

NOTE

SPEAKING TRUTH TO POWER: CRIMINAL DEFAMATION BEFORE THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

BENJAMIN HERSKOVITZ*

INTRODUCTION

On August 1, 2012, Lohé Issa Konaté, a journalist in the West African nation of Burkina Faso, published an article in the weekly newspaper, *L'Ouragan* (The Hurricane), criticizing a local prosecutor in a recent money counterfeiting case.¹ One week later, Konaté published a second article criticizing the role of the prosecutor in a different case,² calling the prosecutor a “rogue officer.”³ The Burkina Faso government did not take the criticisms lightly. Burkina Faso soon prosecuted and convicted Konaté of criminal defamation, public insult, and contempt of court.⁴ He was sentenced to a prison term of twelve months.⁵ He was also required to pay fines that added up to over \$12,000 USD,⁶ eighteen times the average annual income in Burkina Faso.⁷ The Burkina Faso court further ordered Konaté’s paper, *L'Ouragan*, be shut down for six months and the paper publish the key parts of the judgment against Konaté for four months after the temporary shutdown.⁸ Three local newspapers were also ordered to publish the key parts

* J.D. 2018, The George Washington University Law School; B.A. 2012 University of Maryland, College Park.

1. Lohé Issa Konaté v. Burkina Faso, Application 004/2013, African Court on Human and Peoples’ Rights, ¶ 3 (Dec. 5, 2015). Konaté accused the prosecutor of corruption after the prosecutor intervened and dropped the charges in the high-profile counterfeiting case. See *African Court Hears First Free Speech Case*, MEDIA LEGAL DEFENCE INITIATIVE (Mar. 17, 2014), <http://www.mediafence.org/news/african-court-hears-first-free-speech-case> [<https://perma.cc/9BDB-5C4G>].

2. See *African Court Hears First Free Speech Case*, *supra* note 1.

3. Konaté v. Burkina Faso, ¶ 3 (Dec. 5, 2015).

4. *Id.*

5. *Id.* ¶ 5.

6. *Id.*

7. *Arguing the First Free Speech Case at the African Court*, MEDIA LEGAL DEFENCE INITIATIVE (Mar. 24, 2014), <http://www.mediafence.org/news/arguing-first-free-speech-case-african-court#.U19xrVfDVh0> [<https://perma.cc/9WZT-SVX6>].

8. Konaté v. Burkina Faso, ¶ 6 (Dec. 5, 2015).

of the judgment for three consecutive issues.⁹ Konaté appealed the judgment to Burkina Faso's Ouagadougou Court of Appeals, but the judgment was affirmed.¹⁰ Konaté then appealed his case to the African Court on Human and Peoples' Rights (African Court). The African Court overturned Burkina Faso's judgment and held that Burkina Faso's laws violated the freedom of expression guaranteed by the African Charter on Human and Peoples' Rights (African Charter).¹¹

Criminal defamation laws in Africa, such as the ones under which Burkina Faso prosecuted Konaté, are a holdover from colonial times when colonial rulers used them as protection against nationalist movements and uprisings.¹² In addition to criminal defamation, many modern states in Africa maintain similar types of laws such as seditious libel laws and laws against insults toward public institutions or public officials.¹³ For the purposes of this Note, all such laws will be categorized as criminal defamation laws.

The African Court is uniquely positioned to protect journalists from repressive criminal defamation laws because it can issue binding judgments on member-states¹⁴ and it is more insulated from political pressure exerted by powerful leaders than state-level courts.¹⁵ In future cases challenging criminal defamation laws, the African Court should strengthen protections for citizens charged under such laws because a robust freedom of expression is critical to a fully functioning free society that respects all human rights.¹⁶ The African Court should mandate all defamation laws allow a defense of truth, ban all criminal punishments for defamation, and

9. *Id.*

10. *Id.* ¶ 7. The judiciary system of Burkina Faso is meant to be an independent branch of the government, but it is rife with corruption and is strongly influenced by the executive branch. U.S. DEP'T OF STATE, BURKINA FASO 2015 HUMAN RIGHTS REPORT 7 (2015).

11. Konaté v. Burkina Faso, ¶ 176; African Charter on Human and Peoples' Rights, art. 9, June 27, 1981, 1520 U.N.T.S. 217 [hereinafter African Charter].

12. See Badala Tachilisa Balule, *Insult Laws: A Challenge to Media Freedom in the SADC's Fledgling Democracies?*, 41 COMP. & INT'L L.J. S. AFR. 404, 408 (2008).

13. See *id.* at 409 (explaining that these other types of laws also typically carry with them criminal punishments).

14. See Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights, art. 30, OAU Doc. OAU/LEG/EXP/AFCHPRIPROT(III) (June 10, 1998) [hereinafter Protocol].

15. See LUIS GABRIEL FRANCESHI, THE AFRICAN HUMAN RIGHTS JUDICIAL SYSTEM: STREAMLINING STRUCTURES AND DOMESTICATION MECHANISMS VIEWED FROM THE FOREIGN AFFAIRS POWER PERSPECTIVE 201 (2014).

16. Afr. Comm'n on Human & Peoples' Rights, Resolution on the Adoption of the Declaration of Principles on Freedom of Expression in Africa, Res. 62, ACHPR (XXXII) 02 (Oct. 23, 2002) [hereinafter ACHPR Resolution].

ban laws against defaming public institutions. Adopting these changes will promote the freedom of expression guaranteed in the African Charter and align the African Court with other international human rights courts.¹⁷ Without these further protections, it is likely that governments will continue using criminal defamation laws to intimidate journalists and to limit the publication of critical news stories.

Part I of this Note begins with a brief history of criminal defamation and a discussion of freedom of expression. Part I begins by describing the relevant human rights instruments in Africa and closes with a discussion of the African Court's decision in *Konaté v. Burkina Faso*. Part II argues that although the African Court improved protections for freedom of expression in *Konaté*, it should further strengthen defenses for those charged with violating defamation laws. Specifically, this Note argues that the African Court should mandate truth as a defense for defamation cases, ban criminal punishment for defamation, and ban laws against defaming public institutions.

I. BACKGROUND

A. History of Criminal Defamation Laws

Criminal punishments for defamation date back to at least the Roman Empire, when individuals used the action of *iniuria* to protect their honor and reputation.¹⁸ Although such actions were originally used to protect the honor of all citizens, over time they evolved to mainly protect the honor of government officials, especially monarchs.¹⁹ Monarchs were believed to be divinely appointed, and to criticize or insult the monarch was a serious

17. See, e.g., *Donoso v. Panama*, Preliminary Objection, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 93 (Jan. 27, 2009) (holding that true statements made by an individual in a matter of public interest are protected by the freedom of expression guaranteed in the American Convention on Human Rights); *Lingens v. Austria*, 103 Eur. Ct. H.R. (ser. A) 11 (1986) (overturning the conviction of an Austrian journalist for defamation who criticized a politician's decision to accommodate former Nazis participating in Austrian politics).

