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.

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of court, on the basis of which the prosecutor mentioned in the articles also sought civil damages. Konaté was convicted and sentenced on October 29, 2012, to twelve months' imprisonment and payment of a fine equivalent to US$3000, as well as civil damages of US$9000 and costs of US$500. In addition, the criminal tribunal ordered publication of the weekly suspended for six months, while also ordering publication of the judgment, at the expense of the journalist, in three other newspapers. Upon resumption of publication, *L'Ouragan* was required to carry the judgment for a period of four months. On May 10, 2013, the judgment was affirmed by the Ouagadougou Court of Appeal (paras. 5–7).

The application to the African Court invoked its broad jurisdiction, which allows the Court to accept cases alleging violations of the African Charter and other African human rights instruments, as well as "any other relevant Human Rights instrument" ratified by the state concerned.[5] In this instance, the applicant invoked Article 9 of the African Charter, which guarantees freedom of expression, as well as the more detailed Article 19 of the International Covenant on Civil and Political Rights (ICCPR) on the same topic, and Article 66(2)(c) of the Revised Treaty of the Economic Community of West African States (ECOWAS treaty), according to which the states parties undertake to respect the rights of journalists.[6] Konaté asked the African Court to declare that his prosecution, conviction, and the penalties imposed for criminal defamation violated his freedom of expression. He also asked the Court, more generally, to declare that the Burkinabé laws on criminal defamation and insult were on their face contrary to freedom of expression, and to order Burkina Faso to amend the law. Finally, he requested pecuniary and moral reparations.

Proceedings before the Court were extremely rapid by international standards, probably because the applicant was imprisoned immediately after the sentence was pronounced and apparently had health problems. After communicating with the parties, the Court, as requested by the applicant, indicated interim measures ordering the state to provide the care and medicines required for his health. The Court set a short briefing schedule and held hearings over two days in March 2014, only nine months after the application was filed. At the hearing, arguments were presented not only by the parties, but also by representatives of the coalition of human rights and media organizations that had entered the case as amici curiae in November 2013.[7]

The state interposed several objections to admissibility of the case, including by challenging the quality of the applicant as a journalist, who according to the state did not have a press card, was not registered with the state, and had not made any declaration before the tax authorities. The Court found that the failure to observe these formalities was not determinative, noting that the applicant had been prosecuted and punished precisely in his quality as a journalist and that the weekly had been published since 1992. Thus,

[5] Protocol of Establishment, *supra* note 1, Art. 3(1).

[6] International Covenant on Civil and Political Rights, Art. 19, Dec. 16, 1966, S. EXEC. DOC. NO. 95-E (1978), 999 UNTS 171; Revised Treaty of the Economic Community of West African States, Art. 66(2)(c), July 24, 1993, 2373 UNTS 233.

[7] The nongovernmental organizations participating as amici curiae were the Centre for Human Rights, the Comité pour la protection des journalistes, the Media Institute of Southern Africa, the Pan African Human Rights Defenders Network, the Union panafricaine des avocats, Pen International and national Pen branches (Pen Malawi, Pen Algeria, Pen Nigeria, Pen Sierra Leone, and Pen South Africa), the Southern African Litigation Centre, and the World Association of Newspapers and News Publishers.

although he had failed to fulfill certain administrative requirements, in fact he was a journalist. In any event, the Court added, freedom of expression is not extended only to journalists under any of the applicable legal instruments.

