

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

SUIT NO: ECW/CCJ/APP/36/15

BETWEEN:

1. THE FEDERATION OF AFRICAN JOURNALISTS
2. FATOU CAMARA
3. FATAOU JAW MANNEH
4. ALHAGIE JOBE
5. LAMIN FATTY

.....**Applicants**

- AND -

THE REPUBLIC OF THE GAMBIA

..... **Defendant**

BRIEF OF *AMICI CURIAE* AMNESTY INTERNATIONAL, ARTICLE 19, CANADIAN JOURNALISTS FOR FREE EXPRESSION, COMMITTEE TO PROTECT JOURNALISTS, FREEDOM HOUSE, PEN INTERNATIONAL (and its local chapters PEN AFRIKAANS, PEN AMERICAN CENTER, PEN ERITREA IN EXILE, PEN GHANA, PEN KENYA, PEN NIGERIA, PEN SIERRA LEONE, and PEN SOUTH AFRICA), REPORTERS WITHOUT BORDERS, AND RIGHT 2 KNOW CAMPAIGN SOUTH AFRICA

1. This proceeding involves a fundamental question of the highest importance—namely, whether The Gambia, by applying its criminal laws on sedition, criminal libel and false news to prosecute, fine and/or imprison the Applicants and other journalists for publishing reports critical of the government and its leaders, violates their rights (and simultaneously Gambian citizens’ rights) to freedom of expression, freedom of the press and access to information under (i) Article 66(2)(c) of the Revised ECOWAS Treaty; (ii) Article 9 of the African Charter on Human and People’s Rights (African Charter) and (iii) Article 19 of the International Covenant on Civil and Political Rights (ICCPR).

2. As a threshold matter, Article 19 of the ICCPR provides a three-part framework for analyzing State laws and restrictions—like those at issue here—that interfere with the right to freedom of expression. Pursuant to Article 19(3) of the ICCPR, to be permissible, a State restriction on the right to freedom of expression must meet each of the following requirements: (a) the restriction must be “provided by law”; (b) the restriction must serve one of a narrow, specified list of “legitimate aims” (namely, respect for the rights or reputations of others or protection of national security, public order, public health or morals); and (c) the restriction must be proportionate and “necessary”, in the sense that the interference with freedom of expression must be proportionate to the legitimate aim pursued and that there are no other, less intrusive measures available to achieve that legitimate aim. This same framework for analyzing the permissibility of restrictions on the right to freedom of expression was recently applied by the African Court on Human and Peoples’ Rights, in *Konate v. Burkina Faso*, Application No. 004/2013 (2014), to declare that Burkina Faso violated Article 9 of the African Charter, Article 66(2)(c) of the Revised ECOWAS Treaty and Article 19 of the ICCPR due to the existence in its laws of custodial sentences for defamation.¹ Similarly, Article 2(2) of the African Commission on Human and Peoples’ Rights’ Declaration of Principles on Freedom of Expression in Africa (2002) expressly states

¹ ACtHPR, *Lohe Issa Konate v. Burkina Faso*, App. No. 004/2013 (2014), pp. 33-45.

that “[a]ny restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary in a democratic society.”

3. *Amici* respectfully submit that The Gambia’s use of its criminal defamation, false news and sedition laws to prosecute, fine and imprison the Applicants and other journalists for their criticism of public officials infringes free expression rights and violates The Gambia’s international legal obligations under Article 19 of the ICCPR, Article 9 of the African Charter and Article 66 (2)(c) of the ECOWAS Treaty in two fundamental respects:

3.1 First, criminal prosecutions against journalists and others for exercising freedom of expression may be considered permissible only in “exceptional circumstances” such as cases of hate speech or incitement to violence, and imprisonment is never a necessary or proportionate remedy for alleged defamation. Instead, civil defamation suits and civil remedies are the appropriate avenue of relief.

3.2 Second, and moreover, speech and news reporting about government officials and government affairs is entitled to heightened (not lesser) protection; and laws that make it a crime to bring the government or its heads of state into disrepute through public criticism (as The Gambia’s sedition law does here)² do not comport with this mandate.

A. OTHER THAN IN EXCEPTIONAL CIRCUMSTANCES NOT PRESENT HERE, CRIMINAL PROSECUTION FOR EXERCISING FREEDOM OF EXPRESSION IS NOT PERMISSIBLE, AND CUSTODIAL SENTENCES ARE NEVER AN APPROPRIATE REMEDY FOR ALLEGED DEFAMATION

4. There exists near-universal consensus that criminalization of speech on matters of public concern is permissible only in exceptional circumstances involving the gravest of threats, such as incitement to violence or hate speech, and that criminal prosecution and imprisonment for alleged defamation of public officials is never a “necessary” or “proportionate” government interference with the right to freedom of expression, since there exists a far less intrusive measure available for remedying alleged injuries to individual reputation—namely, civil defamation remedies.

5. These fundamental free expression principles have been applied by regional human rights courts across the globe. For example, in a similar case recently decided by the African Court on Human and Peoples’ Rights, *Konate v. Burkina Faso*, Application No. 004/2013 (2014), the applicant was a newspaper editor charged with criminal defamation and with tarnishing the honour of a legal officer based on two articles in which he reported on a State Prosecutor’s alleged ties to criminal activity. The applicant was convicted on all charges and sentenced to a year in prison. Analyzing the relevant provisions of Burkina Faso’s criminal defamation laws, the African Court declared that Burkina Faso had violated Article 9 of the African Charter, Article 19 of the ICCPR and Article 66(2) of the Revised ECOWAS Treaty due to the existence in its national laws of custodial sentences for defamation.³ Finding that Burkina Faso “failed to show how a penalty of imprisonment was a necessary limitation to freedom of expression in order to protect the rights and reputations of members of the judiciary,” the African Court broadly ruled that, apart from “serious and

² Section 52 (1) of The Gambia’s Criminal Code provides that a person commits the criminal offense of sedition if she “utters any seditious words,” prints “any seditious publication” or otherwise acts with “seditious intention.” In turn, Section 51 (1)(a) of the Criminal Code defines “seditious intention” to include “an intention...to bring into hatred or contempt or to excite disaffection against the person of the President, or the Government of The Gambia, as by law established.”

