New Regime, Old Habits

An analysis of current legal proceedings against anti-corruption journalists in Angola

March 30, 2018
“A Free Press is not a luxury. A Free Press is at the absolute core of equitable development because if you cannot enfranchise poor people, if they do not have a right to expression, if there is no searchlight on corruption and inequitable practices, you cannot build the public consensus needed to bring about change.”

I. EXECUTIVE SUMMARY

On March 19, 2018, the trial of two Angolan journalists, Rafael Marques de Morais and Mariano Bras Lourenço, began in the Provincial Tribunal in Luanda, Angola, before Judge Josina Mussua Ferreira Falcão. The two journalists are standing trial on criminal charges of “outrage to a sovereign body,” considered a crime against state security, and “insult against a public authority”. The charges relate to a November 2016 article which Marques de Morais wrote and published in Maka Angola implicating then Attorney General of Angola, Joao Moreira de Sousa, in a questionable 2011 real estate transaction. Lourenço Bras subsequently republished the same article in the weekly newspaper O Crime.

The article by Marques de Morais outlined how the former Attorney General had allegedly acquired certain property for the purposes of urban development, yet the property was designated as “rural land.” Due to its “rural designation,” the Attorney General had purchased the land for a paltry sum and acquired permits to build multiple residences upon it at, ostensibly, great potential profit to himself. Marques de Morais argued that the former Attorney General was constitutionally prohibited from being involved in such business transactions while serving in that role, as these created conflicts of interest. The article concluded by bemoaning the corruption of public institutions in Angola and argued that by failing to prevent such abuses of power particularly by the Attorney General, then President do Santos, was complicit in the same. In addition to the criminal charges by the State, Marques de Morais is facing a civil defamation suit for damages in the sum of 2,000,000 million Kwanza (estimated at USD 9,400), filed by the former Attorney General in his personal capacity.

Angola’s struggle with corruption has been well documented. Despite the country’s rich mineral resources, particularly oil, rampant corruption levels have served to enrich the ruling elite while impoverishing ordinary Angolans. Years of corruption and mismanagement of public funds and institutions, characterized the governance of the ruling party, Popular Movement for the Liberation of Angola (MPLA) under dos Santos, who ruled for 4 decades until he stepped down as president in September 2017. In response to citizens’ growing frustration with the country’s economic state and corruption, dos Santos ruthlessly cracked down on political dissent. Journalists were particularly subject to attack and the government through the abuse of defamation and state security legislation, used these law to “harass, arbitrarily arrest and detain journalists and restrict press freedom”.

2 The trial which was initially set down for March 5th 2018, was postponed in order to give the Prosecution time to pursue the case file. It was then set down on March 14th 2018, but postponed again to March 19th 2018, when it eventually started.
government further passed media legislation (Angolan Media Laws), which came under heavy criticism for their further restrictions on freedom of expression and the media.\(^7\)

Freedom of expression which broadly encompasses freedom of the press and media, the right to receive information and opinions and disseminate the same information and opinions, is a fundamental human right.\(^8\) The African Commission, which is the African Court’s complementary mandate holder under the African Charter on Human and Peoples’ Rights, has recognized the important role the media plays in promoting the free flow of information and ideas, assisting people to make informed decisions and facilitating and strengthening democracy.\(^9\) In relation to corruption, the World Bank has acknowledged that the media is “crucial to creating and maintaining an atmosphere in public life that discourages fraud and corruption” and that the media is “arguably [one] of the most important factors in eliminating systematic corruption”.\(^10\)

Many welcomed President Joao Lourenço’s undertaking to fight corruption and the mismanagement of public funds. In his inauguration speech on September 26, 2017, President Lourenço reportedly acknowledged Angola’s rampant corruption and impunity in some State institutions and the need for transparency, stating that “[n]o one is so rich and powerful that they cannot be punished and no one is so poor that they cannot be protected”.\(^11\) President Lourenço also vowed to build on Angola’s democracy by setting a platform for public debate and opinions and ensuring a greater openness of public officials to criticism.\(^12\) President Lourenço’s commitment to fighting corruption and promoting respect for human rights has, however, come under scrutiny following the continued prosecution of Rafael Marques de Morais and Mariano Lourenço Bras, especially as their charges arise from an article that raised an issue of corruption by a public official, the very issue that has plagued Angola’s economy. In addition, two other Angolan journalists, Graca Campos and Severino Carlos, were recently called for questioning, on February 21, 2018, by the Directorate of Criminal Investigation, in relation to a criminal complaint filed by the then Minister of Justice, Rui Jorge Carneiro Mangueira. The two have been charged with slander and criminal defamation, in response to an article published in September 2017, which speculated that Minister Mangueira would not be included in the incoming government of President Lourenço as a result of serious allegations of abuse of power.\(^13\)

Governments have the authority to impose certain limitations, under international law, on freedom of expression but such limitations must be strictly circumscribed. State security laws, such as “outrage to a body sovereign,” are overly broad and subject to abuse. In addition, laws that impose criminal penalties for

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restricting speech including insult laws and criminal defamation, are a disproportionate sanction to the aim of protecting the reputation of others.\textsuperscript{14} In particular, laws that specifically give greater protection to public officials, who, by nature of their positions must be open to greater criticism, are in obvious contradiction with the democratic pillars of public scrutiny and accountability.\textsuperscript{15} Such laws have an impermissible chilling effect on public discourse regarding governance and matters of public interest and are a violation of freedom of expression. For this reason, the African Commission has called upon all State parties to “repeal criminal defamation laws or insult laws which impede freedom of speech”.\textsuperscript{16} Although civil damages under international law are an acceptable remedy for the harm caused to the reputation of others, States must still avoid awarding excessive damages claims which have an equally chilling effect on freedom of expression, comparable to criminal penalties.