The Court had no difficulty finding that it had personal, subject matter, temporal, and territorial jurisdiction. Nor did it view exhaustion of local remedies as an issue of any significance, since the only remedy cited by the state was recourse to cassation, which the Court found neither effective nor adequate. As regards subject matter jurisdiction, the Court specifically noted its authority to hear cases concerning the interpretation or application of any human rights instrument ratified by the state concerned. The state's main objection was that the application repeatedly referred to it as the "People's Democratic Republic" of Burkina Faso; it argued that the Court should dismiss the case because of this misidentification. The applicant admitted the error and apologized, while urging that the mistake did not serve to exclude the required identification of Burkina Faso as the defendant. The Court agreed with the applicant, citing an earlier matter in which it had determined that it had discretion to correct such errors if the change in question does not affect the procedural or substantive rights of the defendant.[8]

The state also argued, however, that the applicant's nomenclature rendered the matter inadmissible on the basis of Rule 40(3) of the Rules of Court, which provides that in order to be examined, applications must not contain "disparaging or insulting" terms. Only the African system includes such a rule, and it has been invoked in declaring petitions to the African commission inadmissible.[9] The Court proved rather less willing to defer to government sensibilities in this respect. According to the agents for Burkina Faso, use of the term "people's democratic republic" to identify the state recalled former regimes in Eastern Europe and "a sadly notorious People's Republic in Asia" whose principal characteristics are dictatorship and massive violations of human rights; thus, to label Burkina Faso in such a way was obviously disparaging in the sense of Rule 40 (para. 65).

The Court relied on a decision of the African Commission on Human Rights that established and applied criteria to balance freedom of expression with the requirements of Rule 40. In the *Zimbabwe Lawyers* case, where allegations were made about the lack of an independent judiciary, the commission stated that in determining whether a certain remark is disparaging or insulting,

> the Commission has to satisfy itself whether the said remark or language is aimed at unlawfully and intentionally violating the dignity, reputation or integrity of a judicial officer or body and whether it is used in a manner calculated to pollute the minds of the public

[8] Ernest v. United Republic of Tanzania, App. No. 001/2012, Order, paras. 6–7 (Afr. Ct. Hum. & Peoples' Rts. Sept. 27, 2013).

[9] Rules of Court, Rule 40(3) (June 2, 2010). This requirement derives from Article 56(3) of the African Charter, *supra* note 1, concerning admissibility of matters at the African Commission on Human and Peoples' Rights. It excludes submissions written in "disparaging or insulting" language. States often find that accusations of human rights violations in themselves are disparaging and insulting, and the commission has sometimes agreed. *See*, *e.g.*, Article 19 v. Zimbabwe, Comm. No. 305/05, Twenty-ninth Annual Activity Report of the African Commission on Human and Peoples' Rights 42 (2010–11) [hereinafter Activity Rep.], 2010 Afr. Hum. Rts. L. Rep. [AHRLR] 126; Iiesanmi v. Nigeria, Comm. No. 268/2003, 18th Activity Rep. 22 (2004–05), 2005 AHRLR 48. Decisions of the African commission cited herein are available at http://www.achpr.org.

> or any reasonable man to cast aspersions on and weaken public confidence on the institution. The language must be aimed at undermining the integrity and status of the institution and bring it into disrepute.[10]

The commission further observed that "[a] balance must be struck between the right to speak freely and the duty to protect state institutions."[11] Applying this test, the Court found that referring to the state as the People's Democratic Republic of Burkina Faso did not amount to an attack on its dignity, reputation, or integrity, nor was it likely to pollute the public spirit or that of any reasonable person. Moreover, it had not been proved that the applicant had used the term in bad faith (para. 72).

On the merits, the Court found for the applicant both on the assertion that the law itself violated freedom of expression and on the claim that application of the law against him in the domestic courts violated his rights. The Court's conclusions limit the permissible scope of criminal defamation statutes, yet leave open the possibility of sanctions short of incarceration. The challenged laws contain specific provisions on defamation of individuals and institutions, specifically the courts and the armed forces, as well as government personnel acting in their official capacity. Article 178 of the Penal Code expressly governs insults to magistrates and other legal officers in the exercise of their functions. The Court first examined these laws as facially contrary to guarantees in the African Charter, the ICCPR, and the ECOWAS treaty, and second looked to the application of the laws by the Burkinabé courts.

