PRESS FREEDOM IN AFRICA
How can States achieve compliance with standards set by the African courts and African Union, online and offline

4 November 2016, Columbia Law School, New York
Handout on key treaty standards and caselaw findings on press freedom obligations

Over the past few years, the African regional and sub regional courts have handed down important decisions impacting on States’ obligations to uphold press freedom and protect the right to freedom of expression as prescribed by the Banjul Charter. How can AU Member States navigate these norms and ensure they are compliant?

BACKGROUND
In December 2014, the African Court on Human and Peoples’ Rights handed down a landmark judgment in the case of *Lohé Issa Konaté v. Burkina Faso*, providing a binding interpretation on States’ obligations under Article 9 (freedom of expression) of the Banjul Charter. The Court held that imprisonment for defamation was not an acceptable penalty and that any penalties for exercising the right to free speech should be proportionate. The Respondent State was ordered to amend its legislation, which it did in 2015, and to pay compensation to the Applicant. In an earlier judgment in 2014, in the case of *Zongo and Others v. Burkina Faso*, the Court held that the Respondent State’s failure to properly investigate and prosecute the perpetrators in the case of the killing of investigative journalist Norbert Zongo constituted a violation of its obligations under both Article 7 (fair trial) and Article 9.

A similar finding had been made by the ECOWAS Community Court of Justice in June 2014 in the case of *Deyda Hydara Jr. and Others v. The Gambia*, concerning the failure to investigate the shooting of investigative journalist Deyda Hydara. The ECOWAS Court, too, found a violation of Article 9. It had previously handed down decisions finding the respondent state responsible for the torture (Musa Saidykhan v. The Gambia) and failure to investigate the disappearance (Chief Manneh v. The Gambia) of journalists.

In East Africa, in March 2015, the East African Court of Justice found in *Burundi Journalists’ Union v. Burundi* that provisions in the Respondent State’s new press law were in violation of its obligations to uphold the principles of democracy, rules of law, transparency and principles of human rights.

KEY CASELAW FINDINGS
Obligation to create a safe working environment for journalists
*Deyda Hydara Jr. and Others v. The Gambia*: “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. In the situation where attacks by state operatives against journalists are not investigated, let alone not to prosecute the suspects, the State will be in breach of its obligation under the Treaty and also the ACHPR, as such impunity has the effect of denying the journalists the right to function and thus stifling freedom of expression.”
Obligation to conduct proper investigations

Zongo and Others v. Burkina Faso: “the Court finds that the Respondent State has not acted with due diligence in seeking out, prosecuting and placing on trial those responsible for the murder of Nobert Zongo and his three companions. The Court notes, that in that aspect, the Respondent State had violated the right of the Applicants to have their case heard by competent national courts as guaranteed under article 7 of the Charter.”

Deyda Hydara Jr. and Others v. The Gambia: “A State will be neglecting its obligation under international law and treaty if it does not carry out effective investigations into crimes committed in its territory. A State also will be in breach of international law and treaty obligations if it fails to protect media practitioners including those critical of the regime. For freedom of expression also includes the freedom to criticize the government and it functionaries, subject to limitations imposed by the domestic laws. Article 2(3)(a) of [the] International Covenant on Civil and Political Rights is equally applicable to the Defendant to ensure effective investigations into the murder.”

Sanctions for speech offences must be proportionate; imprisonment for defamation is never acceptable

Lohé Issa Konaté v. Burkina Faso: “the 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 journalists in general and especially in the Applicant’s capacity as a journalist.

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.

The Court further notes that other criminal sanctions, be they (fines), civil or administrative, are subject to the criteria of necessity and proportionality; which therefore implies that if such sanctions are disproportionate, or excessive, they are incompatible with the Charter and other relevant human rights instruments.”

“The Court finds that the Respondent State has not demonstrated that the … suspension of the Weekly L’Ouragan for a period of six months was necessary to protect the rights and reputation of the Prosecutor of Burkina Faso…”

The Court adds that, as regards … the payment of a fine, damages, interests and costs, the Respondent has failed to show that the amount … does not excessively exceed the income of the Applicant. The amounts of the fine, damages, interested and costs seem all the ore excessive in that the Applicant was deprived of revenue from publishing the weekly, due to its suspension for a period of six months.”

Orders: legislative change

Lohé Issa Konaté v. Burkina Faso: “[the Court] orders the Respondent State to 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:

• by repealing custodial sentences for acts of defamation; and
by 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.”

Orders: release from detention

*Chief Manneh v. The Gambia* “The Court has found that the applicant was arrested on 11 July 2006 by the police force of The Gambia and has since been detained *incommunicado*, and without being charged. He has not been told the reasons for his arrest, let alone the fact that it was in accord with a previously laid down law. The Court holds these acts clearly violate the provisions of articles 2, 6 and 7(1) of the African Charter on Human and Peoples’ Rights. Furthermore, in view of the fact that these violations of applicant’s human rights were caused by the defendant, which refused to appear in Court, it entitles the applicant to damages. And the Court considers that this violation should be terminated and the dignity of the applicant’s person is to be restored.”

Orders: conduct investigations

*Zongo and Others v. Burkina Faso* “the Court grants the Applicants’ request to order the Respondent State to reopen investigations with a view to prosecute and bring to trial the perpetrators of the murder of Norbert Zongo and his three companions, and thus shed light on this matter and do justice to the families of the victims.”

Orders: payment of compensation

*Lohé Issa Konaté v. Burkina Faso* the Respondent State was ordered to pay the Applicant the equivalent of USD 50,000 for loss of income, USD 216 for medical and transport expenses and USD 20,000 in compensation for moral damage suffered by the Applicant and his family.