³ ACtHPR, *Lohe Issa Konate v. Burkina Faso*, App. 004/2013 (2014), pp. 44, 48.

very exceptional circumstances” involving incitement to crimes or hate speech, “violations of laws on freedom of speech and the press cannot be sanctioned by custodial sentences.”⁴

6. Similarly, in a series of cases involving Costa Rica, Paraguay, Chile and Panama, the Inter-American Court of Human Rights has rejected the sanction of imprisonment as punishment for defamation on the grounds that it is a disproportionate and unnecessary remedy for injury to reputation and violates the right to freedom of expression.⁵ The European Court of Human Rights has likewise repeatedly held that “imposing criminal sanctions on someone who exercises the right to freedom of expression can be considered compatible with Article 10 [the free expression provision of the European Convention on Human Rights]...only in exceptional circumstances, notably where other fundamental rights have been seriously impaired.”⁶ The European Court has clarified that such “exceptional circumstances” which might warrant criminal sanctions constitute “cases of hate speech or incitement to violence.”⁷ By contrast, the European Court has never upheld a prison sentence for defamation. Indeed, the European Court has frequently stated that criminal sanctions are disproportionate when civil remedies are available,⁸ and has accordingly stressed that complaining parties should seek “recourse to means of civil law which, in the Court’s view, are appropriate in cases of defamation.”⁹

7. The United Nations Human Rights Committee (the body responsible for overseeing implementation of the ICCPR) also condemns imprisonment as a punishment for defamation; and has made it clear that criminal prosecution and criminal penalties for defamation are not necessary or proportionate under Article 19 of the ICCPR. Thus, in its General Comment 34 to Article 19 of the ICCPR, the UN Human Rights Committee has stated with respect to defamation laws that “[c]are should be taken by States parties to avoid excessively punitive measures and penalties” and that “imprisonment is never an appropriate penalty.”¹⁰ Consistent with these principles, in *Alexander Adonis v. The Philippines*, the UN Human Rights Committee concluded that the Philippines’ Revised Penal Code, which penalized libel as a criminal offense, was incompatible with Article 19(3) of the ICCPR.¹¹

8. In a 2002 joint declaration, the three special international mandates for promoting freedom of expression—the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, the OAS Special Rapporteur on Freedom of Expression and the OSCE Representative on Freedom of the Media—reiterated that “[c]riminal defamation is not a justifiable restriction on freedom of expression;

⁴ *Id.*, p. 44-45. See also *id.*, p. 44 (“the custodial sentence under the above [criminal defamation] 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”).

⁵ IACtHR, *Herrera-Ulloa v. Costa Rica*, 2 July 2004, Series C, No. 107, par. 124-135; IACtHR, *Canese v. Paraguay*, 31 August 2004, Series C, No. 111, p.104; IACtHR, *Palamara Iribarne v. Chile*, 22 November 2005, Series C, No. 135, para 63; IACtHR, *Trisant Donoso v. Panama*, Series C, No. 193 (2009), par. 20.

⁶ ECtHR, *Gavrilovici v. Moldova*, App. 25464/05 (2009), par. 60; see also ECtHR, *Cumpana and Mazare v. Romania*, App. 33348/96 (2004), par. 115; ECtHR, *Mahmudov and Agazade v. Azerbaijan*, Application No. 38577/04 (2008), par. 50.

⁷ ECtHR, *Cump ăna and Mazăre v. Romania*, App. 33348/96 (2004), par. 50; see also ECtHR, *Mahmudov and Agazade v. Azerbaijan*, App. 35877/04 (2004), par. 50.

⁸ ECtHR, *Raichinov v. Bulgaria*, App. 47579/99 (2006), par. 50.

⁹ ECtHR, *Kubaszewski v. Poland*, App. 571/04 (2010), par. 45. See also ECtHR, *Fedchanko v. Russia*, App. 33333/04 (2010); ECtHR, *Krutov v. Russia*, App. 15469/04 (2009); ECtHR, *Lombardo and others v. Malta*, App. 7333/06 (2007).

¹⁰ UN Human Rights Committee, *General Comment No. 34*, *supra* note 1, par. 47 (emphasis added).

¹¹ UN Human Rights Committee, *Alexander Adonis v. The Philippines*, ICCPR/C/103/D/1815/2008/Rev.1 (26 October 2011), par. 6.

all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.”¹² Abolition of criminal defamation laws has likewise been called for by the African Commission on Human and Peoples’ Rights,¹³ the OAS Inter-American Commission on Human Rights,¹⁴ and the Parliamentary Assembly of the Organization for Security and Co-operation in Europe.¹⁵

9. In sum, *Amici* respectfully submit that The Gambia’s criminal libel, false news and sedition laws—which have been used by the Gambian government to criminalize speech and news reporting by the Applicants and other journalists deemed to harm the reputations of the President and other government officials—do not comport with the protections afforded the rights to freedom of speech and of the press under Article 19 of the ICCPR, Article 9 of the African Charter or Article 66(2)(c) of the Revised ECOWAS Treaty.

B. SPEECH CRITICIZING GOVERNMENT OFFICIALS AND GOVERNMENT AFFAIRS IS ENTITLED TO HEIGHTENED PROTECTION UNDER INTERNATIONAL AND REGIONAL FREE EXPRESSION PRINCIPLES

10. This case presents this Honourable Court with the opportunity to re-affirm the universal free expression principle that criticism of government and government officials must be accorded heightened protection. Criticism of government and government officials “is indispensable in a free society.”¹⁶ Indeed, this Honourable Court has already recognized that States have an affirmative duty to protect the right of their citizens to speak out freely and frankly regarding governmental affairs and political figures. Thus, in ruling that The Gambia violated freedom of expression rights (and other human rights) by failing to conduct an effective investigation into the murder of newspaper editor Deyda Hydera (who was a fierce critic of the then Gambian President), this Honourable Court aptly stated in its *Hydara v. The Gambia* judgment that States have an obligation “to protect media practitioners including those critical of the regime,” for “freedom of expression also includes the freedom to criticize the government and its functionaries[.]”¹⁷

11. The UN Human Rights Committee has likewise made it clear that, under Article 19 of the ICCPR, “all public figures, including those exercising the highest political authority such as heads of state and government, are legitimately subject to criticism and political opposition.”¹⁸ It has also emphasized that “in circumstances of public debate concerning public figures in the political domain and public institutions, the value placed by the Covenant upon uninhibited expression is particularly high.”¹⁹

¹² Joint Declaration of 10 December 2002. Available at:

<http://www.cidh.oas.org/Relatoria/English/PressRel02/JointDeclaration.htm>.

