Will Konaté set African journalists free? Interrogating the promises of an emerging press freedom jurisprudence in African regional courts

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ABSTRACT: The right to freedom of expression is intrinsic to the democratic fabric of any society. This right is recognised in treaties, affirmed in political commitments and has been reiterated in the jurisprudence of judicial and quasi-judicial bodies. Despite its importance and recognition in national constitutions, the right has in various jurisdictions been subjected to severe restrictions under national law. In Africa, these restrictions are evident in a plethora of ways, including through laws on criminalisation of free speech. In recent years, however, regional adjudicatory mechanisms, including the African Court on Human and Peoples' Rights, are increasingly pronouncing on the primacy of this freedom to democracy, offering a catalytic potential for a continent-wide shift against restrictions. This article examines the Court's *Konaté* decision against the background of the *Hydara* and *FAJ* decisions of the Court of Justice of the Economic Community of West African States, and the *Mseto* and *Burundian Journalists' Union* judgments by the East African Court of Justice. Significantly, this article finds that a common denominator in the decisions of regional adjudicatory mechanisms in Africa is the realisation that the protection of the right to freedom of expression and indeed free press is critical to African democracy.

TITRE ET RÉSUMÉ EN FRANCAIS:

Konaté garantira-t-il la liberté d'expression des journalistes africains? Interroger les promesses d'une jurisprudence émergente sur la liberté de presse dans les juridictions régionales en Afrique

RÉSUMÉ: Le droit à la liberté d'expression est inhérente à la fondation démocratique de toute société. Ce droit est reconnu par les traités, réaffirmé dans les engagements politiques et réitéré dans la jurisprudence des institutions judiciaires et quasi-judiciaires. En dépit de son importance et de sa reconnaissance dans les constitutions, ce droit a fait l'objet, dans de nombreux pays, de sévères restrictions en droit interne. En Afrique, lesdites restrictions se manifestent sous divers jours y compris à travers les législations criminalisant la liberté de presse. Toutefois, dans les années récentes, les mécanismes de contentieux régionaux dont la Cour africaine des droits de l'homme

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et des peuples se prononcent de plus en plus sur l'importance de cette liberté pour la démocratie, offrant un potentiel catalytique en vue d'un mouvement contre les restrictions à l'échelle continentale. Le présent article examine l'arrêt *Konaté* de la Cour africaine dans une étude comparée avec ceux rendus par la Cour de justice de la Communauté Economique des Etats d'Afrique de l'Ouest dans les affaires *Hydara* and *FAJ* et par la Cour de justice de la Communauté d'Afrique de l'Est dans les affaires *Mseto* et *Burundian Journalists' Union*. De manière notable, l'article conclut que le dénominateur commun des décisions rendues par les mécanismes de contentieux régionaux en Afrique est la conscience que la protection du droit à la liberté d'expression et, en effet, de la liberté de presse, sont des éléments fondamentaux pour la démocratie en Afrique.

KEY WORDS: ECOWAS Community Court of Justice, East African Court of Justice, freedom of speech, freedom of expression, journalists, African Court on Human and Peoples' Rights, democracy, Konaté

CONTENT:

1 INTRODUCTION

The finding of the African Court on Human and Peoples' Rights (African Court) in the matter of *Issa Lohé Konaté v Burkina Faso*[1] epitomises a broad consensus in international human rights jurisprudence to limit the criminalisation of speech to the most serious circumstances.[2] The Court held as follows:[3]

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

Despite its constitutional protection in the era of the so-called third wave of democratisation,[4] freedom of expression has faced severe restrictions entrenched in penal codes across Africa. The overall pace of decriminalisation of speech has been slow with only a few countries, such as Gabon, Ghana, Kenya, Lesotho, South Africa and Zimbabwe, having taken steps in the right direction.[5]

1 African Court (5 December 2014, merits) (*Konaté* case).

2 See eg *Media Rights Agenda & Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998) para 74; *Gavrilovici v Moldavia* ECHR (15 December 2009) para 60; *Tristant Donoso v Panama* IACHR (27 January 2009) para 20; *Jacqueline Okuta & Another v Attorney-General & Others* (2017) eKLR.

3 *Konaté* case (n 1) para 165.

4 The term was coined by political scientist SP Huntington *The third wave: democratisation in the late twentieth century* (1991).

5 Eg, Ghana enacted the Criminal Code (Repeal of Criminal Libel and Seditious Libel Laws) (Amendment) Act 602 of 2001 on 2 August 2001, which

Against this landscape, recent developments in regional adjudicatory fora have brought excitement and hope. Alongside relentless advocacy observed around the continent, active and strategic litigation has led to unprecedented decisions in the Economic Community of West African States (ECOWAS) Court of Justice, the East African Court of Justice and the African Court. Seen through an optimist's lens, these decisions could be perceived as resolving the jurisdictional weaknesses of the African Commission on Human and Peoples' Rights (African Commission) in adjudicating similar matters.

In light of the 'spill-over' function generally associated with international strategic litigation, there is a need to assess the extent to which these leading regional pronouncements have brought to bear the promise of resolving the quandary of (re)criminalisation of speech in Africa.

In the next section we recall the importance of freedom of expression in the construction of open and democratic societies and the international normative standards protecting the enjoyment of that right. In the following section we showcase important recent jurisprudential developments in African regional courts and the potential they hold for a continent-wide shift in approach. Before concluding the discussion, we investigate the impact of these developments.

2 A WIDE INTERNATIONAL NORMATIVE CONSENSUS FOR FREEDOM OF EXPRESSION

Leading freedom of expression writers have described the right as a critical building block of democratic societies.[6] This view has also enjoyed global consensus not only through legal instruments, but also in soft law, jurisprudence and political commitments.

From a normative standpoint, the right is strongly protected under both international and national standards. First, the International Covenant on Civil and Political Rights (ICCPR)[7] and the Universal Declaration of Human Rights (Universal Declaration)[8] both protect

decriminalised defamation. Kenya took the same stand, albeit through case law, with the judgment of the High Court in the matter of *Jacqueline Okuta & Another v Attorney-General & Others* (2017) eKLR, as did Lesotho in the matter of *Basildon Peta v Minister of Law, Constitutional Affairs and Human Rights & Others*, Constitutional Court of Lesotho, CC 11/2016 (18 May 2018) albeit following legal challenges. In South Africa a process to repeal the common law offence of criminal defamation was started in 2016 with the introduction of a Bill to that end by the ANC.

6 A Meiklejohn *Political freedom: the constitutional powers of the people* (1960); E Barendt *Freedom of speech* (2009) 18.

7 International Covenant on Civil and Political Rights (16 December 1966), UN Doc A/6316 (1966).

8 Universal Declaration of Human Rights (10 December 1948), GA Res 217A (III), UN Doc A/810 at 71 (1948).

freedom of expression in their respective articles 19, and the right is codified in all regional human rights instruments: the African Charter on Human and Peoples' Rights (African Charter) (article 9);[9] the European Convention on Human Rights (article 10);[10] the American Convention on Human Rights (article 13);[11] the ASEAN Human Rights Declaration (article 23);[12] and the Arab Charter on Human Rights (article 32).[13]

Second, in addition to guaranteeing the right in the African Charter, Africa has expressed unequivocal normative commitment to freedom of expression as necessary to achieve major tenets of democracy. Such commitment is exemplified at the continental level through the African Charter on Democracy, Elections and Governance of the African Union (AU), where state parties undertake to '[p]romote freedom of expression, in particular freedom of the press', so as to 'advance political, economic, and social governance'.[14] At the sub-regional level, the Revised Treaty of the Economic Community of West African States of 1993[15] explicitly protects the press in article 66, and in its Protocol on Democracy and Good Governance freedom of the press is listed as one of its constitutional principles.[16] The East African Community (EAC) Draft Protocol on Good Governance specifies in article 7(3) that 'the promotion and institutionalisation of democracy, democratisation processes and good governance' shall be achieved amongst other methods by 'creating an enabling environment for the exercise of freedom of expression, association and assembly, *a free and independent media*, robust civil society and a strong private sector'.[17] The Protocol on Culture, Information and Sport of the Southern African Development Community (SADC) includes several provisions protecting freedom of expression of the media and the rights of journalists.[18] Finally, virtually all national constitutions protect the right to freedom of expression.[19]

9 African Charter on Human and Peoples' Rights (27 June 1981), OAU Doc CAB/LEG/67/3 rev. 5.

10 European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950), ETS 5.

11 American Convention on Human Rights (12 November 1969), OAS Treaty Series 36.

12 Association of Southeast Asian Nations (ASEAN) Human Rights Declaration (18 November 2012).

13 League of Arab States, Arab Charter on Human Rights (15 September 1994).

14 Art 27(8) of the African Charter on Democracy, Elections and Governance, 30 January 2007.

15 Revised Treaty of ECOWAS, 24 July 1993, 2373 UNTS 233 234.

16 Art 1(k) of the Protocol A/SP1/12/01 on Democracy and Good Governance Supplementary to the Protocol relating to the Mechanism For Conflict Prevention, Management, Resolution, Peacekeeping and Security, 2001.