Pursuant to the provisions of international instruments governing freedom of expression, and the jurisprudence of global and regional human rights bodies interpreting these instruments, the Court considered whether the interference with the applicant's right accorded with law, pursued a legitimate aim, and was a necessary and proportional means of fulfilling that aim in a democratic society. The Court first found the provisions restricting freedom of expression in the Penal Code and the Information Code to be positive "law," derived from an 1881 French law on freedom of the press that had already been examined by the European Court of Human Rights. The provisions were deemed sufficiently clear to meet the standard required of a criminal statute, as articulated by the Human Rights Committee, in enabling individuals to know what is required to comply with the law and those applying it to know what forms of expression can be legitimately restricted (paras. 128, 131).[12]

To assess whether the laws had a legitimate aim, the Court indicated that it agreed with the African commission that the only legitimate reasons for limiting rights and liberties in the African system are those foreseen by African Charter Article 27(2) (para. 134),[13] which overlap with those of ICCPR Article 19 on freedom of expression. In this respect, the Court found it a "perfectly legitimate" objective for the law to aim at protecting the honor and reputation of judicial officials in the exercise of their functions or, more generally, the honor and reputation of individuals or entities (para. 137).

[10] Zimbabwe Lawyers for Human Rights v. Zimbabwe, Comm. No. 293/2004, 24th Activity Rep., Annex II, at 108, para. 51, 2008 AHRLR 120, *quoted in* Judgment, para. 70.

[11] *Id.*, para. 52.

[12] Citing Human Rights Comm., Keun-Tae Kim v. Republic of Korea, Comm. No. 574/1994, UN Doc. CCPR/C/64/D/574/1994, para. 12.5 (1999), *in* 6 Selected Decisions of the Human Rights Committee Under the Optional Protocol 110, UN Doc. CCPR/C/OP/6, UN Sales No. E.05.XIV.1 (2005).

[13] Article 27(2) of the African Charter, *supra* note 1, provides: "The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest."

As for the remaining criterion to determine the legality of restrictions, the Court accepted the proposed test of proportional measures necessary in a democratic society, advocated by the applicant and amici curiae, citing the ICCPR and the jurisprudence of the African commission, the Human Rights Committee, the European Court of Human Rights, and the Inter-American Court of Human Rights (Inter-American Court). It noted that the applicant did not contest that the state could impose proportional measures to protect the reputation of others. Instead, he claimed that imprisonment and the totality of penalties foreseen in the law were disproportional (para. 139). The amici curiae strongly supported the applicant on this issue, arguing that any criminal penalties for defamation of a public figure constitute a violation of freedom of expression and calling them a relic of colonialism (paras. 142–43).

In carrying out its assessment of the laws, the Court specifically adopted the doctrine of a separate test for defamation of public figures and the necessity of public debate on those in the public domain. It agreed with the commission that those who assume a public role, such as the prosecutor in this case, must necessarily accept more extensive criticism than private citizens (para. 155). On these grounds, the Court expressed its agreement with other global and regional courts and tribunals that have found that any criminal penalties for defamation are subject to challenge as disproportional and unnecessary in a democratic society. In conclusion, however, the Court limited itself to holding that the Burkinabé provisions on imprisonment for defamation were incompatible with the state's obligations under the African Charter, the ICCPR, and the ECOWAS treaty. The Court unanimously ordered the state to modify its legislation to be consistent with human rights law, first by eliminating imprisonment for defamation, and second by ensuring that all other penalties foreseen are proportional. The Court divided 6-4 in holding that a law that punished defamation would not violate human rights law, provided that the penalties were proportional and fell short of imprisonment.[14]

The Court also held that the proceedings against Konaté in application of the law constituted a violation of his rights insofar as he was condemned to prison, fined an amount twenty times the country's per capita gross domestic product, and forced to suspend publication of the paper. The Court found that these penalties were unnecessary to protect the rights and reputation of the prosecutor. The fine, damages awarded, and costs and interest imposed were held to be excessive, particularly since Konaté had been deprived of revenue by the suspension of publication. The issue of reparations was reserved for judgment in a subsequent phase.

