



**International covenant  
on civil and  
political rights**

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HUMAN RIGHTS COMMITTEE  
Eighty-third session  
14 March – 1 April 2005

**VIEWS**

**Communication No. 1128/2002**

<u>Submitted by:</u>	Rafael Marques de Morais (represented by the Open Society Institute and Interights)
<u>Alleged victim:</u>	The author
<u>State party:</u>	Angola
<u>Date of communication:</u>	5 September 2002 (initial submission)
<u>Document references:</u>	Special Rapporteur's rule 91 decision, transmitted to the State party on 17 October 2002 (not issued in document form)
<u>Date of adoption of Views:</u>	29 March 2005

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\* Made public by decision of the Human Rights Committee.

*Subject matter:* Arrest, detention and conviction of journalist for criticizing the Angolan President

*Procedural issues:* State party's failure to cooperate - Substantiation of claims by author - Admissibility *ratione materiae* - Exhaustion of domestic remedies

*Substantive issues:* Liberty and security of person - Right to be informed of reasons for arrest - Right to be brought promptly before a judge - Challenge of lawfulness of detention - Compensation for unlawful arrest or detention - Right to a fair trial - Liberty of movement - Freedom of speech

*Articles of the Covenant:* 9 (1) to (5), 14 (1), (3) (a), (b), (d), (e), and (5), 12 and 19

*Articles of the Optional Protocol:* 2, 3 and 5 (2) (b)

On 29 March 2005, the Human Rights Committee adopted the annexed draft as the Committee's Views, under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1128/2002. The text of the Views is appended to the present document.

[ANNEX]

**ANNEX**

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political rights

Eighty-third session

concerning

**Communication No. 1128/2002\*\***

Submitted by: Rafael Marques de Morais (represented by the Open Society Institute and Interights)

Alleged victim: The author

State party: Angola

Date of communication: 5 September 2002 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 29 March 2005,

Having concluded its consideration of communication No. 1128/2002, submitted to the Human Rights Committee on behalf of Rafael Marques de Morais under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

**Views under article 5, paragraph 4, of the Optional Protocol**

1. The author of the communication is Rafael Marques de Morais, an Angolan citizen, born on 31 August 1971. He claims to be a victim of violations by Angola<sup>1</sup> of articles 9, 12, 14 and 19 of the International Covenant on Civil and Political Rights (the Covenant). The author is represented by counsel.

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\*\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

<sup>1</sup> The Covenant and the Optional Protocol to the Covenant entered into force for the State party on 10 April 1992.

## **Factual background**

2.1 On 3 July, 28 August and 13 October 1999, the author, a journalist and the representative of the Open Society Institute in Angola, wrote several articles critical of Angolan President *dos Santos* in an independent Angolan newspaper, the *Agora*. In these articles, he stated, inter alia, that the President was responsible “for the destruction of the country and the calamitous situation of State institutions” and was “accountable for the promotion of incompetence, embezzlement and corruption as political and social values.”

2.2 On 13 October 1999, the author was summoned before an investigator at the National Criminal Investigation Division (DNIC) and questioned for approximately three hours before being released. In an interview later that day with the Catholic radio station, *Radio Ecclésia*, the author reiterated his criticism of the President and described his treatment by the DNIC.

2.3 On 16 October 1999, the author was arrested at gunpoint by 20 armed members of the Rapid Intervention Police and DNIC officers at his home in Luanda, without being informed about the reasons for his arrest. He was brought to the Operational Police Unit, where he was held for seven hours and questioned before being handed over to DNIC investigators, who questioned him for five hours. He was then formally arrested, though not charged, by the deputy public prosecutor of DNIC.

2.4 From 16 to 26 October 1999, the author was held incommunicado at the high security Central Forensic Laboratory (CFL) in Luanda, where he was denied access to his lawyer and family and was intimidated by prison officials, who asked him to sign documents disclaiming responsibility of the CFL or the Angolan Government for eventual death or any injuries sustained by him during detention, which he refused to do. He was not informed of the reasons for his arrest. On arrival at the CFL, the chief investigator merely stated that he was being held as a UNITA (National Union for the Total Independence of Angola) prisoner.

