public mind.”<sup>156</sup>

The High Court of Australia has ruled that the Australian Constitution guarantees freedom of political communication, even though it does not include an explicit bill of rights protecting freedom of expression. The guarantee of representative government implicitly protects political speech because of the concept of the accountability of elected representatives:

“Indispensable to that accountability and that responsibility is freedom of communication, at least in relation to public affairs and political discussion ... Freedom of communication in relation to public affairs and political discussion cannot be confined to communications between elected representatives and candidates for election on the one hand and the electorate on the other. The efficacy of representative government depends also upon free communication on such matters between all persons, groups and other bodies in the community.”<sup>157</sup>

In the United Kingdom House of Lords’ judgment in *Campbell v. Mirror Group Newspapers*, Baroness Hale observed:

“There are undoubtedly different types of speech ... some of which are more deserving of protection in a democratic society than others. Top of the list is political speech. The free exchange of information and ideas on matters relevant to the organisation of the economic, social and political life of the country is crucial to any democracy. Without this, it can scarcely be called a democracy at all. This includes revealing information about public figures, especially those in elective office, which would otherwise be private but is relevant to their participation in public life. Intellectual and educational speech and expression are also important in a democracy, not least because they enable the development of individuals’ potential to play a full part in society and in our democratic life. Artistic speech and expression is important for similar reasons, in fostering both individual originality and creativity and the free-thinking and dynamic society we so much value. No doubt there are other kinds of speech and expression for which similar claims can be made.”<sup>158</sup>

The Nigerian High Court reached a similar conclusion:

“Freedom of speech is, no doubt, the very foundation of every democratic society, for without free discussion, particularly on political issues, no public education or enlightenment, so essential for the proper functioning and execution of the processes of responsible government, is possible.”<sup>159</sup>

There are several implications of the particular protection attached to political speech:

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<sup>156</sup> Supreme Court of Sri Lanka, *M Joseph Perera & Ors v. Attorney-General*, App. Nos. 107-109/86, Judgment of 25 May 1987 (1987).

<sup>157</sup> High Court of Australia, *Australian Capital Television Pty Ltd v. The Commonwealth; New South Wales v. The Commonwealth (No. 2)* 66 ALJR 695 (1992), p. 703 (per Mason CJ).

<sup>158</sup> House of Lords, *Campbell v. Mirror Group Newspaper Ltd*, (2004) UKHL 22, par. 148.

<sup>159</sup> High Court of Nigeria, *The State v. The Ivory Trumpet Publishing Co.*, (1984) 5 NCLR 736.

- Political figures must be especially ready to tolerate criticism – rather than the historic situation of having greater protection;
- There needs to be protection of the free speech of politicians when they are conducting their business (as well as protection of those who report what they say); and
- Special rules may be necessary to ensure a fair platform in elections.

### *Criticism of public officials*

Regional human rights courts have increasingly argued that public officials should enjoy *less* protection from criticism than others. As the ACtHPR observed:

“[F]reedom of expression in a democratic society must be the subject of a lesser degree of interference when it occurs in the context of public debate relating to public figures. Consequently, as stated by the [African] Commission [on Human and Peoples’ Rights], ‘people who assume highly visible public roles must necessarily face a higher degree of criticism than private citizens; otherwise public debate may be stifled altogether’.”<sup>160</sup>

According to the ECtHR:

“Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. More generally, freedom of political debate is at the very core of the concept of a democratic society ... . The limits of acceptable criticism are, accordingly, wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed ... and he must consequently display a greater degree of tolerance.”<sup>161</sup>

Public officials can often rely on their status to try to curtail freedom of expression. They have almost automatic access to the media to put their point of view. They may use their office to prosecute critics under national security laws. There may be harsher penalties for those who are found to “insult” public officials.

The ECtHR’s reasoning from the *Lingens* case in 1986 has been echoed in a number of judgments since:

- Freedom of political debate is a core and indispensable democratic value;
- The limits of criticism of a politician must hence be wider than for a private individual; and
- The politician deliberately puts himself in this position and must hence be more tolerant of criticism.

The Nigerian Federal Court of Appeal has distinguished between an outmoded notion of the “sovereign,” who is protected by sedition laws, and the contemporary politician who is regularly subjected to a process of democratic accountability:

“The whole idea of sedition is the protection of the person of the sovereign [...] The present President is a politician and was elected after canvassing for universal votes of the electorate; so is the present State Governor. They are not wearing constitutional protective cloaks of their predecessors in 1963

<sup>160</sup> ACtHPR, *Konaté v. Burkina Faso*, Application No. 004/2013 (2014), par. 155.

<sup>161</sup> ECtHR, *Lingens v. Austria*, Application No. 9815/82 (1986), par. 42.



Constitution ... There is no ban in the Constitution 1979 against publication of truth except for the provisos and security necessities embodied in those sections.”<sup>162</sup>

**Caselaw highlight: ECtHR, *Oberschlick v. Austria***

“The [politician] inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must display a greater degree of tolerance, especially when he himself makes public statements that are susceptible of criticism.”<sup>163</sup>

The principle that public officials should face a higher threshold in mounting a claim of defamation originates from the United States Supreme Court. In the famous case of *New York Times v. Sullivan*, it concluded:

“The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with “actual malice” -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”<sup>164</sup>

The judgment criticized the notion that defendants in defamation cases should be required to prove the truth of their statements about public officials:

“Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which steer far wider of the unlawful zone. The rule thus dampens the vigour and limits the variety of public debate.”<sup>165</sup>

In a later case, the Supreme Court extended the *Sullivan* rule to apply to all “public figures,” on the basis that public figures have access to the media to counteract false statements.<sup>166</sup>

**Point for discussion**

Is it really true that all public figures have “voluntarily exposed themselves” to defamatory falsehoods? If your chosen profession is to be an actor – or even a prominent lawyer – does that mean you are fair game? What are the arguments for and against?

<sup>162</sup> Federal Court of Appeal of Nigeria, *Chief Arthur Nwankwo v. The State*, 6 NCLR 228 (1983), par. 237.

<sup>163</sup> ECtHR, *Oberschlick v. Austria*, Application No. 11662/85 (1991), par. 59.

<sup>164</sup> United States Supreme Court, *New York Times v. Sullivan*, 376 US 254 (1964), par. 279-80.

<sup>165</sup> *Id.*, par 279.

<sup>166</sup> United States Supreme Court, *Gertz v. Robert Welch Inc*, 418 US 323 (1974).

The *Sullivan* reasoning about greater latitude in criticizing public figures has been influential in later judgments in defamation cases, not only in common law jurisdictions such as England, India and South Africa, but also in the Philippines and in Europe. However, the argument in the United States courts about the burden of proving “actual malice” lying with the plaintiff has *not* generally been accepted.

#### K. Insult to institutions

The principle that political speech should be protected is well-established, both at the European level and in many national jurisdictions. It is curious, then, that in many countries, the law offers protection against insult for State offices, institutions or even symbols.

The ECtHR has been influenced by United States free speech jurisprudence, although seldom follows its reasoning fully. Where there is clearly common ground, however, is in the additional latitude given to criticism not only of public officials or politicians, but of the government specifically:

“The limits of permissible criticism are wider with regard to the Government than in relation to a private citizen, or even a politician. In a democratic system the actions or omissions of the Government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion. Furthermore, the dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media.”<sup>167</sup>

Although the ECtHR has not explicitly taken this step, the reasonable position is that “the Government” as an entity should have no standing to bring a case for defamation. In *Romanenko v. Russia* the ECtHR said that there might be good reasons for this as a matter of policy, although it did not rule on the point.<sup>168</sup>

The South African Court of Appeal held in 1946 that organs of the State could not sue individuals for defamation in *Die Spoorbond v. South African Railways*:

“The normal means by which the Crown protects itself against attacks upon its management of the country's affairs is political action, not litigation, and it would, I think, be unfortunate if that practice were altered ... I have no doubt that it would involve a serious interference with the free expression of opinion hitherto enjoyed in this country if the wealth of the State, derived from the State's subjects, could be used to launch against those subjects actions for defamation because they have, falsely and unfairly it may be, criticised or condemned the management of the country.”<sup>169</sup>

This reasoning was followed by the House of Lords in a landmark British case, *Derbyshire County Council v. Times Newspapers*:

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<sup>167</sup> ECtHR, *Castells v. Spain*, Application No. 11798/85 (1992), par. 46.

<sup>168</sup> ECtHR, *Romanenko v. Russia*, Application No. 11751/03, (2009), par. 39; ECtHR, *Lombardo and Ors v. Malta*, Application No. 7333/06 (2007), par. 50.

<sup>169</sup> South African Supreme Court of Appeal, *Die Spoorbond v. South African Railways* (1946) SA 999 (AD).

“It is of the highest public importance that a democratically elected governmental body, or indeed any governmental body, should be open to uninhibited public criticism. The threat of a civil action for defamation must inevitably have an inhibiting effect on freedom of speech.... What has been described as “the chilling effect” induced by the threat of civil actions for libel is very important. Quite often the facts which would justify a defamatory publication are known to be true, but admissible evidence capable of proving those facts is not available. This may prevent the publication of matters which it is very desirable to make public.”<sup>170</sup>

The UN Human Rights Committee has called for the abolition of the offence of “defamation of the State”.<sup>171</sup> While the ECtHR has not entirely ruled out defamation suits by governments, it appears to have limited such suits to situations which threaten public order, implying that governments cannot sue in defamation simply to protect their honour. A number of national courts (e.g. in India, South Africa, the United Kingdom, the United States, and Zimbabwe) have also refused to allow elected and other public authorities to sue for defamation.<sup>172</sup>

In many jurisdictions, by contrast, private corporations are able to sue for defamation. However, there is a trend away from this. Under Australia’s Uniform Defamation Laws of 2006 – which consolidated the pre-existing variety of laws across the different federal States – no corporations with 10 or more employees may sue (although their individual officers may do so). In the United Kingdom Defamation Act of 2013, it is now necessary that a corporation demonstrate actual harm, in the form of serious financial loss, caused by or likely to be caused by a defamatory statement.

### Point for discussion

In the famous “McLibel” case, the fast food company McDonald’s brought a libel suit against two British environmental activists for circulating a pamphlet criticizing the company’s practices in sourcing their meat. The two activists had no legal representation for most of the time – since free legal aid is not available for libel cases – in a case that became the longest such case in British legal history.

McDonald’s won, and the activists took their case to the ECtHR. The ECtHR found a violation of Article 10 because of a lack of procedural fairness and an excessive award of damages. There was no “equality of arms” between the parties.<sup>173</sup>

Should corporations be required to develop the same thick skin as politicians and tolerate vigorous criticism in the public interest?

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<sup>170</sup> United Kingdom House of Lords, *Derbyshire County Council v. Times Newspapers Ltd* (1992) 3 All ER 65 (CA), affirmed (1993) 2 WLR 449.

<sup>171</sup> UN Commission on Human Rights, *Concluding Observations of the Human Rights Committee: Serbia and Montenegro*, CCPR/CO/81/SEMO (12/08/2004), par. 22.

<sup>172</sup> UN Commission on Human Rights, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, Mr. Abid Hussain, E/CN.4/2000/63 (18 January 2000).

<sup>173</sup> ECtHR, *Steel and Morris v. United Kingdom*, Application No. 68416/01 (2005).

### Point for discussion

The French press law of 1881 provided protection of the presidency as a symbol.

Should the President of France to be understood as a politician (and hence required to be tolerant of greater criticism than an ordinary person) or is he national symbol or office (hence meriting greater protection)?

### Caselaw highlight: ECtHR, *Eon v. France*

In 2008, French farmer and political activist Hervé Eon waved a small placard as a group including the President, Nicolas Sarkozy, approached. The placard read, “Casse-toi pauvre con” (“Get lost you sad prick.”) The words had been previously spoken by Sarkozy to a farmer at an agricultural show who had refused to shake his hand.

Eon was charged and convicted under the 1881 law and a suspended fine was imposed. After appealing unsuccessfully through the national courts, the case went to the ECtHR, which found in Eon’s favour:

“The Court considers that criminal penalties for conduct such as that of the applicant in the present case are likely to have a chilling effect on satirical forms of expression relating to topical issues. Such forms of expression can themselves play a very important role in open discussion of matters of public concern, an indispensable feature of a democratic society....”<sup>174</sup>

The ECtHR in the *Eon* case did not go quite as far as it had in the earlier French case of *Colombani*. In the latter, the issue was the section of the Press Law criminalizing the insult of a foreign head of State. A journalist on *Le Monde* newspaper had been convicted of insulting the King of Morocco in an article about the drugs trade in that country, which relied upon an official report. The ECtHR stated the following on the offence of insult to foreign leaders:

“[The offence] confer[s] a special legal status on heads of State, shielding them from criticism solely on account of their function or status, irrespective of whether the criticism is warranted. That, in its view, amounts to conferring on foreign heads of State a special privilege that cannot be reconciled with modern practice and political conceptions. Whatever the obvious interest which every State has in maintaining friendly relations based on trust with the leaders of other States, such a privilege exceeds what is necessary for that objective to be attained.”<sup>175</sup>

### Case scenario for discussion

A newspaper publishes an article about the record of a senior judge. It is based upon documents from the past, when the country was under dictatorial rule. The documents appeared to show that the judge had prosecuted opposition political

<sup>174</sup> ECtHR, *Eon v. France*, Application No. 26118/10 (2013), par. 60-61.

<sup>175</sup> ECtHR, *Colombani v. France*, Application No. 51279/99 (2002), par. 66-68.

prisoners, securing the death penalty in a number of cases.

The judge successfully sues for defamation. He is able to demonstrate that the prosecutor in the newspaper article was not himself, but another lawyer of the same name. He has documentary proof that he was living outside the country at the time.

Is there a violation of the right to freedom of expression?

#### L. The press as public watchdog

In a judgment more than 20 years ago, the ECtHR took the notion of protection of political speech a step further.

The case concerned an Icelandic writer named Thorgeir Thorgeirson, who had written press articles about the issue of police brutality towards suspects. He was convicted in the national courts on charges of defaming members of the Reykjavik police force. When the case came to the ECtHR, the Icelandic government's lawyers argued, among other things, that this case was distinct from earlier ECtHR cases (such as *Lingens v. Austria*), because it did not entail *political* speech, which the ECtHR had found to be specially protected.

The ECtHR was not persuaded by this argument and used its judgment to develop a new doctrine, which has been referred to in a number of subsequent cases. It talked of the importance of the role of the media as a “public watchdog” on matters of importance – not only politics, but also other matters of public concern, such as those in Thorgeirson's articles:

“Whilst the press must not overstep the bounds set, *inter alia*, for “the protection of the reputation of ... others”, it is nevertheless incumbent on it to impart information and ideas on matters of public interest. Not only does it have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of “public watchdog””.<sup>176</sup>

In another case, almost contemporary with *Thorgeirson*, the ECtHR was required to pronounce on a case involving a press exposé of alleged cruelty in Norwegian seal hunting. The report, in the newspaper *Bladet Tromsø*, relied heavily on a leaked and unpublished official report, written by journalist Odd Lindberg. The paper and its editor were sued for defamation by members of the crew of a sealing vessel whose practices were described in the Lindberg report. The ECtHR concluded in a very similar tone to its *Thorgeirson* judgment:

“Having regard to the various factors limiting the likely harm to the individual seal hunter's reputation and to the situation as it presented itself to *Bladet Tromsø* at the relevant time, the Court considers that the paper could reasonably rely on the official Lindberg report, without being required to carry out its own research into the accuracy of the facts reported. It sees no reason to doubt that the newspaper acted in good faith in this respect.”<sup>177</sup>

<sup>176</sup> ECtHR, *Thorgeir Thorgeirson v. Iceland*, Application No.13778/88 (1992), par. 63.

<sup>177</sup> ECtHR, *Bladet Tromsø and Stensaas v. Norway*, Application No. 21980/93 (1999), par. 72.

On the publication of allegations regarded as damaging the reputation of some crew members, the ECtHR's reasoning hinged (as usual in these cases) on whether the limitations on freedom of expression resulting from the defamation cases were "necessary in a democratic society." In doing so, it took into account the immense public interest involved in the case – albeit not necessarily sympathetic to the editorial line taken by the *Bladet Tromsø*:

"[T]he Court must take account of the overall background against which the statements in question were made. Thus, the contents of the impugned articles cannot be looked at in isolation of the controversy that seal hunting represented at the time in Norway and in Tromsø, the centre of the trade in Norway. It should further be recalled that Article 10 is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population ..."<sup>178</sup>

"[I]t appears that the thrust of the impugned articles was not primarily to accuse certain individuals of committing offences against the seal hunting regulations or of cruelty to animals ... The impugned articles were part of an ongoing debate of evident concern to the local, national and international public, in which the views of a wide selection of interested actors were reported."<sup>179</sup>

...

On the facts of the present case, the Court cannot find that the crew members' undoubted interest in protecting their reputation was sufficient to outweigh the vital public interest in ensuring an informed public debate over a matter of local and national as well as international interest."<sup>180</sup>

One of the particular points of interest of this case, however, is that a minority of the ECtHR's bench strongly disagreed with the decision. The dissenting judgment concluded that the judgment sent a bad message to the European media, encouraging them to disregard basic ethical principles of the profession.<sup>181</sup>

This notion of "public interest" in *Bladet Tromsø* has now become widely used in case law on freedom of expression. The following judgment of the South African Supreme Court of Appeal articulates the concept particularly well:

"[W]e must not forget that it is the right, and indeed a vital function, of the press to make available to the community information and criticism about every aspect of public, political, social and economic activity and thus to contribute to the formation of public opinion. The press and the rest of the media provide the means by which useful, and sometimes vital information about the daily affairs of the nation is conveyed to its citizens—from the highest to the lowest ranks. Conversely, the press often becomes the voice of the people—their means to convey their concerns to their fellow citizens, to officialdom and to government."<sup>182</sup>

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<sup>178</sup> *Id.*, par. 62.

<sup>179</sup> *Id.*, par. 63.

<sup>180</sup> *Id.*, par. 73.

<sup>181</sup> *Id.* (Judges Palm, Fuhrmann, Baka, joint dissenting opinion).

<sup>182</sup> South African Supreme Court of Appeal, *National Media Ltd and Others v. Bogoshi* (1999) LRC 616.

### Point for discussion

What is the “public interest”?

How does it differ from what interests the public?

How would you construct a “public interest” argument in defence of a story on, for example, scandals in the private life of a politician?

#### M. Privilege for members of parliament and reporting statements made in parliament

Almost all legal systems encompass the concept of privilege for statements made in the legislature, and usually in other similar bodies (such as regional parliaments or local government councils). The purpose, clearly, is to protect freedom of political debate.

This privilege extends to reporting of what is said in parliament (or other bodies covered by the same privilege). Hence, as a general principle, not only would a member of parliament not be liable for a defamatory statement made in parliament, but neither would a journalist who reported that statement.

The ECtHR has generally been very firm in upholding the principle of privilege in defamation cases. In one case from the United Kingdom, a member of parliament had made a series of repeated statements that were highly critical of one of his own constituents. The member of parliament gave both the name and address of the constituent, following which she was subject to hate mail, as well as extremely critical media coverage. The ECtHR refused to find that her rights under Article 6(1) – the right to have a civil claim adjudicated by a judge – had been violated, since the protection of parliamentary privilege was “necessary in a democratic society.”<sup>183</sup> The ECtHR also stated the following:

“In light of the above, the Court believes that a rule of parliamentary immunity, which is consistent with and reflects generally recognised rules within signatory States, the Council of Europe and the European Union, cannot in principle be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in Article 6(1)”.<sup>184</sup>

In the *Jerusalem* case from Austria, the ECtHR deemed the applicant to have privilege, even though the alleged defamatory statements were made at a meeting of the Vienna Municipal Council and not parliament. This was justified in the following terms:

“In this respect the Court recalls that while freedom of expression is important for everybody, it is especially so for an elected representative of the people. He or she represents the electorate, draws attention to their preoccupations and defends their interests. Accordingly, interferences with the freedom of expression of an opposition member of parliament, like the applicant, call for the closest scrutiny on the part of the Court”.<sup>185</sup>

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<sup>183</sup> ECtHR, *A v. United Kingdom*, Application No. 35373/97 (2002).

<sup>184</sup> *Id.*, par. 83.

<sup>185</sup> ECtHR, *Jerusalem v. Austria*, Application No. 26958/95 (2001), par.36.

## N. Defamation law in South Sudan

Defamation in South Sudan is governed by the provisions of Section 28 of the Media Authority Act 2013 and Section 289, 290, 291, 292, 75 and 76 of the Penal Code Act 2008.<sup>186</sup> As such, defamation is both a civil and criminal offense in South Sudan.

Section 28 of the Media Authority Act states that individuals, legally established businesses, and other legal entities who believe they have been defamed by published or broadcast statements have the right to take legal action against the organization or journalist they believe defamed them. Subsection 6 of Section 28 states the grounds for a complainant to sustain an action for defamation as follows: (1) the statement must be made public (to a third party); (2) the complainant must be identified or identifiable; (3) the statement must be defamatory in common legal usage of the term; (4) the statement must be false; and (5) there must be injury to the party claiming to have been defamed.

Section 28(6)(a)(b) establishes the public figure doctrine. In the case of private complainants, who do not qualify as a public figure, the fault shown must amount to negligence. In the case of public officials, the fault shown must be malice.

Section 28(4) of the Media Authority Act makes defamation a civil offence by setting out the procedure in a defamation case:

“A defamation complaint shall be filed first with the Press and Broadcast Complaints Council, which shall investigate the merits of the complaint and attempt to negotiate a resolution that may include agreement by the journalist or news medium to correct any false information published and/or apologize.”

This is in line with the provision of Section 21(6)(g) of the Media Authority Act, which states that the Press and Broadcast Complaints Council shall have initial jurisdiction over all complaints against the media and journalists and a mandate to resolve such complaints through mediation, conciliation or arbitration as it may deem appropriate.

However, Section 5 of the Media Authority Act (‘Interpretations’) stipulates that defamation “shall have the meaning assigned to it in the Penal Code” which mainly refers to two troubling provisions with respect to criminal defamation and undermining the authority of and insulting the President. This interpretation contradicts the definition from the previous version of the Act as discussed and passed by the National Legislative Assembly, which defined defamation as a civil offence only. Section 5 now contradicts Article 28 of the Media Authority Act, which establishes clear procedures for handling defamation cases as civil offences by the Press and Broadcast Council of the Media Authority.

The continued existence of criminal defamation was never envisaged in the Media Authority Act. Section 2 of the Media Authority Act repeals any existing legislation regarding the subject matters addressed by the Act:

“any existing legislation on the subject governed by this Act is hereby repealed, provided that any orders issued or regulations made under such legislation shall continue in force and effect, until expressly repealed, amended or are otherwise inconsistent with the provisions of this Act.”

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<sup>186</sup> Penal Code Act 2008.



Unfortunately, Section 2 is problematic in and of itself. In a civil law system, any repeal of legislative acts or provisions has to be stated explicitly by quoting the exact provision or law being repealed. A general repeal is not permitted as it creates legal uncertainty. Section 2 of the Media Authority Act does not specify which “existing legislation” is repealed by the Act. In addition, the Media Authority Act, while providing for a general repeal of legislation, at the same time requires explicit repeal, amendment or a declaration of inconsistency of provisions of “any orders issued or regulations made” under the allegedly repealed legislation. This makes Section 2 of Media Authority Act inconsistent with itself. The situation becomes even more confusing when reading Section 2 of the Media Authority Act in conjunction with Section 5, which states that Defamation shall have the meaning “assigned to in the penal code”, which means that the Act in Section 5 is referring to provisions in a law, which should have been considered repealed according to Section 2.

In the absence of clear provisions stipulating the decriminalisation of defamation and the explicit repeal of the relevant articles of the Penal Code Act of 2008, there is a possibility of confusion as to which is the competent authority for defamation complaints brought against journalists and the media. It is likely that, until the necessary clarity is provided, defamation claims will still be filed with the criminal courts instead of the Press and Broadcast Complaints Council of the Media Authority.

An additional concern is that the civil courts have not been given any competence in deciding defamation cases or overseeing decisions made by the Media Authority, including decisions of the Press and Broadcast Complaints Council and Media Appeals Board.

#### **Point for discussion**

Do you think the defamation provisions in South Sudan are in compliance with the international standards outlined above? Why or why not?

If you could make any changes to the current legislative framework, what would those be?

#### IV. NATIONAL SECURITY

"National security" is one of the most common justifications offered by States for limiting freedom of expression by journalists and media organs. When we discussed limitations on freedom of expression, we saw that national security is a legitimate aim (step two of the three-part test) justifying restrictions on freedom of expression in the ICCPR, the ECHR, and the ACHR. The African Charter does not contain this explicit limitation, although the right to freedom of expression in Article 9 is to be exercised "within the law" and Article 27(2) refers to "collective security". The individual also has a general duty, in Article 29(3) of the African Charter, "Not to compromise the security of the State whose national or resident he is."<sup>187</sup>

So how do we assess the legitimacy of a limitation on freedom of expression on grounds of national security – applying the three-part test that has already been introduced?

##### A. The derogation process under international and regional human rights treaties

Before looking at the three-part test, we will first consider situations where the right to freedom of expression is suspended, wholly or in part. This is most often justified because of a grave security threat. The process whereby such a suspension – or *derogation* – takes place is different from the three-part test, although some elements of the reasoning may be familiar.

The African Charter does not contain a clause permitting suspension of human rights during situations of national emergency. The African Commission on Human and Peoples' Rights has repeatedly held that a declaration of a state of emergency cannot be invoked as a justification for violations or permitting violations of the African Charter. Most of the other key human rights instruments do allow a temporary derogation from certain human rights obligations in situations of national emergency. Such a measure is to be found in Article 4 of the ICCPR, Article 15 of the ECHR and Article 27 of the ACHR. The first of these, for example, provides:

"In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin."<sup>188</sup>

Article 4 then proceeds to list a number of articles of the ICCPR that may not be derogated from, even in times of public emergency. These include the rights not to be enslaved or tortured, and the right to freedom of opinion. It does not, however, include Article 19, the right to freedom of expression.

Article 4 concludes by setting out the procedure by which a state of emergency should be notified to other parties to the ICCPR, namely through notification to the Secretary-General of the United Nations.

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<sup>187</sup> African Charter, Art. 29(3).

<sup>188</sup> ICCPR, Art. 4.

The UNHRC has devoted two of its General Comments to explaining in greater detail the meaning of Article 4 and the procedure and scope of derogation. The more recent of these, General Comment 29 of 2001, can be taken as an authoritative statement on the matter. There are a number of key points to note, which can be applied equally to the other human rights treaties that provide for derogation:

- The state of emergency must be **publicly proclaimed according to the law**. This is an essential requirement in maintaining the principle of legality and respect for the rule of law. The proclamation should be in conformity with domestic legal requirements and should be accompanied by **notification to other States Parties** (via the Secretary General). The notification should also state what provisions of the ICCPR have been derogated from and why this was necessary.<sup>189</sup>
- The situation leading to derogation must be "**a public emergency which threatens the life of the nation**."<sup>190</sup> In some of its concluding observations on reports by States Parties, the UNHRC has been highly critical of derogations that have taken place in situations that appear to fall short of the Article 4 requirements. In General Comment 29, the Committee points out that the threshold of threatening "the life of the nation" is a high one.<sup>191</sup>
- The UNHRC emphasises the importance of the principle that derogations should only be "to the extent strictly required by the exigencies of the situation." This consideration is similar to the necessity/proportionality test applied for limitations of human rights. Even in instances when derogation may be warranted, **there should only be derogation from those rights that are strictly required and only to the extent necessary:**

“[T]he mere fact that a permissible derogation from a specific provision may, of itself, be justified by the exigencies of the situation does not obviate the requirement that specific measures taken pursuant to the derogation must also be shown to be required by the exigencies of the situation. In practice, this will ensure that no provision of the Covenant, however validly derogated from will be entirely inapplicable to the behaviour of a State party.”<sup>192</sup>

The final point suggests that the right to freedom of expression may not be completely suspended, even in emergency situations.

The most common circumstance in which the life of a nation may be under threat is one of armed conflict, in which the State's obligations under international humanitarian law are also engaged.

The implication of the above is that, in circumstances where a State has lawfully derogated from its obligations under Article 19 of the ICCPR (or the corresponding articles of the ECHR and ACHR), there remains an obligation on the State to justify the measures taken as being required by the exigencies of the situation. Hence it will be required to offer a rationale for any specific measures taken to limit freedom of expression or media freedom.

#### B. Limiting media freedom on grounds of national security

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<sup>189</sup> UNHRC, *General Comment No. 29, Article 4: States of Emergency*, UN Doc. No. CCPR/C/21/Rev.1/Add.11 (31 August 2001), par. 2 (“General Comment 29”).

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*, par 3.

<sup>192</sup> General Comment 29, par. 3.

As mentioned above, national security is one of the permissible grounds for limitation of the right to freedom of expression under Article 19(3)(b) of the ICCPR, as well as under Article 10(2) of the ECHR and Article 13(2)(b) of the ACHR. The African Charter has distinct wording, mentioning "security" twice, in Article 27(2) requiring rights to be exercised with regard to "collective security" and in Article 29(3), which sets out a duty not "to compromise the security of the State."

In practice, national security is one of the most problematic areas of interference with media freedom. One difficulty is the tendency on the part of many governments to assume that it is legitimate to curb *all* public discussion of national security issues. Yet, according to international standards, expressions may only be lawfully restricted if it *threatens actual damage* to national security. There may be many instances where reporting of national security issues – for example, exposure of corruption or indiscipline within security institutions – may actually help to promote national security. Unfortunately, governments seldom tend to understand the issue that way.

In 1995, a group of international experts drew up the Johannesburg Principles on Freedom of Expression and National Security.<sup>193</sup> Although not binding law, these principles are frequently cited (notably by the UN Special Rapporteur on Freedom of Opinion and Expression) as a progressive summary of standards in this area. The Johannesburg Principles address the circumstances in which the right to freedom of expression might legitimately be limited on national security grounds, at the same time as underlining the importance of the media, and freedom of expression and information, in ensuring accountability in the realm of national security.

### Question

How might media reporting help strengthen national security?

Can you think of examples?

### C. The scope of national security

"Freedom of expression" and "national security" are very often seen as principles or interests that are inevitably opposed to each other. Governments often invoke national security as a rationale for violating freedom of expression, particularly media freedom. Yet national security remains a genuine public good – and without it, media freedom would be scarcely possible. On the other hand, governments are seldom inclined to recognize that media freedom may actually be a means to ensure better national security by exposing abuses in the security sector. Examples might include the Pentagon Papers case in the United States,<sup>194</sup> Wikileaks exposure of abuses by US troops in Iraq and Afghanistan as well as Edward Snowden's revelations of mass electronic surveillance. These are instances where media revelations of abuse in the national security sector may lead to reforms and ultimately, greater security.

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<sup>193</sup> Article 19, Global Campaign for Free Expression, *The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Freedom of Expression and Access to Information*, UN Doc. No. E/CN.4/1996/39 (November 1996), ("Johannesburg Principles").

<sup>194</sup> United States Supreme Court, *New York Times Co. v. United States*, 403 U.S. 713 (1971).

**Caselaw highlight: United States Supreme Court, *New York Times Co. v. United States* (the “Pentagon Papers”)**

"[P]aramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell. ... Far from deserving condemnation for their courageous reporting, the New York Times, the Washington Post, and other newspapers should be commended [for] revealing the workings of government that led to the Vietnam War."<sup>195</sup>

The abuse of national security as a rationale for attacking human rights was one of the factors leading to the development of an alternative paradigm – that of "human security." While this may be preferable in some respects – emphasizing the whole sum of factors that affect enjoyment of security, including human rights – it is not a great deal of help in addressing laws that seek to limit the media on national security grounds. It is, however, worth asking what is meant by "national security" and various related concepts (such as "State security," "internal security," "public security," and "public safety").

The Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR define a legitimate national security interest as one that aims "to protect the existence of the nation or its territorial integrity or political independence against force or threat of force."<sup>196</sup> Subsequent articles indicate that a national security limitation "cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order."<sup>197</sup>

The UN Special Rapporteur on Freedom of Expression has repeatedly limited the scope of a national security limitation in similar terms. For example:

"For the purpose of protecting national security, the right to freedom of expression and information can be restricted only in the most serious cases of a direct political or military threat to the entire nation."<sup>198</sup>

In a similar vein, the Johannesburg Principles define a national security interest as being

"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."<sup>199</sup>

(Note that the Johannesburg Principles prefer the word "country" to "nation," on the grounds that the latter is often invoked to defend the interests of a majority ideology or ethnic group.)

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<sup>195</sup> *Id.*, p. 717 (Black, J. concurring opinion).

<sup>196</sup> United Nations Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc. No. E/CN.4/1985/4, Annex (1985), Principle 29 ("Siracusa Principles").

<sup>197</sup> Siracusa Principles, Principle 30.

