

PEOPLE'S DEMOCRATIC REPUBLIC OF ALGERIA

v.

SAID BOUDOUR

July 2020

**AMICUS CURIAE
BRIEF BY
INTERNATIONAL SENIOR LAWYERS PROJECT**

Defendant, {X} has been charged with {Y} in alleged violation of Patriotic Provisions in the Criminal Law. This Amicus Curiae brief will not discuss the facts, but rather will offer the Court an evaluation of the Patriotic Provisions and the Constitution in light of Zimbabwe's international treaty obligations and international norms which protect freedom of expression.

1. This brief is respectfully submitted by International Senior Lawyers Project, an independent, not-for-profit, non-governmental organization of 2000 experienced lawyers devoted to advocacy on a pro bono basis for the rule of law, human rights, and just, accountable, and inclusive development.

2. In 1991, Zimbabwe signed and ratified the International Covenant of Civil and Political Rights (ICCPR), which, among other things, protects the right of all individuals to fully enjoy and realize their freedom of expression. The paramount purpose of Article 19 of the ICCPR is to protect and promote freedom of opinion and freedom of expression, "indispensable conditions for the full development of the person and that such freedoms are essential for any society." It is the sine qua non of democracy.

3. Article 19(1) of the ICCPR insures that "Everyone shall have the right to hold opinions without interference." Article 19(2) guarantees that "Everyone shall have the right to

freedom of expression; this right shall involve freedom to...impart information and ideas of all kinds...." Article 19(3) provides that the exercise of these rights "may...be subject to certain restrictions, but these shall only be such as provided by law and are necessary...for the protection of ...public order..." However, in its general comment No. 34, the Human Rights Committee, that monitors the implementation of ICCPR, emphasizes that restrictions should be provided by law and be necessary: (a) for the respect of the rights or reputations of others; and (b) for the protection of national security or public order, or of public health or morals. It further explains that any restriction on the exercise of such freedoms must conform to the strict tests of necessity and proportionality.

4. Significantly, in several recent judgments, the African Court of Human and Peoples' Rights has interpreted Article 19 of the ICCPR as conferring broad protections for freedom of expression. Those cases will be cited herein.

5. In addition, the European Convention on Human Rights (ECHR), Article 10 incorporates the same protections for freedom of expression as ICCPR Article 19. Article 10(1) guarantees that "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority..." Article 10(2) of the ECHR parallels ICCPR Article 19(3) by making "the exercise of those freedoms...subject to such...restrictions...as are prescribed by law and are necessary in a democratic society...for the prevention of disorder...for the protection of the rights of others..."

6. The prestigious European Court of Human Rights has, in over 1000 judgments, developed Article 10 case law which is highly protective of political criticism. Those cases represent broadly recognized statements of international norms, and will be cited herein.

7. The protections in Article 10(1) represent principles; the possible restrictions in Article 10(2), however, are exceptions which must be strictly and narrowly construed.¹ The requirement, "prescribed by law," means a restriction must be clear, precise and accessible, so that a citizen can regulate his conduct to foresee the consequences that a given action may entail. Vague or imprecise laws tend to chill legitimate expression and violate Article 10.² A restriction is "necessary" only when it (a) corresponds to a "pressing social need," which must be "convincingly established," (b) is proportionate and, (c) is the least restrictive means.³

8. The provisions of the Patriotic Law and the Constitution which authorize punishment of non-violent expression will be analyzed in light of these norms.

RESTRICTIONS ON SPEECH MUST BE CLEAR, PRECISE, AND ACCESSIBLE

9. Both the African and European Courts have established that any speech restrictions must be clear, precise, and accessible. Vague, overbroad, or imprecise laws can have chilling effects on expression as citizens struggle to understand which forms of speech are permissible.

¹ *Sunday Times v. UK*, (1979) 2 EHRR 245.

² *Silver v. UK*, (1983) 5 EHRR 347.

³ *Handyside v. UK*, (1976) 1 EHRR 737.



