

**KONATÉ V. BURKINA FASO:  
AN ANALYSIS OF A LANDMARK  
RULING ON CRIMINAL DEFAMATION  
IN AFRICA**

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*The African Court of Human and Peoples' Rights heard its first case regarding press freedom in December 2014: Konaté v. Burkina Faso. Overturning a conviction of criminal defamation against a journalist in Burkina Faso who had reported on corruption, this is a landmark decision because few courts in Africa, or in the developing world at large, rule in favor of journalists against public figures. The ruling held that: 1) a petitioner can approach the regional court before exhausting local legal remedies if the country's court system is unable, by design, to rule in the petitioner's favor; 2) the licensing of journalists violates freedom of expression; 3) custodial sentences for defamation are an impediment to free speech; and 4) public figures must tolerate more scrutiny than private individuals. Analyzing regional jurisprudence, this article finds that three main concepts have emerged as "best practices" in international defamation law: civil lawsuits should be used rather than criminal charges; truth must always be allowed as a defense for defamation; and public figures must withstand more scrutiny than private figures. Analyzing the African Court's ruling, the article finds that the Court rooted its decision in both African and international human rights bodies and instruments.*

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## INTRODUCTION

For the past several decades, freedom of expression advocates have focused on the repressive effects of criminal defamation charges that discourage a climate of open dialogue and healthy criticism. Powerful public figures, critics note, use laws designed to ensure the protection of reputations for nefarious purposes, such as punishing journalists who expose corruption or who offer unvarnished criticisms of policies. Even without convictions, the prospect of going to jail for writing or broadcasting a critical report creates a chilling environment for journalists. Criminal libel and slander laws are most often found in a country's penal codes—rather than in media laws—and allow police to arrest people if they receive a complaint of defamation. A front-page editorial in a Qatari newspaper broached the subject in a 2011 column:

Here, anybody can simply file a complaint with the police against a reporter and his newspaper. The police then call the reporter and question him in a harassing way, and if they (the police) feel there is merit in the complaint, the journalist is referred to the Public Prosecution for further questioning. Since it is the prosecution's prerogative to refer a matter to court, many complaints against journalists do not reach the court at all and end up in journalists being harassed and humiliated rather than being put on a fair trial. Many a time prosecution officials call a journalist concerned at 5 am, when he is in the middle of sleep. The entire process is so harrowing and humiliating for a journalist that he chickens out when it comes to writing critically on issues.<sup>1</sup>

The authors of this editorial courageously detail exactly how the criminal defamation laws in Qatar lead to muted journalism. The same situation can be found around the world in countries that suffer from poor press freedom rankings.

This article analyzes the case of *Konaté v. Burkina Faso*, a landmark African Court of Human and Peoples' Rights ruling that should help end the abuse of criminal defamation in many countries in Africa and could have implications beyond the continent. The ruling is important because few courts in Africa, or in the developing world at large, rule in favor of journalists against powerful public figures. The African Court of Human and Peoples' Rights ruled in December 2014 against the state of Burkina Faso, which had imprisoned a journalist reporting on the corruption of a public prosecutor. The judges decided that the use of criminal defamation

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1. Mobin Pandit & Ahmed El Amin, *A Crippled Fourth Estate*, PENINSULA (Mar. 4, 2011), <http://thepeninsulaqatar.com/news/qatar/144697/a-crippled-fourth-estate>.

violated free speech rights guaranteed in both the United Nations Charter of Human Rights and the African Charter on Human and Peoples' Rights. The Court further ruled against the notion of licensing journalists and also agreed to allow an immediate appeal to the African Court because local laws do not protect freedom of expression. The ruling is particularly significant because it should create a precedent against criminal defamation across much of the continent. Twenty-seven countries have agreed to abide by the African Court's ruling, including many countries that suffer from low press freedom rankings.<sup>2</sup>

## I. BACKGROUND

The African Court of Human and Peoples' Rights is a regional court for countries in the African Union, an organization founded in 2001 and to which every country in Africa belongs, with the exception of Morocco.<sup>3</sup> The Union claims fourteen objectives, including the promotion of "peace, security, and stability on the continent" and "democratic principles and institutions, popular participation and good governance."<sup>4</sup> The African Court of Human and Peoples' Rights was established in 2006 to serve as a court of last resort for countries within the African Union.<sup>5</sup> Only countries that have agreed to the Court's protocol are officially under its purview.<sup>6</sup> As of 2015, twenty-seven of the fifty-four countries in the African Union have acceded to the Court's authority.<sup>7</sup>

The African Court was modeled after the Inter-American Court of Human Rights and the European Court of Human Rights. All of these courts use their regional charters—which are modeled in part on the UN Charter for Human Rights—as a basis for deciding cases in which plaintiffs

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2. *List of Countries Which Have Signed, Ratified/Acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court of Human and Peoples' Rights*, AFRICAN UNION (Apr. 16, 2014), [http://www.au.int/en/sites/default/files/achpr\\_1.pdf](http://www.au.int/en/sites/default/files/achpr_1.pdf) [hereinafter *List of Countries*].

3. *AU in a Nutshell*, AFRICAN UNION, <http://au.int/en/about/nutshell> (last visited May 13, 2015).

4. *Id.*

5. Marc Schulman, *The African Court of Justice and Human Rights: A Beacon of Hope or a Dead-End Odyssey?*, INKUNDLA: STUDENT L.J. U. WITWATERSRAND (2013), [http://www.inkundlajournal.org/sites/default/files/2013\\_Inkundla\\_2\\_0.pdf](http://www.inkundlajournal.org/sites/default/files/2013_Inkundla_2_0.pdf).

