regarding the applicability of social policy exceptions to trade restrictions in different contexts and the need for increased environmental protection related to natural resource extraction, as demand for natural resources grows with consumer demand and exponential economic growth in the developing world.

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Geneva Convention Relating to the Status of Refugees—international refugee law—EU refugee qualification directive—conscientious objection—prosecution of deserters as persecution

SHEPHERD v. GERMANY. Case C-472/13. *At* http://curia.europa.eu.
Court of Justice of the European Union, February 26, 2015.

In *Shepherd v. Germany*, the Court of Justice of the European Union (ECJ) issued a preliminary ruling requested by a German administrative court in an asylum case brought by a United States Army service member. Applying the relevant asylum law of the European Union (EU), the ECJ held that, under certain circumstances, a conscientious objector who has deserted from his military unit may claim international refugee protection. It also clarified the conditions under which the basically legitimate prosecution of military deserters must be qualified as illegitimate persecution under international refugee law.[1]

The applicant in this case was Andre Lawrence Shepherd, a U.S. citizen who had enlisted in the U.S. Army. After basic training, he was schooled in maintenance mechanics for Apache helicopters. These attack helicopters are heavily armed with a devastating thirty millimeter chain gun and various antitank and antipersonnel missiles. In September 2004, Shepherd was assigned to the 412th Aviation Support Battalion, which, though stationed in Germany near Ansbach, had been deployed in Iraq since February 2004. In Iraq, he maintained Apache helicopters in Camp Speicher near Tikrit but did not participate in combat.

In February 2005, Shepherd returned with his battalion to the base in Germany and voluntarily extended his contract. He later asserted that during this period in Germany he began to have doubts about the legality of the Iraq war, as well as the specific military uses to which the helicopters he maintained were put. In April 2007, he was assigned to another military mission in Iraq. He then went absent without leave from the Ansbach camp and hid with a German acquaintance until applying for asylum in August 2008 in the district branch of the German Federal Office for Migration and Refugees (Bundesamt für Migration und Flüchtlinge).

Shepherd claimed that he had deserted to avoid being involved in war crimes, since he had found out that military operations in Iraq purportedly entailed the "systematic, indiscriminate and disproportionate use of weapons without regard to the civil population."[2] In particular, the use of Apache helicopters allegedly inflicted great harm on Iraqi civilians. Even though he did not directly engage in combat, he supported combat troops by keeping the helicopters battle ready.

[1] Case C-472/13, Shepherd v. Germany (Eur. Ct. Justice Feb. 26, 2015) [hereinafter Judgment]. Decisions of the Court cited herein are available at its website, http://curia.europa.eu.

[2] Case C-472/13, Shepherd v. Bundesrepublik Deutschland, Opinion of Advocate General Sharpston, para. 3 (Eur. Ct. Justice Nov. 11, 2014).

The federal office rejected his asylum claim, contending that Shepherd had no human right of conscientious objection and that he could have legally terminated his contract with the army. Moreover, he had not substantiated that his helicopter battalion had been involved in committing war crimes. Even if such crimes had occasionally occurred, they would not have been tolerated by the U.S. military. The federal office intentionally left undecided whether the Iraq war met the definition of an international crime of aggression, as the applicant apparently was not a responsible perpetrator. Finally, since May 2005 the military mission in Iraq, which left the territorial integrity of the state unharmed, had been authorized by a United Nations Security Council resolution and thus conformed with international law.

In the Administrative Court of Munich, the plaintiff challenged the administrative act rejecting his asylum claim. The applicant asked the state court to decide whether he would qualify as a protected refugee on the basis of the arguments he had advanced. Besides the individual right to asylum pursuant to Article 16a of the German Constitution (Grundgesetz), which applies to *political* persecution and does not cover nonpolitical prosecution of objectors,[3] European Union law provides for a separate right of refugee protection. National law is to be interpreted in conformity with EU law. Because precise standards for the qualification of deserters and conscientious objectors as protected refugees have not yet been set, the administrative court stayed the proceeding and requested a preliminary ruling by the ECJ on the interpretation of the relevant EU refugee law pursuant to Article 267 of the Treaty on the Functioning of the European Union (TFEU).[4]