¹³ African Commission on Human and Peoples’ Rights, Res. 169 (XLVIII) 2010, *Resolution on repealing criminal defamation laws in Africa* (24 November 2010”), available at http://www.achpr.org/english/resolutions/Resolution169_en.htm.

¹⁴ Inter-American Commission on Human Rights, *Inter-American declaration of principles on freedom of expression* (19 October 2000), available at <http://www.cidh.oas.org/declaration.htm>.

¹⁵ Organization for Security and Co-operation in Europe, Warsaw Declaration (1997), available at <http://www.osce.org/pa/37930>; Bucharest Declaration (2000), available at <http://www.osce.org/node/37761>; Paris Declaration (2001), available at <http://www.osce.org/pa/37658>. See also Council of Europe Parliamentary Assembly, *Recommendation 1814: Towards decriminalisation of defamation* (2007) (calling on member States to immediately abolish the imposition of prison sentences for defamation).

¹⁶ Nigeria Federal Court of Appeal, *Nwankwo v. The State*, [1983] (1) NCR 383, 27 July 1983, p. 253.

¹⁷ *Hydara v. The Gambia*, Case No. ECW/CCJ/APP/30/11 (10 June 2014), p.6.

¹⁸ UN Human Rights Committee, *General Comment No. 34*, *supra* note 1, par. 38.

¹⁹ *Id.*, par. 83.

12. In *Konate v. Burkina Faso*, for instance, the African Court on Human and Peoples' Rights, in construing Article 9 of the African Charter, observed that: "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 [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."²⁰ The Inter-American Court of Human Rights and the European Court of Human Rights, in applying their free expression charters, likewise accord heightened protection to speech criticizing public officials and other public figures.²¹

13. *Amici* note that the Applicants here were each criminally prosecuted under The Gambia's criminal libel, false news and sedition laws for speech critical of the Gambian President and/or other Gambian government officials. *Amici* further note that, far from affording greater protection to speech critical of government officials, section 51(1)(a) of The Gambia's sedition law singles out speech critical of the President or of the Government for criminal punishment—in effect creating the offense of seditious libel of government. In this regard, the UN Special Rapporteur has stated "it must be understood that...Government bodies and public authorities should not be able to bring defamation suits; the only purpose of defamation, libel, slander and insult laws must be to protect reputations and not to prevent criticism of government or even to maintain public order, for which specific incitement laws exist."²²

14. Similarly, in applying the principle that "uninhibited expression" about public figures in the political domain receives "particularly high" protection under Article 19 of the ICCPR, and that government officials "are legitimately subject to criticism," the UN Human Rights Committee has repeatedly condemned laws (like The Gambia's) that punish criticism of government or government officials—be they laws that criminalize lese majesty, *desacato*, disrespect for authority, defamation of the head of state or that protect the honour of public officials.²³ Moreover, "[c]riticism of a merely political kind directed at the holders of public office..., even if it brings those holders of office into disrepute, does not amount to sedition."²⁴ Accordingly, the UN Human Rights Committee has cautioned member States that, so as not to stifle public discussion of matters of legitimate public concern, they must exercise "[e]xtreme care" in narrowly crafting and applying sedition laws "in a manner that conforms to the strict requirements" of Article 19 of the ICCPR.²⁵ Because The Gambia's sedition law expressly targets speech, news and opinion critical of the President and the Gambian Government, *Amici* submit the statute sweeps well beyond the permissible narrow

²⁰ ACtHR, *Lohe Issa Konate v. Burkina Faso*, App. No. 004/2013 (2014), pp. 42..

²¹ See, e.g., IACtHR, *Case of Herrera-Ulloa v Costa Rica*, Ser. C No. 107 (2004), par. 129 ("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 higher risk of being criticized[.]"); ECtHR, *Lingens v. Austria*, App. 9815/82 (1986), par. 42 ("[t]he limits of acceptable criticism are...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 by both journalists and the public at large, and he must consequently display a greater degree of tolerance.").

²² UN Special Rapporteur on Freedom of Opinion and Expression, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2000/63 (2000), par. 52.

²³ ²³ UN Human Rights Committee, *General Comment No. 34*, *supra* note 5, par. 38 (citing communication and Concluding observations).

²⁴ High Court of Australia, *Nationwide News Pty Ltd. v. Wills* (1992) 177 CLR 1. See also, Nigerian Court of Appeal, *Nwanko v. The State*, [1983] (1) NCR 383, p. 252 ("[t]hose who occupy sensitive posts must be prepared to face criticisms in respect of their office so as to ensure they are accountable to the electorate.").

²⁵ UN Human Rights Committee, *General Comment No. 34*, *supra* note 5, par. 30 and par. 38 (citing communication and Concluding observations).

scope of a sedition law and thereby infringes the rights to freedom of expression, freedom of the press and access to information.

AMICUS CURIAE BRIEF OF THE REDRESS TRUST

PART 1: Particular vulnerability of journalists to torture and related abuses

1. Journalists are crucial watchdogs that help to hold governments, businesses and others to account. They help the public to access information about an array of subjects and to form critical views about those subjects. This increases debate within society and can challenge official versions of events put forward by governments or others exercising power or authority. This ability to foster pluralistic views is important for fostering citizens' access to information and underpins democracy. Attacks against journalists violate journalists' right to impart information, undermine the right of individuals and society to seek and receive information and limit transparency and accountability.²⁶ Risks of violence deter journalists from their work and encourage self-censorship.²⁷ Attacks on journalists are used to silence those who investigate, document and report on issues perceived by authorities to be sensitive.²⁸
2. Freedom of expression can be limited by banning independent newspapers, criminalising the publishing or disseminating of certain information and prosecuting editors and journalists. Such limitations are inconsistent with the African Charter.²⁹