6. *Id.*

7. *List of Countries*, *supra* note 2. The countries that have acceded to the Court's authority are Algeria, Burkina Faso, Burundi, Côte d'Ivoire, Comoros, Congo, Gabon, Gambia, Ghana, Kenya, Libya, Lesotho, Mali, Malawi, Mozambique, Mauritania, Mauritius, Nigeria, Niger, Rwanda, South Africa, Sahrawi Arab Democratic Republic, Senegal, Tanzania, Togo, Tunisia, and Uganda.

feel local judgments violated the rights guaranteed them under the regional charter. The African Court was established to complement the African Commission on Human and Peoples' Rights, which was seen as a weak body with no compulsion mechanism.<sup>8</sup> The efficacy of the Court has yet to be determined, although some critics have complained about its progress on some issues.<sup>9</sup> From 2007 to early 2015, the Court decided twenty-five cases.<sup>10</sup> The *Konaté* case is the first to focus on press freedoms.<sup>11</sup>

Pending approval by fifteen countries, the African Court of Human and Peoples' Rights will merge with the African Court of Justice, a court more focused on business matters and treaty disputes.<sup>12</sup> The new court will feature two chambers and will be known as the African Court of Justice and Human Rights.<sup>13</sup>

## II. FACTS OF THE CASE

Konaté describes his French-language newspaper, *L'Ouragan*—"the hurricane"—as a "private Weekly with an independent editorial policy focusing mainly on political and social issues."<sup>14</sup> In his filing to the African Court, Konaté noted that his newspaper had "been the object of various legal proceedings in Burkina Faso due to its style in news reporting."<sup>15</sup> He has served as editor-in-chief since 1992.<sup>16</sup>

In 2012, *L'Ouragan* printed two articles that allegedly defamed Burkina Faso's state prosecutor, Placide Nikiéma. The first articles appeared on August 1: Konaté's "Counterfeiting and laundering of fake bank notes—the Prosecutor of Faso, 3 Police Officers and a Bank Official—Masterminds of Banditry" and reporter Roland Ouédraogo's

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8. Gina Bekker, *The African Court on Human and Peoples' Rights: Safeguarding the Interests of African States*, 51 J. AFR. L. 151, 155 (2007).

9. *Justice for Dictators: History Rules*, ECONOMIST (Apr. 21, 2012), <http://www.economist.com/node/21553010>.

10. *Finalised Cases*, AFR. CT. HUM. & PEOPLES' RTS., <http://en.african-court.org/index.php/13-homepage2/2-list-of-all-cases#finalised-cases> (last visited Nov. 21, 2015).

11. *African Court Delivers Landmark Ruling on Criminal Libel*, MEDIA LEGAL DEF. INITIATIVE (Dec. 5, 2014), <http://mediadefence.org/news/african-court-delivers-landmark-ruling-criminal-libel>.

12. Schulman, *supra* note 5.

13. FRANS VILJOEN, *INTERNATIONAL HUMAN RIGHTS LAW IN AFRICA* 448–450 (2d ed. 2012).

14. *Konaté v. Burkina Faso*, No. 004/2013, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 8 (Dec. 5, 2014), <http://www.ijrcenter.org/wp-content/uploads/2015/02/Konate-Decision-English.pdf>.

15. *Id.*

16. *Id.* ¶ 56.

“The Prosecutor of Faso—a saboteur of Justice.” The editor-in-chief of the weekly newspaper wrote a second article on August 8 entitled: “Miscarriage of Justice—the Prosecutor of Faso: a rogue officer.” The prosecutor filed a complaint against both Konaté and the reporter Ouédraogo for defamation, public insult, and contempt of court.<sup>17</sup> The Ouagadougou High Court ruled quickly. On October 29, Konaté and the reporter were found guilty of all charges and sentenced to twelve months in prison and ordered to pay a fine of about \$12,500 (USD).<sup>18</sup> The court also ordered the newspaper, *L’Ouragan*, to shut down for six months. It further ordered that, upon reopening, the newspaper must publish the operative provisions of the Court’s judgment for four months. Finally, the court demanded that the judgment be published in three successive issues of three other Burkina Faso newspapers, *L’Evenement*, *L’Observateur Paalga*, and *Le Pays*.<sup>19</sup>

Konaté appealed the ruling, but on May 10, 2013, the Ouagadougou Court of Appeal upheld the judgment of the Ouagadougou High Court. At that point, Konaté’s lawyers, rather than continue the appeals process in the Burkina Faso courts, appealed to the African Court of Human and Peoples’ Rights. The reporter never appealed the original ruling and thus is not involved in the African Court ruling.<sup>20</sup>

### III. ANALYSIS

Analysis shows that the decision had one major component and two minor ones: 1) the incompatibility of criminal defamation with protections for freedom of expression and a functional, free press; 2) the rejection of formal control over journalists through licensing requirements; and 3) the regional court’s acceptance of the case, even though local remedies had not been exhausted, because the plaintiff could not expect to receive a favorable ruling. The latter two decisions were made in the procedural section of the court’s decision, so it’s unclear how widely they will be followed.

Other parts of the ruling deal with several motions for dismissal filed by the state defendants, which proved to be ineffective attempts to have the case thrown out on technical grounds. The “respondent state,” for instance, had noted that the legal filing referred to the formal name of Burkina Faso

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17. *Id.* ¶¶ 3-4.

18. *Id.* ¶ 5.

19. *Id.* ¶ 6.

20. Interview with Lohé Issa Konaté, Managing Editor, *L’Ouragan* (2015) (on file with author); Lohé Konaté, *Publication Director “Hurricane”*: “At Maco, Some Spend Almost All of Their Sentence Outside,” *LE PAYS* (Dec. 24, 2014), <http://lepays.bf/lohe-konate-directeur-de-publication-de-louragan-la-maco-certains-passent-la-quasi-totalite-de-leur-peine-dehors>.

incorrectly.<sup>21</sup> The Court ruled that “a typographical error” cannot be “deemed to constitute a ground for the inadmissibility of the Application.”<sup>22</sup> The judges also dismissed the state’s argument that Konaté’s lawyers “disparaged” the country by referring to it as the “Democratic Republic of Burkina Faso,” words that intentionally call to mind the North Korean dictatorship that also calls itself a Democratic Republic.<sup>23</sup> The Court dismissed these and other objections after brief review.