18. RUTH WALDEN, *INSULT LAWS: AN INSULT TO PRESS FREEDOM* 9 (2000). *Iniuria*, translated as insult or injury, originally allowed for compensation for physical attacks, but over time the Roman legal system expanded it to include verbal attacks on honor or reputation. *Id.*

19. *Id.*

offense akin to blasphemy,²⁰ punished with imprisonment or even death.²¹

In Africa, colonial rulers instituted most criminal defamation laws.²² During colonialism, the British enacted seditious libel laws in Africa that criminalized criticism or insults against government officials.²³ The British judiciary originally developed seditious libel laws in England because it feared that the creation of the printing press would lead to the spread of harmful lies about the English monarchs.²⁴ France modeled laws in its African colonies after the French Press Law of 1881, which outlawed criticism against the prime minister and other members of the government, including members of the judiciary.²⁵

Despite the large number of countries that have criminal defamation laws in place,²⁶ not all states prosecute individuals under criminal defamation laws.²⁷ The relative strength and independence of a country's judiciary system is an important factor that influences the tendency of governments to actually prosecute individuals under criminal defamation laws.²⁸ When authoritarian rulers have the power to choose the judges and prosecutors in the judicial branch, they are likely to appoint individuals who will zealously guard the honor of the ruler and punish any perceived slight that could be interpreted as insulting.²⁹ Many governments in Africa routinely use criminal defamation laws to silence criticism from journalists.³⁰ Governments in many African countries have additional leverage over the print media because governments typically own the printing presses and can easily ban certain publica-

20. Blasphemy laws, while a modern-day threat to freedom of expression in many countries, are outside the scope of this Note.

21. James H. Ottoway, Jr. & Leonard H. Marks, *Introduction to RUTH WALDEN, INSULT LAWS: AN INSULT TO PRESS FREEDOM I* (2000).

22. Ruth Walden, *Insult Laws*, in *THE RIGHT TO TELL: THE ROLE OF MASS MEDIA IN ECONOMIC DEVELOPMENT* 207, 210 (Roumee Islam ed. 2002).

23. *Id.*

24. *Id.*

25. Loi du 29 Juillet 1881 sur la liberté de la presse [Law of July 29, 1881 on the Freedom of the Press]; see Balule, *supra* note 12.

26. Roughly 160 countries have such laws in place. Michael O'Flaherty, *Freedom of Expression: Article 19 of the International Covenant on Civil and Political Rights and the Human Rights Committee's General Comment No 34*, 12 HUM. RTS. L. REV. 627, 632 (2012).

27. Walden, *supra* note 22, at 216.

28. See Walden, *supra* note 18, at 10.

29. See *id.*

30. *Id.* at 105 ("Nowhere are the disastrous effects of Western Europe's insult and sedition laws more evident than in the nation of sub-Saharan Africa"); PATTI McCracken, *INSULT LAWS: INSULTING TO PRESS FREEDOM, A GUIDE TO EVOLUTION OF INSULT LAWS IN 2010* 50 (2012).

tions.³¹ Some commentators argue that criminal defamation laws must be struck down in order to protect the freedom of expression guaranteed by international human rights treaties.³²

B. *Freedom of Expression*

Individuals often challenge criminal defamation laws on the ground that the laws violate their right to freedom of expression.³³ Freedom of expression allows citizens to hold their governments accountable.³⁴ By exerting political pressure through public criticism, citizens can pressure governments to respect not only freedom of expression but other human rights as well.³⁵ Human rights advocates emphasize the need for a robust protection of freedom of expression in developing countries because citizens can lay the groundwork for respect of all human rights through public criticism of government actors.³⁶ Freedom of expression can also serve as a safety valve: citizens are less likely to resort to violent means of dissent if they can freely voice their objections to government actions.³⁷

Freedom of expression is particularly important for the media because the media inform the public and disseminate information that the public needs to hold governments accountable.³⁸ In 1936, the U.N. General Assembly wrote, “[f]reedom of information is a fundamental human right and is the touchstone of all the freedoms to which the United Nations is consecrated [I]t is an essential factor in any serious effort to promote the peace and progress of the world.”³⁹ Protecting freedom of expression for journalists in current times is especially urgent. The Committee to

31. Walden, *supra* note 18, at 105.

32. See, e.g., Ottoway et al., *supra* note 21, at 2.

33. Balule, *supra* note 12, at 410–11.

34. Edward Carter, “Error But Without Malice” in *Defamation of Public Officials: The Value of Free Expression in International Human Right Law*, 21 COMM. L. & POL’Y 301, 318 (2016).

35. *Id.* at 318–19; O’Flaherty, *supra* note 26, at 631 (describing freedom of expression as a “meta right”) (citing Michael O’Flaherty, *Article 19 UDHR: Contemporary Challenges and Opportunities for Freedom of Expression*, Lecture at the Carr Centre for Human Rights Policy, Kennedy School of Government, Harvard University (Mar. 4, 2009)).

36. *Id.* Under the right-based approach to development, human rights are prioritized during economic development for moral, legal, and pragmatic reasons. See *What is HBRAP?*, UNICEF, https://www.unicef.org/policyanalysis/rights/index_62012.html#3 [<https://perma.cc/PF4H-65VB>] (last updated Jan. 23, 2016).

37. See *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

38. Balule, *supra* note 12, at 405.

39. G.A. Res. 59 (I), ¶ 1–2 (Dec. 14, 1946).

Protect Journalists⁴⁰ (CPJ) reported that 259 journalists were in jail in 2016, the largest number CPJ has recorded since they started collecting data in 1990.⁴¹ Criminal defamation laws have two primary effects. First, they violate freedom of expression by punishing statements that should be protected.⁴² Second, they pressure journalists to censor themselves at the risk of being imprisoned for criticizing government officials.⁴³

C. *Protections Against Criminal Defamation in the African Context*

Criminal defamation laws in Africa can threaten freedom of expression, which is protected at the regional level as well as at the U.N. level. The African Charter, the African Commission on Human and Peoples' Rights (African Commission), and the African Court provide the main framework for protection of freedom of expression in Africa.⁴⁴ The International Covenant on Civil and Political Rights (ICCPR) also influences the African framework because most African states are parties to the ICCPR⁴⁵ and the African Court has jurisdiction over cases and disputes involving any human rights instrument ratified by the states concerned.⁴⁶ Freedom of expression is protected in both the African Charter and the ICCPR.

40. The Committee to Protect Journalists is a non-profit organization founded in 1981 that tracks abuses against the freedom of the press around the world and advocates for journalists targeted by repressive regimes. See *What We Do*, COMM. TO PROTECT JOURNALISTS, <https://www.cpj.org/about> [<https://perma.cc/BYC7-6629>].