* * * *

Freedom of expression in the African Charter is governed by Article 9(2), which contains one of the so-called clawback clauses: "Every individual shall have the right to express and disseminate his opinions within the law." Quite importantly, the Court announces in this case that to assess whether limitations on human rights are established by "the law" referred to in clawback clauses, it is not the national measures that govern but, instead, international standards,[15] including whether the limitations pursue a legitimate objective and constitute a proportional means in a democratic society of achieving the permissible objective (para. 125). The

[14] The Court did acknowledge the possibility of imprisonment for speech that defends international criminal conduct, incites hatred, discrimination, or violence; or threatens a person or group on the basis of race, color, religion, or national origin. Judgment, para. 165.

[15] The African commission earlier adopted the same approach in *Malawi African Ass'n v. Mauritania*, Comm. Nos. 54/91, 61/91, 98/93, 164/97–196/97, 210/98, 13th Activity Rep. 138, para. 102 (1999–2000), 2000 AHRLR 149.

judgment thus reinforces the jurisprudence of the African Commission on Human and Peoples' Rights, which has repeatedly insisted that such clauses cannot be read as subordinating the exercise of rights to unrestrained state measures or as rendering the guaranteed rights illusory.[16] Moreover, the jurisprudence of the African institutions also conforms to the approach of other human rights bodies that require a state to justify limitations on rights by ensuring that they exist in law for a legitimate aim and are proportional and necessary in a democratic society.

The interpretation of limitations and clawback clauses is but one of many topics on which there is a growing convergence of jurisprudence across global and regional human rights bodies, which often cite each other's judgments and decisions, as this case exemplifies. It is not surprising to find references throughout the judgment to the decisions of the Human Rights Committee, given that the applicant specifically sought a ruling that Burkina Faso's laws violated the ICCPR, as well as the African Charter. But the African Court equally cited case law of the European Court of Human Rights and the Inter-American Court, in addition to decisions from its own system issued by the African commission. This approach may reflect the fact that the Court has handed down only one prior merits judgment, but the same cross-referencing practice in the Inter-American Court has not diminished as that court's jurisprudence has grown to nearly three hundred judgments.[17] As noted by Mads Andenas in his commentary on the *Ahmadou Diallo* case, even the International Court of Justice has begun to cite the decisions of global and regional human rights bodies on matters presented to it.[18]

The African Court's judgment in this case expands the protection of speech directed at public figures and limits the penalties for defamation, very welcome conclusions considering how frequently governments continue to prosecute journalists for public criticism of state officials or institutions. Nonetheless, limiting elements, or at least open questions, remain in the Court's judgment. First, the Court did not comment on aspects of the Burkinabé Information Law not directly challenged in the case, such as the extension of protection from defamation to certain state institutions, in particular the armed forces. Second, and more broadly, even though such laws have been successfully challenged before other human rights bodies,[19] how the African Court would rule is problematical because the Court did not reject all criminal defamation laws or even all laws imposing prison sentences for certain types of speech despite having severely restricted the categories of speech for which imprisonment would be permitted. For defamation convictions, the Court did not rule that all criminal punishments are impermissible, only incarceration. It was on this point that four judges dissented and would have held the provisions of the Burkina Faso law null and void as a violation of freedom of expression regardless of the penalties imposed. In their view, criminal defamation laws are inadmissible per se. Given the narrow margin of the vote and the absence of one of the judges, it would not be surprising to see this issue return to the Court.

[16] Media Rights Agenda v. Nigeria, Comm. Nos. 105/93, 128/94, 130/94, 152/96, 12th Activity Rep. 52, paras. 66–70 (1998–99), 2000 AHRLR 200.

[17] *See, e.g.*, Kichwa Indigenous People of Sarayaku v. Ecuador, Merits and Reparations, Inter-Am. Ct. H.R. (ser. C) No. 245, para. 216 n.285 (June 27, 2012) (citing Centre for Minority Rights Dev. (Kenya) *ex rel.* Endorois Welfare Council v. Kenya, Comm. No. 276/2003 (Afr. Comm'n Hum. & Peoples' Rts. Feb. 4, 2010)).