#### A. *The Licensing of Journalists*

One of these dismissals of objections from the state defendants warrants closer examination: the African Court upheld the international norm against the licensing of journalists. Many global courts have struck down attempts to license journalists because of the danger that governments with the ability to withdraw a license could use that power to influence coverage. The Inter-American Court of Human Rights, for instance, ruled in 1984 against a Costa Rican law that mandated that journalists join a professional organization.<sup>24</sup> While the reasoning behind this licensing requirement appears valid—professional organizations should conceivably help strengthen journalism ethics—the court ruled against requiring such membership. The judges reasoned:

General welfare requires the greatest possible amount of information, and it is the full exercise of the right of expression that benefits this general welfare. . . . A system that controls the right of expression in the name of a supposed guarantee of the correctness and truthfulness of the information that society receives can be the source of great abuse and, ultimately, violates the right to information that this same society has.<sup>25</sup>

The Inter-American Court ruled that the potential for abuse outweighed the argument for mandating membership. The revocation of their membership in an association could, in effect, ban journalists from working.<sup>26</sup>

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21. *Konaté*, No. 004/2013 at ¶ 44.

22. *Id.* ¶ 46.

23. *Id.* ¶¶ 64–73.

24. *Licensing of Media Workers*, ARTICLE 19, <http://www.article19.org/pages/en/licensing-of-media-workers.html> (last visited Mar. 25, 2013).

25. *Id.*

26. The licensing of broadcast media outlets is a well-recognized global norm because audio-visual communication is treated differently. The scarcity of audio-visual spectrum and the pervasiveness of the medium have led many governments to license the airwaves. International courts have stressed that regulation must not unduly infringe upon freedom of expression, particularly about matters of public importance. The European Court of Human Rights specifically

In *Konaté v. Burkina Faso*, the local state had argued that Konaté’s newspaper was not registered appropriately with the government and that he had not received a “press card” from authorities—effectively, licensing requirements.<sup>27</sup> The government therefore alleged that Konaté was engaged in an “illegal practice.”<sup>28</sup> The African Court dismissed these objections. The issue, it held, was “whether, by not complying with the above administrative formalities, the Applicant cannot claim to be a journalist.”<sup>29</sup> The Court noted that the issue of whether one can practice journalism without “administrative formalities” is quite important and said it “deems it useful to rule on this issue.”<sup>30</sup> The judges stated that under the current system in Burkina Faso, the authorities “are in charge of legalizing the existence of a newspaper.”<sup>31</sup> The ruling then pointed out that Konaté worked for a newspaper that had been around since 1992,<sup>32</sup> so the idea that he should not be considered a journalist seems odd. The Court ruled that Konaté “has the *de facto* status of a journalist” even if he had “not complied with some administrative requirements in Burkina Faso.”<sup>33</sup>

The judges also pointed out that Article 9 of the United Nations Declaration of Human Rights and Article 19 of the African Covenant on Human Rights guarantees rights to freedom of expression to all citizens regardless of profession.<sup>34</sup> The Court appears to have gone out of its way in this section of the ruling to repudiate the notion of requiring journalists to receive a license to practice their profession. The government of Burkina Faso, the Court ruled, does not have the authority to decide who can or cannot be considered a journalist.<sup>35</sup> With this ruling, the African Court has aligned itself with the Inter-American Court of Human Rights and many other international jurisdictions where press freedoms are protected. The procedural ruling will probably not lead to major changes throughout Africa, but the Court has provided a robust foundation for a legal case against the practice of licensing journalists.

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ruled that broadcast licensing “tainted with arbitrariness and favoritism” constituted a violation of free speech. PERRY KELLER, *EUROPEAN AND INTERNATIONAL MEDIA LAW: LIBERAL DEMOCRACY, TRADE, AND THE NEW MEDIA* (2011).

27. *Konaté*, No. 004/2013 at ¶ 55.

28. *Id.* ¶ 50.

29. *Id.* ¶ 55.

30. *Id.* ¶¶ 53, 55.

31. *Id.* ¶ 54.

32. *Id.* ¶ 56.

33. *Id.* ¶ 57.

34. *Id.* ¶ 58.

35. *Id.* ¶¶ 55-59.

### B. Local Remedies

The Court also ruled that Konaté deserved to have his case heard in the regional court even though he had not yet exhausted all legal avenues in Burkina Faso because the country's highest court, the Supreme Court of Appeals (*Cour de Cassation*), could not possibly have ruled in his favor.<sup>36</sup> The state had noted that Rule 40(5) of the African Court's governing "Rules of Court" provides that no application to the African Court can be made until "exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged."<sup>37</sup> Although the *Konaté* ruling does not mention it, Article 50 of the Charter establishing the African Court of Human and Peoples' Rights also requires that "all local remedies, if they exist, have been exhausted" before the Court may get involved.<sup>38</sup> The local remedies rule is well established in the realm of international regional courts. Article 2 of the Optional Protocol of the International Covenant on Civil and Political Rights,<sup>39</sup> for instance, requires that the plaintiff have "exhausted all available domestic remedies" before filing a complaint with the United Nations Committee.<sup>40</sup> The same approach can be found in Article 35(1) of the European Convention on Human Rights,<sup>41</sup> as well as Article 46(1)(a) of the American Convention on Human Rights.<sup>42</sup>

The African Court made a unique decision in agreeing to hear the *Konaté* case: it acknowledged, but did not follow, these international precedents regarding local remedies. Konaté had lost a local trial and an appeals court ruling, but he still could have appealed to the Supreme Court of Appeals (*Cour de Cassation*), the highest court in the country available

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36. *Id.* ¶¶ 113-14.

37. *Id.* ¶ 74.

38. *African Charter on Human and Peoples' Rights*, AFR. COMMISSION HUM. & PEOPLES' RTS., <http://www.achpr.org/instruments/achpr/#a50> (last visited May 19, 2015).