41. Elana Beiser, *Turkey's Crackdown Propels Number of Journalists in Jail Worldwide to Record High*, COMMITTEE TO PROTECT JOURNALISTS (Dec. 13, 2016), <https://cpj.org/reports/2016/12/journalists-jailed-record-high-turkey-crackdown.php> [<https://perma.cc/8RF9-QQSR>]. The report of countries that have jailed journalists included the African countries of Cameroon, Egypt, Eritrea, Ethiopia, Gambia, Mauritania, Nigeria, Tunisia, and Zambia. *Id.* (follow "Database of all imprisoned journalists" hyperlink on left side of screen).

42. Lohé Issa Konaté v. Burkina Faso, Application 004/2013, African Court on Human and Peoples' Rights, separate opinion ¶ 4 (Dec. 5, 2015).

43. See Matt J. Duffy, Konaté v. Burkina Faso: *An Analysis of a Landmark Ruling on Criminal Defamation in Africa*, 6 J. INT'L MEDIA & ENT. L. 1, 2 (2016).

44. Kolawole Olaniyan, *Civil and Political Rights in the African Charter: Articles 8–14*, in *THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHT: THE SYSTEM IN PRACTICE 1986-2006* 219–225 (Malcolm Evans & Rachel Murray eds., 2008).

45. *Status of Ratification Interactive Dashboard*, OFFICE OF THE U.N. HIGH COMM'R FOR HUMAN RIGHTS, <http://indicators.ohchr.org> [<https://perma.cc/2PPK-UVPT>] (select "International Covenant on Civil and Political Rights" from the dropdown menu located above the world map). South Sudan is the only African country not party to the ICCPR. Western Sahara, which has a disputed legal status, is not a party either. See *id.*

46. Protocol, *supra* note 14, art. 3 ¶ 1. The African Commission also "draws inspiration" from human rights instruments that African countries have ratified. African Charter, *supra* note 11, art. 60.

1. African Charter on Human and Peoples' Rights

The Organization of African Unity (OAU)⁴⁷ adopted the African Charter (also known as the Banjul Charter) in June 1981, and the Charter entered into force on October 21, 1981.⁴⁸ The African Charter is an international human rights instrument created after a twenty-year-long effort by the OAU and the U.N. Commission on Human Rights to develop a regional system of human rights protection in Africa.⁴⁹ Article 9 of the African Charter guarantees that “(1) [e]very individual shall have the right to receive information” and “(2) [e]very individual shall have the right to express and disseminate his opinions within the law.”⁵⁰ Laws limiting freedom of expression violate the African Charter unless they protect a legitimate interest and are necessary to protect that interest.⁵¹ To be “necessary,” a law must not include a punishment too severe in light of the stated interest that the law protects.⁵² The obligations provided by the African Charter are binding on states after ratification.⁵³ Fifty-three states have signed and ratified the African Charter, with South Sudan being the only African state that has not yet ratified the Charter.⁵⁴ The African Charter set the framework for the establishment and mission of the African Commission.

47. The Organization for African Unity (OAU) was a pan-African organization established on May 25, 1963. It was established to oppose colonization, reduce racial discrimination, and promote economic development in Africa. Following years of perceived ineffectiveness, the OAU was replaced by the African Union (AU) in 2002. The AU serves many of the same goals as the OAU. Gino J. Naldi, *The African Union and the Regional Human Rights System*, in *THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: THE SYSTEM IN PRACTICE 1986-2006 20* (Malcolm Evans & Rachel Murray eds., 2008) [hereinafter Naldi, *THE SYSTEM IN PRACTICE*].

48. Germain Baricako, *Introductory Preface* to *THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: THE SYSTEM IN PRACTICE 1986-2006* 1, 8 (Malcolm Evans & Rachel Murray eds., 2008).

49. *Id.* at 1–8.

50. African Charter, *supra* note 11, art. 9. The African Commission has explained that “[t]he expression ‘within the laws’ must be interpreted as reference to the international norms” which only allow for particular interests to justify restrictions on freedom of expression. See *Malawi African Association v. Mauritania*, Communication No. 54/91-61/91-96/93-98/93-164/97-196/97-210/98, African Commission on Human and Peoples' Rights, ¶ 101–02 (May 11, 2000).

51. *Lohé Issa Konaté v. Burkina Faso*, Application 004/2013, African Court on Human and Peoples' Rights, ¶¶ 132, 148 (Dec. 5, 2015).

52. See *id.* ¶ 163 (holding 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 reputation” of the local prosecutor).

53. African Charter, *supra* note 11, art. 65.

54. *Ratification Table: African Charter on Human and Peoples' Rights*, AFR. COMM'N ON HUMAN & PEOPLES' RIGHTS, <http://www.achpr.org/instruments/achpr/ratification> [<https://perma.cc/SMC8-W82U>].

2. African Commission on Human and Peoples' Rights

The African Charter called for the establishment of the African Commission "to promote human and peoples' rights and ensure their protection in Africa."⁵⁵ The African Commission has the authority to interpret provisions of the African Charter,⁵⁶ but decisions of the African Commission are not legally binding on states and are merely persuasive authority.⁵⁷ The African Charter requires states to submit reports to the African Commission every two years, describing the progress that the state has made in furthering the rights set out in the Charter.⁵⁸ The African Commission does not have any mechanism to enforce its rulings, but the African Court does take guidance from the African Commission's rulings.⁵⁹

The African Commission has passed several influential, albeit non-binding, resolutions that address criminal defamation laws.⁶⁰ For example, the African Commission adopted the Declaration of Principles on Freedom of Expression in Africa on October 23, 2002.⁶¹ That Declaration reads in part:

States should ensure that their laws relating to defamation conform to the following standards: no one shall be found liable for true statements, opinions or statement regarding public figures which it was reasonable to make in the circumstances; public figures shall be required to tolerate a greater degree of criticism; and sanctions shall never be so severe as to inhibit the right to freedom of expression, including by others.⁶²

In 2010, the African Commission passed a resolution, calling on state parties "to repeal criminal defamation laws or insult laws which impede freedom of speech" and emphasizing "that criminal defamation laws constitute a serious interference with freedom of expression and impede[] the role of the media as a watchdog, preventing journalists and media practitioners from practicing their profession without fear and in good faith."⁶³ These two reso-

55. African Charter, *supra* note 11, art. 30; *see also* Naldi, THE SYSTEM IN PRACTICE, *supra* note 47, at 20.

56. African Charter, *supra* note 11, art. 45.

57. *Id.* art. 52.

58. *Id.* art. 63.

59. *See* Duffy, *supra* note 43, at 15 n.73.

60. *See infra* notes 61, 63.

61. ACHPR Resolution, *supra* note 16.

62. *Id.* ¶ XII.