17 Copy on file with the authors (our emphasis).

18 Arts 1 & 2 (ch 1); arts 3-9, 17-23 (ch 2) of the SADC Protocol on Culture, Information and Sport, 2000.

19 A Stone 'The comparative constitutional law of freedom of expression' in T Ginsburg & R Dixon (eds) *Comparative constitutional law. Research handbooks in comparative law* (2011) 406 (our emphasis).

The importance of the right to freedom of expression in building democracy has also been asserted through soft law, jurisprudence and political commitments. With respect to soft law, the African Commission's Declaration of Principles on Freedom of Expression in Africa, adopted by resolution in October 2002,[20] underlines '*the key role of the media* and other means of communication in ensuring full respect for freedom of expression, in promoting the free flow of information and ideas, in assisting people to make informed decisions and *in facilitating and strengthening democracy*'.[21] In its General Comment 34, which is an authoritative statement of its decisions regarding the freedoms of opinion and expression, the United Nations (UN) Human Rights Committee made it very clear that freedom of expression is 'a necessary condition for the realisation of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights', and for the enjoyment of which freedom of expression forms an essential basis.[22] The Committee further stated that '*[a] free, uncensored and unhindered press or other media is essential in any society* to ensure freedom of opinion and expression and the enjoyment of other Covenant rights. *It constitutes one of the cornerstones of a democratic society*.' The free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies '*a free press and other media able to comment on public issues and to inform public opinion without censorship or restraint*'.[23] The United Nations Educational, Scientific and Cultural Organisation (UNESCO), in turn, has stated that 'freedom of expression and access to information are crucial building blocks for democracy, development and dialogue'.[24]

The importance of the role of the media in the realisation of the right to freedom of expression is reflected in the UN Human Rights Committee's decisions, such as that in the case of *Rafael Marquez de Morais v Angola*.[25] The Committee stated that '[a] free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights. *It constitutes one of the cornerstones of a democratic society*.'[26] Since its early years of adjudication, the European Court of Human Rights (European Court) has viewed freedom of expression as one of the essential foundations of a democratic society.[27] The African Commission echoed the same recognition when it took the view in

20 Resolution 222 to modify the Declaration of Principles on Freedom of Expression to include Access to Information and Request for a Commemorative Day on Freedom of Information.

21 Preamble and art 1(1) (our emphasis).

22 United Nations Human Rights Committee, General Comment 34, Article 19: Freedoms of opinion and expression,12 September 2011, UN Doc CCPR/C/GC/34, paras 2 & 3.

23 General Comment 34 (n 22) paras 13 & 20 (our emphasis).

24 UNESCO *Pressing for freedom* (2013) 7.

25 *Marques v Angola* Communication 1128/2002 UNHR Committee (2005).

26 *Marques* (n 25) para 6.8 (our emphasis).

27 See, eg, *Lingens v Austria* ECHR (8 July 1986).

Scanlen and Holderness v Zimbabwe that '[p]ublic order in a democratic society demands the greatest possible amount of information. *It is the widest possible circulation of news, ideas and opinions as well as the widest access to information by society as a whole that ensures this public order*.'[28] The Constitutional Court of South Africa, one of the more free speech-minded courts on the continent, has also underlined the importance of freedom of expression as an instrument – both for the press and others – to advance transparency and thereby enhance democracy by holding that

> [freedom of expression] is closely linked to the right to human dignity and helps to realise several other rights and freedoms. Being able to speak out, to educate, to sing and to protest, be it through waving posters or dancing, is *an important tool to challenge discrimination, poverty and oppression. This Court has emphasised the importance of freedom of expression as the lifeblood of an open and democratic society*.[29]

While the right to freedom of expression is not absolute, it may only be restricted if specific conditions are met, as set out in article 19(3) of the ICCPR.[30] The restrictions must be 'provided by law'; they may only be imposed in the pursuit of protecting the respect for the rights or reputations of others, the protection of national security, public order or public health or morals; and the restriction must conform to the strict tests of necessity and proportionality. These conditions are cumulative: If not all parts of this three-part test are met, a restriction to the right to freedom of expression is not permissible under international law. Article 27(2) of the African Charter and the 2002 Declaration of Principles of Freedom of Expression in Africa set out similar limitations to restrictions on the right to freedom of expression as protected by article 9 of the African Charter,[31] and the other regional instruments mentioned above contain similar wording.

This diverse global consensus supports the view that modern democratic societies cannot be achieved without the full exercise and respect for the right to freedom of expression. In Africa, where a number of fragile democracies face recurring challenges such as a weakened rule of law, corruption, and the lack of a robust system of checks and balances, democratisation could become a futile process without freedom of expression and freedom of the press. The exercise by members of the press of their right to freedom of expression enables the free flow of information that allows citizens to inform themselves on matters of public interest and hold their political leaders to account.

28 *Scanlen & Holderness v Zimbabwe* (2009) AHRLR 289 (ACHPR 2009) para 110 (our emphasis).

29 *Print Media South Africa & Another v Minister of Home Affairs & Another* (CCT 113/11) [2012] ZACC 22 (our emphasis).

30 General Comment 34 (n 22) para 22.

31 See art I of the African Commission Declaration of Principles on Freedom of Expression in Africa (2002). The provision reads '1 Freedom of expression and information, including the right to seek, receive and impart information and ideas, either orally, in writing or in print, in the form of art, or through any other form of communication, including across frontiers, is a fundamental and inalienable human right and an indispensable component of democracy. 2. Any restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary and in a democratic society.'

Despite broad ratification of the above-mentioned treaties on the continent – ICCPR has been ratified by 53[32] and the African Charter by 54 AU member states[33] – attacks on freedom of expression and journalistic freedom are prevalent in Africa. Recent adjudication of freedom of expression cases in African regional courts, however, shows a trend of litigation that seeks to address the existing gap between normative commitment and actual protection. The following section discusses this jurisprudence and the potential it holds.

3 PRESS FREEDOM JURISPRUDENCE IN AFRICAN FORA

This section will discuss the most relevant and recent decisions on the subject of freedom of the press in a two-step approach. First, we will examine those decisions in which the courts have taken an implied or limited approach to freedom of expression and especially that of the press. Cases discussed under this category illustrate a trend of interpretation and adjudication that is more restrained, which arguably is due to the litigation's historical context in combination with judicial self-restraint.

Second, we will look at subsequent jurisprudence that brings about a more expansive approach to the interpretation and application of international human rights standards relating to freedom of expression and the rights of journalists. This category includes cases that were adjudicated when courts had become more active and case law on press freedom began to build in African regional courts.

3.1 An implied or limited approach to protecting press freedom

3.1.1 ECOWAS Court of Justice: *Manneh v The Gambia* and *Saidykhan v The Gambia*

The cases of *Manneh v The Gambia*[34] and *Saidykhan v The Gambia*[35] were both adjudicated by the ECOWAS Court of Justice. The cases form part of a body of case law against The Gambia, many of which cases were filed following human rights abuses committed by the regime of former President Jammeh. The regime was particularly negatively disposed towards the press, with Jammeh having stated at a press

32 United Nations Office of the High Commissioner for Human Rights; see interactive dashboard on status of treaty ratification http://indicators.ohchr.org/ (accessed 24 August 2018).

