Strengthening Judiciary Systems and African Courts to protect Safety of Journalists and End Impunity

In preparation of the International Day to End Impunity for Crimes against Journalists

Seminar Co-organized by
The African Court on Human and Peoples’ Rights and UNESCO
10 September 2016
Arusha, United Republic of Tanzania

AFRICAN JURISPRUDENCE AND INTERNATIONAL STANDARDS

Sharing knowledge on African jurisprudence and inter-court exchange of best practices on how judicial actors can play an instrumental role on applying international standards on freedom of expression, the importance of safety of journalists, ending impunity and decriminalization of defamation.

Presentation

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Introduction

1. Freedom of expression can be defined as the right to communicate one’s opinions and ideas without fear of government retaliation or censorship. The African Commission on Human and Peoples’ Rights (African Commission) in its Resolution 338 underlined the fundamental importance of freedom of expression and access to information\(^1\). Freedom of expression is indeed considered to be one of the essential foundations of a democratic society\(^2\). Therefore, this right is protected by a wide range of treaties, resolutions, international instruments and national constitutions.

2. The International Covenant on Civil and Political Rights states in its article 19 (2) that “everyone shall have the right to freedom of expression; this right shall include freedom to seek and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in form of art, or through any other media of his choice”. The African Charter on Human and Peoples’ Rights (African Charter) states on its article 9(2) that “every individual shall have the right to express and disseminate his opinions within the law”. Similarly, article 4(g) of the Revised Treaty of the Economic Community of West African States (ECOWAS) also emphasizes the “recognition, promotion and protection of human and peoples’ rights in accordance with the provision of the African Charter”. The African Charter on Democracy Elections and Governance (the African Charter on Democracy) expands a more broad manner also supports the protection of that right by emphasizing the respect of human rights and democratic principles\(^3\). Finally, the East African Community Treaty provides that “the fundamental principles that shall govern the achievement of the objectives of the Community by the Partner States shall include: (…) (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

\(^1\) Resolution to revise the Declaration of Principles of Freedom of Expression in Africa - ACHPR/Res. 33 (EXT.OS/XX) 18 June 2016.
\(^3\) See Article 3 (1) of the African Charter on Democracy.
peoples’ rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights”\(^4\).

3. Judicial actors, such as the African Court on Human and Peoples’ Rights (African Court), the African Commission, the European Court of Human Rights (European Court), the Inter-American Court of Human Rights (IACHR), the ECOWAS Court of Justice and the East Africa Court of Justice, interpret and apply these international standards in order to ensure protection of freedom of expression.

4. More specifically, in December 2014, the African Court delivered a judgment in the first case before it on the issue of press freedom in Lohé Issa Konaté v Burkina Faso (Konaté case)\(^5\). Journalist Lohé Issa Konaté wrote two newspaper articles in which he accused a state prosecutor of corruption. In response, the prosecutor filed a complaint against him and a co-defendant for defamation, public insult and contempt of court. The Court held that the conviction of criminal defamation against the journalist is a violation of the freedom of expression and freedom of press. This case has been lauded as a landmark case on this issue. The Court’s judgment in this case will be referred to throughout this paper.

5. The questions that need to be answered are:
   a. What are the relevant international standards?
   b. How have international judicial institutions interpreted and applied them?

6. Firstly, it is essential to underline that the main international standard concerning freedom of expression is that its restrictions can only be limited. Secondly, it has to be emphasizing that the jurisprudence of international judicial institutions is developing towards an expansion of what the protection of freedom of expression includes.

\(^4\) See Article 6(d) of the Treaty for the Establishment of the East African Community.

The limited restrictions of the freedom of expression standard

7. Even though the freedom of expression is a fundamental Human Right, it has to be balanced with other fundamental rights and can therefore be restricted.