PART 2: The nature and applicability of the absolute prohibition of torture

3. For an act to amount to torture, it must be carried out for a specific purpose,³⁰ such as to obtain a confession, to punish, discriminate or intimidate. The intimidation of journalists to discourage or prevent them from imparting information or as a form of punishment meet the purposive requirement for torture.
4. The torture prohibition is absolute³¹ and non-derogable.³² This has been underscored by human rights courts³³ and monitoring bodies.³⁴ Torture is absolutely prohibited irrespective of the circumstances and of the victim's behavior.³⁵ The African Charter prohibits torture in article 5. The Commission has affirmed that the prohibition applies even in public emergencies.³⁶ The Robben Island Guidelines for the Prohibition and Prevention of Torture in Africa stipulate that States shall not invoke justifications for torture.³⁷ The African Commission has recognised that the absolute prohibition applies to cases involving journalists and the protection of freedom of expression. In *Article 19 v. Eritrea* it held that a difficult political situation does not excuse restrictions or limitations on the right to be free from torture; holding journalists and political dissidents incommunicado without allowing them access to their families violates Article 5.³⁸

PART 3: States' positive obligations to protect journalists from violence

²⁶ UN Human Rights Committee, *General Comment No. 34 on Article 19*, CCPR/C/GC/34, 12 September 2011, para. 11; UN General Assembly, Report of the Special Rapporteur on freedom of opinion and expression, A/HRC/20/17, 4 June 2012, para. 54.

²⁷ *Ibid.*, para. 95.

²⁸ UN General Assembly, The safety of journalists and the issue of impunity, A/69/268, 6 August 2014, para. 3.

²⁹ African Commission, *Article 19 v Eritrea* (2007) Comm 275/03 para. 105, "Any law ... which permits a wholesale ban on the press and the imprisonment of those whose views contradict those of the Government's is contrary to both the spirit and the purpose of Article 9."

³⁰ UNGA, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (10.12.84) (UNCAT) UN Treaty Series Vol. 1465, Art 1.

³¹ See e.g., Art 2(2) UNCAT; Art 5 of the Inter-American Convention to Prevent and Punish Torture.

³² The prohibition is expressly excluded from the derogation provisions of human rights treaties of general scope: Art 4(2) ICCPR; Art 3 UN Torture Declaration; Art 15 European Convention of Human Rights; Art 59 Arab Charter of Human Rights.

³³ See e.g., European Court of Human Rights (ECtHR), *Ireland v the UK*, (1978) 2 EHRR 25, para.163; Inter-American Court of Human Rights (IACtHR), *Maritza Urrutia v Guatemala* (Merits, Reparations and Costs), Series C N. 103, 27 Nov 2003, para.89; ICJ, *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* 20 July 2012, ICJ Reports 2012, para. 99.

³⁴ See e.g., UN Human Rights Committee, General Comment No. 20 (article 7) UN Doc A/44/40, 10 March 1992, para.5; UN Committee Against Torture, General Comment No. 2, UN Doc. CAT/C/GC/2, 24 January 2008, para.1.

³⁵ See for instance, ECtHR, *Labita v Italy*, application no. 26772/95, 6 April 2000, para.119.

³⁶ African Commission, *Abdel Hadi, Ali Radi & Others v Republic of Sudan*, Comm 368/09, para. 69; *Huri-Laws v Nigeria* Comm 225/98, para. 41; *Gabriel Shumba v Zimbabwe* Comm 288/04, para.164.

³⁷ African Commission, Robben Island Guidelines, para.10.

³⁸ African Commission, *Article 19 v Eritrea* (2007) Communication 275/03 para. 102.

5. The prohibition of torture imposes positive obligations. In cases involving non-derogable rights, “the positive obligations of States go further than in other areas.”³⁹
6. ***The positive obligation to prevent violence against journalists.*** It is submitted that the Court should consider the particular vulnerability of journalists and the paramount obligations on States to protect them from torture, to prevent torture and to investigate allegations. In a case against Turkey involving the killing of a journalist, the European Court of Human Rights held that the State failed to “create a favourable environment for participation in public debate by all the persons concerned, enabling them to express their opinions and ideas without fear.”⁴⁰ It held that the State must “was also under a positive obligation to protect his or her right to freedom of expression against attack, including by private individuals.”⁴¹ Similar reasoning was adopted by the Inter-American Court:

The effective exercise of freedom of expression depends upon social conditions and practices that stimulate such exercise. It is possible to illegally restrict such freedom by the legal or administrative actions of the State or by *de facto* conditions that put, directly or indirectly, in a situation of risk or greater vulnerability those who exercise or attempt to exercise such freedom, by actions or omissions of state agents or private individuals. ... the State must abstain from acting in a way that fosters, promotes, favors or deepens such vulnerability and it has to adopt, whenever appropriate, the measures that are necessary and reasonable to prevent or protect the rights of those who are in that situation, as well as, where appropriate, investigate the facts that affect them.⁴²
7. ***The duty to investigate allegations of torture and ill-treatment.*** State obligations under the African Charter include a positive obligation to prosecute and punish perpetrators of abuses.⁴³ The mere existence of a legal system criminalising and providing sanctions for violence is insufficient; States need to ensure that incidents of violence are actually investigated, prosecuted and punished.⁴⁴
8. Journalists’ vulnerability is increased when attacks are committed with impunity. The UN General Assembly has called on States to “... ensure accountability through the conduct of impartial, speedy and effective investigations into all alleged violence against journalists and media workers.”⁴⁵ The African Commission has also called on States Parties to prevent and investigate “all crimes allegedly committed against journalists and media practitioners and also to bring the perpetrators to justice.”⁴⁶ In its Declaration of Principles on Freedom of Expression in Africa, the African Commission has restated that States are obliged to investigate violations of Article 9 of the Charter, including attacks on those exercising their right to freedom of expression and to punish perpetrators and ensure that victims have access to effective remedies.⁴⁷
9. A failure by a State to investigate torture violates the right to an effective remedy and the right not to be subjected to torture.⁴⁸ The obligation to investigate exists independent of a complaint filed by the victim,⁴⁹ and may help deter future violations. As the Inter-American Court found in a case concerning abuse of media workers in Venezuela:

The investigation of the violation of a specific substantive right may be a way to shelter, protect, or guarantee that right... In cases of extrajudicial killings, forced disappearances, torture, and other grave violations to human rights, ... carrying out an investigation *ex officio*, without delay and in a serious, fair, and effective manner is a fundamental element that contributes to the protection of certain rights affected by those situations, such as personal freedom, the right to humane treatment, and life. It is

³⁹ African Commission, *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006) Communication 245/02, para. 155.

⁴⁰ See ECtHR, *Dink v Turkey*, applications no. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, 14 September 2010, para.137 (in French).

