RAFAEL MARQUES V. REPUBLIC OF ANGOLA

COMMUNICATION SUBMITTED FOR CONSIDERATION UNDER
THE FIRST OPTIONAL PROTOCAL TO THE
INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Before:
The United Nations Human Rights Committee
C/0 OHCHR - UNDOG
1211 Geneva 10, Switzerland
Fax No. (41-22) 9179022

On behalf of:
Rafael Marques de Morais

Represented by:
Open Society Institute, 400 West 59th Street, New York, NY 10019, USA
and
INTERIGHTS (International Centre for the Legal Protection of Human Rights)
Lancaster House, 33 Islington High Street, London N1 9LH, United Kingdom

Date: 5 September 2002

I. INTRODUCTORY INFORMATION

A. Information Concerning the Applicant of the Communication

1. The Applicant in this communication is Rafael Marques, an Angolan national born in Luanda on 31 August 1971. The Applicant is a journalist. He is also the representative in Angola of the Open Society Institute.

2. The Applicant is assisted in this matter by the Open Society Institute, 400 West 59th Street, New York, NY 10019, and by INTERIGHTS, 33 Islington High Street, London N1 9LH, United Kingdom. The addressee for exchange of any confidential correspondence regarding this matter is c/o Helen Duffy at the office of INTERIGHTS.

II. STATE CONCERNED/ARTICLES VIOLATED/EXHAUSTION OF DOMESTIC REMEDIES/OTHER INTERNATIONAL PROCEDURES

A. State Concerned

1. The State Party to the International Covenant on Civil and Political Rights ('the Covenant' or 'ICCPR') and the First Optional Protocol against which the communication is directed is the Republic of Angola (‘Angola’ or 'the Respondent State').

2. Angola acceded to the ICCPR and to the Optional Protocol on 10 January 1992.

B. Article(s) of the ICCPR Allegedly Violated

3. This case arises in relation to the repression of the Applicant's free speech and freedom of movement, and his arrest, detention and his criminal conviction, upheld on appeal, in respect of media publications critical of the Angolan President. It is submitted that the case involves multiple violations of the ICCPR. This application focuses on violations of Articles 9, 12, 14 and 19 of the ICCPR, together with Article 2, which requires the State Party to take proactive measures to 'respect and ensure' the rights recognised in the Covenant.

C. Exhaustion of Domestic Remedies

4. The Applicant sought to challenge the lawfulness of his arrest and detention by initiating *habeus corpus* proceedings shortly after his arrest. The *habeus corpus* petition was never addressed by the Angolan courts and at no point did the Applicant receive a response to it.

5. Upon conviction, the Applicant appealed his conviction to the highest available national authority, the Supreme Court of Angola. The judgment of the Supreme Court, dated 26 October 2000, which upheld the conviction, is final and conclusive. The Applicant has exhausted all possible domestic remedies.

D. Other International Procedures

6. This matter has not been submitted to any other international forum for investigation or settlement.

III. SUMMARY OF FACTS

A. The articles and press statements

1. Between July and October 1999, the Applicant wrote several Articles in an independent Angolan newspaper, *Agora. (See articles dated 3 July, 28 August and 13 October 1999 (Annex A, I)*[1] *and the Judgment of the Provincial Court of Luanda of 31 March 2000 ('Trial Judgement'), Annex A, VI). Inter alia*, those articles criticised the President of Angola for "the destruction of the country and the calamitous situation of State institutions, …incompetence, embezzlement and corruption as social and political values." (*See article "The Dictator's Lipstick", dated 3 July 1999 (Annex A, I) and Trial Judgement Annex A, VI).*

2. On 13 October 1999, the Applicant was informed by one Aguiar dos Santos, a colleague, that he was required to appear before an investigator at the National Criminal Investigation Division ('DNIC'). He appeared in person before the DNIC and was questioned for approximately three hours before being released.

3. On the same day, the Applicant gave an interview to the Catholic radio station, Rádio Ecclésia, in which he described his treatment during questioning. The Applicant confirmed his understanding that he had been summoned on the basis of the articles in *Agora*, and reiterated some of the critical comment contained in those articles.

B. Arrest, interrogation and detention

4. On 16 October 1999, at approximately 6:00 a.m., more than twenty armed members of the Rapid Intervention Police and plain-clothed officers of DNIC arrested the Applicant at gunpoint at his home in Luanda, Angola. The DNIC agents did not inform the Applicant of the reasons for his arrest. They refused to provide the Applicant or his wife with information as to the location to which he would be taken.

5. The Applicant was driven in a small closed van, from which he could not see out, accompanied by several other police and civilian vehicles. He was taken to a large shed, which, it subsequently transpired, was the Operational Police Unit. He was held there for approximately seven hours and questioned, before being handed over to DNIC officials. The Applicant was then questioned for almost five hours more, by investigators Manuel Muhongo and Ávila Sotto Mayor of DNIC, before being taken to the office of the deputy public prosecutor of DNIC, Machado da Rosa. Only at this point was he formally arrested (though not charged).

---

[1] This application has 2 annexes: Annex A contains a chronology of documents relating to the Applicant's case and Annex B contains all the authorities cited in this Application.

6. He was then taken to the high security Central Forensic Laboratory in Luanda, where he was held incommunicado between 16-26 October 1999. During this period, he was denied access to counsel and to his family and friends. Throughout the course of his detention, and notwithstanding repeated requests, the Applicant was not informed in detail of the reasons for his arrest. On the contrary, upon arrival at the Central Forensic Laboratory, the chief investigator, Manuel Muhongo, informed the local authorities and other prisoners, in front of the Applicant, that he was held as a UNITA Prisoner (*União Nacional pela Independencia Total de Angol*a/National Union for the Total Independence of Angola). Similarly, the questions put to the Applicant during interrogation were primarily political in nature, aimed at ascertaining his views, and only at the end of the interrogation did the investigators pose questions about the Applicant's writing or the interview referenced above.

7. Between 16 and 26 October 1999, the Applicant was subjected to intimidation from prison officials. For example, the second night after his detention the Security Chief of the Forensic Central Laboratory, Mr. Chico, asked the Applicant to sign documents exculpating the Laboratory and the government of Angola from responsibility for death or any injuries sustained by the Applicant while in detention. The Applicant declined to sign the documents. Subsequently fearing for his life, he declined to eat food provided by the authorities.

8. On 26 October 1999, the Applicant's lawyer Luís do Nascimento filed an application for *habeas corpus* on his behalf before the Supreme Court in Luanda, in exercise of the right recognised in Article 42(1) of the Constitution of the Republic of Angola 1991. *(See Request for Habeas Corpus Annex A, III.)* The *habeas corpus* application was never acknowledged, assigned to any judge nor heard by the Angolan courts.

9. The same day, the Applicant was transferred to a regular prison, *Viana,* in Luanda, and allowed to speak to his lawyer for the first time, some 10 days after his arrest.

C. The charges

10. On 25 November 1999, following external pressure from, among others, the Open Society Institute, the US State Department and British Foreign Office, the Applicant was released from prison. It was not until this point, following his release from custody, that the Applicant was informed of the charges against him. He had by that date been held for 40 days (almost 6 weeks) without charge.

11. The Applicant was charged, together with Aguiar dos Santos and António José de Freitas - Director and Chief Editor of *Agora* respectively - with multiple offences of defaming and injuring the President and the Attorney General through the articles referred to in para. 1 above. The indictment failed to distinguish the charges against the three indictees. (*See Indictment, Annex A, II*).

12. The indictment filed with the Provincial Court accused the Applicant of: "… materially and continuously committ(ing) the crimes characteristic of defamation and slander against His Excellency the President of the Republic and the Attorney-General of the Republic prohibited and punishable by Articles 44, 46 all

of Law no. 22/91 of June 15 (the Press Law) with aggravating circumstances 1, 2, 10, 20, 21 and 25, all of articles 34 of the Penal Code."

13. In its trial judgment of 31 March 2000, however, the Provincial Court convicted the Applicant of apparently additional counts under Articles 43 & 45 of the Press Law (Law No. 22/91). These provisions had never been formulated as charges against the Applicant. The judgment referred also to various articles of the Penal Code - Articles 181 ('Injury against public authorities'), 407 ('Defamation'), 408 ('Proof of the veracity of the alleged facts'), 409 ('Proof of the veracity of the facts and calumny') and 410 ('Injury'), provisions of the Penal Code - as providing the 'legal framework'. None of these Penal Code provisions were brought to the attention of the Applicant at any time before judgment. (*See Trial Judgement, Annex A, VI. See also Penal Code, Annex A, IX, Press Law Annex A, X*).

14. On appeal, the Collective Judgment of the Supreme Court (*Supreme Court judgement)* in its turn referred to Articles 44, 45 & 46 of the Press Law, with the aggravating circumstances provided for under items 5, 7, 10, 20, 21 & 25 of Article 34 of the Penal Code a different set of aggregating circumstances than were referred to in the Provincial Court. *(See Supreme Court judgement, Annex A, XI).*

D. Conditions of Bail

15. On the same day as the charges were filed, 25 November 1999, the Applicant was released on bail. The conditions of bail obliged the Applicant:

> "1. Not to leave the Country; 2. Not to engage in certain activities that are punishable by the offence committed and that create the risk that new violations may be perpetrated- Art 270 of the Penal Code." *(Indictment, Annex A, II.)*

The Applicant repeatedly and unsuccessfully sought from the Angolan authorities and judicial officers clarification of the meaning of this prohibition. *(See Request for clarification of bail conditions and responses to such a request at Annex A, IV and V)*

E. The Trial

16. The trial started on 21 March 2000. Thirty minutes after the commencement of trial, the trial judge ordered that proceedings should continue *in camera,* on the purported justification that a photo-journalist had attempted to photograph the proceedings.

17. The Applicant sought to present evidence to establish the good faith basis, or the truth, of the statements critical of the President. To this end, he offered into evidence numerous documents - including the texts of speeches by the president and senior government officials, various government papers and resolutions, and statements by foreign officials and agencies, such as the U.S. Secretary of State.

18. The Provincial Court refused to allow the Applicant to present a defence of the 'truth' of the allegations, or the good faith basis on which statements were made, and ruled that evidence pursuant to such defences was inadmissible. In so doing it

relied upon Article 46 of the Press Law. Article 46 prohibits the admission of any evidence regarding the truth of statements about the President of the People's Republic of Angola:

> **"If the person defamed is the President of the People's Republic of Angola, or the head of a foreign state, or its representative in Angola, then proof of the veracity of the facts shall not be admissible."** (*See Press Law Annex A,X)*

19. The Applicant's counsel, Luís do Nascimento, in protest at the refusal to allow the presentation of the evidence, stated that he could not represent his client in these circumstances and left the courtroom. When he returned to the Court on 25 March 2000 to take up the Applicant's defence, he was unlawfully (as recognised by the Supreme Court of Angola in its 26/10/2000 judgement, under the heading "Procedural Issues: -Abandonment of the client by Counsel") prevented by the trial judge from doing so. The judge ordered that Mr. do Nascimento be disbarred from practising as a lawyer in Angola for a period of six months.

20. Thereafter, the Court assigned as defence 'counsel' to the Applicant without the latter's consent a Court Clerk, João António Francisco, who was not qualified to practise as a lawyer. The only interventions made by this appointee for the remainder of the trial were a general request to the court to 'do justice' and an expression of satisfaction with court proceedings. *(See the Court records, minutes of Trial hearings at Annex A, VII and the statement of the Angolan Bar Association at Annex A, XII).*

21. On 28 March 2000, a witness testifying on behalf of the Applicant, Fernando Macedo, was ordered to leave the court and discontinue his testimony after he asserted that the law under which the Applicant was charged was unconstitutional. The court refused to allow the Applicant to call two other witnesses -- Holden Roberto and Justino Pinto de Andrade – to offer evidence in his behalf, without giving reasons for its refusal.