2.5 On or about 29 October 1999, the author was transferred to *Viana* prison in Luanda and granted access to his lawyer. On the same day, his lawyer filed an application for habeas corpus with the Supreme Court, challenging the lawfulness of the author’s arrest and detention, which was neither acknowledged, nor assigned to a judge or heard by the Angolan courts.

2.6 On 25 November 1999, the author was released from prison on bail and informed of the charges against him for the first time. Together with the director, A. S., and the chief editor, A. J. F., of *Agora*, he was charged with “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...by arts. 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.” The terms of bail obliged the author “not to leave the country” and “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”. Several requests by the author for clarification of these terms were unsuccessful.

2.7 The author’s trial began on 21 March 2000. After thirty minutes, the judge ordered the proceedings to continue in camera, since a journalist had tried to photograph the proceedings.

2.8 By reference to article 46<sup>2</sup> of Press Law No. 22/91 of June 15 1991, the Provincial Court ruled that evidence presented by the author to support his defence of the ‘truth’ of the allegations and the good faith basis upon which they were made, including the texts of speeches of the President, Government resolutions and statements of foreign State officials, was inadmissible. In protest, the author’s lawyer left the courtroom, stating that he could not represent his client in such circumstances. When he returned to the courtroom on 25 March, the trial judge prevented him from resuming his representation of the author and ordered that he be disbarred from practising as a lawyer in Angola for a period of six months. The Court then appointed as ex officio defence counsel an official of the General Attorney’s Office working at the Provincial Court’s labour tribunal, who allegedly was not qualified to practise as a lawyer.

2.9 On 28 March 2000, a witness testifying on behalf of the author was ordered to leave the court and to stop his testimony after asserting that the law under which the author had been charged had been unconstitutional. The Court also refused to allow the author to call two other defence witnesses, without giving reasons.

2.10 On 31 March 2000, the Provincial Court convicted the author of abuse of the press<sup>3</sup> by defamation,<sup>4</sup> finding that his newspaper article of 3 July 1999, as well as the radio interview, contained “offensive words and expressions” against the Angolan President and, albeit not raised by the accusation and therefore not punishable, against the Attorney-General in their official and personal capacities. The Court found that the author had “acted with intention to injure” and based the conviction on the combined effect of articles 43, 44, 45 and 46 of Press Law No. 22/91, aggravated by item 1 of article 34 of the Penal Code (premeditation). It sentenced the author to six months’ imprisonment and a fine of 1,000,000.00 Kwanzas (Nkz.) to “discourage” similar behaviour, at the same time ordering the payment of NKz. 100,000.00 compensatory damages to “the offended” and of a court tax of NKz. 20,000.00.

2.11 On 4 April 2000, the author appealed to the Supreme Court of Angola. On 7 April 2000, the Supreme Court issued a public notice criticizing the Bar Association for having qualified the trial judge’s suspension of the author’s lawyer as null and void for lack of

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<sup>2</sup> Article 46 of the Press Law reads: “If the person defamed is the President of the 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 admitted.”

<sup>3</sup> The crime of abuse of the press is defined as follows in article 43 of the Press Law: “(1) For purposes of this law, an abuse of the press shall be deemed to be any act or behavior 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. (2) The criminal code is applicable to the aforementioned crimes as follows: (a) The court shall apply the punishment set forth in the incriminating legislation, which punishment may be aggravated pursuant to general provisions. (b) If the agent of the crime has not previously been found guilty of any abuse of the press, then the punishment of imprisonment may be replaced by a fine of not less than NKz. 20,000.00.”