The European law governing the determination of refugee status is Council Directive 2004/83/EC (Directive).[5] The Directive transforms international refugee law into EU law, which (in Germany) is in turn transformed into national law by the Asylum Procedure Act (Asylverfahrensgesetz).[6] Pursuant to the preamble (recital 3) to the Directive, the Geneva Convention Relating to the Status of Refugees (Convention)[7] constitutes the cornerstone of the legal regime for the protection of refugees. The Convention is also invoked in TFEU Article 78 on asylum. The ECJ has accordingly made clear in recent jurisprudence that the Directive must be interpreted in the light of international refugee law, in particular the Convention (para. 23).[8] The Directive "must also be interpreted in a manner consistent with the rights

[3] *See* Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court] Dec. 6, 1988, 81 ENTSCHEIDUNGEN DES BUNDESVERWALTUNGSGERICHTS [BVERWGE] 41, 42 (1988); Hans D. Jarass, *Artikel 16a*, GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND, para. 20 (Hans D. Jarass & Bodo Pieroth eds., 13th ed. 2014).

[4] Verwaltungsgericht München [VG] [Administrative Court Munich] Aug. 20, 2013, Case M 25 K 11.30288; Consolidated Version of the Treaty on the Functioning of the European Union, Art. 267, Sept. 5, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU].

[5] Council Directive 2004/83/EC on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees, 2004 O.J. (L 304) 12 [hereinafter Directive].

[6] Asylverfahrengesetz [AsylVfG] [Asylum Procedure Act] Sept. 2, 2008, BGBL. I at 1798, *cited in* Judgment, para. 12.

[7] Convention Relating to the Status of Refugees, July 28, 1951, 189 UNTS 150.

[8] Joined Cases C-199/12–C-201/12, Minister voor Immigratie en Asiel v. X, para. 40 (Eur. Ct. Justice Nov. 7, 2013); Case C-604/12, H. N. v. Minister for Justice, Equality and Law Reform, paras. 27–28 (Eur. Ct. Justice May 8, 2014); Joined Cases C-148/13–C-150/13, A v. Staatssecretaris van Veiligheid en Justitie, para. 46 (Eur. Ct. Justice Dec. 2, 2014).

recognised by the Charter of Fundamental Rights of the European Union" (Charter).[9] The Charter entails a right to asylum in Article 18 that "shall be guaranteed with due respect for the rules of the Geneva Convention."[10]

Article 4 of the Directive sets out the conditions for the assessment of the relevant facts and circumstances that the applicant must submit to substantiate his application for refugee protection. Pursuant to this provision, the assessment of an application is to be carried out on an individual basis and must take into account all relevant and attainable facts. Article 9(1) of the Directive defines acts of persecution in conformity with the Geneva Convention. Acts of persecution must be sufficiently serious in nature or recurrent as to constitute a severe violation of basic human rights. Article 9(2) lists typical (and nonexhaustive) examples of acts of persecution; namely, prosecution or punishment that is disproportionate or discriminatory, and especially prosecution or punishment for refusal to perform military service in a conflict, where performing such service would include crimes or acts falling under the exclusion clause in Article 12(2) of the Directive.

The crucial exclusion clause provides, in accordance with Article I(F)(a) of the Geneva Convention, that a person is excluded from being a refugee where there are serious reasons for considering that "he or she has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes," which are the instruments that constitute international criminal law.[11] Thus, the Directive, on the one hand, excludes presumed war criminals from refugee protection and, on the other hand, grants refugee protection to persons refusing to perform military service to avoid involvement in war crimes. Notably, conscientious objectors are not generally protected but can be if there is a sufficient likelihood that they will be involved in war crimes. But a religiously or ethically based reluctance to kill is insufficient to make a deserter into a refugee.

The ECJ summarized the general standards to be applied as "[t]he national concerned must therefore, on account of circumstances existing in his country of origin, have a well-founded fear of being personally the subject of persecution for at least one of the five reasons listed in [Directive 2004/83] and the Geneva Convention" (para. 24). Because the threat of prosecution of the plaintiff in the United States was undisputed, the ECJ concentrated on whether an almost certain prosecution would probably amount to a form of persecution, which would trigger refugee protection. In a teleological approach, the Court stressed that the requirements must take into account the general aim of the Directive, that is, "to identify persons who, forced by circumstances, genuinely and legitimately need international protection in the European Union" (para. 32).