The Center therefore strongly appeals to Angola and President Lourenço to drop the pending criminal charges against Marques de Morais and fellow journalists in Angola. The Center also calls upon President Lourenço to honour his pledge to build Angola’s democracy by repealing Angola’s laws that unduly restrict freedom of expression and ensure that public officials are, indeed, open to greater public scrutiny.

\section*{II. INTRODUCTION}

The American Bar Association (ABA), Center for Human Rights (CHR) has prepared this memorandum as part of its ongoing obligation to promote the rule of law and realization of human rights at home and around the globe.\textsuperscript{17} Angola, as a party to the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and People’s Rights (African Charter), has committed itself to the preservation of human rights within its jurisdiction, including the rights to freedom of expression.\textsuperscript{18} This obligation is reinforced by Angola’s own internal laws. In particular, Section 40 of the Constitution of Angola also provides for a person’s right to freedom of expression and opinion.\textsuperscript{19} The following analysis thus examines the case against Rafael Marques de Morais and Mariano Bras Lourenço, case no. 592/17-8, before the Provincial Tribunal in Luanda Angola, and looks at whether the criminal and civil actions taken against the two journalists in response to the published article, are compatible with regional and international human rights standards. Although international law recognizes the protection of the national security and the rights and reputations of others as legitimate aims for restricting speech, international human rights bodies have consistently held that criticism of public officials and statements on matters of

\begin{itemize}
\item \textsuperscript{14} African Commission: “Resolution 169 on Repealing Criminal Defamation Laws in Africa” 48th Ordinary Session (2010), available at http://www.achpr.org/sessions/48th/resolutions/169/. The U.N. Human Rights Committee in its General Comment No. 34 (2011) at paragraph 47, has recommended that “States parties should consider the decriminalization of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty.”
\item \textsuperscript{15} Organization for Security and Co-operation in Europe (OSCE), Defamation and Insult Laws in the OSCE Region A Comparative Study, March 2017.
\item \textsuperscript{17} The American Bar Association (ABA) Center for Human Rights (CHR) submits this memorandum as an objective, legally supported and truthful examination based on the case materials and information at hand. The views expressed in this memorandum have not been approved by the ABA House of Delegates or Board of Governors and should not be construed as representing ABA policy. Furthermore, nothing in this report is to be considered rendering legal advice in this particular case or any others.
\item \textsuperscript{19} See Section 40 (1) : Everyone shall have the right to freely express, publicise and share their ideas and opinions through words, images or any other medium, as well as the right and the freedom to inform others, to inform themselves and to be informed, without hindrance or discrimination. Constitution of Angola (2010).
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public interest should be afforded the highest level of protection and that any restrictions upon the basis of these legitimate aims must be necessary and proportionate to the aim pursued.

In light of Angola’s international and regional obligations, it is the Center’s conclusion that (i) Angola’s crime of “outrage to a sovereign body” is overly broad and lacks sufficient clarity to satisfy international standards requiring criminal offenses be clearly articulated; (ii) both the crime of “outrage to a sovereign body” and “insult to a public authority” that impose criminal sanctions including prison sentences, for the exercise of speech, are a disproportionate limitation on freedom of expression, inconsistent with a democratic society; (iii) laws that afford greater protection to public officials or public institutions deter public debate and have no place in a democratic society; (iv) while civil remedies such as damages are an acceptable recourse for defamation a) such remedies must only be awarded where statements, particularly against public officials, are made without due diligence or recklessness and; b) if damages are to be awarded, these should not be so high so as to lead to a chilling effect on freedom of expression.

III. SUMMARY OF THE CASE

Rafael Marques de Morais is a world renowned Angolan journalist and human rights activist. He is also the founder and director of Maka Angola, a website dedicated to fighting corruption and defending democracy in Angola.21 Mariano Bras Lourenço is also an Angolan journalist and the editor of the weekly newspaper O Crime. On May 12, 2017, the two journalists were charged with (i) “insults against public authority” in terms of article 181 of the Penal Code and (ii) “outrage to a body of sovereignty”, under of Article 25 paragraph 1 of Law No. 23.10, of the Law on Crimes Against the Security of the State.22

The charges against Marques de Morais and Bras Lourenço are over an article originally written by Marques de Morais and posted on the Maka Angola website on November 3, 2016, titled “ANGOLA’S LAWLESS LAWMEN”.23 The article was subsequently republished by Bras Lourenço in the weekly paper, O Crime, on November 26, 2016, where it allegedly appeared in the front page with a slightly different title “Attorney General of the Republic accused of corruption”.24

The article by Marques de Morais claimed that Maka Angola had documentary evidence showing that in 2011, then-Attorney General, de Sousa had purchased a sizeable piece of land located in Kwanza Sul for the sum of 600,000 Kwanzas (equivalent to USD 3,600). The article noted that because of the designation of the land as “rural land”, it had been sold for a lowly amount. It also noted that a permit for the land had been granted for the development of residential condominiums. Marques de Morais went on to question the transaction by the Attorney General whilst holding his official position. According to the article, relying on information from Maka Angola’s legal adviser, the Attorney General under the doctrine of “Principle of Exclusive Dedication”, is constitutionally prohibited from involving himself in business transactions or any activity for personal profit to avoid conflicts of interest. Under this principle as claimed by Marques de Morais, the Attorney General was alleged to have used his position to benefit personally from the sale of the land.