<sup>4</sup> Article 407 of the Criminal Code describes the crime of defamation as follows: “If one person defames another publicly, de viva voce, in writing, in a published drawing, or in any public manner, imputing to him something offensive to his honor and dignity, or reproduces this, then he shall be condemned to a prison term of up to four months and a fine of up to one month.”

jurisdiction, in a decision of its National Council adopted on 27 March 2000.<sup>5</sup>

2.12 On 26 October 2000, the Supreme Court quashed the trial court's judgment on the defamation count, but upheld the conviction for abuse of the press on the basis of injury<sup>6</sup> to the President, punishable by item No. 3 of article 45<sup>7</sup>, of Press Law No. 22/91. The Court considered that the author's acts were not covered by his constitutional right to freedom of speech, since the exercise of that right was limited by other constitutionally recognized rights, such as one's honour and reputation, or by "the respect that is due to the organs of sovereignty and to the symbols of the state, in this case the President of the Republic." It affirmed the prison term of six-month, but suspended its application for a period of five years, and ordered the author to pay a court tax of NKz. 20,000.00 and NKz. 30,000.00 damages to the victim. The judgment did not refer to the pre-existing bail conditions imposed on the author.

2.13 On 11 November 2000, the author unsuccessfully sought to obtain a declaration confirming that his bail restrictions were no longer applicable.

2.14 On 12 December 2000, the author was prevented from leaving Angola for South Africa to participate in an Open Society Institute conference; his passport was confiscated. Despite repeated requests, his passport was not returned to him until 8 February 2001, following a court order of 2 February 2001 based on Amnesty Law 7/00 of 15 December 2000,<sup>8</sup> which was declared applicable to the author's case. Regardless of this amnesty, on 19 January 2002, the author was summoned to the Provincial Court and ordered to pay compensation of Nkz. 30,000 to the President, which he refused to pay, and legal costs, for which he paid.

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<sup>5</sup> The translation of the Supreme Court's public notice reads, in pertinent parts: "It does not make sense, therefore, for a single courtroom incident, resulting from a decision handed down by the Judge in question in open court, a decision which may be cured by a higher court in the legal process, and which is subject to an inter-institutional decision, to have caused such an inflammatory and unnecessary public notice from the Bar Association, creating an unjustly suspicious climate and discrediting [the judiciary] both domestically and abroad, and causing distorted proclamations by individuals, institutions, and even governmental officials."

<sup>6</sup> The crime of injury is defined in article 410 of the Criminal Code: "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 [...].

In an accusation for injury, no proof whatsoever of the veracity of the facts to which the injury may refer shall be admissible."

<sup>7</sup> Article 45 No. 3 reads: "Providing the veracity of the facts of the offense, once admitted by the author, shall render it exempt from punishment. Otherwise, the violator would be punished as a slanderer and sentenced to a prison term of up to 2 years and the corresponding fine, in addition to damages to be determined by a court, but in no case less than NKz. 50,000.00."

<sup>8</sup> Amnesty Law 7/00 applies 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 [...]."

## The complaint

3.1 The author claims that his arrest and detention were not based on sufficiently defined provisions, in violation of article 9, paragraph 1, of the Covenant. In particular, article 43 of the Press Law on ‘abuse of the press’ and article 410 of the Criminal Code on ‘injury’ lacked specificity and were overly broad, making it impossible to ascertain what sort of political speech remained permissible. Moreover, the authorities relied upon different legal bases for the author’s arrest and throughout the course of his subsequent indictment, trial and appeal. Even assuming that his arrest was lawful, his continued detention for a period of 40 days was neither reasonable nor necessary in the circumstances of his case.<sup>9</sup>

3.2 The author claims a violation of article 9, paragraph 2, as he was arrested without being informed of the reasons for his arrest or the charges against him. His 10-day incommunicado detention,<sup>10</sup> without access to his lawyer or family, the denial of his constitutional<sup>11</sup> right to be brought before a judge during the entire 40 days of his detention, and the authorities’ failure to release him promptly pending trial, despite the absence of a risk of flight (as reflected by his cooperative attitude, e.g. when he reported to the DNIC on 13 October 1999), violated his rights under article 9, paragraph 3. The fact that he was prevented from challenging the lawfulness of his detention while detained incommunicado also violated article 9, paragraph 4, as did the Angolan courts’ failure to address his habeas corpus application. Under article 9, paragraph 5, the author claims compensation for his unlawful arrest and detention.