8. However, because of its importance in a democratic society, the restrictions of this freedom can only occur in limited circumstances. The African Commission stated that although in the African Charter the grounds of limitation to freedom of expression are not expressly provided as in other international and regional Human Rights treaties, “within the law” under article 9(2) provides a leeway to cautiously fit in legitimate and justifiable individual, collective and national interests as grounds of limitation. The African Commission was clearer on those conditions to the restriction of freedom of expression by stating that “any restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary and in a democratic society.” This analysis is shared by the African Court stating in its landmark decision that it has to consider “whether restrictions on the freedom of expression imposed by the Respondent State are provided by “law”, within international standards, pursue a legitimate objective and are a proportionate means to attain the objective being sought.”

9. Firstly, an interference with the right to freedom of expression must have been prescribed by law. This first condition has been interpreted by the international Human Rights actors as entailing a requirement of foreseeability. Therefore, a norm could not be regarded as a “law” unless it was formulated with sufficient precision to enable the person concerned to regulate his/her

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6 Article 10(1) of the European Convention for instance directly states the conditions in which there can be a restriction to freedom of expression.
7 ACmHPR, Kenneth Good v Botswana Comm. N°313/05. See also ACmHPR, Malawi African Ass’n v Mauritania Comm n°54/91 (2000).
8 Resolution n°64 on the adoption of the Declaration on Principles of Freedom of Expression, 23 October 2002.
10 ACmHPR, Malawi African Ass’n v Mauritania Comm n°54/91 (2000). See also Article 10 (2) of the European Convention/ Perinçek v Switzerland, n° 27510/08, GC, 15/10/2015, para. 124.
conduct he/she needed to be able to foresee, to a degree that was reasonable in the circumstances, the consequences that a given action could entail\textsuperscript{11}. 

10. In line with settled principles, the African Court stated that, “to be considered as “law”, norms have to be drafted with sufficient clarity to enable an individual to adapt his behaviour to the rules and made accessible to the public. The law cannot give persons who are in charge of its application unlimited powers of decision on the restriction of freedom of expression. Laws must contain rules which are sufficiently precise to allow persons in charge of their application to know what forms of expression are legitimately restricted and what forms of expression are unduly restricted”\textsuperscript{12}. The European Court has also stated that that these consequences did not need to be foreseeable with absolute certainty\textsuperscript{13}.

11. Secondly, it has to be established that the law has a legitimate purpose. In the Konaté case the African Court, stated that “the reasons for possible limitations must be based on legitimate public interest”\textsuperscript{14}. This condition, like the American Convention specifies it, ensures respect for the rights or reputations of others or the protection of national security, public order or public health or morals.

12. The last condition is that the restriction of freedom of expression needs to be necessary in a democratic society\textsuperscript{15}. This last condition is being applied by the judicial actors through a proportionality test. The African Court applied this test in the Konaté case by assessing whether that restriction is a proportionate measure to achieve the set objective, namely, the protection of the rights of

\textsuperscript{11} The Sunday Times v The United Kingdom n°1, 26 April 1979, para. 48-49, Series A n°30. See also UNHR Comm, Keum-Tae Kim v Republic of Kore, COMm. N°574/1994 (Jan 04, 1999).


\textsuperscript{13} Ozturk v Turkey, GC, n°22479/93, para. 54, ECHR 1999-VI.


\textsuperscript{15} Handyside v The United Kingdom, n°5493/72, 7/12/1976, Series A n°24.
The restriction then must be proportionate to the interest that justifies it and closely tailored to accomplishing this legitimate objective, interfering as little as possible with the effective exercise of the right to freedom of expression. More precisely, the African Court held that “the reasons for possible limitations must be based on legitimate public interest and the disadvantages of the limitation must be strictly proportionate to and absolutely necessary for the benefits to be gained.” Therefore, the court must examine the alleged violation, given all the facts in the case and the context and circumstances in which the acts occurred.

13. Those limitations to restrictions of freedom of expression are general principles that all international judicial institutions apply. Furthermore, their jurisprudence is expanding what the protection of freedom of expression includes.