<sup>198</sup> UN Special Rapporteur on Freedom of Expression, *Report of the Special Rapporteur on the nature and scope of the right to freedom of opinion and expression, and restrictions and limitations to the right to freedom of expression*, UN Doc. No. E/CN.4/1995/32 (1995).

<sup>199</sup> Johannesburg Principles, Principle 2(a).

Like the Siracusa Principles, the Johannesburg Principles also offer a non-exhaustive list of invalid reasons for invoking a national security interest to restrict freedom of expression, 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>200</sup>

National security interests must be carefully balanced so as not to unjustifiably limit rights. In a recent High Court decision in Kenya, the Court confirmed that "protecting national security carries with it the obligation on the State not to derogate from the rights and fundamental freedoms guaranteed in the Constitution."<sup>201</sup>

The Court of Appeal in Kenya, in an appeal to an interlocutory application in the same case, reiterated the need to ensure that national security is not used in such a way that fundamental human rights are disregarded:

"However, national security is subject to the authority of the Constitution and Parliament and must be pursued in compliance with the law and with the utmost respect for the rule of law, democracy, human rights and fundamental freedoms. Article 238(2) of the Constitution. That implies that in enacting or amending any law that touches on national security (or any other law for that matter), Parliament (i.e. the National Assembly and the Senate) must ensure that there is no violation of the people's rights and freedoms that are spelt out in the Bill of Rights and which are, moreover, part and parcel of what national security entails as per the Constitutional definition."<sup>202</sup>

The Court explained the fundamental nature of human rights, and that they are not to be regarded as transitory:

"It must always be borne in mind that the rights and fundamental freedoms in the Bill of Rights are not granted by the State and therefore the State and/or any of its organs cannot purport to make any law or policy that deliberately or otherwise takes away any of them or limits their enjoyment, except as permitted by the Constitution. They are not low-value optional extras to be easily trumped or shunted aside at the altar of interests perceived to be of greater moment in moments such as this."<sup>203</sup>

#### D. Terrorism

In the past decade or so – since the attacks in the United States on 11 September 2001 – much of the focus of security legislation has been on countering terrorism. In part this reflects a genuine change in understanding the nature of the threat to national security – seen also in the notion that terrorism or terrorist organizations are the object of a "war." More generally, it serves as a rhetorical device whereby dissent – including critical media coverage – may be characterized as giving succour to terrorists.

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<sup>200</sup> Johannesburg Principles, Principle 2(b).

<sup>201</sup> Kenya High Court, *Coalition for Reform and Democracy and Others v. Republic of Kenya and Attorney General* Petition 628 of 2014, 23 February 2015, par. 1.

<sup>202</sup> Kenya Court of Appeal, *Attorney General v. Coalition for Reform and Democracy*, Petition 628 of 2014, 23 January 2015, par. 31.

<sup>203</sup> Kenya Court of Appeal, *Attorney General v. Coalition for Reform and Democracy*, Petition 628 of 2014, 23 January 2015, par. 31-32.

The UN Security Council has required Member States to take a number of steps to combat terrorism. One measure of particular relevance to the media is contained in Resolution 1624 of 2005, which was the first international instrument to address the issue of incitement to terrorism. The preamble to Resolution 1624 condemns "incitement to terrorist acts" and repudiates "attempts at the justification or glorification (*apologie*) of terrorist acts that may incite further terrorist acts."<sup>204</sup>

The operative section of Resolution 1624:

“1. *Calls upon* all States to adopt such measures as may be necessary and appropriate and in accordance with their obligations under international law to:

- (a) Prohibit by law incitement to commit a terrorist act or acts;
- (b) Prevent such conduct;
- (c) Deny safe haven to any persons with respect to whom there is credible and relevant information giving serious reasons for considering that they have been guilty of such conduct”

This may at first sight be seen as overly restrictive of media expression. However, in the event that Resolution 1624 is used as a rationale for censoring media, a number of points should be borne in mind:

- Resolution 1624, unlike other counter-terrorism resolutions of the Security Council, is not binding on Member States. It is not issued under the Council's powers in Chapter VII of the UN Charter (preserving peace and security).
- Although the preamble mentions "glorification" or apology for terrorism, this is explicitly when such glorification may have the effect of inciting terrorist acts.
- The preamble also makes explicit reference to the guarantee of the right to freedom of expression in Article 19 of the ICCPR and the limited circumstances and conditions under which this right may be restricted. In other words, Resolution 1624 confers no additional basis for curbing free expression, beyond the criteria and process already set out in international law.

One serious problem with legal restrictions on glorification (or even incitement) of terrorism is the lack of any commonly accepted definition of terrorism in international law. Early counter-terrorism treaties focused on criminalization of particular acts, such as hijacking aircraft, without using the term terrorism. Later treaties, such as the International Convention for the Suppression of Financing of Terrorism,<sup>205</sup> do offer a definition, although this has no binding character beyond the treaty itself.

Many States, as well as entities such as the European Union, additionally define terrorism with reference to certain organizations "listed" as terrorist. This may hold particular dangers for the media in reporting the opinions and activities of such organizations.

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<sup>204</sup> UN Security Council, *Resolution 1624 of 2005*, UN Doc. No. S/RES/1624 (14 September 2005).

<sup>205</sup> Art. 2(1), International Convention for the Suppression of Financing of Terrorism (9 December 1999).

The United Nations Special Rapporteur on protecting human rights while countering terrorism has offered a definition of terrorism, based upon best practices worldwide, which focuses on the act of terror rather than the perpetrator:<sup>206</sup>

“Terrorism means an action or attempted action where:

1. The action:

- (a) Constituted the intentional taking of hostages; or
- (b) Is intended to cause death or serious bodily injury to one or more members of the general population or segments of it; or
- (c) Involved lethal or serious physical violence against one or more members of the general population or segments of it; and

2. The action is done or attempted with the intention of:

- (a) Provoking a state of terror in the general public or a segment of it; or
- (b) Compelling a Government or international organization to do or abstain from doing something; and

3. The action corresponds to:

- (a) The definition of a serious offence in national law, enacted for the purpose of complying with international conventions and protocols relating to terrorism or with resolutions of the Security Council relating to terrorism; or
- (b) All elements of a serious crime defined by national law.”<sup>207</sup>

### Point for discussion

What do you think of this definition by the Special Rapporteur? Is it too broad or too narrow to cover the concept of “terrorism”, in your view?

Some defenders of freedom of expression might argue that there is no purpose served by defining a crime of terrorism at all. “One man's terrorist,” as the saying goes, “is another man's freedom fighter.” But it is precisely because labels of terrorism are so prone to political partisanship that a clear legal definition is required.

The advantage of the Special Rapporteur's definition is that it clearly sets out both the subjective and objective elements of the crime: the coercive political objective and the serious crime. This excludes the possibility of labelling political opinions alone as terrorist.

Where does this leave the crimes of incitement and glorification?

We will look at the notion of incitement in greater depth when we consider “hate speech.” “Incitement” exists as a crime in many legal systems. It is known as an *inchoate* crime – meaning an incomplete action. It must be related to an existing recognized crime – in other words, it is only a crime to incite someone to commit an action that is itself a crime. It must contain both the intention (*mens rea*) to incite someone to commit a crime *and* the actual possibility that someone will commit the crime as a consequence of the incitement.

<sup>206</sup> UN Special Rapporteur on the promotion and protection of human rights while countering terrorism, *Statement by the Special Rapporteur on the promotion and protection of human rights while countering terrorism at the International Seminar Terrorism and human rights standards*, 15 November 2011, Santiago de Chile, Chile.

<sup>207</sup> *Id.*



This is similar to the standard contained in the Johannesburg Principles regarding the circumstances in which expression may be regarded as a threat to national security:

“Expression may be punished as a threat to national security only if a government can demonstrate that:

- (a) the expression is intended to incite imminent violence;
- (b) it is likely to incite such violence;
- (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.”<sup>208</sup>

### Point for discussion

The UK Terrorism Act 2000 defines “terrorism” as involving the use or threat of an action that (i) involves serious violence against a person, (ii) involves serious damage to property, (iii) endangers a person's life, other than that of the person committing the action, (iv) creates a serious risk to the health or safety of the public or a section of the public, or (v) is designed seriously to interfere with or seriously to disrupt an electronic system.

For such an action or threat of action to be deemed “terrorism” under the Act its use or threat must be “designed to influence the government or an international governmental organisation or to intimidate the public or a section of the public”, and “must be made for the purpose of advancing a political, religious, racial or ideological cause.”

What do you think of this definition of “terrorism”?

Consider the following two examples:

1. The publication of a blog or an article that argues (on religious or political grounds) against the vaccination of children for certain diseases.
2. A group of junior doctors wishes to erect a sign to protest about Government policy towards the public health service. Inadvertently, some members of the group erect it in a way that accidentally endangers the life of a passer-by.

Does either of these examples fall within the definition? Why or why not?

In *R (on application of Miranda) v. Secretary of State for the Home Department*, the Court of Appeal of England and Wales read into the definition of “terrorism”, under the UK Terrorism Act 2000, a *mens rea* that was absent in a literal reading of the definition:

“If Parliament had intended to provide that a person commits an act of terrorism where he unwittingly or accidentally does something which in fact endangers another person's life, I would have expected that, in view of the

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<sup>208</sup> *Johannesburg Principles*, Principle 6.

serious consequences of classifying a person as a terrorist, it would have spelt this out clearly.”<sup>209</sup>

In light of this, there had to be an intent, or recklessness as to whether the action endangers a person’s life or creates a serious risk to the health or safety of the public or a section of the public.<sup>210</sup>

#### E. Prescribed by law

If national security is to be used to limit freedom of expression, the restriction must not only address a legitimate national security interest but must also be prescribed by law. The exact meaning of this has been at issue in several national security related cases.

In *Ekin Association v. France*, involving the banning of a Basque nationalist publication, the authorities' decision had been based on a law allowing the prohibition of the publication, distribution or sale of texts of "foreign origin." The book in question was published in France, but four out of its five chapters had been written by Spanish citizens. The ECtHR was "inclined to think that the restriction complained of by the applicant association did not fulfil the requirement of foreseeability."<sup>211</sup> (It also pointed out that the law appeared to be in direct conflict with paragraph 1 of Article 10 of the ECHR, which allows freedom of expression "regardless of frontiers.")<sup>212</sup>

Similar questions about foreseeability and the lack of precision in laws has arisen in cases relating to "false news."

#### **Caselaw highlight: Zimbabwe Supreme Court, *Chavunduka and Choto v. Minister of Home Affairs & Attorney General***

In *Chavunduka and Choto v. Minister of Home Affairs & Attorney General*,<sup>213</sup> the Zimbabwe Supreme Court considered the case of two journalists who had been charged with publishing false news on the strength of an article reporting that an attempted military coup had taken place. The two journalists were also tortured while in custody.

The Court found that false news was protected by the constitutional guarantee of freedom of expression: "Plainly embraced and underscoring the essential nature of freedom of expression are statements, opinions and beliefs regarded by the majority as false."<sup>214</sup>

The offence of publishing false news in the Zimbabwean criminal code was vague and over-inclusive. It included statements that "might be likely" to cause "fear, alarm or despondency" – without any requirement to demonstrate that they actually did so. In any event, as the Court pointed out:

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<sup>209</sup> Court of Appeal of England and Wales, *R (on application of Miranda) v. Secretary of State for the Home Department*, (2016) EWCA Civ 6, par. 54

<sup>210</sup> *Id.*, par. 53 to 56.

<sup>211</sup> ECtHR, *Ekin Association v. France*, Application No. 39288/98 (2001), par. 46.

<sup>212</sup> *Id.*

<sup>213</sup> Supreme Court of Zimbabwe, *Chavunduka & Choto v. Minister of Home Affairs & Attorney General*, Judgment No. S.C. 36/2000, Civil Application No. 156/99 (2000).

<sup>214</sup> *Id.*

"[A]lmost anything that is newsworthy is likely to cause, to some degree at least, in a section of the public or a single person, one or other of these subjective emotions."<sup>215</sup>

The word "false" was vague, since it included any statement that was inaccurate, as well as a deliberate lie. The law did not require it to be proved that the defendant knew the statement was false. (The Court then went on to find the provision unconstitutional on necessity grounds as well.)

#### F. Necessary in a democratic society

Most cases involving national security restrictions tend to be decided on the necessity leg of the three-part test.

One area where restrictions may fall down is if they are overbroad. This was the issue in the UNHRC case of *Mukong v. Cameroon*. Albert Mukong was a journalist and author who had spoken publicly, criticizing the President and Government.<sup>216</sup> He was arrested twice under a law that criminalized statements "intoxicat[ing] national or international public opinion."

The government justified the arrests to the Committee on national security grounds. The Committee disagreed. Laws of this breadth that "muzzled advocacy of multi-party democracy, democratic tenets and human rights" could not be necessary.<sup>217</sup>

The African Commission on Human and Peoples' Rights has taken similar positions. In *Constitutional Rights Project and Civil Liberties Organisation v. Nigeria*, opponents of the annulment of the 1993 presidential elections, including journalists, had been arrested and publications were seized and banned.<sup>218</sup> The Commission said that no situation could justify such a wholesale interference with freedom of expression.

Various bodies have found that the burden is on the government to show that a restriction on freedom of expression was necessary. In *Jong-Kyu v. Republic of Korea*, the UNHRC found against the State for failing to explain the specific threat to national security behind Jong-Kyu's statement in support of striking workers.<sup>219</sup> It made a similar argument in the case of *Vladimir Petrovich Laptsevich v. Belarus*.<sup>220</sup>

Courts have also insisted that there must be a close nexus between the restricted expression and an actual damage to national security or public order. Rather as in incitement to hatred – discussed later in this manual – courts will tend to look closely at the exact words used and the context of publication and assess what the likely impact is of the publication on the audience.

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<sup>215</sup> *Id.*

<sup>216</sup> UNHRC, *Womah Mukong v. Cameroon*, Communication No. 458/1991, UN Doc. No. CCPR/C/51/D/458/1991 (1994).

<sup>217</sup> *Id.*, par. 9.7.

<sup>218</sup> African Commission, *Constitutional Rights Project and Civil Liberties Organisation v. Nigeria*, Communication No. 102/93 (1998).

<sup>219</sup> UNHRC, *Jong-Kyu Sohn v. Republic of Korea*, Communication No. 518/1992, UN Doc. No. CCPR/C/54/D/518/1992 (1995).

<sup>220</sup> UNHRC, *Vladimir Petrovich Laptsevich v. Belarus*, Communication No. 780/1997, UN Doc. No. CCPR/C/68/D/780/1997 (2000).

The Supreme Court of India, in *S Rangarajan v. P Jagjivan Ram & Ors*, expanded on the need for this close nexus:

“Our commitment of freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered. The anticipated danger should not be remote, conjectural or far-fetched. It should have proximate and direct nexus with the expression. The expression of thought should be intrinsically dangerous to the public interest. In other words, the expression should be inseparably locked up with the action contemplated like the equivalent of a “spark in a powder keg”.”<sup>221</sup>

The African Commission’s Declaration of Principles of Freedom of Expression in Africa also links the acceptability of limitations to expression with the potential harm that expression may cause. Principle XIII explicitly calls on African States to ensure that criminal restrictions “*serve a legitimate interest in a democratic society*,”<sup>222</sup> and states that “[f]reedom 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.”<sup>223</sup>

#### **Caselaw highlight: ECtHR jurisprudence on Turkey and national security**

Mr Okçuoğlu participated in a round table discussion.<sup>224</sup> His comments were later published in an article entitled “The past and present of the Kurdish problem.” He was imprisoned for these comments and later required to pay a fine, under a law protecting national security and preventing public disorder.

To determine if the restrictions were necessary, the ECtHR looked at the words used and the context. It noted the “sensitivity of the security situation in south-east Turkey” and the government’s fear that the comments would “exacerbate the serious disturbances.” Yet the negative terms of some of the comments did “not amount to incitement to engage in violence, armed resistance, or an uprising” because the comments were published in a “periodical whose circulation was low, thereby significantly reducing their potential impact on ‘national security’, ‘public order’, or ‘territorial integrity.’”<sup>225</sup>

The ECtHR reached a similar conclusion in the case of *Gerger v. Turkey*, decided on the same day. The Applicant in this case had written the commemoration address read out at a memorial service for two people executed by the government. What the ECtHR found “essential to take into consideration” was that the address was read only to “a group of people attending a commemorative ceremony, which considerably restricted its potential impact on ‘national security’, public ‘order’ or ‘territorial integrity.’”<sup>226</sup>

<sup>221</sup> Supreme Court of India, *S Rangarajan v. P Jagjivan Ram & Ors*, (1989) 2 SCC 574, par. 45.

<sup>222</sup> Declaration of Principles of Freedom of Expression in Africa, Principle XIII, section 1.

<sup>223</sup> Declaration of Principles of Freedom of Expression in Africa, Principle XIII, section 2.

<sup>224</sup> ECtHR, *Okçuoğlu v. Turkey*, Application No. 24246/94 (1999).

<sup>225</sup> *Id.*

<sup>226</sup> ECtHR, *Gerger v. Turkey*, Application No. 24919/94 (1999), par. 50.

On the other hand, in a third Turkish case, *Zana*, a mayor had expressed support for the Kurdistan Workers Party (PKK), engaged in armed struggle against the Turkish authorities.<sup>227</sup> Incidents of terrorism had increased in response to the mayor's comments.

"[T]he support given to the PKK ... by the former mayor of Diyarbakir, the most important city in south-east Turkey, in an interview published in a major national daily newspaper, had to be regarded as likely to exacerbate an already explosive situation in that region."<sup>228</sup>

In some cases the necessity of restrictions has been denied because material said to damage national security has already been published elsewhere. The most famous example of this was the "Spycatcher" cases before the ECtHR, *The Observer and Guardian v. the United Kingdom*<sup>229</sup> and *The Sunday Times v. the United Kingdom*.<sup>230</sup> The government succeeded in gaining injunctions against the newspapers in question to prevent publication of passages from unauthorized memoirs of a former member of the security service. The injunctions remained in place even after the book had been published in the United States, which made the material widely available in the United Kingdom too. The ECtHR held that there was a violation of Article 10, since there could be no necessity to prohibit the circulation of material that was already widely available. Of course, this consideration is likely to be even more frequent in the days of internet publication.

In a 2006 Report to the United Nations General Assembly, the Special Rapporteur warned that infringing citizens' fundamental human rights can actually harm national security.

"[t]he systematic violation of human rights undermines true national security and may jeopardize international peace and security; therefore, a State shall not invoke national security as a justification for measures aimed at suppressing opposition or to justify repressive practices against its population."<sup>231</sup>

A number of domestic courts have also recognised that sometimes protecting rather than limiting free speech is more beneficial to the safety of a State. In *Free Press of Namibia v. The Cabinet for the Interim Government of South Africa*, the South West Africa High Court held:

"Because people (or a section thereof) may hold their government in contempt does not mean that a situation exists which constitutes a danger to the security of the state or to the maintenance of public order. In fact to stifle just criticism could as likely lead to those undesirable situations."<sup>232</sup>

The seminal judgment of the Supreme Court of Canada in *R v. Boucher* considered the definition of sedition under Canadian law, and decided that a narrow definition was necessary in a democratic society. It was not enough for there to be "contempt in

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<sup>227</sup> ECtHR, *Zana v. Turkey*, Application No. 18954/91 (1997).

<sup>228</sup> *Id.*, par. 60.

<sup>229</sup> ECtHR, *Observer and Guardian v. the United Kingdom*, Application No. 13585/88 (1991).

<sup>230</sup> ECtHR, *The Sunday Times v. United Kingdom* (No. 2), Application No. 13166/87 (1991).

<sup>231</sup> UN Special Rapporteur Report 2006 UN Doc A/61/267 at par. 20

<sup>232</sup> South West Africa High Court, *Free Press of Namibia v. The Cabinet for the Interim Government of South Africa*, SWA 614 (1987), p. 625.

words of political authority or the actions of authority”, there had to be direct incitement to disorder and violence:

“If we conceive of the governors of society as superior beings, exercising a divine mandate, by whom laws, institutions and administrations are given to men to be obeyed, who are, in short, beyond criticism, reflection or censure upon them or what they do implies either an equality with them or an accountability by them, both equally offensive.”<sup>233</sup>

The House of Lords in the United Kingdom has also recognised this:

“The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country.”<sup>234</sup>

#### G. Prior restraint in national security cases

There is a general presumption against prior restraint. But surely national security interests are precisely the type of issue where it may be necessary to step in and prevent publication. There is little point – as in *Spycatcher* – in stepping in to stop publication of material that is already in the public domain. (Though the other lesson from *Spycatcher*, of course, was that the publication did no harm anyway).

This was precisely the question that the United States Supreme Court confronted in *New York Times Co. v. United States* – better known as the “Pentagon Papers” case. The government sought prior restraint on publication of a large stash of documents – 47 volumes of them – labelled “top secret” and leaked from the Department of Defense.

The documents detailed the decision-making leading to its involvement in the Vietnam war and the government sought to prevent publication because of alleged damage to national security and relations with other countries.

In a brief judgment rejecting the request for prior restraint, the Court drew on earlier judgments to note that prior restraint can only be allowed in extreme circumstances:

“Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity” ... The Government “thus carries a heavy burden of showing justification for the imposition of such a restraint.”<sup>235</sup>

Individual opinions by the judges elaborated on this reasoning. Justice Hugo Black argued:

“To find that the President has “inherent power” to halt the publication of news ... would wipe out the First Amendment and destroy the fundamental liberty and security of the very people the Government hopes to make “secure.” ... The word “security” is a broad, vague generality whose contours

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<sup>233</sup> Supreme Court of Canada, *R v. Boucher*, (1951) SCR 265, p. 285 and 286.

<sup>234</sup> United Kingdom House of Lords, *R v. Secretary of State for the Home Department, Ex parte Simms*, 2 AC 115 (2000), p. 126.

<sup>235</sup> United States Supreme Court, *New York Times Co. v. United States* (“Pentagon Papers” case), 403 US 713 (1971).

should not be invoked to abrogate the fundamental law embodied in the First Amendment. The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security".<sup>236</sup>

This reasoning was echoed more recently by the Israeli Supreme Court:

"A democracy must sometimes fight with one arm tied behind her back. Even so, democracy has the upper hand. The rule of law and individual liberties constitute an important aspect of her security stance. At the end of the day, they strengthen her spirit, and this strength allows her to overcome her difficulties."<sup>237</sup>

While less categorical than Justice Black's reasoning, the ECtHR has also consistently warned of the danger of prior restraint, including in national security cases. Note, for example, its reasoning in the *Spycatcher* case:

"The dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court. This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest."<sup>238</sup>

Some of the same issues arose in the case of *Vereniging Weekblad Bluf! v. Netherlands*.<sup>239</sup> The magazine in question had got hold of an internal report by the internal security service (BVD). It showed the extent of the BVD's monitoring of the Communist Party and the anti-nuclear movement. The special issue of the magazine containing details of the report was seized. However, the offset plates were not and the magazine simply reprinted its issue. Later a court order was obtained banning the issue from circulation.

The ECtHR in this case found, as with *Spycatcher*, that the court order withdrawing the magazine from circulation was not a necessary interference with Article 10, since the information in the issue was already publicly known. (The ECtHR also questioned whether the contents were genuinely secret). However, it rejected the argument from the magazine that Article 10 would in all instances prevent a State from seizing and withdrawing material from circulation. National authorities have to be able to take steps to prevent disclosure of secrets when this is truly necessary for national security.

The approach of the ECtHR to prior restraint can be starkly contrasted with the Inter-American system. The ACHR explicitly prohibits prior restraint on expression with one limited exception: "public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence."<sup>240</sup>

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<sup>236</sup> *Id.*

<sup>237</sup> Supreme Court of Israel, *Beit Sourik Village Council v. The Government of Israel*, HCJ 2056/04 (2004).

<sup>238</sup> ECtHR, *Observer and Guardian v. the United Kingdom*, Application No. 13585/88 (1991), par. 60.

<sup>239</sup> ECtHR, *Vereniging Weekblad Bluf! v. The Netherlands*, Application No. 16616/90 (1995).

<sup>240</sup> ACHR, Article 13(4).



### **Case scenario for discussion**

Your client is a magazine that has published an article about the standard issue infantry rifle of your country's army. Using first-hand (anonymous) testimony from serving soldiers, as well as interviews with experts, the article demonstrates that the rifle has serious shortcomings. It easily becomes overheated and jams, placing the lives of its users in danger in situations of combat.

The editor of the magazine and the author of the article are charged under the country's secrets laws and accused of endangering national security. What lines of argument would you use in their defence?

### **H. National security law in South Sudan**

The legal framework governing issues of National Security in South Sudan is set out in the National Security Service Act 2014.<sup>241</sup> Section 13 of the National Security Service Act outlines the powers and functions of the Service.

The Act grants the National Security Service powers to collect, search for, and seize information without specifying the precise criteria for the use of these powers, without determining their scope, and without providing for any restrictions or procedures that need to be followed.

The Act in Section 13(11) authorizes security agents to monitor and tap radio frequencies, wireless systems, publications and broadcasting stations, with the aim of preventing “misuse” of these facilities.

Section 54 authorizes the National Security Service to arrest without a warrant any person who is found committing any one of the offences against the State as provided under Section 7 of the Act. The arrest and detention by any service officer of anyone who is reasonably suspected of having committed, having attempted to commit, or being about to commit such offence is also permitted under the Act.

Section 82 states that all official authorities and citizens shall provide necessary assistance to members of the Service as may be required in execution of their duties under the Act.

### **Point for discussion**

Consider the powers of the National Security Service under the 2014 Act in light of the Johannesburg and Siracusa Principles.

To what extent do you think the Act is in compliance with those international standards?

What potential threats to freedom of expression and freedom of the press do you see in this context?

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<sup>241</sup> National Security Service Act 2014.



## V. HATE SPEECH AND INCITEMENT

The issue of "hate speech" and incitement is one that creates an enormous amount of disagreement among defenders of freedom of expression. Free speech advocates usually have little difficulty uniting against infringement of press freedom in the name of national security, say, or the reputation of politicians, yet there is much less unanimity in defence of expressions of hatred.

This is because, in principle, speech that expresses or incites hatred is not only potentially subject to limitation under Article 19(c) of the ICCPR, but it also conflicts directly with an explicit obligation in Article 20 of the ICCPR that states:

- "1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."<sup>242</sup>

The balance between freedom of expression and protection against incitement is understood very differently in different jurisdictions. On the one hand, the United States, given the near absolute character of the First Amendment to its constitution protecting free speech and press freedom, has permitted hate speech and will only draw a line when there is a "clear and present danger" of hateful expression resulting in violence. By contrast, the ECtHR has applied its usual reasoning in determining the legitimacy, lawfulness and necessity of any given restriction on freedom of expression, with differing outcomes. National jurisdictions have taken a wide range of approaches, with none as permissive as the United States. Even within Europe, which is more restrictive on this issue than the US, there is a considerable divergence between countries like France and Germany, with extensive legal prohibitions on hate speech, and the United Kingdom, which is more permissive.

Incitement, or a similar offence, exists in many legal systems. It is an inchoate crime – that is to say, it is not necessary that the action being incited actually has to occur. The question, therefore, is what test should apply to determine that speech is in fact incitement.

In addition to Article 20 of the ICCPR, which can be properly interpreted as being consistent with the requirements of Article 19(3), other international instruments also require the prohibition of hate speech. For example, the Convention on the Elimination of Racial Discrimination, in Article 4, states that States Parties:

- "(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;
- (b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;
- (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination."<sup>243</sup>

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<sup>242</sup> ICCPR, Art. 20.

<sup>243</sup> Art. 4, United Nations General Assembly, *Convention on the Elimination of All Forms of Racial Discrimination*, GA Resolution 2106 (XX), (21 December 1965).

The jurisprudence of the Committee on the Elimination of Racial Discrimination has been extremely problematic in its inconsistency with the UNHRC – charged with interpreting ICCPR Articles 19 and 20 – and with most regional and national case-law.

The Committee on the Elimination of Racial Discrimination (“CERD”) itself recognizes the inherent tension between freedom of expression and prohibition of speech that incites to discrimination, referring to the need for Article 4 to be interpreted in line with the principles contained in the Universal Declaration of Human Rights. However, the CERD committee has sometimes been inclined to disregard this tension, as for example in the recent case of *TBB v. Germany*, where the Committee found against Germany for its failure to prosecute an individual for offensive and derogatory statements about Turkish people made in the course of a magazine interview.<sup>244</sup> The refusal to prosecute was made on freedom of expression grounds. A dissenting opinion by Committee member Carlos Manuel Vazquez offers cogent reasons for deferring to the national prosecutors' reading of the situation, with a much more nuanced appreciation of the tension between freedom of expression and combating hate speech.<sup>245</sup>

In *Ross v. Canada*, the UNHRC observed that:

"restrictions on expression which may fall within the scope of Article 20 must also be permissible under Article 19, paragraph 3, which lays down requirements for determining whether restrictions on expression are permissible."<sup>246</sup>

This implies that the same three-part test – legitimate aim, prescribed by law, necessary in a democratic society – that is required for applying a restriction under Article 19(3) applies equally to the restrictions required by Article 20. Importantly, this contrasts with the way in which Article 4 of the CERD has usually been understood and applied.

The UNHRC has decided a number of cases involving hate speech, generally in favour of restrictions on freedom of expression, but offering a clearer line of reasoning to be emulated.

In *Ross v. Canada*, mentioned above, the UNHRC made clear how freedom of expression may be limited for the "rights and reputations of others." In this instance, Ross was a schoolteacher responsible for anti-Semitic statements and publications, who had been removed from his teaching position. The Committee remarked that others had the "right to have an education in the public school system free from bias, prejudice and intolerance".<sup>247</sup>

In *Faurisson v. France*, the Committee made clear that the interests to be protected by restricting freedom of expression were those of the community as a whole. Faurisson was a professor of literature convicted of violating the Gayssot Act, which makes it a crime to contest the facts of the Holocaust. He had expressed doubts in his publications about "the existence of gas chambers for extermination purposes."<sup>248</sup>

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<sup>244</sup> Committee on the Elimination of Racial Discrimination, *TBB v. Germany*, Communication No. 48/2010, CERD/C/82/D/48/2010 (2013).

<sup>245</sup> *Id.*

<sup>246</sup> UNHRC, *Ross v. Canada*, Communication No. 736/1997 (2000), par. 10.6.

<sup>247</sup> *Id.*, par. 6.11.

<sup>248</sup> UNHRC, *Robert Faurisson v. France*, Communication No. 550/1993, U.N. Doc.CCPR/C/58/D/550/1993 (1996).

The Committee analysed whether the restrictions "were applied for the purposes provided for by the Covenant." These included not only "the interests of other persons [but also of] those of the community as a whole". In particular, such interests included the interest "of the Jewish community to live free from fear of an atmosphere of anti-semitism".<sup>249</sup>

A. Was "hate speech" intended to incite?

One important strand in the case law on hate speech has been the requirement that the speaker (or author) *intended* to incite hatred. Perhaps the key case in this regard is *Jersild v. Denmark* before the ECtHR. Jersild was a television journalist who made a documentary featuring interviews with members of a racist, neo-Nazi gang. He was prosecuted and convicted for propagating racist views – indeed the case was included in Denmark's report to the CERD as an example of its commitment to suppress racist speech.<sup>250</sup>

When Jersild took his case to the ECtHR, however, the Court took a different view. The journalist's *intent*, clearly, was to make a serious social inquiry exposing the views of the racist gangs, not to promote their views. There was a clear public interest in the media playing such a role:

"Taken as a whole, the feature could not objectively have appeared to have as its purpose the propagation of racist views and ideas. On the contrary, it clearly sought - by means of an interview - to expose, analyse and explain this particular group of youths, limited and frustrated by their social situation, with criminal records and violent attitudes, thus dealing with specific aspects of a matter that already then was of great public concern..."<sup>251</sup>

In its consideration of the case, the ECtHR made an observation, often repeated subsequently, about the courts having no role in determining how journalists go about their work:

"the methods of objective and balanced reporting may vary considerably, depending among other things on the media in question. It is not for this Court, nor for the national courts for that matter, to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists."<sup>252</sup>

Hence:

"The punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so."<sup>253</sup>

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<sup>249</sup> *Id.*, par. 9.6.

<sup>250</sup> ECtHR, *Jersild v. Denmark*, Application No. 15890/89 (1994).

<sup>251</sup> *Id.*, par. 33-35.

<sup>252</sup> *Id.*, par. 31.

<sup>253</sup> *Id.*, par. 35.