⁴¹ *Ibid.*, para.138; See also UN Secretary-General, The safety of journalists and the issue of impunity, A/69/268 para 51.

⁴² Inter-American Court of Human Rights, *Perozo et al v Venezuela*, Series C, No.195, 28 January 2009, para. 118.

⁴³ *Ibid.*, para. 159. See also *Amnesty International and Others v Sudan* (1999), para 56; *Law Office of Ghazi Suleiman v Sudan* (2003), para. 45–46; *Mouvement Burkinabé des Droits de l’Homme et des Peuples v Burkina Faso* (2001), para. 42.

⁴⁴ *Ibid.*, *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006), para 159.

⁴⁵ UN General Assembly, Resolution 68/163, The safety of journalists and the issue of impunity, A/RES/68/163, 18 December 2013, para.5;

UN General Assembly, UN Secretary-General, The safety of journalists and the issue of impunity, A/69/268, para.50.

⁴⁶ African Commission, Resolution 185 on the Safety of Journalists and Media Practitioners in Africa, 12 May 2011.

⁴⁷ Afr Comm, Res’n on the Adoption of the Declaration of Principles on Freedom of Expression in Africa, October 2002, principle XI (2).

⁴⁸ See UN Human Rights Committee, *Avadanov v. Azerbaijan*, UN Doc CCPR/c/100/D/1633/2007 (2010) paras. 9.3-9.5; *Aydin v. Turkey* (Grand Chamber) Application No. 23178/94 (1997) para. 103; UN Human Rights Committee, General Comment no 31, UN Doc CCPR/c/21/Rev.1/Add.13, 26 May 2004, paras. 15-16; UNCAT, article 12.

⁴⁹ UN Committee Against Torture, General Comment No 3, 19 November 2012, UN Doc. CAT/C/GC/3, para 27.

considered that in those cases impunity will not be eradicated without the determination of the general responsibilities –of the State- and individuals – ... which complement each other.⁵⁰

10. This Court has already affirmed a State's obligation to conduct a thorough, rigorous, and independent investigation into the violent death of a journalist,⁵¹ as has the African Court on Human and Peoples' Rights in a case concerning the assassination of a journalist and newspaper director. The African Court determined that Burkina Faso failed to take measures, other than legislative ones, to ensure that the Applicants could be heard by competent courts, and did not act with due diligence in seeking, trying and judging those who had carried out the assassination.⁵² The Inter-American Commission on Human Rights similarly concluded in a case concerning the murder of a Mexican 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. ... The Mexican State must send a strong message to society that there will be no tolerance for those who engage in such a grave violation of the right to freedom of expression.⁵³

11. The obligation to investigate allegations of torture also forms part of the African Commission's jurisprudence on Article 5.⁵⁴ The Robben Island Guidelines also provide specific criteria for torture investigations, indicating that they shall be conducted promptly, impartially and effectively⁵⁵ consistent with the UN Manual on the Effective Investigation and Documentation of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (The Istanbul Protocol)⁵⁶

PART 4: The right to redress for tortured journalists in forced exile

12. Journalists forced into exile after torture or ill-treatment have the added challenge of re-establishing themselves in new countries frequently without familial support, in addition to dealing with trauma.⁵⁷ States are obliged to afford redress to victims of torture, a right that is enshrined in treaties,⁵⁸ declarative instruments⁵⁹ and confirmed by UN⁶⁰ and regional bodies⁶¹ including this Court.⁶² The African Commission's jurisprudence has recognised the right to redress for torture and ill-treatment.⁶³ The right to redress is also prominent in a range of instruments adopted by the Commission.⁶⁴

⁵⁰ Inter-American Court of Human Rights, Case of *Rios et al. v. Venezuela*, Series C No. 194, 28 January 2009, para. 283.

⁵¹ See this Court's decision in *Deyda Hydara Jr. v The Gambia* ECW/CCJ/APP/30/11, 10 June 2014.

⁵² African Court on Human and Peoples' Rights, *Claimants of Late Norbert Zongo et al v. Burkina Faso*, Appl no. 013/2011, 5 June 2015.

⁵³ Inter-Am Comm HR, *Hector Felix Miranda v Mexico*, Case 11.730, Rep 5/99, OEA/Ser.L/V/II.95 Doc.7 rev. (1998) para. 52.

⁵⁴ *Malawi African Association and Others v. Mauritania*, Communications 54/91, 61/91, 98/93, 164/97-196/97, 210/98, para.142. In this case, the African Commission instructed Mauritania to launch an independent inquiry in order to clarify the fates of disappeared and to "identify and bring to book the authors of the violations perpetrated."

⁵⁵ Afr Comm, Robben Island Guidelines, para. 19.

⁵⁶ HR/P/PT/8/Rev.1, 2004. See also, *Abdel Hadi, Ali Radi & Others v Republic of Sudan* 368/09, para 92.

⁵⁷ Committee to Protect Journalists, "Exiled: When the most dangerous place for journalists is your country" 17 June 2015,

<https://cpj.org/reports/2015/06/exiled-when-most-dangerous-place-for-journalists-is-your-country-world-refugee-day.php>; "Journalists flee East African countries – region's free expression deteriorates" 24 June 2012,

<http://humanrightshouse.org/Articles/18262.html>; National Union of Journalists U.K., "Exiled Journalists"

<https://www.nuj.org.uk/rights/health-and-safety/exiled-journalists/>.

⁵⁸ E.g. the International Covenant of Civil and Political Rights (ICCPR) (1966) (Arts. 2(3), 9(5) and 14(6)); International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (1965) (Art. 6); Convention of the Rights of the Child (1989) (Art. 39); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) (UNCAT) (Art. 14) and Rome Statute for an International Criminal Court (1998) (art. 75). It also figures in regional instruments, e.g. European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) (1950) (Arts. 5(5), 13 and 41); the American Convention on Human Rights (ACHR) (1969) (Arts. 25, 63(1) and 68) and the African Charter on Human and Peoples' Rights (ACHPR) (1981) (Art. 21(2)); CPED, (Art. 24).

⁵⁹ Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law, Resolution 2005/35 (UN Doc. No. E/CN.4/RES/2005/35 (2005)) and General Assembly (GA) Res'n 60/147 (UN Doc. A/RES/60/147 (2006)) (the "Basic Principles and Guidelines"); See also the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by General Assembly resolution 40/34 of 29 Nov. 1985; and the Universal Declaration of Human Rights (UDHR) (1948) (Art. 8).