33 African Union, List of countries which have, signed, ratified/acceded to the African Charter on Human and Peoples' Rights https://au.int/en/treaties/african-charter-human-and-peoples-rights (accessed 7 November 2018).

34 *Chief Ebrimah Manneh v The Gambia* ECW/CCJ/JUD/03/08 (5 June 2008).

35 *Musa Saidykhan v The Gambia* ECW/CCJ/JUD/08/10 (16 December 2010).

conference following his contested 2006 election victory, that 'if I want to ban any newspaper, I will, with good reason'.[36]

In the *Manneh* case, which was decided in 2008, representatives of Gambian journalist Chief Ebrimah Manneh alleged that his arrest in 2006 without a warrant and incommunicado detention without any charge or medical attention by national intelligence agents violated his human rights to security, liberty and dignity guaranteed in articles 5 and 6 of the African Charter.[37] The plaintiff himself had sporadically been seen during the first years of his arrest, but has since been considered to have been disappeared by the Gambian regime.[38]

The Court first considered the alleged violation of article 6 of the African Charter. It preliminarily noted that the case was premised mainly on article 6 of the Charter, which protects the right to personal liberty and protection from arbitrary arrest.[39] In determining whether Manneh's arrest and detention were justified, the Court relied on the testimony of three witnesses for the plaintiff. Notably, the plaintiff's submissions were purely factual and did not make a case for a violation of article 6 of the Charter in the context of freedom of expression or the right of journalists to perform their duties free from fear and undue restrictions.[40] Without delving into such considerations either, the Court moved on to examine the violation of article 7 of the Charter, which had neither been invoked by the plaintiff, nor mentioned by the Court in framing the issue for determination. In reaching the conclusion that the respondent state had violated both articles 6 and 7 of the Charter, the Court relied solely on the fact that the respondent state had not properly disputed the alleged human rights violations: 'All these facts stand uncontroverted, and they appear credible so the Court accepts them.'[41]

In considering the plaintiff's claim of a violation of his right to dignity as protected by article 5 of the African Charter, the Court began by identifying the enjoyment of this right and the right to 'political or any opinion' as 'core rights' that need to be respected and protected without discrimination.[42] However, instead of making its determination based on this premise, as one might have expected, the Court surprisingly leaped to finding a violation of the right to liberty and security without further addressing the freedom of expression element it had previously alluded to.[43]

36 BBC News 'Gambian opposition claims fraud' 25 September 2006.

37 *Manneh* (n 34) summary of facts, paras 24 & 29.

38 See Media Foundation for West Africa 'The Gambia must implement ECOWAS Court judgment on Ebrima Manneh' 4 June 2015 http://www.mfwa.org/country-highlights/the-gambia-must-implement-ecowas-court-judgment-on-ebrima-manneh/ (accessed 3 September 2018).

39 *Manneh* (n 34) para 15.

40 *Manneh* paras 18-20.

41 *Manneh* para 20.

42 *Manneh* paras 24 & 25.

43 *Manneh* paras 27 & 28.

The Court did not change its trajectory while examining whether the plaintiff was entitled to monetary compensation. It limited itself to defining the meaning of reparations, establishing causality between the violations it had found and the actions of the respondent state, after which it reverted to comparative jurisprudence to determine the amount of damages.[44] Neither the facts referenced, nor the reasoning pointed to consideration by the Court of the fact that the violations had arisen in the context of the plaintiff's work as a journalist. The Court ordered The Gambia to release the plaintiff, to restore his right to free movement and to pay him US $100 000 in damages.[45] At the time of writing, Manneh has not been released, his whereabouts not been made public, nor have full damages been paid to his relatives.[46] The Gambian government so far has denied having him in its custody, and there have been contradictory statements as to whether or not Manneh is still alive.[47]

The *Manneh* case was not explicitly framed as a press freedom case. As such the only nexus to freedom of expression and its application to the media and journalists was the plaintiff himself. It may be rightly argued that the case as made by the plaintiff was not one of a violation of his right to freedom of expression as protected under article 9(2) of the African Charter and article 66 of the ECOWAS Revised Treaty. While it was obvious that agents of the respondent state subjected the plaintiff to the established violations because of his work as a journalist, the plaintiff's complaint did not invoke any relevant provisions, namely, article 9 of the African Charter and article 66 of the ECOWAS Treaty, to support such a claim. While the Court itself mentions in its reasoning the element of 'political opinion', it did not pursue this line of reasoning further in its findings.

Although the subsequent case of *Saidykhan v The Gambia*, decided two years later by the Court in 2010, did not yield more explicit findings on the issue of freedom of expression, the evidence presented in the case brought the matter closer to the subject matter of press freedom. Following the publication in his newspaper of the names of the alleged masterminds behind the 21 March 2006 *coup* in The Gambia, Gambian journalist Musa Saidykhan was arrested by military and police agents without an arrest warrant. He was taken to the headquarters of the National Intelligence Agency and detained incommunicado for 22 days,

44 *Manneh* paras 29-40.

45 *Manneh* para 44.

46 Partial payment was reported to have been made in 2018; see Media Foundation for West Africa 'Justice at last: Gambia finally pays compensation to families of Ebrima Manneh and Deyda Hydara' (5 June 2018).

47 In 2011 The Gambia's Justice Minister stated in two different interviews that Manneh was alive; see Committee to Protect Journalists 'Gambian minister should disclose Manneh's fate' 11 October 2011 https://cpj.org/2011/10/gambian-justice-minister-should-disclose-mannehs-f.php (accessed 2 September 2018), while earlier the same year Jammeh referred in public statements to Manneh's case as 'a death'; see Committee to Protect Journalists 'Jammeh to news media: I set limits on press freedom' 23 March 2011 https://cpj.org/blog/2011/03/jammeh-to-news-media-i-set-limits-on-press-freedom.php (accessed 2 September 2018).

during which time he was tortured. Security agents continued to shadow him after he had been released, and the plaintiff decided to flee The Gambia together with his wife.

In determining whether or not the plaintiff had been arrested and detained by agents of the respondent state, the Court relied on the plaintiff's statement on the reason for his arrest and torture, which he asserted had been the publication in his newspaper.[48] The Court further based its finding on the respondent state's response, which argued that, had its agents arrested the plaintiff, they would have been justified to do so since the latter had admitted to said publication.[49]

The Court considered three other issues, namely, whether or not the plaintiff was tortured while in detention; whether or not he sustained any harm or injury, physical or otherwise; and whether or not the plaintiff was entitled to damages or compensation from the respondent state. Having found that the plaintiff's rights were violated, the Court ordered the respondent state to pay the amount of US $200 000 in damages.[50]

It may be argued that, as opposed to *Manneh*, the *Saidykhan* case sought to profile the matter as one of press freedom. References to that effect include the plaintiff stating during the public hearing that 'soldiers of the respondent constrained him to commit to stop practising journalism, which he declined';[51] that he was arrested and tortured 'because he published a piece on the said *coup*'.[52] Despite these references and the findings, the *Saidykhan* judgment ultimately only found violations of the rights to liberty, security and fair trial protected by articles 6 and 7 of the African Charter and not of freedom of expression guaranteed under article 9(2) of the Charter. However, in spite of not finding a violation of the right to freedom of expression at its own initiative, the Court did take the opportunity of indirectly stressing the plaintiff's work as a journalist as the main reason for the established violations.

3.1.2 African Court on Human and Peoples' Rights: *Norbert Zongo & Others v Burkina Faso*

The *Zongo* case,[53] decided by the African Court in 2014, has become one of the most emblematic decisions on freedom of expression, and especially that of the press, in Africa. Beneficiaries of the late Zongo and his companions brought a claim against Burkina Faso for violating the deceased's rights to equality, life, fair trial, and freedom of expression and information. With respect to freedom of expression, the applicants argued that by failing to prevent Zongo's assassination and bringing

48 *Saidykhan* (n 35) para 30.
49 *Saidykhan* para 32.
50 *Saidykhan* para 47.
51 *Saidykhan* para 16.
52 *Saidykhan* para 17.
53 *Beneficiaries of the Late Norbert Zongo & Others v Burkina Faso* African Court (28 March 2014, merits).

those responsible to justice, the respondent state violated its obligations related to the right to freedom of expression, the right to disseminate information and the rights of journalists protected by article 9 of the African Charter, article 19(2) of the ICCPR, and article 66(2)(c) of the ECOWAS Revised Treaty.