F. **Conviction and Sentence**

22. On 31 March 2000, the Provincial Court convicted the Applicant of 'defamation and injury', imposed a term of six months' imprisonment, and ordered payment of a fine of kwanzas 1 000 000 (approximately US$169 000), a court tax of kwanzas 2000 (approximately US$338) and the amount of kwanzas 100,000 (approximately US$17 000) in compensatory damages to the President. *(See Documents relating to Applicant's payment of fines at Annex A, VIII)* The Court explained that it imposed this penalty "due to the need to discourage behaviour such as the defendant's." The Provincial Court made no reference to the continuing applicability of the bail restrictions previously imposed on the applicant. *(See Trial Judgment, Annex A VI).*

G. The Appeal

23. The Applicant appealed against conviction and sentence to the Supreme Court of Angola on 4 April 2000. *(See Supreme Court Judgment, Annex A XI).*

24. On 7 April 2000, while the appeal was still pending, the Supreme Court issued what it termed a ‘public notice’ related to the case. It responded to a statement which had been issued by the Angolan Bar Association on 30 March 2000, while trial was ongoing. The Bar Association statement criticised the trial judge for having barred the Applicant’s counsel, Nascimento, from further representation in the case and for replacing him with someone who was not a member of the bar licensed to practise law. In response, in its 7 April 2000 public notice published widely on Angolan television and in the press, the Supreme Court chastised the Bar Association for 'creating an unjustly suspicious climate and discrediting [the judiciary] both domestically and abroad' and for 'causing distorted proclamations by individuals, institutions and even governmental officials.’ *(See Supreme Court Public Notice, Annex A XIII).*

25. On 26 October 2000, the Supreme Court upheld the Applicant’s conviction for ‘injury’ under Article 410 of the Penal Code, for ‘imputing in a generic way facts so injurious to the honour and consideration owed to the citizen who is the President of the Republic….’ *(See Trial Judgment, Annex A, VI).* While 'defamation', which was held to involve the imputation of specific facts, was not in the Supreme Court's view established, injury was sufficient to amount to the crime of ‘abuse of the press’ under 'Articles 44, 45 and 46 of Law No. 22/91 of June 15 1991 (The Press Law).' Aggravating circumstances, provided for under Article 34 of the Penal Code, were found to be established.

26. The Supreme Court judgment affirmed the six-month imprisonment term, but suspended its application for a period of five years. The judgment made no reference to the pre-existing bail restrictions imposed upon the Applicant. On 11 November 2000, the Applicant sought, unsuccessfully, to obtain a declaration from the relevant authorities confirming that the bail restrictions were no longer applicable (*see Annex A, IV and V*).

27. The Applicant was never formally notified of the Supreme Court judgment, as a copy of the judgment was never served upon him or his counsel. He learned about the judgment listening to a radio news report.

H. Subsequent Movement

28. On 12 December 2000, as the Applicant sought to leave Angola to participate in an Open Society Institute conference in Johannesburg, South Africa, he was questioned at the airport in Luanda, his passport seized, and he was unable to travel abroad. At various stages, before and after questioning at the airport, the Applicant sought to clarify whether he was lawfully entitled to leave the country. The Applicant’s numerous written requests received no response from the authorities. *(See Annex A, XIV, letters dated 9 November 2000, 8 December 2000, 5, 12 and 18 January 2001).*

29. The Applicant's passport was returned to him on 8 February 2001, following the amnesty decision, referred to below. He was finally allowed to leave Angola on 24 February 2001.

I. Amnesty Law

30. On 15 December 2000 the Angolan government enacted an 'amnesty law' (Law 7/00), which stated that it applied to 'crimes against security which were committed…within the sphere of the Angolan conflict, as long as its agents have presented themselves or may come to present themselves to the Angolan authorities….' Despite the fact that the Applicant's alleged crime was not 'related to the conflict' and that he did not apply for amnesty, a court order dated 2 February 2001 found the amnesty applicable to his case. The court decision declared that the effect of amnesty was that the crimes covered by it 'shall be declared amnestied and consequently the sentence shall be abolished.' *(See Amnesty decision, Annex A, XV).*

31. Despite this amnesty, and the terms of the judgments against him, described above, on 19 January 2002 the Applicant was summoned to the Provincial Court and ordered to pay compensation of 30,000 kwanzas (approximately $950) to the President, which the applicant has refused to pay, as well as legal costs, which have been paid. *(See Annex A, VIII)*

IV. LEGAL ARGUMENT AS APPLIED TO THE FACTS

A. Rights of Liberty and Security of Person, Article 9

<u>Article 9</u>

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

<u>Article 9(1)</u>

<u>Established by Law</u>

1. Deprivation of liberty under Art. 9(1) is permissible only “on such grounds and in accordance with such procedure as are established by law.” Lawfulness has both

substantive and procedural components: it requires the existence of a law that provides, in terms which are clear, for interference with liberty, and that regulates the procedure to be followed.

2. As noted by an authoritative commentator on the ICCPR, the 'established by law' provision requires that 'the law itself must not be arbitrary, and the enforcement of the law in a given case must not take place arbitrarily.' The prohibition on arbitrariness requires predictability, reasonableness and proportionality, as well as due process.

   Manfred Nowak, Commentary to the ICCPR (1993), p. 172. (Engel publisher Vienna 93)

3. Similarly, the UN Human Rights Committee ("the Committee") has noted that 'arbitrariness is not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability.'

   ***Hugo Van Alphen v. The Netherlands* (Comm. No. 305/88, para. 5.8)**[2]

4. Article 9(1) therefore requires that arrest and detention must be in accordance with clear and accessible law, and must be just, reasonable and proportionate in all the circumstances. In the present case, the state violated each of these requirements, as discussed in turn below.

<u>Impermissible Vagueness</u>

5. Vagueness in the relevant legal provisions on which deprivation of liberty is based may violate the 'established by law' requirement, which invokes the cardinal principle of certainty in the law. The doctrine of the impermissibility of vague laws, and the particularly stringent standards applicable to criminal law, has been repeatedly reaffirmed in international and comparative jurisprudence alike. *Nullum crimen sine lege* and *nulla poene sine lege* are fundamental tenets of any system of penal law, national or international. There can be no crime, and no punishment, without clearly defined law.

6. Among the common threads in international and comparative jurisprudence is the need for law to be accessible and foreseeable, providing sufficient precision to give notice to the citizen, who can then conform his or her behaviour to the law, and to provide guidelines for enforcement.

   See, for example, *Kokkinakis v. Greece* (European Court of Human Rights ("ECHR") Judgment of 25 May 1993 para. 52); *City of Chicago v. Jesus Morales et al.*, US Supreme Court, No. 97-1121, June 10, 1999; *Papachristou v City of Jacksonville*, 405 US 156 (1972); *Connally v. General Construction Co.*, 269 U.S. 385 (1926); *National Coalition for Gay and Lesbian Equality and Others v. Minister of Justice and Others from South Africa* 1998 (6) BCLR 726 (W); 8/05/1998; and *R v Nova Scotia*

[2] Please refer to Annex B for all authorities listed

***Pharmaceutical Society* 10 CRR (2d) 34 (1992) at 47-48. See also arguments in relation to freedom of expression set out, *infra*.**

7. As noted in the Summary of Facts above, in the present case the authorities relied upon different legal bases for the Applicant's arrest and prosecution throughout the course of his subsequent indictment, trial and appeal. The lack of clarity with regard to the applicable law is itself indicative of the lack of clarity surrounding the true nature of the offence committed by the Applicant. Moreover, none of the legal provisions invoked against the Applicant complied with international standards such that the Applicant's arrest and detention could reasonably be understood as having been 'established by law.'

8. Thus, Article 43 of the Press Law, which sets forth the "crime of abuse of the press," as mentioned in the judgments of the Provincial and Supreme Court, defines "an abuse of the press" so broadly as to encompass: "any act or behaviour that injures the juridical values and interests protected by the criminal code, effected by publication of texts or images through the press, radio broadcasts or television…."

9. Article 44 of the Act, referred to in the Indictment and the Judgment of the Provincial Court, provides:

   "1. The crimes of injury, defamation or threat against officials of sovereign Angolan organs, the attorney general of the republic, heads of foreign states, members of foreign governments, or against any diplomatic representatives in the People's Republic of Angola, as set forth in the Press Law, shall be effected via publication or diffusion of a text or any image in which these offences are evident.
   2. Publication or diffusion by the press of any injury, defamation or threat against the authorities referred to in the previous number shall be considered the same as if effected in their presence."

10. Article 410 of the Penal Code, mentioned by the Provincial and Supreme Courts, provides:
    "The crime of injury, without imputation of any determined fact, if committed against any person publicly, by gestures, *de viva voce*, by published drawing or text, or by any other means of publication, shall be punished with a prison term of up to two months and a fine of up to one month [sic]….
    In an accusation of injury, no proof whatsoever of the veracity of the facts to which the injury may refer shall be admissible".

11. 'Injury, defamation or threat' – the crimes referred to in Article 44 of the Press Law as purportedly "set forth in the Penal Law" – are not defined anywhere in the law. The 'juridical values and interests enshrined in the Criminal Code' mentioned in Article 43 lack specificity. The nature and degree of the harm or 'injury' that may give rise to these offences are unclear, rendering predictability in the application of these criminal laws illusory. To the extent that, on their plain meaning, these textual provisions may cover any form of injury or threat, the offence is overly broad.

12. The offences enshrined in the Press Law, and those referred in the Penal Code are ambiguous and potentially extremely broad reaching. It is impossible to ascertain what sort of political speech remains permissible, and to distinguish it from speech that may result in criminal sanction. The *de facto* absolute discretion that this situation affords to law enforcement officials, and the inherent susceptibility to abuse and political manipulation, as demonstrated by the application of the law in the present case, is inconsistent with the requirement of legality and certainty.

Reasonableness and Proportionality of Continued Detention

13. The requirements of Article 9 set out above apply both to the lawfulness of arrest *and* continuing detention. In the present case, even assuming that the arrest was lawful, which the Applicant disputes, the decision to detain him for 40 days was not. The Committee's jurisprudence makes clear that deprivation of liberty must be exceptional, and "*reasonable* in all the circumstances […] and must be *necessary* in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime".

    ***Hugo van Alphen v. The Netherlands* (Comm. No. 305/1988, para. 5.8), concerning remand in custody pursuant to lawful arrest. Also *Manfred Nowak*, p. 172**.

14. The Applicant's continued detention until 25 November 1999 was not necessary and may be regarded as arbitrary, as is discussed in more detail below. His rights as a detainee under Article 9(2), 9(3) and 9(4) were violated.

Article 9(2): Right to information concerning reasons for arrest and charges

15. Article 9(2) ICCPR enshrines the individual's right to be informed of the reasons for arrest and, where the arrest is pursuant to criminal justice, to be informed promptly of the charges against him/her.

16. Information as to the reasons for the arrest must be provided at the time of arrest. Article 9(2) is violated when no information at all is given, or when the information is not sufficient, such as where mere reference is made to the legal basis for arrest without any indication of the substance of the complaint against the person arrested. The Committee has observed that "Article 9(2) of the Covenant requires that anyone who is arrested shall be informed sufficiently of the reasons for his arrest to enable him to take immediate steps to secure his release if he believes that the reasons given are invalid or unfounded."