The ECtHR has similarly dealt with the issue of intent in some of its Turkish cases. In *Gokceli*, the ECtHR invoked the "attitude" behind a writer's articles on the Kurdish situation as evidence that "the tenor of the article could not be said to be an incitement to the use of violence..."<sup>254</sup>

In *Gunduz*, where the issue was the broadcast of a television programme about Islam and *sharia* law, the ECtHR said that "the mere fact of defending sharia, without calling for violence to establish it, cannot be regarded as "hate speech".<sup>255</sup>

By contrast, in *Sürek*, in which the ECtHR did find the publication to be "hate speech and glorification of violence", there was found to be a "clear intention to stigmatise the other side to the conflict", that constituted "an appeal to bloody revenge".<sup>256</sup>

Some national courts have followed a similar approach. In *R. v. Keegstra*, the Supreme Court of Canada had to determine the consistency of a section of the Criminal Code prohibiting "wilful promotion of hatred" on racial or ethnic grounds with the freedom of expression provisions of the Canadian Charter of Rights and Freedoms. Although the Court upheld the section of the Criminal Code, it did so by focusing on the word "wilful" and underlining the importance of subjective intent. "Wilfully" meant, according to the Court, that the "accused subjectively desires the promotion of hatred or foresees such a consequence as certain or substantially certain to result ...". The Court went on to note that "this stringent standard of *mens rea* is an invaluable means of limiting the incursion of s. 319(2) into the realm of acceptable (though perhaps offensive and controversial) expression".<sup>257</sup>

The special mandate holders on freedom of expression for the United Nations, OSCE and the OAS have also taken the view that there is an intent requirement if hate speech is to be used as a ground to limit freedom of expression:

"In accordance with international and regional law, hate speech laws should, at a minimum, conform to the following:

...

[N]o one should be penalised for the dissemination of hate speech unless it has been shown that they did so with the intention of inciting discrimination, hostility or violence."<sup>258</sup>

#### B. Must violence or hatred actually result?

Incitement is what is known as an *inchoate* offence. That means that there is no requirement that hatred (or violence or discrimination) actually results from it. However, there must be the possibility of demonstrating a plausible nexus between the offending words and some undesirable consequence. Courts in different jurisdictions have differed on what exactly this nexus should be.

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<sup>254</sup> ECtHR, *Gokceli v. Turkey*, Application Nos. 27215/95 and 36194/97 (2003), par. 22 (translation from French).

<sup>255</sup> ECtHR, *Gunduz v. Turkey*, Application No. 35071/97 (2003), par. 51.

<sup>256</sup> ECtHR, *Sürek v. Turkey (No. 1)*, Application No. 26682/95 (1999), par.

<sup>257</sup> Supreme Court of Canada, *R v. Keegstra*, 3 S.C.R. 697 (1990).

<sup>258</sup> The UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, *Joint Statement on Racism and the Media* (27 February 2001). p. 2.

The United States (perhaps not surprisingly) has the strictest test. Its standard – usually known as "clear and present danger" – derives from the Supreme Court decision in *Brandenburg v. Ohio*. Brandenburg was a leader of the racist Ku Klux Klan. He and his confederates held a rally to which they invited representatives of the press. They displayed weapons, burned crosses and made racist comments. They were convicted under a law banning "advocat[ing] ... the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform".<sup>259</sup>

In its decision, the Supreme Court concluded that a restriction on advocacy of the use of force not only required the intent to incite but also a finding that it "is likely to incite or produce such action."<sup>260</sup>

Few other jurisdictions (with the partial exception of Israel) have such a stringent standard. Nevertheless, many do require that there is some demonstrable connection between the hateful expression and the undesirable outcome. This was the view of the UNHRC in the *Ross* case already discussed. The reason why the suspension of the anti-Semitic teacher was not a violation of freedom of expression was that his statements were partly to blame for a "poisoned school environment" experienced by Jewish children.<sup>261</sup>

### C. The danger of vagueness

As we have seen, the obligation to prohibit racist discrimination and violence is strongly rooted in international human rights law. It can be defined according to the intent behind it and the real possibility that it will cause violent or discriminatory consequences. The danger, clearly, is that vague prohibitions – which cannot be considered as "provided by law" in accordance with step one of the three-part test – are used to penalize expression that has neither the intent nor the realistic possibility of inciting hatred. Many of the Turkish cases heard by the ECtHR fall into this category.

The Constitutional Court of South Africa reflected at length and constructively on precisely this issue. In *The Islamic Unity Convention v. The Independent Broadcasting Authority et al*, it was required to rule upon the constitutionality of clause 2(a) of the Code of Conduct for Broadcasting Services, which prohibited the broadcast of "any material which is ... likely to prejudice ... relations between sections of the population". There is no constitutional protection for propaganda for war, incitement of imminent violence, and the advocacy of hatred. However, the Court noted that material that might prejudice relations between sections of the population might not necessarily fall into these categories.

Whereas the constitutional definition was "carefully circumscribed, no such tailoring is evident in" the language of clause 2(a). The latter, by contrast, was "so widely-phrased and so far-reaching that it would be difficult to know beforehand what is really prohibited or permitted". Hence the Court found clause 2(a) inconsistent with the constitutional right to freedom of expression.<sup>262</sup>

### D. Advocacy of genocide and Holocaust denial: a special case?

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<sup>259</sup> United States Supreme Court, *Brandenburg v. Ohio*, 395 US 444 (1969).

<sup>260</sup> *Id.*

<sup>261</sup> UNHRC, *Ross v. Canada*, *Communication No. 736/1997* (2000), par. 10.6.

<sup>262</sup> Constitutional Court of South Africa, *Islamic Unity Convention v. Independent Broadcasting Authority*, (4) SA 294 (CC); (5) BCLR 433 (CC) (2002).

Within the debate on hate speech and incitement, the issue of advocacy of genocide and Holocaust denial occupies a particular place – although the phenomena are certainly not identical.

The 1948 Genocide Convention lists among its punishable acts "direct and public incitement to commit genocide."<sup>263</sup> This followed the trial at the Nuremberg Tribunal of Julius Streicher, editor of the pro-Nazi newspaper *Der Stürmer*, who was convicted of crimes against humanity and hanged for his incitement of genocide, having called for the extermination of the Jews. The tribunal linked Streicher's propaganda to the actual genocide of Jews. Another Nazi publicist, Hans Fritzsche, was acquitted on the basis that, although there was evidence of his anti-Semitism, the link between his work and the genocide was less direct.

In the 1994 Rwanda genocide, the media again played a role in generating propaganda against the victims. This role led to the first prosecutions at the International Criminal Tribunal for Rwanda (ICTR) for "direct and public incitement to commit genocide." This was defined as an inchoate offence, meaning that it was not necessary that the genocide actually occurred, but required the intent on the part of the accused that it should do so. "Direct" was defined in a broad sense, not necessarily meaning explicit, but with the implication that listeners were being called on to take some specific action. When specific action was not called for, this was defined as "hate propaganda."

There were several cases brought against journalists at the ICTR, notably *Nahimana et al*, often known as the Media Trial.<sup>264</sup> Two of the three journalists in the latter case were the founders of a radio station that broadcast anti-Tutsi propaganda before the genocide. Once it had started, the station actually broadcast the names and licence plate numbers of intended victims.

The Tribunal found: "The actual language used in the media has often been cited as an indicator of intent." However, it is not necessary to show "any specific causation ... linking the expression at issue with the demonstration of a direct effect."<sup>265</sup>

The Rome Statute establishing the ICC also establishes the crime of incitement to genocide – although not incitement to any of the other crimes (such as crimes against humanity, war crimes etc.) covered by the treaty.

**Caselaw highlight: Rwandan Supreme Court, *Agnes Uwimana-Nkusi and Saidati Mukakibibi v. Rwanda***

Agnès Uwimana-Nkusi and Saidati Mukakibibi were arrested in July 2010. They both wrote for the biweekly publication called *Umurabyo*, a Kinyarwanda-language newspaper with a circulation estimated at 100-150 copies per issue, of which Ms Uwimana-Nkusi also was the editor. In the course of 2010, Ms Uwimana-Nkusi and Ms Mukakibibi had published a number of articles raising critical questions about, amongst other things, the government's agricultural policies, its handling of corruption by high-ranking government officials, and human rights violations in the country.

<sup>263</sup> United Nations General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, Resolution 260 (III) (9 December 1948), Art. 3.

<sup>264</sup> International Criminal Tribunal for Rwanda, *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze*, Case No. ICTR-99-52-T (2003).

<sup>265</sup> *Id.*, par. 86-90.

The journalists were tried before the High Court of Kigali. Ms Uwimana-Nkusi was charged and convicted for four separate charges, on the basis of four articles she wrote for *Umurabyo*: threatening national security, genocide minimization, defaming the President, and divisionism. Ms Mukakibibi was charged and convicted for threatening national security on the basis of one article published in *Umurabyo*.

Ms Uwimana-Nkusi's conviction for genocide minimization was related to an article she had written describing the division between ethnic groups within Rwandan society since the distinction between Hutu, Tutsi, and Twa was introduced by the colonial power, and the subsequent favouritism for a different group by each presidential administration. Ms Uwimana-Nkusi pointed out that there was not only "ethnicism" in the country, but also "regionalism." She then wrote that "Rwandans lived for a long time with this hatred until they ended up killing each other after [former President] Kinani [Habyarimana]'s death." It was the "killing each other" wording that was considered as minimizing the genocide. Ms Uwimana-Nkusi was convicted to ten years' imprisonment and a fine for this charge.

In the appeal judgment, the Supreme Court of Rwanda looked into the question whether or not the term "gutemagurana", used in the article and which according to Ms Uwimana-Nkusi should be read as meaning "killing each other with machetes" constituted genocide minimization. The Prosecution insisted that the term implied that a "civil war" had occurred, rather than genocide, and that hence, by using this term, Ms Uwimana-Nkusi had minimized the genocide.

While the Court acknowledged that its own laws or the Court's caselaw did not provide clear guidance on what exactly constituted "genocide minimization" ("[the law] does not explain clearly the acts constituting the crime of genocide minimisation. It only shows the denial of genocide can be punished when it is made public either through speech, writing, image or photo or any other way. The Supreme Court has never taken a decision in a trial explaining what it means to minimise the genocide. The Rwandan dictionary also does not give an explanation of what is 'the minimisation of genocide'"<sup>266</sup>), it nevertheless concluded that the wording used could be considered as such.

However, in order for the use to constitute the crime of genocide minimization, the term also had to have been used with that specific intent:

"[T]he Supreme Court finds that the use of the word 'gutemagurana' in the sense of the genocide committed against Tutsis is effectively a proposition that minimises the genocide. The use of this word is like so many others often used inappropriately to justify the genocide committed against Tutsis, notably the following statements: this happened during the war, the tragedy known in Rwanda, sectarian conflict . . . are about the minimisation of the genocide that people should avoid using as they can in the future grow to devalue the genocide against Tutsis. However, what the use of this terminology may be, in order for those who used it to be punishable under Article 33bis/2003 Law of the law against genocide, crimes against humanity and war crimes, there must be evidence proving that he who committed it recognises and had the intention to convince others that he does not

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<sup>266</sup> Rwandan Supreme Court, *Le Ministère Public v. Uwimana Nkusi and Mukakibibi*, Case No. RPA 0061/11/CS (S.C. Apr. 4, 2012), par. 48.

acknowledge the genocide committed against Tutsis. Having said that, Uwimana-Nkusi Agnes did not have this intention as has been explained. The court therefore acquits her on this count."<sup>267</sup>

The genocide of the Jews in Nazi-occupied Europe was such a formative event in the creation of the European human rights system that Holocaust denial – claiming that the genocide did not occur – is an offence in several countries and is treated in a particular fashion within the ECtHR jurisprudence.

The usual approach of the ECtHR has been to use the Article 17 "abuse clause" to deny Holocaust deniers the protection of Article 10. Article 17 prohibits the abuse of rights in the Convention to deny the rights of others. The ECtHR ruled the application of Roger Garaudy inadmissible on Article 17 grounds:

"Denying crimes against humanity is one of the most serious forms of racial defamation of Jews and of incitement to hatred of them."<sup>268</sup>

Mr Garaudy had written a book entitled *The Founding Myths of Modern Israel*, denying the Holocaust and hence falling foul of French law.

However, it is noteworthy that the ECtHR has only used this approach in the specific instance of Holocaust denial and not other historical revisionism, even when closely related. Hence in the case of *Léhideux and Isorni v. France* it found a violation of Article 10. The two authors had written in defence of the pro-German French wartime leader Marshal Pétain and were convicted of defending war crimes and collaboration. The ECtHR observed:

"the lapse of time makes it inappropriate to deal with such remarks, forty years on, with the same severity as ten or twenty years previously."<sup>269</sup>

The Grand Chamber of the ECtHR has taken into account a number of factors when considering whether a conviction for genocide denial, minimisation or justification is necessary in a democratic society:

- The nature of the statements;
- The context in which they were interfered with;
- The extent to which they affected the rights of those affected by the genocide;
- The existence or lack of consensus among the Member States on the need to resort to criminal law sanctions in response to such statements;
- The existence of any international law rules on this issue (whether the State was complying with an international obligation);
- The method employed by the domestic courts to justify conviction;
- The severity of the interference.<sup>270</sup>

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<sup>267</sup> Rwandan Supreme Court, *Le Ministère Public v. Uwimana Nkusi and Mukakibibi*, Case No. RPA 0061/11/CS (S.C. Apr. 4, 2012), par. 56. See also Yakaré-Oulé (Nani) Jansen, *Denying Genocide or Denying Free Speech? A Case Study of the Application of Rwanda's Genocide Denial Laws*, 12 Nw. J. Int'l Hum. Rts. 191 (2014). Available at SSRN: <http://ssrn.com/abstract=2425060>.

<sup>268</sup> ECtHR, *Garaudy v. France*, Application No. 65831/01 (2003).

<sup>269</sup> ECtHR, *Léhideux and Isorni v. France*, Application No. 55/1997/839/1045 (1998), par. 55.

<sup>270</sup> Grand Chamber of the ECtHR, *Perinçek v. Switzerland*, Application No. 27510/08 (2015).



### Point for discussion

In cases involving a denial of the Nazi Holocaust, the ECtHR usually invokes Article 17 of the ECHR (prohibiting the abuse of the Convention to deny rights to others).

“Denying crimes against humanity is one of the most serious forms of racial defamation of Jews and of incitement to hatred of them.”<sup>271</sup>

Do you agree?

### E. Hate speech against LGBT individuals

Throughout the continent, hate speech and incitement to violence against LGBT individuals unfortunately is a common occurrence.

Fortunately, several national courts in southern Africa have recognised that hate speech against LGBT communities is unjustified. The Ugandan High Court, for example, interdicted a local newspaper called Rolling Stone after it published the names and addresses of people it claimed were gay or lesbian, under the heading “Hang them, they are after our kids!!!”. Even though same-sex sexual conduct is criminalised in Uganda, the Court stated that this does not criminalise a person for being gay. The Court noted that “this application is not about homosexuality *per se*. It is about fundamental rights and freedoms” and concluded that the publication of the lists of names and the accompanying incitement to violence threatened the rights of the Applicants to respect for human dignity and protection from inhuman treatment and violated their constitutional right to privacy.<sup>272</sup> Rolling Stone was ordered to stop publishing the identities of alleged gay or lesbian people, pay 1.5 million Ugandan shillings plus court costs to each of the plaintiffs, and the paper was shut down.

International courts have also issued judgments that prohibit homophobic hate speech. The ECtHR in *Vejdeland v. Sweden* stressed that discrimination based on sexual orientation was as serious as discrimination based on race, origin or colour. The case concerned four Swedish nationals who were convicted in Sweden for violating the Swedish Penal Code by distributing leaflets referring to “homosexuality has a morally destructive effect on the substance of society” at a school. The ECtHR held that the convictions and interference with the Applicants’ exercise of their right to freedom of expression could “be regarded by the national authorities as necessary in a democratic society for the protection of the reputation and rights of others”.<sup>273</sup>

### F. Religious defamation

Many States have laws prohibiting defamation of religions, while in the common law there exists the crime of blasphemous libel.

Because of the doctrine of the “margin of appreciation,” the ECtHR has been very reluctant to find against States in matters of blasphemy and defamation of religions. Because this falls within the area of “public morals,” the ECtHR often declines to interfere in decisions made at the national level:

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<sup>271</sup> ECtHR, *Garaudy v. France*, Application No. 65831/01 (2003).

<sup>272</sup> High Court of Uganda, *Kasha Jacqueline, David Katso Kisuule and Onziema Patience v. Rolling Stone Ltd and Giles Muhame*, Cause No. 163 of 2010, 30 December 2010.

<sup>273</sup> ECtHR, *Vejdeland v. Sweden*, Application No 1813/07 (2012), par. 59.

"The absence of a uniform European conception of the requirements of the protection of the rights of others in relation to attacks on their religious convictions broadens the Contracting States' margin of appreciation when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or religion..."<sup>274</sup>

In more recent cases, however, the ECtHR has been reluctant to find that religions have been defamed. In *Giniewski v. France*, in which a writer published an article critically examining Roman Catholic doctrine and linking it to anti-Semitism and the Holocaust, the ECtHR found that a verdict of defaming religion was a violation of Article 10. While it invoked the margin of appreciation doctrine, the ECtHR still underlined the importance of a liberal application of Article 10 on matters of general public concern (of which the Holocaust is undoubtedly one):

"By considering the detrimental effects of a particular doctrine, the article in question contributed to a discussion of the various possible reasons behind the extermination of the Jews in Europe, a question of indisputable public interest in a democratic society. In such matters, restrictions on freedom of expression are to be strictly construed. Although the issue raised in the present case concerns a doctrine upheld by the Catholic Church, and hence a religious matter, an analysis of the article in question shows that it does not contain attacks on religious beliefs as such, but a view which the applicant wishes to express as a journalist and historian. In that connection, the Court considers it essential in a democratic society that a debate on the causes of acts of particular gravity amounting to crimes against humanity should be able to take place freely..."<sup>275</sup>

In a case from Slovakia, a writer published an article criticizing the head of the Roman Catholic church for calling for the banning of a film poster and later the film itself, on moral grounds. He was convicted of the offence of "defamation of nation, race and belief," on the basis that criticizing the head of the church was tantamount to defaming the religion itself. The ECtHR rejected this reasoning and found a violation of Article 10:

"The applicant's strongly worded pejorative opinion related exclusively to the person of a high representative of the Catholic Church in Slovakia. Contrary to the domestic courts' findings, the Court is not persuaded that by his statements the applicant discredited and disparaged a sector of the population on account of their Catholic faith.

...

The fact that some members of the Catholic Church could have been offended by the applicant's criticism of the Archbishop and by his statement that he did not understand why decent Catholics did not leave that Church since it was headed by Archbishop J. Sokol cannot affect the position. The Court accepts the applicant's argument that the article neither unduly interfered with the right of believers to express and exercise their religion, nor did it denigrate the content of their religious faith...."<sup>276</sup>

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<sup>274</sup> ECtHR, *Giniewski v. France*, Application No. 64016/00 (2006), par. 44.

<sup>275</sup> *Id.*, par. 51.

<sup>276</sup> ECtHR, *Klein v. Slovakia*, Application No. 72208/01 (2006), par. 51-52.

These recent cases contrast with the earlier decisions of the ECtHR. In one Austrian case, the ECtHR declined to find that the seizure of a film deemed to offend Roman Catholics was a violation of Article 10. In exercising the right to freedom of expression, people had an

"Obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights and which do not contribute to any form of public debate capable of furthering progress in human affairs. This being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent improper attacks on objects of religious veneration, provided always that any 'formality', 'conditions', 'restriction' or 'penalty' imposed be proportionate to the legitimate aim pursued."<sup>277</sup>

The ECtHR reached a similar conclusion in a British case involving a short film with erotic content that was banned on the grounds that it would be guilty of the criminal offence of blasphemous libel.<sup>278</sup>

The gradual move away from blasphemy laws and the protection of religion may derive in part from the sense that the protection offered was uneven and unfair. In *R v. Chief Metropolitan Stipendiary Magistrate, ex parte Choudhury*, a District Court in London ruled on the refusal of a magistrate to issue a summons for blasphemy against the author Salman Rushdie, at the request of a Muslim organization. The court made a clear finding that the common law of blasphemy only protected the Christian church – actually, not all Christians, but those who constitute the State religion in England and Wales.

Furthermore, the absence of a law protecting religions other than Christianity was not a breach of the United Kingdom's obligations under the ECHR because the protection of freedom of religion in Article 9 of the ECHR did not require a domestic law to provide a right to bring criminal proceedings of blasphemy and such proceedings would be contrary to the author's right of freedom of expression under Article 10 of the convention.<sup>279</sup>

In 2008, the offence of blasphemy was abolished.

The final word on this issue is with the UNHRC:

"Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in Article 20, paragraph 2, of the Covenant. Such prohibitions must also comply with the strict requirements of article 19, paragraph 3, as well as such articles as 2, 5, 17, 18 and 26. Thus, for instance, it would be impermissible for any such laws to discriminate in favour of or against one or certain religions or belief systems, or their adherents over another, or religious believers over non-believers. Nor would it be permissible for such prohibitions to be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith."<sup>280</sup>

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<sup>277</sup> ECtHR, *Otto-Preminger-Institut v. Austria*, Application No. 13470/87 (1994), par. 49.

<sup>278</sup> ECtHR, *Wingrove v. the United Kingdom*, Application No. 17419/90 (1996).

<sup>279</sup> Divisional Court of Queen's Bench, *R. v. Chief Metropolitan Stipendiary Magistrate, ex parte Choudhury*, 1 All ER 313 (1991).

<sup>280</sup> General Comment 34, par 48.

### **Case scenario for discussion**

Your country has a law prohibiting denial of the Rwandan genocide. A magazine publishes an article by a historian arguing that the killings in 1994 did not constitute genocide – and discussion of genocide is actually used to stir up tribal hatred. The author and the magazine's editor are convicted under the genocide denial law.

They take their case to the regional human rights court. What arguments could be used by each side and what, in your opinion, should the court decide?

#### **G. Hate speech laws in South Sudan**

Hate speech in South Sudan is governed by the Media Authority Act 2013.<sup>281</sup>

Section 6(13)(d) states the right of an individual to be protected against hate speech, incitement to violence, defamation and the intrusion of privacy.

Article 6(13)(c) calls for the respect for religious, ethnic and cultural diversity to be guaranteed under the principles contained within international human rights instruments, and that inciting religious, ethnic or cultural intolerance shall be guarded against as an abuse of freedom of expression.

Section 29(1) indicates what can be considered hate speech:

“It shall be an offence to publish, broadcast or otherwise disseminate statements that threaten, insult, ridicule or otherwise abuse a person or group with language that is intended to, and does or may provably incite others to commit acts of violence or to discriminate against that person or group, or is published, broadcast or otherwise disseminated in reckless disregard of the probability that it may incite such violence or discrimination.”

Section 29(3) establishes a procedure for complaints regarding hate speech. Complaints can be made to the Press and Broadcast Complaint Council, which shall investigate the merits of the complaint and attempt to resolve the matter through mediation and negotiation.

Whereas section 29(3) of the Media Authority Act 2013 envisages hate speech as a civil offence, to be dealt with through the Press and Broadcast Complaint Council, Section 29(6) of the Act criminalises hate speech with the following wording:

“In serious cases where malicious intent or recklessness is shown and damage is serious, a prison term of up to five years may be imposed by a competent court.”

**Point for discussion**

Is hate speech a prevalent issue in South Sudan? Who tend to be the main offenders? And who the victims?

Who do you think is best suited to handle complaints regarding hate speech: the Press and Broadcast Complaint Council or the criminal courts?

## VI. PROTECTION OF SOURCES

The protection of confidential sources is usually regarded as a fundamental principle of journalistic ethics, and is increasingly protected in law as well.

In most instances good journalistic practice will rest on the open identification of sources, preferably as many as possible. This is part of the transparency that allows an audience or readers to judge the quality of the information that the journalist presents.

For some stories, however – often the most important ones – the risk to the source may be too great for his or her identity to be safely revealed. The risk may be from criminals, the State or others. It may be a risk to life, liberty or livelihood.

Journalists have long understood that they sometimes depend on these confidential sources. They need to be able to *guarantee* anonymity against legal threats – otherwise future sources will not come forward. This is why legal protection is so important.

### Question

Under which circumstances do you think a journalist should be compelled to disclose their sources? Do you know of any cases in which this happened? What were the facts?

The landmark international case on this issue is *Goodwin v. the United Kingdom* from the ECtHR. The journalist had been fined for contempt by a British court for refusing to reveal the sources who had leaked information about a company's financial position.

The ECtHR found in favour of the journalist. The company had a legitimate interest in trying to identify a "disloyal" employee, but this was outweighed by the need for a free press in a democratic society:

"Protection of journalistic sources is one of the basic conditions for press freedom.... Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest."<sup>282</sup>

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<sup>282</sup> ECtHR, *Goodwin v. the United Kingdom*, Application No. 17488/90 (1996), par. 39.

## Question

The ECtHR in *Goodwin* mentions an “overriding requirement in the public interest” that could justify a journalist to be ordered to reveal their source. Can you think of an example of such a situation?

It is important to understand that the public interest here is served by protecting the source from disclosure; it is not a particular right enjoyed by journalists. Hence the protection of sources may be invoked by communicators beyond the traditional journalistic profession.

The EACJ ruling on the compliance of the Burundian press law with human rights standards, echoed the language of the ECtHR in *Goodwin*. The Burundian law required journalists to reveal their sources in matters relating to "State security, public order, defence secrets and the moral and physical integrity of one or more persons." In relation to these matters, the ECtHR held that the solution lay in "enacting other laws to deal with the issue and not by forcing journalists to disclose their confidential sources. There are in any event other less restrictive ways of dealing with these issues."<sup>283</sup>

The Declaration of Principles on Freedom of Expression in Africa States:

"Media practitioners shall not be required to reveal confidential sources of information or to disclose other material held for journalistic purposes except in accordance with the following principles:

- the identity of the source is necessary for the investigation or prosecution of a serious crime, or the defence of a person accused of a criminal offence;
- the information or similar information leading to the same result cannot be obtained elsewhere;
- the public interest in disclosure outweighs the harm to freedom of expression; and
- disclosure has been ordered by a court, after a full hearing."<sup>284</sup>

Of course, as the African Declaration makes clear, the right to maintain the confidentiality of sources (like the right to freedom of expression itself) is not an absolute one. The decision on whether to require disclosure should be made according to the same three-part test.

The Inter-American Commission on Human Rights has said:

Every social communicator has the right to keep his/her source of information, notes, personal and professional archives confidential.<sup>285</sup>

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<sup>283</sup> EACJ, *Burundi Journalists' Union v. The Attorney General of the Republic of Burundi*, Ref. No. 1 of 2014 (2015).

<sup>284</sup> Declaration of Principles on Freedom of Expression in Africa.

<sup>285</sup> Inter-American Commission on Human Rights, *Inter-American Declaration of Principles on Freedom of Expression*, 108<sup>th</sup> session, 19 October 2000.

The Committee of Ministers of the Council of Europe issued a recommendation on the protection of sources that argues that protection of sources should only be overridden in the interests of protecting life, preventing major crime, or in defence of someone charged with a major crime.<sup>286</sup>

Of course, there is another type of case where the issue of protection of sources may arise, namely those where the journalist is on trial (or has been sued, for example for defamation). Revelation of sources may favour the journalist, but journalistic ethics would demand a refusal to disclose. (The Council of Europe recommendations are not alone in maintaining that courts should never order the revelation of confidential sources in a defamation case).

Zimbabwean journalist Geoffrey Nyarota found himself in just such a situation. The editor of the *Bulawayo Chronicle*, Nyarota had exposed corrupt acquisition and sale of vehicles from the Willowvale car plant by government ministers and senior ruling party figures (inevitably dubbed "Willowgate"). One such minister, Nathan Shamuyarira, sued Nyarota for defamation. His counsel demanded that the editor reveal the identities of the sources who leaked details of the Willowgate scandal. Nyarota refused and later recalled in his memoirs:

"If they were not identified in court, the non-disclosure would in no way prejudice Shamuyarira as the plaintiff. Such failure to disclose would, however, effectively prejudice me, the defendant, because my refusal to identify the sources supporting my evidence would increase the burden on me to satisfactorily prove the truth of the allegations against the minister."<sup>287</sup>

In the event, the court did not require Nyarota to reveal his sources, using the reasoning already set out. Nyarota lost his case.

In a case from Singapore on a related question, the Court of Appeal used a "balancing of interests" approach to determine whether a journalist, James Dorsey, should be required to reveal his sources. Dorsey had written a blog entry, using information from a leaked report by PriceWaterhouseCoopers ("PWC"), relating to corruption in football. World Sports Group ("WSG") regarded the allegations as defamatory and sought to make Dorsey disclose his source – an application that was upheld by the lower court.

Note that in this case WSG did not actually sue Dorsey for defamation, which it was certainly able to, nor did it sue PWC whose report it was, but was trying to identify the whistleblower who had leaked the report.

The Court of Appeal noted that Singapore did not have a "newspaper rule" protecting Dorsey against being required to disclose his sources. In balancing the competing interests, however, it found in favour of the public interest of protecting the whistleblower:

"Whistleblowing and the reporting of corrupt activities by credible parties... should not be unnecessarily deterred by the courts, as such activities, given their surreptitious nature, are usually very difficult to detect. In fact, it should

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<sup>286</sup> Council of Europe, *Recommendation No. R (2000) 7 of the Committee of Ministers to Member States on the right of journalists not to disclose their sources of information*, 8 March 2000.

<sup>287</sup> Geoffrey Nyarota, *Against the Grain: Memoirs of a Zimbabwean Newsmen*, (Zebra 2006), p. 196.



be reiterated that there is a compelling public interest consideration ever present in Singapore to encourage whistle blowing against corruption..."<sup>288</sup>

A related question is whether there may in some circumstances be a privilege for journalists in not being compelled to testify. This was the issue confronted by the International Criminal Tribunal for the Former Yugoslavia in the case against *Brdjanin* and *Talic*. The trial court issued a *subpoena* against Jonathan Randal, formerly a war correspondent with the *Washington Post*, who had interviewed Brdjanin during the course of the war. Randal appealed to the Appeals Chamber of the Tribunal to set aside the *subpoena*.

Randal's argument, which the Appeals Chamber broadly accepted, was that war correspondents play a vital public role in documenting and publicizing events, such as the atrocities of which the defendants were accused. It would become much more difficult for them to play this role if it was known that they could be required to testify.

The Appeals Chamber offered a two-part test to determine whether journalists should be compelled to testify in these circumstances. First, did the journalist have evidence that was of direct value in determining a core issue in the case? Second, was there no alternative means of obtaining this evidence? In this case, given that the published article of the interview with Brdjanin was available, the two-part test was not satisfied.<sup>289</sup>

It is also worth noting, as recognised by the passage from Declaration of Principles on Freedom of Expression in Africa States cited above, that confidentiality extends beyond the protection of the identity of sources and can also attach to other journalistic material. This was alluded to by the ECtHR in *Nagla v. Latvia*:

"The Court considers that any search involving the seizure of data storage devices such as laptops, external hard drives, memory cards and flash drives belonging to a journalist raises a question of the journalist's freedom of expression including source protection and that the access to the information contained therein must be protected by sufficient and adequate safeguards against abuse. In the present case, although the investigating judge's involvement in an immediate post factum review was provided for in the law, the Court finds that the investigating judge failed to establish that the interests of the investigation in securing evidence were sufficient to override the public interest in the journalist's freedom of expression, including source protection and protection against the handover of the research material." <sup>290</sup>

### Question for discussion

What if it is in the journalist's interest to reveal the source, for example if they are being sued for defamation and need to prove the truth of an allegation they published?

Should a journalist reveal their source then?

<sup>288</sup> Singapore Court of Appeal, *Dorsey v. World Sport Group Pte Ltd*, Civil Appeal No. 167 of 2012/M (2014), par. 75.

<sup>289</sup> International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Radoslav Brdjanin & Momir Talic*, Case No. IT-99-36-AR73.9, Decision on Interlocutory Appeal (2002).

<sup>290</sup> ECtHR, *Nagla v. Latvia*, Application No. 73469/10 (2013), par. 101.

Should the journalist be compelled by the court to do so?

Should the journalist comply with a court order?

A. What if the "journalist" is a blogger or a "citizen journalist"?

The question of whether James Dorsey was entitled to invoke a journalist's right to protect sources arose in the Singapore case above. He was a blogger rather than a traditional journalist.

While clearly not everyone can enjoy this "right to protect confidential sources" in all circumstances, the application is in fact rather more widely enjoyed. The purpose of the principle, clearly, is to allow a whistle-blower to communicate evidence of wrongdoing to the public, as noted by the Singapore court. This is done through an intermediary – usually a journalist – whose name is publicly attached to the exposure. But if someone else exposed the story – a blogger, say, as in Dorsey's case – the principle would still apply.

Some international bodies avoid the term journalists altogether in this connection. The Declaration of Principles on Freedom of Expression adopted by the Inter-American Commission on Human Rights states:

"Every social communicator has the right to keep his/her source of information, notes, personal and professional archives confidential."<sup>291</sup>

The Recommendation adopted by the Council of Europe's Committee of Ministers provides, in similar terms:

"The term "journalist" means any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication."