With respect to the alleged violation of these provisions, the Court set out two issues for determination: first, whether the respondent state had violated Zongo's right to freely perform his profession by failing to prevent his assassination and, second, whether freedom of expression among the media profession in general had been violated. Having declined temporal jurisdiction over the alleged violation of Zongo's right to life in its preliminary ruling, the Court held that it could not consider the first issue on the merits given that the alleged violation of the right to life was instantaneous and completed before the entry into force of the Protocol creating the Court and did not continue thereafter.[54] The Court then decided to tie its consideration of the second issue to the violation of the right to have one's cause heard by competent national courts. In considering whether the respondent state's failure to bring those responsible for Zongo's assassination to justice caused fear and concerns among the media profession, the Court took a minimalist approach to reasoning. Having outlined the issue in three paragraphs,[55] it concluded in a three-line paragraph as follows: 'In these conditions, the Court is of the view that the respondent's failure to find and prosecute those responsible for the assassination of Zongo raised fear and concerns among the media profession.'[56] Based on that conclusion, the Court found that the respondent had violated 'the freedom of expression of journalists as guaranteed by Articles 9 of the Charter read together with Articles 66(2)(c) of the ECOWAS Revised Treaty'.[57]

The Court's reasoning calls for some observations. First, in making a determination on such an important right as freedom of expression, which undoubtedly also is the core issue in the *Zongo* case, the Court did not lean on any factual element. For instance, the Court did not examine the fact that Zongo was a leading investigative journalist in his country and the region or that, at the time of his assassination, he was expected to publish the findings of an investigation on alleged corruption involving the brother to the then President of Burkina Faso. The Court also did not address the fact that he had received death threats over the said investigation and forthcoming publication or what the circumstances were that immediately preceded and followed the assassination. Second, the Court did not conduct a thorough analysis of the right concerned, either based on doctrine or case law, and finally devoted three lines to the actual determination. It cannot be overstated that the Court missed a unique first opportunity to provide guidance on what the freedom of expression and rights of journalists encompass

54 *Zongo* (n 53) paras 65-69; 180-181.
55 *Zongo* paras 183-185.
56 *Zongo* para 186.
57 *Zongo* para 187.

under both article 9 of the African Charter and article 66(2)(c) of the ECOWAS Revised Treaty. This outcome was all the more surprising given that at the time it considered the matter, the Court had ample precedents from the African Commission[58] and other regional human rights bodies[59] to borrow from.

3.1.3 East African Court of Justice: *Burundian Journalists' Union v Burundi*

The case of *Burundian Journalists' Union v Burundi*[60] was decided by the East African Court of Justice (EACJ) in 2015. A proper understanding of the following case discussion requires some background on the human rights jurisdiction of the EACJ.

Pursuant to the Treaty for the Establishment of the East African Community (EAC Treaty),[61] the Court was vested with jurisdiction to hear human rights cases, but such competence was to be activated by the policy organs at a later stage. In the case of *James Katabazi v Uganda*,[62] the Court used the Treaty principles of the rule of law and human rights[63] to assert jurisdiction on claims that were presented to it as human rights violations. Following the Court's decision in the case of *Sitenda Sebalu v Uganda*[64] that the failure to implement its human rights jurisdiction violated the Treaty, civil society advocacy led to the adoption of a Bill of Rights and draft Protocol, which, however, remained dead letter as they were never assented into law.[65] So far, the Court has been using its *Katabazi* precedent to deal with cases involving claims concerning allegations of human rights violations.[66]

The case of *Burundian Journalists' Union v Burundi* can be considered as such a case. The applicant alleged that Law 1/11 of 4 June 2013, amending Law 1/025 of 27 November 2015, governing the press

58 See eg *Media Rights Agenda* (n 2); *Zegveld & Another v Eritrea* (2003) AHRLR 85 (ACHPR 2003).

59 See international case law cited in sec 2 of the article.

60 *Burundian Journalists Union v The Attorney-General of the Republic of Burundi* (*Burundian Journalists Union*) Reference 7 of 2013 EACJ Law Report 299 (2012-2015).

61 Treaty for the Establishment of the East African Community (1999).

62 *James Katabazi & 21 Others v Uganda* (2007) EALS Law Digest 29.

63 See art 6(d) of the EAC Treaty.

64 *Hon Sitenda Sebalu v Secretary-General of EAC & Others* (2011) EALS Law Digest 110.

65 See SH Adjolohoun 'Giving effect to the human rights judgments of the ECOWAS Court of Justice: compliance and influence' unpublished doctoral thesis, University of Pretoria, 2013 119.

66 *Independent Medical Unit v Attorney-General of Kenya & Others* Reference 3 of 2010 (2011) EALS Law Digest 22 (referring to its precedent in the *Katabazi* case, the Court declined human rights jurisdiction in a matter concerned with allegations of torture and inhuman treatment); *Emmanuel Mwakisha Mjawasi & Others v Attorney-General of Kenya*, Reference 2 of 2010 (2011) EALS Law Digest 204 (declining human rights jurisdiction, the Court drew a distinction between such matters and the failure of the respondent state to abide by treaty obligations); *Mary Ariviza & Another v Attorney-General of Kenya & Another* Application 3 of 2010 (2011) EALS Law Digest 1 (in the case concerned with the

in Burundi, contravened articles 6(d) and 7(2) of the Treaty.[67] The applicant argued that the Burundi Press Law violated freedom of the press and the right to freedom of expression, which are cornerstones of the principles of democracy, the rule of law, accountability, transparency, and good governance as codified in the above-mentioned provisions.[68] The Court set out to determine whether it had jurisdiction, and if the impugned law was consistent with the aforementioned provisions of the EAC Treaty.

In relation to the first issue, the respondent state argued that the disputed law had already been considered by Burundi's Constitutional Court and that the EACJ therefore had no jurisdiction.[69] The Court referred to articles 33(2) and 34 of the Treaty and its precedent in the case of *Democratic Party v The Secretary-General and the Attorneys-General of the Republic of Uganda, Kenya, Rwanda and Burundi*[70] and reiterated the position that there is no doubt about the primacy, if not supremacy, of its jurisdiction over the interpretation of provisions of the Treaty. With respect to the relationship between national law and the Treaty, the Court took the view that, even if the Treaty does not provide a consistent pointer in addressing the question, by virtue of article 8(2), partner states are obligated to enact national laws to give effect to the Treaty and, to that extent, the latter is superior law.[71] That the Court asserted jurisdiction over press freedom cases is a good development in itself as it strengthens its constructive human rights mandate.

With respect to the conformity of the Press Law with the Treaty, the Court made two main relevant findings. First, it found that articles 19(b), (g), (i) and part of (j) of the Press Law, which restrict dissemination of information on the stability of the currency, offensive articles or reports regarding public or private persons, information that may harm the credit of the state and national economy, diplomacy, scientific research and reports of commissions of inquiry by the state were in violation of the principles enshrined in articles 6(d) and 7(2) of the Treaty.[72] Second, the Court found that article 20 of the Press Law violated articles 6(d) and 7(2) of the Treaty to the extent that it obliged journalists to reveal their sources of information there where this information related to offences against state security, public order, state defence secrets, and against the moral and physical integrity of

constitutional review process in Kenya, the Court concluded that it had no competence as the matter involved the review of a domestic judicial decision); *Plaxeda Rugumba v Secretary-General of EAC & Another* Reference 8 of 2010 (2011) which related to arrest and detention by the government of Rwanda, and where, although the Court declined human rights jurisdiction, it embraced its interpretation mandate and decided that the applicant was seeking a declaration of rights rather than an enforcement of human rights).

67 Treaty establishing the East African Community, 2000.

68 *Burundian Journalists Union* (n 60) paras 17-21.

69 *Burundian Journalists Union* para 25.