    ***Drescher Caldas v. Uruguay* (Comm. No. 43/1979, para. 13.2). Also *Glenford Campbell v. Jamaica* (Comm. No. 248/1987, para. 6.3).**

17. In addition to the reasons for arrest, subsequent information concerning the charge against the person must be provided promptly and with sufficient specificity to enable him or her to submit a well-founded application for remand.

    ***Glenford Campbell v. Jamaica* (Comm. No. 248/1987, para. 6.3); *McLawrence v. Jamaica* (Comm. No. 701/1996, para.5.6), failure or undue**

delay (of more than 1 month and of three weeks respectively) in informing the arrested of the criminal charges against him violate Art. 9 (2).

18. In the present case, the Applicant was arrested and interrogated on the day of his arrest without being given information as to the reason for his arrest or the nature of any charges against him.

19. In addition to violating Article 9 of the ICCPR, this procedure also violates Art.39 of the Angolan Constitution, which states that "No citizen shall be arrested without being informed of the charge at the time of the arrest," and Article 55(3) of the 'Press Law'

Article 9(3): Rights of Persons in Custody

20. Everyone has the right to be "brought promptly" before a judge or some other officer authorised by law to exercise judicial power, regardless of whether the person has been arrested on the basis of a court order or due to direct action by the executive authorities. No time limits are expressly established in the Covenant, but as the Committee has itself emphasised, delays must not exceed a few days. Thus, custody must end within a few days with either release or remittal by a judge to pre-trial detention.

    General Comment No. 8 on Article 9(3). Also *Koster v. The Netherlands (*ECHR Judgment of 28 November 1991, para. 24*)* in relation to the analogous requirement in Art. 5(3) ECHR: 'Whereas promptness is to be assessed in each case according to its special features…. The significance to be attached to those features can never be taken to the point of impairing the very essence of the right guaranteed by Article 5 para.3, that is to the point of effectively negating the State's obligation to ensure a prompt release or a prompt appearance before a judicial authority….'. In *Patrick Taylor v. Jamaica (*Comm. No. 707/1996, para. 8.3*),* the failure to bring the Applicant before a judge and to inform him about the charges against him during the 26 days of his detention was considered in breach of Arts. 9(2) and 9(3).

21. In the instant case, the Applicant was never taken before a judge at any point during the 40 days of his detention. Such delay amounts to a violation of Article 9(3). It also violates Article 38 of the Angolan Constitution: "Any citizen subjected to preventive detention shall be taken before a competent judge to legalise the detention and be tried within the period provided for by law or released".

22. Moreover, the Applicant was held in *incommunicado* detention for ten days, without the opportunity to consult a lawyer, as discussed below. ***(See para. III.6, supra)***. Incommunicado detention has been held by the Committee to itself give rise to a violation of Article 9(3), as it negatively impacts on the exercise of the right to be brought before a judge.

    ***Terán Jijón* v. *Ecuador* (Comm. No.277/1988, para. 3).**

<u>Right to Release Pending Trial</u>

23. The right to liberty and the presumption of innocence are both fundamental human rights. Therefore, as enshrined in Article 9(3), a person suspected of a criminal offence who has not yet been found guilty should, as a general rule, be released pending trial. Deprivation of liberty, as an exceptional measure, must be necessary and reasonable in all the circumstances. In the present case, the Applicant should have been released promptly pending trial.

24. Detention may be justified where it is necessary to prevent the flight of suspects. However, as the European Court of Human Rights has noted, the risk of flight must be more than slight.

    ***Van Alpen v. Netherlands*, para. 5.8, where the Court notes that a slight risk of absconding is insufficient.**

25. The seriousness of the offence alleged may be a factor for consideration, although not sufficient in itself to justify detention absent other considerations.

    ***Letellier v. France* (ECHR, Judgment of 26 June 1991): the seriousness of the murder charge may be taken into account in assessing the risk of absconding and necessity of pre-trial detention, although they are not *per se* sufficient to justify refusal to release pending trial.**

26. In the present case, there was no reason to believe – and the state adduced no evidence – that the Applicant might attempt to evade the authorities. On the contrary, on 13 October 1999 just three days prior to his arrest, the Applicant had appeared in person before the National Criminal Investigation Division when asked to do so. *(See para. III.2 supra)*. Moreover, when the Applicant had faced charges concerning other articles he had written in the past, he had made no attempt to abscond. (Also report of Amnesty International *"Angola: Freedom of Expression on Trial"* 18 June 2000). The Applicant's good faith was borne out subsequently by the fact that, once released on 25 November, 1999, he remained in Angola to defend himself against the charges at trial and on appeal, and he remains there as at the date of filing this Communication.

27. Other factors are also relevant to an assesment of the reasonableness and proportionality of continued detention in this case. First is the relatively minor nature of the offence alleged. The offence involved not an egregious attack on life, person or public order, but the criticism of the political activity of the President. Moreover, there was no suggestion that a serious offence might be committed in the future if the Applicant was at large. These factors underscore the lack of justification for the detention of the Applicant over 40 days. The lack of judicial supervision left the Applicant without a remedy in respect of this violation.

    Letellier v. France* (ECHR, para. 43), *ibid.

<u>Article 9(4): Habeas Corpus</u>

28. All persons deprived of their liberty, even when such deprivation is lawful, are entitled to have the lawfulness of their detention reviewed in court without delay.

The significance of this guarantee is pronounced where custodial detention or other security measures have been imposed solely by the executive authorities rather than pursuant to a judicial order.

29. The Committee has found that detention for five weeks without being brought before a judge, and without having access to legal representation to challenge the lawfulness of the detention, constitutes a violation of Arts. 9(3) and (4).

    ***Paul Kelly v. Jamaica* (Comm. No. 253/1987, para. 5.6). Also *Inés Torres v. Finland* (Comm. No. 291/1988, para. 7.3), where held that three months was impermissible) and *Albert Berry v. Jamaica* (Comm. No. 330/1988, para. 11.1)**

30. The Committee has found that incommunicado detention violates Art. 9(4), as it effectively precludes the arrested person from challenging the lawfulness of his detention.

    ***Tshitenge Muteba v. Zaire* (Comm. No.124/1982, para. 12.**

31. On 26 October 1999, the Applicant's lawyer filed an application for *habeas corpus* on the Applicant's behalf before the Supreme Court in Luanda in exercise of the rights recognised in Article 42(1) of the Constitution of the Republic of Angola 1991. *(See Annex A, III)* The *habeas corpus* application was never acknowledged, assigned to any judge nor heard by the Angolan courts. ***(See para. II.8, supra)***. This amounts to a violation of Article 9(4).

<u>Article 9(5): Compensation for Unlawful Arrest</u>

32. As set out above, the Applicant has been the victim of unlawful arrest and detention. As such, he has an 'enforceable right to compensation,' in accordance with Article 9(5). The mechanism for establishing the unlawfulness of his arrest and detention, which would have provided the basis for any domestic claim in respect of compensation was denied to the Applicant, as explained above. The respondent State should now provide compensation in respect of the violations of his rights under Article 9.

    Nowak, M., 181-182. Also *Monja Jaona* v. *Madagascar* (Comm. No. 132/1982, para. 16); *Ramon Martines Portorreal* v. *Dominican Republic*, (Comm. No. 188/1984, para. 12); *Edgardo Dante Santullo Valcada* v. *Uruguay,* (Comm. No. 9/1977, para. 13). In each instance the Committee specified that compensation should be granted under Article 9(5) of the Covenant, where there were violations of Article 9(1) – (4).

B. Right to Fair Trial, Article 14

<u>Article 14</u>

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law,

everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law….

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
    (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
    (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
    (c) To be tried without undue delay;
    (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
    (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him….

Article 14(1): Fair Trial

1. The right to a fair trial is a fundamental human right. While Articles 14(2) and (3) specify certain minimal elements of that right, it is broader than the simple sum of these guarantees. For example, one of the most important criteria of fair trial is the principle of equality of arms between the plaintiff and the defendant, or the prosecutor and the accused. Any difference of treatment between the prosecutor and the accused, although not envisaged explicitly in Article 14, will amount to a violation of the requirement of fair trial in Article 14(1).

    ***Ilda Thomas v. Uruguay*, (Comm. No. 139/1983, para. 10), where denial of a fair hearing was found as autonomous violation in addition to the breaches of the other specific guarantees in Article 14. Also *De Haes and Gijsels v. Belgium* (ECHR, Judgment of 24 February 1997, para. 53), a case concerning freedom of expression, where the ECHR stated that: "...the principle of equality of arms - a component of the broader concept of a fair trial - requires that each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent." Thus failure of the first instance court to allow the production of the documents and of the medical opinion on which the two journalists' article was based, put them at a substantial disadvantage vis-à-vis the plaintiffs, this giving rise to a violation of the principle of equality of arms and thus of Article 6(1) ECHR (ibid., paras. 58-59).**

Article 14(1): The right to a 'public' trial

Press and Public in the Courtroom

2. As the Committee has noted 'the publicity of hearings is an important safeguard in the interest of the individual and of society at large'.

   General Comment 13

3. As such, while the right to be tried in public is not an absolute right and can be restricted, this should be done only in the 'exceptional circumstances' specified in Article 14 **(General Comment 13, para. 6).** Article 14 anticipates that exclusion of the press or public may be permissible 'for reason of morals, public order or national security in a democratic society, or when the interest if the private lives of parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.'

4. The present case does not fall within any of these exceptional circumstances specified in Article 14. In the present case the purported reason for exclusion of the press and public was one disruptive photographer who took photographs during trial. While the court is entitled to restrict such activity, this could readily have been achieved by other means, such as the removal of the camera or even, if strictly necessary, the exclusion of the individual in question. The exclusion of the public at large and the press from a trial of this nature cannot however be considered a necessary or proportionate response and the decision to take such measures violates Article 14(1) of the Covenant.

<u>Article 14(3)(a): Right to be informed of the charges</u>

5. The duty to inform of charges is essentially linked to the ability of the accused to prepare a defence.

6. The information provided must relate to the nature and cause of the accusation, and must be sufficiently detailed as to the facts alleged and their legal characterisation to enable the accused to refute the allegations against him. The duty to inform under Article 14(3)(a) is more precise and comprehensive than that provided for in Article 9(2). As underscored in General Comment No. 13 (para. 8), the information must indicate both the exact legal description of the offence and the alleged facts on which the charge is based.

7. As to the right to be informed "promptly", the General Comment (para. 8) clarifies that this right requires that the information be given as soon as the charge is first made by the competent authority

   ***Sendic v. Uruguay* (Comm. No. 16/1977, para. 20), where the Applicant had been subjected to trial without any previous knowledge of the charges against him; *Mbenge v. Zaire* (Comm. No. 63/1979, para. 14.1, 14.2).**

8. In the present case, formal charges were received on 25 November 1999, some 40 days after the Applicant was detained on 16 October 1999. The nature of the charges, and the lack of complexity of the factual investigation, underscore the lack of justification for such a time lapse in the presentation of charges in this case. It is suggested that in the present circumstances, the right to be informed "promptly" was violated.

9. The case also involves striking violations of the duty to inform in detail of the nature and cause of the charges. First, the formal indictment of November 1999, cast in general terms, fails to meet this requirement *(Annex A,II).* The Supreme Court *(See Supreme Court Judgment, Annex A XI, under the heading "Concerning the alleged nullity of the prosecution")* sought to justify the lack of detail and specificity, stating that what the law requires is only a "mere indication of the facts", as opposed to a detailed and precise description. If this interpretation of the law of Angola is correct, then there is an incompatibility between Angolan law as applied in this case and Art 14(3)(a) ICCPR. Even if the interpretation is wrong, acceptance of mere 'indication of the facts' - a lower standard than that required by the Covenant - constitutes a violation in the present case.