The UNHRC has also reinforced that the definition of "journalist" should not be narrow in scope:

"Journalism is a function shared by a wide range of actors, including professional full-time reporters and analysts, as well as bloggers and others who engage in forms of selfpublication in print, on the internet or elsewhere".<sup>292</sup>

B. Are there exceptions to the right to protect sources?

The protection of sources – like the right to freedom of expression of which it is part – is not absolute. There will be occasions when courts are entitled to require journalists (or "social communicators") to reveal their sources.

What might these occasions be?

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<sup>291</sup> Inter-American Commission on Human Rights, *The Inter-American Declaration of Principles on Freedom of Expression*, 108 session, 2-20 October 2000, Washington D.C., The United States.

<sup>292</sup> UNHRC, *General Comment No. 34, ICCPR, Article 19: Freedoms of opinion and expression*, UN Doc. No. CCPR/C/GC/34 (12 September 2011), par. 44.

The Council of Europe Recommendation and the Declaration of Principles on Freedom of Expression in Africa, both already cited, set out the possible circumstances:

- Only if there is an overriding requirement in the public interest. The Council of Europe Recommendation states that this could be the case only if disclosure was necessary to protect human life, to prevent major crime or for the defence of a person accused of having committed a major crime.
- The interest in disclosure should always be balanced against the harm to freedom of expression.
- Disclosure should only be ordered at the request of an individual or body with a direct, legitimate interest, who has demonstrably exhausted all reasonable alternative measures.
- The power to order disclosure of a source's identity should be exercised exclusively by courts of law.
- Courts should never order disclosure of a source's identity in the context of a defamation case.
- The extent of a disclosure should be limited as far as possible, for example just being provided to the persons seeking disclosure instead of general public.
- Any sanctions against a journalist who refuses to disclose the identity of a source should only be applied by an impartial court after a fair trial, and should be subject to appeal to a higher court.

It is not necessarily true that the more important the case, the more likely it is that sources should be disclosed. As the Norwegian Supreme Court has pointed out, the greater the interest in ordering the disclosure of sources, the greater also the need to protect them in many instances:

"In some cases ... the more important the interest violated, the more important it will be to protect the sources ... It must be assumed that a broad protection of sources will lead to more revelations of hidden matters than if the protection is limited or not given at all."<sup>293</sup>

### C. Raids of journalist's premises

What if the authorities don't bother going to court, but just raid the journalist's premises? The ECtHR has dealt with this situation and was highly critical of an attempt by the State (Luxembourg) to bypass the requirement that a court determine whether a journalist is required to reveal a confidential source:

"The Court considers that, even if unproductive, a search conducted with a view to uncover a journalist's source is a more drastic measure than an order to divulge the source's identity. This is because investigators who raid a journalist's workplace unannounced and armed with search warrants have very wide investigative powers, as, by definition, they have access to all the documentation held by the journalist. The Court ... thus considers that the searches of the first applicant's home and workplace undermined the protection of sources to an even greater extent than the measures in issue in *Goodwin*."<sup>294</sup>

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<sup>293</sup> Supreme Court of Norway, the "*Edderkopp*" case (*HR-1992-10-A - Rt-1992-39*), LNR 10/1992, JNR 34/1991, (1992), p. 39.

<sup>294</sup> ECtHR, *Roemens Schmit v. Luxembourg*, Application No. 51772/99 (2003), par. 57.

The danger posed is clearly broader than to the journalist affected (and the source). The possibility that the police may turn up with a search warrant is likely to have a "chilling effect" on investigative journalism. For this reason, courts in some countries have demanded higher standards for the issuing of search warrants where these affect journalism and freedom of expression.

Hence the United States Supreme Court, for example, made this observation in a case where police conducted a raid to seize books:

"The authority to the police officers under the warrants issued in this case, broadly to seize "obscene . . . publications," poses problems not raised by the warrants to seize "gambling implements" and "all intoxicating liquors" ... the use of these warrants implicates questions whether the procedures leading to their issuance and surrounding their execution were adequate to avoid suppression of constitutionally protected publications."<sup>295</sup>

A British court expressed similar disquiet about a case where the journalist raided had been investigating possible wrongdoing by public authorities:

"Legal proceedings directed towards the seizure of the working papers of an individual journalist, or the premises of the newspaper or television programme publishing his or her reports, or the threat of such proceedings, tend to inhibit discussion. When a genuine investigation into possible corrupt or reprehensible activities by a public authority is being investigated by the media, compelling evidence is normally needed to demonstrate that the public interest would be served by such proceedings. Otherwise, to the public disadvantage, legitimate inquiry and discussion, and 'the safety valve of effective investigative journalism' ... would be discouraged, perhaps stifled."<sup>296</sup>

These additional procedural protections are required because raids on journalistic premises are almost automatically an interference with freedom of expression and are hence subject to the three-part test – a decision for a judge, not a police officer.

In the case of *Sanoma v. The Netherlands*, the Grand Chamber of the ECtHR overruled a decision by the Third Section of the ECtHR in a case where police arrested a newspaper editor who refused to hand over photographs and threatened to close down the newspaper.<sup>297</sup> The ECtHR found that the quality of the relevant national law was deficient as there was no procedure in place to allow an independent assessment of whether a criminal investigation overrode the public interest in the protection of journalistic sources. One of the deficiencies in the national law was the lack of an independent judge or other decision-making body to review an order for disclosure, prior to the disclosure of the material in which the sources were identified. The ECtHR stated that, whilst it accepted that elaborate reasons may not always be given for urgent requests, at the very least an independent review should be carried out following seizure but prior to the access and use of the obtained material.<sup>298</sup> The State entity should also consider whether a less intrusive measure can suffice, if an overriding public interest is established by the authorities seeking disclosure.<sup>299</sup> Relevant and non-relevant information should also be separated at the

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<sup>295</sup> United States Supreme Court, *Marcus v. Search Warrant*, 367 US 717 (1961), par. 730-31.

<sup>296</sup> Divisional Court of England and Wales, *R v. Central Criminal Court, ex parte the Guardian, the Observer and Martin Bright*, 2 All ER 244, 262 (2001).

<sup>297</sup> ECtHR (Grand Chamber), *Sanoma Uitgevers B.V. v. the Netherlands*, Application No. 38224/03 (2010).

<sup>298</sup> *Id.*, par. 91.

<sup>299</sup> *Id.*, par. 92.

earliest available opportunity, and any judge or other person responsible for the independent review should have appropriate legal authority.<sup>300</sup>

Similarly, in the case of *Telegraaf v. The Netherlands*, the ECtHR stated that in order for a national law to be of sufficient quality, it had to have safeguards appropriate to the nature of the powers used to discover journalistic sources (in this case, surveillance). In that case, it was also found that the lack of a prior review by an independent body with the power to prevent or terminate the interference meant that the law was deficient and there was, therefore, a violation of Article 10.<sup>301</sup>

The Supreme Court of Canada has developed nine factors that must be taken into account in the balancing process in determining whether a search order of a media organisation was reasonable in the circumstances and should have been issued:

1. It is essential that all the requirements set out in the domestic criminal law for the issuance of a search warrant have been met;
2. Once the statutory conditions have been met, the judge should consider all of the circumstances in determining whether to exercise his or her discretion to issue a warrant;
3. The judge should ensure that a balance is struck between the competing interests of the State in the investigation and prosecution of crimes and the right to privacy of the media in the course of their news gathering and news dissemination. It must be borne in mind that the media play a vital role in the functioning of a democratic society. Generally speaking, the news media will not be implicated in the crime under investigation. They are truly an innocent third party. This is a particularly important factor to be considered in attempting to strike an appropriate balance, including the consideration of imposing conditions on that warrant;
4. The affidavit in support of the application must contain sufficient detail to enable the judge to properly exercise his or her discretion as to the issuance of a search warrant;
5. Although it is not a constitutional requirement, the affidavit material should ordinarily disclose whether there are alternative sources from which the information may reasonably be obtained and, if there is an alternative source, that it has been investigated and all reasonable efforts to obtain the information have been exhausted;
6. If the information sought has been disseminated by the media in whole or in part, this will be a factor which will favour the issuing of the search warrant;
7. If a judge determines that a warrant should be issued for the search of media premises, consideration should then be given to the imposition of some conditions on its implementation, so that the media organization will not be unduly impeded in the publishing or dissemination of the news;
8. If, subsequent to the issuing of a search warrant, it comes to light the authorities failed to disclose pertinent information that could well have affected the decision to issue the warrant, this may result in a finding that the warrant was invalid;
9. Similarly, if the search itself is unreasonably conducted, this may render the search invalid.<sup>302</sup>

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<sup>300</sup> *Id.*, par. 91.

<sup>301</sup> ECtHR, *Telegraaf Media Nederland Landelijke Media B.V. and others v. the Netherlands*, Application No. 39315/06 (2013).

<sup>302</sup> Supreme Court of Canada, *Canadian Broadcasting Corporation v. Lessard*, (1991) 3 S.C.R. 421, p. 445; Supreme Court of Canada, *Canadian Broadcasting Corporation v. New Brunswick (Attorney General)*, (1991) 3 S.C.R. 459, p. 481 to 482.

### **Case scenario**

One day, a reporter for newspaper The Watchman receives a set of electronic files from an anonymous source. The files relate to the faulty security arrangements at the local military compound; the documents show that there have been several security breaches over the past month, with intruders making it all the way inside the barracks.

The reporter, having examined the documents, contacts Ministry of Defence with a request for comment, explaining that she plans to publish the next day. The Ministry refuses to comment.

The story is published the next day, resulting in a great scandal. The Minister of Defence goes on record saying that the documents referred to in the article must have been fabricated – the article is a threat to national security, he says. The Minister obtains a court order, ordering the journalist to hand over all her files and computers so the source of these materials can be detected. The journalist refuses.

### **Questions**

Does the court order constitute a violation of the journalist's right to freedom of expression?

Why/why not?

Motivate your viewpoint as if you were the lawyer of the journalist/the Respondent State.

### **D. Whistleblowers**

The purpose of this chapter is to summarise the approach to the protection of journalistic sources adopted by a number of courts. In doing so, the principles and guidelines which have emerged from relevant case law related to the freedom of expression have been assessed. The chapter explains the law protecting journalists from having to disclose their sources rather than the law related to the protection of the sources themselves (whistleblowers), although there is some overlap between the two. However, it may be relevant to have a brief look at the standards for whistleblower protection set out by the ECtHR.

The leading case of *Guja v. Moldova* concerned the head of the press department of the Moldovan public prosecutor's office, who was dismissed when he informed a newspaper about a letter from the Deputy Speaker of Parliament in which the Deputy Speaker implicitly suggested that the investigation against four police officers should be stopped. The ECtHR found a violation of Article 10 of the Convention and formulated six factors for when a whistleblower may be protected.

First, dissemination of the information should only be considered when raising the matter internally is "clearly impracticable".<sup>303</sup> Second, the interest, which the public may have in particular information, can sometimes be so strong as to override even a

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<sup>303</sup> ECtHR, *Guja v. Moldova*, Application No 14277/04 (2008), par. 73.

legally imposed duty of confidence (on an employee).<sup>304</sup> Third, the information disclosed must be accurate and reliable.<sup>305</sup> Fourth, the court must look at whether the damage suffered by the public authority as a consequence of the disclosure in question outweighs the interest of the public in having the information revealed.<sup>306</sup> Fifth, the person revealing the information should act in good faith. Hence "an act motivated by a personal grievance or a personal antagonism or the expectation of personal advantage, including pecuniary gain, would not justify a particularly strong level of protection".<sup>307</sup> Lastly, the court must look at the penalty imposed in order to measure whether the interference was proportionate.<sup>308</sup> The ECtHR has observed that the dismissal of a whistleblower by way of disciplinary sanction is a particularly severe measure.<sup>309</sup> The factors are part of the overall balancing of interests that the ECtHR must make. This has been reaffirmed in a number of cases concerning whistleblower protection.<sup>310</sup>

### **Case scenario for discussion**

You are a judge. The police have applied to you for an order to seize unbroadcast television footage of recent civil disturbances. There are a number of criminal cases arising out of the disturbances and the police believe that there may be evidence in the footage that can be used to build their cases.

The television company argues that surrendering the footage will compromise its future ability to cover public events, especially where violence takes place or is threatened. What is your decision?

### **E. Protection of sources in South Sudan**

Section 6(13)(f) of the Media Authority Act 2013<sup>311</sup> provides that:

"A journalist shall not be compelled to reveal his or her source of information obtained upon promise of confidentiality."

The Code of Conduct and Ethics of Journalism Guide for South Sudan<sup>312</sup> outlines the following guiding principles:

- "i. Wherever possible, the print, electronic and broadcast media should rely on open and identified sources of information.

<sup>304</sup> *Id.*, par. 74.

<sup>305</sup> *Id.*, par. 75.

<sup>306</sup> *Id.*, par. 76.

<sup>307</sup> *Id.*, par. 77.

<sup>308</sup> *Id.*, par. 78.

<sup>309</sup> ECtHR, *Fuentes Bobo v. Spain*, Application No. 39293/98 (2000), par. 49.

<sup>310</sup> See ECtHR, *Frankowicz v. Poland*, Application No. 53025/99 (2008); see also ECtHR, *Maschenko v. Ukraine*, Application No. 4063/04 (2009); see also ECtHR, *Kudeshkina v. Russia*, Application No. 29492/05 (2009); see also ECtHR, *Pasko v. Russia*, Application No. 69519/01 (2009); see also ECtHR, *Sosinowska v. Poland*, Application No. 10247/09 (2011); see also ECtHR, *Heinisch v. Germany*, Application No. 28274/08 (2011); see also ECtHR, *Bucur and Toma v. Romania*, Application No. 40238/02 (2013).

<sup>312</sup> Code of Conduct and Ethics of Journalism Guide for South Sudan 2013, p. 20.

- ii. Journalists and their publications and stations have an obligation to protect the identity of those who provide information to them in confidence, whether or not they explicitly request for anonymity.
- iii. Journalists shall respect the confidentiality of sources they have promised anonymity.”

Section 51(1) of the Right of Access to Information Act 2013<sup>313</sup> relates to whistleblowers and protects bona fide disclosures of information in the following terms;

“A person shall not be subjected to any legal, administrative or employment related proceedings, for breach of a legal or employment obligation where the person acted in good faith and;

- (a) Releases substantially true information which discloses evidence of wrong doing or corruption
- (b) Releases substantially true information which discloses a serious threat to health, safety or the environment.”

### **Point for discussion**

What do you think weighs heavier in the balance: a journalist’s duty to comply with a court order to disclose their sources or their ethical obligations towards the source?

What if it is not a court order, but a request from police?

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<sup>313</sup> Right of Access to Information Act 2013.



## VII. PHYSICAL SAFETY OF JOURNALISTS

So far we have focused on potential restrictions on media freedom through legal measures taken by governments and others. Yet the most dangerous attacks on the media are physical ones. Each year dozens of journalists are killed as they carry out their professional activities. Many more suffer threats to make them back away from stories that offend vested interests.

### Question

What is the situation in your country?

Are journalists free to work without danger, threat or physical interference?

If your answer to the previous question is no, where does this danger come from – the State or other actors?

Human rights law is not silent on the issue of journalist safety. Essentially it says two things:

- The State has a responsibility to provide protection to media professionals;
- The State has a responsibility to initiate an independent investigation into any attack on media professionals and to prosecute those responsible, as appropriate.

These obligations are not specific to attacks on or threats against journalists, but there is an added duty on States with regards to violence and threats against the media in that the right to freedom of expression requires States to ensure an 'enabling environment' for its enjoyment. The obligation is not merely to *respect* rights – that is, not to violate them directly – but also to ensure that they are protected against abuses by third parties.

Article 2 (3) of the ICCPR provides the right for a remedy for violation of any of the rights contained in the treaty (which would cover assault, threats, killing, torture or disappearance of journalists). This has three elements:<sup>314</sup>

- a. The right to an effective remedy, irrespective of who violated the right;
- b. This right shall be determined by a competent judicial, legislative or administrative authority, in accordance with the legal system of the State;
- c. The remedy shall be enforced by the competent authorities.

There are similar provisions in the regional human rights instruments: Article 27(1) of the Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights, Article 13 of the ECHR, and Article 25 American Convention on Human Rights.

Although Article 2 (2) of the ICCPR recognizes that there are different ways in which international law may be "domesticated" into national legal systems, the UNHRC has underlined the application in all cases of the principle enunciated in Article 27 of the Vienna Convention on the Law of Treaties, namely that a State "may not invoke the

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<sup>314</sup> ICCPR, Art. 2 (3).

provisions of its internal law as justification for its failure to perform a treaty."<sup>315</sup> This means, among other things, that there is a general obligation on all branches of the State (including the judiciary and legislature, not just the executive, which normally represents the State on the international stage) to respect and protect rights and, in this instance, to provide an effective remedy.

One important element of an effective remedy is understood to be prompt and independent investigation of an alleged violation:

“Administrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies.”<sup>316</sup>

The UNHRC notes that failure to investigate alleged violations "could in and of itself give rise to a separate breach of the Covenant."<sup>317</sup>

When investigations reveal violations of some Covenant rights, those responsible should be brought to justice and, again, the UNHRC notes that failure to do so could itself be a breach of the ICCPR.

"These obligations arise notably in respect of those violations recognized as criminal under either domestic or international law, such as torture and similar cruel, inhuman and degrading treatment (article 7), summary and arbitrary killing (article 6) and enforced disappearance (articles 7 and 9 and, frequently, 6). Indeed, the problem of impunity for these violations, a matter of sustained concern by the Committee, may well be an important contributing element in the recurrence of the violations."<sup>318</sup>

In its case law, the Committee has reached a similar conclusion – that in cases involving arbitrary detention, enforced disappearance, torture and extrajudicial executions Article 2(3) must entail a criminal investigation that brings those responsible to justice.<sup>319</sup>

The same reasoning has been applied in the jurisprudence of regional human rights courts. The ECtHR has a particularly well-developed case law on Article 2 (the right to life), sometimes read in conjunction with Article 13 (the right to a remedy). It has found that States should take appropriate steps to safeguard the lives of those within their jurisdictions. This would include criminal law provisions, backed up by an effective law enforcement machinery.<sup>320</sup> The absence of direct State responsibility for a death does not preclude State responsibility under Article 2.<sup>321</sup>

Not all unlawful killings will engage a State's Article 2 obligations:

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<sup>315</sup> UNHRC, *General Comment No. 31, ICCPR, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 2187th meeting, Geneva, Switzerland (26 May 2004), par. 4 (“General Comment 31”).

<sup>316</sup> *Id.*, par. 15.

<sup>317</sup> *Id.*, par.15.

<sup>318</sup> *Id.*, par. 18.

<sup>319</sup> See e.g. UNHRC, *Bautista de Arellana v. Colombia*, Communication No. 563/1993, U.N. Doc. CCPR/C/55/D/563/1993 (1995) (Views of 11 October 1994).

<sup>320</sup> See ECtHR, *L.C.B. v. the United Kingdom*, Application No. 23413/94 (1998); see also ECtHR, *Osman v. the United Kingdom*, Application No. 23452/94 (1998).

<sup>321</sup> ECtHR, *Angelova and Iliev v. Bulgaria*, Application No. 55523/00 (2007), par. 93.

"[W]here there is an allegation that the authorities have violated their positive obligation to protect the right to life ... it must be established to the [ECtHR's] satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk."<sup>322</sup>

Article 2 also implies an obligation to conduct an investigation into any death that may be in breach of the Convention. The importance of an investigation, as the ECtHR reasoned in the landmark case of *McCann v. the United Kingdom*, is that a prohibition on arbitrary killing by the State would be ineffective without an independent means of determining whether any given killing was arbitrary.<sup>323</sup> Beyond that, of course, an investigation is about the State exercising its obligation to protect those within its jurisdiction from violence by other parties. In *Ergi v. Turkey* the ECtHR stated that the obligation to investigate "is not confined to cases where it has been established that the killing was caused by an agent of the State."<sup>324</sup> In various judgments the ECtHR has established the essential characteristics of such an investigation: independence, promptness, adequate powers to establish the facts, and accessibility to the public and relatives of the victims.

The ECtHR's jurisprudence on Article 2 is the most developed case law of a human rights body on this issue. It would be reasonable to draw upon this reasoning outside Europe as well, and in relation to other issues than the right to life, such as torture or serious bodily injury. The ECtHR itself has applied similar standards in relation to investigation of torture and disappearances.

These requirements apply to everyone, but they assume particular importance in the case of journalists and other media workers because the issue at stake is not merely the individual rights of those concerned but the freedom of the media in general (and hence the right to information of the population).

#### **Caselaw highlight: *Zongo v. Burkina Faso***

On 13 December 1998, passersby discovered four bodies in a badly burnt car some 100 kilometres from Ouagadougou, the capital of Burkina Faso. The burnt bodies also had bullet wounds and the men were identified as the journalist Norbert Zongo, his brother, Ernest Zongo, the journalist Blaise Ilboudo, and his driver, Ablasse Nikiema.

Prior to his death Zongo had been working on a story about how the driver of the younger brother of Burkina Faso's president had been tortured and killed for allegedly stealing vast sums of money from his employer. An independent commission of enquiry later concluded that Zongo's killing had been triggered by these journalistic investigations and identified five members of Burkina's presidential guards as implicated in the killing.

Only one of the five was ever charged for these killings and the charges against him were subsequently dropped. All efforts by Zongo's family to seek accountability for his killing were thwarted: the case was repeatedly reassigned to

<sup>322</sup> ECtHR, *Osman v. the United Kingdom*, Application No. 23452/94 (1998), par. 116.

<sup>323</sup> ECtHR, *McCann and Ors v. the United Kingdom*, Application No. 18984/91 (1994).

<sup>324</sup> ECtHR, *Ergi v. Turkey*, Application No. 23818/94 (1998).

different prosecutors and judges, and the fees paid by the family for processing the case returned. The ACtHPR would later classify these national proceedings as “unduly prolonged.”

Finally, Zongo’s family filed an Application before the ACtHPR, arguing that following the assassination the local authorities had failed to mount a proper investigation and to act with due diligence in seeking, trying and judging those involved in the death of Zongo and his companions. The ACtHPR found that Burkina Faso had indeed failed to take measures to ensure the Applicants’ right to be heard by a competent national court, therefore violating its obligations under Articles 1, 7 and 9(2) of the African Charter and Article 66 of the ECOWAS Treaty.

Enumerating all the shortcomings in the domestic proceedings, the ACtHPR found:

“that the Respondent had not acted with due diligence in seeking out, prosecuting and placing on trial those responsible for the murder of Norbert Zongo and his three companions. The Court notes in consequence, that in that aspect, the Respondent State had violated the rights of the Applicants to have their case heard by competent national courts as guaranteed under article 7 of the Charter.”<sup>325</sup>

The African Commission on Human and Peoples' Rights' Declaration of Principles on Freedom of Expression states:

1. Attacks such as the murder, kidnapping, intimidation of and threats to media practitioners and others exercising their right to freedom of expression, as well as the material destruction of communications facilities, undermines independent journalism, freedom of expression and the free flow of information to the public.
  2. States are under an obligation to take effective measures to prevent such attacks and, when they do occur, to investigate them, punish perpetrators and to ensure that victims have access to effective remedies.
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The special mechanisms monitoring respect for freedom of expression have made several statements on the issue. Most recently, in 2012, the special mandates on freedom of expression from the UN, the OSCE, the African Commission on Human and Peoples' Rights and the OAS declared that States should:

- put in place special measures of protection for individuals who are likely to be targeted for what they say where this is a recurring problem;
- ensure that crimes against freedom of expression are subject to independent, speedy and effective investigations and prosecutions; and

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<sup>325</sup> ACtHPR, *Claimants of Late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Liboudo and the Burkinabe Movement on Human and Peoples' Rights v. Burkina Faso*, Application No. 013/2011 (2014), par. 156. [unofficial translation]

<sup>326</sup> Declaration of Principles on Freedom of Expression in Africa, Principle XI.

- ensure that victims of crimes against freedom of expression have access to appropriate remedies.<sup>327</sup>

The rapporteurs suggested the creation of specific crimes for physical attacks on journalists because of their impact on freedom of expression (or at least applying the harshest available penalties). They recommended the creation of special protection programmes against violent attack. And they elaborated the investigation requirements: independence, speed and effectiveness (with each spelt out in some detail).

When it comes to the question of the specific obligations of States in relation to serious crimes where journalists are the victims – "crimes against freedom of expression," as the rapporteurs call them – the regional human rights courts have relevant case law.

The ACtHPR, in the case of the assassinated journalist Norbert Zongo,<sup>328</sup> found that Burkina Faso "failed to act with due diligence in seeking, trying and judging the assassins of Norbert Zongo and his companions" [and as a result violated] "the rights of the Applicants to be heard by competent national courts." This "failure ... in the investigation and prosecution of the murderers of Norbert Zongo, caused fear and worry in media circles."

In a case from the ECOWAS Court of Justice concerning the killing of the Gambian journalist, Deyda Hydara, the Court found that the Gambian State had failed to conduct an effective investigation of the killing.<sup>329</sup> The Court noted that "there are no hard and fast rules as to what constitute[s] proper, effective or diligent investigations".<sup>330</sup> The Court, however, made clear from an objective standpoint it should be possible to state whether such investigations had taken place. In the present case, the Court found it a particularly aggravating factor that two eyewitnesses had found it necessary to flee the country. Furthermore, seven journalists were prosecuted for sedition when they spoke out against the failure to investigate the killing.<sup>331</sup>

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<sup>327</sup> The United Nations Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights Special Rapporteur on Freedom of Expression and Access to Information, *Joint declaration on crimes against freedom of expression* (25 June 2012).

<sup>328</sup> ACtHPR, *Claimants of Late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Liboudo and the Burkinabe Movement on Human and Peoples' Rights v. Burkina Faso*, Application No. 013/2011 (2014).

<sup>329</sup> ECOWAS Community Court of Justice, *Deyda Hydara Jr. and Others v. The Gambia*, Case No. ECW/CCJ/APP/30/11 (2014).

<sup>330</sup> *Id.*, p. 7.

<sup>331</sup> The ECOWAS Court of Justice handed down two other important decisions concerning journalists, though neither judgment explicitly referred to Article 9 of the African Charter. In *Chief Ebrima Manneh v. Republic of The Gambia*, the ECOWAS Court found the Gambian authorities responsible for the disappearance of Ebrima Manneh, a journalist with the *Daily Observer* who has been missing since July 2006. The Gambian Government was ordered to release Mr Manneh and pay compensation. In *Musa Saidykhan v. The Republic of The Gambia*, the court found the Government responsible for the torture of Musa Saidykhan, a former chief editor of the now-suspended *The Independent* newspaper. ECOWAS Community Court of Justice, *Chief Ebrima Manneh v. Republic of The Gambia*, Case No. ECW/CCJ/APP/04/07 (2008) and *Musa Saidykhan v. The Republic of The Gambia*, Case No. ECW/CCJ/APP/11/07 (2010).

In the ECtHR case of *Ozgur Gundem v. Turkey*, the newspaper in question had been the target of numerous attacks by "unknown perpetrators" that were not disputed by the government. These included seven killings of journalists and others associated with the paper and a number of attacks on others, such as vendors and distributors. In addition, there were alleged to be a number of attacks that were disputed by the government. The newspaper had drawn these incidents to the attention of the authorities, but for the most part there were neither investigations nor the requested protection. (There were, however, police raids on Ozgur Gundem's offices and prosecutions of its staff.)<sup>332</sup>

On the general obligations that the State has to protect the media against unlawful attack, the ECtHR noted:

"The Court recalls the key importance of freedom of expression as one of the preconditions for a functioning democracy. Genuine, effective exercise of this freedom does not depend merely on the State's duty not to interfere, but may require positive measures of protection..."<sup>333</sup>

The ECtHR found that the failure to protect the newspaper against attack constituted a breach of its Article 10 (freedom of expression) obligations on the part of Turkey:

"the authorities were aware that Özgür Gündem, and persons associated with it, had been subject to a series of violent acts and that the applicants feared that they were being targeted deliberately in efforts to prevent the publication and distribution of the newspaper. However, the vast majority of the petitions and requests for protection submitted by the newspaper or its staff remained unanswered. The Government have only been able to identify one protective measure concerning the distribution of the newspaper which was taken while the newspaper was still in existence....

The Court has noted the Government's submissions concerning its strongly held conviction that Özgür Gündem and its staff supported the PKK [an armed anti-government group] and acted as its propaganda tool. This does not, even if true, provide a justification for failing to take steps effectively to investigate and, where necessary, provide protection against unlawful acts involving violence."<sup>334</sup>

#### **Caselaw highlight: *Hydara v. The Gambia***

Deyda Hydara was a prominent Gambia journalist and cofounder of the newspaper *The Point*. He received several death threats during his lifetime due to his journalistic work. On 16 December 2004, Mr Hydara was murdered in a drive-by shooting as he was driving home from the offices of *The Point*. He suffered multiple gunwounds to the head and stomach. Two of his colleagues, who were in the car with him, were severely injured.

The investigations in The Gambia, first by police and then by the National Intelligence Agency (whose vehicles were said by witnesses to have been present at the murder), yield no tangible results. In 2011, the Hydara family files a case at the ECOWAS Community Court of Justice.

<sup>332</sup> ECtHR, *Ozgur Gundem v. Turkey*, Application No. 23144/93 (2000).

<sup>333</sup> *Id.*, par. 43.

<sup>334</sup> *Id.*, par. 44.

The Court delivered its judgment in 2014, finding that The Gambia had failed its duty to properly investigate the killing, thereby contributing to a climate of impunity that stifled free expression:

“Article 66 of the ECOWAS Revised Treaty imposes an obligation on Member States to assure a safe and conducive atmosphere in the practice of journalism. And in the situation where attacks by state operatives against journalists are not investigated, let alone to prosecute the suspects, the State will be in breach of its obligation under the Treaty and also the African Charter, as such impunity has the effect of denying the journalists the right to function and thus stifling freedom of expression.”<sup>335</sup>

The Gambia was ordered to pay the family USD 50,000 in compensation.

In a highly celebrated case, concerning the assassinated journalist Firat (Hrant) Dink the ECtHR found against Turkey. Hrant Dink was a Turkish journalist of Armenian origin who wrote a series of articles about the consequences of the 1915 genocide of Armenians and the importance of acknowledging (and naming) what had happened. Dink was prosecuted for denigrating "Turkishness," convicted and, at the time of his murder in 2007, the case was still in the upper reaches of the judicial system. It emerged that intelligence on the plot to kill Dink had been gathered, but not acted upon, by the police.<sup>336</sup>

The ECtHR found that Dink's rights had been violated on several counts. First, the failure to take action to prevent Dink's assassination was a violation of Article 2 "in its substantive aspect." Second, the failure to carry out an effective investigation into the murder was a violation of Article 2 "in its procedural limb."

The ECtHR also found a violation of Article 10 (freedom of expression), not only because of the prosecution of Dink for his journalism, but also because of its failure to protect him against physical attack:

"[The ECtHR] considers that, in these circumstances, the failure of the police in their duty to protect the life of Firat Dink against attack by members of an ultranationalist group ... added to the guilty verdict handed down by criminal courts in the absence of any pressing social need ... also led to a breach of its positive obligations on the part of the Government in relation to the freedom of expression of the applicant."<sup>337</sup>

Finally, the failure of effective investigation also engaged Article 13 – the right to an effective remedy – which the ECtHR found to have been violated.

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<sup>335</sup> ECOWAS Community Court of Justice, *Deyda Hydara Jr. and Others v. The Gambia*, Case No. ECW/CCJ/APP/30/11 (2014), p. 9-10.

<sup>336</sup> ECtHR, *Dink v. Turkey*, Application Nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09 (2010).

<sup>337</sup> *Id.*, par. 138 (unofficial translation). The original reads: "Elle estime que, dans ces circonstances, le manquement des forces de l'ordre à leur devoir de protéger la vie de Firat Dink contre l'attaque des membres d'un groupe ultranationaliste ... ajouté au verdict de culpabilité prononcé par les juridictions pénales en l'absence de tout besoin social impérieux ... a aussi entraîné, de la part du Gouvernement, un manquement à ses obligations positives au regard de la liberté d'expression de ce requérant."