⁶⁰ See, e.g., UN HRC, General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant 26/05/2004, U.N. Doc. CCPR/C/21/Rev.1/Add.13, at paras. 15–17; CAT, General Comment No. 2, Implementation of Article 2 by States Parties, U.N. Doc. CAT/C/GC/2/CRP.1/Rev.4 (2007) at para. 15.

⁶¹ See, e.g., IACtHR, *Velasquez Rodriguez v. Honduras*, para. 174; ECtHR, *Papamichalopoulos v. Greece*, (Art. 50) (Appl. No. 14556/89), 31 October 1995, para. 36.

⁶² *Musa Saïdykhan v The Gambia*. ECW/CCJ/APP/11/07 16 December 2010.

⁶³ G. Musila, 'The right to an effective remedy under the African Charter on Human and Peoples' Rights', in African Human Rights Law Journal, (2006), p. 442. See also M. Cherif Bassiouni, "International Recognition of Victims' Rights," Human Rights Law Review, Vol. 6, No. 2 (2006), pp. 203-279, at p. 207; REDRESS, 'Reaching for Justice: the right to reparation in the African Human Rights System',

13. The UN Human Rights Committee has held that Article 2(3) and Article 7 of the ICCPR oblige States Parties to ensure that victims of torture and ill-treatment have accessible and effective remedies and receive reparation.⁶⁵ Article 14 of UNCAT similarly provides that victims of torture obtain redress and have an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible.⁶⁶
14. The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law⁶⁷ provides that reparation should be proportional to the gravity of the violations and the harm suffered and victims should be provided with full and effective reparation.⁶⁸ The Committee Against Torture also stressed that monetary compensation only is inadequate to comply with article 14.⁶⁹
15. **Restitution** is particularly relevant in cases of forced exile and loss of citizenship. In *John D. Ouko v Kenya*, the complainant submitted, *inter alia*, that he was forced to flee the country due to fear for his life as a result of his political opinions. The African Commission found Kenya responsible for violating his rights and as a measure of reparation, urged Kenya “to facilitate the safe return of the Complainant to the Republic of Kenya, if he so wishes.”⁷⁰ The Inter-American Court, in a case concerning the attempted kidnapping of a journalist who subsequently was forced into exile⁷¹ ordered Colombia to, *inter alia*, carry out an effective investigation and guarantee the conditions for the family to return to Colombia, stressing that if they decide to return, it “must pay the expenses of the return of the members of the family and their belongings.”⁷²
16. **Compensation** should be adequate. In *Gabriel Shumba v Zimbabwe*, a case concerning the torture and forced exile of a human rights lawyer, the African Commission recommended that Zimbabwe pay adequate compensation to him for the torture and trauma caused.⁷³ The Commission’s practice appears to be in contrast to the approach taken by this Court, which in several cases where it found a violation of Article 5, has awarded specific amounts of compensation, including up to \$200,000.00 USD for a victim who had been arbitrarily detained and tortured for 22 days in The Gambia.
17. **Rehabilitation** is a key component of reparation, aimed at restoring “as far as possible, their independence, physical, mental, social and vocational ability, and full inclusion and participation in society.”⁷⁴ It is explicitly highlighted in Article 14 of UNCAT and the Robben Island Guidelines. The Inter-American Court held in *Vélez Restrepo* that if the victims want to reside in Colombia, the State should provide them with health care, and if not, a fixed amount to contribute toward the payment of their health costs abroad.⁷⁵
18. In addition to ‘individual’ measures of reparation, it is common for human rights bodies to indicate reparation that is designed to remedy the structural causes of violations.⁷⁶ Guarantees of non-repetition are particularly relevant in cases which involve systemic

October 2013, at

<http://www.redress.org/downloads/publications/1310Reaching%20For%20JusticeFinal.pdf>

⁶⁴ This includes the Robben Island Guidelines, Section C; the Commission’s Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa as well as the Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (the Luanda Guidelines). Also, Public Consultation on the Zero Draft of the General Comment on Art 5,

<http://www.achpr.org/news/2016/04/d214/>.

⁶⁵ UN Human Rights Committee, General Comment No.31, para.15; UN Human Rights Committee, General Comment No.20, para.14.

⁶⁶ UNCAT, Article 14 (1).

⁶⁷ A/RES/60/147, paras 19 -23.

⁶⁸ *Ibid*, UN Basic Principles, para 9.

⁶⁹ UN Committee Against Torture, General Comment No. 3, CAT/C/GC/3, 19 November 2012, para. 9.

⁷⁰ *John D. Ouko v Kenya (2000) Communication 232/99*

⁷¹ *Vélez Restrepo and family v Colombia*, Judgement of 3 September 2012, paras 259 -289

⁷² *Ibid*, paras. 264-265.

⁷³ *Gabriel Shumba v Zimbabwe*, Comm 288/04, 21 March 2013.

⁷⁴ UN Committee Against Torture, General Comment No.3, para.11.

⁷⁵ *Vélez Restrepo and family v Colombia*, 3 September 2012.

⁷⁶ UN Committee Against Torture, General Comment No. 3, para.18.

violations. The African Commission for instance has requested States to repeal laws;⁷⁷ to ensure that police respect detainees' rights;⁷⁸ to put in place safeguards that guarantee for all persons deprived of their liberty effective access to competent authorities.

Conclusion

19. We submit that in awarding reparation, this Court should take into account factors such as the seriousness of the violations, the length of time over which the violations continued and the costs of the medical care incurred. Case law of this Court indicates that the failure to investigate torture and enforced disappearances are amongst those violations for which monetary compensation is ordered.⁷⁹ The Court is empowered to consider additional measures of satisfaction by ordering a State to conduct an impartial investigation in line with the principles of independence, promptness and thoroughness.⁸⁰

DATED this day of May **2016**

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⁷⁷ Afr Comm, *Purohit and Moore v The Gambia* (2001) 241/01; *Doebbler v Sudan* (2003) 236/2000; *EIPR & Interights v Egypt*, Comm (2011) 323/06.

⁷⁸ *EIPR & Interights v Egypt*, Communication (2011) 334/06.

⁷⁹ *Musa Saidhykhan v the Gambia* ECW/CCJ/APP/11/07 16 Dec 2010; *Deyda Hydara Jr. v The Gambia* ECW/CCJ/APP/30/11, Chief *Ebrima Manneh v the Gambia* ECW/CCJ/APP/04/07.