10. Secondly, as noted in the Summary of the Facts *(see para. III.12 above),* the Applicant appears to have been convicted in respect of certain crimes, or under certain provisions, with which he had never been charged or of which he had never been informed. In its decision on 31 March, the Provincial Court *convicted* the applicant under 'Articles 43, 44, 45 and 46' of the Press Law, with reference to the 'legal framework' of Articles 181, 407, 408, 409 and 410 of the Penal Code. Yet the Applicant was *charged* only with offences under Articles 44 and 46 of the Press Law.

11. The additional provisions, in particular Article 43, are more broad-reaching than the specified in the indictment. *(See IV. A Article 9-Impermissible Vagueness).* Moreover, two of the provisions referred to for the first time in the trial judgement explicitly mandate or provide for prison sentences. (Article 410 of the Penal Code provides that injury 'shall be punished by a prison term of up to two months' and Article 45 of the Press Law provides for 'imprisonment of up to two years.' *See Annexes A, IV and A, V)*. This would appear to indicate that these offences are not only different but also more serious than those specified in the Indictment.

12. The conviction of the Applicant on these additional charges should have been quashed by the Supreme Court, which instead upheld the convictions. The Supreme Court asserted that a Provincial Court 'may sentence a defendant for an infraction different from the one that he was accused of, even if it is more serious, provided the grounds are facts included in the indictment or similar ruling.' *(See Supreme Court judgement, Annex A, XI).*

13. While a trial judge may, in particular circumstances, allow a judge to change the legal characterisation of charges during trial (the principle *Iura novit curia*), the fundamental principle that the accused must be put on notice and given the opportunity to prepare his defence to those charges must not be compromised. By contrast, convicting for crimes with which the accused was not charged negates entirely the right to defend oneself in respect of those charges.

    See the discussion set out in the *Prosecutor v Kupreskic et al* before the International Criminal Tribunal for the former Yugoslavia (ICTY), IT-95-16-T, Judgement, 14 January 2000.

14. Finally, certain national systems allow conviction for 'lesser included offences' than those charged, where all the elements of the crime are the same and the conviction is for a less serious crime than that charged. However, contrary to the Supreme Court's statement in this case, conviction for a more serious crime than first charged is impermissible and violates the right of defence. The approach adopted in this case is thus at odds with the principle of fair trial in the ICCPR and with international standards of justice in national and international criminal courts. The original offences the applicant was charged with, articles 44 and 46, make no reference to either the criminality of the offence or the criminal sanction of imprisonment. Whereas the additional offence the applicant was convicted under article 43 and 45 expressly refer to the criminality of the offence concerned. Furthermore Article 45 (3) in which the applicant was convicted of by the Supreme Court provides for a maximum period of two years of imprisonment:

    See the discussion set out in the *Kupreskic* judgement, *ibid*.

The right to counsel and to present one's defence in person or through legal representation

15. Article 14(3)(b) provides for the right to 'communicate with counsel of one's own choosing' and 14(3)(d) provides for the right to be represented, in person or through such counsel.

16. The right to consult counsel of choice is violated by *incommunicado* detention, which deprives the detainee, at a critical stage of proceedings, of the possibility of communicating with counsel.

    ***Drescher Caldas v. Uruguay* (Comm. No. 43/1979, para. 13.3), and in *Lafuente Penarrieta v. Bolivia* (Comm. No. 176/1984, para. 16).**

17. It is also violated where an *ex-officio* defence attorney is appointed for the accused against his will.

    ***Celiberti de Casariego v. Uruguay*, (Comm. No. 56/1979, para. 11), and *Domukovsky and others v. Georgia* (Comm. No. 623, 624, 626 and 627/1995, para. 18.9).**

18. The right to counsel is violated where counsel is not qualified or competent. The right to counsel implies the right to counsel that satisfies a basic standard of 'effectiveness'. The Committee, like the ECHR, has recognised the need for 'effective' representation. While the former has addressed the issue primarily in the context of capital cases, the ECHR has affirmed the principle of effective representation also in relation to non-capital cases.

    ***Pakelly v. Germany* (ECHR Judgement of 25 April 1983, para. 31) on the right to 'effective assistance' designed to ensure effective protection of the right to defence. Also *Paul Kelly v. Jamaica* (Comm. No. 253/1987, para. 5.10), where the Committee stated that: "while Article 14(3)(d) does not entitle the accused to choose counsel provided to him free of charge,**

measures must be taken to ensure that counsel, once assigned, provides effective representation in the interests of justice."

19. The State's legal aid provisions may limit the exercise of the right to 'choose' ones representative. However, there is no justification for limiting the exercise of this right where, as in the present case, the Applicant was willing to pay for counsel and did not request the appointment of free legal counsel.

    ***Albert Berry v. Jamaica* (Comm. No. 330/1988, para. 11.6). Also *Paul Kelly v. Jamaica* (Comm. No. 253/1987, para. 5.10), where the Committee stated that: "while Article 14(3)(d) does not entitle the accused to choose counsel provided to him free of charge, measures must be taken to ensure that counsel, once assigned, provides effective representation in the interests of justice." Also *Glenford Campbell v. Jamaica* (Comm. No. 248/1987, para. 6.6).**

20. The right to legal representation is also violated where there is insufficient time to consult with counsel (Art 14(3)(b)), which is an essential element of the right to prepare one's defence (Article 14(3)(d)).

    ***George Winston Reid v. Jamaica*. (Comm. No. 355/1989). Also *Phillip v. Trinidad and Tobago* (Comm. No. 594/1992, para. 7.2): where the Committee found that "the failure to grant the Applicant's lawyer an adjournment, when he had been appointed three days before the retrial and had never dealt with a capital case, meant that the Applicant was not effectively represented in breach of Article 14(3)(b) and (d)". Also *Daud v. Portugal* (ECHR, Judgment of 21 April 1998, paras. 39-42), where the Court found that the first defence lawyer was inadequate and the second had been given too little time to study the case and prepare the defence, in breach of Article 6(3)(c).**

21. In safeguarding this right the court should not remain passive but is obliged to take reasonable proactive measures to ensure the effective representation of defendants.

    ***Daud v. Portugal, supra,* noting that the court should have inquired into the way the first defence lawyer was carrying out her duties in order to replace her sooner, and should have granted an adjournment to the second defence lawyer even in the absence of a request by the latter. Article 6(3)(c) being only a specification of the principle of fair trial in Article 6(1), the Court also found that the Applicant had not been given a fair trial (*ibid.*, para. 43).**

22. In the present case, these rights were violated in several respects. Firstly, the Applicant was held *incomunicado* for 10 days, at a critical stage, during which he was interrogated. He had no opportunity to consult with counsel at that stage *(Section III.B above).*

23. Secondly, the lawyer of the Applicant's choice, Luis do Nascimento, was arbitrarily removed from the case and disbarred for 6 months. When he returned to

the Court on 25 March 2000 to take up the Applicant's defence, he was unlawfully (as recognised by the Supreme Court of Angola in its 26/10/2000 judgement, under the heading "Procedural Issues: -Abandonment of the client by Counsel") prevented by the trial judge from doing so. *(Section III.E and III.G above).* This constituted a violation of the Applicant's right to counsel of his own choosing.

24. Thirdly, the lawyer appointed was not legally qualified and not competent to provide adequate defence.

25. Finally, upon disbarring Nascimento on 23 March 2000, and appointing an *ex officio* defence lawyer, the trial judge did not order an adjournment of the trial, which continued on the same day. It is therefore clear that the Applicant was not afforded adequate time to communicate with his new defence counsel, and as such to prepare his defence, as required by Article 14(b) and (d).

Article 14(3)(d) and (e): The right to present evidence pursuant to the right to defence

26. The Applicant sought to present in his defence evidence of the truth of his statements, and the good faith basis on which they were made, pursuant to his professional role and responsibility as a journalist.

27. As discussed in detail in relation to the right to free expression (*see IV.C. below*), international standards increasingly indicate that restrictions on statements of opinion may not be imposed as long as they are made in good faith, and that persons accused of defamation must be given the opportunity to demonstrate the truth of factual allegations. This is particularly so where the allegedly defamatory statements are of a political nature and are made against politicians or others in high office.

    ***Castells* v. *Spain* (ECHR, Judgment of 26 March 1992, para.48, 46) where the Court attached significant importance to the fact that evidence for the purpose of demonstrating truth and good faith were deemed inadmissible and stated that "such an interference in the exercise of the applicant's freedom of expression was not necessary in a democratic society." The Court further noted that "[t]he limits of permissible criticism are wider with regard to the Government than in relation to a private citizen, or even a politician. In a democratic system the actions or omissions of the Government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion."**

28. In the present case these defences ought to have been available to the Applicant, but were not. The judge allowed the Applicant to present only one witness on the basis that Article 46 of the Press Law precluded the presentation of evidence against the President. The witness, human rights activist Fernando Macedo, was expelled from the court when he expressed the opinion that Article 46 of the Press Law is unconstitutional. The Judge allowed no further witnesses.

29. The Applicant also sought to offering into evidence numerous documents - including the texts of speeches by the president himself as well as senior government officials, various government papers and resolutions, and statements by foreign officers and agencies, such as the U.S. Secretary of State. He was denied the opportunity to do so, again on the basis of Article 46 of the Press Law.

30. Such evidence, although principally relevant to the truth or good faith of statements, would also have been relevant to establishing whether or not all the elements of the offence had been met. Specifically, they were germane to the Court satisfying itself beyond reasonable doubt that he possessed the requisite mental element, namely, that he had acted "consciously and deliberately, and [with] this intention of offending their Excellencies the President of the Republic and the Attorney General of the Republic…" *(See Indictment, Annex A II).*

31. The application of this rule resulted, in effect, in the denial to the Applicant of any opportunity to defend himself, in violation of Article 14.

Appeal to an Impartial Tribunal

32. This right to Appeal one's conviction to a 'higher tribunal' is specifically provided for in Article 14(5). A 'tribunal' signifies a 'competent, independent and impartial tribunal established by law.'

    Nowak supra, p. 244

33. In appellate proceedings, as in trial proceedings, the basic fair trial guarantees must be observed.

    Nowak, *ibid*., p. 267: "in appellate proceedings as well, the guarantees of a fair and public trial are to be observed."

34. The right to an appeal before an impartial tribunal is infringed where the court prejudges the issue before it, or where it is influenced by personal interest or political bias.

    ***González del Rio v. Peru* (Comm. No. 263/1987, para. 5.2), where the fact that some of the judges had made statements referring to the political implications of the case, which allegedly were the reason of its delay, was in violation of the requirement that a court be independent and impartial. Also *Karttunen v. Finland* (Comm. No. 387/1989, para. 7.2), where the Committee observed "'Impartiality' of the court implies that judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties.**

35. In the present case the impartiality of the Supreme Court was undermined by the public statements made while the appeal was pending. *(See Fact Section).*

36. The right to appeal is violated where the basis on which one is convicted is not sufficiently clear.

***Henry v. Jamaica,* (No. 250/1987, Section 8.4). Also Nowak, p. 268.**

37. In the present case, the charges, and the legal basis of the conviction, were not sufficiently clear but shifted over time, as set out above. Moreover, the failure to make available the judgement against the Applicant negated his ability to lodge a meaningful appeal against that judgement.