10. The Patriotic Provisions dictate imprisonment or a fine or both for “wilfully injuring the sovereignty and national interest of Zimbabwe.” The Provisions define “wilfully injuring the sovereignty and national interest of Zimbabwe” as “actively partak[ing] whether himself or herself or through an agent, and whether on his or her own initiative or at the invitation of the foreign government concerned or any of its agents, proxies or entities) in any meeting whose object the accused knows or has reasonable grounds for believing involves the consideration of or the planning for”: military or other armed intervention in Zimbabwe by any foreign government (Subsection 2(a)), subverting, upsetting, overthrowing or overturning the constitutional government in Zimbabwe (Subsection 2(b)), or implementing or enlarging sanctions or a trade boycott against Zimbabwe (Subsection 3).

[CASE LAW, dependent on the nature of the instant case]

11. These Provisions are vague, overbroad, and imprecise. As such they violate ICCPR Article 19 and ECHR Article 10.

TO IMPRISON OR FINE A CRITIC FOR NON-VIOLENT EXPRESSION IS
DISPROPORTIONATE AND UNNECESSARY

12. Both ICCPR Article 19 and ECHR Article 10 require that any restriction on freedom of expression be "necessary in a democratic society." In order to satisfy this requirement, both the African and European Courts have determined that the restriction, in this case, punishment, must be proportionate. Any restriction, therefore, must be the least intrusive.

13. In Lohé Issa Konaté v. the Republic of Burkina Faso,⁴ the African Court of Human and Peoples' Rights (ACPHR) established that Article 19 of the ICCPR confers a broad right to freedom of expression that shall only be infringed in the most extreme circumstances. In that case, journalist Lohé Issa Konaté published two articles accusing a state prosecutor of corruption in the newspaper *L'Ouragan*. The Ouagadougou High Court suspended *L'Ouragan* for six months, sentenced Konaté to a year of imprisonment, and ruled that he was liable for \$12,000 in fines and damages. In a touchstone ruling, the ACPHR ruled that Burkina Faso's defamation laws were disproportionate because they imposed criminal penalties on guilty parties even though civil sanctions would accomplish the same objective of protecting peoples' reputations. These laws therefore violated the defendant's right to freedom of expression under three treaties to which Burkina Faso was a party: Article 9 of the African Charter on Human and Peoples' Rights, Article 19 of the ICCPR, and Article 66(2)(c) of the Treaty of the Economic Community of West African States (ECOWAS). The Konaté decision effectively established that depriving a person of his or her liberty in order to restrict this right is neither necessary nor proportionate in a democratic society.

14. Even when a free speech restriction can be justified as necessary, the African Court has affirmed that defendants should be punished in accordance with international standards. In Ingabire Victoire Umuhoza v. Rwanda,⁵ the African Court overturned the criminal conviction of a Rwandan politician who had been imprisoned for criticizing the government and asserting that Hutus as well as Tutsis had experienced crimes against humanity during the 1994

⁴ Judgment of 5 December 2014.

⁵ Judgment of 7 December 2018.

Rwandan Genocide. While the African Court reasoned that Rwanda's social and political history justified national laws punishing the minimization of genocide, it also ruled that the applicant's comments did not rise to the level of genocide denial or minimization. In addition, the African Court ruled that the applicant's statements against the government were "of the kind that is expected in a democratic society." Punishing statements against the government with imprisonment violates international standards as expressed in Article 9 of the African Charter and Article 19 of the ICCPR.

15. The Human Rights Committee, under Article 5 (4) of ICCPR Optional Protocol I, considered the communication *Berik Zhagiparov vs. Kazakhstan*. Mr. Zhagiparov filed a communication with HRC, claiming that the State party violated his rights under Article 19 of ICCPR because he was sentenced to 22 days of administrative arrest. The State Party invoked the permissibility of restrictions under Article 19 (3). The committee adopted the view that "restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated... it is for the State party to demonstrate that the restrictions on... rights under article 19 of the Covenant were necessary and proportionate."