39. Optional Protocol to the International Convention on Civil and Political Rights, art. 2, Mar. 23, 1976, 999 U.N.T.S. 171, 173-74. The ICCPR is an international treaty that creates safeguards for the civil and political rights of individuals, including freedom of religion, freedom of speech, freedom of assembly, the right to life, electoral rights and rights to due process. As of 2014, 74 countries had adopted the treaty.

40. *Id.*; *Optional Protocol to the Covenant on Civil and Political Rights*, HUM. RTS. WEB, <http://www.hrweb.org/legal/cpr-prot.html> (last visited May 19, 2015).

41. Convention for the Protection of Human Rights and Fundamental Freedoms, art. 35(1), Sept. 3, 1953, 213 U.N.T.S. 222.

42. American Convention on Human Rights "Pact of San Jose, Costa Rica" (B-32), art. 46(1)(a), July 18, 1978, 1144 U.N.T.S. 144, 155; *European Convention on Human Rights*, EUR. CT. HUM. RTS., [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf); *American Convention on Human Rights "Pact of San Jose, Costa Rica" (B-32)*, DEP'T INT'L L., [http://www.oas.org/dil/treaties\\_B-32\\_American\\_Convention\\_on\\_Human\\_Rights.htm](http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm) (last visited May 19, 2015).



to Konaté.<sup>43</sup> (A higher court, the Constitutional Council, does not hear cases from individuals.) The African Court could have agreed to hear the case on the grounds that the review process would take too long. The judges expressly stated, however, that the plaintiff had not adequately made the case that the courts were moving too slowly.

Instead, the African Court accepted the case in advance of this condition by finding that Konaté could not have expected a ruling in his favor from the highest court in Burkina Faso. The decision is interesting because no part of the African Charter explicitly authorizes such an exception. The Court noted that a prior African Court ruling had found that plaintiffs in Burkina Faso had not exhausted their legal remedies because the Supreme Court of Appeals could have conceivably ruled in their favor. In the *Konaté* case, however, the Court found that “the issue of its effective application in the present case is a matter that requires closer attention.”<sup>44</sup> The judges pointed to an earlier decision from the African Commission on Human and Peoples’ Rights that called for avoiding local remedies if they were not “available (or accessible), effective and sufficient.”<sup>45</sup> The Court also noted, without being specific, that other international courts also allowed for exemptions in similar cases. While the European Court of Human Rights does not offer such an exception, the Court of Inter-American Human Rights does provide several exemptions to the local remedies. The American Convention on Human Rights allows for avoiding local remedies in the following three cases:

- a) when the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated;
- b) when the party alleging violation of his or her rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or
- c) when there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.<sup>46</sup>

Konaté’s situation appears to fit the first reason—that Burkina Faso “does not afford due process of law for the protection of the right.”<sup>47</sup>

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43. Kounkiné Augustin Somé, *Burkina Faso Legal Information and Research*, GLOBALEX, [http://www.nyulawglobal.org/globalex/Burkina\\_Faso.htm#\\_The\\_Judiciary](http://www.nyulawglobal.org/globalex/Burkina_Faso.htm#_The_Judiciary) (last visited May 19, 2015).

44. *Konaté*, No. 004/2013, at ¶ 94.

45. *Id.* ¶ 95.

46. *American Convention on Human Rights “Pact of San Jose, Costa Rica” (B-32)*, *supra* note 42, art. 46(2) at 155-56.

Examining the issue, the Court noted that the plaintiff essentially wanted the Supreme Court of Appeals to “declare that the Burkinabé Laws on the basis of which he was held criminally and civilly liable are in breach of the right to freedom of expression.”<sup>48</sup> The African Court must rule, therefore, on the issue of whether the Supreme Court of Burkina Faso would itself “rule on such a request and thus ultimately overturn the laws in question.”<sup>49</sup> The African Court noted that the role of Burkina Faso’s Supreme Court is simply to review whether lower courts had acted in accordance with the Burkina Faso law. The Supreme Court does not have the power to overturn a law on any grounds, but instead, its judges are “charged with ensuring the strict observance of the law by other lower domestic courts.”<sup>50</sup> The judges noted that the Constitutional Council is the appropriate organ for determining whether a law should be overturned on human rights grounds. The Constitutional Council, however, is set up in such a way that only institutions may approach this court with grievances. As a private citizen, therefore, Konaté could not possibly approach the Constitutional Council. For these reasons, the Court concluded “that the remedy at appeal was ineffective and insufficient and . . . that the appeal to the Constitutional Council was unavailable.”<sup>51</sup> The justices justified its ruling in *Konaté* by citing the African Commission’s earlier ruling and, perhaps, knowledge of the Inter-American Charter that provides similar guidance. It is unclear whether this ruling will have a wide impact on other pending cases for the African Court, although the Court did grant a waiver for local remedies in another Burkina Faso ruling from the same year.<sup>52</sup>

### C. Criminal Defamation in International Jurisprudence

Laws that prohibit the defamation of reputations serve a public good by ensuring that people who deserve good reputations can protect their image.<sup>53</sup> Most governments ostensibly use criminal defamation laws to create public order and control. Historically, however, many governments have used such laws—particularly in criminal prosecutions—to control and

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47. *Id.*

48. *Konaté*, No. 004/2013, at ¶ 109.

49. *Id.*

50. *Id.* ¶ 110.

51. *Id.* ¶ 114.

52. In the matter of Late Norbert Zongo v. Burkina Faso, Judgment, No. 013/2011, African Court on Human and Peoples’ Rights [Afr. Ct. H.P.R.], ¶ 203 (Mar. 28, 2014), <http://en.african-court.org/index.php/13-homepage2/2-list-of-all-cases#finalised-cases>.