The IACtHR has specified criteria for the conduct of investigations. Quoting jurisprudence from the ECtHR, it has held that the investigation must be concluded within a reasonable time; three factors are crucial for deciding what is 'reasonable': a) the complexity of the matter; b) the judicial activity of the interested party; and c) the behaviour of the judicial authorities.<sup>338</sup> State authorities must take the initiative: the investigation "must ... be assumed by the State as its own legal duty, not as a step taken by private interests which depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government."<sup>339</sup>

Importantly, the IACtHR has stressed the impact on society as a whole of the failure to conduct a proper investigation into the murder of a journalist:

"A State's refusal to conduct a full investigation of the murder of a journalist is particularly serious because of its impact on society. And that is the case here, because the impunity of any of the parties responsible for an act of aggression against a reporter – the most serious of which is assuredly deprivation of the right to life – or against any person engaged in the activity of public expression of information or ideas, constitutes an incentive for all violators of human rights. At the same time, the murder of a journalist has a "chilling effect" most notably on other journalists, but also on ordinary citizens as it instils the fear of denouncing any and all kinds of offences, abuses or illegal acts."<sup>340</sup>

In another case from the IACtHR concerning a violent attack on the journalist Luis Gonzalo Vélez the IACtHR stated that:

"The State must conduct, effectively and with a reasonable time, the criminal investigation into the attempted deprivation of liberty of Luis Gonzalo Vélez Restrepo that took place on October 6, 1997, in a way that leads to the clarification of the facts, the determination of the corresponding criminal responsibilities, and the effective application of the sanctions and consequences established by law, in accordance with paragraph 285 of this Judgment."<sup>341</sup>

### **Case scenario for discussion**

A journalist who has reported on links between the police and organized crime is abducted. Later his body is found with all the hallmarks of a gangland killing.

The police say that they are investigating the murder as they do all crimes. There is no particular human rights obligation on them in this case, they argue.

Is this an adequate response? If not, how would you respond to the police position?

<sup>338</sup> IACtHR, *Genie Lacayo v. Nicaragua*, Series C No. 30 (1997), par. 77. See also ECtHR, *König v. Germany*, Application No. 6232/73 (1978), par. 99.

<sup>339</sup> IACtHR, *Velásquez Rodríguez v. Honduras*, Series C No. 4 (1988), par. 177.

<sup>340</sup> IACtHR, *Miranda v. Mexico*, Case 11.739, Report N° 5/99, OEA/Ser.L/V/II.95 Doc. 7 rev., p. 755 (1998), par. 52.

<sup>341</sup> IACtHR, *Vélez Restrepo and Family v. Columbia* (2012), p. 90.



A. Protection of journalists' safety in South Sudan

Section 6(13)(p) of South Sudan's Media Authority Act 2013<sup>342</sup> stipulates that:

“The unlawful arrest, detention, harassment, intimidation and torture of journalists, including photo journalists accredited to media organizations shall be prohibited. Any existing laws shall be applied to the extent that they do not contradict the principle stated in this section.”

Section 6(13)(g) of the Act states that mass media and journalists shall be protected from criminal prosecution for media and journalistic offences, except in the case of incitement to violence and referral to laws of general application. It also states that any litigation proceedings for journalistic offences shall be governed by the provisions of the Act and the Civil Procedures Act 2007 to the extent applicable and consistent with the provision of Section 2 and the guiding principles of Section 6.

Sections 6(13)(h) and (j) make clear that no licence is required to practice journalism in South Sudan. No registration is required for publications in print or online other than to comply with the regulation of commercial and non-profit activity, but all journalists must adhere to a code of conduct.<sup>343</sup>

**Point for discussion**

What are the benefits of giving such a wide scope to who can qualify as a journalist and claim a right to be protected as such?

Do you see any disadvantages to this arrangement? Why or why not?

## VIII. HOW CAN INTERNATIONAL HUMAN RIGHTS LAW AND COMPARATIVE CASE LAW BE APPLIED IN NATIONAL COURTS?

Much of the discussion in this manual focuses on the standards for protecting freedom of expression set out in international and regional human rights law. But how can these standards be applied at the national level? Will a civil or criminal court simply ignore any argument based upon these standards?

Regional human rights standards may be particularly influential, with effectively universal ratification of the relevant treaties in Africa, Europe, and Latin America. The influence of regional jurisprudence has been particularly strong in Europe and Latin America, where human rights courts offer detailed findings on States' obligations to protect freedom of expression. International courts on the continent (the ACtHPR, ECOWAS Community Court of Justice and the EACJ) have only just started developing their freedom of expression caselaw, but as is evident from the previous chapters, this is progressive in protecting free speech and the rights of journalists. This is in line with the steady line of caselaw protecting the right to freedom of expression issued by the African Commission on Human and Peoples' Rights, which, although not binding, is an authoritative interpretation of States' obligations under the African Charter.

Globally, the key treaty protecting freedom of expression is the ICCPR. Like the regional treaties, this creates a binding obligation on the State to comply with the obligations it creates.

The ICCPR requires:

"Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant."<sup>344</sup>

The African Charter requires that:

"[P]arties to the present Charter shall recognise the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them."<sup>345</sup>

The ECHR and ACHR have similar provisions,<sup>346</sup> as does the Treaty Establishing the East African Community, which states that:

"The Partner States undertake to abide by the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights."<sup>347</sup>

As mentioned previously, a State's obligation to implement their obligations under international law apply to all organs of the State, the judiciary included. As articulated by the International Law Commission:

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<sup>344</sup> ICCPR, Art. 2 (2).

<sup>345</sup> African Charter, Art. 1.

<sup>346</sup> ECHR, Art. 1; ACHR, Art. 1.

<sup>347</sup> Treaty Establishing the East African Community, 30 November 1999, Art. 7(2).

“The conduct of an organ of the State shall be considered as an act of that State under international law, whether that organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character, and whether it holds a superior or a subordinated position in the organization of the State.”<sup>348</sup>

However, the exact way in which international law obligations are implemented domestically is a matter of great variation.

#### A. International human rights law

Theoretically, States are said to fall into one of two categories: *monist* and *dualist*.

*Monist* States are those where international law is automatically part of the domestic legal framework. This means that it is possible to invoke the State's treaty obligations in domestic litigation (such as a defamation trial).

*Dualist* States are those where international treaty obligations only become domestic law once they have been enacted by the legislature. Until this has happened, courts could not be expected to comply with these obligations in a domestic case.

States with common law systems are invariably dualist. States with civil law systems are more likely to be monist, but many are not (for example the Scandinavian States). All the previously dualist post-Communist States of Central and Eastern Europe are now monist.

That is the theory. The practice is more complicated.

In monist States, although ratified treaties are automatically a part of domestic law, their exact status varies. Do they stand above the constitution? On a par with it? Above national statutes? Or on a par with them? The answer varies from country to country.

In dualist States, some parts of international law may be automatically applicable. In States such as the United Kingdom and the United States, customary international law may be directly invoked, provided that it is not in conflict with national statute law. The United States constitution also says that "all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the land."<sup>349</sup> In practice, however, the Supreme Court has found many treaties (including those on human rights) to be "non self-executing," which means that they must first be incorporated by Congress.<sup>350</sup> However, even where treaties have not been incorporated in dualist States, courts are likely to consider them as interpretive guidance in deciding cases. The Netherlands' constitution allows its subjects to rely on any provision from a treaty the State entered into that attributes concrete rights to individuals (that has "direct effect") without the need for national legislation.<sup>351</sup>

<sup>348</sup> Yearbook of the International Law Commission, 1973, Vol. II, p. 193.

<sup>349</sup> *United States Constitution* (21 June 1788), art. VI.

<sup>350</sup> United States Supreme Court, *Foster & Elam v. Neilson*, 27 U.S. 2 Pet. 253 (1829).

<sup>351</sup> Constitution of the Kingdom of the Netherlands, Art. 94. In addition, EU law has a special position, with its provisions often directly creating rights for citizens of EU Member State without intervention of the State's legislature. See ECJ, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, (Case 26/62); (1963) ECR 1; (1970) CMLR 1.

It is very difficult, therefore, to give general guidance on how far domestic courts will admit arguments based upon international legal standards. It will be for practitioners in each country to understand this.

There is, however, a common problem that potentially cuts across different legal systems: judges may simply be unaware of States' treaty obligations, or the contents of the treaty, or how the treaty should be interpreted and applied. It is unlikely to be a good strategy in litigation to tell judges that they should apply treaty law. A better approach in most instances would be to invoke international law *as a means of interpreting national law*.

After all, most national constitutions protect freedom of expression. The limitations on freedom of expression permitted in national law often echo closely the terms of the limitations allowed in international and regional standards. This provides a good starting point for using international and comparative caselaw to interpret national standards.

#### B. Caselaw from other jurisdictions

In this manual we refer sometimes to landmark cases from national courts. Of course, the decision of a national court in one country does not bind the court of another, even when they have similar laws and legal systems and even when, as in the common law countries, they operate according to a doctrine of precedent.

#### **Question**

What is the situation in your country? Is it “monist” or “dualist”?

How do the courts look at caselaw from other jurisdictions?

The importance of consulting cases from other countries is simply to learn what are the most advanced decisions and most persuasive reasoning in freedom of expression cases. If these arguments are introduced into cases in national courts, this must be done in a careful and diplomatic fashion, so as not to antagonize judges. It is important, however, that judges hearing freedom of expression cases get the opportunity to be educated in the case law of other countries.

#### **Caselaw highlight: *Charles Onyango Obbo v. Attorney General***

Charles Onyango Obbo was arrested in 1997 and charged for the “publication of false news”, following a story published in *The Sunday Monitor* titled “Kabila paid Uganda in Gold - says Report,” which referred to reports saying that Uganda, along with Rwanda, had been paid in gold by Laurent Kabila for helping oust Zaire’s former military dictator. After protracted legal proceedings that went to the Constitutional Court and back, the Ugandan Supreme Court in 2003 found the false news provisions under which he was charged unconstitutional.<sup>352</sup>

The judgment is a great example of a Court drawing inspiration from its

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<sup>352</sup> Uganda Supreme Court, *Charles Onyango-Obbo and Anor v. Attorney General* (Constitutional Appeal No.2 of 2002).

counterparts elsewhere and worth reading. In weighing the constitutionality of the false news provision, the Court, in addition to referring to the constitutional traditions related to freedom of expression in Canada, Papua New Guinea, Namibia, Zimbabwe, Nigeria, and Zambia (and making a number of literary references) refers to precedent from:

- the Supreme Court of South Africa;
- the Supreme Court of the United States;
- the Supreme Court of Canada;
- the High Court of Zimbabwe;
- the Supreme Court of India;
- the Court of Appeal of Tanzania.

The judgments from these courts are used alongside precedent from Uganda itself, and referred to as means to “support” the conclusions the Court comes to and to draw “inspiration” from in dealing with the matter before it.

### C. International and comparative caselaw in South Sudanese Courts

Information on any current practice of South Sudanese courts using comparative and international law in their decision-making is difficult to obtain due to the lack of publication of judgments. There are, however, several references to these sources of law in South Sudan’s Constitution.

Article 5 of the Transitional Constitution of the Republic of South Sudan<sup>353</sup> provides for what it calls “sources of legislation” in the following terms:

“The sources of legislation in South Sudan shall be:

- (a) This Constitution;
- (b) Written law;
- (c) Customs and traditions of the people;
- (d) The will of the people; and
- (e) Any other relevant source.”

Article 9(3) of the Constitution stipulates that:

“All rights and freedoms enshrined in international human rights treaties, covenants and instruments ratified or acceded to by the Republic of South Sudan shall be an integral part of this Bill.”

Article 9(3) in particular indicates an intent to integrate international human rights standards in the national legal system.

South Sudan currently is a State Party to the following international human rights treaties:<sup>354</sup>

- the Convention on the Elimination of all Forms of Discrimination Against Women (“CEDAW”);

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<sup>354</sup> For up to date information on the ratification status of treaties by South Sudan (and other countries), visit this dashboard created by the UN Office of the High Commissioner for Human Rights: <http://indicators.ohchr.org>.

- the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”);
- the Convention on the Rights of the Child (“CRC”).

While South Sudan has not yet ratified the ICCPR, as stated above, it is widely considered as representing norms of customary international law. The UDHR is universally applicable and does not require ratification, as it is not a treaty.

While the ratification process for the African Charter has been initiated, with the national Parliament having ratified the treaty, the full ratification process had not yet been completed at the time of writing.<sup>355</sup>

### **Questions for discussion**

How often do lawyers in your country use international and comparative law when arguing domestic cases?

Do the courts respond positively to this? Do you think they would react positively if this were done more often?

From which courts or jurisdictions are or do you think precedent would be most persuasive to judges in your country?

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<sup>355</sup> For an up to date overview of the ratification of the African Charter, visit the African Commission’s website: <http://www.achpr.org/instruments/achpr/ratification/>.

## **IX. TAKING A PRESS FREEDOM CASE TO THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS, AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS OR EAST AFRICAN COURT OF JUSTICE**

### **A. Introduction**

This chapter looks at how to litigate cases on freedom of expression and the rights of the media at the regional level in East Africa. It focuses on setting out the processes and procedures for filing and arguing human rights cases before the African Commission on Human and Peoples' Rights, the African Court on Human and Peoples' Rights and the East African Court of Justice and highlights the key caselaw on press freedom from these international human rights bodies. While at this point in time not all of these bodies will be accessible to citizens of South Sudan to enforce their human rights, the practice of the courts and the African Commission should be informative and the caselaw can potentially be of practical use in the national courts of South Sudan as well (see chapter VIII).

*What is the rule of subsidiarity as applied to international human rights litigation and the African human rights system?*

The rule of subsidiarity refers to the basic principle that international forums should only be used when domestic (sometimes referred to as "local") forums have failed to remedy human rights abuses. The State has the primary obligation to provide remedies for violations of human rights and the role of international human rights forums is to ensure that States are complying with these obligations. In practical terms, this means that most cases seeking the enforcement of human rights should be brought at the domestic level first, where the courts are better placed to judge facts, interpret domestic laws and ensure enforcement of their decisions. You will need to apply this principle when you look at admissibility.

If for any reason this system fails, cases may be brought against the State at an international or regional forum. In East Africa the regional mechanisms are:

- the African Commission on Human and Peoples' Rights;
- the African Court on Human and Peoples' Rights; and
- the East African Court of Justice.

Each of these will have different rules to ensure the principle of subsidiarity (including limiting jurisdiction and requiring the exhaustion of local remedies). We will discuss these below.

*What is the purpose and function of international and regional litigation?*

Under international human rights law each State has obligations to respect, protect and fulfil human rights. The primary obligation is therefore always on the State to ensure enjoyment of human rights and it is the domestic courts of each State that serve the primary function of enforcement of human rights. From a practical perspective it is also often easier to enforce the decisions of domestic courts because domestic legal systems have developed mechanisms of enforcement that are absent from international forums, which are much more dependent on political pressure. It is for these reasons that international tribunals must always be considered as subsidiary to domestic proceedings.

## **Subsidiarity**

The rule of subsidiarity is the basic principle that international forums should only be used when domestic (sometimes referred to as “local”) forums have failed to enforce human rights.

*What roles do the domestic, regional and international systems play?*

The primary function of international and regional courts and other enforcement mechanisms is to ensure that States comply with their international obligations. Cases should therefore generally be brought to the attention of the domestic courts first, to give the government an opportunity to remedy the violation.

Reasons for bringing cases to regional and international forums include:

- developing pressure to change domestic law;
- achieving concrete remedies (including compensation) for individual clients; and
- as part of a wider advocacy strategy.

Although international forums have a reputation of failing to ensure that their decisions are actually enforced, some countries are very quick to pay compensation when asked to do so by international forums. In some cases litigation before international human rights forums is the only way to get attention from the domestic government or the international community for specific human rights situations.

*When should you take your case to the international and regional human rights system?*

Cases should generally be brought to regional forums when the domestic forums have failed or are not available.

However, there are situations where the domestic legal system does not work, for example, because:

- of corruption;
- of long delays;
- the domestic law is itself in violation of international human rights law; or
- the extent of the violations overwhelms the domestic courts.

In these cases you may need to take a case immediately to the international or regional level.

When deciding to take cases before international and regional forums it is important to consider a number of things, including whether:

- there is a possibility that litigation could result in harmful impact;
- there are any unexpected negative consequences of victory; or
- there are any unexpected negative consequences of defeat.

This applies to many issues and should always be a consideration when bringing a case before a regional or international forum.



### *How do you file a case with the regional and international systems?*

If you decide to file a case before an international forum you will need to ensure that it meets both the *formal* and *content* requirements of that forum. Different systems will apply different rules and you should therefore refer to the rules of procedure of each system before you file a complaint. The different forums we talk about in this manual (the African Commission; the ACtHPR; and the EACJ) each have different rules regarding the content and form required for filing a case.

#### **B. African Commission on Human and Peoples' Rights**

##### *Introduction*

The Organisation of African Unity (the "OAU") was established at the height of the decolonization processes in Africa in 1963, in Addis Ababa, Ethiopia. However, the protection of human rights was not a core function of the OAU, and it was only in the late 1970s that pressure from international and regional civil society led to development of the African Charter, which was adopted in 1981. The African Charter established the African Commission, whose functions include deciding complaints (called 'communications') lodged by individuals claiming that their rights under the African Charter have been violated.

In 2002, the OAU transformed into the African Union (the "AU"). The Constitutive Act of the AU expressly states that one of its main objectives is to promote and protect human and peoples' rights.

The African Charter did not establish a judicial body with the power to make binding decisions on cases, and indeed the decisions of the African Commission are still officially referred to as recommendations (even though they are adopted by the AU Assembly).

One explanation that was given for this was that "traditional African dispute settlement places a premium on the improvement of relations between the parties on the basis of equity, good conscience, and fair play rather than on strict legality."<sup>356</sup>

It is often argued that African States were not amenable to being hauled before an "adversarial and adjudicative judicial institution" to account for the human rights violations that were rife in almost every country. However, in reality, the African Commission exercised, and continues to exercise, its powers as an adversarial quasi-judicial body. Moreover, despite many complaints, the AU continues to adopt their decisions, granting them some legal weight. As with all international forums however, enforcement of decisions remains very difficult.

The process for bringing communications to the African Commission is as follows:

- First, a case is filed by the complainant (by letter);
- Second, the African Commission:
  - declares itself to be seized of the matter;
  - determines jurisdiction and admissibility; and
  - makes a decision on the merits of the case.

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<sup>356</sup> Nsongurua J. Ndombana, *An African Human Rights Court and An African Union Court; A Needful Duality or Needless Duplication*, Vol. 28 No. 3 Brooklyn Journal of International Law (2003), p. 818.

### *The African Charter on Human and Peoples' Rights*

The African Charter is the main human rights instrument in Africa, used both at the continental level (by the African Commission and the ACtHPR) and by the regional courts (especially the ECOWAS Community Court of Justice, but also to some extent by the EACJ). It entered into force on 21 October 1986 and aims to reflect the “historical tradition and values of African civilization.”<sup>357</sup> The treaty has a number of unique features including that it:

- recognises rights of peoples (group rights), such as rights of all peoples to self-determination and right of peoples to freely dispose of natural wealth;
- equally protects both civil and political rights, as well as economic, social and cultural rights;
- emphasises the duties of individuals towards the community and State; and
- gives people fleeing persecution the right to obtain asylum (and not just to seek it).

However, despite these unique features, there is very little practical difference between the content of the African Charter and international human rights law as enshrined in other international treaties.

For example, the majority of universally accepted civil and political rights are contained in the Charter:

- the right to freedom from discrimination (Articles 2 and 18(3));
- equality (Article 3);
- life and personal integrity (Article 4);
- freedom from slavery (Article 5);
- freedom from cruel, inhuman or degrading treatment or punishment (Article 5);
- rights to due process concerning arrest and detention (Article 6);
- the right to a fair trial (Articles 7 and 25);
- freedom of religion (Article 8);
- freedom of information and expression (Article 9);
- freedom of association (Article 10);
- freedom of assembly (Article 11);
- freedom of movement (Article 12);
- freedom of political participation (Article 13); and
- the right to property (Article 14).

Many of these rights will be directly relevant to the work that media organisations do across Africa. Violations of media rights often constitute interferences with a variety of these rights.

Other rights protected in the African Charter may also be relevant, at least to the extent that they relate to stories that media organisations may work on, including:

- the right to work (Article 15);
- the right to health (Article 16); and
- the right to education (Article 17).

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<sup>357</sup> African Charter, Preamble.

It is also important to remember that the African Commission has held that it can read new rights into the African Charter. For example, in *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria* the Commission interpreted the Charter to include:

- the right to housing; and
- the right to food.<sup>358</sup>

Such an approach may be needed in the future with regard to rights, such as data protection or privacy, which are not expressly protected in the African Charter.

It is crucial to remember that you are not bound by the four corners of the African Charter when you draft your cases – the African Charter expressly calls on the African Commission to apply international human rights law, stating that the Commission “shall draw inspiration from international law and peoples’ rights” (Article 60), and take into consideration “other general or special international conventions” (Article 61).

### *Seizure*

The first step in the process of taking a case to the African Commission is filing a complaint (called a communication) with the Commission. If the communication meets the formal requirements of:

- (i) identifying the parties; and
- (ii) alleging a violation of the Charter,

the African Commission will seize itself of the communication.

*Anyone* can bring a complaint, including:

- *non-governmental organisations*, whether registered in Africa or not. NGOs do not need to have observer status at the African Commission or with any AU body.
- *interested individuals acting on behalf of victims of abuses*. In such cases, the authors should usually have the consent of the victims. Although, when it is impossible to get consent, the African Commission may waive this requirement<sup>359</sup> (see *Article 19 v. Eritrea*, Communication 275/03).

Communications can also be brought:

- for the public good (*actio popularis*);
- as class or representative actions; or
- on behalf of another person.

Although seizure is primarily a formal step, it is important to ensure that you explain as early as possible how you meet the admissibility requirements. It is advisable therefore at this stage to set out your arguments on each of the requirements under Article 56 of the African Charter (see below).

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<sup>358</sup> African Commission, *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria*, Communication 155/96 (2001), par. 37.

<sup>359</sup> African Commission, *Article 19 v. Eritrea*, Communication 275/03 (2007).

### **Contents of a communication**

As a minimum you should ensure that your communication includes the following information (as required under Article 56 of the African Charter):

- The name, nationality and signature of the person or persons filing it, or in cases where the complainant is a non-governmental entity, the name and signature of its legal representative(s);
- Whether the complainant wishes that his or her identity be withheld from the State;
- The address for receiving correspondence from the Commission and, if available, a telephone number, a fax number, and an email address;
- An account of the act or situation complained of, specifying the place, date and nature of the alleged violations;
- The name of the victim, in a case where he or she is not the complainant;
- Any public authority that has taken cognisance of the fact or situation alleged;
- The name of the State(s) alleged to be responsible for the violation of the African Charter, even if no specific reference is made to the Article(s) alleged to have been violated;
- Compliance with the period prescribed in the African Charter for submission of the communication;
- An indication that the complaint has not been submitted to another international settlement procedure as provided in Article 56(7) of the African Charter; and
- Any steps taken to exhaust domestic remedies. If the applicant alleges the impossibility or unavailability of domestic remedies, the grounds in support of such allegation must be stated.

### *Admissibility*

Admissibility is governed by Article 56 of the African Charter, which sets out a cumulative test of seven requirements. Each of these must be met for a case to be admissible. However, the trickiest issues, and the ones on which most cases are declared inadmissible, are exhaustion of local remedies and the requirement that cases be brought within a reasonable time. It is therefore crucial that you give particular attention to these issues. It is important to remember that you only have an initial (*prima facie*) evidentiary burden at this stage:

“One is presumed to have presented a *prima facie* case or shown a *prima facie* violation of rights and freedoms under the Charter, when the facts presented in the Complaint show that a human rights violation has likely occurred. The Complaint should be one that compels the conclusion that a human rights violation has occurred if not contradicted or rebutted by the Respondent State.”<sup>360</sup>

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<sup>360</sup> African Commission, *Samuel T. Muzerengwa and 110 Others (represented by Zimbabwe Lawyers for Human Rights) v. Zimbabwe*, Communication 306/05 (2011), par. 56.

You should address the requirements under Article 56 of the African Charter in the same way that the African Commission does by ticking off each element one by one:

*(1) Identity of the author*

Article 56(1) of the African Charter requires that, “communications should indicate their authors, even if the latter requests anonymity.” Thus make sure that your communication includes your name and address and, if you are not the victim yourself, your relationship with the victim (including on what grounds you represent the victim).

The reasons for the requirement under Article 56(1) are to ensure that the Commission:

- has adequate information and specificity concerning the victims;<sup>361</sup>
- is in continuing communication with the author;<sup>362</sup>
- knows the author’s identity and status;<sup>363</sup>
- can be assured of their continued interest in the communication;<sup>364</sup> and
- can request supplementary information if the case requires it.<sup>365</sup>

*(2) Compatibility*

Article 56(2) requires that the communication be compatible with either the African Charter or the Constitutive Act of the OAU (now the Constitutive Act of the AU).<sup>366</sup> This requires sufficient *prima facie* evidence that the complaint relates to a violation of the African Charter. Put another way, all that is required is preliminary proof that a violation occurred and it is not even necessary to set out what article of the Charter has been violated.<sup>367</sup>;

In *Kevin Mgwanga Gunme et al v. Cameroon*, the Commission held that this condition requires that the Communication should:

- be brought against a State party to the Charter;
- allege *prima facie* violations of rights protected by the African Charter; and
- be brought in respect of violations that occurred after the State’s ratification of the African Charter (or have continued after such ratification).<sup>368</sup>

*(3) Disparaging language*

Article 56(3) requires that “communications are not written in disparaging or insulting language directed against the State concerned and its institutions or to the

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<sup>361</sup> African Commission, *Luke Munyandu Tembani and Benjamin John Freeth (represented by Norman Tjombe) v. Angola and Thirteen Others*, Communication 409/12 (2014), par. 87.

<sup>362</sup> *Id.*

<sup>363</sup> *Id.*

<sup>364</sup> *Id.*

<sup>365</sup> *Id.*

<sup>366</sup> African Charter, Article 56(2).

<sup>367</sup> See for example African Commission, *Mouvement des refugies Mauritiens au Senegal v. Senegal*, Communication 162/97 (1997); and African Commission, *Southern Africa Human Rights NGO Network and Others v. Tanzania*, Communication 333/06 (20b).

<sup>368</sup> African Commission, *Kevin Mgwanga Gunme et al v. Cameroon*, Communication 266/03, par.71.

African Union”.<sup>369</sup> The phrases have been explained in case law of the African Commission. In *Ilesanmi v. Nigeria* the African Commission held that:

“disparaging means ‘to speak slightly of ... or to belittle’ and insulting means ‘to abuse scornfully or to offend the self-respect or modesty of ...’ The language must be aimed at undermining the integrity and status of the institution and to bring it into disrepute.”<sup>370</sup>

The factors to consider will include:

- whether the language is aimed at unlawfully and intentionally violating the dignity, reputation or integrity of a judicial officer or body;<sup>371</sup>
- whether it is used in a manner calculated to pollute the minds of the public or any reasonable man to cast aspersions on and weaken public confidence in the administration of justice;<sup>372</sup>
- whether the language is aimed at undermining the integrity and status of the institution and bring it into disrepute.<sup>373</sup>

**See the following cases for an analysis of disparaging language:**

*Ilesanmi v. Nigeria*<sup>374</sup>

*Ligue Camerounaise des Droits de l'Homme v. Cameroon Communication*<sup>375</sup>

*Zimbabwe Lawyers for Human Rights and Associated Newspapers of Zimbabwe v. Zimbabwe*<sup>376</sup>

However, later cases have emphasised that the African Commission should not use this sub-article to violate the right to freedom of expression:

“Article 56(3) must be interpreted bearing in mind Article 9(2) of the African Charter which provides that ‘every individual shall have the right to express and disseminate his opinions within the law’. A balance must be struck between the right to speak freely and the duty to protect state institutions to ensure that while discouraging abusive language, the African Commission is not at the same time violating or inhibiting the enjoyment of other rights guaranteed in the African Charter, such as in this case, the right to freedom of expression.”<sup>377</sup>

One occasion when Article 56(3) was applied to hold a case inadmissible was *Ligue Camerounaise des Droits de l'Homme v. Cameroon*, where the African Commission condemned the use of words such as “Paul Biya must respond to crimes against humanity”; “30 years of the criminal neo-colonial regime incarnated by the duo

<sup>369</sup> African Charter, Article 56(6).

<sup>370</sup> African Commission, *Ilesanmi v. Nigeria*, Communication 268/03 (2005), par. 39.

<sup>371</sup> African Commission, *Eyob B. Asemie v. the Kingdom of Lesotho*, Communication 435/12 (2015), par. 56.

<sup>372</sup> *Id.*

<sup>373</sup> *Id.*

<sup>374</sup> African Commission, *Ilesanmi v. Nigeria*, Communication 268/03 (2005).

<sup>375</sup> African Commission, *Ligue Camerounaise des Droits de l'Homme v. Cameroon*, Communication 65/92 (1997).

<sup>376</sup> African Commission, *Zimbabwe Lawyers for Human Rights and Associated Newspapers of Zimbabwe v. Zimbabwe*, Communication 284/03 (2009).

<sup>377</sup> *Id.*, par. 91.

Ahidjio/Biya;” “regime of torturers”; and “government barbarisms”, as insulting language.<sup>378</sup>

While it is debatable whether the balance was properly struck in the case, it is informative of the language to avoid in drafting your communications with the African Commission. A good rule of thumb is that allegations of violations and failings are acceptable, but personal attacks or insults toward the alleged perpetrators of the violations are not.

#### *(4) Mass media*

Article 56(4) requires that “the communication should not be based exclusively on news disseminated through the mass media.”<sup>379</sup> The African Commission noted in *Dawda K Jawara v. the Gambia* that the section seeks to exclude cases that are based “exclusively” on news disseminated through the mass media, without more information.<sup>380</sup> This means that there must be some corroborating evidence, although the African Commission has made it clear that the amount of corroborating evidence required is not high.<sup>381</sup>

#### *(5) Local remedies*

Article 56(5) requires that “communications be sent to the Commission only after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged.”<sup>382</sup> Before bringing a dispute to the African Commission, the complainant must have utilized all the legal or judicial avenues or forums available domestically to resolve the matter. “Local remedies” are any judicial/ legal mechanisms put in place at the domestic level to ensure the effective settlement of disputes.

From a practical perspective, it is crucial to submit all the information on all the steps taken to exhaust local remedies. Be careful to argue the human rights issues at the domestic level as the African Commission may not accept that local remedies have been exhausted unless you make the same human rights arguments at the domestic level that you intend to make before the African Commission.

This generally means that the case must have been brought to the highest appellate court for a decision (in different systems this may be the Supreme Court or the Court of Cassation). It usually does not matter that the complainant knew that the case would be unsuccessful – a case must still be appealed through the system.

A communication is inadmissible if the case has not been brought to the domestic forums, if it is pending before the national courts, or if the complainant fails to show that they have made an effort to appeal. It is an established principle in international law that a State should be given the opportunity to redress an alleged wrong within the framework of its own domestic legal system before it is dealt with at the international level.<sup>383</sup> This requirement safeguards the role of domestic courts to

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<sup>378</sup> African Commission, *Ligue Camerounaise des Droits de l’Homme v. Cameroon*, Communication 65/92 (1997), par. 13.

<sup>379</sup> African Charter, Article 56(4).

<sup>380</sup> African Commission, *Sir Dawda K. Jawara v. the Gambia*, Communication 147/95-149/96 (2000), par. 24.

<sup>381</sup> *Id.*, par. 26 and 27.

<sup>382</sup> African Charter, Article 56(5).

<sup>383</sup> African Commission, *Luke Munyandu Tembani and Benjamin John Freeth (represented by Norman Tjombe) v. Angola and Thirteen Others*, Communication 409/12 (2014), par. 96.

decide the matter before it is brought to any international adjudicative body. However:

“the local remedies rule is not rigid. It does not apply if: local remedies are inexistent; local remedies are unduly and unreasonably prolonged; recourse to local remedies is made impossible; from the face of the complaint there is no justice or there are no local remedies to exhaust, for example, where the judiciary is under the control of the executive organ responsible for the illegal act; and the wrong is due to an executive act of the government as such, which is clearly not subject to the jurisdiction of the municipal courts.”<sup>384</sup>

The ‘remedies’ referred to in Article 56(5) include all judicial remedies that are easily accessible to obtain justice:

“The fact remains that the generally accepted meaning of local remedies, which must be exhausted prior to any communication/complaint procedure before the African Commission, are ordinary remedies of common law that exist in jurisdictions and normally accessible to people seeking justice.”<sup>385</sup>

*Any local remedies must be “available, effective and sufficient”*

The onus is on the respondent State to demonstrate that there exist local remedies that are available, effective and sufficient. If it meets that burden, the onus is on the complainant to show why in that particular case they were not required to exhaust that remedy.

- A remedy is “available” if the petitioner can pursue it without impediment;<sup>386</sup>
- A remedy is “effective” if it offers a reasonable prospect of success;<sup>387</sup> and
- A remedy is “sufficient” if it is capable of redressing the complaint.<sup>388</sup>

*Available?*

The requirement that a remedy be “available” is closely related to the purpose behind the requirement to exhaust domestic remedies:

“One purpose of the exhaustion of local remedies requirement is to give the domestic courts an opportunity to decide upon cases before they are brought to an international forum, thus avoiding contradictory judgements of law at the national and international levels. Where a right is not well provided for in domestic law such that no case is likely to be heard, potential conflict does not arise”.<sup>389</sup>

Although this requirement appears to grant the most leeway to complainants, it has generally been applied in cases where the jurisdiction of the courts has expressly been ousted by the State (such as by military decrees in the *SERAC and CESR v.*

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<sup>384</sup> *Id.*, par. 99.