3.3 The author contends that the exclusion of the press and the public from his trial was not justified by any of the exceptional circumstances enumerated in article 14, paragraph 1, since the disruptive photographer could have been deprived of his camera or excluded from the courtroom<sup>12</sup>.

3.4 The fact that the author did not receive the formal charges against him until 40 days after his arrest is said to violate his right under article 14, paragraph 3 (a), to be informed promptly of the nature and cause of the charge against him. He argues that this delay was not justified by the complexity of the case. Moreover, his conviction of more serious crimes (articles 43 and 45 of the Press Law) than the ones for which he was originally charged (articles 44 and 46 of the Press Law) breached his right to adequate facilities for the preparation of his defence (article 14, paragraph 3 (b), of the Covenant). His conviction on these additional charges should have been quashed by the Supreme Court, which instead held 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 that the grounds are facts included in the indictment or similar ruling.”

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<sup>9</sup> The author refers to Communication No. 305/1988, *van Alphen v. The Netherlands*, Views adopted on 23 July 1990, at para. 5.8.

<sup>10</sup> By reference to Communication No. 277/1988, *Terán Jijón v. Ecuador*, Views adopted on 26 March 1992, at para. 3, the author submits that incommunicado detention as such gives rise to a violation of article 9, paragraph 3, of the Covenant, since it negatively impacts on the exercise of the right to be brought before a judge.

<sup>11</sup> Article 38 of the Constitution of Angola provides: “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.”

<sup>12</sup> It appears that this issue was not however raised in the Supreme Court.

3.5 The author claims that his right under article 14, paragraph 3 (b), to communicate with counsel was violated, as he could not consult his lawyer during incommunicado detention, at a critical state of the proceedings, and because the trial judge did not adjourn the trial upon disbarring the author's lawyer and appointing an ex officio defence counsel on 23 March 2000, thereby denying him adequate time to communicate with his new counsel. His right to defend himself through legal assistance of his own choosing (article 14, paragraph 3(d)) was breached because his lawyer was unlawfully removed from the case, as confirmed by the Supreme Court's judgment of 26 October 2000. He claims that, despite his willingness to pay for a counsel of his own choosing, a new counsel was appointed ex officio, who was neither qualified nor competent to provide adequate defence, limiting his interventions during the remainder of the trial to requesting the Court to "do justice" and to an expression of satisfaction with the proceedings.

3.6 For the author, the judge's decision to hear only one defence witness, a human rights activist who was expelled from court after claiming that article 46 of the Press Law was unconstitutional, and to reject documentary evidence of the truth of the author's statements, and the good faith basis on which they had been made, on the ground that article 46 of the Press Law precluded the presentation of evidence against the President, violated his rights under article 14, paragraph 3 (e), and denied him an opportunity to produce evidence on whether or not all the elements of the offence had been met, in particular whether he had acted with the intention of offending the President.

3.7 The author claims a violation of article 14, paragraph 5, because of the Supreme Court's lack of impartiality when it publicly criticized the Bar Association while his appeal was still pending, as well as by the lack of clarity as to the exact legal basis of his conviction, which prevented him from lodging a "meaningful" appeal.