53. PETER N. AMONSAH, LIBEL LAW, POLITICAL CRITICISM, AND DEFAMATION OF PUBLIC FIGURES: THE UNITED STATES, EUROPE, AND AUSTRALIA (2004).

suppress criticism of public officials and other public figures. Indeed, the practical purpose of defamation statutes has often been to protect the powerful and elite. Government officials and public figures with the ability to have residents arrested for criticisms that are deemed libelous or insulting can generate a huge chilling effect on public discourse.<sup>54</sup> Most human rights observers agree that criminal defamation charges place too much of a burden on the press to perform its role as a watchdog of the powerful.

Framed by a logic of public security, criminal libel prosecutions have often not even hinged on whether the allegedly defamatory material was true. Media law scholar Greg Lisby underscores this point:

The purpose of the prosecution of the crime was to prevent violence—either against public officials and prosecuted as seditious libel, or against private persons and prosecuted as criminal libel. As a result, it made no difference whether the matter was true or false, because the greater the truth the more likely violence would result.<sup>55</sup>

In recent decades, however, the tide of jurisprudence has turned against criminal defamation. Global norms regarding defamation have coalesced into three main concepts: defamation complaints should be handled by civil lawsuits rather than criminal charges, public figures must withstand more scrutiny than private figures, and truth must always be a defense for libel. The next three sections explore these concepts and the global trends in their favor.

### 1. Civil vs. Criminal

In 2002, the UN Special Rapporteur on Freedom of Expression, the Organization for Security and Cooperation in Europe's Representative on Freedom of Expression, and the Organization of American States' Special Rapporteur jointly suggested the complete elimination of criminal libel: "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."<sup>56</sup> In fact, many

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54. Lyrisa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855 (2000); Leslie Kendrick, *Speech, Intent, and the Chilling Effect*, 54 WM. & MARY L. REV. 1633 (2013); Chris Dent & Andrew T. Kenyon, *Defamation Law's Chilling Effect: A Comparative Content Analysis of Australian and US Newspapers*, 9 MEDIA & ARTS L. REV. 89 (2004); LEE C. BOLLINGER, UNINHIBITED, ROBUST, AND WIDE-OPEN: A FREE PRESS FOR A NEW CENTURY (2010).

55. Gregory C. Lisby, *No Place in the Law: The Ignominy of Criminal Libel in American Jurisprudence*, 9 COMM. L. & POL'Y 433–87, 456–57 (2004).

56. HOUSE OF COMMONS CULTURE MEDIA AND SPORT COMMITTEE, PRESS STANDARDS, PRIVACY AND LIBEL, 2009-10, HC 362-II, at 429 (UK).

jurisdictions have by now either stopped employing their criminal defamation laws or have actually repealed them altogether.

Although many countries, including the United States, still have criminal defamation statutes, many rarely use them.<sup>57</sup> Less than half of US states still have criminal defamation statutes and some have recently voted to repeal theirs.<sup>58</sup> Bosnia-Herzegovina (2002), Central African Republic (2004), Georgia (2004), Ghana (2001), Sri Lanka (2002), Togo (2004), and Ukraine (2001) have all removed criminal defamation laws from their penal codes.<sup>59</sup> In many jurisdictions, including the United States, statutes that address breaches of the peace, disorderly conduct, or incitement to riot are used instead of criminal libel statutes.<sup>60</sup>

Regional courts have also joined this movement. Two regional courts have overturned criminal defamation convictions in their jurisdictions because imprisonment for publication seemed unduly harsh and an impediment to freedom of expression.

The Inter-American Court of Human Rights has overturned criminal defamation convictions on several occasions.<sup>61</sup> In *Herrera-Ulloa v. Costa Rica* (2004), the Inter-American Court found that “laws on criminal defamation, libel and slander were used to silence criticism of a public official and to censor the publication of articles related to the alleged illicit activities in which a public official engaged while discharging his office.”<sup>62</sup> The case involved a journalist who reported on corruption allegations made against a Costa Rican diplomat. The court ruled that Costa Rica’s criminal defamation laws were incompatible with Article 13 of the Inter-American Convention of Human Rights, which guarantees freedom of thought and expression.

The European Court of Human Rights similarly found that a criminal defamation case in Spain conflicted with guarantees of freedom of expression. In *Castells v. Spain* (1985), the European Court ruled in favor

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57. See Lisby, *supra* note 55. Lisby argues that criminal libel laws should be removed from all state penal codes or ruled unconstitutional by the Supreme Court.

58. See *Colorado Repeals Criminal Libel Law*, IFEX (Apr. 20, 2012), [https://www.ifex.org/united\\_states/2012/04/20/colorado\\_repeal](https://www.ifex.org/united_states/2012/04/20/colorado_repeal).

59. STEVE BUCKLEY ET AL., BROADCASTING, VOICE, AND ACCOUNTABILITY: A PUBLIC INTEREST APPROACH TO POLICY, LAW, AND REGULATION 111 (2008).

60. Alexander Tsesis, *Inflammatory Hate Speech: Offense Versus Incitement*, 97 MINN. L. REV. 1145 (2013).

61. Edward Carter, *Actual Malice in the Inter-American Court of Human Rights*, 18 COMM. L. & POL’Y 395–423 (2013).

62. *Herrera-Ulloa v. Costa Rica*, Merit, Reparation, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 107, ¶ 102(2)(g), (July 2, 2004), [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_107\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_107_ing.pdf).

of a journalist who criticized the performance of an elected official. The court did not rule out criminal libel completely, but stressed that it should not be used against speech that involves a public debate. The court stated that the “dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media.”<sup>63</sup>