On the basis of this precondition, the ECJ accepted that, in principle, a military service member who has deserted from his unit could be a refugee even if he was not one of the combat troops directly engaged in battle (para. 38). The Directive "covers all military personnel, including logistical or support personnel" (para. 46). Consequently, refugee status must be

[9] Judgment, para. 23 (citing Minister voor Immigratie en Asiel v. X, *supra* note 8, para. 40); *see also* Case C-364/11, Abed el Karem el Kott v. Bevándorlási és Állampolgársági Hivatal, para. 43 (Eur. Ct. Justice Dec. 19, 2012).

[10] Charter of Fundamental Rights of the European Union, Art. 18, Dec. 7, 2000, 2000 O.J. (C 364) 1, 40 ILM 266 (2001).

[11] Directive, *supra* note 5, Art. 12(2)(a); *see* GUY S. GOODWIN-GILL & JANE MCADAM, THE REFUGEE IN INTERNATIONAL LAW 166–68 (3d ed. 2007).

granted even if the applicant "participate[d] only indirectly in the commission of [war] crimes if it [was] reasonably likely that, by the performance of his tasks, he would provide indispensable support to the preparation or execution of those crimes" (*id.*). Furthermore, the Directive does not require that war crimes have already been committed or that the applicant has actually been commanded to commit war crimes. As the Directive was intended to protect military personnel trying to avoid "the risk of committing, in the future," acts qualified as war crimes, the "person concerned can therefore invoke only the likelihood of such acts being committed" (para. 39). Admittedly, this is a rather broad approach, as in military clockwork every unit, like interlocking cogs, depends on the reliability of other units and, in particular, on unceasing support with logistics, supplies, and weapons maintenance. Thus, most support tasks (perhaps even cooking) will be considered "indispensable" to the combat troops, which should make it comparatively easy to substantiate a claim of being indirectly involved in war crimes in the future, as long as the applicant is able to prove a sufficient likelihood that war crimes may be committed by the supported combat troops.

Nonetheless, disregarding the broad personal scope of protection for service members, the Court convincingly established high substantive and procedural standards for refugee protection of conscientious objectors with regard to the sufficient likelihood of involvement in war crimes. Although a person is a refugee *ipso jure*, independently of positive recognition by a state authority, in practice the right to asylum depends on the procedural law under which the states determine refugee status.[12] Of course, in most asylum cases the assessment of evidence is daunting, as national authorities and courts must investigate the facts in a foreign country and often lack reliable information on the general and/or individual situation, especially in a nearly inaccessible combat zone. Notwithstanding these severe difficulties, asylum applications are increasingly common, and resources for scrutiny of their claims are limited. In Germany alone, over two hundred thousand new asylum claims were presented in 2014; some six hundred thousand were filed in Europe as a whole; and statistics indicate a significant rise in 2015 due to the upheaval in North Africa, the Levant, and Iraq.[13] Predictions at the end of July 2015 based on recent applications are for almost half a million asylum seekers in Germany alone.

The evaluation of the facts in asylum cases is unavoidably based on scattered indicia, since "hard" evidence—like witnesses, reliable official documents, photos, videos, and objects to exhibit—cannot be obtained in most circumstances. And a state indirectly accused of persecution will usually not cooperate in an effective investigation or provide legal aid. As a result, the ECJ demands that the competent national court assess the claim only on the basis of a sufficient body of evidence to decide on its credibility (para. 40). This requirement means, in turn, that the national authority must exhaust all indicia it can gather to reach a fair, balanced, and well-founded assessment.

What obviously made the *Shepherd* case puzzling is that punishing desertion or absence without leave is an integral part of—as the ECJ puts it—the "legitimate exercise of the right

[12] FRANCESCO CHERUBINI, ASYLUM LAW IN THE EUROPEAN UNION: FROM THE GENEVA CONVENTION TO THE LAW OF THE EU 9–10 (2015).