**The expansion of the protection of freedom of expression standard**

- The importance of the safety of journalists

14. Another topic on which the international judicial actors agree is the strong link there is between the freedom of expression, a free media and the safety of journalists. The East African Court of Justice underlines itself that “the principles of democracy must of necessity include adherence to press freedom.” Journalists and media are the cornerstone of any democratic society as they are of crucial importance for the promotion of Human Rights, the rule of law and democracy. Journalists ensure transparency and accountability in the management of public affairs and matters of public

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interest. This duty is mirrored by the public’s right to receive such information\textsuperscript{20}.

15. It should be noted that, the Windhoek Declaration\textsuperscript{21} which was endorsed by the UNESCO General Conference was adopted by African journalists to, among others, show the connection between a fully independent press and successful participatory democracy. A free press is considered essential to democracy and a fundamental human right. This is why the Declaration calls for “the establishment, maintenance and fostering of an independent, pluralistic and free press”\textsuperscript{22}.

16. The safety of journalists is therefore a fundamental pillar of the right to freedom of expression and of free media. Journalists can be exposed to fear for their safety which prompts them to self-censor and the public will then be deprived of reliable, critical and independent information. These threats facing journalists in African countries were also elaborated on in the in the Windhoek Declaration. It has been argued also that journalists’ solemn duties to the case of human rights call for reciprocity in the form of special protection and assistance\textsuperscript{23}. This is the reason why the revised treaty of ECOWAS imposes on its article 66 “an obligation on Member States to assure a safe and conducive atmosphere in the practice of journalism”. Applying this article, the ECOWAS court stated that a State breaches international law and its treaty obligation when “it fails to protect media practitioners including those critical of the regime”\textsuperscript{24}.

17. That safety includes physical protection against threats and violence and protection against undue interference (legal or administrative).

\textsuperscript{20} Lingens v Austria, n°9815/82, Series A n°103, 8/07/1986, para 41.
\textsuperscript{21} Windhoek Declaration on Promoting Independent and Pluralistic Media, adopted on 3 May 1991.
\textsuperscript{22} See Paragraph 1 of the Windhoek Declaration.
\textsuperscript{24} Hydara v Gambia (ECW/CCJ/APP/30/11), 10 June 2014, p.6.
The African Commission expressed its concern about “the widespread violation of the right of freedom of expression by Member States to the Charter through harassment, arbitrary arrest and detention of journalists, victimization of media houses and criminal and civil laws that inhibit the right to freedom of expression”\textsuperscript{25}. As a consequence, the African Commission decided to adopt the Declaration of Principles on Freedom of expression (the African Declaration). This African Declaration, as the Inter-American Declaration\textsuperscript{26}, states that “the murder, kidnapping, intimidation of and/or threats to social communicators, as well as the material destruction of communications media violate the fundamental rights of individuals and strongly restrict freedom of expression”\textsuperscript{27}.

International judicial actors therefore agree on expanding the protection of the freedom of expression through which the protection of the journalists as they are considered to be means of how freedom of information is achieved.

That the safety of journalists implies the respect of two international standards:

- **Ending impunity**

Ending impunity is one of the biggest obstacles for effectively ensuring the safety of journalists. It is defined as a total lack of investigation, prosecution, capture, trial and conviction of those responsible for the violation of Human Rights\textsuperscript{28}. The African Charter on Democracy in its Article 7 provides that: “State Parties shall take all necessary measures to strengthen the Organs of the Union that are mandated to promote and protect human rights and to fight impunity”.

\textsuperscript{25}Resolution on freedom of expression, n°54, 7 May 2001
\textsuperscript{26}Principle 9
\textsuperscript{27}Declaration of Principles on Freedom of Expression, African Commission, Section XI (1).
22. In the context of freedom of expression, States have to ensure accountability for threats and attacks against journalists by investigating any allegation, bringing perpetrators to justice in accordance with international Human Rights standards and providing adequate remedies to the victims.

23. There are challenges arising from lack of implementation of international standards. An issue that was still a concern in 1991 has it is stated in the Windhoek Declaration: "In Africa today, despite the positive developments in some countries, in many countries journalists, editors and publishers are victims of repression (...) and are restricted by economic and political pressures"\(^{29}\). Since some States do not fully respect international standards, judicial actors are there to ensure that States comply with their international obligations. In this regard, the African Court in the Konaté case held that “by failing to adequately investigate the murder of an investigative journalist, Burkina Faso had indirectly stymied freedom of expression"\(^{30}\). The State’s failure to investigate impacted in freedom of expression since journalists would then fear reprisals.