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20 This background is drawn from the criminal and civil indictments in the case and publicly available media reports. The Center has not independently verified any of the alleged facts contained therein.
21 Maka Angola website, About, available at https://www.makaangola.org/about/.
22 Indictment, Attorney General’s office, PROC. 805/17-M. “P”.
24 Indictment, Attorney General’s Office, PROC. 805/17-M. “P”.
Morais, the Attorney General of Angola is not allowed to engage in certain commercial activities whilst in office.\(^{25}\) The article listed several other questionable transactions in real estate, exports and imports by certain companies in which the Attorney General held a position. Marques de Morais claimed he had written to then-President dos Santos raising the issue of the Attorney General’s financial interests but no action had been taken. As a result, it was his view that the President was complicit in the illicit dealings of the Attorney General.

In its indictment of Marques de Morais and Bras Lourenço, the State, alleges that the publication of the article by \textit{Maka Angola}, and the subsequent republication, amounted to a crime. According to the State, an investigation with the relevant authorities revealed that although Joao Maria de Sousa had purchased the land in 2011, “after one year of missed payments, the contract was nullified and de Sousa lost title to the land”.\(^{26}\) The State alleged that the article’s reference to the president amounted to “outrage of a sovereign body” and insulting the Attorney General, who is a public official. The Prosecution further asserts that as journalists, Marques de Morais and Bras Lourenço had a duty to act in good faith and truth. As a result of their conduct, the defendants were liable to civil and criminal liability, for “insults against a public authority in terms of Article 181 of the penal code” and “outrage of a body sovereign” in terms Article 25 of Law 23/10 of the Law on Crimes against the State.\(^{27}\)

Marques de Morais was also individually served with a civil defamation suit, filed by the plaintiff, then-Attorney General, Joao Maria de Sousa, in his private capacity.\(^{28}\) Joao Maria de Sousa claims that as a result of the article by Marques de Morais, several citizens, who commented on the \textit{Maka Angola} website in response to the article, had concluded that he was corrupt. The former Attorney General in his claim alleges that Marques de Morais exceeded the limits of his press freedom provided by Article 7 of Angola’s Press Law. He further claimed that Marques de Morais acted with the intent of offending, insulting and defaming him. He further claims that Marques de Morais acted in an irresponsible manner seeking to offend his honour, dignity, good name and image. In his complaint, de Sousa, without prejudice to the criminal charges levelled against Marques de Morais, claims the sum of 2,000,000 million Kwanzas (estimated USD 9,400) in defamation damages.

IV. ANALYSIS OF THE CHARGES AGAINST RAFAEL MARQUES DE MORAIS AND MARIANO BRAS LOURENÇO UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS.

i. Angola’s Treaty Obligations.

The Vienna Convention on the Law of Treaties (Vienna Convention) notes that a State, by way of signature, ratification or accession, consents to be bound by a treaty,\(^{29}\) and that every treaty in force is binding upon

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\(^{25}\) According the Article, the Attorney General is only permitted to engage in research or teaching provided these do not affect his workload.

\(^{26}\) Indictment, Attorney General’s Office, PROC. 805/17-M. “P”.

\(^{27}\) Indictment, Attorney General’s Office, PROC. 805/17-M. “P”.

\(^{28}\) Civil Claim pursuant to Articles 7,20 and 29 of DOC C. P.P.

the parties to it and must be performed by them in good faith, in accordance with the international law principle of *pacta sunt servanda*. Furthermore, the Angolan Constitution specifically charges the President of Angola with the duty to “ensure compliance with laws, agreements, and international treaties” and requires that “constitutional and legal precepts relating to fundamental rights be interpreted in accordance with the Universal Declaration of the Rights of Man, the African Charter on the Rights of Man and Peoples and international treaties on the subject ratified by the Republic of Angola”. 

Angola’s obligation to recognize the right to freedom of expression requires it to adopt legislative or other measures to give effect to this right. States may not invoke the provisions of its internal law as a justification for its failure to perform a treaty obligation. Furthermore, the U.N. Human Rights Committee, has stated that the obligation to respect freedoms of opinion and expression is binding on every State party as a whole. All branches of the State, including the executive, legislature and judiciary, are required to meet the responsibilities of the State party under its international treaty obligations.

**ii. Freedom of Expression is a fundamental right.**

Freedom of expression is a fundamental human right that is crucial to a functioning democracy. It is considered “[…] the touchstone of all the freedoms to which the United Nations is consecrated”. As the African Commission stated in the 2002 Declaration, “[f]reedom of expression and information, including the right to seek, receive and impart information and ideas […] is a fundamental and inalienable human right and an indispensable component of democracy.” The European Court of Human Rights (ECtHR) the body tasked with enforcing the European Convention succinctly laid out the importance of freedom of expression in the following paragraph:

> Freedom of expression constitutes one of the essential foundations of such [democratic] society, one of the basic conditions for its progress and for the development of every man. Subject to article 10(2), it is applicable not only to “information” or ‘ideas” that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend shock or disturb the state or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society’.