[13] Eurostat, Asylum Statistics (May 21, 2015), *at* http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum-statistics.

to maintain an armed force" (para. 54). In fact, every Western democracy, insofar as it maintains an army, makes desertion a punishable criminal offense. Hence, the Court accurately concluded that the mere threat of punishment as such cannot be qualified as an act of persecution. Rather, the likely penalty would have to be disproportional or discriminatory within the meaning of Article 9(2) of the Directive (paras. 49, 54, 56).[14] Disproportionality of punishment—which is an act that goes "beyond what is necessary for the State concerned in order to exercise its legitimate right to maintain an armed force" (para. 50)—is relatively difficult to judge, because the penal cultures—not even between the United States and Europe but within the European Union or among the members of the European Convention on Human Rights—vary significantly,[15] and the very nature of penalties as intentionally inflicted harm eludes precise measuring. Transforming something that is legitimate on the merits into illegitimate persecution merely on the basis of the extent of the penalty requires an unusual amount of severity, like cruel forms of punishment and a strikingly excessive sentence. Desertion is a crime under U.S. federal law and can be punished with a maximum of five years of imprisonment (para. 52), which is comparable to the range of sentences under German criminal law and far from excessive.[16] The ECJ makes clear that nothing suggests that the imposition of criminal penalties would be "so disproportionate or discriminatory as to amount to acts of persecution" under the Directive (para. 56), a conclusion that is prima facie reasonable.

Additionally, since it is legitimate for a state to maintain armed forces, desertion can only be the *ultima ratio*. The "refusal must constitute the only means by which that applicant could avoid participating in the alleged war crimes" (para. 44). Still, the national court must take into account that "in the present case, the applicant not only enlisted voluntarily in the armed forces at a time when they were already involved in the conflict in Iraq but also, after carrying out one tour of duty in that country, re-enlisted in those forces" (*id.*), unless he "proves that no procedure [for obtaining conscientious objector status] would have been available to him in his specific situation" (para. 45). Apparently, the applicant will find it hard to justify his conduct, above all his reenlistment.

* * * *

Although the ECJ's decision was formally based on EU law, it will inevitably influence the understanding of general international refugee law because the Court indirectly applied the Geneva Convention. The ruling derives its significance from having emanated from the highest court of the European Union; as such, it represents an official interpretation attributable to twenty-eight members of the Geneva Convention. Nonetheless, caution should be taken in transferring elements of the ECJ's interpretation into international refugee law.

The rationale of the Court is primarily based on the Directive, so that international law and EU law are intermingled. Although the Directive is explicitly designed to transform the Geneva Convention directly into EU law, the legislative process within the European Union might

[14] *Cf.* JAMES C. HATHAWAY & MICHELLE FOSTER, THE LAW OF REFUGEE STATUS 270–74 (2d ed. 2014) (containing various references to legal practice).

[15] For a profound analysis, see JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE 191–207 (2003).

[16] *See* 10 U.S.C. §885 (2013); MANUAL FOR COURTS-MARTIAL UNITED STATES, Art. 85(e), Maximum Punishment, at IV-12 (2012); Wehrstrafgesetz [WStG] [Military Penal Code] §16(1) (Ger.) (fine or imprisonment for up to five years).

have changed its regulatory content. The ECJ drew its main arguments from the regulatory purpose and reasoning of the Directive, supported by its preamble, and from the Court's own prior jurisprudence, whereas it omitted any references to international sources of interpretation such as guidelines and practice of the United Nations High Commissioner for Refugees. Additionally, there is an important difference between EU and international refugee law. Although the Geneva Convention, as traditional international law, is exclusively binding between member states and does not directly bestow individual rights, the EU law adopts the objective scope of the Convention's guarantees and transforms them into individual rights, which asylum seekers may invoke against the European Union and EU member states implementing the law.[17] As a right to asylum is guaranteed by Charter Article 18, which enjoys the status of primary EU law,[18] the Directive as mere secondary EU law must be interpreted in conformity with the respective fundamental right.