63. African Comm'n on Human & Peoples' Rights, Resolution on Repealing Criminal Defamation Laws in Africa, Res. 169/48 (Nov. 24, 2010). The resolution favorably cites the Declaration of Table Mountain, an influential advocacy statement made by the World Association of Newspapers and News Publishers at the World Editors Forum of 2007 in Cape

lutions identify criminal defamation laws as a threat to freedom of expression in Africa, emphasize that public officials need to accept a greater degree of public scrutiny, and indicate that the media and journalists play an integral role in holding public officials accountable through exercise of freedom of expression.⁶⁴ While the African Commission's resolutions are not binding, the decisions of the African Court are binding on member states,⁶⁵ and the African Court can incorporate the resolutions into its opinions.⁶⁶

3. African Court on Human and Peoples' Rights

The OAU adopted the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (the Protocol) on June 9, 1998.⁶⁷ The Protocol established the African Court.⁶⁸ The OAU created the African Court in response to criticisms that the African human rights system lacked a judicial body as well as enforcement mechanisms.⁶⁹ Some commentators believe the OAU did not originally establish a regional court with power to issue binding rulings when the African Commission was created because OAU member states did not want to undermine their sovereignty by accepting the jurisdiction of a regional court.⁷⁰

The Protocol came into force in 2004 when it had been ratified by the required fifteen countries.⁷¹ The Protocol sets out the purpose, jurisdiction, and structure of the African Court.⁷² State parties nominate individuals to serve as judges on the Court, with no two judges from a single state.⁷³ The African Court is meant to

Town, South Africa. *See id.* The Declaration of Table Mountain calls insult laws and criminal defamation laws the "greatest scourge of press freedom on the continent." *The Declaration of Table Mountain*, WORLD ASS'N OF NEWSPAPERS & NEWS PUBLISHERS (2007), <http://www.wan-ifra.org/articles/2011/02/16/the-declaration-of-table-mountain> [<https://perma.cc/X6LD-4DA8>].

64. *Id.*; ACHPR Resolution, *supra* note 16.

65. Protocol, *supra* note 14, art. 30.

66. *See id.* art. 2.

67. Ibrahima Kane & Ahmed C. Motala, *The Creation of a New African Court of Justice and Human Rights*, in *THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: THE SYSTEM IN PRACTICE 1986-2006* 406 (Malcolm Evans & Rachel Murray eds., 2008).

68. Protocol, *supra* note 14, art. 1.

69. Naldi, *THE SYSTEM IN PRACTICE*, *supra* note 47, at 43.

70. Baricako, *supra* note 48, at 2.

71. *Establishment of the Court*, AFR. COURT ON HUMAN & PEOPLES' RIGHTS, <http://en.african-court.org/index.php/about-us/establishment> [<https://perma.cc/WQ55-NN5U>].

72. Protocol, *supra* note 14, art. 1.

73. *Id.* arts. 11–12.

complement the African Commission in carrying out the mission of the African Charter.⁷⁴ Both the African Commission and states party to a complaint lodged with the African Commission can submit a case to the African Court.⁷⁵ States can also submit cases to the African Court without going through the African Commission if a citizen of the state is the victim of a human rights violation.⁷⁶ The African Court also has jurisdiction to accept cases from individuals and non-governmental organizations (NGOs) that have observer status before the African Commission,⁷⁷ but states must explicitly waive into this type of jurisdiction by making an additional declaration after ratifying the Protocol.⁷⁸ To date, thirty states have ratified the Protocol⁷⁹ and eight of those states have made the additional declaration to submit to cases brought by an individual or NGO.⁸⁰

A state might choose to bring a case to the African Commission instead of the African Court to avoid a binding ruling.⁸¹ The states that have not ratified the Protocol cannot bring cases to the African Court and only have the option of lodging a complaint with the African Commission.⁸² The jurisdiction of the African Court extends not only to interpretation of the African Charter but also to other cases involving “relevant Human Rights instrument[s] ratified by the States concerned.”⁸³ The ICCPR is one of those relevant human rights instruments and the African Court discussed the ICCPR at length in the *Konaté* decision.⁸⁴

74. *Id.* art. 2.

75. *Id.* art. 5 ¶ 1(a)–(b).

76. *Id.* art. 5 ¶ 1(d).

77. *Id.* art. 5 ¶ 3.

78. *Id.* art. 34 ¶ 6.

79. The states are Algeria, Benin, Burkina Faso, Burundi, Cameroon, Chad, Cote 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. *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 on Human and Peoples' Rights*, AFR. COURT ON HUMAN & PEOPLES' RIGHTS, http://en.african-court.org/images/Basic%20Documents/Ratification_and_Deposit_of_the_Declaration_final-jan_2017.pdf [https://perma.cc/SE79-XNN8] [hereinafter *List of Countries Which Have Signed, Ratified/Acceded to the Protocol*].

80. The states are Burkina Faso, Malawi, Mali, Tanzania, Ghana, Rwanda, Cote d'Ivoire, and Benin. *See id.*

81. Naldi, *THE SYSTEM IN PRACTICE*, *supra* note 47, at 43.

82. *Id.*

83. Protocol, *supra* note 14, art. 3 ¶ 1.

84. *See* Lohé Issa Konaté v. Burkina Faso, Application 004/2013, African Court on Human and Peoples' Rights (Dec. 5, 2015).

4. The International Covenant on Civil and Political Rights

The ICCPR is the chief source for protection of freedom of expression at the U.N. level. The U.N. General Assembly adopted it on December 16, 1966.⁸⁵ The General Assembly based the ICCPR on the language of the Universal Declaration of Human Rights (UDHR).⁸⁶ The UDHR is a non-binding declaration by the U.N. General Assembly, while the ICCPR is a binding treaty on nations that ratify it.⁸⁷ The U.N. Human Rights Committee enforces state compliance with the ICCPR.⁸⁸ There are 171 state parties to the ICCPR⁸⁹ and virtually all African countries are state parties to the ICCPR.⁹⁰ Therefore, the African Court is extremely likely to consider the ICCPR in future cases involving freedom of expression.⁹¹ Article 19 of the ICCPR guarantees the right to freedom of expression, defining it as the “freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media.”⁹²

In 2011, the U.N. Human Rights Committee officially adopted Comment 34 to the ICCPR which expounds upon Article 19 and provides guidance on its interpretation.⁹³ The U.N. Human Rights Committee considers such comments as authoritative instructions regarding implementation of the treaty.⁹⁴ Comment 34 to the ICCPR recognizes that a “free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression . . . [and is] one of the cornerstones of a democratic society.”⁹⁵ Comment 34 notes the following:

[T]he mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties [A]ll public figures, including those exer-

85. Carter, *supra* note 34, at 307.

86. *Id.*

87. *Id.*

88. International Covenant on Civil and Political Rights, art. 28, Dec. 16, 1966, S. Exec. Doc. No. 95-E (1978), 999 U.N.T.S. 171 [hereinafter ICCPR].

89. *Status of Ratification Interactive Dashboard*, *supra* note 45.