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30 Id.
31 Article 26, Constitution of Angola 2010.
32 Article 1, African Charter. See also Article 2 of the ICCPR which specifically states that each State party to the Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction, the rights recognized in the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
The press in a democratic society plays an essential role in imparting information and ideas to the public and facilitating the public’s corresponding right to receive them. In the same 2002 Declaration, the African Commission noted that the media plays a “key role […] 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.” Similarly, the U.N. Human Rights Committee has emphasized the important role of the press as follows: “[a] free, uncensored and unhindered press or other media is essential in any society to ensure freedom of expression and the enjoyment of other Covenant rights. It constitutes one of the cornerstones of a democratic society”.

Freedom of expression is guaranteed under several binding international human rights treaties to which Angola is a party to, including the International Covenant on Civil and Political Rights (Article 19) as well as the African Charter on Human and People's Rights (Article 9).

Article 19 of the International Covenant on Civil and Political Rights provides that;

(1) Everyone shall have the right to hold opinions without interference.
(2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
(3) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
   (a) For respect of the rights or reputations of others;
   (b) For the protection of national security or of public order (order public), or of public health or morals.”

Article 9 of the African Charter provides that;

(1) Every individual shall have the right to receive information.
(2) Every individual shall have the right to express and disseminate his opinions within the law

iii. Limitations on Freedom of Expression

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41 Universal Declaration of Human Rights, UNGA, 1948, Article 19 states that : “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”
The U.N. Human Rights Committee has explicitly stated Article 19(1) is one of those basic rights that cannot, under any circumstance, be derogated under Article 4 of the ICCPR. In evaluating whether a government’s interference with a person’s Article 19(2) right to expression is justified, the UN HRC looks to Article 19(3). The Committee has stressed that “[t]he right to freedom of expression is of paramount importance in any democratic society, and any restrictions to the exercise of this right must meet a strict test of justification.” Therefore, any restriction on freedom of expression must meet three requirements: 1) it must be provided by law; 2) it must serve one of the aims set out in paragraphs 3 (a) and (b) of Article 19 (respect of the rights and reputation of others; protection of national security or of public order, or of public health or morals); and 3) it must be necessary to achieve a legitimate purpose.

The various regional human rights decision-making bodies, including the African Court of Human and Peoples’ Rights, have adopted essentially the same three prong test for evaluating limitations on the right to freedom of expression.

a. Prescribed by Law

The ICCPR require that any restrictions on freedom of expression be “prescribed by law.” This requirement looks upon the legal authority used to support the restriction. In order for a restriction to be legitimate, it must be characterized as a “law”, formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public. Furthermore, a law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution. The Johannesburg Principles on National Security, Freedom of Expression and Access to Information (Johannesburg Principles) defined “prescribed by law” as:

(a) Any restriction on expression or information must be prescribed by law. The law must be accessible, unambiguous, drawn narrowly and with precision so as to enable individuals to foresee whether a particular action is unlawful.

43 Id.
46 The African Commission has noted that although the grounds of limitation to freedom of expression in the African Charter are not expressly provided for, they are in the other international and regional human rights treaties and the phrase ‘within the law’ under Article 9(2) provides a leeway to cautiously fit in legitimate and justifiable individual, collective and national interests as grounds of limitation. See Kenneth Good v. Botswana, Comm. Comm. No.313/05, paragraph 188, 28th ACHPR AAR Annex (Nov 2009 - May 2010). The African Commission has also held that the phrase “within the law” must be interpreted with reference to international norms. See Malawi African Ass’n v. Mauritania, Comm. 54/91, 61/91, 98/93, 164/97, 196/97, 210/98, paragraph 102, 13th ACHPR AAR Annex V (1999-2000). In the African Commission has adopted a stringent three-part test whereby limitations on the right to freedom of expression must be “founded in a legitimate state interest,” be “strictly proportionate with and absolutely necessary for the advantages which are to be obtained,” and “never have as a consequence that the right itself becomes illusory.” See Media Rights Agenda v. Nigeria, Comm. Nos. 105/93, 128/94, 130/94, 152/96, 12th Afr.Comm’n H.P.R. AAR Annex V (1998-1999).
47 ICCPR Article 18(3).
49 The Johannesburg Principles were adopted on 1 October 1995 by a group of experts in international law, national security, and human rights convened by ARTICLE 19, the International Centre Against Censorship, in collaboration with the Centre for Applied Legal Studies of the University of the Witwatersrand, in Johannesburg. The Principles are based on international and regional law and standards relating to the protection of human rights, evolving state practice (as reflected, inter alia, in judgments of national courts), and the general principles of law recognized by the community of nations.
(b) The law should provide for adequate safeguards against abuse, including prompt, full and effective judicial scrutiny of the validity of the restriction by an independent court or tribunal.

b. **Legitimate Aim**

The second prong requires courts to assess whether the regulation contested serves a legitimate aim. In order to serve a legitimate aim, the law must be narrowly tailored. 50 Legitimate interests are limited to those listed in Article 19(3) of the ICCPR, which includes national security, public safety, protection of health or morals, protection of reputation. These exceptions, however, are meant to be narrowly interpreted and the necessity for such restrictions must be convincingly established. 51

c. **Necessary for a Democratic Society (Proportional)**

The UN HRC has set out that restrictive measures must be necessary to achieve a legitimate aim, and must conform to the principle of proportionality. Such restriction must be “the least intrusive instrument amongst those which might achieve their protective function and must be proportionate to the interest to be protected.” 52 The requirement of necessity is not met if the restriction’s aims could be achieved in other ways that do not restrict freedom of expression. 53 This prong requires the state to demonstrate that the restriction is justified by a relevant and sufficient goal. 54 The ECtHR has stated that the interference with freedom of expression must meet a pressing social need, while remaining proportionate, achieving a fair balance between various conflicting interests. 55 The African Commission, in interpreting Article 9 of the Africa Charter, set a higher standard by stating that the restriction must be “strictly proportionate with and absolutely necessary for the advantages which are to be obtained,” and “never have as a consequence that the right itself becomes illusory.” 56

iv. **Criminal charges of outrage to a sovereign body” and “insult against a public authority”**.