If the regulatory content of the Geneva Convention is disregarded, an individual fundamental right will be interpreted functionally in the light of the individual need for protection, which will at least tend to broaden that guarantee and make it more effective. In any case, this mode of interpretation applies to the procedural standards of evidence assessment developed by the ECJ, which are based on the principle of procedural effectiveness under EU law,[19] are concretized in Article 4 of the Directive, and lack an equivalent in international refugee law. After all, the individualization of objective regulation—from status to right—will always have a deep impact on the structure of law.

Nonetheless, the ECJ hedges the risks of guaranteeing conscientious objectors refugee status. Granting asylum may be highly political, as the organs of the state in which an applicant seeks asylum must interfere collaterally with the political order of another state, which is denounced for persecution. Thus, asylum cases can be turned into foreign affairs proxy wars, as the demand to grant Edward Snowden asylum in Germany has recently shown. All in all, offering Shepherd asylum would entail accepting that he has a well-founded fear of being involved in war crimes. Accordingly, courts, which make poor diplomats in the political arena of foreign affairs, find themselves in a predicament. On the one hand, they should accept their epistemic limits and exercise judicial self-restraint when assessing the conduct of a foreign nation in a foreign country far beyond national jurisdiction and legal aid.[20] On the other hand, each applicant for refugee status is endowed with an individual right to asylum, enforceable in an independent court of law.[21] The courts cannot resort either to administrative discretion in granting asylum or to reserving judgment on national security or foreign policy grounds, and judicial proceedings generally lie outside political influence.

Freely offering asylum to deserters may seriously undermine the effectiveness and reliability of a nation's armed forces. The ECJ clearly acknowledged the legitimate interest of every nation in maintaining a reliable armed force and punishing deserters. As war crimes are committed

[17] *See* Charter, *supra* note 10, Art. 51.

[18] *See* Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Art. 6(1), Dec. 13, 2007, 2007 O.J. (C 306) 1.

[19] PAUL CRAIG, EU ADMINISTRATIVE LAW 256–57, 705–07 (2d ed. 2012).

[20] *See* BVerwG (Military Service Senate), June 21, 2005, 127 BVERWGE 302, 343–52 (2005) (acquitting an army major of a disciplinary charge for his refusal to obey an order and, on the merits, in an obvious case of overreach, incidentally declaring the invasion of Iraq an act of aggression incompatible with Article 51 of the UN Charter).

[21] GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, Art. 19(4), BGBL. I; Charter, *supra* note 10, Art. 47.

in almost every armed conflict, following the dynamics of violence, a merely abstract threat of being indirectly involved in such criminal offenses would easily be construed. Against this background, the ECJ convincingly established a heavy burden of producing evidence, which mitigates the potentially far-reaching ramifications of the decision. An applicant must plausibly demonstrate a high probability that he could be forced to participate in war crimes. First, it is essential to prove a sufficient likelihood of participation in the commission of war crimes. Second, the applicant must make a plausible argument that he could not reasonably avail himself of the regular conscientious objection procedure. A state that legalizes conscientious objection based on religious training and belief in conformity with reasonable procedures (like the United States under 50 U.S.C. App. §456(j)) can hardly be accused of persecution. Third, as the state concerned can never generally exclude the possibility that acts qualified as war crimes will be committed, how the state reacts to the disclosure of presumed crimes and whether it consistently initiates prosecutions are important considerations.[22] Since war crimes are punishable under 18 U.S.C. §2441, an effective prosecution by the U.S. military significantly reduces the likelihood that individual service members will be involved in such crimes. In this regard, of course, established legal interpretation and actual practice matter.

Nevertheless, in its—perhaps exaggerated—eagerness to avoid political confrontation, the ECJ transgressed its procedural competence. It is undisputed doctrine that the ECJ, when deciding a request for a preliminary ruling, is restricted to answering the purely legal questions referred to the bench by the national court; it may neither rule on the underlying case nor provide an assessment of the relevant facts. Yet in the *Shepherd* decision, the ECJ repeatedly mentioned the file submitted to the Court (paras. 51, 52, 54) and incidentally noted that the Court found nothing to suggest that the refugee claim was justified. Considering the standards set by the Court, this observation is presumably true. Nonetheless, the ECJ should have refrained from any comments on the case and left it to the national court to draw the apparent conclusion.