⁸⁰ The Istanbul Protocol, para 74.

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AFFIDAVIT OF UNITED NATIONS SPECIAL RAPPORTEUR DAVID KAYE

A. Statement of Identity of Special Rapporteur

1. I, Professor David Kaye, am the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. I have served in this position since August 2014.
2. Special Rapporteurs are independent experts appointed by the United Nations Human Rights Council to examine and report on human rights issues. They conduct fact-finding country visits, send allegation letters and urgent appeals on human rights violations, and submit annual reports. For over 20 years, Special Rapporteurs have provided counsel to UN Member States on laws that restrict expression.
3. Pursuant to the Report of the UN Human Rights Council, UN Doc. A/HRC/25/2 (17 July 2014), I have a mandate from the United Nations Human Rights Council to: (i) gather information relating to violations of the right to freedom of opinion and expression, including, as a matter of high priority, harassment, persecution or intimidation directed against journalists and (ii) make recommendations and provide suggestions to UN Member States and related organizations on ways to better promote and protect the right to freedom of opinion and expression.
4. As UN Special Rapporteur, I am an independent expert on issues relating to freedom of opinion and expression, and I have extensive expertise on such matters.
5. My affidavit is appended to the *amici's* brief to comply with the Court's instructions; my views are conveyed in my capacity as an expert on the subject matter and not as an advocate for any party or *amicus curiae*.
6. This affidavit is submitted to the ECOWAS Court on a voluntary and personal basis without prejudice to, and should not be considered as a waiver, express or implied, of the privileges and immunities of the United Nations, its officials and experts on missions, pursuant to the 1946 Convention on the Privileges and Immunities of the United Nations.

B. Limitations on Restrictions on the Right to Freedom of Expression

Introduction

7. The right to freedom of expression is a keystone of modern democratic society. It is "essential for the promotion and protection of human rights," and goes hand in hand with the freedom of opinion guaranteed under ICCPR Article 19(1). UN Human Rights Committee General Comment 34, ¶ 3, UN Doc. CCPR/C/GC/34 (29 July 2011) ("General Comment 34") (Annex 24).
8. Of particular importance is the protection of journalists. Indeed, the UN General Assembly has emphasized "the relevance of freedom of expression and of free media in building inclusive knowledge societies and democracies and in fostering intercultural dialogue, peace and good governance." UN General Assembly, Resolution 68/163, UN Doc. A/HRC/68/163 (21 February 2014).
9. The United Nations has made the protection of journalists and promotion of free and open news media a global priority. The Human Rights Council, General Assembly, and Security Council have each stressed the importance of protecting a "free, uncensored and unhindered press or other media." See UN General Assembly, Promotion and protection of the right to freedom of opinion and expression, ¶ 7, UN Doc. A/70/361 (8 Sept. 2015). And, the UN General Assembly and the UN Human Rights Council have gone even further, issuing resolutions condemning violence against journalists and calling upon states to promote a safe environment for journalists to do their work. UN General Assembly, Resolution 68/163, ¶¶ 2, 6, UN Doc. A/HRC/68/163 (21 February 2014); UN Human Rights Council, Resolution 27/5, ¶¶ 1-2, 5, UN Doc. A/HRC/RES/27/5 (2 October 2014); UN Human Rights Council, Resolution 21/12, Safety of journalists, ¶¶ 4,

8, UN Doc. A/HRC/RES/21/12 (9 October 2012); UN Plan of Action on the Safety of Journalists and the Issue of Impunity, ¶ 1.5 (endorsed 12 April 2012).

10. Article 19 of the ICCPR imposes upon State Parties a negative obligation not to interfere with that right to freedom of opinion and expression. While the right carries with it “duties and responsibilities,” restrictions are limited by Article 19(3). Critically, the Human Rights Committee has emphasized that “[S]tates should always be guided by the principles that the restrictions must not impair the essence of the right . . . [and that] the relation between right and restriction, between norm and exception, must not be reversed.” UN Human Rights Committee, General Comment 27, ¶ 24, UN Doc. CCPR/C/21/Rev. 1/Add.9-0 (02 Nov. 1999) (Annex 26).
11. Under the ICCPR, permissible restrictions on the right to freedom of expression must meet three requirements.

First Requirement: Be Provided by Law

12. The law imposing a restriction on expression must be codified in a national law and be accessible to the public. General Comment 34, ¶¶ 24-25. A restriction on expression must also be “within the framework of international human rights law and the principles deriving therefrom.” UN Human Rights Council, Report of the Special Rapporteur, ¶ 76, UN Doc. A/HRC/14/23 (20 Apr. 2010).
13. To be provided by law, it is necessary but not sufficient that the restrictions be duly enacted. Such restrictions also must not be overly broad or vague, and must “be formulated with specific precision to enable an individual to regulate his or her conduct accordingly.” See General Comment 34, ¶ 25 and UN Human Rights Council, Report of the Special Rapporteur, ¶ 32, UN Doc. A/HRC/29/32 (22 May 2015). Legal restrictions on expression that are too broad or vague create a “chilling effect” that discourages individuals from exercising their rights to free expression for fear that government authorities may use their broad interpretive discretion to penalize a swath of speech-related activities. Such wide discretion makes the consequences of engaging in free expression unforeseeable, and as such, individuals may be deterred from exercising such rights in the first place.

Second Requirement: Must Serve a Legitimate State Interest

14. A restriction on expression must be necessary for one of the following goals only: “[f]or respect of the rights or reputations of others” or “[f]or the protection of national security or of public order . . . or of public health or morals.” ICCPR Art. 19(3).

Third Requirement: Be Necessary and Proportionate to Meet the Legitimate Purpose

15. Courts assess whether the interference with the expression was “necessary in a democratic society.” *The Sunday Times v. The United Kingdom*, European Court of Human Rights, ¶ 59, Application No. 6538/74 (26 April 1979). The UN Human Rights Committee has noted that restrictive measures “must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest to be protected.” General Comment 34, ¶ 34.

Defamation and Criminal Libel

16. In determining whether a restriction on freedom of expression is necessary, international human rights bodies and courts have repeatedly emphasized that public figures are expected to tolerate a higher degree of criticism than average citizens. Criticism or other reporting in the public interest that implicates a public figure’s reputation may not be subject to restriction. General Comment 34 states that “the value placed by the [ICCPR] upon uninhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in the public and political domain.”