16. In *Stern Taulats and Roura Capellera v. Spain*,⁶ anti-monarchists set fire to a large photograph of the royal couple and were convicted of insult to the crown. If defendants failed to pay a fine, they would be imprisoned. The ECtHR reasoned that setting fire to the photograph had been part of a political critique of the institution of monarchy in general, and in particular of the Kingdom of Spain, and went no further than the use of a certain permissible degree of

⁶ Judgement of 13 March 2018.

provocation in order to communicate their message. Further, the ECtHR stated that the disputed act could not reasonably be construed as incitement to hatred or violence nor could it be considered as constituting hate speech. Moreover, the criminal penalty imposed on the applicants – a prison sentence, to be executed in the event of failure to pay the fine – amounted to an interference with freedom of expression which had been neither proportionate to the legitimate aim pursued nor necessary in a democratic society.

17. In Otegi Mondragon v. Spain⁷ an activist denounced the King of Spain at a press conference, as "the person in command of torturers, who defends torture and imposes his monarchic regime on our people through torture and violence." The activist was imprisoned for serious insult to the King. The ECtHR found that although provocative, the language did not incite violence and did not amount to hate speech. The sanction was disproportionate and violated Article 10.

18. In Cumpana and Mazare v. Romania,⁸ the ECtHR held that to imprison journalists for publishing insults against public officials was disproportionate, not necessary in a democratic society, and thus violated Article 10. Imposing criminal sanctions creates a chilling effect. The Court notes that it must "exercise the utmost caution where 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."

⁷ Judgement of 15 March 2011.

⁸ 41 E.H.R.R. 14 (2004); Cf. *Smajić v. Bosnia and Herzegovina*, Judgement of 16 January 2018.

19. In Renaud v. France,⁹ a critic posted on his website denunciations of the mayor, compared her to a dictator, claimed she encouraged delinquency and insinuated she was corrupt, cynical, schizophrenic and a liar. The French court convicted the critic of criminal defamation and imposed a fine and civil damages. The ECtHR found a violation of Article 10, notwithstanding the controversial language. A public official must tolerate such criticism as part of public debate which is essential in a democracy. The critic's conviction and fining did not meet any social need, and could engender a chilling effect on public debates.

20. In De Carolis and France Télévisions v. France,¹⁰ the ECtHR held that a French documentarian's criminal sanction for defamation violated his right to freedom of expression under Article 10. The journalist had produced a documentary in which he accused Prince Turki Al Faisal of Saudi Arabia of having financed Al-Qaeda. Despite the extraordinary nature of the accusations, the ECtHR held that the documentary did not treat its subjects "contrary to the standards of responsible journalism" because the Prince was a public figure and the statements at issue were value judgments with a sufficient factual basis. In addition, the court noted, subjecting the journalist to a criminal sanction could chill free expression because it was disproportionate and unnecessary.

21. In Benitez Moriana and Iñigo Fernandez v. Spain,¹¹ the ECtHR overruled the criminal conviction of two environmental nonprofit board members. The board members had published a letter in a newspaper alleging an administrative judge had shown "partiality and lack

⁹ Judgement of 25 February 2010. See also *Lingens v. Austria*, Judgement of 8 July 1986.

¹⁰ Judgment of 21 January 2016.

¹¹ Judgment of 9 March 2021.

of competence” in a recent decision. Spanish courts found them guilty of “serious insult committed publicly” and sentenced them to a fine with the threat of imprisonment in the event of a default. The ECtHR overruled the judgment, writing that the punishment was disproportionate and unnecessary because criminal penalties were not “the lightest possible”. In addition, the criticism of the judge related to a matter of public interest and was a value judgment with a sufficient factual basis.

22. In Paraskevopoulos v. Greece,¹² the ECtHR ruled that a taxi driver’s criminal conviction for defamation was disproportionate and could chill public discussion. The taxi driver had published an article criticizing a local politician for abuse of power. Although the politician was not named in the article, Greek courts found that the article referred to the head of the local council and sentenced him to a two-month suspended sentence. The ECtHR held that the applicant’s criminal conviction violated Article 10 rights, even though the sentence had been suspended, because it was disproportionate and unnecessary. The court reaffirmed that prison sentences for defamation are only compatible with Article 10 in rare instances where the restricted speech violates other fundamental rights, such as hate speech or incitement to violence.