Finally, the ECJ advanced the rather puzzling—and unsolicited—argument "that an armed intervention engaged upon on the basis of a resolution adopted by [the UN] Security Council offers, in principle, every guarantee that no war crimes will be committed and that the same applies, in principle, to an operation which gives rise to an international consensus" (para. 41). In doing so, the ECJ stated a presumption of legality that seems questionable. A Security Council resolution may abstractly legalize the use of military force on a broad scale without realistically reducing the risk that war crimes will be committed in the fog of combat action on the ground. Furthermore, in prior jurisprudence the ECJ had justly adopted a critical perspective on the Security Council and claimed the competence to review such resolutions under the standards of fundamental EU rights.[23] If the present judgment, beyond the sound handling of the current case, should reveal a new friendliness toward international lawmaking, it would be a step backward regarding the protection of fundamental rights in Europe.

[22] See, in this connection, Judgment, para. 41.

[23] Joined Cases C-402/05 P & C-415/05 P, Kadi v. Council, 2008 ECR I-6351, paras. 281–85.

In the wake of the preliminary ruling, the Administrative Court of Munich will have to assess the facts and decide the case.[24] The outcome is foreseeable. In view of the standards of determining refugee status as set out by the ECJ, the plaintiff realistically has rather bleak prospects of winning.

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Human rights—freedom of expression—criminal defamation—regional courts—amici curiae—treaty interpretation

KONATÉ v. BURKINA FASO. App. No. 004/2013. *At* http://www.african-court.org. African Court on Human and Peoples' Rights, December 5, 2014.

In only its second merits judgment, the African Court on Human and Peoples' Rights (Court) placed strict limits on penalizing expression, especially that of journalists, in states party to the African Charter on Human and Peoples' Rights (African Charter).[1] In doing so, the African Court narrowly interpreted the often-criticized "clawback clauses" in the African Charter and relied instead on the tests of necessity, proportionality, and legitimate aim applied by other human rights tribunals to determine the legality of restrictions on rights.[2]

The case was filed on June 14, 2013, by lawyers for Lohé Issa Konaté, a citizen of Burkina Faso and editor in chief of an independent weekly newspaper, *L'Ouragan,* dedicated to politics and public policy.[3] The matter originated when the edition of August 1, 2012, printed two articles, one of them written by Konaté, accusing a local public prosecutor of being linked to criminal activities and referring to him as a "mastermind[] of banditry" and "saboteur [*torpilleur*] of justice" (para. 3). Another article appeared the following week entitled, "Miscarriage of Justice—The Prosecutor of Faso: A Rogue Officer [*un justicier voyou*]?" Konaté[4] was prosecuted in the Ouagadougou High Court for criminal defamation, public insults, and contempt

[24] A judgment of the court is reviewable by the Higher Administrative Court and, depending on its decision, can be appealed to the Federal Administrative Court. A final decision can be challenged by constitutional complaint to the Federal Constitutional Court.

[1] African Charter on Human and Peoples' Rights, June 27, 1981, 1520 UNTS 217, 21 ILM 58 (1982) (entered into force Oct. 21, 2001) [hereinafter African Charter]. The Court was established by the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights, June 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III) [hereinafter Protocol of Establishment]. For these and other basic documents cited herein, information about the Court generally, and the cited cases, see the Court's website, http://www.african-court.org.

[2] Konaté v. Burkina Faso, App. No. 004/2013 (Afr. Ct. Hum. & Peoples' Rts. Dec. 5, 2014) [hereinafter Judgment].

[3] The Statute of the African Court takes an intermediary position between those of the Inter-American Court of Human Rights, where individuals have no direct access but must first proceed through the Inter-American Commission on Human Rights, and the European Court of Human Rights, which confers automatic standing on persons claiming to be victims of rights violations by a state party to the European Convention for the Protection of Human Rights and Fundamental Freedoms. In the African system, individuals may proceed directly to the African Court if the accused state has filed an optional declaration with the Court allowing such cases to be initiated. *See* Protocol of Establishment, *supra* note 1, Arts. 34(6), 5(3).

[4] The prosecutor complained of the other journalist as well, but his matter did not come before the African Court.