As discussed above, one of the key requirements under international law for limiting the enjoyment of fundamental rights, is that the limitation must be “prescribed by law”. Article 25 of Law 23/10, declares that whoever publicly, in a meeting or through the use of words or sounds, causes “outrage” to the Republic of Angola, the President of Angola or any other sovereign body shall be guilty of an offense punishable with a maximum penalty of 3 years in prison. It is the Center’s view that while this law is provided for by statute, the language of the prohibited act is vague and overly broad, such that it does not meet the requirements set out for a law to be “prescribed by law.” It is not precise enough to put Angolan citizens

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53 See Kim v. Republic of Korea; U.N. Human Rights Committee, Communication No. 574/1994, (1999). The Committee noted that “[a]ny restriction on the right to freedom of expression must cumulatively meet the following conditions: it must be provided by law; it must address one of the aims set out in paragraph 3 (a) and (b) of article 19 (respect of the rights and reputation of others; protection of national security or of public order, or of public health or morals), and it must be necessary to achieve a legitimate purpose.”; see also *Media Rights Agenda v. Nigeria*, African Commission, Communication. Nos. 105/93, 128/94, 130/94, 152/96, (1998-1999).
on notice of what kind of conduct is prohibited in order to regulate themselves. As it is drafted, any actions that the State decides to classify as “outrage to the Republic, the President or any other sovereign body” can be classified as such and hence the law is widely open to abuse.

It is important to note that the crime “outrage to a sovereign body” under Angolan law is considered a state security crime. From this law, it is assumed that expression that causes “outrage to a sovereign body” threatens the security of the state and thus justifying the limitation. Indeed, states under international law, are entitled to limit the exercise of speech if such limitations serve certain legitimate aims, including in the interest of national security.57 This however, does not give states the blanket authority to classify anything as a threat to national security in order to justify restrictions. It is difficult to see how speech that causes “outrage to a sovereign body,” without more specificity, would be a threat to national security. The UN HRC has emphasized that when a State establishes a ground for restricting freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken. Furthermore it must establish “a direct and immediate connection between the expression and the threat”.58 Principle 6 of the Johannesburg Principles has specifically stated that: “[e]xpression may be punished as a threat to national security only if a government can demonstrate that: (a) the expression is intended to incite imminent violence; (b) it is likely to incite such violence; (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.”59

In the case Media Rights Agenda and Others v Nigeria, in specifically addressing defamation of public officials, the African Commission made clear that “[i]t is important for the conduct of public affairs that opinions critical of the government be judged according to whether they represent a real danger to national security” rather than merely an insult towards [the government] or the Head of State.” The African Commission went on to explain that “[p]eople who assume highly visible public roles must necessarily face a higher degree of criticism than private citizens, otherwise public debate may be stifled altogether.”60

It is the Center’s view that the State in its indictment has not offered any justification for treating the published article as a threat to national security, nor how the broadly defined crime of causing “outrage to a sovereign body” serves to protect national security or any other legitimate aim and thus falls short of international standards. The U.N. Special Rapporteur on Freedom of Expression and Opinion has rightly noted that many Governments have illegitimately used national security legislation to restrict, partially or totally, freedom of opinion and expression and the right of access to information.61

According to media reports, if convicted Marques de Morais and Bras Lourenço could face up to 4 years in prison.62 Angola’s laws that impose criminal sanctions conflict with international law, which generally disfavours the imposition of criminal penalties for expression. As discussed above, even where a law is “prescribed by law” and “serves a legitimate aim”, the restriction imposed must be “necessary in a

57 Article 19, ICCPR.
democratic society” in order to achieve that legitimate aim(s). A key criterion for assessing whether or not a measure is “necessary in a democratic society” is whether or not it is proportionate to the interest to be protected. Criminalization of expression for the protection of the reputation of others, and particularly that of public officials, is a disproportionate sanction and is a violation of the freedom of expression. The criminalization of such speech, particularly as it relates to public officials, has an impermissible chilling effect on public discourse regarding governance and other matters of public interest. International law has thus reserved prison sentences for exceptional cases such as hate speech and incitement to violence.62

The importance of freedom of expression in a democratic society cannot be over emphasized, particularly in conversations of public interest and public figures in the political domain.63 Respect for freedom of expression leads to greater public transparency and accountability, as well as to good governance and the strengthening of democracy. 64 The value of public debate, especially concerning figures in the political domain, is thus very high. The Council of Europe Commissioner for Human Rights has echoed the holdings of the UN HRC and other human rights bodies in explaining that politicians and government officials have to accept a higher level of public criticism and scrutiny.65 Similarly the African Commission, has stated that “[a] higher degree of tolerance is expected when it is a political speech and an even higher threshold is required when it is directed towards the government and government officials.” 66 The African Commission in its 2002 Declaration, referred to above, explained, inter alia, that “no one shall be found liable for true statements, opinions or statements regarding public figures which it was reasonable to make in the circumstances.”