C. Right to Freedom of Expression, Article 19

Article 19

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 the respect of the rights or reputations of others;
   b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

The Right to Free Expression and the Role of the Press

1. As numerous international, regional and domestic courts and bodies have repeatedly observed, the right to freedom of expression is fundamental not only to each individual's own development, but also to any democratic system of government. The Committee has itself stated that 'the freedoms of information and expression are cornerstones in any free and democratic society. *It is in the essence of such societies that its citizens must be allowed to inform themselves about alternatives to the political system/parties in power, and that they may criticise or openly and publicly evaluate their Governments* without fear of interference or punishment, within the limits set by Article 19, paragraph 3.'

   ***Aduayom et al. v. Togo* (Comm. No. 422-24/1990, para. 7.4, emphasis added); *Media Rights Agenda et al. v. Nigeria*, (African Commission on Human and People's Rights ("Af. Comm."), Comm. Nos. 105/93, 128/94, 130/94, 152/96, para.52): "[F]reedom of expression is a basic human right, vital to an individual's personal development, his political consciousness, and participation in the conduct of public affairs of his country." Also *Lingens v. Austria*, E (ECHR, Judgment of 8 July 1986, para.41): "[F]reedom of expression . . . constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment."**

2. The particular role of the press as "public watchdog" – both by imparting information and providing a means for the public to express its views – has been repeatedly recognised as essential to the proper functioning of a democratic society. The work of journalists thus requires particularly vigilant protection

under the right to free expression. An integral aspect of this role of the press is the ability to express political opinion, including criticism of those who wield political power.

> ***Thorgeirson v. Iceland*** **(ECHR, Judgment of 25 June 1992, para. 63): "Regard must … be had to the pre-eminent role of the press in a State governed by the rule of law. Whilst the press must not overstep the bounds set, *inter alia*, for 'the protection of the reputation of . . . others,' it is nevertheless incumbent on it to impart information and ideas on matters of public interest. Not only does it have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of 'public watchdog'." Also *Castells v. Spain* (Judgment of 26 March 1992, para. 43): "Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders". Note the opinion of the Inter-American Court of Human Rights in *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Series A, No. 5, Advisory Op. OC-5/85 of 13 November 1985, para.34), where it similarly emphasised the central importance of journalists in "mak[ing] the exercise of freedom of expression a reality."**

3. In addition to the violation of Article 19, the right to take part in the conduct of public affairs, as guaranteed by Article 25 of the Covenant, is also implicated by the Respondent State's action against the Applicant for his statements concerning President dos Santos. As the Committee has stated: "In order to ensure the full enjoyment of rights protected by Article 25, the free communication of information and ideas about public and political issues between citizens, candidates and elected representative is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion."

> **General Comment No. 25, para. 25, adopted 12 July 1996; *Gauthier v. Canada* (Comm. No. 633/1995, para. 13.4).**

4. Domestic high courts have likewise echoed the important role of the press, including in presenting criticism of those in power.

> ***National Media Ltd. and Others v. Bogoshi*** **(South Africa, Supreme Court of Appeal, 29 September 1998, 1999 (1) BCLR 1 (SCA) at 18D): "In a system of democracy dedicated to openness and accountability, as ours is, the especially important role of the media, both publicly and privately owned, must in my view be recognised. The success of our constitutional venture depends upon *robust criticism* of the exercise of power. . . It is for this very reason that the Constitution recognises the especial importance and role of the media in nurturing and strengthening our democracy," emphasis added, quoting *Holomisa v. Argus Newspapers Ltd.*, 1996 (2) SA 588 (W) at 608J-609D). Also *Nazami v. Rashid* (Pakistan, High Court, Lahore, 27 March 1996, para. 28): "Freedom of the press hardly requires any emphasis. It is essential not only for the healthy growth of democratic**

norms but also for inculcating awareness in the citizens and for reflecting public opinion, its ultimate object being the protection of the rights of the citizens. In an accountable democracy, it is a common practice that those who find no other venue of venting their views on matters of public interest use the columns of press for this purpose."

Restrictions on Free Expression: the Standard and the Appropriate Burden of Proof

5. In the present case, there can be no doubt that the Applicant has suffered a restriction of his right to free expression. On the sole basis of statements made by the him regarding President dos Santos, the Applicant has: (1) been unlawfully arrested and detained; (2) had severe restrictions on his rights to free speech and movement imposed pending trial; (3) been prosecuted, convicted and sentenced to a six month prison sentence suspended for five years, fined and ordered to pay compensation and court costs; and (4) been detained and prevented from leaving the country, even after the criminal case was completed and no legal limits on his free movement remained. **(*See Fact Section).*** His ability to express opinion freely has been impeded by the threat of similar repression by the state in the future.

6. Under the Committee's jurisprudence, each of these actions constitutes a restriction of the Applicant's right to free expression.

    ***Pietroroia v. Uruguay* (Comm. No. R.10/44) where the Applicant's unlawful arrest, detention *incommunicado*, and subsequent trial and conviction for his political activities constitute restrictions; *Park v. Korea* (Comm. No. 628/1995) where it was held that the criminal conviction of Applicant for statements critical of government constitutes restriction; *Kalenga v. Zambia* (Comm. No. 326/1988) where it was held that the denial of passport and travel restrictions, *inter alia*, because of political statements constitutes restriction.**

7. The question is whether such restrictions can be justified under the Covenant. Due to the 'paramount importance' of the right to freedom of expression in democratic society, the Covenant strictly provides for the circumstances under which restrictions on the right may be imposed. In accordance with Article 19(3), the Committee has stated that any restriction on free expression "must cumulatively meet the following conditions: it must be *provided for by law*, it must address one of the *aims* enumerated in paragraph 3(a) and (b) of Article 19, and must be *necessary* to achieve the legitimate purpose."

    ***Sohn v. Korea* (Comm. No. 518/1992, para. 10.4, emphasis added); *Kim v. Korea* (Comm. No. 547/1994, para.12.2). On the 'paramount importance' of free expression, see *Park v. Korea* (Comm. No. 628/1995, para. 10.3).**

8. Furthermore, once the Applicant has demonstrated, as in this case, that restrictions on his right to free expression have been imposed, the burden falls on the Respondent State to establish that the requirements set forth in paragraph 3 are met.

Laptsevich v. Belarus **(Comm. No. 780/1997) where held that failure of State party to explain why restrictions on Applicant's publishing and disseminating of pamphlet are necessary requires finding of violation;** ***Andrews v. Law Society of British Columbia*** **56 DLR (4th) 1 at 21 (S.C. of Canada 1989), where McIntyre J dissenting on the merits, but speaking for the court on this issue of principle under the Canadian Charter of Rights and Freedoms);** ***R v. Butcher*****, 2 NZLR 257 at 266 (NZ Court of Appeal 1992) (same under the NZ Bill of Rights Act 1990).**

9. Without prejudice to the submission that the burden lies with the Respondent State, the Applicant further submits that the State cannot meet its burden in establishing *any* of the requirements set forth under paragraph 3, as discussed in turn below.

Provided by Law

10. As an initial matter, the State must establish that any restriction on the Applicant's free expression is "provided by law." The Committee has indicated that, at a bare minimum, the "provided by law" requirement mandates that there be a *"legal framework"* under which a restriction is imposed and that the Applicant be given the opportunity to be heard in all proceedings and to appeal against adverse decisions. In this case, however, not even the bare framework of what constitutes a restriction "provided by law" was met.

- Lack of Legal Framework

11. Certain of the restrictive measures that have been imposed on the Applicant – such as unlawful detention and travel restrictions – have no basis in Angolan law. They are in direct contravention of legal provisions or court orders which govern the Applicant's circumstances. Accordingly, these restrictions lack any 'legal framework' and fail to meet the requirement that they be 'provided by law'.

- Impermissibly Vague Provisions

12. To the extent that the Applicant's conviction and sentence purported to be based on Angolan law, the provisions relied upon are so vague that they cannot satisfy the "provided by law" requirement. The Committee has noted that a vaguely defined offence may be incompatible with Article 19.

Report of the Human Rights Committee, 1998 GAOR Supp. No. 40, UN Doc. A/53/40, Vol. 1 at para. 153 (Belarus): "The many restrictions imposed on the media, in particular the vaguely defined offences, are incompatible with Article 19, paragraph 3, of the Covenant." Also Report of the Human Rights Committee, GAOR Supp. No. 40, UN Doc. A/55/40, Vol. 1 at para. 487 (Kuwait): "The Committee is particularly concerned about the vagueness of chapter III of Law No. 3 of 1961 on Printing and Publication…."

13. However, as the Committee has not explicitly set forth the standard that a legal provision must meet in this regard, the jurisprudence of the European Court of

Human Rights (ECHR) – which, under Article 10(2) of the European Convention must similarly determine whether a restriction on free expression is "prescribed by law" – is particularly instructive.

14. The ECHR has found that any law which imposes a restriction on free expression must be both "adequately accessible" -- so that an individual citizen understands the legal rules that apply to him or her -- and "sufficiently precise," so that an individual is able to regulate his or her conduct and "foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail."

    ***Sunday Times v. UK (No. 1)* (ECHR, Judgment of 29 March 1979, para.49). Also *Hasan and Chaush v. Bulgaria* (ECHR, Judgment of 26 October 2000, para.86), finding an interference with the internal organisation of the Bulgarian Muslim community "not prescribed by law in that it was . . . based on legal provisions which allowed an unfettered discretion to the executive and did not meet the required standards of clarity and foreseeability."**

15. Similar requirements are a common feature of the jurisprudence of other legal systems.

    See, e.g., *Irwin Toy v. Quebec*, 1 S.C.R. 927, 983 (S.C. Canada 1989), establishing that a law would fail the prescribed-by-law test where there is "no intelligible standard"; *Connally v. General Construction Co.*, 269 U.S. 385 (1926) which decided that a statute will be held void for vagueness if persons "of common intelligence must necessarily guess at its meaning and differ in its application."

16. Moreover, while a vague statute may generally violate fundamental requirements of fairness, "it has been emphasised that *even stricter standards* of permissible statutory vagueness must be applied where freedom of expression is at issue; for at jeopardy are not just the rights of those who may wish to communicate and impart ideas and information but also those who may wish to receive them."

    ***Chavunduka, et al. v. Minister of Home Affairs, et al.*, Zimbabwe Supreme Court, Judgment of 22 May 2000, p.13-14 (citing *Smith v. California*, 361 U.S. 147, 151 (1959), emphasis added), finding a statute punishing any "false statement" likely to cause "fear, alarm or despondency" to be "vague, being susceptible of too wide an interpretation" and over-broad.**

17. As set out above, with relation to Article 9 and 14, particularly strict standards are also mandated where there are penal consequences for the individual. The Applicant was charged with defamation and injury with reference to the Press Law, as set out in the Fact Section above, and the Provincial Court convicted him of "abuse of the press" (Art. 43 of the Penal Code) with reference to Articles 43-46 of the Press Law. The Applicant had never been charged with the more general offence of 'abuse of the press'.

18. The laws under which the Applicant's free speech appears to have been was restricted are Articles 43-46 of the Press Law, and the Penal Code, set out in relation to the charges against the accused. *(See discussion under Right to Fair Trial section, supra)*. For example, Article 43 of the Press Law (crime of abuse of the Press) criminalises 'any act or behaviour that injures the judicial values and interests protected by the criminal code.…' Article 410 criminalises 'injury [*injuria*], where no specific fact is charged, if committed against any person publicly, by gestures, de viva voce, by published drawing or text, or by any other means of publication….'

19. As the crime of '*injuria*' is potentially extremely broad-reaching, the lack of clarity in the law allows law enforcement bodies in Angola unlimited discretion in applying these laws, and precludes the Applicant and other citizens from understanding the precise scope of the prohibition and the circumstances in which statements may be punishable. As such, as set out also in relation to violations of the Applicant's right to liberty (**See discussion under Article 9, *supra***), these offences are over-broad and do not satisfy the "provided by law" test.