90. *Id.*

91. The African Court has jurisdiction to consider any relevant human rights instrument that a state before the African Court has ratified. *See Protocol supra* note 14, art. 3 ¶ 1.

92. ICCPR, *supra* note 88, art. 19.

93. U.N. Human Rights Comm., Summary Record of the 2820th Meeting, ¶ 86, CCPR/C/ SR.2820 (July 21, 2011).

94. O’Flaherty, *supra* note 26, at 644.

95. U.N. Human Rights Comm., General Comment No. 34, ¶ 13, U.N. Doc. CCPR/C/GC/34 (2011) [hereinafter General Comment No. 34].

cising the highest political authority such as heads of state and government, are legitimately subject to criticism and political opposition. Accordingly, the Committee expresses concern regarding laws on such matters as, lese majesty, desacato, disrespect for authority . . . defamation of the head of state and the protection of the honour of public officials, and laws should not provide for more severe penalties solely on the basis of the identity of the person that may have been impugned. States parties should not prohibit criticism of institutions, such as the army or the administration.⁹⁶

Comment 34 also calls for truth as a defense to all defamation laws, notes that imprisonment is never appropriate as a punishment for defamation, and encourages states to “consider the decriminalization of defamation.”⁹⁷ The Comment also states that “[t]he penalization of a media outlet, publisher[] or journalist solely for being critical of the government . . . can *never* be considered to be a necessary restriction of freedom of expression.”⁹⁸ In *Konaté*, the African Court looked to Comment 34 for guidance on deciding whether Burkina Faso’s defamation laws violated the right to freedom of expression.⁹⁹ The African Court incorporated many of the directives included in Comment 34, but it failed to fully comport with the Comment by not allowing a showing of truth as a defense to defamation, not banning all criminal punishments for defamation, and not banning laws against defaming public institutions.

5. *Konaté v. Burkina Faso*

In 2014, the African Court decided *Konaté v. Burkina Faso*, holding that Burkina Faso had impermissibly violated Konaté’s freedom of expression. In the case, Konaté challenged his conviction for defamation, public insult, and contempt of court for publishing articles accusing a local prosecutor of corruption.¹⁰⁰ The African Court overturned Konaté’s sanctions and conviction and held that Burkina Faso’s laws violated the African Charter and the ICCPR.¹⁰¹ The ruling is binding on states that have ratified the Protocol establishing the African Court.¹⁰²

96. *Id.* ¶ 38 (citations omitted).

97. *Id.* ¶ 47 (citations omitted).

98. *Id.* ¶ 42 (citations omitted) (emphasis added).

99. Lohé Issa Konaté v. Burkina Faso, Application 004/2013, African Court on Human and Peoples’ Rights, ¶ 152 (Dec. 5, 2015).

100. *Id.* ¶ 4.

101. *Id.* ¶¶ 3–8

102. Protocol, *supra* note 14, art. 30; see *List of Countries Which Have Signed, Ratified/ Acceded to the Protocol*, *supra* note 79.

Burkina Faso's laws define defamation as "[a]ny allegation or imputation of a fact which undermined the honour or image of a person or profession."¹⁰³ Under Burkina Faso law, defamation of "the Court's Tribunals, Armed Forces, State Officials . . . Members of Parliament or Government . . . a Judge, [or] a member of the Jury of Courts or Tribunals" is punishable with imprisonment and fines.¹⁰⁴ Burkina Faso sentenced Konaté harshly with twelve months' imprisonment, a fine of approximately \$3,000 USD, and damages of approximately \$9,000 USD.¹⁰⁵ The Burkina Faso courts also ordered a suspension of Konaté's publication for six months.¹⁰⁶ Konaté appealed his conviction to the African Court.¹⁰⁷

Using a proportionality test, the African Court held that Burkina Faso's punishment of Konaté violated Article 9 of the African Charter and Article 19 of the ICCPR.¹⁰⁸ In *Konaté*, the African Court assessed whether Burkina Faso had properly balanced the rights of the individual (the prosecutor that Konaté accused of corruption), the objective of the state in trying to protect the reputation of public officials, the method used by the state to achieve that objective, the gravity of the offense, and the society's interest in having a free and open press.¹⁰⁹ The African Court stopped short of stating that there should never be criminal punishments for defamation, but instead wrote that the proportionality test must be applied to determine whether criminal punishments for acts such as defamation violate freedom of expression rights under the African Charter or other human rights agreements.¹¹⁰ It also wrote that there were certain exceptions, such as "incitement to international crimes, public incitement to hatred, discrimination or violence or threats against a person or a group of people, because of specific criteria such as race, colour, religion or nationality," in which it may even be valid for a state to impose the severe criminal punishment of a custodial sentence without violating freedom of expression.¹¹¹

103. *Konaté v. Burkina Faso*, ¶ 121 (quoting INFORMATION CODE (Burkina Faso) art. 109). Burkina Faso's laws are written in French and there is no official English translation.

104. *Id.* (quoting INFORMATION CODE (Burkina Faso) arts. 110–11).

105. *Id.* ¶ 5.

106. *Id.* ¶ 6.

107. *Id.* ¶ 1.

108. *Id.* ¶ 164. The African Court explained that the proportionality test was based on the approach based on Article 19 of the ICCPR taken by the African Commission, U.N. Human Rights Committee, the European Court, and the Inter-American Court. *Id.* ¶ 147.

109. *Id.* ¶¶ 139–66.

110. *Id.* ¶ 166.

111. *Id.* ¶ 165. A custodial sentence is a prison sentence. *Custodial Sentence*, BLACK'S LAW DICTIONARY (10th ed. 2014).

Four judges wrote a separate concurring opinion sharply differing from the majority opinion on the issue of criminal punishments for defamation.¹¹² The concurring judges reached the same conclusion as the majority, ordering Konaté's conviction to be overturned.¹¹³ However, the concurring opinion rejected the majority's proportionality analysis that weighed competing interests to determine whether Konaté's punishment was appropriate.¹¹⁴ Instead, the concurring justices held that under the African Charter, there should never be criminal punishments allowed for defamation.¹¹⁵ They held that individuals should use the civil system, rather than the criminal system, to address defamation.¹¹⁶ They also dismissed the majority's exceptions that would allow for custodial sentences for defamation, stating that "once a so-called criminal defamation amounts to say hate speech or incitement, it is no longer criminal defamation."¹¹⁷ The concurring judges argued that keeping broad exceptions in place that allow governments to imprison journalists for defamation was a grave threat to freedom of expression.¹¹⁸

The African Court did not discuss in *Konaté* whether truth is a defense to defamation.¹¹⁹ The lack of discussion of truth as defense may have been a sign that the African Court was implicitly adopting a standard akin to "actual malice," without using the term explicitly.¹²⁰ The actual malice standard is well known from a case challenging a civil defamation law, *New York Times v. Sullivan*, decided by the U.S. Supreme Court.¹²¹ The actual malice standard dictates that to foster a robust debate over the performance of public figures, courts will only punish individuals for libel of such officials if the criticisms were made with "actual malice," or stated more clearly, with "knowledge that it was false or with reckless disregard of whether it was false or not."¹²² This approach protects not only true statements, but even false statements made without "actual malice." The Inter-American Court, a regional human

112. Lohé Issa Konaté v. Burkina Faso, Application 004/2013, African Court on Human and Peoples' Rights, separate opinion ¶ 4 (Dec. 5, 2015).