In the landmark case of Lohe Issa Konate v Burkina Faso, the African Court considered the case of a journalist in Burkina Faso who had been convicted of criminal defamation, public insult and contempt of court for writing and publishing two articles, titled “Counterfeiting and laundering of fake can notes the Prosecutor of Faso, 3 Police officers and a bank official – Masterminds of Banditry” and “the Prosecutor of Faso – a saboteur of Justice”.67 The journalist was found guilty and sentenced to 12 months imprisonment and ordered to pay an equivalent of USD 3000 fine and damages equivalent to USD 9000. The court also ordered 6 months suspension of the publishing newspaper. Although the African Court was primarily dealing with the question of criminal penalties for defamation, the court stated the following in relation to public officials:

“In assessing the need for restrictions on freedom of expression by the respondent State to protect the honor and reputation of others, this court also deems it necessary to consider the function of the person whose rights are to be protected……the Court is of the view that freedom of expression in a democratic society must be the subject of a lesser degree of interference when it occurs in the context of public debate relating

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62 Cuțimpana and Măzăre v. Romania, ECTHR, Application No. 33348/96 92004). See also Human Rights Committee, General Observation No. 34, Article 19: Freedom of Opinion and Freedom of Expression, para 47, where the UNHRC states that “criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty”.
to public figures. Consequently, as stated by the Commission, “people who assume highly visible roles must necessarily face a higher degree of criticism than private citizens; otherwise public debate may be stifled altogether.”

The U.N. Human Rights Committee has also found that harsh critiques of the government are permissible under Article 19(2). Ironically, this was in the case of *Marques de Morais v. Angola*.[68] Marques de Morais had written an article where he stated, *inter alia*, that the President was responsible ‘for the destruction of the country and the calamitous situation of state institutions’ and was ‘accountable for the promotion of incompetence, embezzlement and corruption as political and social values’. Marques de Morais was charged and convicted under Article 43 of the Press Law in conjunction with Section 410 of the Criminal Code. The basis for the charges was the protection of the President’s rights and reputation. The UN HRC found that the conviction of a journalist for writing several articles critical of the President of Angola violated Article 19.[70] The Committee specifically held that “the scope of the restriction imposed on freedom of expression must be proportional to the value which the restriction serves to protect. Given the paramount importance, in a democratic society, of the right to freedom of expression and of a free and uncensored press or other media, the severity of the sanctions imposed on [Marques de Morais] cannot be considered as a proportionate measure to protect public order or the honour and the reputation of the President, a public figure who, as such, is subject to criticism and opposition”.[71]

**v. Civil defamation suit against Rafael Marques de Morais**

In addition to the criminal charges, Marques de Morais is facing a civil defamation suit. Defamation can be understood as the protection against “unlawful attacks” on a person’s “honour and reputation”. Article 19 (3)(a) of ICCPR and Article 27(2) of the African Charter recognize as a general principle that freedom of expression may not be exercised in a manner that violates the rights or reputation of others. Defamation laws have hence been long accepted as legitimate grounds for imposing restrictions on freedom of expression for the purpose of respecting or protecting the reputation of others. Whilst the right to freedom of expression is not without limitation, and many countries provide for civil defamation within their national laws, allowing for the protection of the reputation of others, defamation is not an automatic or blanket restriction on free expression. The U.N. Human Rights Committee in General Comment No. 34, has therefore stressed that: “[l]aws on defamation must be carefully formulated so as to ensure that they meet the necessity requirement …….and that they should not be used, in practice, to stifle freedom of expression.”[74]

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[70] Id.

[71] Id.


[73] There is little dispute that defamation laws can serve a legitimate purpose and it is recognised internationally as a valid grounds for restricting freedom of expression.

Even where speech is harmful to one’s reputation, international standards have recognized exceptions to when liability can be attached to such speech. Opinions and true statements are exempt. In addition, statements related to public figures that are not necessarily true or accurate and were reasonably made, are generally protected. The African Commission on Human and Peoples’ Rights thus concisely states that “no one shall be found liable for true statements, opinions or statements regarding public figures which it was reasonable to make in the circumstances.”

i. True Statements

This memorandum will not delve deeply on the facts of this case, particularly whether or not the Attorney General illegally purchased a piece of rural land for the purposes of urban development and whether or not his involvement in commercial transactions during his tenure as the Attorney General was in violation of the constitution. This will be for the court to determine. It is however important to point out that as a general matter, truth is a defence to a defamation claim. As stated above, no one should be held liable for true statements. This principle been affirmed by both the Human Rights Committee in its General Comment No. 34 and the African Commission, in its 2002 Declaration. Regional courts and national courts have also repeatedly refused to find one liable for defamation where the truth of the statements is proven. In addition, it is recommended best practise by the OSCE Representative on Freedom of the Media, the UN Special Rapporteur on Freedom of Opinion and Expression, the OAS Special Rapporteur on Freedom of Expression, and ACHPR Special Rapporteur on Freedom of Expression and Access to Information, in their annual Joint Declaration on the Current Challenge to Media Freedom, that “the plaintiff [or State in a criminal matter] should bear the burden of proving the falsity of any statements of fact on matters of public concern”.

ii. Opinions

The right to hold an opinion without interference is guaranteed under Article 19 (1) of the ICCPR, and is done so without exception or restriction. Article 9 (2) of the African Charter guarantees the right to an opinion made within the law. All forms of opinion including political or moral opinion are protected. The ECtHR has specifically acknowledged that a statement of opinion or value judgment is inherently incapable of being proved true or false. It is too subjective, too imprecise, too unverifiable to subject it to proof at trial. The Court has held that to hold a defendant liable under libel or insult laws because they