## 2. Actual Malice and Scrutiny of Public Figures

In *New York Times v. Sullivan* (1964), the US Supreme Court issued a landmark ruling on civil defamation that created a high bar for public officials to win defamation charges against journalists. The case occurred in the middle of the Civil Rights era in the United States when blacks were fighting for equality, particularly in the racially segregated South. The Birmingham, Alabama police commissioner had sued the *New York Times* in state court over an advertisement that made derogatory claims about the police department’s conduct. The Alabama courts found in favor of defamation and ordered the newspaper to pay Sullivan a fine of \$500,000. The result provided a palpable incentive for media outlets from the North to stop reporting on Southern civil rights violations. Nearly \$300 million in libel lawsuits were pending against media outlets covering news in the South when *The New York Times* appealed to federal courts on constitutional grounds.<sup>64</sup> The Supreme Court unanimously ruled that the state court’s libel ruling had violated the First Amendment by unjustly restricting freedom of the press. The court reasoned that public officials must withstand scrutiny because they decide issues of public importance. Justice William Brennan stated the Supreme Court’s reasoning:

We consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.<sup>65</sup>

The court ruled that to ensure robust debate, public officials must tolerate small inaccuracies as long as the journalist did not act with “actual

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63. *Castells v. Spain*, App. No. 11798/85, 14 Eur. H.R. Rep. 445 (1992) (Eur. Ct. H.R.) (1992), [http://hudoc.echr.coe.int/eng?i=001-57772#{"itemid":\["001-57772"\]}](http://hudoc.echr.coe.int/eng?i=001-57772#{).

64. George Hodak, *March 9, 1964: New York Times Co. v. Sullivan Decided*, A.B.A. J. (Mar. 1, 2012), [http://www.abajournal.com/magazine/article/march\\_9\\_1964\\_new\\_york\\_times\\_co\\_v\\_sullivan\\_decided](http://www.abajournal.com/magazine/article/march_9_1964_new_york_times_co_v_sullivan_decided).

65. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

malice.” This term has proven confusing because it does not mean “ill will,” but rather only that the journalist acted with “reckless disregard of the truth” or “knowing falsity.”<sup>66</sup> Another Supreme Court ruling, *Garrison v. Louisiana* (1964), applied the actual malice standard to criminal defamation while also discouraging the use of criminal libel on public order grounds.<sup>67</sup> In *Curtis Publishing Co. v. Butts* (1967), the Supreme Court applied the same standard to public figures (such as politicians, celebrities, or business leaders) since they may discuss matters of public concern.<sup>68</sup>

Some international courts have decided against adopting the “actual malice” concept, while other courts have embraced it in practice, if not in name. As media law scholar Kyu Ho Youm reports, Canada, Australia, England, New Zealand, South Korea, and South Africa have all explicitly rejected the use of the actual malice standard. Courts in Argentina, Bosnia-Herzegovina, Hungary, India, the Philippines, and Taiwan, however, have all followed the concept.<sup>69</sup> Media law researcher Edward Carter surveyed several cases in South America and concluded that the region appeared to be on a “slow march” toward adopting actual malice standards.<sup>70</sup>

Regardless of whether courts are specifically drawing a line at “reckless disregard for the truth,” most courts and human rights observers have agreed that public figures must withstand more scrutiny than private figures. In the regional court cases mentioned in the section above, the courts did not explicitly adopt the actual malice standard (knowing disregard of the truth). Still, they sided with the journalists, agreeing that in order to encourage robust dialogue in a democracy people who are pervasively involved in public affairs cannot expect the same level of protection from defamation as private individuals can, especially in matters of public importance.

### 3. Truth as a Defense Against Defamation

The final generally accepted international norm related to defamation allegations is the concept that truth must be a defense against an allegation of libel or slander. This concept is deeply rooted in English common law

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66. See generally W. WAT HOPKINS, ACTUAL MALICE: TWENTY-FIVE YEARS AFTER *TIMES* V. *SULLIVAN* (1989).

67. *Garrison v. Louisiana*, 379 U.S. 64 (1964). See generally COMMUNICATION AND THE LAW (W. Wat Hopkins ed., 2012).

68. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). See generally COMMUNICATION AND THE LAW, *supra* note 67.

69. See generally Kyu Ho Youm, *The “Actual Malice” of New York Times Co. v. Sullivan: A Free Speech Touchstone in a Global Century*, 19 COMM. L. & POL’Y 185 (2014).

70. Carter, *supra* note 61, at 397.

and was invoked in America as far back as the colonial period, when, in a 1735 case against John Peter Zenger, the publisher of a New York newspaper successfully defended himself against a libel charge from the governor. The jury found him not guilty after he proved during his trial that his critical comments about the governor were true.<sup>71</sup> Truth as a defense for libel ensures that people cannot protect good reputations if they do not deserve them.

Over the years, many courts and human rights observers have agreed that truth should be a defense. The Declaration of Principles on Freedom of Expression in Africa, adopted by the African Commission on Human and Peoples' Rights in 2002, states that "[n]o one shall be found liable for true statements."<sup>72</sup> In *Castells v. Spain* (1992), the European Court of Human Rights invalidated a libel conviction in Spain because, in part, the journalist had no opportunity to prove the truth of his reporting.

#### D. Konaté v. Burkina Faso and International Jurisprudence

In *Konaté*, the African Court addressed two of the three "best practices" outlined above regarding defamation. The judges dealt with the issues of criminal charges and greater scrutiny for public figures, but did not consider the issue of truth as a defense for libel.

The Court's ruling on the issue of criminal defamation is quite exhaustive and draws heavily on past decisions of the African Commission on Human and Peoples' Rights while taking note of the rulings of the European Court of Human Rights and the Inter-American Court of Human Rights, as well.<sup>73</sup> The Court also addressed Article 66(2)(c) of the Revised Treaty of the Economic Community of West African States (ECOWAS) of July 24, 1993, which holds that member states should try to protect journalists so that they may do their jobs.<sup>74</sup> The Court noted that Article

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71. See generally GAIL JARROW, *THE PRINTER'S TRIAL: THE CASE OF JOHN PETER ZENGER AND THE FIGHT FOR A FREE PRESS* (2006).

72. Afr. Comm'n H.P.R. [ACHPR], Res. 62 (XXXII) 02, *Declaration of Principles on Freedom of Expression in Africa of 2002*, at XII(1) (Oct. 23, 2002); BUCKLEY ET AL., *supra* note 59, at 113.