70 EACJ Reference 2 of 2012.

71 *Burundian Journalists Union* (n 60) paras 39-44.

72 *Burundian Journalists Union* para 102.

one or more persons.[73] The Court consequently ordered that 'the Republic of Burundi shall, in accordance with article 38(3) of the Treaty take measures, without delay, to implement this judgment within its internal legal mechanisms'.[74]

A few remarks are worth making on this case in relation to whether it has advanced freedom of expression in Africa. First, the Court applied its constructive 'human rights jurisprudence'[75] to freedom of expression by reaffirming its precedents that the Treaty's reference to human rights in the African Charter as principles of the Community are not mere aspirations but 'have crystallised into actionable obligations' for states.[76] Second, and in the same vein, the Court was not shy to make substantial reference to the abundant international and national freedom of expression case law material submitted by both the applicant and *amici*.[77] It relied on the same to ascertain that 'there is no doubt that freedom of the press and freedom of expression are essential components of democracy'.[78] Having established that the African Charter rights, including freedom of expression, are 'justiciable principles of the Treaty',[79] the Court addressed the lack of pointers to conduct the *contrôle de conventionnalité* – or 'conventionality test' – in the Treaty by borrowing exclusively from domestic case law, mainly from the Supreme Court of Canada.[80]

While this approach ultimately led to the identification of the relevant requirements for the proportionality test, the Court's choice of reference can be questioned. The choice can at the very least be called surprising since the Court referred extensively to international case law to hold that the matter had been properly brought before it. It is not clear why the Court chose a different approach when deciding on the merits of the case.

In its assessment of the merits of the case, the Court limited the application of the three-part test to only a small number of the articles in the Press Law[81] compared to the number of provisions challenged by the applicant in the reference, finding that it did not have sufficient evidence to assess the other alleged violations.[82] The Court eventually declared only articles 19, 20, and 38(3) of the Law in violation of the EAC Treaty provisions.[83]

73 *Burundian Journalists Union* para 111.
74 *Burundian Journalists Union* para 123.
75 See *Katabazi* (n 61); *Independent Medico Legal Unit* (n 65); *Samuel Mukira Mohochi v Uganda* (2013).
76 *Burundian Journalists Union* (n 60) paras 75-76.
77 *Burundian Journalists Union* paras 46 58, 68-69, 76-80, 91, 97 & 108.
78 *Burundian Journalists Union* paras 77-86.
79 *Burundian Journalists Union* para 86.
80 *Burundian Journalists Union* para 87.
81 *Burundian Journalists Union* paras 90, 95 & 109.
82 *Burundian Journalists Union* paras 21 & 122.
83 *Burundian Journalists Union* para 125.

One possible explanation is that the Court perhaps was reluctant to deal with the abstract challenge to the Press Law posed by the applicants.

The cases discussed in this section reveal a limited or restricted approach to the interpretation and application of freedom of expression. The following section illustrates that there is a developing jurisprudence that demonstrates more expansive and stronger adjudication on the same right.

3.2 An expansive approach to the judicial protection of freedom of expression

3.2.1 ECOWAS Court of Justice: *Deyda Hydara Jr & Others v The Gambia* and *Federation of African Journalists & Others v The Gambia*

The case of *Deyda Hydara Jr & Others v The Gambia*[84] was decided by the ECOWAS Court of Justice in 2014, several years later than the *Manneh* and *Saidykhan* cases discussed earlier. The application was brought by the two sons of the late Gambian journalist Deyda Hydara Sr. Just as Manneh, Saidykhan and Zongo, Hydara Sr was a West-African freedom of expression icon. As recounted in the application filed before the Court, Hydara Sr had received several death threats in connection with his journalistic work. The applicants alleged that the journalist was murdered in a drive-by shooting while in the company of two employees of his newspaper.

The plaintiffs contended that the respondent state's failure to properly investigate Hydara Sr's assassination and bring those responsible to justice violated his right to life as guaranteed by articles 1 and 4 of the African Charter; that this violation and lack of subsequent investigation and prosecution led to a state of systemic insecurity for media practitioners and government critics; and that the failure to investigate the killing violated Hydara Sr's right to freedom of expression and freedom of the press guaranteed by article 9 of the African Charter and article 66 of the Revised ECOWAS Treaty.

In adjudicating this case, the ECOWAS Court took an interesting departure from the approach taken in other regional pronouncements in freedom of expression cases and especially its own precedent, discussed earlier. A first departure relates to the Court's definition of freedom of expression in the *Hydara* judgment. In a joint reading of articles 9 of the Charter and 66 of the Treaty, the Court held that '[a] state also will be in breach of international law and treaty obligations if it fails to protect media practitioners including those critical to the regime. For freedom of expression also includes freedom to criticise government and its functionaries subject to limitations imposed by the

84 See *Dayda Hydara Jr, Ismaila Hydara & International Federation of Journalists Africa v The Gambia* ECW/CCJ/APP/30/11 (10 June 2014).

domestic laws.'[85] In none of the cases discussed earlier as part of the limited approach to adjudication of freedom of expression had the right been fleshed out with such emphasis and strength.

While establishing whether the failure to investigate Hydara's killing created a climate of impunity in the country, the Court based its analysis on its precedent in the *Manneh* and *Saidykhan* cases cited by the plaintiffs. The Court drew parallels from those cases to single out the lack of investigation as a common feature that encourages impunity of the perpetrators of such crimes.[86] More interestingly, the Court stressed the obligation of member states under article 66 of the ECOWAS Revised Treaty as one of

> assuring a safe and conducive atmosphere in the practice of journalism. And in the situation where attacks by state operatives are not investigated, let alone to prosecute the suspects, the state will be in breach of its obligation under the Treaty, and also the African Charter, as such impunity has the effect of denying the journalists the right to function and thus stifling freedom of expression.[87]

The case of *Federation of African Journalists & Others v The Gambia*[88] is the most recent judgment by the ECOWAS Court dealing with freedom of expression and freedom of the press, and its most detailed pronouncement on the issue so far. While the judgment is not entirely on steady ground in applying the principles, such as the three-part test, it devotes ample space to setting out and citing both international and comparative standards on the right to freedom of expression and the importance of a free press.[89] Its judgment on the facts also takes a strong position that is protective of both.

The case concerned a complaint filed by the Federation of African Journalists, a non-governmental organisation (NGO) representing the interests of journalists on the continent, and four individual journalists living in exile against The Gambia. They argued that the existence and implementation by the respondent state of its sedition, false news and criminal defamation laws violated the state's obligations relating to the right to freedom of expression as enshrined in article 19 of the ICCPR, article 9 of the African Charter and article 66(2) of the Revised ECOWAS Treaty. Two of the applicants also alleged having suffered a violation of their right to freedom from torture.

In its judgment, which is lengthy compared to its usual standards,[90] the Court makes a number of statements on the right to

85 See *Hydara* (n 84) 6 (as the paragraphs of this judgment were not numbered, reference is made to page numbers).

86 *Hydara* 9.

87 *Hydara* 9 & 10.

88 *Federation of African Journalists (FAJ) & Others v The Gambia* ECW/CCJ/APP/36/15 (14 February 2018).

89 *FAJ* (n 88) 36-48 (as the paragraphs of this judgment were not numbered, reference is made to page numbers).