76 Human Rights Committee General Comment No. 34, Article 19: Freedoms of opinion and expression, paragraph 34, CCPR/C/GC/34 (21 July 2011), available at http://www2.ohchr.org/english/bodies/hrc/docs/GC34.pdf
78 These representatives have mandates from the various inter-governmental bodies to promote free media and expression and have adopted joint declarations on freedom of expression annually since 1999.
79 Human Rights Committee General Comment No 34, Article 19: Freedom of Opinion and Freedom of Expression, paragraph 33, paragraph. 9.
80 "No one shall be found liable for true statements, opinions or statements regarding public figures which it was reasonable to make in the circumstances”. See African Commission on Human and Peoples’ Rights, Declaration of Principles on Freedom of Expression in Africa of 2002, ACHPR/Res.62 (XXXII) 02.
failed to establish the truth of a statement of opinion results is a violation of the right to freedom of opinion under Article 10 of the European Convention.\textsuperscript{83}

In the civil claim against Marques de Morais, the former Attorney General challenged Marques’ assertion that, as the Attorney General, he was constitutionally prohibited from engaging in any commercial activity of the kind described in the article and that he was only allowed to engage in research and teaching, provided these would not affect his work.\textsuperscript{84} The Attorney General claimed amongst other things that as a shareholder removed from the business or corporate activities, he had essentially not violated the constitution.\textsuperscript{85} Again, while the Center will not delve into whether Marques’ interpretation of the law is correct or incorrect, his conclusion on the law amounts to an opinion on the legal provisions of the law, which is subjective and falls under protected speech.

\textbf{iii. False Statements}

The former Attorney General in his civil suit claims that the allegations made by Marques de Morais in the article, \textsc{ANGOLA’S LAWLESS LAWMEN}, were false and malicious. In the claim, de Sousa alleges he never forcefully took possession of the Southern Kwanza property and that his involvement in several companies as a legal consultant or shareholder was legal.\textsuperscript{86} Even if the facts in the article by Marques were mistaken, untrue statements are not automatically defamatory. International law and cases from jurisdictions such as the United States and South Africa have established that even where a statement is untrue or harmful, if the statement was made about a public person (political candidates, governmental officeholder, movie star, author, celebrity, sports hero, etc.), such statements are usually exempt from liability, if they were made without malice, hate, dislike, or the intent and/or desire to harm and without reckless disregard for the truth. The African Commission, in its 2002 Declaration of Principles on Freedom of Expression in Africa (“2002 Declaration”), stated that “no one shall be found liable for true statements, opinions or statements regarding public figures which it was reasonable to make in the circumstances,” and “public figures shall be required to tolerate a greater degree of criticism”.

While the Center by is not in a position to conclusively ascertain whether Marques de Morais acted in reckless manner with disregard for the truth, as alleged by de Sousa, in the original publication, Marques de Morais alleges he had documentary evidence of the 2011 transaction by the Attorney General and that a permit was awarded for the construction of a residential condominium under Process 144-K/11.\textsuperscript{87} He also alleges that on October 10, 2016, before publishing the story, he submitted 13 questions to the office of Joao Maria de Sousa, pertaining to the transaction.\textsuperscript{88} Marques de Morais also claims he wrote to the former President dos Santos in 2009 regarding de Sousa’s business transactions whilst he was Attorney General. Marques de Morais received no response from either public official.\textsuperscript{89} If true, it would appear that Marques de Morais did not act with reckless disregard for the truth as he had official documents that appeared to

\textsuperscript{83} Id.
\textsuperscript{84} See Civil Claim pursuant to Articles 7,20 and 29 of DOC C. P.P.
\textsuperscript{85} Id.
\textsuperscript{86} Id.
\textsuperscript{88} Maka Angola, My Trial has begun, March 20, 2018, available at https://www.makaangola.org/2018/03/my-trial/
\textsuperscript{89} Id.
show an improper transaction, and based upon his understanding of the law, that the Attorney General could not financially benefit from any commercial enterprise.

a. **Statements regarding public figures**

As stated above, even if certain statements are not correct, where such statements consist of political speech and debate, including criticism of individual government officials, these are the most highly protected forms of expression under international law. A democracy cannot function without transparency and debate and both are stifled where citizens may face lawsuits.

The European Court, in evaluating States Parties’ domestic defamation and libel laws, has explained that it must “exercise caution when the measures taken or sanctions imposed by the national authorities are such as to dissuade the press from taking part in the discussion of matters of legitimate public concern.” Further, the Court has found that, in light of the press’s “possible recourse to a degree of exaggeration, or even provocation,” when evaluating freedom of the press vis-à-vis a public official’s right to protection of his/her reputation, “the limits of acceptable criticism […] are wider with regard to a politician acting in his public capacity than in relation to a private individual. A politician inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must display a greater degree of tolerance, especially when he himself makes public statements that are susceptible of criticism. He is certainly entitled to have his reputation protected, even when he is not acting in his private capacity, but the requirements of that protection have to be weighed against the interests of open discussion of political issues, since exceptions to freedom of expression must be interpreted narrowly.”

The judgments of the ECtHR have therefore consistently extended the protections of Article 10 to good faith criticism of government, governmental institutions and public officials. Such criticism lies at the core of democratic self-governance. The ECtHR has been very clear on the matter of public officials and defamation: they are required to tolerate more, not less, criticism, in part because of the public interest in open debate about public figures and institutions. It has written that public officials, by virtue of their assumption of public office, expose themselves to close scrutiny and must display greater degrees of tolerance for criticism. Nowhere is this more important than when critics comment on public officials’ performance of their governmental duties.