3.8 The author contends that his critical statements about President *dos Santos* were covered by his right to freedom of expression under article 19, which requires that citizens be allowed to criticize or openly and publicly evaluate their Governments, as well as the ability of the press to express political opinion, including criticism of those who wield political power. His unlawful arrest and detention on the basis of his statements, the restrictions on his rights to free speech and movement pending trial, his conviction and sentence, and the threat that any expression of opinion may be punished by similar sanctions in the future constituted restrictions on his freedom of speech. He argues that these restrictions were not "provided by law" within the meaning of article 19, paragraph 3, given (a) that his unlawful detention and subsequent travel restrictions had no basis in Angolan law; (b) that his conviction was based on provisions such as article 43 of the Press Law ("abuse of the press") and article 410 of the Criminal Code ("injury"), which lacked the necessary clarity to qualify as "adequately accessible" and "sufficiently precise" norms, enabling an individual to foresee the consequences that his statements may entail; and (c) that the terms of his bail prohibiting him to "engage in certain activities that [...] create the risk that new violations may be perpetrated" were equally unclear and that he had unsuccessfully requested clarification of the meaning of this restrictions.

3.9 The author denies that the restrictions imposed on him pursued a legitimate aim under article 19, paragraph 3 (a) and (b). In particular, respect of the rights or reputation of others (lit. a) could not be interpreted so as to protect a President from political, as opposed to personal, criticism, given that the aim of the Covenant is to promote political debate. Nor

were the measures against him necessary or proportionate to achieve a legitimate purpose, considering (a) that the limits of acceptable criticism are wider regarding politicians as opposed to private individuals, who do not enjoy comparable access to effective channels of communication to counteract false statements; (b) that he was convicted for his statements without having had an opportunity to defend the factual basis of these statements or to establish the good faith basis on which they were made; and (c) that the use of criminal rather than civil penalties against him, in any event, constitutes a disproportionate means of protecting the reputation of others.

3.10 Lastly, the author claims a violation of article 12, which includes a right to obtain the necessary travel documents for leaving one's country. His prevention from leaving Angola on 12 December 2000 and the confiscation, without any justification, of his passport, which was withheld until February 2001, despite his repeated attempts to recover it and to clarify his legal entitlement to travel, had no legal basis, as the bail restrictions no longer applied and since the Supreme Court's judgment did not include any penalty inhibiting free movement. He contends that, in addition to article 12, these measures also violated his freedom of expression by precluding his participation in the conference organized by the Open Society Institute in South Africa.

3.11 The author claims that the same matter is not being examined under another procedure of international investigation or settlement and that he has exhausted domestic remedies, as he unsuccessfully tried to initiate habeas corpus proceedings to challenge the lawfulness of his arrest and detention and also appealed his conviction and sentence to the Supreme Court, the highest judicial authority in Angola.

3.12 The author seeks compensation for the alleged violations and requests the Committee to recommend that his conviction be quashed, that the State party clarify that there are no impediments to his freedom of movement, and that articles 45 and 46 of the Press Law be repealed.

### **State party's failure to cooperate**

4. On 15 November 2002, 15 December 2003, 26 January 2004 and 23 July 2004, the State party was requested to submit to the Committee information on the admissibility and merits of the communication. The Committee notes that this information has still not been received. The Committee regrets the State party's failure to provide any information with regard to the admissibility or the substance of the author's claims. It recalls that it is implicit in article 4, paragraph 2, of the Optional Protocol that States parties examine in good faith all the allegations brought against them, and that they make available to the Committee all information at their disposal. In the absence of a reply from the State party, due weight must be given to the author's allegations, to the extent that they are substantiated.

### **Issues and proceedings before the Committee**

#### **Consideration of admissibility**

5.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with article 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

5.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a), of the Optional Protocol.

5.3 With regard to the author's allegation that the press and the public were excluded from his trial, in violation of article 14, paragraph 1, the Committee notes that the author did not raise this issue before the Supreme Court. It follows that this part of the communication is inadmissible under articles 2 and 5, paragraph 2 (b), of the Optional Protocol.