113. *Id.* ¶ 3.

114. *Id.* ¶ 5.

115. *Id.* ¶ 4.

116. *Id.*

117. *Id.*

118. *See id.*

119. *See Duffy, supra* note 43, at 19.

120. *See id.*

121. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).

122. *Id.*

rights court that the African Court cited as persuasive authority in *Konaté*, has developed a standard in defamation cases that is similar to actual malice and allows for protection of journalists publishing false statements if they have a reasonable belief the statements are true.¹²³

The African Court's decision in *Konaté* has been recognized as an important victory for freedom of expression and freedom of the press in Africa.¹²⁴ It affirmed that public officials must be willing to accept greater public scrutiny and criticism than average citizens.¹²⁵ The case also demonstrated that the African Court has an important and powerful role in ordering member states to respect human rights; as of December 2016, Burkina Faso fully complied with the African Court's ruling.¹²⁶

II. ANALYSIS

While the African Court's ruling in the *Konaté* case was a major advancement for freedom of expression in Africa, the African Court should further more protections for those charged with violating defamation laws because a robust freedom of expression encourages a fully functioning free society that respects all human rights.¹²⁷ Specifically, the African Court should mandate a showing of truth as a defense to defamation, ban all criminal punishments for defamation, and ban laws against defaming public institutions.

A. *Truth as a Defense*

Importantly, the African Court's ruling in the *Konaté* case did not discuss whether the critical articles *Konaté* published about the local prosecutor were true.¹²⁸ The African Court failed to apply the directive from the Declaration of Principles on Freedom of Expression in Africa adopted by the African Commission that "no one shall be found liable for true statements, opinions or state-

123. See *Donoso v. Panama*, Preliminary Objection, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 93 (Jan. 27, 2009).

124. See Duffy, *supra* note 43; Dinah Shelton, *Konaté v. Burkina Faso*. *App. No. 004/2013*, 109 AM. J. INT'L L. 630, 635 (2015).

125. *Lohé Issa Konaté v. Burkina Faso*, Application 004/2013, African Court on Human and Peoples' Rights, ¶¶ 155–156 (Dec. 5, 2015).

126. Nani Jansen Reventlow, *Press Freedom and Africa's Regional Courts: A Positive Model for Transparency and Accountability*, JUST SEC. (Dec. 22, 2016, 7:39 AM), <https://www.just-security.org/35773/press-freedom-africas-regional-courts-positive-model-transparency-accountability/> [<https://perma.cc/S2LP-9RA9>].

127. See ACHPR Resolution, *supra* note 16.

128. Duffy, *supra* note 43, at 15.

ments regarding public figures which it was reasonable to make in the circumstances.”¹²⁹ Mandating truth as a defense ensures that citizens can criticize the actions of public officials and that public officials only maintain a good reputation if they deserve it.¹³⁰ The African Court’s failure to inquire whether Konaté’s critical articles about the prosecutor were true overlooks one of the fundamental purposes of freedom of expression—the promotion of good democratic institutions.¹³¹ Freedom of expression in any democratic society is a “necessary condition for . . . transparency and accountability,”¹³² and the media in particular play an important role in informing the public about the performance of public officials.¹³³ Given this important role of the media, it is especially important that they be able to report on the actions of government officials, without fear of being punished for reporting and criticizing government actions.

Without demanding truth as a defense to defamation, the African Court encouraged member states to simply word their defamation statutes broadly, so as to protect the reputations of all citizens, rather than just certain public officials.¹³⁴ The African Court held that Burkina Faso’s laws violated freedom of expression because they provided more severe penalties for harming the reputation of public officials than for harming the reputation of regular citizens.¹³⁵ This simply encourages member states to write defamation laws broadly. However, governments are known to adeptly use broadly worded defamation statutes to stifle dissent and single out critics of the government.¹³⁶ The African Court should have mandated truth as a defense to defamation to ensure that public officials seek to earn good reputations based on the truth rather than manufacture good reputations by stifling damaging reports.¹³⁷

If the African Court does not allow for truth as a defense, defamation laws will function as insult laws. Under insult laws, only the subjective indignity suffered by a public official matters, not the truth of the statement that caused that indignity.¹³⁸ Not allowing

129. ACHPR Resolution, *supra* note 16.

130. Duffy, *supra* note 43, at 15.

131. See Duffy, *supra* note 43, at 19.

132. General Comment No. 34, *supra* note 95, at ¶ 3.

133. *Id.* ¶ 13.

134. See Lohé Issa Konaté v. Burkina Faso, Application 004/2013, African Court on Human and Peoples’ Rights, ¶ 156 (Dec. 5, 2015).

135. *Id.*

136. See Walden, *supra* note 18, at 105–09.

137. See Duffy, *supra* note 43, at 15.

138. Balule, *supra* note 12, at 409.

for truth as defense will make the enforcement of defamation laws more arbitrary, allowing governments to protect themselves from all criticisms including reports that are true and made in the public interest.¹³⁹ If journalists fear severe punishments for violating insult laws, they will censor themselves and will not report on wrongdoings of their government and public officials.¹⁴⁰ Reporters need to be able to criticize governments without fear of reprisal because public officials must be accountable to the population in a democratic society.¹⁴¹ The African Court should give journalists the assurance that freedom of expression protects reporting the truth, regardless of whether government officials take offense at having their misdeeds exposed to the public.

Some commentators claim that the African Court was adopting a standard resembling actual malice without actually using that specific term.¹⁴² Adopting such a standard would protect both true statements and false statements made without a reckless disregard for the truth.¹⁴³ But the African Court in *Konaté* did not analyze whether Konaté's claims about the local prosecutor were made with reckless disregard for the truth, let alone whether his claims were true.¹⁴⁴ If the African Court wanted to adopt a standard similar to actual malice, it should have followed the guidance of other international courts to a greater extent than it did in *Konaté*. Other international courts do not have any binding influence on the African Court,¹⁴⁵ but in *Konaté*, the African Court cited to a recent Inter-American Court case, *Tristan Donoso v. Panama*,¹⁴⁶ to support the *Konaté* decision's reliance on the proportionality test.¹⁴⁷ The *Donoso* case, however, applied a standard similar to actual malice.¹⁴⁸ In *Donoso*, the Inter-American Court held that Panama had violated Donoso's right to freedom of expression when the Panamanian

139. *Id.*

140. *Id.*

141. *Id.* at 405, 409.