90 The Court Rules do not include any provision on the length of a judgment. However, a review of the Court's case law shows that a 62-page judgment is above the average length for what could be termed an 'important' case or one involving multiple allegations of violations. The judgments of the Court in *Habre v Senegal* (2010), *SERAP (Education) v Nigeria* (2010) and *CDP v Burkina Faso* (2015) could be used as comparators.

freedom of expression, underlining its importance, such as that '[f]reedom of expression is a fundamental human right and full enjoyment of this right is central to achieving individual freedoms and to developing democracy. It is not only the cornerstone of democracy, but indispensable to a thriving civil society.'[91] Remarkably, after outlining the parties' arguments on the alleged violation by The Gambia in this area, the Court devotes several pages to discuss the genesis of 'the restrictions on freedom of expression',[92] citing comparative and international standards supporting the need to decriminalise defamation;[93] on the importance of the press;[94] the potential 'chilling effect' of vaguely-worded legislation restricting free speech;[95] and the proportionality of sanctions.[96] The Court then proceeds to find that '[i]n analysing the criminal laws of The Gambia, one can certainly infer that these laws do not guarantee a free press within the spirit of the African Charter on Human and Peoples' Rights and the International Covenant on Civil and Political Rights', and concludes that the criminal sanctions imposed for sedition, defamation and false news have a chilling effect 'that may unduly restrict the exercise of freedom of expression of journalists'.[97] The Court finds that the laws violate the right to freedom of expression and directs that they be 'reviewed and decriminalised to be in conformity with the international provisions on freedom of expression'.[98] Following this, the Court also finds the detention of the individual journalists as well as the mistreatment of two of them to have violated their rights to freedom of expression and freedom from torture.[99]

While perhaps not outlining its argument in the most structured fashion, the Court's judgment touches upon a number of key aspects related to the right to freedom of expression and freedom of the press. The Court underlines the importance of the right in a democratic society, acknowledges the important role the press plays in this context, and touches upon all elements of the three-part test, even if it addresses the legitimate aim of the laws only indirectly when it discusses in brief the historical background to the crime of defamation.[100] The judgment cites a variety of both comparative and international sources, including the UN Human Rights Committee, the European Court of Human Rights and the African Court's *Konaté* judgment, clearly embedding its finding in previous, detailed freedom of expression case law. With the *FAJ* case, the Court made an important further step towards a comprehensive freedom of expression judgment. It further elaborated on its findings in the *Hydara* judgment and made a number of strong

91 *FAJ* (n 88) 32.
92 *FAJ* 35.
93 *FAJ* 37.
94 *FAJ* 40-41.
95 *FAJ* 41-43 & 46.
96 *FAJ* 47.
97 *FAJ* 47.
98 *FAJ* 48.
99 *FAJ* 48-60.
100 *FAJ* 35.

statements on the importance of the right. In the end, however, the Court failed to set out – in its written judgment at least, as the Court does refer to having 'analysed' and 'critically examined' the laws[101] – a clear analysis in which it brings those elements to bear on the case at hand, applying the three-part test methodically to the facts to reach its final conclusions. As it stands, the groundwork and principles are set out, and the ultimate finding of a violation appears to correspond with them, but the bridge between them is largely absent.

3.2.2 African Court on Human and Peoples' Rights: *Lohé Issa Konaté v Burkina Faso*

This case, heard by the African Court after the *Zongo* case discussed above, can rightly be considered a landmark judgment on freedom of expression in Africa as it clearly addresses the main issues such as the scope of the right, the application of its limitations, and the decriminalisation of related offences. For publishing two articles in his newspaper, which were deemed insulting to the public prosecutor, journalist Lohé Issa Konaté was prosecuted and sentenced to 12 months' imprisonment and the payment of a fine of US $3 000, damages of US $9 000, and costs of US $500. Further, the domestic courts ordered that his weekly be suspended for a period of six months and the operative provisions of the judgment be published in several issues of local newspapers.

Before the African Court, Mr Konaté alleged that the above facts constituted a violation of his right to freedom of expression under article 9 of the African Charter, article 19 of ICCPR and article 66(2) of the ECOWAS Revised Treaty. Our discussion here focuses on the Court's interpretation and application of the provisions of the above-mentioned articles in advancing press freedom in Africa, especially in light of existing precedents.

In dealing with the merits of the matter, the Court first undertook the three-part test of the restriction imposed by the Burkinabe Information Code. On legality, the Court concluded that the limitations complained of were enshrined in the Burkinabe Penal Code and Information Code and therefore met the 'provided by law' criterion.[102] While more extensive than that of the Court on the same issue in the *Zongo* judgment, the analysis in the *Konaté* case left room for further improvement. Compared to international standards,[103] the Court could have pointed with greater strength to state obligations under international law to protect the rights of journalists in their laws and set a higher bar for what constitutes *sufficiently precise and clear* legislation to restrict freedom of expression than being satisfied with the mere presence of a legal basis which – based on the broad wording used in the Law – could be argued as one existing in form only.

101 *FAJ* 47.

102 *Konaté* (n 1) paras 128-131.

103 See analysis under part 2 of this article on a 'wide international consensus for freedom of expression'.

In making a determination on whether the same limitations served a legitimate purpose, the Court leaned on the right and reputation of others, collective security, morality and common interest as prescribed by articles 27(2) of the African Charter and article 19(3) of the ICCPR. Noting that the impugned national law aimed at, among others, protecting the reputation of magistrates in the performance of their duties, the Court concluded that the restriction was imposed in pursuit of a legitimate purpose.[104]

When it came to proportionality, the Court undertook an extensive analysis based on international case law.[105] It began by adopting the broadly-accepted international standard that restrictions to freedom of expression must be necessary in a democratic society. However, while one might have expected the Court to frame a preliminary definition of 'necessity', it merely stated situations where limitations would not be seen as necessary.[106] The core of the Court's proportionality analysis was devoted to balancing the right of a person to freedom of expression and the interests of society as a whole. The Court took the view that limitations should not be disproportionate and never be so severe as to result in a stifling of the freedom of expression.[107] A second limb of the analysis interrogated restrictions aimed at protecting the honour and reputation of others. There, the Court appeared to frame a 'need for a lesser degree of interference with freedom of expression in a democratic society when exercised in the context of public debate relating to public figures'.[108] The conclusive finding of the Court expressly referred to the *Media Rights Agenda* precedent of the African Commission that 'people who assume highly visible public roles must necessarily face a higher degree of criticism than private citizens; otherwise, public debate may be stifled altogether'.[109]

On those grounds, the Court made what could be considered as the major findings in this case and in the jurisprudence on freedom of expression in Africa. First, it held that proportionality in a democratic society can only accommodate custodial sentences for breaches of laws on 'freedom of speech and the press' in 'serious and very exceptional circumstances'.[110] Second, it held that other criminal sanctions such as fines, civil or administrative are incompatible with international human rights law, including the African Charter, when they are disproportionate and excessive.[111] With these two findings, the Court aligned itself with the position taken by other regional human rights courts that custodial sentences for defamation are never an acceptable

104 *Konaté* (n 1) paras 132-138.
105 *Konaté* paras 149-161.
106 *Konaté* para 146.
107 *Konaté* para 166.
108 *Konaté* para 155.
109 As above.
110 *Konaté* (n 1) para 165.
111 *Konaté* para 166.

penalty, and that all penalties for speech-related offences should be necessary and proportionate.[112] Finally, the Court stated that the decriminalisation of expression cannot apply in circumstances such as 'international crimes, public incitement to hatred, discrimination or violence or threat against a person or groups on grounds of race, colour, religion or nationality, among others'.[113] In this regard, the majority took a more restrictive approach than the more liberal minority of four judges, who argued in a separate opinion that in order to address such grave offences as hate speech and incitement to violence, criminal law might be considered as a measure, but that in such cases specific legislation targeted at these offences can be adopted; *criminal defamation*, however, was not the appropriate basis for that and therefore not necessary.[114]

While it is perhaps understandable that the majority of the Court, in handling its first criminal defamation case, opted for the more traditional option – which is in line with the current state of jurisprudence at its regional counterparts[115] – the minority view appears to be doctrinally more correct when looking at the international standards set out above. The separate opinion – correctly, in our view – hinges on the legality criterion: Laws have to be carefully and precisely drafted in order for individuals to be able to regulate their behaviour.[116] If the legislator wants to curb issues such as incitement to violence, it should legislate for that purpose specifically and not stretch defamation provisions to meet its requirements to limit speech it considers undesirable. Looking at the issue from this point of view and the fact that the main purpose of defamation claims is a protection of the reputation, it is difficult to imagine a scenario in which this specific aim could not be achieved through civil proceedings.