20. Furthermore, to the extent that the crime of "*injuria*" may simply be found to constitute any expression of opinion that "injures" another individual in any manner, then the law is overbroad and limitless in its application, potentially applying to any statement of perceived criticism. The Committee has itself noted the danger of such overly broad prohibitions in the context of free expression on several occasions.

    Report of the Human Rights Committee, 2000 GAOR Supp. No. 40, UN Doc. A/55/40, Vol. 1 at para. 119 (Morocco), expressing "concern that… provisions . . . severely restrict freedom of expression …by imposing penalties for broadly defined offences". Also para. 153 (Hong Kong SAR), expressing "concern that the offences of treason and sedition . . . are defined in overly broad terms, thus endangering freedom of expression guaranteed under Article 19.") Because such an overbroad prohibition serves to intimidate individuals from expressing themselves under any circumstances, such a law would clearly fail the strict requirement of proportionality imposed by the necessity test. *Infra* IV. See, e.g., *Airport Commissioners of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987), where the court unanimously strike down a provision that prohibited any individual or group from "engag[ing] in First Amendment activities with the Central Terminal Area at the Los Angeles International Airport" as overbroad because it potentially prohibited all forms of expression.

21. To compound this fundamental uncertainty regarding the restrictions imposed in the form of criminal charges, when the Applicant was released on bail, he was ordered not to "engage in certain activities that … create the risk that new violations may be perpetrated." These provisions are likewise insufficiently precise and failed to provide notice to the Applicant as to what conduct is being proscribed.

22. Despite attempts to clarify the meaning of this restriction and its implications for the Applicant's conduct pending trial, neither the Applicant nor his lawyer could do so *(see Annex A, IV and V)*. It remained unclear whether Article 270 of the Penal Code might provide a basis for prohibiting *any and all* statements by the Applicant – even ones that might not regard President dos Santos, but only the legal process itself. This was confirmed by the trial judgement's repeated and unsubstantiated references to the Applicant's 'continued criminal activity' during the bail period.

23. As a result of the ambiguity and breadth of the offence in question, the Applicant continues to exercise self-censorship in fear of a reprised detention or prosecution under these statutes. No doubt other Angolans exercise similar self-censorship for fear of recrimination. It is respectfully submitted that the restrictions that continue to be imposed on the Applicant for his statements regarding President dos Santos lacked sufficient legal basis and may not be considered "provided by law."

Legitimate Aim

24. The second prong of the test under Article 19, paragraph 3 requires that the Respondent State establish that the relevant restrictions have been imposed in furtherance of one of the legitimate aims enumerated under paragraphs 3(a) or (b).

25. For present purposes, it is assumed that, having relied on the laws of defamation and injury, the respondent State may invoke the aim of respecting the 'rights or reputations of others' pursuant to paragraph 3(a) as justification for the restriction of free expression. The aims under paragraph 3(b) *i.e.*, national security, public order or public health or morals do not appear to have been relied upon to date and are less likely to be of potential relevance in this case.

26. To date, the Committee has not explored fully the scope of this aim under paragraph 3(a). It is submitted that this provision must be interpreted consistently with the purpose of the Covenant, and must be interpreted restrictively. Otherwise, as the plain meaning of paragraph 3(a) could potentially be limitless in scope, considering that any governmental purpose might be described in some way as '[f]or the respect of the rights or reputations of others,' a flexible interpretation may frustrate the objective of Article 19.

> ***R. v. Oakes,* 1 S.C.R. 103 (S.C. Canada 1986), holding that any objective set forth as a reason for restricting fundamental rights under the Charter of Rights and Freedoms must "at a minimum . . . relate to concerns which are pressing and substantial".**

27. In particular, it is submitted that the legitimate aim of "respect[ing] . . the . . . reputations of others" must not be interpreted to include the protection of the reputation of a government or a head of state for the reasons set out below.

28. As numerous courts and tribunals have repeatedly observed, public figures such as politicians – even those who are not as powerful as President dos Santos – are precisely the individuals who least require protection from criticism. Unlike 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 consequently display a greater degree of tolerance."

***Lingens v. Austria* (ECHR, Judgment of 8 July 1986, para. 42.**

29. The political – as opposed to personal – nature of the criticism, is also a key factor. As the essence and purpose of the Covenant includes promoting rather than impeding political debate, including on occasion 'robust criticism' of political figures by the media, it would be anomalous if this provision of the covenant were to be interpreted to preclude public expressions of opinion as to political figures.

    General Comment No. 25, para. 25, adopted 12 July 1996 noting the importance of: '…. a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion'; *Oberschlick v. Austria* (ECHR, Judgment of 23 May 1991): "Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders."

30. The proposed interpretation is also consistent with the findings of many domestic courts, which have determined that it is not legitimate for a State to bring a cause of action based on harm to its reputation and reiterated the importance of allowing 'uninhibited public criticism'. For example, the U.K. House of Lords has determined that government institutions may not bring proceedings for defamation, because '[i]t is of the highest public importance that a democratically elected governmental body, or indeed any governmental body, should be open to uninhibited public criticism. The threat of a civil action for defamation must inevitably have an inhibiting effect on freedom of speech'.

    ***Derbyshire County Council v. Times Newspapers Limited*, AC 534, 547F-G (1993): "It is of the highest public importance that a democratically elected governmental body, or indeed any governmental body, should be open to uninhibited public criticism.". Also *Die Spoorbond v. South African Railways,* SA 999, 1012 (AD) (South African Court of Appeal 1946) holding that South African Railways, as a State enterprise, could not sue in defamation and stating that "[t]he normal means by which the Crown protects itself against attacks upon its management of the country's affairs is political action and not litigation". Also *Hector v. Attorney General of Antigua and Barbuda and Others*, Privy Council, Judgment of 22 January 1990, [1991] LRC (Const) 237, 240: "In a free democratic society it is almost too obvious to need stating that those who hold office in government and who are responsible for public administration must always be open to criticism. Any attempt to stifle or fetter such criticism amounts to political censorship of the most insidious and objectionable kind."**

31. In the instant case, the statements for which the Applicant was punished were a form of political expression in which he criticised the actions of the president. As a journalist engaging in and provoking debate over important political issues, the Applicant was exercising not only his right but also his responsibility as a member

of the press, consistent with the critical role of the media as recognised in the jurisprudence cited above.

32. The Applicant submits that, if the Committee considers that senior politicians may, in certain circumstances be covered by the protection of paragraph 3, on the facts of this case, the Respondent State may not invoke as a legitimate aim the protection of the reputation of the President -- the most powerful individual in the Government and the Angolan Head of State -- insofar as it touches on his political or governmental responsibilities.

33. In the present case, the President is not merely protected on an equal footing with others, but is given a greater degree of protection under the law. *(See Article 46, set out at Part III E).* He is protected even from the presentation to a court of law of evidence of the truth of statements that may allegedly defame or injure him. Affording such special protection to the President is not a 'legitimate aim', but is entirely at odds with international human rights standards. For example, the UN Special Rapporteur has stated that: "Defamation laws should reflect the principle that public figures are required to tolerate a greater degree of criticism than private citizens; defamation law should not afford special protection to the president and other senior political figures."

    Report of the Special Rapporteur (E/CN.4/1999/64, 24 January 1999, para. 28(b)). Also Report of the Special Rapporteur (E/CN.4/2000/63, 18 January 2000, para. 52): "Government bodies and public authorities should not be able to bring defamation suits; the only purpose of defamation, libel, slander and insult laws must be to protect reputations and not prevent criticism of Government or even maintain public order, for which specific incitement laws exist."

Necessary to Achieve a Legitimate Purpose

34. Even if the Committee were to take the view that there *is* a legitimate aim under Article 19(3) such as the protection of the President's reputation, it is submitted that the measures taken against the Applicant in this case cannot be justified as 'necessary' and 'proportionate measures,' under the test set out below.

35. Whether a state meets its burden of establishing the "necessity" requirement of paragraph 3 has generally been the crucial issue in past Committee communications concerning Article 19. In this respect, the Committee has been careful to scrutinise the full circumstances of a restriction in order to determine whether the restriction meets "a strict test of justification." Any restriction must be strictly necessary and proportionate to the particular aim.

    ***Park v. Korea* (Comm. No. 628/1995, para. 10.3); *Laptsevich v. Belarus* (Comm. No. 780/1997, para. 8.2). Also the concurring judgment in *Faurisson v. France* (Comm. No. 550/1993, para. 8, emphasis in original), where Committee members noted that "The Covenant … stipulates that the purpose of protecting one of those values [set forth in 3(a) and (b)] is not, of itself, sufficient reason to restrict expression. The restriction must be necessary to protect the given value. This requirement of necessity**

implies an element of proportionality. The scope of the restriction imposed on freedom of expression must be proportional to the value which the restriction serves to protect. It must not exceed that needed to protect that value. As the Committee stated in its General Comment 10, the restriction must not put the very right itself in jeopardy." Also the European Court has noted when considering restrictions on the right to free expression under Article 10 – which similarly requires an assessment of necessity – the choice the Court must make is not "between two conflicting principles but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted." Also *Sunday Times v. UK (No. 1)* (Judgment of 29 March 1979, para. 65).

36. In the present case the restrictions imposed on the Applicant - including unlawful imprisonment, criminal prosecution, restriction on speech pending trial, conviction and sentence, and subsequent restrictions on travel - were in no way necessary and proportionate to the ostensible aim of protecting the reputation of the president of Angola, a public figure who by his very position maintains unlimited access to the media and whose actions must, in a democratic society, be open to criticism and comment.

37. The Committee has repeatedly found violations of Article 19 under similar circumstances, where a state party has punished someone for statements critical of a political figure or the government.

Laptsevich v. Belarus (Comm. No. 780/1997), involving a fine and having leaflets confiscated for statements disagreeing with government); _Park v. Korea_ (Comm. No. 628/1995), concerning the conviction and imprisonment of Park for statements critical of government); _Kim v. Korea_ (Comm. No. 574/1994, same); _Sohn v. Korea_ (Comm. No. 518/1992) concerning the conviction and imprisonment of Sohn for pamphlets supporting labour movement; _Mukong v. Cameroon_ (Comm. No. 458/1991) concerning the detainment (incommunicado) and torture of Mukong for statements critical of President and government on radio interview; _Aduayom et al. v. Togo_, (Comm. Nos. 422-24/1990) involving an arrest, charged for criticising government; _Essono Mika Miha v. Equatorial Guinea_ (Comm. No. 414/1990) involving the detainment and torture of support of opposition party); _Kivenmaa v. Finland_ (Comm. No. 412/1990) involving a conviction and fine for participating in demonstration criticising visiting head of state; _Kalenga v. Zambia_ (Comm. No. 326/1988) concerning the jailing, torture and denial of passport for protesting government's national education, military and economic policies; _Bwalya v. Zambia_ (Comm. No. 314/1988) concerning the detainment, harassment, restriction of movement and denial of right to run for parliamentary seats for activities in opposition party; _Mpaka-Nsusu v. Zaire_ (Comm. No. 157/1983) involving detainment and banishment for opposing government; _Mpandanjila at al. v. Zaire_ (Comm. No. 138/1983) involving detainment, torture and banishment for opinions and statements opposing government; _Jaona v. Madagascar_ (Comm. No. 132/1982) involving arrest and persecution for statements opposing the government; _Muteba v. Zaire_ (Comm. No. 124/1982),

involving arrest, torture, and detainment (incommunicado) for statements opposing government; *de López v. Uruguay* (Comm. No. R.12/52) concerning arrest and torture for statements supporting trade unions; *Weisz v. Uruguay* (Comm. No. R.7/28) (same); *Pietroroia v. Uruguay* (Comm. No. R.10/44) (same).