<sup>385</sup> African Commission, *Southern Africa Human Rights NGO Network and Others v. Tanzania*, Communication 333/06(20b), par. 64.

<sup>386</sup> African Commission, *Majuru v. Zimbabwe*, Communication 308/05 (2008), par. 79; African Commission, *Sir Dawda K. Jawara v. the Gambia*, Communication 147/95-149/96 (2000), par. 32.

<sup>387</sup> *Id.*

<sup>388</sup> *Id.*

<sup>389</sup> African Commission, *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria*, Communication 155/96 (2001), par. 37.



Nigeria).<sup>390</sup> It will be interesting to see how this requirement will be developed by the ACtHR.

### *Effective?*

It appears that in situations where the rule of law is exceedingly weak and court decisions are not implemented, or the court system is corrupt, such remedies would not be effective. Even though the African Commission has expressed this principle, in practice it has been more difficult to prove that remedies are not effective:

“It is not enough for a Complainant to simply conclude that because the State failed to comply with a court decision in one instance, it will fail to comply in their own case. Each case must be treated on its own merits. Generally, this Commission requires Complainants to set out in their submissions the steps taken to exhaust domestic remedies. They must provide some *prima facie* evidence of an attempt to exhaust local remedies.”<sup>391</sup>

Therefore, local remedies should be *actually attempted*; a complainant cannot rely on past or other experiences for not attempting. The African Commission has held that:

“it is incumbent on the Complainant to take all necessary steps to exhaust, or at least attempt the exhaustion of local remedies. It is not enough for the Complainant to cast aspersions on the ability of the domestic remedies of the State due to isolated incidences.”<sup>392</sup>

One case where the African Commission did hold that local remedies would be ineffective is *Andrew Meldrum v. Zimbabwe*,<sup>393</sup> where the complainant was deported despite a High Court order in his favour preventing the deportation. The African Commission held that following the government’s failure to implement such a decision of the court, the complainant could not be expected to exhaust any further judicial remedy as this would clearly be ineffective as the government would continue to disregard the court orders.<sup>394</sup>

### *Sufficient?*

The remedies that the domestic law offers must be sufficient to remedy the harm caused. This issue may arise in cases where the domestic law provides some, usually administrative, remedies. One example may be where the harm complained of is the State’s failure to investigate and prosecute violent crimes; the existence of the right to launch private prosecutions cannot be a sufficient domestic remedy requiring exhaustion.<sup>395</sup>

An interesting debate that has not yet been settled by the African Commission is whether local civil remedies will be sufficient in certain cases. The ECtHR has stated that in some cases civil remedies are not sufficient.<sup>396</sup> This argument was expressly

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<sup>390</sup> *Id.*

<sup>391</sup> African Commission, *Chinhamo v. Zimbabwe*, Communication 307/05 (2007), par. 84.

<sup>392</sup> African Commission, *Article 19 v. Eritrea*, Communication 275/03 (2007), par. 67.

<sup>393</sup> African Commission, *Zimbabwe NGO Forum v. Zimbabwe*, Communication 245/02 (2006).

<sup>394</sup> African Commission, *Andrew Meldrum v. Zimbabwe*, Communication 294/04 (2009), par. 55.

<sup>395</sup> African Commission, *Zimbabwe NGO Forum v. Zimbabwe*, Communication 245/02 (2006), par. 71.

<sup>396</sup> *E.g.* European Court of Human Rights, *Assenov and Others v. Bulgaria*, Application No. 24760/94 (1998), par. 84.

made in *Egyptian Initiative for Personal Rights and INTERIGHTS v. Egypt* (which involved sexual violence and physical assaults) and the African Commission held the case admissible albeit without expressly taking a position on the effectiveness and sufficiency of civil remedies in such cases.<sup>397</sup>

### *Exceptions to the rule of exhaustion of domestic remedies*

The primary strategy for taking cases to the African Commission should be to ensure that all domestic remedies are exhausted – however there are certain circumstances where it is not necessary to exhaust domestic remedies.

#### **Exceptions to the rule of exhaustion of domestic remedies include those situations where:**

- local remedies are non-existent;<sup>398</sup>
- local remedies are unduly and unreasonably prolonged;<sup>399</sup>
- recourse to local remedies is made impossible;<sup>400</sup>
- it is impractical or undesirable for the complainant to seize the domestic courts in the case of each violation;<sup>401</sup> or
- from the face of the complaint there is “no justice” or there are no local remedies to exhaust.<sup>402</sup>

The main exceptions to the exhaustion requirement are as follows:

#### *a) Unduly prolonged*

One of the primary exceptions to the rule on exhaustion of local remedies is where local remedies are unduly prolonged. The basic principle is that if the domestic legal system is so inefficient that it takes too long to receive a remedy from the local courts a case may be brought to the African Commission without first exhausting remedies at the local level.

The length of a delay in the exhaustion of local remedies that will allow you to take a case to the African Commission will depend on:

- the facts of the case;
- the nature of the domestic legal system; and
- the length of time it takes for comparative cases to be finalised.

In one case relating to elections, the African Commission noted that, “[m]ore than four years after the election petitions were submitted, the Respondent State’s courts have failed to dispose of them and the positions which the victims are contesting are

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<sup>397</sup> African Commission, *Egyptian Initiative for Personal Rights and INTERIGHTS v. Egypt*, Communication 323/06 (2011), par. 50.

<sup>398</sup> African Commission, *Luke Munyandu Tembani and Benjamin John Freeth (represented by Norman Tjombe) v. Angola and Thirteen Others*, Communication 409/12 (2014), par. 99.

<sup>399</sup> *Id.*

<sup>400</sup> *Id.*

<sup>401</sup> *Id.*, par. 100.

<sup>402</sup> *Id.*, par. 99.

occupied and the term of office has almost come to an end.”<sup>403</sup>

What constitutes unduly prolonged procedure under Article 56(5) has not been defined by the African Commission. There are therefore no standard criteria used by the African Commission to determine if a process has been unduly prolonged, and the African Commission has thus tended to treat each communication on its own merits. In some cases, the African Commission takes into account the political situation of the country, in other cases, the judicial history of the country or the nature of the complaint.

*b) Where the victim has fled his country*

Where a victim has been unable to utilize local remedies out of fear for his safety, the African Commission has stated:

“The existence of a remedy must be sufficiently certain, not only in theory but also in practice, failing which, it will lack the requisite accessibility and effectiveness. Therefore, if the applicant cannot turn to the judiciary of his country because of generalised fear for his life (or even those of his relatives), local remedies would be considered to be unavailable to him.”<sup>404</sup>

However, the burden of proof that it is impossible to exhaust domestic remedies because the complainant has fled the country has been held to be quite strict, as stated in the case *Chinhamo v. Zimbabwe*:

“This Commission holds the view that having failed to establish that he left the country involuntarily due to the acts of the Respondent State, and in view of the fact that under Zimbabwe law, one need not be physically in the country to access local remedies; the Complainant cannot claim that local remedies are not available to him.”<sup>405</sup>

This exception will therefore only apply in limited circumstances where the victim can demonstrate a fear of returning to his country and has done everything in his power to exhaust domestic remedies despite fleeing his country.

*c) Situations of serious or massive violations*

To use this exception, the complainant must demonstrate the nature and scope of the violation and must show, for example, that there are so many victims and the violations are so serious that it is impractical to try to bring the case before local courts.<sup>406</sup>

*(6) Reasonable time*

Article 56(6) of the African Charter<sup>407</sup> states that “communications received by the Commission will be considered if they are submitted within a reasonable period from

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<sup>403</sup> African Commission, *Zimbabwe Lawyers for Human Rights and the Institute for Human Rights and Development in Africa v. Zimbabwe*, Communication 293/04 (2006), par. 61.

<sup>404</sup> African Commission, *Sir Dawda K. Jawara v. the Gambia*, Communication 147/95-149/96 (2000), par. 35.

<sup>405</sup> African Commission, *Majuru v. Zimbabwe*, Communication 308/05 (2008), par. 100; African Commission, *Chinhamo v. Zimbabwe*, Communication 307/05 (2007), par. 84.

<sup>406</sup> African Commission, *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Inter africaine des Droits de l'Homme, Les Témoins de Jehovah v. DRC*, Communication 25/89-47/90-56/91-100/93 (1995), par. 37.

<sup>407</sup> African Charter, Article 56(6).

the time local remedies are exhausted”.<sup>408</sup> This requirement has been difficult to apply since there is no clear interpretation of a “reasonable period” in the African Charter. In early cases communications were held admissible even when they were filed up to 12<sup>409</sup> or even 15 years<sup>410</sup> after the violation or after local remedies were exhausted.

However, it is now advisable to submit cases as soon as possible; at least within ten months and preferably within six months of the exhaustion of domestic remedies. The African Commission treats every case on its own merit depending **on the reasons given for delay**.

- Although the African Commission has not expressed this, you should generally work with a six-month rule – try to get your case to the Commission within six months of the exhaustion of domestic remedies.
- If you fail to do so you need to give compelling factual and contextual reasons why you failed to do so:

“Where there is a good and compelling reason why a Complainant does not submit his Complaint to the Commission for consideration, the Commission has a responsibility, for the sake of fairness and justice, to give such a Complainant an opportunity to be heard.”<sup>411</sup>

In the absence of a standard defining “unreasonable” delay, the African Commission decides cases based on the facts and context of each case. In practice this has meant an almost unfettered discretion by the African Commission.

#### **Case law relating to “reasonable period” and “unreasonable delay”**

It is very difficult to identify the uniting principle in these cases, but the basic principle is to file within as short a period as possible and to provide compelling explanations for any delay beyond six months:

- *Michael Majuru v. Zimbabwe*: the communication was submitted to the African Commission 22 months after the complainant fled Zimbabwe. He argued that the delay was caused both by his need for psychotherapy and by his lack of funds. However, the African Commission was not convinced by his explanation, holding that 22 months was “clearly beyond a reasonable man’s understanding of reasonable period of time.”<sup>412</sup>
- *Darfur Relief and Documentation Centre v. Republic of Sudan*: the African Commission held that a period of 29 months between the time when the High Court dismissed the matter and when the communication was submitted to the African Commission was unreasonable.<sup>413</sup>

<sup>408</sup> It is also important to remember that throughout the proceedings communications must be submitted within a reasonable time. See *Id.*

<sup>409</sup> African Commission, *Embga Mekongo Louis v. Cameroon*, Communication 59/91 (1995).

<sup>410</sup> African Commission, *John Modise v. Botswana*, Communication 97/93 (2000).

<sup>411</sup> African Commission, *Southern Africa Human Rights NGO Network and Others v. Tanzania*, Communication 333/06(20b), par. 71; African Commission, *Darfur Relief and Documentation Centre v. Sudan*, Communication 310/05 (2009), par. 79.

<sup>412</sup> African Commission, *Majuru v. Zimbabwe*, Communication 308/05 (2008), par. 110.

<sup>413</sup> African Commission, *Darfur Relief and Documentation Centre v. Sudan*, Communication 310/05 (2009), par. 80.

- *Obert Chinhamo v. Zimbabwe*: the communication was submitted to the African Commission ten months after the complainant allegedly fled from his country. Due to the circumstances in this case, the Commission decided that the communication complied with Article 56(6) of the Charter stating that; “[t]he Complainant is not residing in the Respondent State and needed time to settle in the new destination, before bringing his Complaint to the Commission. Even if the Commission were to adopt the practice of other regional bodies to consider six months as the reasonable period to submit complaints, given the circumstance in which the Complainant finds himself, that is, in another country, it would be prudent, for the sake of fairness and justice, to consider a ten months period as reasonable.”<sup>414</sup>
- *Luke Munyandu Tembani and Benjamin John Freeth (represented by Norman Tjombe) v. Angola and Thirteen Others*: the African Commission clarified that a reasonable time runs either from the date of exhaustion of domestic remedies or, in cases where exhaustion is either unnecessary or impossible, from the date of the violation of the African Charter.<sup>415</sup>

#### (7) *Ne bis in idem*

Article 56(7) states that “[t]he Commission does not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the OAU or the provisions of the present Charter.”<sup>416</sup> This means that communications that have been finalised by some other international mechanism(s) similar to the African Commission are inadmissible.<sup>417</sup> The African Commission will, however, consider communications that have been discussed by non-judicial or adjudicatory international bodies.<sup>418</sup>

The African Commission has held that:

- Article 56(7) codifies the *non bis in idem* rule which ensures that no State may be sued or condemned more than once for the same alleged human rights violations, and seeks to uphold and recognize the *res judicata* status-of decisions issued by international and regional tribunals and/or bodies.
- The matter in contention, which must relate to the same facts and parties, must have been “settled” – *i.e.* it must no longer be under consideration in an international dispute-settlement procedure. Here there is conflicting opinion from a 1988 case where the African Commission held that even cases pending before other international dispute settlement mechanisms were barred.<sup>419</sup>

<sup>414</sup> African Commission, *Chinhamo v. Zimbabwe*, Communication 307/05 (2007), par. 89.

<sup>415</sup> African Commission, *Luke Munyandu Tembani and Benjamin John Freeth (represented by Norman Tjombe) v. Angola and Thirteen Others*, Communication 409/12 (2014), par. 109.

<sup>416</sup> African Charter, Article 56 (7).

<sup>417</sup> *E.g.* African Commission, *Amnesty International v. Tunisia* Communication, Communication 69/92 (1993).

<sup>418</sup> African Commission, *Bakweri Land Claims Committee v. Cameroon*, Communication 260/02 (2004), par. 53

<sup>419</sup> African Commission, *Mpaka Nsusu Andre Alphonse v. DRC* Communication, Communication 15/88 (1988), par. 2-3.

- The decision must have been by “an international adjudication mechanism, with a human rights mandate” and not a political entity.<sup>420</sup>

#### *Review of admissibility decision*

Rule 107(4) of the African Commission Rules of Procedure states that “[i]f the Commission has declared a Communication inadmissible this decision may be reviewed at a later date, upon the submission of new evidence, contained in a written request to the Commission by the author.”

While it is very rare for the African Commission to change its mind, even where it has clearly made a glaring mistake in the law or the facts where there is new information that relates to an admissibility question you may try to persuade the Commission to set its decision aside.

#### *Advisory Opinions*

One way of getting the African Commission to consider a legal issue is to request an Advisory Opinion under Article 45(3) of the African Charter. However, this is not a popular process as it does not provide redress through remedies against individual States.

The African Commission has only issued one Advisory Opinion, which was on the United Nations Declarations on the Rights of Indigenous Peoples. While a request for such an advisory opinion needs to be brought by an African organisation recognised by the AU, in practice this means that any African registered NGO with observer status may ask the African Commission for an advisory opinion. However, it is crucial to remember that this cannot be a contentious case presented as a request for an advisory opinion. It should therefore be an honest request for the African Commission to interpret the African Charter. One way of presenting this would be situations where there is a widespread human rights violation across a number of countries and the question is drafted to ask the African Commission what obligations State parties have to ensure enjoyment of human rights in such situations. Widespread harmful traditional practices may be a practical example of situations where the African Commission may give an advisory opinion that has direct bearing on the enjoyment of human rights.

#### *Merits*

Once a communication is declared admissible, the African Commission proceeds to consider substantive issues of the case. The complainant should respond with arguments on the merits within 60 days.<sup>421</sup> The respondent State party has a right of reply for three months after receiving the complainant’s arguments on the merits.<sup>422</sup> The complainant then has 30 days to respond to the State’s arguments.<sup>423</sup>

It is not unusual for States to ignore communications and refuse to cooperate with the African Commission. In such a case, the African Commission should rely on the facts at its disposal to reach a final decision and may “resort to any appropriate method of investigation” to verify the facts.<sup>424</sup> However, the African Commission is

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<sup>420</sup> African Commission, *Luke Munyandu Tembani and Benjamin John Freeth (represented by Norman Tjombe) v. Angola and Thirteen Others*, Communication 409/12 (2014), par. 112.

<sup>421</sup> African Commission Rules of Procedure, Rule 108.

<sup>422</sup> *Id.*

<sup>423</sup> *Id.*

<sup>424</sup> African Charter, Article 46.

not keen on making decisions by default and will usually fall over backwards to allow the State an opportunity to respond to claims. Even if they do not, you will still be expected to prove your claims on a balance of probabilities, so it is still important to file submissions and argue your case.

As stated above, under Article 46 of the African Charter, the African Commission can use any appropriate method of investigation in addition to the evidence placed before it by the parties, such as a fact-finding mission.<sup>425</sup> However, in practice, the African Commission will rely on documents filed on record and in exceptional circumstances on witness evidence brought before the African Commission.

A number of issues can affect the time taken to reach a decision, including the complexity of the case and the diligence of the complainant. Even though it takes an average of 18 months for a communication to be considered, this varies extensively between communications.

The African Commission was primarily established to enforce the African Charter and therefore the primary source of law will be the African Charter. However, as mentioned above, the African Charter itself incorporates all international human rights standards. This means that when arguing cases you can cite from international treaties, customary international law, declarations, general comments, and comparative law and jurisprudence.

The African Commission has made a number of important decisions relating to the freedom of expression and has confirmed the importance of free speech and the media in a democracy:<sup>426</sup>

“Freedom of expression is a basic human right, vital to an individual's personal development and political consciousness, and to his participation in the conduct of public affairs in his country. Individuals cannot participate fully and fairly in the functioning of societies if they must live in fear of being persecuted by state authorities for exercising their right to freedom of expression. The state must be required to uphold, protect and guarantee this right if it wants to engage in an honest and sincere commitment to democracy and good governance.”<sup>427</sup>

In one case, the African Commission had to deal with the situation where a member State forcibly closed a newspaper for refusing to register with a government controlled oversight body and the African Commission noted that:

“The action of the State to stop the Complainants from publishing their newspapers, close their business premises and seize all their equipment cannot be supported by any genuine reasons. In a civilised and democratic society, respect for the rule of law is an obligation not only for the citizens but for the State and its agents as well. If the State considered the Complainants to be operating illegally, the logical and legal approach would have been to seek a court order to stop them. The State did not do that but decided to use force and in the process infringed on the rights of the Complainants.”<sup>428</sup>

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<sup>425</sup> *Id.*

<sup>426</sup> *E.g.* African Commission, *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v. Nigeria*, Communications 140/94, 141/94 and 145/95 (1999).

<sup>427</sup> African Commission, *Zimbabwe Lawyers for Human Rights and Associated Newspapers of Zimbabwe v. Zimbabwe*, Communication 284/03 (2009), par. 92.

<sup>428</sup> *Id.*, par. 178.

The African Commission will apply both binding international standards on freedom of expression and media rights, as well as soft law guarantees such as its own principles and guidelines.

The African Commission has an extensive jurisprudence on the full range of human rights and if your case proceeds to the merits stage you are likely to receive a well-reasoned decision. There are leading cases on the obligation to prevent torture and the requirements that military tribunals comply with fair trial standards,<sup>429</sup> the rights of human rights activists,<sup>430</sup> and the rights of indigenous peoples.<sup>431</sup>

Almost half the cases determined by the African Commission on the merits have involved the right to fair trial (Article 7 of the African Charter).<sup>432</sup> The African Commission has progressive and emphatic jurisprudence on the right to a fair trial and these standards should be useful in your media cases (both at the regional level but also as persuasive jurisprudence at the domestic level). For example, in *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v. Nigeria* the African Commission held that the banning of newspapers while they were suing the government for illegal attacks on their premises constituted a violation of the right to a fair trial.<sup>433</sup> The African Commission has recognised the following rights as falling within the right to a fair trial:

- the right of recourse to courts;<sup>434</sup>
- the right to information upon arrest and the presumption of innocence;<sup>435</sup>
- the right to defence and to counsel;<sup>436</sup>
- the right to be tried within a reasonable time;<sup>437</sup>
- the right to a public trial;<sup>438</sup>
- the right to equal treatment;<sup>439</sup>

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<sup>429</sup> African Commission, *Egyptian Initiative for Personal Rights and INTERIGHTS v. Egypt*, Communication 323/06 (2011).

<sup>430</sup> African Commission, *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v. Sudan*, Communication 379/09 (2014).

<sup>431</sup> African Commission, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, Communication 276 / 03 (2009).

<sup>432</sup> Nsongurua J. Udombana, *The African Commission on Human and Peoples' Rights and the development of fair trial norms in Africa* (2006), Vol. 2 African Human Rights Law Journal, p. 298-332.

<sup>433</sup> African Commission, *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v. Nigeria*, Communications 140/94, 141/94 and 145/95 (1999), par. 43.

<sup>434</sup> African Commission, *Fair Trial Guidelines*, Principle C; African Commission, *Lawyers for Human Rights v. Swaziland*, Communication 251/02 (2005), par. 53.

<sup>435</sup> African Commission, *Fair Trial Guidelines*, principle M 2, principle N 6 (e); African Commission, *Amnesty International, Comité Loosli Bachelard, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v. Sudan*, Communications 48/90, 50/91, 52/91 and 89/93 (1999), par. 61.

<sup>436</sup> African Commission, *Avocats Sans Frontières (on behalf of Gaëtan Bwampamye) v. Burundi*, Communication 231/99 (2000), par. 30; African Commission, *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v. Nigeria*, Communications 140/94, 141/94 and 145/95 (1999), par. 29; African Commission, *Courson v. Equatorial Guinea*, Communication 144/95 (2000), par. 22.

<sup>437</sup> African Commission, *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v. Nigeria*, Communication 218/98 (2001), par. 43.

<sup>438</sup> African Commission, *Media Rights Agenda and Others v. Nigeria*, Communication 224/98 (2000), par. 51; African Commission, *Fair Trial Guidelines*, Principle A 3.

<sup>439</sup> African Commission, *Avocats Sans Frontières (on behalf of Gaëtan Bwampamye) v. Burundi*, Communication 231/99 (2000), par. 29.



- the right to appeal;<sup>440</sup>
- the right to legal assistance;<sup>441</sup>
- prohibition of *ex post facto* law;<sup>442</sup> and
- the independence of the judiciary.<sup>443</sup>

#### **Leading cases on fair trial include:**

- *Amnesty International, Comité Loosli Bachelard, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v. Sudan* (concerning the arbitrary arrests and detentions that took place following the coup of 30 July 1989 in Sudan. It was alleged that hundreds of prisoners were detained without trial or charge).<sup>444</sup>
- *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v. Nigeria* (concerning death penalties imposed by a Special Military Tribunal for an alleged coup plot to overthrow the Nigerian Military Government under General Sani Abacha).<sup>445</sup>
- *Courson v. Equatorial Guinea* (concerning a conviction for an attempt to overthrow the government of Equatorial Guinea and high treason. The defendant was denied the right to consult with defence counsel and not permitted to examine the evidence against him).<sup>446</sup>
- *Jawara v. The Gambia* (concerning the aftermath of the military coup of July 1994 in Gambia. The violations alleged included – arbitrary detention, and a violation of the prohibition on retroactivity).<sup>447</sup>
- *Media Rights Agenda & Others v. Nigeria* (concerning public hearing).<sup>448</sup>
- *Lawyers for Human Rights v. Swaziland* (concerning the decision to repeal the democratic Constitution of Swaziland, enacted in 1968, which was held to have breached Articles 1, 7, 10, 11, 13 and 26 of the African Charter).<sup>449</sup>

#### *Types of evidence accepted and burden of proof*

During African Commission sessions, the parties can make written or oral presentations. Whilst Rule 88 of the African Commission's Rules of Procedure allows

<sup>440</sup> African Commission, *Kenneth Good v. Republic of Botswana*, Communication 313/05, par. 176.

<sup>441</sup> African Commission, *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v. Nigeria*, Communication 218/98 (2001), par. 30.

<sup>442</sup> African Commission, *Sir Dawda K. Jawara v. the Gambia*, Communication 147/95-149/96 (2000), par. 62.

<sup>443</sup> African Commission, *Fair Trial Guidelines*, principle M 2, principle N 6 (e); African Commission, *Amnesty International, Comité Loosli Bachelard, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v. Sudan*, Communications 48/90, 50/91, 52/91 and 89/93 (1999), par. 69.

<sup>444</sup> *Id.*, 100.

<sup>445</sup> African Commission, *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v. Nigeria*, Communication 218/98 (2001).

<sup>446</sup> African Commission, *Courson v. Equatorial Guinea*, Communication 144/95 (2000).

<sup>447</sup> African Commission, *Sir Dawda K. Jawara v. the Gambia*, Communication 147/95-149/96 (2000).

<sup>448</sup> African Commission, *Media Rights Agenda and Others v. Nigeria*, Communication 224/98 (2000).

<sup>449</sup> African Commission, *Samuel T. Muzerengwa and 110 Others (represented by Zimbabwe Lawyers for Human Rights) v. Zimbabwe*, Communication 306/05 (2011).

for oral hearings, the African Commission prefers deciding cases on the papers. It is only recommended to insist on an oral hearing if you have exceptional circumstances to argue or an argument to make that is new to the African Commission.

If you do get an oral hearing, some States send representatives to contest allegations, whilst some do not. However, be ready to be grilled by individual Commissioners and prepare your evidence for the hearing on the basis that you will be arguing against a well-represented State.

Always ensure that the submission on the merits makes precise allegations of fact – at this point it is important to substantiate the allegations made in the original complaint. Documents can (and should) be included to support these facts (*e.g.* affidavits, court judgments, expert opinions, medical statements, and flight records).

At this point the onus of proof lies on the complainant to prove the case on a balance of probabilities (this is implicit in the decision of the African Commission in *Al Asad v. Djibouti*).<sup>450</sup> Where the State fails to contest an allegation of fact, the African Commission will take this as proven.<sup>451</sup>

However, as the case will likely have been determined by the domestic courts it is important to remember that the African Commission does not see itself as an arbiter of fact. It believes that this role is primarily played by the domestic courts. This does not mean that you cannot reopen factual matters, merely that to do so will be very difficult unless you can demonstrate bias or bad faith on the part of the local courts:

“[I]t is for the courts of State Parties and not for the [African] Commission to evaluate the facts in a particular case and unless it is shown that the courts’ evaluation of the facts were manifestly arbitrary or amounted to a denial of justice, the [African] Commission cannot substitute the decision of the courts with that of its own.”<sup>452</sup>

*Remedies: What remedies has the African Commission granted? What should you prioritise?*

The African Commission’s final decisions are called recommendations and they remain confidential until they are adopted by the Assembly of Heads of State of the AU at its annual meeting (Article 59 of the African Charter). The African Commission has been consistent in its approach to remedies recommending compensation, the repeal of decrees or legislation, the return of deportees, grants of citizenship, and reform of electoral laws. The African Commission will not grant remedies that have not been asked for, so it is crucial to ask for the most appropriate remedy.

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<sup>450</sup> African Commission, *Al Asad v. Djibouti*, Communication 383/10 (2014), par. 141.

<sup>451</sup> See African Commission, *Constitutional Rights Project v. Nigeria*, Communication 148/96 (1999), par. 14; African Commission, *Embaga Mekongo Louis v. Cameroon*, Communication 59/91 (1995); African Commission, *Constitutional Rights Project (in respect of Akamu & Others) v. Nigeria*, Communication 60/91 (2000); African Commission, *Achuthan & Another (on behalf of Banda & Others) v. Malawi*, Communications 64/92, 68/92 and 78/92 (2000); African Commission, *Constitutional Rights Project (in respect of Lekwot & Others) v. Nigeria*, Communication 87/93 (2000); African Commission, *Civil Liberties Organisation (in respect of Bar Association) v. Nigeria*, Communication 87/93 (2000).

<sup>452</sup> African Commission, *Interights et al. (on behalf of Mariette Sonjaleen Bosch) v. Botswana*, Communication 240/01 (2003), par. 29.

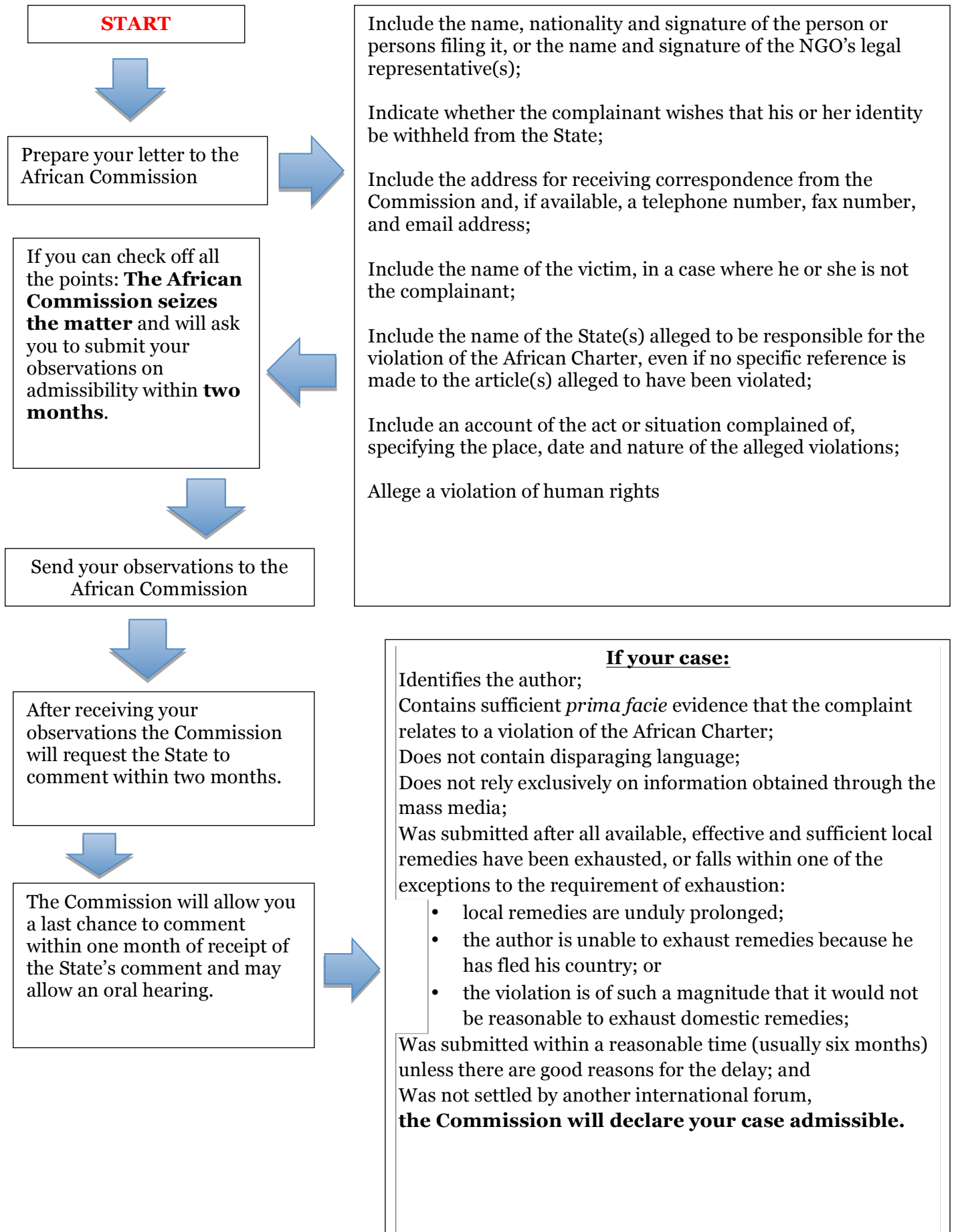
### *Enforcement*

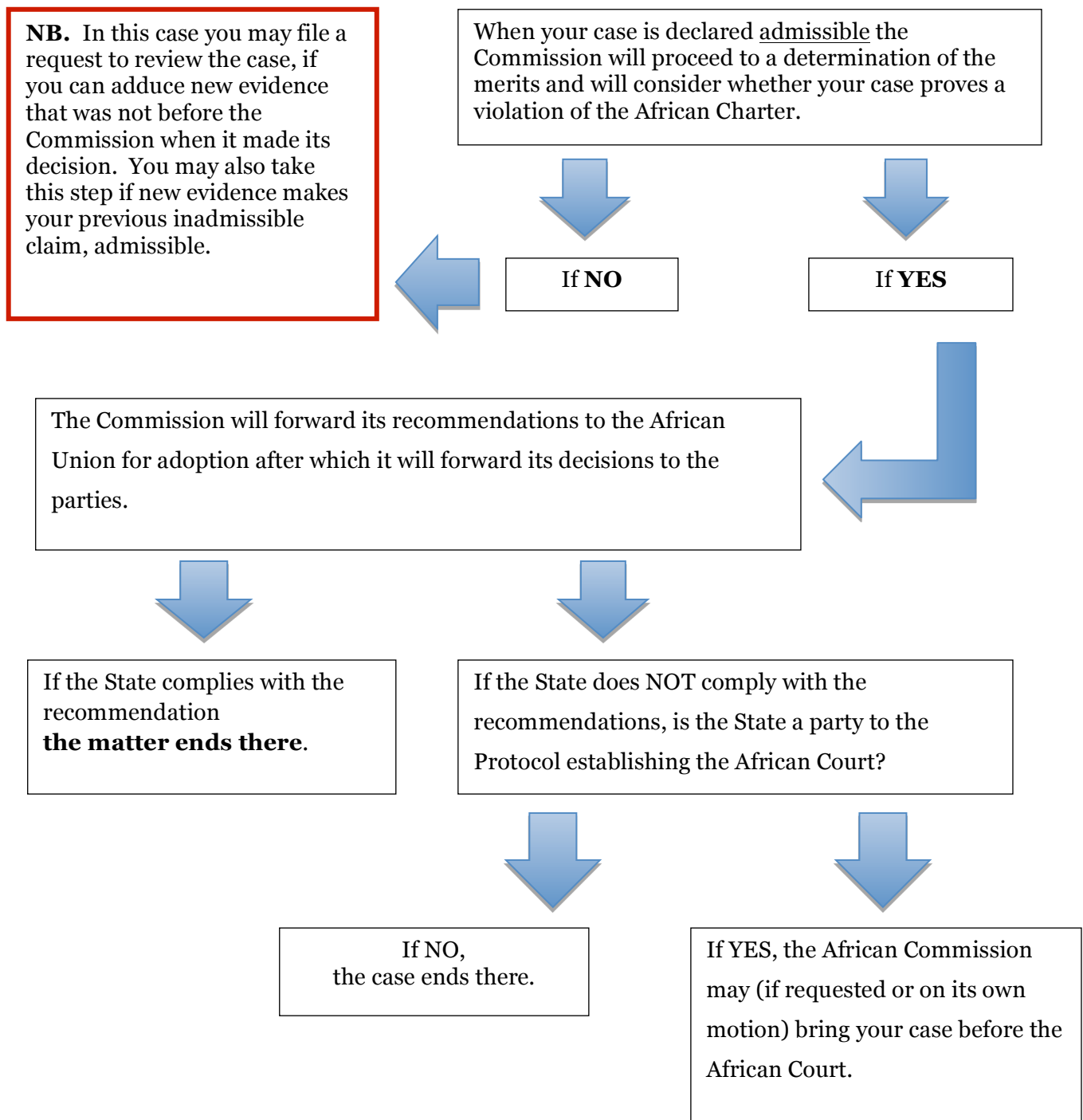
The African Commission is a quasi-judicial body and final recommendations are therefore not legally binding (although the fact that they are adopted by the AU Assembly does provide some legal obligations on the State concerned). The enforcement of the African Commission's decisions depends entirely on the goodwill of the offending State, which can make enforcement very difficult. Nonetheless, the African Commission usually requires the State to inform it, within 180 days, of the measures taken to implement the recommendations. For States that are party to the Protocol establishing the African Court on Human and Peoples' Rights (the "Protocol")<sup>453</sup> there is now the possibility that the African Commission will take cases to the ACtHPR if the State concerned fails to abide by its recommendations.