5.4 Insofar as the author claims that he was not apprised of the formal charges against him until 40 days after his arrest, the Committee recalls that article 14, paragraph 3 (a), of the Covenant does not apply to the period of remand in custody pending the result of police investigations,<sup>13</sup> but requires that an individual be informed promptly and in detail of the charge against him, as soon as the charge is first made by a competent authority. Although the author was formally charged on 25 November 1999, that is, one week after the indictment had been "approved" by the prosecution, he did not raise this delay on appeal. The Committee therefore concludes that this part of the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

5.5 As to the claim that the conviction of more serious crimes than the ones charged by the prosecution violated the author's right under article 14, paragraph 3 (b), the Committee has noted the argument, in the Supreme Court's judgement of 26 October 2000, that a judge may convict a defendant of a more serious offence than the one that he was accused of, as long as the conviction is based on the facts described in the indictment. It recalls that it is generally for the national courts, and not for the Committee, to evaluate the facts and evidence in a particular case, or to review the interpretation of domestic legislation, unless it is apparent that the courts' decisions are manifestly arbitrary or amount to a denial of justice. The Committee considers that the author has not adequately substantiated that there was any absence of fair notice of the charges confronting him, nor has he otherwise substantiated any defects in relation to the Supreme Court's finding that a judge is not bound by the prosecution's legal evaluation of the facts as included in the indictment. Accordingly, this part of the communication is inadmissible under article 2 of the Optional Protocol.

5.6 As regards the author's claim that article 14, paragraph 3 (b), was also violated because the trial judge did not adjourn the trial after having replaced his lawyer by an ex officio counsel, thereby denying him adequate time to consult with his new counsel to prepare his defence, the Committee notes that the material before it does not reveal that the author, or his new counsel, requested an adjournment on grounds of insufficient time to prepare the defence. If counsel felt that they were not properly prepared, it was incumbent on him to request the adjournment of the trial.<sup>14</sup> In this respect, the Committee refers to its jurisprudence that a State party cannot be held responsible for the conduct of a defence lawyer, unless it was, or should have been, manifest to the judge that the lawyer's behaviour

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<sup>13</sup> See Communication No. 253/1987, *Kelly v. Jamaica*, Views adopted on 8 April 1991, para. 5.8.

<sup>14</sup> See Communication No. 349/1989, *Wright v. Jamaica*, Views adopted on 27 July 1992, at para. 8.4.

was incompatible with the interests of justice.<sup>15</sup> It considers that the author has not substantiated, for purposes of admissibility, that failure to adjourn the trial was manifestly incompatible with the interests of justice. Accordingly, this part of the communication is inadmissible under article 2 of the Optional Protocol.

5.7 As to the author's claim that his right to defend himself through legal assistance of his own choosing (article 14, paragraph 3 (d)) was breached, the Committee notes that the Supreme Court, while annulling the temporary suspension of the author's lawyer, did not pronounce itself on the legality of the lawyer's removal from the trial. On the contrary, it held that the abandonment of a client by a lawyer, outside situations specifically allowed by law, was subject to disciplinary sanctions under applicable regulations. In its public notice, the Supreme Court, instead of defending the judge's decision to debar the author's lawyer, expressed its concern about the effects of the Bar Associations criticism (causing "an unjustly suspicious climate [...] discrediting [the judiciary] both domestically and abroad"), while emphasizing that the trial judge's decision "may be cured by a higher court in the legal process." The Supreme Court subsequently declared the author's lawyer's six-month suspension null and void. Similarly, it does not transpire from the trial transcript that counsel was appointed against the author's will or that he limited his interventions during the remainder of the trial to redundant pleadings. According to the transcript, the author, when asked whether he intended to designate a new legal representative, declared that he would leave such decision to the Court. The Committee concludes that the author has not substantiated, for purposes of admissibility, that the removal of his lawyer from the trial was unlawful or arbitrary, that counsel was appointed against the author's will, or that he was unqualified to provide effective legal representation. Accordingly, this part of the communication is inadmissible under article 2 of the Optional Protocol.