38. The above cases have generally concerned restrictions purportedly imposed for reasons of "national security" and/or "public order." A finding of a violation is considerably more compelling in the instant case considering that the Angolan state has taken such extreme oppressive actions solely in an effort to protect President dos Santos's reputation.

39. As set forth in greater detail below, three factors are, in the Applicant's submission, decisive as to the determination that the extreme measures taken again him were unnecessary for the aim of protecting the reputation of President dos Santos, and disproportionate to that aim. As set out in more detail below, these are: (i) the measures resulted from criticism directed against the President, a *powerful political figure*; (ii) the measures were imposed on the Applicant for statements of *opinion*, without affording him an opportunity to establish the *good faith* basis for his statements; and (iii) the measures were *penal* in nature.

(i) Powerful Political Figure

40. The Applicant's critical statements were directed at President dos Santos, the single most powerful public figure in Angola. The President controls and directs not only the police and security forces, but also the Attorney General's office.

41. Courts and tribunals have repeatedly found public figures such as politicians less requiring of protection from criticism than ordinary individuals. This stems partly from the aforementioned fact that, unlike a private individual, a politician "lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance."

    ***Lingens v. Austria* (ECHR, Judgment of 8 July 1986, para. 42).**

42. Accordingly, the European Court of Human Rights, the African Commission on Human and People's Rights, the Inter-American Commission of Human Rights and various domestic courts around the world have found that "[t]he limits of acceptable criticism are . . . wider as regards a politician as such than as regards a private individual."

    ***Lingens v. Austria* (para. 42); *Media Rights Agenda et al. v. Nigeria*, African Commission (Comm. Nos. 105/93, 128/94, 130/94, 152/96, para. 52) "People who assume highly visible public roles must necessarily face a higher degree of criticism than private citizens; otherwise public debate may be stifled altogether."; *Inter-American Commission on Human Rights Report on Compatibility between "Desacato" Laws and the American Convention on Human Rights* (OAS/Ser L/VIII.88, Doc 9 rev (1995), p. 210): "[I]n democratic societies, political and public figures must be more,**

not less, open to public scrutiny and criticism.”; *New York Times v. Sullivan*, 376 U.S. 254 (1964), holding that in order for a public official to sustain a libel action, he or she must meet the heavy burden of proving that the defamatory statement was both false and made with “actual malice,” i.e., knowledge of the statement’s falsity or with reckless disregard for the truth); *Rajagopal v. State of Tamil Nadu*, India, Supreme Court, Judgment of October 1994, (6) SCC 632 (same); *Nazami v. Rashid*, Pakistan, High Court (Lahore), 27 March 1996 (same). Also *Lange v. Atkinson* (New Zealand Court of Appeal, Judgment of 21 June 2000) holding that the defence of qualified privilege applies to defamatory statements concerning political discussions); *Lange v. Australian Broadcasting Commission* (Australia, High Court, 1997, 71 A.L.J.R. 818) holding that false and defamatory statements concerning government and political matters are not actionable if the defendant establishes that the publication was made honestly, without malice and was reasonable under the circumstances; *National Media Ltd. and Others v. Bogoshi*, South Africa, Supreme Court of Appeal, 29 September 1998, 1999 (1) BCLR 1 (SCA) (same); *Decision 36/1994*, Hungarian Constitutional Court, applying *Lingens* to declare art. 232 unconstitutional.

43. The UN Special Rapporteur has likewise stated that: “Defamation laws should reflect the principle that public figures are required to tolerate a greater degree of criticism than private citizens; defamation law should not afford special protection to the president and other senior political figures.”

Report of the Special Rapporteur (E/CN.4/1999/64, 24 January 1999, para. 28(b)). Also Report of the Special Rapporteur (E/CN.4/2000/63, 18 January 2000, para. 52.)

44. Angolan law, as applied in this case, is at odds with the principles set out above. Far from allowing a greater degree of criticism of the President than ordinary citizens, the law protects the President from evidence establishing the truth of allegations against him, even in the context of a criminal case. **(*See Article 46 of the Press Law, set out at Part III E, supra.)***

45. The greater tolerance of statements critical of politicians is justified also by the fact that political figures in general, and the head of state in particular, “usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy.”

***Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).**

46. Measures that may be necessary to protect private individuals may not therefore be necessary to protect political figures, who have alternative ways to refute allegations not involving recourse to the courts. In this case, where the public figure subject to criticism is also the most powerful individual in the government, there can be little doubt that it is entirely unnecessary to take such drastic measures to 'protect' him from criticism.

(ii) Opinions and Proof of Good Faith

47. Although the Committee has not to date had occasion to address the issue, it is well settled under the ECHR's necessity test that restrictions on statements of opinion may not be imposed as long as they are made in good faith. Such a rule is particularly appropriate considering that, as the European Court has repeatedly observed, statements made in the heat of political debate are often formulated in harsh terms.

    Da Silva v. Portugal **(ECHR, Judgment of 28 September 2000, para. 34): "La Cour relève à cet égard que dans ce domaine l'invective politique déborde souvent sur le plan personnel: ce sont là les aléas du jeu politique et du libre débat d'idées, garants d'une société démocratique."**

48. In many cases, the opinions pronounced 'offend, shock or disturb,' yet they remain protected by the guarantee of free expression. Restrictions on such statements are impermissible as long as the Applicant establishes a good faith basis for them.

    Thorgeirson v. Iceland **(ECHR, Judgment of 25 June 1992, para. 63): "[F]reedom of expression . . . is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as matter of indifference, but also to those that offend, shock or disturb". In *Lingens v. Austria*, for example, the European Court considered the validity of a journalist's defamation conviction, based on his reference to a politician as "immoral," "undignified," and guilty of "the basest opportunism." In *Da Silva v. Portugal*, the Court held that the criminal conviction of a journalist for calling a political candidate a "grotesque and clownish candidate" with "an incredible mixture of reactionary coarseness, fascist bigotry and vulgar anti-Semitism" similarly violated Article 10. Also *Oberschlick v. Austria (No. 2),* (ECHR, Judgement of 1 July 1997), where violation found where journalist is convicted of defamation for calling politician an "idiot" despite the Applicant's objectively understandable explanation for using the term; *Thorgeirson v. Iceland* (ECHR, Judgment of 25 June 1992) where there was found to be a violation where journalist is convicted of defamation for referring to police officers as "beasts in uniform" and "brutes" in the context of an effort to urge the government to establish an independent investigation into police brutality; *Schwabe v. Austria* (ECHR, Judgment of 24 June 1992) violation found where a journalist was convicted of defamation for publishing statements that equated a politician's involvement in a traffic accident with another accident involving alcohol; *Oberschlick v. Austria (No. 1)* (ECHR, Judgment of 23 May 1991) violation found where journalist is convicted of criminal defamation for concluding that a politician knowingly expressed ideas corresponding to those expressed by Nazis.**

49. The statements at issue in this communication are no different in nature from those described in the cases above. In particular, the Applicant referred to President Dos Santos as a "dictator" and "anti-people," and held him accountable

for "the promotion of . . . embezzlement and corruption," which are criticisms of a political, not personal, nature. The Applicant presented these statements in the context of an article and interview in independent media. He set forth those views in the context of a variety of facts upon which he drew his conclusions, and in which he also called for a "lasting peace" and "national reconciliation." Moreover, under the European Court jurisprudence, the restrictions imposed on the Applicant in the form of unlawful imprisonment and criminal prosecution and conviction would undoubtedly be deemed unnecessary. It is respectfully submitted that, given the similar nature of the test of necessity under Article 19, paragraph 3, the Committee should likewise find that the restrictions are unnecessary and in violation of Article 19.

- Prohibition on Proffering Evidence of the Good Faith Basis for his Statements

50. The European Court jurisprudence, like that of various domestic systems, makes clear that under its necessity test, an individual must not be *required* to prove the truth of a value judgment. This view is supported by reports of the Special Rapporteur on Freedom of Expression.

    Lingens v. Austria, **where the European Court held that requiring proof of value judgments is "impossible of fulfilment" and that accordingly the conviction was an impermissible restriction on Article 10. (Judgment of 8 July 1986, paras. 46-47.) Also *Hector v. Attorney General of Antigua and Barbuda and Others* (Privy Council, Judgment of 22 January 1990, [1991] LRC (Const) 237, 240): "[I]t would on any view be a grave impediment to the freedom of the press if those who print . . . matter reflecting critically on the conduct of public authorities could only do so with impunity if they could first verify the accuracy of all statements of fact on which the criticism was based."; *Derbyshire County Council v. Times Newspapers Ltd. and Others* (U.K., House of Lords, Judgment of 18 February 1993, [1993] 2 LRC 617, 625): "What has been described as 'the chilling effect' induced by the threat of civil actions for libel is very important. Quite often the facts which would justify a defamatory publication are known to be true, but admissible evidence capable of proving those facts is not available." Accordingly, the European Court has determined in several recent cases that good faith efforts in reporting accurately are far more critical to determining liability than a strict test of truth. See, e.g., *Bladet Tromsø and Stensaas v. Norway* (ECHR, Judgment of 20 May 1999). The Special Rapporteur has stated that "[t]o require truth in the context of publications relating to matters of public interest is excessive; it should be sufficient if reasonable efforts have been made to ascertain the truth." Report of the Special Rapporteur (E/CN.4/1999/64, 24 January 1999, para. 28(d)). Also Report of Special Rapporteur, E/CN.4/2000/63, 18 January 2000, para. 51.**

51. However, of greater significance in the present case, the ECHR has also clearly established that defendants must be afforded the *opportunity* to present evidence as to the good faith basis of their opinions.

Castells v. Spain **(ECHR, Judgment of 26 March 1992) where a violation was found where an opposition politician was convicted for criticising the government in making a variety of verifiable assertions but was not given the opportunity to prove the truth of these statements);** ***Dalban v. Romania,*** **(ECHR, Judgment of 28 September 1999) where a violation was found where a journalist was convicted for asserting that two politicians committed fraud, but was not allowed to prove the truth of his statements.**

52. Other, domestic courts have likewise determined that, particularly where political statements are at issue, a defendant should be given the opportunity to establish the good faith basis for his or her statements and the reasonableness of their publication.

See, e.g., ***Reynolds v. United Kingdom,*** **[2000] 2 LRC 690;** ***Lange v. Australian Broadcasting Commission*****, (1997) 71 A.L.J.R. 818, the High Court of Australia.**

53. The Applicant was charged with 'defamation and injury under Article 45 of the Press Law. Generally, under Angolan law, the truth or the good faith basis of statements is not an absolute defence, but does exempt the person responsible from punishment. In relation to the president, not even this applies, but instead Article 46 provides that 'If the person defamed is the President of the People's Republic of Angola, or the head of a foreign state or its representative in Angola, then proof of the veracity of the facts is not admissible.'

54. In the present case, the Applicant was *prohibited* from putting forth any evidence to establish the basis for his statements, as set out in Part III, *supra*. The Applicant was convicted on the basis of his statements with no opportunity to defend the factual underpinnings of such statements or the good faith basis on which they were made.

55. The application of such a rule, allowing as it did for the conviction of the Applicant without any opportunity to establish the good faith basis of his statements, was an excessive restriction that could not be justified as necessary or proportionate to any legitimate aim.