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<sup>453</sup> The OAU, *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights*, 10 June 1998, Ouagadougou, Burkina Faso, entered into force on 25 January 2004.

*Procedural flow-chart  
Process for bringing communications to the African Commission*





### C. African Court on Human and Peoples' Rights

In the 1990s, the transition to democracy in a number of countries across Africa marked a new emphasis on human rights and the rule of law. Partly building on the success (and responding to the failures) of the African Commission, civil society lobbied for the creation of an ACtHPR which would have the power to issue binding decisions and would therefore complement the protective role of the African Commission. Their efforts were successful, and the final text of the Protocol was adopted by the Assembly of Heads of State and Government of the OAU in Ouagadougou, Burkina Faso, in June 1998. The jurisdiction of the ACtHPR includes the interpretation and application of the African Charter, the Women's Protocol,<sup>454</sup> and relevant human rights instruments ratified by the Member States. Decisions of the ACtHPR will be legally binding and this may lead to improved implementation by States.

Members of the African Union have agreed to a draft protocol of a merged African Court of Justice and Human Rights and have recently adopted a new protocol that would give this merged court jurisdiction over crimes under international law such as genocide, crimes against humanity, war crimes and enforced disappearances. However, neither of these protocols has come into force.

#### *Jurisdiction*

At the ACtHPR there is an additional step to admissibility before it can consider the merits of a case. This is the question of jurisdiction, and it relates to whether the ACtHPR has the right to hear and determine a case. Put differently, the question is whether the applicant has the right to access the ACtHPR. Unlike the African Commission, the ACtHPR allows very limited access. The following entities can take cases before the ACtHPR:

- the African Commission;
- States parties that were complainants or respondents to a complaint before the African Commission;
- State parties that have an interest in a case;
- African inter-governmental organisations; and
- NGOs with observer status at the African Commission and ordinary individuals – but only when the State party against which the complaint is lodged has made a declaration allowing individuals or NGOs direct access to the ACtHPR.<sup>455</sup> At the time of writing (August 2016), the following seven countries had made the declaration allowing for direct access: Benin, Burkina Faso, Mali, Malawi, Tanzania, Ghana, and Côte d'Ivoire. Rwanda withdrew its declaration in 2016.<sup>456</sup>

The ACtHPR approaches access to the court by first asking whether it has jurisdiction. These considerations are set out in *Konaté v. Burkina Faso*:<sup>457</sup>

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<sup>454</sup> African Commission, *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, 2nd Session, 11 July 2003, Maputo, Mozambique.

<sup>455</sup> The African Court Protocol, Art. 34(6).

<sup>456</sup> The Court held that a year-long notice period applied and that the withdrawal would have no effect on ongoing cases due to the principle of non-retroactivity. ACtHPR, *Ingabire Victoire Umuhoza v. Republic of Rwanda*, Application No. 003/2014, Ruling on Jurisdiction, 3 June 2016, par. 66 and 68.

<sup>457</sup> ACtHPR, *Konaté v. Burkina Faso*, Application No. 004/2013 (2014), par. 30-40.

- *Ratione personae* – whether the court has jurisdiction over both the complainant and the respondent State. This may be:
  - if a case is brought by a State party to the Protocol, an African intergovernmental organisation, or the African Commission against any State party to the Protocol;
  - if a case is brought by an NGO or an individual against a State party that has made a declaration under article 34(6) of the Protocol allowing direct access; or
  - if a case is brought by an African organisation seeking an Advisory Opinion.
- *Ratione materiae* - whether the acts complained of violate the African Charter and other international human rights treaties ratified by the respondent State;
- *Ratione temporis* – whether the violation occurred after the State concerned had ratified the Protocol or the human rights treaty you claim it has violated. The ACtHPR has expressly recognised that violations may be of a continuous nature – thus opening its jurisdiction to cases where violations began before the Protocol came into force for any State but continued thereafter.<sup>458</sup>
- *Ratione loci* – whether the violations occurred within the territory of a State party. (So far, no case has dealt with extraterritorial obligations).

The ACtHPR will not have jurisdiction over cases brought by individuals and NGOs against countries that have not made a declaration under article 34(6).

“[T]he second sentence of Article 34(6) of the Protocol provides that [the ACtHPR] ‘shall not receive any petition under Article 5(3) involving a State party which has not made such a declaration’. The ... objective of the aforementioned Article 34(6) is to prescribe the conditions under which the Court could hear such cases; that is to say, the requirement that a special declaration should be deposited by the concerned State party, and to set forth the consequences of the absence of such a deposit by the State concerned.”<sup>459</sup>

However, the ACtHPR has in a number of cases referred such cases to the African Commission even though this procedure may be legally questionable.<sup>460</sup>

### *Admissibility*

After the ACtHPR has confirmed that it has jurisdiction, it will need to consider the wider questions regarding the admissibility of the case. The three main situations in which the ACtHPR will have jurisdiction are:

- when the African Commission brings the case against a State that has ratified the Protocol;
- when an individual or an NGO takes a case directly against a State that has made a declaration under article 34(6) of the Protocol allowing direct access; or

<sup>458</sup> ACtHPR, *Urban Mkandawire v. Malawi*, Application No. 003/2011 (2013), par. 32.

<sup>459</sup> ACtHPR, *Michelot Yogogombaye v. Republic of Senegal*, Application No. 001/2008 (2009), par. 39; ACtHPR, *Baghdadi Ali Mahmoudi v. Tunisia*, Application No. 007/2012 (2012), par. 7-11. [emphasis added].

<sup>460</sup> E.g. ACtHPR, *Ekollo M. Alexandre v. Republic of Cameroon and Federal Republic of Nigeria*, Application No. 008/2011 (2011), par. 12; see also Dissenting Opinion by Judge Fatsah Ouguergouz, par. 36.

- if a case is brought by an African organisation seeking an advisory opinion.

In each of these cases different considerations will apply to the admissibility of the cases.

*(1) Cases brought through the African Commission*

Experience from other regional mechanisms suggests that the primary way to engage the ACtHPR will lie through the African Commission. The African Commission has the right to take cases in its name before the ACtHPR against any State that has ratified the Protocol. In Rule 118 of its Rules of Procedure the African Commission has indicated that it will bring cases before the ACtHPR in the following circumstances:

- if the African Commission has taken a decision with respect to a communication and considers that the State has not complied or is unwilling to comply with its recommendations in respect of the communication within the time limit;
- if the African Commission has made a request for provisional measures against a State party, and considers that the State has not complied with the provisional measures requested;
- if a situation constituting one of serious or massive violations of human rights has come to its attention; or
- if it deems it necessary to do so at any stage of a communication.

An example of the procedure under Rule 118 can be seen in the *African Commission v. Libya* where, during the conflict in 2011, a number of NGOs brought a communication against Libya before the African Commission and asked for provisional measures. The African Commission held that it was impossible to grant interim measures as these would be ignored by the Libyan government. However, they also held that the situation was one of serious or massive violations and they referred the case to the ACtHPR, which proceeded immediately to grant provisional measures (which were never complied with). However, neither the African Commission nor the original NGOs followed up on the case (primarily because of a difficulty in gathering evidence during the conflict but also as a consequence of the change of government in Libya), which eventually led the ACtHPR to strike out the case.

*(2) Admissibility where States allow direct access*

For cases against States that have made an Art 34(6) declaration, the admissibility questions will be very similar to those that have been applied by the African Commission. In addition, however, note that NGOs that do not have observer status before the African Commission will not be able to bring cases directly before the ACtHPR (although individuals can often bring the same cases).<sup>461</sup>

Admissibility is governed by Rule 40 of the Rules of Court<sup>462</sup> which sets out a cumulative test of seven requirements, and reflects the requirements under Article 56 of the African Charter. Each of these must be met for a case to be admissible. However, the trickiest issues, and the ones on which most cases are thrown out, are

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<sup>461</sup> ACtHPR, *Association des Juristes d'Afrique pour la Bonne Gouvernance v. Republic of Cote d'Ivoire*, Application No. 006/2011 (2011), par. 5.

<sup>462</sup> African Court on Human and Peoples' Rights, *Rules of the Court*, April 2010, Arusha, Tanzania, Rule 40.



exhaustion of local remedies and the requirement that cases be brought within a reasonable time. It is therefore crucial that you give particular attention to these issues. These considerations are set out in greater detail above under the section on the African Commission, but are summarised here:

- (i) Identity of the author: Rule 40(1) of Rules of Court requires that communications should indicate their authors, even if the latter “requests anonymity”. Thus make sure that your communication includes your name and address and, if you are not the victim yourself, your relationship with the victim (including on what grounds you represent the victim).
- (ii) Compatibility: Rule 40(2) requires that applications to the ACtHPR comply with the Constitutive Act of the African Union and the African Charter. This requires sufficient *prima facie* evidence that the complaint relates to a violation of the African Charter. The ACtHPR has confirmed that there is no need to cite articles of the Charter. Although the ACtHPR’s primary role is to adjudicate violations of the African Charter and it is preferable that you cite which articles have been violated, it is not necessary to do so, as the ACtHPR has said that “where only national law or the Constitution has been cited or relied upon in an application, the ACtHPR will look for corresponding articles in the Charter, or any other human rights instrument, and base its decisions thereon.”<sup>463</sup>

However, the case must not merely be an appeal against a domestic decision. In *Ernest Mtingwi v. Malawi*, the ACtHPR dismissed an appeal from the Malawi Supreme Court in a labour case on the basis that they did not have jurisdiction (and no human rights issues had been argued).<sup>464</sup>

- (iii) Disparaging language: Rule 40(3) requires that “communications are not written in disparaging or insulting language directed against the State concerned and its institutions or to the African Union.”<sup>465</sup> The factors to consider will include:
  - whether the language is aimed at unlawfully and intentionally violating the dignity, reputation or integrity of a judicial officer or body;<sup>466</sup>
  - whether it is used in a manner calculated to pollute the minds of the public or any reasonable man to cast aspersions on and weaken public confidence on the administration of justice;<sup>467</sup>
  - whether the language is aimed at undermining the integrity and status of the institution and bring it into disrepute;<sup>468</sup>

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<sup>463</sup> ACtHPR, *Chacha v. Tanzania*, Application No. 003/2012 (2014), par. 114-115; ACtHPR, *Frank David Omary and Others v. The United Republic of Tanzania*, Application No. 001/2012 (2014), par. 74.

<sup>464</sup> ACtHPR, *Ernest Mtingwi v. Malawi*, Application No. 001/2013 (2013), par. 15.

<sup>465</sup> African Court Rules of Court, Rule 40(3); *see also* African Charter, Article 56(3)

<sup>466</sup> African Commission, *Zimbabwe Lawyers for Human Rights v. Zimbabwe*, Communication 293/04 (2008), par. 51; African Commission, *Eyob B. Asemie v. the Kingdom of Lesotho*, Communication 435/12 (2015), par. 56.

<sup>467</sup> *Id.*

<sup>468</sup> *Id.*

- whether there is a sufficient balance between respect for the institutions and the freedom of expression implying that the requirement not to use disparaging language will no longer be applied strictly.<sup>469</sup>
- (iv) Mass media: Rule 40(4) requires that the communication should “not be based exclusively on news disseminated through the mass media.”<sup>470</sup> The African Commission noted in *Dawda K Jawara v. the Gambia* that the section excludes cases that are based “exclusively” on news disseminated through the mass media, without more information.<sup>471</sup> This means that there must be some corroborating evidence, although the African Commission has made it clear that the amount of corroborating evidence required is not high.<sup>472</sup>
- (v) Local remedies: Article 56(5) requires that communications be sent to the Commission only “after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged.”<sup>473</sup> Rule 40(5) creates a similar condition for the ACtHPR. As with communications before the African Commission this will be the most relevant consideration. Before bringing a dispute to the ACtHPR, the applicant must have utilised all the legal or judicial avenues or forums available domestically to resolve the matter. “Local remedies” are any judicial/legal mechanisms put in place at the domestic level to ensure the effective settlement of disputes.

This generally means that the case must have been brought to the highest appellate court for a decision (in different systems this may be the Supreme Court or the Court of Cassation). It usually does not matter that the applicant knew that the case would be unsuccessful – a case must still be appealed throughout the system.

**Any local remedies must be “available, effective and sufficient”**

The onus is on the respondent State to demonstrate that there exist local remedies that are available, effective and sufficient and, if it meets that burden, the applicant has the onus to show why in that particular case they were not required to exhaust that remedy.

Exceptions: The primary strategy for taking cases to the ACtHPR should be to ensure that all domestic remedies are exhausted – however there are certain circumstances where it is not necessary to exhaust domestic remedies.

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<sup>469</sup> *Id.*, par. 60.

<sup>470</sup> African Court Rules of Court, Rule 40(4); *see also* African Charter, Article 56(4).

<sup>471</sup> African Commission, *Sir Dawda K. Jawara v. the Gambia*, Communication 147/95-149/96 (2000), par. 24-26.

<sup>472</sup> *Id.*

<sup>473</sup> African Court Rules of Court, Rule 40(5); *see also* African Charter, Article 56(5).

**Exceptions to the rule of exhaustion of domestic remedies include those situations where:**

- local remedies are non-existent;
- local remedies are unduly and unreasonably prolonged;
- recourse to local remedies is made impossible;
- it is impractical or undesirable for the applicant to seize the domestic courts in the case of each violation; or
- from the face of the application there is no justice or there are no local remedies to exhaust.

While there have not yet been enough cases before the ACtHPR to determine strong differences in approach, the following cases are good examples of how the ACtHPR will apply the rules developed by the African Commission:

- In *Tanganyika Law Society and The Legal and Human Rights Centre and Reverend Christopher Mtikila v. The United Republic of Tanzania*, the ACtHPR held that local remedies that need exhausting will generally be judicial remedies and do not include parliamentary or administrative remedies, stating that, “in principle, the remedies envisaged in Article 6(2) of the Protocol read together with Article 56(5) of the Charter are primarily judicial remedies as they are the ones that meet the criteria of availability, effectiveness and sufficiency that has been elaborated in jurisprudence”;<sup>474</sup>
- In *Norbert Zongo v. Burkina Faso*, the ACtHPR confirmed that where local remedies are unduly prolonged they do not need to be exhausted;<sup>475</sup>
- In *Konaté v. Burkina Faso*, the ACtHPR expressly applied the African Commission’s test of whether local remedies were available, effective and sufficient, holding that an appeal that did not allow the applicant to challenge the content of a law criminalising defamation as violating freedom of expression could not be held to be an effective or sufficient remedy;<sup>476</sup>
- In *Joseph Chacha v. Tanzania*, the majority of the ACtHPR confirmed that it will apply the same rules on exhaustion of local remedies as the African Commission. In this case the majority of the ACtHPR held both that failure to appeal a decision to the highest appellate court made the case inadmissible, as well as that general inadequacies in the legal system are not enough to make remedies unavailable. This decision was made despite extensive flaws in the domestic system that made it impossible for an unrepresented detainee to have his case heard (a point that is well made by the dissenting decisions in the case);<sup>477</sup>

<sup>474</sup> ACtHPR, *Tanganyika Law Society and The Legal and Human Rights Centre and Reverend Christopher Mtikila v. The United Republic of Tanzania*, Application Nos. 009/2011 and 011/2011, (2011) par. 82.

<sup>475</sup> ACtHPR, *Norbert Zongo v. Burkina Faso*, Application No. 013/11 (2014), par. 55.

<sup>476</sup> ACtHPR, *Konaté v. Burkina Faso*, Application No. 004/2013 (2014), par. 113.

<sup>477</sup> ACtHPR, *Chacha v. Tanzania*, Application No. 003/2012 (2014).

- In *Frank David Omary and others v. The United Republic of Tanzania*, the ACtHPR held that local judicial remedies had not been exhausted as the case had not been brought before the Court of Appeal on its merits and that any delay in the finalisation of the case was caused by internal disagreements between the applicants themselves.<sup>478</sup>
- (vi) Reasonable time: Article 56(6) of the African Charter states that, “communications received by the Commission will be considered if they are submitted within a reasonable period from the time local remedies are exhausted, or from the date the Commission is seized with the matter.” Rule 40(6) creates a similar condition for the ACtHPR. This requirement has been difficult to apply since there is no clear interpretation of a “reasonable period” in the African Charter. However, it is now advisable to submit cases as soon as possible; at least within ten months and preferably within six months of exhaustion of domestic remedies. If you fail to do so, you need to give compelling factual and contextual reasons why you failed to do so.

The ACtHPR in *Joseph Chacha v. Tanzania* confirmed that there is no set period after the exhaustion of domestic remedies within which to file a case with the ACtHPR (again following the example of the African Commission that each case will be dealt with on its merits).<sup>479</sup> However, the ACtHPR may be more lenient with the application of this rule. For instance, in *Tanganyika Law Society and The Legal and Human Rights Centre and Reverend Christopher Mtikila v. The United Republic of Tanzania*, the ACtHPR held that a year was not an inordinate delay as the applicants were entitled to wait to see whether Parliament would change the law to cure the violation of the Charter.<sup>480</sup>

- (vii) Ne bis in idem: Article 56(7) states that, “[t]he Commission does not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the OAU or the provisions of the present Charter.” Rule 40(7) creates similar condition for ACtHPR. This means that communications that have been finalised by some other international mechanism similar to the African Commission are inadmissible.<sup>481</sup> The African Commission has held that:

- The provision codifies the *non bis in idem* rule which ensures that no State may be sued or condemned more than once for the same alleged human rights violations, and seeks to uphold and recognise the *res judicata status* of decisions issued by international and regional tribunals and/or bodies.<sup>482</sup>

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<sup>478</sup> ACtHPR, *Frank David Omary and Others v. The United Republic of Tanzania*, Application No. 001/2012 (2014), par. 137.

<sup>479</sup> ACtHPR, *Chacha v. Tanzania*, Application No. 003/2012 (2014), par. 155.

<sup>480</sup> ACtHPR, *Tanganyika Law Society and The Legal and Human Rights Centre*, Application Nos. 009/2011, (2011), par. 83.

<sup>481</sup> E.g. African Commission, *Amnesty International v. Tunisia*, Communication No. 69/92 (1994).

<sup>482</sup> African Commission, *Spilg and Mack & Ditshwanelo (on behalf of Lehlohonolo Bernard Kobedi) v. Botswana*, Communication No. 277/2003 (2011), par. 110.

- The matter in contention, which must relate to the same facts and parties, must have been “settled” – it must no longer be under consideration under an international dispute-settlement procedure.<sup>483</sup>
- The decision must have been by “an international adjudication mechanism, with a human rights mandate” and not a political entity.<sup>484</sup>

### *(3) Advisory opinions*

Another way in which the ACtHPR may receive cases is through the advisory opinions procedure. According to the Protocol, “any African organization recognized by the OAU [now the AU]” can seek an advisory opinion of the ACtHPR.<sup>485</sup> According to Rule 68(1) of the ACtHPR’s Rules of Procedure, requests may be filed by:

- Member States;<sup>486</sup>
- the AU;<sup>487</sup>
- an organ of the AU;<sup>488</sup> or
- an African organization recognized by the AU.<sup>489</sup>

However, like the African Commission, advisory opinions must only be sought for the interpretation of the law (the African Charter or other international human rights instrument) and should not be an attempt to bring a case against a State. If an advisory opinion is sought it must set out:

- the provisions of the Charter or of any other international human rights instrument in respect of which the advisory opinion is sought;
- the circumstances giving rise to the request; and
- the names and addresses of the representatives of the entities making the request.

In addition, the subject matter of the request for an advisory opinion shall not relate to an application pending before the African Commission.

### *Representation before the ACtHPR*

According to Rule 28 of the Rules of Court, “[e]very party to a case shall be entitled to be represented or to be assisted by legal counsel and/or by any other person of the party’s choice.”<sup>490</sup>

### *Merits*

It is important to remember that the ACtHPR will approach evidence through the lens of a judicial body and will therefore apply stricter evidentiary rules.<sup>491</sup> The early

<sup>483</sup> *Id.*, par. 111; African Commission, *Bob Ngozi Njoku v. Egypt*, Communication No. 40/90 (1997), par. 56.

<sup>484</sup> African Commission, *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v. Sudan*, Application No. 279/03-296/05 (2009), par. 105.

<sup>485</sup> The African Court Protocol, Art. 4.

<sup>486</sup> African Court Rules of Court, Rule 68(1).

<sup>487</sup> *Id.*

<sup>488</sup> *Id.*

<sup>489</sup> *Id.*

<sup>490</sup> African Court Rules of Court, Rule 28.

<sup>491</sup> See above on arguing merits before the African Commission.

jurisprudence from the ACtHPR is promising for the right to freedom of expression, and the rights of journalists and the media:

- In *Norbert Zongo v. Burkina Faso*, the ACtHPR found that Burkina Faso had violated Articles 7 and 1 of the African Charter because it had “failed to act with due diligence in seeking, trying and judging the assassins of Norbert Zongo and his companions” and therefore had violated “the rights of the Applicants to be heard by competent national courts”.<sup>492</sup> The ACtHPR also held that Burkina Faso had violated Article 9 of the African Charter protecting freedom of expression because its “failure ... in the investigation and prosecution of the murderers of Norbert Zongo, caused fear and worry in media circles.”<sup>493</sup>
- In *Konaté v. Burkina Faso*, the ACtHPR held that aspects of Burkinabé criminal defamation laws, particularly those imposing the sanction of imprisonment, violated Article 9 and other international human rights provisions recognising the right to freedom of expression.<sup>494</sup>

### *Amicus curiae*

The ACtHPR will accept *amicus curiae* submissions from interested NGOs. Rule 45(1) of the Rules of Court provides that “[t]he Court may, *inter alia*, decide to hear ... in any other capacity [other than witness or expert], any person whose evidence, assertions or statements it deems likely to assist it in carrying out its task”. Though the procedure regarding *amicus curiae* briefs is not clearly set out in the Rules of Court, practice shows that they have been filed successfully.<sup>495</sup>

There have been a number of applications filed by NGOs to submit briefs suggesting that this is a popular mechanism to submit legal arguments to the ACtHPR. For example:

- The Centre for Human Rights, Comitée Pour la Protection des Journalistes, Media Institute of Southern Africa, Pan African Human Rights Defenders Network, Pan African Lawyers’ Union, PEN International and National PEN Centres (PEN Malawi, PEN Algeria, PEN Nigeria, PEN Sierra Leone and PEN South Africa), Southern Africa Litigation Centre and World Association of Newspapers and News Publishers submitted an *amicus curiae* brief in *Konaté v. Burkina Faso*.<sup>496</sup>
- PALU submitted an *amicus curiae* brief in *African Commission on Human and Peoples’ Rights v. the Great Socialist Libyan People’s Arab Jamahiriya*.<sup>497</sup>

### *Interim Measures*

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<sup>492</sup> ACtHPR, *Norbert Zongo v. Burkina Faso*, Application No. 013/11 (2014), par. 156.

<sup>493</sup> *Id.*, par. 203.

<sup>494</sup> ACtHPR, *Konaté v. Burkina Faso*, Application No. 004/2013 (2014), par. 176.

<sup>495</sup> See PALU’s application for filing an *amicus curiae* brief, ACtHPR, *African Commission on Human and Peoples’ Rights v. the Great Socialist Libyan People’s Arab Jamahiriya*, Application No. 004/2011 (2013). The request to participate as *amicus curiae* was granted but never materialised as the case was struck out.

<sup>496</sup> ACtHPR, *Konaté v. Burkina Faso*, Application No. 004/2013 (2014).

<sup>497</sup> ACtHPR, *African Commission on Human and Peoples’ Rights v. the Great Socialist Libyan People’s Arab Jamahiriya*, Application No. 004/2011 (2013). The request to participate as *amicus curiae* was granted but never materialised as the case was struck out.

The ACtHPR has extensive powers to grant interim measures under article 27(2) of the Protocol, “at the request of a party, the Commission or on its own accord.” These may be granted in the interest of the parties or in the interests of justice.

In *African Commission v. Libya*, a number of NGOs brought a communication, during the conflict in 2011, against Libya before the African Commission and asked for provisional measures. The African Commission held that it was impossible to grant interim measures as these would be ignored by the Libyan government. However, they also held that the situation was one of serious or massive violations and they referred the case to the ACtHPR, which proceeded immediately to grant interim measures (which were never complied with).<sup>498</sup> This is thus an example of the situations in which the ACtHPR is likely to grant interim measures (and the difficulties in enforcing them).

In *Konaté v. Burkina Faso*, the applicant requested the immediate release of an imprisoned journalist as a provisional measure, or, alternatively adequate medical care.<sup>499</sup> The ACtHPR found that granting an immediate release corresponded “in substance to one of the reliefs sought in the substantive case, namely that the punishment of imprisonment is in essence a violation of the right to freedom of expression”.<sup>500</sup> A consideration of this question would therefore “adversely affect consideration of the substantive case.”<sup>501</sup> Concerning the request for adequate medical care, the ACtHPR noted that “the situation in which the applicant finds himself appears to be a situation that can cause irreparable harm”.<sup>502</sup> The ACtHPR therefore stated that the Applicant was entitled to all necessary medical care and accordingly ordered provisional measures.<sup>503</sup>

In the course of 2016, the ACtHPR issued provisional measures in a number of cases, ordering Tanzania to refrain from executing several applicants on death row before their case had been determined by the ACtHPR.<sup>504</sup>

### *Remedies*

The ACtHPR is likely to grant more effective remedies than the African Commission because it is established as a fully judicial body. The ACtHPR will order specific amounts of damages, give supervisory interdicts (requiring the State party to report on the implementation of the remedy) and require positive action to guarantee non-repetition. Thus in *Norbert Zongo v. Burkina Faso*, the ACtHPR ordered Burkina Faso to:

- re-open the investigation into the murder of the four deceased;<sup>505</sup>

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<sup>498</sup> ACtHPR, *African Commission on Human and Peoples’ Rights v. the Great Socialist Libyan People’s Arab Jamahiriya*, Application No. 004/2011 (2013), Order for Provisional Measures.

<sup>499</sup> ACtHPR, *Konaté v. Burkina Faso*, Application No. 004/2013 (2014), Order for Provisional Measures, par. 6.

<sup>500</sup> *Id.*, par. 19.

<sup>501</sup> *Id.*

<sup>502</sup> *Id.*, par. 22.

<sup>503</sup> *Id.*

<sup>504</sup> See, for example, ACtHPR, *Amini Juma v. The United Republic of Tanzania*, Application No. 024/2016, Order for Provisional Measures, 3 June 2016, ACtHPR, *Cosma Faustin v. The United Republic of Tanzania*, Application No. 018/2016, Order for Provisional Measures, 3 June 2016 and ACtHPR, *Deogratius Nicholas Jeshe v. The United Republic of Tanzania*, Application No. 017/2016, Order for Provisional Measures, 3 June 2016.

<sup>505</sup> ACtHPR, *Norbert Zongo v. Burkina Faso*, Application No. 013/11 (2014), Ruling on Reparations.

- pay damages to the victims' families;<sup>506</sup>
- take measures to prevent further recurrence of such violations;<sup>507</sup> and
- report back to the ACtHPR within six months on the implementation of the judgment.<sup>508</sup>

In *Konaté v. Burkina Faso* the ACtHPR unanimously ordered Burkina Faso to amend its legislation on defamation by:

- repealing custodial sentences for acts of defamation;<sup>509</sup> and
- adapting its legislation to ensure that other sanctions for defamation meet the test of necessity and proportionality, in accordance with its obligations under the Charter and other international instruments.<sup>510</sup>

In its subsequent judgment on reparations, the ACtHPR furthermore ordered Burkina Faso to expunge the criminal convictions from the Applicant's record and pay the Applicant compensation for material and moral damages, including for:

- lost income due to the forced closure of the Applicant's newspaper;
- financial loss suffered by the Applicant's family in order to visit him in prison;
- medical costs while in prison;
- *moral prejudice* suffered by the Applicant and his family as a result of his trial, conviction and imprisonment in breach of his fundamental rights.<sup>511</sup>

### *Review of judgments*

Under Rule 67 of the Rules of Court and Article 28(3) of the Protocol, you may ask for a review of a decision that you do not agree with. However, you can only do this if you discover new evidence that you did not have at the point that the decision was made. This means that the power of review will only be resorted to in limited circumstances.

### *Sources of law*

When bringing a case to the ACtHPR you can use different sources of law to argue your case. Firstly, you should refer to the provisions in the African Charter that have been violated. Secondly, the Rules of Court set out more formal requirements in relation to the proceedings. Thirdly, you can refer to the Declaration of Principles on Freedom of Expression in Africa. Fourthly, it is always a good idea to support your arguments with references to jurisprudence of the African Commission and ACtHPR. Lastly, you may consider including references to international standards.

### *Advantages/disadvantages of the system*

The ACtHPR is the premier human rights mechanism in Africa. Its decisions are binding and enforceable and the ACtHPR will apply both the African Charter and other international human rights law. Due to its judicial nature, the decisions that are handed down from the ACtHPR are usually more reasoned than the African Commission's decisions.