142. See Duffy, *supra* note 43, at 19.

143. Edward Carter, *Actual Malice in the Inter-American Court of Human Rights*, 18 COMM. L. & POL'Y 395, 416 (2013).

144. See Lohé Issa Konaté v. Burkina Faso, Application 004/2013, African Court on Human and Peoples' Rights, ¶ 154 (Dec. 5, 2015); Duffy, *supra* note 43, at 15.

145. See Protocol, *supra* note 14, art. 7 (listing the sources of law for the African Court as only the African Charter and human rights instruments ratified by states before the Court).

146. *Donoso v. Panama*, Preliminary Objection, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 93 (Jan. 27, 2009).

147. *Konaté v. Burkina Faso*, ¶ 154.

148. Carter, *supra* note 143, at 417–18.

court found him guilty of criminal defamation¹⁴⁹ after he held a press conference in which he erroneously accused the attorney general of Panama of illegally wiretapping Donoso's phone call with a client.¹⁵⁰ The Inter-American Court found that while Donoso had made erroneous claims, there were sufficient grounds to believe the claims were true at the time of his press conference.¹⁵¹ The Inter-American Court reasoned that because freedom of expression covers true statements made about public officials, Donoso was protected because he justifiably believed that the accusations he was making were true.¹⁵² This standard is similar to the actual malice standard because it considers the declarant's knowledge and behavior with regard to the truthfulness of the alleged defamatory statement.¹⁵³ Had the African Court followed the Inter-American Court's fact-intensive inquiry in *Donoso*, it would have provided greater protections for freedom of expression by protecting journalists from defamation prosecutions for both true statements and statements that the journalists reasonably believed to be true.

While the Inter-American Court's standard is similar to actual malice, the Inter-American Court seems to intentionally avoid using that term.¹⁵⁴ There may be several reasons that the Inter-American Court made this choice. One reason is that the term actual malice can be confusing and has often been misunderstood as meaning ill will or hatred.¹⁵⁵ Another reason for developing its own standard, as opposed to simply importing the concept of actual malice from the United States, is that the Inter-American Court can increase its legitimacy by avoiding the perception that it is strongly influenced by the United States.¹⁵⁶ As an international court, the Inter-American Court may have also wanted to avoid importing jurisprudence from a state, particularly a state that has not ratified the American Convention on Human Rights.¹⁵⁷

Similarly, all of these concerns may have led the African Court to try and develop its own standard in defamation cases. Part of the mission of the African Charter is to "eradicate all forms of colonial-

149. *Donoso v. Panama*, ¶ 130.

150. *Id.* ¶ 46.

151. *Id.* ¶ 125.

152. *Id.* ¶¶ 124–28.

153. Carter, *supra* note 143, at 421.

154. *Id.* at 397–98.

155. *See id.* at 403.

156. *Id.* at 421.

157. *See id.* at 422.

ism from Africa,”¹⁵⁸ emphasizing that African independence is an important ideal underlying the human rights system of Africa. As an international court, the African Court may be unwilling to import a legal concept from a state, let alone a state that is not in Africa. But if the African Court wants to develop its own standard for defamation, it must improve upon the *Konaté* standard; otherwise, member states will continue to intimidate and imprison journalists who criticize the government. The African Court rightly overturned Konaté’s punishment, but it missed the opportunity to provide greater protections to journalists when it neither assessed the veracity of Konaté’s claims about the prosecutor nor considered whether any potentially false claims were made in good faith.¹⁵⁹

Furthermore, the African Court could simply incorporate a more robust standard similar to actual malice within the proportionality test it used in *Konaté*. If an alleged defamatory statement is true, that veracity should always weigh heavily in the test. The proportionality test would give false statements less weight, while giving greater weight to individuals that make false statements with reasonable beliefs that the statements are true. Whatever form this standard takes, the African Court should inquire in each case whether the defamatory statements were true and whether any false statements were made with a reasonable belief that they were true. Examining the reasonableness of false statements would protect journalists from unfair punishments when they make reasonable efforts to verify information within constraining deadlines and the information is later discovered to be false. Without the protection of journalists in such situations, governments will continue to use criminal defamation laws to intimidate journalists in Africa to avoid critically reporting on governments, depriving the African public of the necessary information it needs to hold its leaders accountable.

B. *Criminal Punishments for Defamation*

In addition to allowing truth as a defense, the African Court should ban all criminal punishments for defamation because the threat of criminal punishment has a significant chilling effect on the media. The African Court in the *Konaté* case should have followed the concurring opinion’s approach and banned all criminal

158. African Charter, *supra* note 11, pmbl.

159. See Lohé Issa Konaté v. Burkina Faso, Application 004/2013, African Court on Human and Peoples’ Rights, ¶ 154 (Dec. 5, 2015); Duffy, *supra* note 43, at 15.

punishments for defamation. The majority's opinion in the *Konaté* case ruled that laws that allow for criminal punishments for defamation can be valid if they meet the test of proportionality and necessity.¹⁶⁰ The separate concurring opinion, however, advocated for the elimination of all criminal punishments for defamation, reasoning that “[a]ccess to civil action, civil sanction, together with specifically defined crimes for safeguarding national security, public peace and the common interest, should be sufficient.”¹⁶¹ The concurring opinion's approach is preferable because it reduces the chilling effect that defamation laws have on the media.¹⁶² When an individual is charged with violating a criminal law, he or she faces arrest and detention leading up to trial, while civil offenses do not typically involve arrest and detention.¹⁶³ Defamation laws should allow for civil redress but should not allow for criminal punishments because defamation harms private interests of individuals rather than the public interest which is typically the ground for criminal prosecutions.¹⁶⁴ Courts applying proportionality tests commonly ask whether the stated objective can be achieved using a less drastic measure.¹⁶⁵ Civil remedies are less drastic than criminal punishments,¹⁶⁶ and therefore, the African Court should not allow freedom of expression to be threatened by criminal punishments.

The majority opinion's failure to reject custodial sentences for defamation in *Konaté* is even more troubling because imprisoning journalists for reporting government actions that are of public interest is an egregious violation of freedom of expression.¹⁶⁷ The majority opinion stated that custodial sentences might be allowable in “very exceptional circumstances: for example, incitement to international crimes, public incitement to hatred, discrimination

160. *Konaté v. Burkina Faso*, ¶ 166.

161. *Id.* separate opinion ¶ 4.

162. See, e.g., SUE VALENTINE & TOM RHODES, *BROKEN PROMISES: HOW KENYA IS FAILING TO UPHOLD ITS COMMITMENT TO A FREE PRESS, COMM. TO PROTECT JOURNALISTS* (July 15, 2015), https://cpj.org/reports/broken_promises_kenya_cpj_special_report.pdf [<https://perma.cc/8DKZ-XNYL>] (“[T]he mere threat of punitive action and the uncertainty surrounding the laws’ implementation is enough to make journalists pause before airing or publishing sensitive stories.”).