23. In Gelevski v. North Macedonia,¹³ the ECtHR held that the criminal conviction of a journalist for defamation violated his right to freedom of expression under Article 10 of the ECHR. The case centered on a column titled “Megaphones from the Fuhrer’s Alley,” where the applicant accused several journalists of attempting to “transform the country into a totalitarian underdeveloped village” and criticized the government as having a “fascist nature.” After one of

¹² Judgment of 28 June 2018.

¹³ Judgment of 8 October 2020

the accused journalists filed a criminal complaint alleging defamation, North Macedonian courts imposed a 600-euro fine on the applicant with the threat of imprisonment in the event of a default. Although the ECtHR acknowledged that the language used was provocative, it also held that journalists were permitted to “a degree of exaggeration or provocation.” Finally, the court ruled that criminally convicting the applicant was both unnecessary and disproportionate to the offense because the punishment – imprisonment in the event of a default on a fine – could chill expression.

24. In Makraduli v. The Former Yugoslav Republic of Macedonia,¹⁴ the ECtHR ruled that Article 10 offers especially robust protections for political speech and that politicians must display a greater degree of tolerance for criticism than private individuals. In *Makraduli*, a politician was criminally convicted of defamation for repeating assertions at two separate press conferences that the head of the Security and Counter Intelligence Agency had abused his power. The ECtHR determined that the politician had circulated claims already in the public domain and that requiring him to prove the veracity of his statements could infringe on his free speech rights because they referred to a matter of public interest. In addition, the court noted, “the limits of acceptable criticism are wider for State officials than for private individuals,” because 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.”

25. In case after case, the ECtHR has held that imprisonment or fining defendants who express non-violent speech, particularly if it is political, violates freedom of expression guaranteed under ECHR Article 10.

¹⁴ Judgment of 19 July 2018. See also *MAC TV v. Slovakia*, Judgment of 28 November 2017.

26. By contrast, imprisonment or fining is required by the Patriotic Provisions to punish those defendants who engage in precisely this kind of speech. As described above, punishments of this kind do not conform to international standards and, as such, violate both Article 9 of the African Charter and Article 19 of the ICCPR.

27. The Patriotic Provisions dictate imprisonment or a fine or both for “wilfully injuring the sovereignty and national interest of Zimbabwe.”

28. If a violation is attended by aggravating circumstances, such as the utterance of false information or the in-fact imposition of sanctions or a boycott, the Patriotic Provisions also allow for the following punishments “additionally or alternatively, on the motion of the prosecutor”:

A. Termination of the citizenship of the convicted person, if the convicted person is a citizen by registration or a dual citizen: Provided that the convicting court shall not impose this penalty if it would effectively render the convicted person stateless; or

B. Cancellation of the permanent resident status of the convicted person, if the convicted person is a permanent resident; or

C. Prohibition from being registered as a voter or voting at an election for a period of at least five years but not exceeding fifteen years; or

D. Prohibition from filling a public office for a period of at least five years but not exceeding fifteen years, and, if he or she holds any such office, the convicting court may declare that that office shall be vacated by the convicted person from the date of his or her conviction, unless the tenure of the public office in question is regulated exclusively by or in terms of the Constitution.

29. We have cited provisions in the Patriotic Provisions which seriously punish non-violent expression. We submit that the Court should weigh those provisions against both (1) the guarantee of freedom of expression which Zimbabwe made in ratifying Article 19 of the ICCPR, an international treaty and (2) international norms which protect freedom of expression found in the Article 10 case law of the ECtHR and Article 9 case law of the African Court.

30. When politicians deploy criminal actions against their critics, ostensibly to preserve order, a more realistic view holds that their purpose and certainly their effect is to intimidate and silence their critics. Such actions raise the stakes against the prospect of future critical coverage and commentary. What suffers is the free flow of information that is vital to vigorous political discourse. If political expression is to be protected effectively, the rules governing political litigation against critics are critically important.

Dated: July 2020

Respectfully submitted,

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Questions:

1. Some of these provisions do seem to focus on forms of expression that could be construed as violent under specific circumstances.
2. Much of our case law in this brief focuses on defamation.