Having found a violation of the respondent state's obligations concerning the right to freedom of expression under the African Charter, the ICCPR and the Revised ECOWAS Treaty,[117] the Court also gave detailed orders to the respondent state to bring its domestic legislation in line with these human rights treaties by stating that it had to

> amend its legislation on defamation in order to make it compliant with article 9 of the Charter, article 19 of the Covenant and article 66 (2)(c) of the Revised ECOWAS Treaty (1) by repealing custodial sentences for acts of defamation; and (2) by adapting its legislation to ensure that other sanctions for defamation meet the test of necessity and proportionality, in accordance with its obligations under the Charter and other international instruments.[118]

112 See European and Inter-American Court case law as quoted in *Konaté* (n 1) paras 149-161.

113 *Konaté* (n 1) para 165.

114 See *Konaté* Separate Joint Opinion of Elsie Thompson, Sophia AB Akuffo, Bernard M Ngoepe and Duncan Tambala (5 December 2014) paras 4 & 5.

115 See European and Inter-American Court case law as quoted in *Konaté* (n 1) paras 149-161.

116 *Konaté* Separate Joint Opinion (n 114).

117 See *Konaté* (n 1) paras 170(3)-(7).

118 *Konaté* para 170(8).

In ordering the respondent state to amend its laws, the Court arguably gave additional force and potential impact to its judgment, with effects extending beyond the situation of the individual applicant.

3.2.3 East African Court of Justice: *The Managing Editor Mseto and Hali Halisi Publishers Limited v United Republic of Tanzania*

The *Managing Editor Mseto and Hali Halisi Publishers Limited v United Republic of Tanzania*[119] case was filed six months after the East African Court of Justice's judgment in the *Burundi Journalists' Union* case. The case concerned a 36-month publishing ban imposed on the *Mseto* newspaper issued in August 2016 on grounds of having published 'incitement and false news', following the paper's publication of an article that alleged that President Magufuli's successful election campaign the previous year had been partly financed through corrupt means. The Court's judgment continues the stance on freedom of expression and press freedom taken in *Burundi Journalists' Union*, but further builds on it by a more structured application of the three-part test and issuing stronger and more specific orders after finding a violation.

In their complaint before the Court, the applicants argued that the order restricted press freedom and the right to freedom of expression, which was in violation of the respondent state's obligation to uphold and protect the fundamental and operational principles of the East African Community and universally-accepted human rights standards.[120] In arguing that the imposed restriction of press freedom failed to meet the three-part test, the applicants referred to the Court's articulation of this standard in *Burundi Journalists' Union*.[121] The applicants also alleged that the order instituting the ban – which was made pursuant to section 25 of the since repealed Tanzania Newspapers Act – did not specify reasons for doing so.[122]

In its judgment the Court found that the respondent state had failed to establish how Mseto's publication violated the public interest or the interest of peace and good order of the people. By issuing the order 'whimsically', the Minister demonstrated a failure to recognise the right to freedom of expression and press freedom as a basic human right which should be protected.[123] Therefore, the order had been made in violation of the right to freedom of expression as protected by article 18(1) of the Constitution of Tanzania, article 19(3) of the ICCPR and article 27(2) of the African Charter and derogated from the principles of democracy and adherence to the principles of good governance, the rule

119 *The Managing Editor Mseto & Hali Halisi Publishers Limited v the Attorney-General of the United Republic of Tanzania*, Reference 7 of 2016 (21 June 2018).

120 *Mseto* (n 119) paras 6-10.

121 *Mesto* para 27.

122 *Mseto* para 5.

123 *Mseto* para 68.

of law and social justice. The Court also found that it failed to conform with and adhere to the principles of accountability and transparency.[124]

The Court repeated its usual finding in human rights matters that the provisions of articles 6(2), 7(d) and 8(1) of the Treaty are binding, not merely aspirational and justiciable, and that they create an obligation on every partner state to respect the principles of good governance and rule of law, which include accountability, transparency and the promotion and protection of democracy.[125] The Court found that these principles had been violated in this case and that, while the rights to freedom of expression and press freedom were not absolute,[126] the restrictions imposed in this case were unlawful, disproportionate and did not serve a legitimate or lawful aim.[127] It cited from *Burundi Journalists' Union*,[128] concluding that it was

> not in doubt that the rights to freedom of expression and free press run in tandem, and as rights guaranteed and also limited under law, may nonetheless also be described as human and democratic rights and freedoms which partner states should aspire to protect and promote through the enactment of national laws that achieve the objectives of good governance, more so the adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities and gender equality.[129]

The Court also emphasised the importance of the press and its watchdog role in democratic societies:[130]

> While it is not our place to determine whether the information published was correct or not, a knee jerk reaction to ban a publication, hours after the story hit the news stalls, cannot, in our view, be conduct that is within the parameters of the rule of law and good governance. Worse still, it cannot be, as the Minister suggested, that the President of a partner state cannot ever be mentioned in newspaper articles. That is the price of democracy and public watch dogs like the press must be allowed to operate freely within lawful boundaries.

Having held that the Minister had acted in breach of the Treaty, the Court ordered the resumption of the newspaper's publication as requested. The Court highlighted that, in accordance with article 38(3) of the Treaty, the respondent state was expected to take measures to implement this judgment within its internal legal mechanisms without delay.[131]

3.3 Assessing the impact of adjudication gains

As an overall observation, it is worth stressing that in the *Hydara*, *Konaté* and *FAJ* cases, the ECOWAS Court and African Court made unprecedented and landmark rulings on freedom of expression in Africa culminating in strong pronouncements on the right and the

124 *Mseto* para 68.
125 *Mseto* para 69.
126 *Mseto* para 59.
127 *Mseto* para 69.
128 *Mseto* paras 47-49, 64-65 & 67.
129 *Mseto* para 50.
130 *Mseto* para 72.
131 *Mseto* para 74.

limited grounds on which it can legitimately be curtailed. As similar cases related to freedom of expression and the criminalisation of speech are pending before the East African Court of Justice and the African Commission, it remains to be seen whether those adjudicatory bodies will build on the above-mentioned precedent, especially the *Konaté* judgment.

The African Commission is expected to issue a decision in the matter of *Nkusi and Mukakibibi v Rwanda* where two journalists complained of the violation of their rights to fair trial and freedom of expression after they were convicted and sentenced to 17 and seven years in prison, respectively.[132] The complainants were jailed for genocide minimisation, threatening national security and defamation of the President after they had published pieces in local newspapers that were critical of the government. The Commission is yet to publicise its decision, and it will be interesting to see if its findings will be grounded in *Konaté* and potentially reveal a dialogue between the Commission and the Court in the development of its jurisprudence.

It will also be important to follow jurisprudential developments in the East African Court of Justice as it is considering at least two cases that concern press freedom. The first case is that of *Ssembuusi v Uganda*, which concerns the conviction of a journalist for criminal defamation.[133] After he was convicted to payment of US $400 or one year's imprisonment for a story he had reported on CBS radio on the disappearance of solar panels donated to Kalangala district by the African Development Bank, Ronald Ssembuusi took his case to the EACJ in 2015. He has since passed away, but the case continued in the name of a representative and is currently pending before the Court. The case was filed after the applicant had become aware of the *Konaté* decision and confirmation by the EACJ in the *Burundi Journalists' Union* case that press freedom issues fell within its jurisdiction.

Unlike *Burundi Journalists' Union*, the *Ssembuusi* case offers the EACJ a more concrete and individualised violation of freedom of expression to assess than a piece of legislation. However, a more abstract challenge to the Tanzanian Media Services Act in the matter of *Media Council of Tanzania & 2 Others v The Attorney-General of the United Republic of Tanzania*[134] is also currently pending before the EACJ. It will be interesting to see whether the Court will follow the approach taken in *Mseto* in either or both of these cases.

The Gambia has not yet fully complied with the judgments delivered by the ECOWAS Court in the cases of *Manneh*, *Saidykhan* and *Hydara*. There are reports, however, that the government of The Gambia recently paid half of the damages award to Manneh's family.[135]

132 See *Agnes Uwimana-Nkusi & Saidati Mukakibibi (represented by Medial Legal Defence Initiative) v Rwanda* Communication 426/12.

133 See *Ronald Ssembuusi v TheAttorney-General of the Republic of Uganda*, Reference 16 of 2014.

134 *Media Council of Tanzania & 2 Others v The Attorney-General of the United Republic of Tanzania*, Reference 2 of 2017.