*Zongo and Others v. Burkina Faso* the Respondent State was ordered to pay the equivalent of USD 34,000, USD 20,000 and USD 13,600 to different family members of the deceased Norbert Zongo for moral prejudice suffered, and the equivalent of USD 59,000 in total in fees and expenses for the proceedings before the Court.

*Deyda Hydara Jr. and Others v. The Gambia* the Respondent State was ordered to pay USD 50,000 to the plaintiff’s for the failure to investigate the assassination of Deyda Hydara Sr.

*Musa Saidykhan v. The Gambia* the Respondent State was ordered to pay the plaintiff USD 200,000 in damages for physical injuries resulting from torture and having to abandon his job and country.

*Chief Manneh v. The Gambia* the Respondent State was ordered to pay the plaintiff USD 100,000 in damages for having arbitrarily detained him.

**KEY TREATY PROVISIONS**

**Regional**

*African Charter on Human and Peoples’ Rights*

**Article 7**

1. Every individual shall have the right to have his cause heard. This comprises:

   a. The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;
   
   b. The right to be presumed innocent until proved guilty by a competent court or tribunal;
   
   c. The right to defence, including the right to be defended by counsel of his choice;
   
   d. The right to be tried within a reasonable time by an impartial court or tribunal.
2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

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.

Article 27
1. Every individual shall have duties towards his family and society, the State and other legally recognised communities and the international community.
2. The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.

African Commission Declaration of Principles on Freedom of Expression in Africa

Principle I
1. Freedom of expression and information, including the right to seek, receive and impart information and ideas, either orally, in writing or in print, in the form of art, or through any other form of communication, including across frontiers, is a fundamental and inalienable human right and an indispensable component of democracy.
2. Everyone shall have an equal opportunity to exercise the right to freedom of expression and to access information without discrimination.

Principle II
1. No one shall be subject to arbitrary interference with his or her freedom of expression.
2. Any restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary and in a democratic society.

Principle XI
1. Attacks such as the murder, kidnapping, intimidation of and threats to 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, to punish perpetrators and to ensure that victims have access to effective remedies.
3. In times of conflict, States shall respect the status of media practitioners as non-combatants.

Principle XII
1. States should ensure that their laws relating to defamation conform to the following standards:
   - no one shall be found liable for true statements, opinions or statements regarding public figures which it was reasonable to make in the circumstances;
   - public figures shall be required to tolerate a greater degree of criticism; and
   - sanctions shall never be so severe as to inhibit the right to freedom of expression, including by others.
2. Privacy laws shall not inhibit the dissemination of information of public interest.

Principle XIII
States shall review all criminal restrictions on content to ensure that they serve a legitimate interest in a democratic society. Freedom of expression should not be restricted on public order or national
security grounds unless there is a real risk of harm to a legitimate interest and there is a close causal link between the risk of harm and the expression.

**African Declaration on Internet Rights and Freedoms**

**Principle 3**

Everyone has the right to hold opinions without interference. Everyone has a right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds through the Internet and digital technologies and regardless of frontiers.

The exercise of this right should not be subject to any restrictions, except those which are provided by law, pursue a legitimate aim as expressly listed under international human rights law (namely the rights or reputations of others, the protection of national security, or of public order, public health or morals) and are necessary and proportionate in pursuance of a legitimate aim.

**Principle 11**

Everyone has the right to due process in relation to any legal claims or violations of the law regarding the Internet.

Standards of liability, including defences in civil or criminal cases, should take into account the overall public interest in protecting both the expression and the forum in which it is made; for example, the fact that the Internet operates as a sphere for public expression and dialogue.

**Sub-regional**

**East African Community Treaty**

**Article 6**

The fundamental principles that shall govern the achievement of the objectives of the Community by the Partner States shall include:

(a) mutual trust, political will and sovereign equality;
(b) peaceful co-existence and good neighbourliness;
(c) peaceful settlement of disputes;
(d) good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples’ rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights;
(e) equitable distribution of benefits; and
(f) co-operation for mutual benefit.

**Article 7**

1. The principles that shall govern the practical achievement of the objectives of the Community shall include:

(a) people-centered and market-driven co-operation;
(b) the provision by the Partner States of an adequate and appropriate enabling environment, such as conducive policies and basic infrastructure;
(c) the establishment of an export oriented economy for the Partner States in which there shall be free movement of goods, persons, labour, services, capital, information and technology;
(d) the principle of subsidiarity with emphasis on multi-level participation and the involvement of a wide range of stakeholders in the process of integration;
(e) the principle of variable geometry which allows for progression in co-operation among groups within the Community for wider integration schemes in various fields and at different speeds;
(f) the equitable distribution of benefits accruing or to be derived from the operations of the Community and measures to address economic imbalances that may arise from such operations;
(g) the principle of complementarity; and
(h) the principle of asymmetry.

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.

**Revised ECOWAS Treaty**

**Article 66**

1. In order to involve more closely the citizens of the Community in the regional integration process, Member States agree to co-operate in the area of information.

2. To this end they undertake as follows:
   a) to maintain within their borders, and between one another, freedom of access for professionals of the communication industry and for information sources;
   b) to facilitate exchange of information between their press organs; to promote and foster effective dissemination of information within the Community;
   c) to ensure respect for the rights of journalists;
   d) to take measures to encourage investment capital, both public and private, in the communication industries in Member States;
   e) to modernize the media by introducing training facilities for new information techniques; and
   f) to promote and encourage dissemination of information in indigenous languages, strengthening co-operation between national press agencies and developing linkages between them.

**International**

**International Covenant on Civil and Political Rights**

**Article 19**

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.

**Universal Declaration of Human Rights**

**Article 19**

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.