163. Jacqueline Okuta v. Attorney General, (2017) KLR Petition No. 397, 6 (Kenya). This case, decided by the High Court of Kenya, declared Kenya’s criminal defamation laws unconstitutional.

164. *Id.*

165. *Id.* at 10.

166. *Id.*

167. See Lohé Issa Konaté v. Burkina Faso, Application 004/2013, African Court on Human and Peoples’ Rights, separate opinion ¶ 4 (Dec. 5, 2015).

or violence or threats against a person or a group of people, because of specific criteria such as race, colour, religion, or nationality.”¹⁶⁸ The concurring opinion, however, was correct in stating that the exceptions the majority opinion carved out can be protected on other grounds such as laws governing hate speech or incitement.¹⁶⁹ Under the majority opinion’s approach governments can intimidate journalists and private citizens from criticizing the performance of public officials through the threat of prison sentences.¹⁷⁰ Maintaining even the possibility of prison sentences for defamation emboldens governments to use judicial and extra-judicial forms of coercion against journalists. Therefore, the African Court should follow the separate concurring opinion and only allow civil damages for defamation, never criminal prosecution and imprisonment.

C. *Defamation of Public Institutions*

When the African Court decides future cases involving laws against defamation of public institutions, it should consider categorically striking down such provisions. Although the Burkina Faso laws involved in the *Konaté* case criminalized defamation of public institutions such as “the Court’s Tribunals, [and] Armed Forces,”¹⁷¹ the African Court did not discuss how such laws against the defamation of public institutions might violate freedom of expression. The *Konaté* case dealt more closely with the alleged defamation of the individual prosecutor,¹⁷² but the African Court may face future cases involving defamation of public institutions. The African Court should follow the guidance of Comment 34 to the ICCPR, which urged that state parties to the ICCPR “should not prohibit criticism of institutions, such as the army or the administration.”¹⁷³ The African Court should strike down such defamation laws to avoid the severe imbalance of power that exists between an individual journalist and a state institution in court over defamation charges.

The African Court in *Konaté* did address the issue of whether Konaté made disparaging remarks about Burkina Faso in his filings with the African Court.¹⁷⁴ This issue involved a procedural rule of

168. *Id.* main opinion ¶ 165.

169. *Id.* separate opinion ¶ 4.

170. *See* Okuta v. Attorney General, (2017) KLR Petition No. 397, at 11.

171. *Konaté v. Burkina Faso*, ¶ 121.

172. *See id.* ¶ 3.

173. General Comment No. 34, *supra* note 95, ¶ 38.

174. *Konaté v. Burkina Faso*, ¶¶ 64–73.

the African Court that applications “must not contain disparaging and insulting language.”¹⁷⁵ Although this procedural rule of the African Court is quite different from state laws against defamation of public institutions, the typical justifications for the two are similar—to maintain public confidence in public institutions and the administration of justice.¹⁷⁶ The OAU modeled this rule of the African Court after the African Charter, which only allowed for consideration of human rights complaints if they were “not written in disparaging or insulting language directed against the State concerned and its institutions.”¹⁷⁷ This rule is unique among international human rights standards—the United Nations and other regional human rights instruments do not have such a requirement.¹⁷⁸

Burkina Faso made an objection to the admissibility of the *Konaté* case to the African Court on the basis that Konaté violated the African Court’s procedural rule by referring to Burkina Faso as the “People’s Democratic Republic of Burkina Faso” in a court filing.¹⁷⁹ Konaté, for his part, claimed that it was a typographical error.¹⁸⁰ The African Court found that Burkina Faso did not adequately show how Konaté had “undermine[d] the dignity, reputation, or integrity of Burkina Faso” and that Burkina Faso had “not shown that such designation [was] used in bad faith by the Applicant.”¹⁸¹ Given the similar goal of the procedural rule and defamation laws protecting the reputation of public institutions, the African Court should at least extend its conclusion in *Konaté* that the state bears the burden of proving actual injury and bad faith by the other party to defamation cases. The African Court should further consider following the international norm reflected in Comment 34 to the ICCPR discouraging laws against defamation of public institutions because such laws produce a chilling effect that

175. *Id.* ¶ 64.

176. *See* Zimbabwe Lawyers for Human Rights v. Republic of Zimbabwe, Communication 284/2003, African Commission on Human and Peoples’ Rights, ¶ 91 (Apr. 3, 2009).

177. African Charter, *supra* note 11, art. 56.

178. Frans Viljoen, *Communications Under the African Charter: Procedure and Admissibility*, in *THE AFRICAN CHARTER ON HUMAN AND PEOPLES’ RIGHTS: THE SYSTEM IN PRACTICE 1986-2006* 76, 108 (Malcolm Evans & Rachel Murray eds., 2008).

179. *Id.* ¶ 65. The correct name of the country is Burkina Faso. Burkina Faso claimed that the name of People’s Democratic Republic of Burkina Faso “refers, in a devious and biased manner, to the former peoples democracies of Eastern Europe and to a sadly notorious People’s Republic in Asia over which everyone agrees that its main characteristics were or are dictatorship and massive violations of human rights.” *Id.*

180. *Id.* ¶ 66.

181. Lohé Issa Konaté v. Burkina Faso, Application 004/2013, African Court on Human and Peoples’ Rights, ¶ 72 (Dec. 5, 2015).

inhibits freedom of expression and hinders the press' role in keeping public institutions accountable for respecting all human rights.¹⁸²

CONCLUSION

In *Konaté*, the African Court greatly advanced protection of freedom of expression in Africa, but the African Court must do more to prevent governments from using defamation laws to stifle dissent. First, the African Court should mandate that truth be a defense against defamation charges to ensure that journalists are not prevented from reporting on government actors and holding them accountable to the public.¹⁸³ Although the African Court need not adopt the "actual malice" standard, it should take into account whether individuals charged with defamation had a reasonable belief that their claims were true. Second, the African Court should ban all criminal punishments for defamation. Individuals who have their reputations unfairly damaged should have a civil remedy, as opposed to the government prosecuting and imprisoning individuals. Lastly, the African Court should ban laws against the defamation of public institutions because such laws are antithetical to the democratic system and intimidate individuals from voicing their frustrations with the government and government institutions.

Freedom of expression plays an important role in the system of human rights and serves as a safeguard against the abrogation of other rights. Especially in today's modern age where it is easier than ever for individuals to publish their thoughts and opinions on social media, the African Court needs to ensure that governments do not seek to insulate themselves from criticism by tracking and imprisoning everyone who criticizes them. The African Court should therefore place paramount importance on strengthening freedom of expression.

182. General Comment No. 34, *supra* note 95, ¶ 38.

183. See Duffy, *supra* note 43, at 15.