24. Establishing a binding precedent within its jurisdiction, the ECOWAS Court of Justice emphasized that “the consequence of systematic impunity has a chilling effect on journalists attempting to exercise the right to freedom of expression”\(^{31}\). There is therefore a need for States to respect the freedom of expression, in action and not just in words, as commitments at the international level have to translate to action at the national level. The first step towards that accomplishment is to ensure that Member States are transparent. Indeed, as the East Africa Court of Justice specifies, “a free press goes hand in hand with the principles of accountability and transparency”\(^{32}\). Furthermore, transparency is also espoused in the African Charter on Democracy which provides that “State Parties shall promote good governance by ensuring transparent and accountable administration” and emphasizing that they “shall

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\(^{29}\) See paragraph 6 of the Windhoek Declaration.


\(^{31}\) Hydara v Gambia (ECW/CCJ/APP/30/11), 10 June 2014.

take measures to ensure and maintain (...) public trust and transparency between political leaders and the people”33.

25. The IACHR also underlines that the States’ obligation to investigate must be undertaken in a serious manner and not as a mere formality. Therefore, when States have not been successful in protecting journalists, they must investigate Human Rights violation against journalists and prosecute the perpetrators, as it is stated in the principle 9 of the Inter-American Declaration of Principles on Freedom of Expression “it is the duty of the States to prevent and investigate Human Rights violations against journalists and prosecute the perpetrators”. State must use all legal means to combat impunity, which if unchecked fosters chronic recidivism of human rights violation and total defenselessness of victims and their relatives34.

- Decriminalization of defamation

26. The other obstacle for effectively ensuring the safety of journalists is the criminalization of defamation. Freedom of expression is subject to the respect for the rights or reputations of others. It can therefore be restricted if the content of the speech is defamatory. A defamatory statement is a statement likely to lower that person in the estimation of reasonable people and in particular to cause that person to be regarded with feelings of hatred, contempt, ridicule, fear or dislike. In addition, to be defamatory, a statement must state or imply assertions of facts which are capable of being proven false.

27. The issue is that defamation laws, in certain States, were increasingly being used to silence journalists. It is then crucial that defamation be decriminalized.

28. It is towards this evolution that the judicial actors are heading. Indeed, the African Court was asked whether criminal penalties for defamation gave rise to  

33 See Articles 12 (1) and 13 of the African Charter on Democracy.
an impermissible restriction of one’s freedom of expression right. Applying the proportionality test, the African Court applied the three questions analysis set out by the African Commission\textsuperscript{35}. It has to analyze first whether the language of the domestic law is clear enough that parties can easily conform to it, then whether the restriction serves some legitimate purpose and finally whether the limitation is necessary to achieve that purpose.

29. The real issue in the case was to determine whether or not the criminal penalty imposed was proportionate against the freedom of expression. According to the African Court, penalties should only go as far as strictly necessary to achieve an objective. Here, the Court states that criminal penalties for defamation is not proportionate: “apart from serious and very exceptional circumstances for example, incitement to international crimes (...) 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 (article 9 of the African Charter and Article 66 (2) (c) of the Revised ECOWAS Treaty)”\textsuperscript{36}. Furthermore, it underlines 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”\textsuperscript{37}.

30. This jurisprudence is similar to that of other regional and international judicial actors. Indeed, the IACHR, also applying the international standard of the proportionate test, considers that criminal defamation is not the least restrictive means of limiting freedom of expression so as to protect other rights\textsuperscript{38}. Therefore, civil defamation suits are considered to suffice to repair damage to reputations in that context, through compensatory damages or punitive damages.

\textsuperscript{36} Idem, para. 164 and 165.
\textsuperscript{37} Idem, para. 166.
31. The UN Special Rapporteur on Freedom of Expression also shared that opinion stating that “Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws”\textsuperscript{39}.