In the South African case of *Mthemi-Mahanyele v Mail and Guardian Ltd and Others* the Supreme Court of Appeal dealt with the alleged defamation of a Cabinet Minister. In that case, a Minister asserted that she had awarded a massive housing contract to her friend were defamatory and implied that she was corrupt. The Supreme Court held that cabinet ministers had standing to file such suits, as public officials had a right to dignity and not to have their reputation harmed. The court, however noted that, in

90 *Kaperzyriski v Poland*, ECtHR, Application No. 43206/07, 2012.
91 *Instytut Ekonomicznych Reform, TOV v. Ukraine*, 2016
93 Id.
certain circumstances, publications of defamatory statements about a cabinet minister or any member of government could be justifiable and hence not unlawful. The court applied the same principles as enumerated in the African Commission 2002 Declaration and other jurisdictions, and held that where the press had been reasonable in publishing the material, they could not be held liable. South Africa’s Supreme Court thus ruled that a defendant should not be held liable where the publisher reasonably believed the information published was true and that such publication would not be unlawful in the circumstances. The court also concluded that political speech, depending on the context, may be lawful, even when false, provided that its publication was reasonable.

iv. Excessive Damages

The former Attorney General has claimed two million (2,000,000) Kwanzas in damages for “strong psychic and psychological disturbance” that resulted in loss of sleep, migraines and disruption of his personal and professional life. As discussed above, international law has frowned upon criminal penalties as undue restrictions on freedom of expression but regards civil penalties in certain circumstances as acceptable. A person who has been defamed is entitled to a remedy. Nonetheless, defamation laws that are prescribed by law and have a legitimate aim of protecting the reputation of others, must still conform to the requirement that the limitation be necessary in a democratic society. A key criterion for assessing whether or not a measure is “necessary in a democratic society” is whether or not it is proportionate to the interest to be protected.

Excessive defamation awards, even if of a civil nature, have a chilling effect on freedom of expression. This is particularly pronounced in the case of journalists who rely on freedom of expression for their livelihood and whose expression receives wide dissemination. Chilling the speech of journalists is also particularly problematic because it interferes not just with the journalists’ right to expression, but also with the right of the public to receive information. Excessive damages awards are likely to discourage the participation of the press in debates over matters of legitimate public concern.” The African Commission 2002 Declaration specifically states that “…..sanctions shall never be so severe as to inhibit the right to freedom of expression”.

In the United States case of New York Times v Sullivan, Justice Brennan noted that “[t]he fear of damage awards….may be markedly more inhibiting than the fear of prosecution under criminal statute… Whether or not a newspaper can survive a succession of such judgements, the pall of fear

95 * Justifiability is to be determined by having regard to all the relevant circumstances, including the interest of the public in being informed; the manner of publication; the tone of the material published; the extent of public concern in the information; the reliability of the source; the steps taken to verify the truth of the information; whether the person had been given the opportunity to comment on the Statement before publication.
96 In the United States, courts have found non-actionable a variety of intertemperate expressions of disfavour aimed at public officials including a statement that a judge is “corrupt” and ought to be removed from office, (see Rinaldi v Holt, Binehart & Winston, 42 N.Y. 369, 397 N.Y.S.2d 943 (1977)); and a statement that a prosecutor had rushed a criminal prosecution in order to enhance his electoral chances (see Hentel v Alfred A. Knopf, Inc. 92A.D.2d 756, 458 N.Y.S.2d 969 (1st Dept. 183)). Each of these statements was held to be non-actionable in the partisan context in which it was uttered, on the ground that the public should be free to weigh the source and make their own judgments concerning political allegations.
98 Civil Claim pursuant to Articles 7,20 and 29 of DOC C. P.P. 99 Article 9(1) African Charter.
and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms [freedom of the press and expression] cannot survive.”

In the current case against Marques de Morais, the former Attorney General is claiming damages in the sum of 2,000,000 Kwanza which is approximately equivalent to USD 9,400.00. Such high damages could amount to a per se violation given they are almost triple the per capita for Angola in 2017, which was estimated at USD 3,630.7. The contemplated penalties seem even more disproportionate given that the article addressed the issue of transparency, accountability and corruption of public officials and appears to have been based upon review of official documents. As highlighted above, people who hold public office face a higher degree of criticism than private citizens and thus a higher degree of tolerance is expected when it is a political speech and an even higher threshold is required when it is directed towards the government and government officials. Unless the complainant, Joao Maria de Sousa, can prove that the article was not only substantially false, but that Marques de Morais published it with reckless disregard for the truth, there can be no liability.

V. CONCLUSION

It is an established principle that freedom of opinion and freedom of expression are indispensable rights and that the free flow of information is fundamental to a democratic society. International jurisprudence has stressed the vital role played by the media in imparting information and ideas to the public on matters of legitimate public concern such as the competence and performance of public officials. In light of the above analysis, the Center not only recommends that criminal charges against Marques de Morais and Bras Lourenço be dropped, but that Angola immediately review its laws that provide criminal sanctions for criticising public officials. They are incompatible with its regional and international obligations to respect, protect and promote freedom of expression. Regarding the civil defamation suit against Marques de Morais, the court should take into account that (1) true statements and opinions should not be the subject of defamation suits, and (2) even where published facts related to public figures are not true, courts should consider non-monetary measures, such as an apology or retraction of the offending article, rather than impose severe penalties that have a substantial risk of producing a chilling effect on freedom of expression and debate within society.