73. As a reminder, the African Commission is a body that issues rulings without any enforcement mechanisms, whereas the African Court is a newer court that has jurisdiction over the countries that have opted into the system. The African Court tends to look toward the African Commission's rulings for guidance.

74. *Konaté v. Burkina Faso*, No. 004/2013, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶¶ 164, 176 (Dec. 5, 2014), <http://www.ijrcenter.org/wp-content/uploads/2015/02/Konate-Decision-English.pdf>; Revised Treaty of the Economic Community of West African States [ECOWAS], art. 66(2)(c), July 24, 1993, 35 ILM 660.

19(3) of the International Covenant on Civil and Political Rights provides that:

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 the law and are necessary:

For respect of the rights or reputation of others,

For the protection of national security or of public order (ordre public) or of public health or morals.<sup>75</sup>

Given that protecting the reputation of others is guaranteed in the charter,<sup>76</sup> the Court had to determine whether the criminal defamation charge against a journalist unduly affects the government's ability to protect reputations. The Court quoted a 2009 case before the African Commission in which the Court ruled that it must weigh the "balance . . . between the protection of the rights and freedoms of the individual and the interests of the society as a whole."<sup>77</sup> In the 2009 case, the Commission used five questions to help sort out the government's actions: "Was there sufficient reasons supporting the action? Was there a less restrictive alternative? Was the decision-making process procedurally fair? Were there any safeguards against abuse? Does the action destroy the very essence of the Charter rights in issue?"<sup>78</sup>

The African Court also referenced the African Commission case *Media Rights Agenda v. Nigeria*, noting that the Commission had determined that government actions should not be disproportionate and unexpected, thereby leading to the dampening of freedom of expression, and that the Commission had considered the closure of specific media outlets to be generally disproportionate.<sup>79</sup> In both cases before the African Commission, this quasi-judicial body had ruled in favor of the speakers. The European Court of Human Rights and the Inter-American Court of Human Rights had

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75. *Konaté*, No. 004/2013 at ¶ 11; International Convention on Civil and Political Rights, art. 19(3), Mar. 23, 1976, 999 U.N.T.S. 171, 178.

76. The same language can be found in many international documents including the United Nations Declaration of Human Rights and the International Covenant of Civil and Political Rights.

77. *Konaté*, No. 004/2013 at ¶ 149; *Zimbabwe Lawyers for Human Rights v. Zimbabwe*, No. 284/03, African Commission on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 176 (Apr. 3, 2009), <http://caselaw.ihrda.org/doc/284.03/view/en>.

78. *Zimbabwe Lawyers*, No. 284/03 at ¶ 176. By raising these issues when considering the case, the Commission was therefore of the view that the closing of the Newspaper of the Complainants amounted to a violation of their right to the Freedom of Expression. *Id.* ¶ 178.

79. *See Konaté*, No. 004/2013 at ¶ 150.



ruled in a similar manner on the issue of proportionality, the African Court also noted.

In addition to criminal charges, the African Court's ruling in *Konaté* also addressed the issue of the allegedly defamed prosecutor and his position as a public figure, ruling that Burkinabé law was out of step with international norms. The Court observed that the African Commission had previously ruled that public figures must withstand more scrutiny than private figures: "[P]eople who assume highly visible public roles must necessarily face a higher degree of criticism than private citizens; otherwise public debate may be stifled altogether."<sup>80</sup> The Court further noted that "there is no doubt that a prosecutor is a 'public figure'; as such, he is more exposed than an ordinary individual and is subject to many and more severe criticisms."<sup>81</sup> The Court points out that no laws of the states that are party to the African Charter and African Covenant should allow for greater penalties for defaming public figures than for defaming private individuals.<sup>82</sup>

The laws in Burkina Faso, however, do just that. Articles 109, 110, and 111 of Burkina Faso's Information Code<sup>83</sup> and Article 178 of its Penal Code<sup>84</sup> provide extra penalties for defaming members of the judiciary, the army, the "constituted corps," as well as magistrates, jurors, and "assessors."<sup>85</sup> The Court here ruled that the laws in question aimed to protect the reputations of public servants. While acknowledging that protecting reputations of public servants is a "perfectly legitimate objective" and "consistent with international standards in this area," the Court also made clear that such legislation conflicts with guarantees of freedom of expression:

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80. See *Konaté*, No. 004/2013 at ¶ 155; *Media Rights Agenda v. Nigeria*, Nos. 105/93-128/94-130/94-152/96, African Commission on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 74, (Oct. 31, 1998), <http://caselaw.ihra.org/doc/105.93-128.94-130.94-152.96/view/en/>.

81. *Konaté*, No. 004/2013 at ¶ 156.

82. *Id.* ¶ 156.

83. Le code de l'information [INFORMATION CODE] art. 109, 110, 111, <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/98114/116623/F-1159016860/BFA-98114.pdf>.

84. Code pénal [PENAL CODE] art. 178, <http://www.refworld.org/docid/3ae6b5cc0.html>.

85. See *id.* ¶ 157:

In the instant case, the Court notes that Article 110 of the Information Code of the Respondent State provides that defamation committed against members of the judiciary, the army and the constituted corps shall be punishable by a prison term of fifteen (15) days to three (3) months and a fine of 100,000 to 500,000 or one of both fines only." And that Article 178 of its Penal Code provides that "when one or more Magistrates, jurors or Assessors are victims of contempt in words or in writing or in drawings not made public, while exercising their duties, which may tarnish their image and reputation, the culprit will be sentenced to a prison term of from six (6) months to one (1) year and a fine of 150,000 to 1,500,000 CFA francs.