32. The European Court, also working towards decriminalization of defamation, is however less categorical stating that the use of criminal law sanctions in defamation cases is not in itself disproportionate, however the imposition of such sanctions will be taken into consideration proportionality\textsuperscript{40}.

33. Furthermore, the African Court, in the Konaté case, agrees that there is a higher level of protection from defamation suits for statements made about a person whose activities are within the domain of public interest: The Court held that “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”. Additionally, the Court stated 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 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’\textsuperscript{41}.

34. The IACHR pursues on saying that those individuals who have an influence on matters of public interest have laid themselves open voluntarily to a more intense public scrutiny and, consequently, in this domain, they are subject to a

\textsuperscript{39} House of Commons Culture Media and Sport Committee, Press standards, privacy and libel, 2009-10, HC 362-11 (UK).
\textsuperscript{40} Radio France and others v France, n°53984/00, 30/03/04, para. 40.
higher risk of being criticized. The European Court has also emphasized that freedom of expression leaves a much reduced margin to any restriction of political discussion or discussion of matter of public interest.

35. However, none of those judicial actors have pronounced themselves regarding criminal proceedings in defamation cases against private people.

Special Rapporteurs

36. In serious cases, in addition to judicial procedures, special ones are developed such as Special Rapporteurs for the Freedom of Expression.

37. Concerning the decriminalization of defamation, the African Union Rapporteur for freedom of expression and access to information therefore underlined that “criminal defamation, insult and false news are often used by governments to punish legislative criminal expression”.

38. Concerning the fight against impunity, the OAS Special Rapporteur for freedom of expression may personally contact State authorities to express concern or make recommendations in steps to be taken to protect the freedom of expression.

39. It is with the full collaboration of the Member States that those Special Rapporteurs fulfil their mission.

Conclusion

40. The trend of regional human rights courts and international judicial institutions is to restrict the limitations of freedom of expression that can occur because of the central role this right is playing in a democratic society.

41. The Konaté case is seen as a landmark ruling that should change the nature of the debate throughout Africa and stand as a reference to State Parties to the Charter regarding their obligations.

42. Applying those international standards in an expansive way those judicial actors play an instrumental role in the protection of the different principles regarding the protection of freedom of expression. That being said, it is essential to underline that the task of those judicial actors is not to take the place of the competent national authorities but rather to review the decisions they delivered in line with the principle of subsidiarity. The Courts have to look at the interference complained of in the light of the case as a whole and determine whether the reasons adduced by the national authorities to justify it are “relevant and sufficient” and whether it was “proportionate to the legitimate aim pursued”. In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied the texts relating to freedom of expression and, moreover, that they relied on an acceptable assessment of the relevant facts.\textsuperscript{44}

43. Therefore, the instrumental role that international judicial actors are playing in the protection of freedom of expression has to be in collaboration with the local courts which are also charged with applying international principles.

44. This is why the African Commission intervened by adopting the African Declaration as a guideline for the national courts regarding the protection of freedom of expression. That instrument was drawn from a comprehensive range on international standards and jurisprudence, to elaborate and expand the nature, content and extend of the right to freedom of expression. Moreover, being aware that the situation of freedom of expression in some part of the African continent is critical, the African Commission called on Member States to take all necessary measures in order to uphold their

\textsuperscript{44} Hertel v. Switzerland, 25 August 1998, § 46, Reports 1998·VI; Pedersen and Baadsgaard v. Denmark [GC], no. 49017/99, §§ 68-71, ECHR 2004·XI; Steel and Morris v. the United Kingdom, no. 68416/01, § 87, ECHR 2005·II; and Mamère v. France, no. 12697/03, § 19, ECHR 2006·XIII
obligations under the African Charter and other international instruments and to extend their full collaboration with the mandate of the Special Rapporteur on freedom of expression in Africa, in order to strengthen the right on the African continent and work towards the effective implementation of the principles enshrined in the African Declaration and other applicable Human Rights standards in the region in order to achieve this goal.\footnote{Resolution 99 on situation of freedom of expression in Africa, 29 November 2006.}