17. Libel, defamation, and “false news” laws generally fail to be proportionate when they (i) carry criminal punishments, (ii) do not provide wider latitude for criticism against public officials versus other citizens and/or (iii) do not provide wider latitude for speech in the public interest versus other content. The Human Rights Council has decried the “abuse of legal provisions on defamation and criminal libel” as a major source of violations of the right to freedom of expression. UN Human Rights Council, Freedom of opinion and expression, ¶ 3a, UN Doc. A/HRC/12/16 (12 Oct. 2009).
18. The United Nations maintains that imprisonment is *never* an appropriate penalty for defamation, and that any attempt to criminalize defamation should be reserved only for the most serious of cases. General Comment 34, ¶ 47. The freedom of expression rapporteurs for the United Nations, Inter-American Commission on Human Rights, African Court of Human and Peoples’ Rights, and Organization for Security and Co-operation in Europe (OSCE) issued a joint declaration defining criminal defamation laws as one of the top ten key challenges to freedom of expression.
19. My predecessor Special Rapporteurs on freedom of expression have consistently found that criminal defamation laws that imprison or impose heavy fines on journalists are “inconsistent with the principle of proportionality and therefore [are] an undue restriction of press freedom.” UN Human Rights Council, Report of the Special Rapporteur, ¶ 42, UN Doc. A/HRC/7/14 (Feb. 28, 2008) (“2008 Special Rapporteur Report”).

False News

20. Laws penalizing the dissemination of false news that do not require proving something more than the mere falsity of the news violate Article 19’s guarantees. UN CCPR, Concluding Observations of the Human Rights Committee on Cameroon, ¶ 24, UN Doc. CCPR/C/79/Add. 116 (Nov. 1999).
21. Such “false news” laws hinder the ability of journalists to disseminate information to the public, which is pivotal for a well-functioning democratic society. In such situations, as a predecessor special rapporteur has noted, “prison terms are both reprehensible and out of proportion to the harm suffered by the victim. In all such cases, imprisonment as punishment for the peaceful expression of an opinion constitutes a serious violation of human rights.” UN Economic and Social Council, Report of the Special Rapporteur, ¶ 205, UN Doc. E/CN.4/2000/63 (18 Jan. 2000).
22. Special Rapporteurs on freedom of expression have developed a consistent record of raising serious concerns about the use of such laws to violate, inter alia, the freedoms of opinion and expression. Official communications to governments on the matter include allegation letters sent to Syria, Iran, Egypt, Saudi Arabia, Thailand, the Gambia, Malaysia, and Bahrain, to address such issues as suspension of independent newspapers and arrest of journalists in Iran, IRN 14/2011 (19 October 2011).

Anti-Sedition

23. Laws against sedition are often said to aim toward the protection of public order or national security, but are generally not necessary for such purposes and are inconsistent with ICCPR Article 19, not least when used to prosecute journalists, researchers, and other activists for disseminating information of a legitimate public interest to the public. General Comment 34, ¶ 30. Rather, such laws meet the necessity test only when narrowly crafted and applied in a manner that conforms to strict requirements. *Id.* ¶ 30; 2008 Special Rapporteur Report, ¶¶ 42, 48.
24. Anti-sedition laws that restrict speech for an unlimited amount of time or in situations less than a public emergency are disproportionate and thus not necessary for the protection of national security. 2008 Special Rapporteur Report, ¶¶ 42, 49-51.
25. This necessity test remains in effect even during states of national emergency or other times when protection of national security is paramount. Recently, I promoted this principle in a letter expressing serious concern about Malaysia’s anti-sedition act as a tool to curtail legitimate exercises of the right to freedom of opinion and expression where I

noted that “freedom of expression plays a central role in the effective functioning of a vibrant democratic political system.” MYS 6/2014 (1 October 2014).

26. I, along with numerous other independent experts with whom I have signed on to communications, have developed a consistent record of raising concerns with States about their anti-sedition laws for the reasons stated in the paragraphs above. Official communications have been sent to Malawi, Thailand, India and other states.

D. Analysis of Gambian Law

27. In my opinion, the Relevant Laws related to criminal libel, defamation, and false news raise a number of concerns regarding Article 19 of the ICCPR. In particular, Criminal Code § 59 criminalizes the publication of any statement likely to cause fear and alarm to the public, when the journalist has reason to believe that the report is false. Any person subject to this standard may face legitimate and significant uncertainty as to whether a statement, regardless of its falsity, is likely to cause fear or alarm, as such a standard is a clearly subjective matter. Similarly, Criminal Code § 181A punishes the publication of a statement that a person may not even have known was false, unless the person took adequate measures to verify the accuracy of the information. This standard would appear not to provide guidance as to the measures that must be taken to avoid an allegation of false news publication. Also, the Relevant Laws’ penalties of up to 15 years of imprisonment and additional fines appear disproportionate.
28. The criminal libel and “false news” laws also raise concern because they do not differentiate between criticism of public officials and criticism of ordinary individuals. Nor do they appear to differentiate between speech that is in the public interest and other types of communication. Given these penalties, I am concerned that the laws subject journalists to the prospect of criminal punishment, including significant prison terms, in a manner that likely chills the reporting of matters of public interest. I join my predecessor Special Rapporteurs in calling for abolition of criminal defamation and “false news” laws.
29. The sedition offenses raise similar concerns, particularly because of their lack of guidance to individuals who could be subject to prosecution. In particular, the definition of “seditious intent” in Section 51, which criminalizes acts with a seditious intention, includes, among other vague provisions, an intention “to raise discontent or disaffection among the inhabitants of the Gambia” or “to promote feelings of ill will and hostility between different classes of the population.” I am concerned that journalists and others would be unable to predict whether dissemination of information that is critical of the government would fall under the category of sedition.
30. The Gambia’s anti-sedition laws also raise concerns on the ground of necessity and proportionality. Imprisonment for speech that is critical of the government can never be necessary nor proportionate to protect a legitimate State interest, even if – or perhaps particularly when – it may succeed in convincing others to feel the same.



DEPONENT

SWORN TO AT THE REGISTRY OF THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

Thisday of2016

**BEFORE ME
COMMISSIONER FOR OATHS**