<u>(iii) Penal Sanctions Are Unnecessary to Protect Reputation</u>

56. Finally, the use of criminal rather than civil penalties to restrict the Applicant’s political speech constitutes a disproportionate and therefore unnecessary means of furthering the ostensible aim of protecting the reputation of President dos Santos. Such a conclusion is consistent not only with the views of this Committee, but also of numerous other international and domestic tribunals that have likewise determined that imposing criminal penalties for political expression contravenes the fundamental guarantee of free expression.

57. Since 1994, the Committee has itself frequently criticised countries for retaining laws that authorise imprisonment for crimes of expression. For example, the Committee indicated that Iceland’s libel law was inconsistent with Article 19

because it permits "the possibility of a sentence of up to one year's imprisonment for libel."

Report of the Human Rights Committee, 1994, GAOR Supp. No. 40, UN Doc. A149140, Vol. 1, at para. 78.

58. The Committee has also criticised Norway for maintaining "certain obsolete laws..., in particular with regard to penal sanctions against defamation," *id.* at para. 91, and has similarly criticised Jordan [1994], Tunisia [1995], and Mauritius [1996]. In 1997, the Committee severely criticised Iraq for imposing criminal sanctions – including imprisonment and even the death penalty – for the offence of insulting the president.

59. The UN Special Rapporteur on Freedom of Expression has repeatedly condemned the use of penal sanctions for the offence of defamation, stating in one report that "penal sanctions, in particular imprisonment, should *never* be applied" for defamation.

Report of the Special Rapporteur (E/CN.4/1999/64, 24 January 1999, para. 28(h) 28(h), emphasis added); Report of the Special Rapporteur (E/CN.4/2000/63, 18 January 2000, para. 48).

60. Similarly, the Inter-American Commission on Human Rights and the Special Rapporteur for Freedom of Expression of the Organisation of American States (OAS) have condemned the use of penal sanctions as a restriction on free expression and have stated that the aim of protecting reputations may be furthered through recourse to civil actions alone.

Report of OAS Special Rapporteur for Freedom of Expression, 1999, Ibid, Annex I (citing Inter-American Commission of Human Rights ("IACHR") Report, 1994, published February 1995), where desacato laws are rejected as inverting the logic underlying democracy and freedom of expression: "The use of desacato laws to protect the honor of public functionaries acting in their official capacities unjustifiably grants a right to protection to public officials that is not available to other members of society. This distinction inverts the fundamental principle in a democratic system that holds the Government subject to controls, such as public scrutiny, in order to preclude or control abuse of its coercive powers. If we consider that public functionaries acting in their official capacity are the Government for all intents and purposes, then it must be the individual and the public's right to criticise and scrutinise the officials' actions and attitudes in so far as they relate to the public office." The Report goes on to observe that "[a] law that targets speech that is considered critical of the public administration by virtue of the individual who is the object of the expression, strikes at the very essence and content of freedom of expression. Also *Verbitsky v. Argentina* (IACHR Report No. 22/94, Case 11.012) approving settlement of case brought by journalist convicted under *desacato* law for calling a minister "disgusting" and noting that by agreeing to repeal such laws, the government "brings Argentine law into conformity with the Convention".

61. The European Court has also repeatedly found criminal sanctions to be a disproportionate and unnecessary means of protecting an individual's reputation – even when the sanction is only a fine and does not involve imprisonment.

    Da Silva v. Portugal **(ECHR, Judgment of 28 September 2000, para.36): "Contrairement à ce qui a été soutenu par le Gouvernement, ce qui compte n'est pas le caractère minime de la peine infligée au requérant, mais le fait même de la condamnation. La condamnation du journaliste ne représentait donc pas un moyen raisonnablement proportionné à la poursuite du but légitime visé compte tenu de l'intérêt de la sociéte démocratique à assurer et à maintenir la liberté de la presse."; *Castells v. Spain* (ECHR, Judgment of 26 March 1992, para. 46): "[T]he dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media.". The European Court has explained that because criminal sanctions, even when they take the form of small fines, "are capable of discouraging open discussion of matters of public concern," they are considered unnecessary. *Thorgeirson v. Iceland* (ECHR, Judgment of 25 June 1992, para. 68).**

<u>Amnesty and free expression</u>

62. Finally, the Applicant has noted that as a result of his exercise of free expression, the Applicant was arrested, detained, subjected to the criminal process, denied a fair trial and his movement was curtailed. In addition, the criminal process came to a formal end on 15 December 2000 with the purported application of an 'amnesty' in his case. The amnesty law pursuant to which this measure was taken covers 'crimes against security…within the Angolan conflict…' The Applicant is not guilty of any crime, and has not even been accused of crimes of a 'security' nature, or related to the Angolan armed conflict, and he did not apply for amnesty. The Applicant notes that the implication that flows from the application of the amnesty – that the political dissent expressed through his role as a journalist is tantamount to criminal conduct, and that he is linked to the rebel movement in Angola – is unfounded and itself amounts to defamatory assertions concerning the Applicant by the Respondent State.

D. Article 12: Freedom of Movement

<u>The Right to Free Movement</u>

1. The Applicant has the right to leave his own country, under Article 12 of the ICCPR, which guarantees freedom of movement within, and beyond, one's own state. This right is reflected in international and regional human rights provisions.

    Article 13, Universal Declaration on Human Rights; Article 22, American Convention; Article 20, African Charter and Article 2, Protocol 4, European Convention on Human Rights

2. Freedom of movement may be directly curtailed by physically preventing individuals from leaving their country or by denying access to passports or other documents essential for that purpose. The right to leave one's country 'must include the right to obtain the necessary travel documents.'

   Committee General Comment 27 on Freedom of Movement (Article 12), CCPR/C/21/Rev.1Add.9, dated 2 November 1999, para. 9.

3. The right may also be infringed by less direct measures. As the Committee has noted, there are 'manifold legal and bureaucratic barriers unnecessarily affecting the full enjoyment of the rights of individuals to move freely.' These 'rules and practices include, *inter alia*, lack of access for Applicants to competent authorities and lack of information regarding documents'.

   General Comment 27, para. 17 where the Committee described such bureaucratic obstacles as major source of concern. Also para. 15. Also *Vidal Martins v. Uruguay* (Comm. No. 57/1979).

4. The Applicant's freedom of movement was infringed by the Respondent State between October 1999 and February 2001. Specifically, following his release from prison, he was directly prevented from leaving Angola when, on 12 December 2000, he was stopped at the airport and not allowed to board his aeroplane. Moreover the violation continued with the confiscation of his passport on that day and the withholding of it until February 2001. The Applicant took repeated legal measures to recover his passport and clarify, legally, his entitlement to travel but was hampered by complete lack of access to information regarding his travel documents.

   ***Vidal Martins v. Uruguay* (Comm. No. 57/1979, para. 9):"The Human Rights Committee, acting under Article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by it, in so far as they have occurred after 23 March 1976 (the date on which the Covenant entered into force in respect of Uruguay), disclose a violation of Article 12 (2) of the Covenant, because Sophie Vidal Martins was refused the issuance of a passport without any justification therefore, thereby preventing her from leaving any country including her own."**

Restrictions

5. Any restriction on the exercise of this right must be exceptional, as provided for tin Article 12(3). As the Committee has noted, 'to be permissible restrictions must be provided by law, must be necessary in a democratic society for the protection of these purposes and must be consistent with all other rights recognised in the Covenant."

   General Comment 27, para. 11.
   Restrictions justified by national security: *Celepli v. Sweden* (Comm. No. 456/1991).

6. The law must thus clearly provided for the restriction of free movement. In the Applicant's case, there was no legal basis for preventing him from leaving the country in December 2000. The bail restrictions - which specifically banned him from leaving the country - no longer applied. The Supreme Court decision, which altered his sentence to a 6 month prison sentence, suspended for five years, did not include any penalty inhibiting free movement. As such, there was no question of his movement being restricted pursuant to the criminal judgement against him. No legal basis was ever provided for the confiscation of his passport and the decision to prevent his foreign travel; indeed, no reasons were given for the restriction. As set out in relation to free expression, above, any restriction on rights, including freedom of movement, must be justified.

   Restriction on leaving country not justified where criminal proceedings unduly delayed in *Conzalez Del Rio v. Peru* (Comm. No. 263/1987). Refusal of passport was however justified in *Peltonen v. Finland* (Comm. No. 492/1992).

7. Moreover, where a restriction does serve a legitimate aim, the restriction must, in addition, be necessary to achieve that aim and proportionate to it. Proportionality must be respected 'not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law.'

   General Comment 27, para. 15, which notes that: 'states should ensure that any proceedings relating to the exercise or restriction of these rights are expeditious and that reasons fort he application of restrictive measures are provided.'

8. Hence, even if were the case that the protection of the reputation of the president were a legitimate aim (as discussed in relation to free expression above), preventing persons politically opposed to the president from the leaving their own country would constitute a manifestly disproportionate restriction.

9. Any restriction of freedom of movement must be consistent with other rights under the Covenant. In the present case, restricting the Applicant's freedom of movement also had the effect of restricting his freedom of expression, by precluding the possibility of participation in the conference organised by the Open Society Institute outside Angola.

   General Comment 27, para. 11

10. The right to free movement cannot be restricted on the basis of political opinion, which is also a violation of the non-discrimination provisions of Article 26.

    General Comment 27, para. 18

11. The Applicant submits that his movement was curtailed on the basis of, and with a view to preventing him from expressing, his political opinions. It thus simultaneously violated Articles 19 and 26, together with Article 12.

V. RELIEF SOUGHT

1. The Applicant hereby requests that the Committee:

a) declare a violation of the Applicant's rights, under articles 9, 12, 14(1), 14(2), 14(3) paragraphs (c), (f) and (g); and 2(1), 2(3) and 26 of the Covenant; declare specifically that:
   (i) the arrest and detention of the Applicant lacked sufficient basis in law; his detention for 40 days was neither necessary nor proportionate; he was not provided with basic procedural rights to which all detainees are entitled, namely to be informed of the reasons for his arrest, to have access to legal advice and assistance, to be brought promptly before a judge, to challenge the lawfulness of his arrest and detention and to an enforceable right of compensation for wrongful arrest and detention.
   (ii) the Applicant's trial was unfair. The press and public were unjustifiably excluded; the charges lack the necessary precision and clarity to allow for the preparation of a defence; the Applicant had no meaningful legal representation and no opportunity to present evidence on his behalf; he had no meaningful right of appeal.
   (iii) the Applicant's movement was unjustifiably impaired.
   (iv) the Applicant's right to free expression was violated by all of the above measures. He was arrested, detained, charged, prevented from leaving the country and ultimately 'amnestied' as a person responsible for political crimes, as a direct result of the exercise of his right to free expression and his contribution as a journalist to the political debate within his country.

b) request that the State Party award compensation to the Applicant for the violation of his rights under the Covenant;

c) request that the State Party quash the conviction of the Applicant, rendered as it was pursuant to a trial that lacked basic safeguards and fell short of international fair trial standards; pending such a step the Respondent State should clarify that there are at present no impediments to the Applicant's free movement, nor any outstanding residual payments due by him;

d) declare that certain provisions of Angolan legislation are incompatible with the Covenant and should be repealed, specifically section 45 of the Press Law, in so far as it does not allow truth or good faith to constitute a complete defence, but only a basis for exemption from punishment, and section 46, so far as it disallows any evidence as to the truth of statements made against the President of the Republic of Angola;

e) request that the respondent State Party take all legislative and others measures as may be necessary to give effect to the Covenant and in particular to article 19, including the removal of criminal defamation from the Penal Code so far it relates to political speech.

Applicant's Signature: ________________________

Representative’s Signature: ________________________

Date: ________________________