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<sup>506</sup> *Id.*

<sup>507</sup> *Id.*

<sup>508</sup> *Id.*

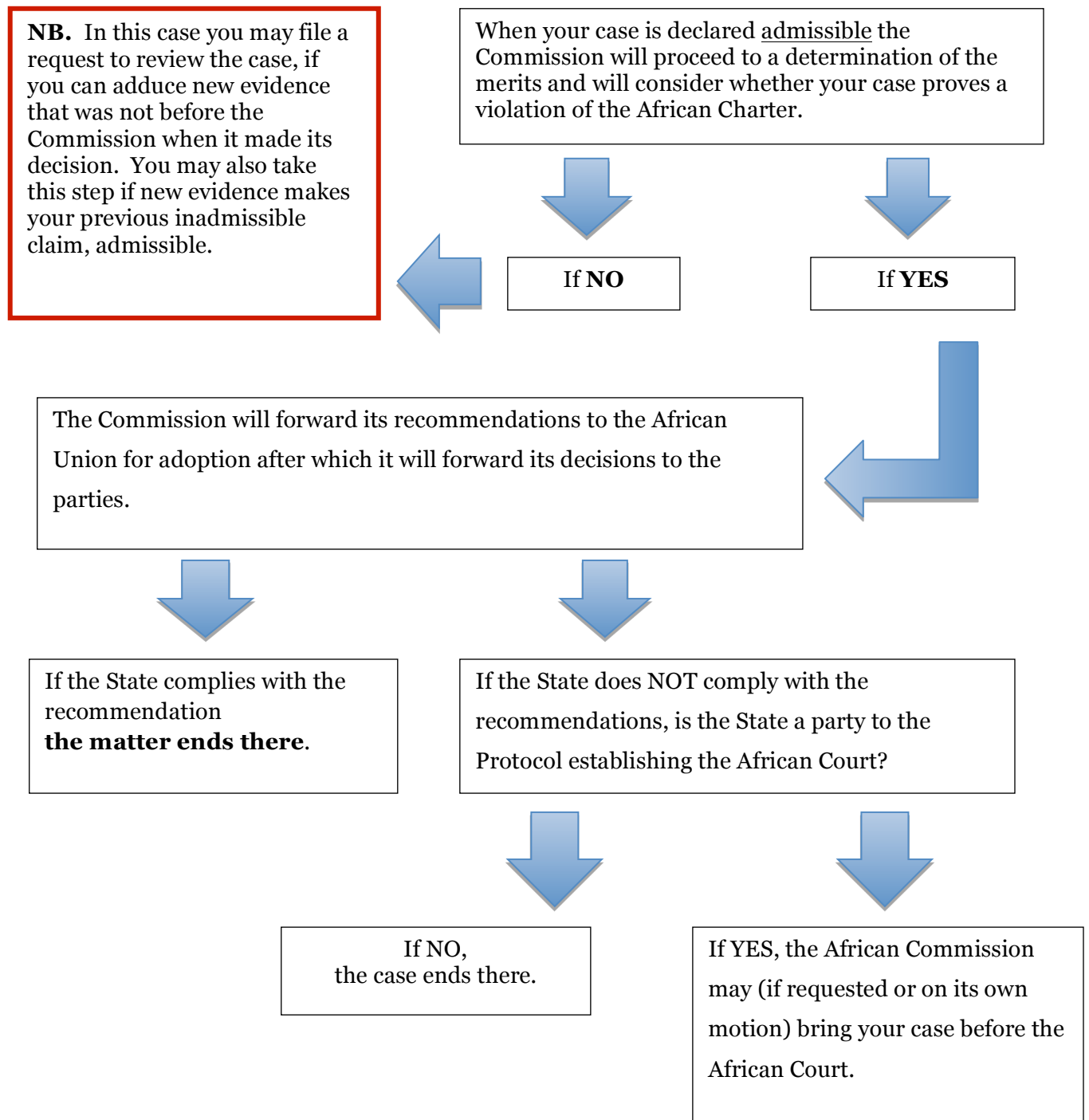
<sup>509</sup> ACtHPR, *Konaté v. Burkina Faso*, Application No. 004/2013 (2014), par. 176.

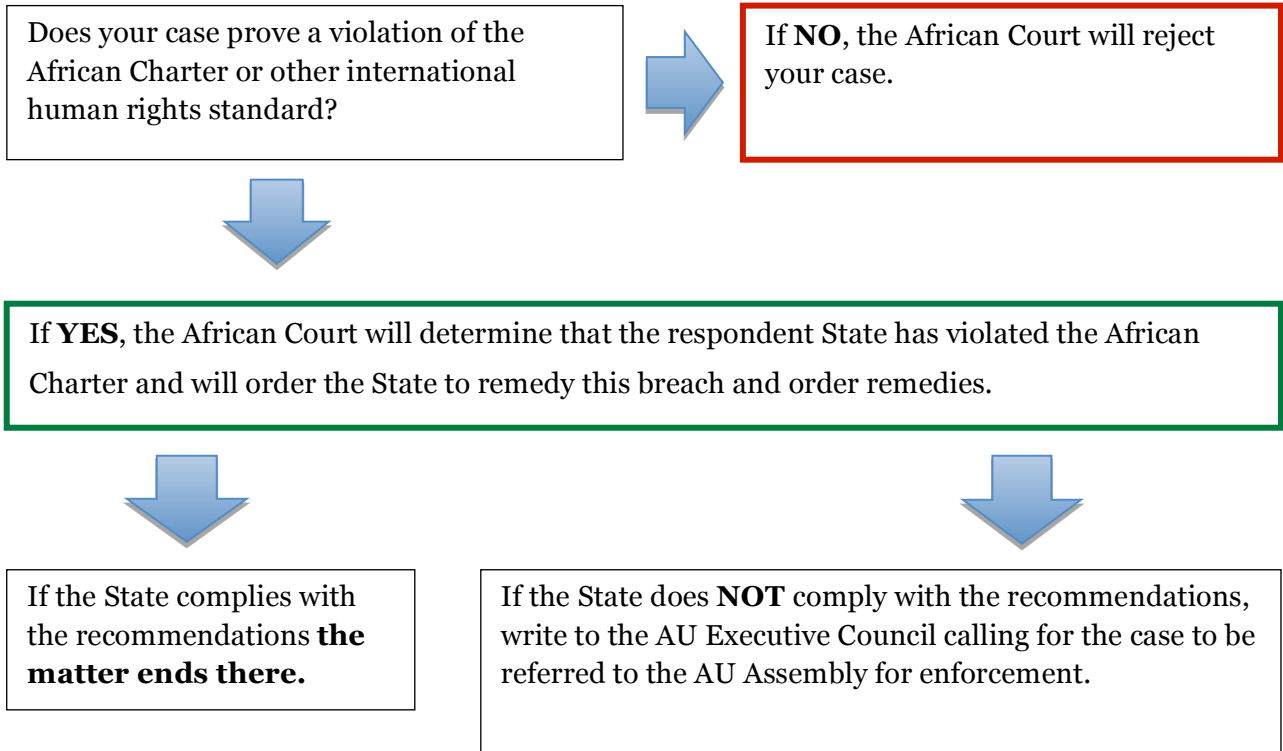
<sup>510</sup> *Id.*

<sup>511</sup> ACtHPR, *Konaté v. Burkina Faso*, Application No. 004/2013, Judgment on Reparations (2016).



*Procedural flow-chart  
Process for bringing Applications to the ACtHPR*





#### D. East African Court of Justice

##### *Jurisdiction*

Access to the EACJ is determined primarily by an application of the jurisdiction requirements set out in the East African Treaty (the “Treaty”). The jurisdiction of the EACJ is set out in Articles 27 and 30 of the Treaty. Article 27 states as follows:

1. The Court shall initially have jurisdiction over the interpretation and application of this Treaty;  
Provided that the Court’s jurisdiction to interpret under this paragraph shall not include the application of any such interpretation to jurisdiction conferred by the Treaty on organs of Partner States.
2. The Court shall have such other original, appellate, human rights and other jurisdiction as will be determined by the Council at a suitable subsequent date. To this end, the Partner States shall conclude a protocol to operationalise the extended jurisdiction.

Article 30 states:

1. Subject to the provisions of Article 27 of this Treaty, any person who is resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this Treaty.  
  
...
2. The Court shall have no jurisdiction under this Article where an Act, regulation, directive, decision or action has been reserved under this Treaty to an institution of a Partner State.

The EACJ has summarised the jurisdictional requirements as follows:<sup>512</sup>

“Any plain reading of the aforementioned Article underscores that prior to submitting a Reference before the Court, any person must meet the following conditions:

- a) Be a legal or natural person; and
- b) Be resident of an EAC Partner State; and
- c) Be challenging the legality of any Act, regulation, directive, decision, and action of the said Partner State or an institution of the Community.”

##### A. Jurisdiction *ratione personae*

According to Act 30(i) of the Treaty, any person (or company) resident in the East African Community may bring a case to the EACJ.

##### B. Jurisdiction *ratione temporis*

Cases will fall within the temporal jurisdiction of the EACJ if they occurred subsequent to the Treaty coming into force for the State against whom the complaint is made. A strict application of the two months rule (see below) and the refusal by the

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<sup>512</sup> See EACJ, *Godfrey Magezi v. The Attorney General of the Republic of Uganda*, Reference No. 5 of 2013 (2014), par. 27.

EACJ to recognise continuing violations of the Treaty indicate that time limits will be applied strictly.<sup>513</sup>

C. Jurisdiction *ratione materiae*

Article 30(1) of the Treaty authorises legal and natural persons, resident in a State party to the Treaty, to bring a complaint (i.e. make a Reference) to the EACJ on whether an act or omission of a State Party is an infringement of the Treaty. While Article 27 appears to expressly exclude human rights jurisdiction, the EACJ has expressly said that where it is called on to interpret the Treaty it will not refrain from doing so merely because doing so would involve determining violations of human rights, provided the conduct also violates other principles protected under the Treaty. In *James Katabazi and 21 Others v. Secretary General of EAC and Another*, the EACJ held that:<sup>514</sup>

“Article 7 spells out the operational principles of the Community which govern the practical achievement of the objectives of the Community in Sub-Article (1) and seals that with the undertaking by the Partner States in no uncertain terms of Sub-Article (2): The Partner States undertake to abide by the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights. Finally, under Article 8(1)(c) the Partner States undertake, among other things: Abstain from any measures likely to jeopardise the achievement of those objectives or the implementation of the provisions of this Treaty. While the Court will not assume jurisdiction to adjudicate on human rights disputes, it will not abdicate from exercising its jurisdiction of interpretation under Article 27(1) merely because the reference includes [an] allegation of [a] human rights violation.”

As the EACJ put it in *East Africa Law Society v. The Attorney General of the Republic of Burundi*; “the Treaty provisions alleged to have been violated have, through Burundi’s voluntary entry into the Treaty, been crystallized into actionable obligations, now stipulated in among others, Articles 6(d) and 7(2) of the Treaty, breach of any of which by the Republic of Burundi (1<sup>st</sup> Respondent) would give rise to infringement of the Treaty. It is that alleged infringement which, through interpretation of the Treaty under Article 27(1) of the Treaty constitutes the cause of action”.<sup>515</sup>

In *Burundi Journalists’ Union v. The Attorney General of the Republic of Burundi*, the EACJ held that violations of freedom of expression and of the press were justiciable as violations of the East African Treaty. The EACJ reasoned that “there is no doubt that freedom of the press and freedom of expression are essential components of democracy.”<sup>516</sup> The EACJ further noted that “under Articles 6(d) and 7(2), democracy must of necessity include adherence to press freedom”<sup>517</sup> and a “free press goes hand in hand with the principles of accountability and transparency which are also entrenched in Articles 6(d) and 7(2)”. Accordingly, the obligation to abide by

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<sup>513</sup> EACJ, *Emmanuel Mwakisha Mjawasi and Others v. The Attorney General of Kenya*, Reference No. 2 of 2010 (2011), pp. 8-14.

<sup>514</sup> EACJ, *James Katabazi and 21 Others v. Secretary General of EAC and Another*, Reference No. 1 of 2007 (2007), p. 16.

<sup>515</sup> EACJ, *East Africa Law Society v. The Attorney General of the Republic of Burundi*, Reference No. 1 of 2014 (2015), par. 53.

<sup>516</sup> EACJ, *Burundi Journalists’ Union v. The Attorney General of the Republic of Burundi*, Reference No. 7 of 2013 (2015).

<sup>517</sup> *Id.*, par. 82.

the right to freedom of expression was within the justiciable principles under the Articles 6(d) and 7(2) of the Treaty.

Since the EACJ does not formally hold human rights jurisdiction, most human rights cases will be brought and determined by the EACJ as violations of the principles of good governance and rule of law under Articles 6(d) and 7(2) of the Treaty. It is therefore imperative to argue that the violations complained of are not pure human rights violations.

#### **Human rights cases as violations of the Treaty:**

- *Samuel Mukira Mohochi v. The Attorney General of the Republic of Uganda* (the denial of entry into Uganda followed by detention, removal and return of the applicant to Kenya were found unlawful).<sup>518</sup>
- *James Katabazi and 21 others v. The Secretary General of the East African Community and others* (the invasion of court premises by armed security agents of Uganda and the subsequent re-arrest and incarceration of 16 Ugandan prisoners despite the existence of a lawful court order from the Ugandan High Court, granting bail to 14 of the prisoners, constituted a violation of the Treaty).<sup>519</sup>
- *The Attorney General of the Republic of Kenya v. Independent Medical Unit* (the case concerned the killings at Mount Elgon. The EACJ held that it had a “duty to interpret the Treaty” and the matter fell within its jurisdiction).<sup>520</sup>
- *Mary Ariviza and Okotch Mondoh v. Attorney General of Kenya and Secretary General of the East African Community* (the conduct and process of a referendum as well as the promulgation of a new Constitution in the Republic of Kenya fell under the jurisdiction of the EACJ).<sup>521</sup>
- *Sitenda Sebalu v. Secretary General of the East African Community et al.* (the failure to extend the jurisdiction of the EACJ pursuant to Article 27 violated the Applicant’s legitimate expectations that the matter be expedited and contravened the principles of good governance stipulated in Article 6 of the Treaty).<sup>522</sup>

The EACJ has also confirmed that it does not hold appellate jurisdiction over decisions made by domestic courts, so you must make sure that your case does not appear to be an appeal against the decision of the local courts.<sup>523</sup>

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<sup>518</sup> EACJ, *Samuel Mukira Mohochi v. The Attorney General of the Republic of Uganda*, Reference No. 5 of 2011 (2013).

<sup>519</sup> EACJ, *James Katabazi and 21 Others v. Secretary General of EAC and Another*, Reference No. 1 of 2007 (2007).

<sup>520</sup> EACJ, *The Attorney General of the Republic of Kenya v. Independent Medical Unit*, Appeal 1 of 2011 (2013).

<sup>521</sup> EACJ, *Mary Ariviza and Okotch Mondoh v. Attorney General of Kenya and Secretary General of the East African Community*, Reference No. 7 of 2010 (2013).

<sup>522</sup> EACJ, *Honorable Sitenda Sibalu v. Secretary General of the EAC, Attorney General of Uganda, Honorable Sam Njumba, and the Electoral Commission of Uganda*, Reference No. 1 of 2010 (2010).

<sup>523</sup> *Id.*

### *Bringing a case*

The EACJ includes a First Instance Division, where your case will be heard and an Appeals Division (see below). The procedure for filing and having cases heard at the EACJ mirrors the procedure at the domestic level in common law countries to a much greater extent than procedures at the African Commission, in that the case is first made on the papers, allowing the respondent to make preliminary objections on the law, before the trial process during which the EACJ makes decisions on facts based on the evidence. A Reference by a partner State, the Secretary General, or a legal or natural person is instituted by lodging a statement of reference in the EACJ which should include:

- the name, designation, address and (where applicable) residence of the applicant;
- the designation, name, address and (where applicable) residence of the respondent;
- the subject-matter of the reference and a summary of the points of law on which the application is based;
- where appropriate, the nature of any evidence offered in support;
- where applicable, the order sought by the applicant;
- where the reference seeks the annulment of an Act, regulation, directive, decision or action, the application shall be accompanied by documentary evidence of the same; and
- where the reference is made by a body corporate, the application shall be accompanied by documentary evidence of its existence in law.

Within 45 days of being served with a notification of the Reference, the respondent should file a statement of response after which the applicant has 45 days to file a reply. Within 45 days the respondent may then file a rejoinder (neither the reply nor rejoinder should repeat earlier arguments). There will then be a scheduling conference to determine when the case will be set down for oral hearing. At the oral hearing, both parties can call and examine witnesses.

### *Admissibility*

Although the EACJ does not apply the same admissibility criteria applied by the African Commission and the ACtHPR, there are a few very important considerations to take into account:

#### *(1) Exhaustion of domestic remedies*

The EACJ has held that there is no requirement that an applicant must exhaust local remedies before approaching the EACJ and they have based this on the argument that the EACJ has primacy in interpreting the Treaty (which is an overt rejection of the subsidiarity principle).<sup>524</sup>

Indeed the EACJ has held that this jurisdiction is not voluntary and that once an applicant can show an alleged violation of the Treaty, the EACJ must exercise jurisdiction. On the flip side, where there is no jurisdiction it cannot become involved:

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<sup>524</sup> EACJ, *Rugumba v. Attorney General of Rwanda*, Appeal No.1 of 2012 (2012), par. 39; EACJ, *Burundi Journalists' Union v. The Attorney General of the Republic of Burundi*, Reference No. 7 of 2013 (2015).

“Jurisdiction is quite different from the specific merits of any case ... As it is, it should be noted that one of the issues of agreement as set out by the parties is that there are triable issues based on Articles 6, 7, 27 and 30 of the Treaty. That is correctly so since once a party has invoked certain relevant provisions of the Treaty and alleges infringement thereon, it is incumbent upon the Court to seize the matter and within its jurisdiction under Articles 23, 27 and 30 [to] determine whether the claim has merit or not. But where clearly the Court has no jurisdiction because the issue is not one that it can legitimately make a determination on, then it must down its tools and decline to take one more step.”<sup>525</sup>

## *(2) Two-month rule*

The Treaty requires that References should be filed with the EACJ within two months of the violation complained of, which is an extremely difficult requirement to comply with. In two cases the EACJ has held that it will not give any leeway on this requirement and that there is no provision in the Treaty that covers the concept of continuing violations of the Treaty (holding that this is a human rights concept and is therefore not applicable to interpretation of the Treaty).<sup>526</sup>

## *Representation before the East African Court of Justice*

The rules concerning representation before the EACJ are stated in Rule 17 of the Court's Rules of Procedure.<sup>527</sup>

According to Rule 17(1), a party to any proceedings in the EACJ may appear in person or by an agent and may be represented by an advocate. A corporation or company may either appear by its director, manager or secretary, who is appointed by resolution under the seal of the corporation or the company, or may be represented by an advocate.<sup>528</sup> The advocate for a party shall file with the registrar a certificate that he or she is entitled to appear before a superior court of a partner State.<sup>529</sup> A representative of a party other than an advocate shall for purposes of this Rule file with the registrar proof of his or her appointment as such representative.<sup>530</sup> In case of the death of a party during the continuance of the proceedings, the legal representative shall take over the proceedings.<sup>531</sup>

## *Merits*

All cases must relate to the interpretation of the East African Treaty. While the Treaty expressly excludes human rights jurisdiction, the EACJ has held that Article 7(2) of the Treaty requires that the EACJ judge actions of member States against the principles of good governance, which include democracy and the rule of law.

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<sup>525</sup> EACJ, *Democratic Party v. the Secretary, General and the Attorneys General of the Republics of Uganda, Kenya, Rwanda and Burundi*, EACJ Reference No. 2 of 2012 (2013), par. 30-31.

<sup>526</sup> EACJ, *Attorney General of Uganda and Attorney General of Kenya v. Omar Awadh and Six Others*, Appeal No. 2 of 2012 (2013), par. 31; EACJ, *Attorney General of Kenya v. Independent Medical Legal Unit*, Appeal No. 1 of 2011 (2013).

<sup>527</sup> East African Court of Justice, *Rules of Procedure*, Gazette No. 7, 11 April 2013, Arusha, Tanzania.

<sup>528</sup> *Id.*, Rule 17 (3).

<sup>529</sup> *Id.*, Rule 17 (5).

<sup>530</sup> *Id.*, Rule 17 (6).

<sup>531</sup> *Id.*, Rule 17 (7).

Article 7(2) states that:

“The Partner States undertake to abide by the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights”.

The approach of the EACJ is explained in *James Katabazi and 21 others v. The Secretary General of the East African Community and others*. There, the EACJ stated that while it will not assume jurisdiction to adjudicate on human rights disputes, it will not abdicate from exercising its jurisdiction of interpretation under Article 27(1) merely because the reference includes allegations of human rights violations.<sup>532</sup>

Thus merits arguments must be made on the basis that the human rights violations complained of violate the principles of good governance, democracy, rule of law or social justice.<sup>533</sup> In *James Katabazi and 21 others v. The Secretary General of the East African Community and others* the Ugandan security services had (i) re-arrested the 22 complainants immediately after the High Court had ordered their release on bail and (ii) surrounded the court in a show of the strength of Uganda. This is the classic example of a situation in which human rights concerns are covered by the principle of the rule of law.

However, in practice this does not preclude the EACJ from hearing media freedom cases. As seen above in *Burundi Journalists Union v. The Attorney General of the Republic of Burundi*, the EACJ held that violations of the freedom of expression and of the press were justiciable as violations of the Treaty, *inter alia*, holding that “a government should not determine what ideas or information should be in the market place.”<sup>534</sup>

In practice therefore many human rights cases will likely be justiciable before the EACJ, as long as the violations are expressed as violations of the principles of good governance, democracy, rule of law or social justice. Indeed, even within the limitations of arguing cases within the four corners of the Treaty and avoiding express human rights arguments, it is evident that the EACJ will be persuaded by human rights jurisprudence. In *Burundi Journalists’ Union v. The Attorney General of the Republic of Burundi*, the EACJ applied jurisprudence of the European Court of Human Rights:<sup>535</sup>

“On this issue [protection of sources], we are of the same mind as the [European Court of Human Rights] in *Goodwin vs. UK* where it was stated as follows:

‘Protection of journalistic sources is one of the basic conditions for press freedom ... Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result, the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected.’”

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<sup>532</sup> EACJ, *James Katabazi and 21 Others v. Secretary General of EAC and Another*, Reference No. 1 of 2007 (2007).

<sup>533</sup> East African Community Treaty, Articles 6(d) and 7(2).

<sup>534</sup> EACJ, *Burundi Journalists’ Union v. The Attorney General of the Republic of Burundi*, Reference No. 7 of 2013 (2015).

<sup>535</sup> *Id.*, par. 108.



On freedom of expression and the rights of the media, the *Burundi Journalists Union* case was important for its recognition of the importance of free press and freedom of expression for democratic good governance, the condemnation of government control over the content of publication by the media, and the need to protect journalistic sources. However, the absence of human rights expertise and jurisdiction may perhaps be seen in the fact that the EACJ was satisfied both with an accreditation scheme that allowed a state-mandated body to effectively determine who could practice as a journalist (which allows the state to control who qualifies as a member of the press), and a right to correction for public officials that gives them an advantage over ordinary people.

### *Appeal*

According to Article 35A of the East African Treaty, the EACJ allows appeals of decisions of the First Instance Division to the Appeals Division:

- on points of law;
- on jurisdiction; and
- to review procedural irregularities.<sup>536</sup>

Although this procedure appears limited, as it excludes appeals on determination of the facts, it is much more extensive than the limited review procedures allowed by the African Commission and the ACtHPR. The EACJ therefore provides an important opportunity for decisions to be challenged on appeal.

### *Remedies*

In *Burundi Journalists' Union v. The Attorney General of the Republic of Burundi*, the EACJ held that it had no authority to order a Partner State to amend its legislation and instead issued a declaratory order that the legislation violated the Treaty and directed the Partner State to comply with the decision.<sup>537</sup> This indicates that the EACJ is conservative in its use of remedies and may primarily rely on declarations of violations of the Treaty.<sup>538</sup>

### *Advisory Opinion*

According to Article 36 of the East African Treaty, a request for an advisory opinion must be lodged in the Appeals Division. The request must:

- contain a statement of the question upon which an opinion is required; and
- be accompanied by all relevant documents.

As with the African Commission and the ACtHPR, advisory opinions must be requests for interpretation of the law.<sup>539</sup>

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<sup>536</sup> East African Community Treaty, Article 35A.

<sup>537</sup> *Id.*

<sup>538</sup> See also EACJ, *Samuel Mukira Mohochi v. The Attorney General of the Republic of Uganda*, Reference No. 5 of 2011 (2013).

<sup>539</sup> East African Community Treaty, Article 36(i).

### *Sources of law*

The EACJ will primarily apply and interpret the Treaty. However, it will also refer to human rights instruments such as the African Charter, jurisprudence of the African Commission or the ACtHPR, or interpretative guidelines such as the Declaration of Principles on Freedom of Expression in Africa where these can be read to interpret the principles of the rule of law, democracy and good governance.

### *Advantages/disadvantages of the system*

The EACJ has many positive elements. For a regional court it is very fast in giving decisions, it issues binding legal judgments which the Community of East African States is required to enforce, and the legal regime it applies is closely linked to the legal systems of most of its member States (particularly Kenya, Uganda and Tanzania).

However, as the EACJ expressly does not have human rights jurisdiction, it has to rely on an often creative interpretation of the concepts of good governance, democracy and the rule of law to allow it to consider human rights cases. There is therefore an over-emphasis on the rule of law and on legal procedures and the rights available at the domestic level without the opportunity to infuse these rules with human rights values. Thus, for example, in *East Africa Law Society v. The Attorney General of the Republic of Burundi* the violation was a failure to comply with domestic law.<sup>540</sup> Where a violation of international law complies with domestic law the EACJ may be less progressive. Further, at times it appears that the EACJ will apply a very functional definition of the rule of law like it did in *Godfrey Magezi v. The Attorney General of the Republic of Uganda*:<sup>541</sup>

“It is our understanding that the rule of law, democracy and good governance are the major features of a civilized society and as such, the rule of law provides the general framework for good governance. Rule of law implies that every citizen is subject to the law including the lawmakers.”

The absence of explicit human rights jurisdiction on occasion leads to unfortunate decisions and States are allowed to escape censure for some of the most serious violations on what appear to be technicalities.<sup>542</sup> For example, the EACJ refused to adjudicate on rendition and illegal detention because the violations were not complained of within two months of the first arrest, even though the illegality continued at the date of the Reference and proceedings:<sup>543</sup>

“The Respondents laboured valiantly to avail to us all the abundant jurisprudence of the European Human Rights Court, the Inter-American Court, the African Commission and others, that recognize the principle of ‘continuing violations’. While this jurisprudence is perfect for its particular circumstances, it is all about human rights violations, governed by particular conventions on human rights. Furthermore, the background to that jurisprudence concerns

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<sup>540</sup> EACJ, *East Africa Law Society v. The Attorney General of the Republic of Burundi*, Reference No. 1 of 2014 (2015).

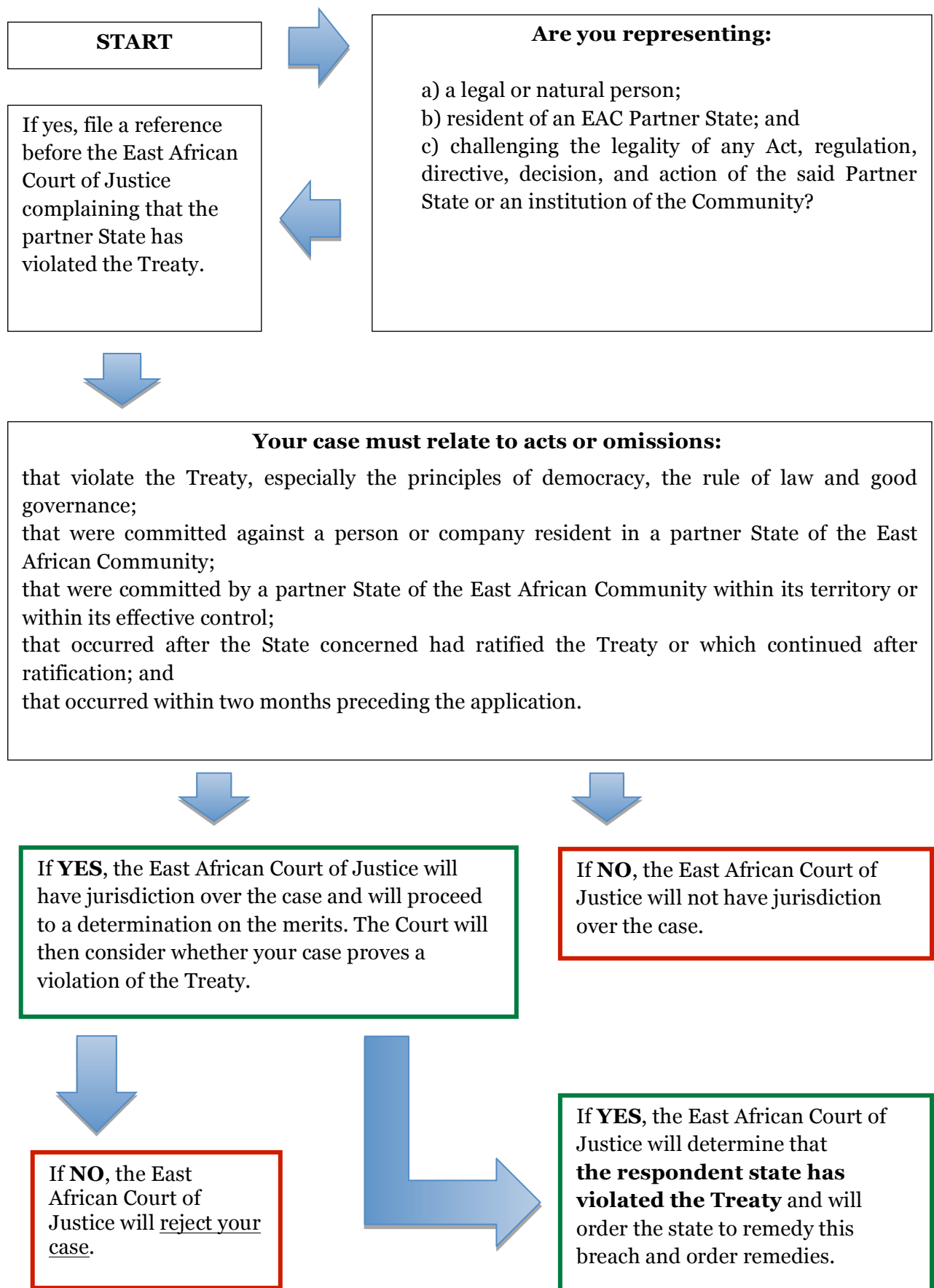
<sup>541</sup> EACJ, *Godfrey Magezi v. The Attorney General of the Republic of Uganda*, Reference No. 5 of 2013 (2014).

<sup>542</sup> In May 2005, the Council of Ministers issued a *Draft Protocol to Operationalise the Extended Jurisdiction of the East African Court of Justice*, however, the protocol has not yet been signed by Partner States.

<sup>543</sup> EACJ, *Attorney General of Uganda and Attorney General of Kenya v. Omar Awadh and Six Others*, Appeal No. 2 of 2012 (2013), par. 55.

criminal matters, whose prosecution does not in, most cases, have a prescription of time limit. In the instant case, the Respondents' cause of action was clearly the alleged infringement of Partner States' Treaty obligations – a matter which lies outside the province of human rights and the realm of criminal law.”

*Procedural flow-chart  
Process for bringing References to the East African Court of Justice*



### **Appeal**

If you lose the case at the First Instance Division you may appeal to the Appeals Division, which will reconsider the jurisdictional, legal and procedural questions and confirm, alter or overturn the original decision.

If the State loses the case it may also appeal to the Appeals Division.

## **XI. LIST OF RESOURCES**

### *International human rights instruments*

Universal Declaration of Human Rights

<http://www.un.org/en/universal-declaration-human-rights/>

International Covenant on Civil and Political Rights

<http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

African Charter on Human and Peoples' Rights

<http://www.achpr.org/instruments/achpr/>

European Convention on Human Rights

<http://www.echr.coe.int/pages/home.aspx?p=basictexts>

American Convention on Human Rights

[https://www.oas.org/dil/treaties\\_B-32\\_American\\_Convention\\_on\\_Human\\_Rights.htm](https://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm)

Johannesburg Principles

<https://www.article19.org/data/files/pdfs/standards/joburgprinciples.pdf>

Siracusa Principles

<http://www.refworld.org/docid/4672bc122.html>

### *Human rights bodies*

African Court on Human and Peoples' Rights

<http://en.african-court.org>

African Commission on Human and Peoples' Rights

<http://www.achpr.org>

East African Court of Justice

<http://eacj.org>

ECOWAS Community Court of Justice

<http://www.courtecowas.org>

Inter-American Court of Human Rights

<http://www.corteidh.or.cr/index.php/en>

European Court of Human Rights

<http://www.echr.coe.int/Pages/home.aspx?p=home>

UN Human Rights Committee

<http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx>

### *Freedom of expression resources*

Columbia Freedom of Expression Database:

<https://globalfreedomofexpression.columbia.edu/>

African Human Rights Case Law Analyser  
<http://caselaw.ihrda.org/>

African Human Rights Case Law Database  
<http://www.chr.up.ac.za/index.php/documents/african-human-rights-case-law-database.html>

WorldCourts  
<http://www.worldcourts.com/>

Refworld  
<http://www.refworld.org>

World Legal Information Institute  
<http://www.worldlii.org/>

University of Minnesota Human Rights Library  
<http://www1.umn.edu/humanrts/>

Free Access to Law Movement  
<http://www.fatlm.org/>

*Financial and legal support for press freedom cases*

Media Legal Defence Initiative  
<http://www.mediadefence.org>