135 See Media Foundation for West Africa (n 38).

It has also not yet complied with the judgment in the *FAJ* case, although that judgment of course is more recent in nature. While the reason for non-compliance was obvious under the Jammeh rule, The Gambia has changed power in early 2016 and the newly-elected authorities have pledged to implement the judgments. Furthermore, a legislative reform process for The Gambia's media laws has been announced.[136] It is worth noting that the orders in the aforementioned judgments, except for the *FAJ* judgment, were mainly pecuniary and to release the plaintiffs. Legislative change, therefore, can only be expected from the judgment delivered in the *FAJ* case, which places the standards higher in advancing freedom of expression. Without doubt, the *FAJ* ruling has the potential to impact national freedom of expression-related law making and enforcement nationally and potentially at least across ECOWAS. The latter may be expected because the case resulted in an order to amend national laws similar provisions to which can be found in the domestic press laws of several other countries across the region.

There is evidence from stakeholders that Burkina Faso has complied with the judgments of the African Court at least partly for *Zongo* and fully for *Konaté*. Despite the importance of those two pronouncements, the changes they are believed to have led to cannot be exclusively attributed to them for lack of nexus. In a proper categorisation as per literature,[137] Burkina's compliance must be termed as 'situational' because it would very unlikely have happened had the country not experienced regime change.[138] So, while the judgments gave rise to their subsequent implementation, this may not have taken place had the rule of former Burkinabe President Blaise Compaoré not come to an end when it did. That being said, the judgments gave impetus to a number of positive actions and judgments concerning freedom of expression across the entire continent. One instance that may be quoted as a direct impact is the decision of the government of Côte d'Ivoire to withdraw a Bill it had tabled before parliament in mid-2017, which proposed fines of up to US $5 000 and five years' imprisonment for certain press offences.[139] As alluded to earlier, a criminal defamation law was struck down in Kenya, citing the *Konaté* decision,[140] and the recent judgment from the Lesotho High

136 The Point *Information minister talks about media law reform* (30 June 2017).

137 See F Viljoen & L Louw 'State compliance with the recommendations of the African Commission on Human and Peoples' Rights' (2007) 1 *American Journal of International Law* 5; HH Koh 'How is international human rights law enforced?' (1999) 74 *Indiana Law Journal* 1397.

138 On why African states have complied with judgments of regional human rights courts, see in general Viljoen & Louw (n 137); Adjolohoun (n 65) and V Ayeni 'State compliance with and influence of reparation orders by regional and sub-regional human rights tribunals in five selected African states' unpublished LLD thesis, University of Pretoria, 2018.

139 See MFWA 'Ivorian government withdraws controversial press Bill after MFWA petition' http://www.mfwa.org/ivorian-government-withdraws-controversial-press-bill-after-mfwa-petition/ (accessed 11 April 2018).

140 *Jacqueline Okuta* (n 2).

Court finding that the offence of criminal defamation violated the right to freedom of expression also included a citation of *Konaté*.[141]

The EACJ judgment in the *Burundian Journalists' Union* case has not been implemented, and the applicant has been unable to pursue implementation due to the political turmoil there, which has led the majority of Burundian journalist to flee the country.[142] According to the 2016 Report from Freedom House,[143] Burundi's Parliament adopted changes to the media law in March 2015, repealing some of the controversial provisions. However, the President had not signed these as of the end of 2015. Media outlets and journalists continued to face legal harassment and arrests in 2015. In any event, Burundi cannot be a reference in the ongoing discussion granted the increasing political turmoil in that country following the President's pursuit of a third term. Journalists have been experiencing threats and physical attacks when reporting on the human rights violations which are being committed.[144]

So, will *Konaté* set journalists free? The forthcoming decisions by the EACJ and African Commission will give an indication of the answer to this question. If the direction in which the press freedom jurisprudence at the regional courts has been developing is followed, there is reason to be optimistic.

4 CONCLUSION

Based on this critical review of African regional case law on press freedom, it can be argued that the judgment delivered by the African Court in the matter of *Lohé Issa Konaté v Burkina Faso* rightly generated hope for media professionals on the continent. The *Konaté* judgment played the dual role of being both a ground-breaking and a standard-setting pronouncement. In particular, the latter role has already manifested itself in an incremental trend towards the decriminalisation of defamation in the region. More generally, it also holds promise for future positive developments regarding democratic governance in Africa.

There are two trends that can be identified: first, a trend to internal standard building within the adjudicatory bodies; and, second, a trend of jurisprudential judicial dialogue. With respect to internal standard building, both the ECOWAS Court and the EACJ provide relevant illustrations. The ECOWAS Court judgment in *FAJ* was the result of an incremental jurisprudential process. It started with the minimal

141 *Basildon Peta* (n 4) para 21.

142 See electronic interview with Advocate Nani Jansen Reventlow, 6 October 2016.

143 Freedom House is an independent watchdog organisation dedicated to the expansion of freedom and democracy around the world founded in 1941, New York City in the USA.

144 See OHCHR 'Oral briefing by the members of the Commission of Inquiry on Burundi to the Human Rights Council' 27 June 2018 https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23274&LangID=E (accessed 21 August 2018).

standards set out in the *Manneh* and *Saidykhan* cases, which led, via *Hydara*, to the strong press freedom statements made in *FAJ*. Similarly, in building its determinative argument in the *Mseto* judgment, the EACJ quoted its previous decision in the *Burundian Journalists' Union* case. The exception in this regard is the African Court's *Konaté* judgment, which only referred to its previous decision in *Zongo* in considering the admissibility of the matter.

Regarding jurisprudential dialogue, the *Konaté* judgment arguably takes the lead. For instance, the ECOWAS Court cited *Konaté* in its *FAJ* judgment. While the case concerns a number of individual claims, the judgment sets a regional standard for West Africa. It is of course important to note that the African Court relied on the African Commission by, among others, expressly citing the Commission's *Media Rights Agenda* decision in examining the critical element of the level of criticism which should be tolerated by public figures or officials. Through this lens, it may be suggested that the pronouncement in *Konaté* judicialised the Commission's case law, including its findings in *Media Rights Agenda*.

The *Konaté* judgment, however, did more. As opposed to, for instance, the *Mseto* ruling of the EACJ, *Konaté* inaugurated a post-individual trend by making an order intended to align national legislation with international freedom of expression standards and therefore created a potential for wider impact. *FAJ*, which reflected on *Konaté*, subsequently did the same. In doing so, *Konaté* sent a regional signal on the need to abolish open-ended legislation that allows for abuse through discretionary application. The emerging influence observed among regional adjudicators has arguably begun to find resonance in domestic courts as seen earlier in Kenya and Lesotho.

The jurisprudential movement launched by *Konaté* also holds promise regarding the improvement of democratic governance in Africa. The central statement that emerges as a common denominator in all the cases discussed is that protecting press freedom is critical in affirming Africa's democratic societies. It remains to be seen whether, with the benefit of strategic litigation, innovative regional and national adjudicators, and politically willing governments, Africa will move towards maintaining a free press that ensures public accountability.

In moving towards this goal, follow-up litigation is critical. Lessons can be learned in this regard from at least two litigation projects initiated before the ECOWAS Court. The first led to the *Koraou Slavery* judgment,[145] which since it was delivered in 2008 did not attract a single follow-up case, while the scourge of slavery remains prevalent in Niger and many other countries in the region.[146] The second case is that of *SERAP (Education) v Nigeria*,[147] which critically addressed corruption as a violation of economic and social rights. The case, as

145 See *Khadidjatou Mani Koraou v Niger* (2008) AHRLR 182 (ECOWAS 2008).

146 See H Adjolohoun 'The ECOWAS Court as a human rights promoter? Assessing five years' impact of the Koraou Slavery judgment' (2013) 31 *Netherlands Quarterly of Human Rights* 342.

147 See *SERAP v Nigeria* (*Education*) ECW/CCJ/ JUD/07/10 (10 October 2010).

such, should have yielded post-judgment strategic litigation throughout the region where corruption remains a widespread phenomenon.

In all, jurisprudential developments on freedom of expression in Africa deserve attention and further investigation in light of the catalytic potential that these findings hold for democratisation on the continent.