[18] Mads Andenas, Case Report: Ahmadou Sadio Diallo, 107 AJIL 178, 181–82 (2013).

[19] *See, e.g.*, Palamara Iribarne v. Chile, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 135 (Nov. 22, 2005); Canese v. Paraguay, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 111 (Aug. 31, 2004); Herrera Ulloa v. Costa Rica, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 107 (July 2, 2004).

Certainly, the existence of criminal defamation laws is increasingly challenged and condemned by human rights bodies. By asking for amendment, rather than repeal, of Burkina Faso's statute, the Court went only part of the way necessary to protect journalists on the continent who write about public figures, public institutions, and matters of public concern.

DINAH SHELTON
Of the Board of Editors

Recognition of states—"Reception Clause" of the U.S. Constitution—presidential authority—status of Jerusalem—international law as part of U.S. foreign relations law

ZIVOTOFSKY *EX REL.* ZIVOTOFSKY v. KERRY. 135 S.Ct. 2076.
United States Supreme Court, June 8, 2015.

In *Zivotofsky v. Kerry,*[1] decided June 8, 2015, the United States Supreme Court (Court) held unconstitutional a federal statute that permitted U.S. citizens born in Jerusalem to designate "Israel" as their place of birth on their passports,[2] notwithstanding the secretary of state's decision that such passports should designate "Jerusalem" as the place of birth. The opinion resolved a relatively narrow question of law (the constitutionality of an unusual statute), but the justices' reasoning and language are of potentially broad significance and will provide fodder for many doctrinal debates in U.S. foreign relations law.

The plaintiff, Menachem Binyamin Zivotofsky, was born to U.S. citizens living in Jerusalem. His parents, exercising their statutory right, requested that the Department of State list Zivotofsky's place of birth as "Israel" on his passport. The State Department refused. In an effort to remain neutral in the sensitive political debates about sovereignty over Jerusalem, the department instead followed long-standing U.S. policy by listing the place of birth as "Jerusalem." Zivotofsky sued.

The first court to consider Zivotofsky's case held both that it presented a nonjusticiable political question and that Zivotofsky lacked standing.[3] These two closely related doctrines ensure that the federal courts hear only disputes well suited to judicial resolution. As to standing, the district court reasoned that Zivotofsky had alleged only a conjectural harm, not an actual or imminent injury, from having Jerusalem listed as the place of birth on his passport. The U.S. Court of Appeals for the District of Columbia Circuit reversed, holding that the invasion of the statutory right to have Israel listed itself creates standing, even when the plaintiff would otherwise have suffered no cognizable injury.[4] In its first consideration of the dispute, the Supreme Court did not address the standing issue[5] but held in an 8-1 decision that the political question doctrine did not bar Zivotofsky's claim (*Zivotofsky I*).[6] The case was therefore returned to the lower court for a determination on the merits. The D.C. Circuit then held the statute unconstitutional because it conflicted with a long-standing presidential

[1] Zivotofsky *ex rel.* Zivotofsky v. Kerry, 135 S.Ct. 2076 (2015).
[2] Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, §214(d), 116 Stat. 1350, 1366.
[3] Zivotofsky *ex rel.* Zivotofsky v. Sec'y of State, No. 03-1921, 2004 WL 5835212 (D.D.C. Sept. 7, 2004).
[4] Zivotofsky *ex rel.* Zivotofsky v. Sec'y of State, 444 F.3d 614, 619 (D.C. Cir. 2006).
[5] Whether a statutory right itself is enough to confer standing is an issue currently before the Supreme Court in another case, *Robins v. Spokeo, Inc.*, 742 F.3d 409, 413 (9th Cir. 2014), *cert. granted*, 135 S.Ct. 1892 (2015).
[6] Zivotofsky v. Clinton, 132 S.Ct. 1421, 1430 (2012).