Given that a higher degree of tolerance is expected of him/her, the laws of States Parties to the Charter and the Covenant with respect to dishonoring or tarnishing the reputation of public figures, such as the members of the judiciary, should therefore not provide more severe sanctions than those relating to offenses against the honor or reputation of an ordinary individual.<sup>86</sup>

The African Court appears to be calling out all of the state parties to the African Commission and the African Charter for their laws that create extra penalties for defaming public officials. Such laws, it held, are out-of-step with the international norms surrounding defamation law.

The Court cited international media law rulings and previous African Commission decisions to discuss when criminal defamation laws are justified. It noted that the European Court of Human Rights held that the “exceptional circumstances justifying a prison term are for example, the case of hate speech or incitement to violence.”<sup>87</sup> It also noted the similar approach taken by the Inter-American Court of Human Rights. The Court concluded that:

Apart from serious and very exceptional circumstances for example, incitement to international crimes, public incitement to hatred, discrimination or violence or threats against a person or a group of people, because of specific criteria such as race, color, religion or nationality, the Court is of the view that the violations of laws on freedom of speech and the press cannot be sanctioned by custodial sentences, without going contrary to the above provisions.<sup>88</sup>

Given these conclusions, the Court decided that the government violated Konaté’s rights by imprisoning him for criminal defamation. It specifically noted that sections 109 and 110 of Burkina Faso’s Information Code and Section 178 of its Penal Code (which call for custodial sentences for defamation) violated his right to freedom of expression as guaranteed by both Article 9 of the African Charter and Article 19 of the International Covenant of Civil and Political Rights.<sup>89</sup> The Court also decided that the government violated the ECOWAS Treaty, in which the signatory states agreed to “respect the rights of journalists.”<sup>90</sup> It ruled that Burkina Faso “also failed in its duty in this regard in that the custodial sentence under the above legislation constitutes a disproportionate interference in the exercise

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86. *Id.* ¶ 156.

87. *Id.* ¶ 158.

88. *Id.* ¶ 165.

89. *See id.* ¶ 164-6.

90. *Id.* ¶ 164.

of the freedom of expression by journalists in general and especially in the Applicant's capacity as a journalist."<sup>91</sup> The judges noted that any sanctions against journalists that are excessive are incompatible with guarantees of free speech.<sup>92</sup>

In its conclusion, the Court issued several declarations and demands:<sup>93</sup> It ruled that the government violated Konaté's rights with both the imprisonment and the "excessive fine, damages, interests and costs." The Court also ruled that Burkina Faso should amend its defamation laws so that they do not conflict with the African Charter and the ECOWAS treaty protecting journalists. The judges urged the Burkina Faso government to repeal custodial sentences for defamation and to change its legislation so that sanctions for defamation meet the tests of necessity and proportionality in agreement with obligations of the African Charter and other international instruments. The Court agreed with the international consensus that criminal defamation should not be employed against journalists and that public figures must withstand greater scrutiny than private figures. The Court did not, however, address the issue of the truth of Konaté's reporting.

The absence of such a ruling on truth can be interpreted in two ways. First, it may be an opportunity squandered. Many countries in Africa and elsewhere do not hold truth as a standard in many defamation cases. The situation allows public figures to win libel allegations by merely showing that their reputations have been injured with no emphasis on whether the defamatory material was rooted in truth. In these cases, courts are in the habit of protecting good reputations for people who don't deserve them. The other perspective is that the court did not wish to broach the issue of truth because they have adopted an "actual malice" approach in which small errors will be tolerated in order to satisfy robust public debate. The court may have decided that since the prosecutor was a public figure, determining the truth of the reporting was simply immaterial.

## CONCLUSION

The African Court of Human and People's Rights ruling in the Konaté case appears to have lived up to its billing as a "landmark" ruling.<sup>94</sup> The case should change the nature of the debate throughout Africa, a continent that sees an abundance of criminal defamation charges used against

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91. *Id.* ¶ 164.

92. *See id.* ¶ 165.

93. *Id.* ¶ 176.

94. *African Court Delivers Landmark Ruling on Criminal Libel*, *supra* note 11.

journalists.<sup>95</sup> At least one country has already seen the ruling mentioned in its court system. In Uganda, a journalist made reference to it while asking a judge to throw out his criminal defamation charges.<sup>96</sup> The judge asked him to provide a copy of the ruling.<sup>97</sup>

The African Court clearly aligned itself with the prevailing international norms regarding criminal defamation and the rule of law. The Court upheld the norms of discouraging criminal defamation charges and holding that public figures must expect more scrutiny than public figures.

The Court also weighed in on two other important matters, albeit in the context of procedural law. In their decision, the judges went out of their way to state that requiring journalists to obtain licenses violated their free speech rights. The judges also ruled that a petitioner could avoid exhausting all local remedies in a specific type of situation. The move to the African Court would be allowed if the local courts could not, by design, receive a favorable court ruling.

The full effect of the entire ruling may not be visible for years. The expected outcome, however, is greater freedom of expression and better journalism in Africa. The ruling may even lead to other regions suffering from weak protections for journalists (such as the Middle East and Africa) to make changes in their approach.

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95. See Tom Rhodes, *A Bid to Rid Africa of Criminal Defamation, Sedition Laws*, COMMITTEE TO PROTECT JOURNALISTS (July 12, 2013), <https://cpj.org/blog/2013/07/a-bid-to-rid-africa-of-criminal-defamation-seditio.php>.

96. Jonathan McCully, *Criminalizing Speech in Africa: What Did the African Court on Human and Peoples' Rights Actually Say About Defamation Law?*, MEDIABELF (Jan. 16, 2015), <https://mediabelf.wordpress.com/2015/01/16/criminalising-speech-in-africa-what-did-the-african-court-on-human-and-peoples-rights-actually-say-about-defamation-law>.

97. *HRNJ-Uganda Alert, Journalist Asks Court to Dismiss Defamation Charges Against Him*, HRNJ-UGANDA (Dec. 17, 2014), <http://hrnjuganda.blogspot.co.uk/2014/12/hrnj-uganda-alert-journalist-asks-court.html>.