5.8 With respect to the alleged violation of article 14, paragraph 3 (e), by the trial judge's decision to admit only one defence witness, who was expelled from the court after criticizing Article 46 of the Press Law as unconstitutional, the Committee notes that it does not transpire from the Supreme Court's judgment of 26 October 2000, or from any other document at its disposal, that the author raised this claim on appeal. Consequently, this part of the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol for failure to exhaust domestic remedies.

5.9 While noting that the author based his appeal, *inter alia*, on the fact that the trial judge had rejected the documentary evidence presented by him in defence of the truth of his statements, the Committee notes that it is in principle beyond its competence to determine whether national courts properly evaluate the admissibility of evidence, unless it is apparent that their decision is manifestly arbitrary or amounts to a denial of justice. In the instant case, the Committee notes that the Provincial Court and, in particular, the Supreme Court examined whether the Press Law lawfully precludes the defence of the truth in relation to statements concerning the Angolan President, and it finds no evidence that their findings suffered from the above defects. It therefore considers that the author has not substantiated this part of his claim under article 14, paragraph 3 (e), for purposes of admissibility, and concludes that this part of the communication is inadmissible under article 2 of the Optional

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<sup>15</sup> See Communications No. 980/2001, *Hussain v. Mauritius*, decision on admissibility adopted on 18 March 2002, at para. 6.3, and No. 618/1995, *Campbell v. Jamaica*, Views adopted on 20 October 1998, at para. 7.3.

Protocol.

5.10 As regards the author's claim that his right under article 14, paragraph 5, was violated because of the lack of clarity about the legal basis for his conviction by the Provincial Court, and because the Supreme Court's impartiality was undermined by its public notice of 7 April 2000, the Committee observes that the crime of which the author was convicted (abuse of the press by defamation) is described with sufficient clarity in the Provincial Court's judgment. The Committee therefore concludes that the author has not sufficiently substantiated his claim, for purposes of admissibility, and that this part of the communication is inadmissible under article 2 of the Optional Protocol.

5.11 As to the remainder of the communication, the Committee considers that the author has sufficiently substantiated his claims for purposes of admissibility.

5.12 On the issue of exhaustion of domestic remedies, the Committee notes that the author raised the substance of his claims under article 9 in his application for habeas corpus, which, according to him, was never adjudicated by the Angolan courts. As regards the author's claim under article 19 of the Covenant, the Committee notes that he invoked "the right of political and social criticism and of the freedom of the press" on appeal. It furthermore notes the author's claim (in relation to article 12 of the Covenant) that he "took repeated legal measures to recover his passport and [to] clarify, legally, his entitlement to travel but was hampered by complete lack of access to information regarding his travel documents," and observes that, in the circumstances, no domestic remedies were available to the author.

5.13 In the absence of any information from the State party to the contrary, the Committee concludes that the author has met the requirements of article 5, paragraph 2 (b), of the Optional Protocol, and that the communication is admissible, insofar as it appears to raise issues under articles 9, paragraphs 1 to 5, 12, 14, paragraph 3(b) (inasmuch as author's inability to have access to counsel during his incommunicado detention is concerned), and 19 of the Covenant.

### **Consideration of the merits**

6.1 The first issue before the Committee is whether the author's arrest on 16 October 1999 and his subsequent detention until 25 November 1999 were arbitrary or otherwise in violation of article 9 of the Covenant. In accordance with the Committee's constant jurisprudence,<sup>16</sup> the notion of "arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law. This means that remand in custody must not only be lawful but reasonable and necessary in all the circumstances, for example to prevent flight, interference with evidence or the recurrence of crime. No such element has been invoked in the instant case. Irrespective of the applicable rules of criminal procedure, the Committee observes that the author was arrested on, albeit undisclosed, charges of defamation which, although qualifying as a crime under Angolan law, does not justify his arrest at gunpoint by 20 armed policemen, nor the length of his detention of 40 days, including 10 days of

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<sup>16</sup> See Communication No. 305/1988, *Van Alphen v. The Netherlands*, Views adopted on 23 July 1990, at para. 5.8; Communication No. 458/1991, *Mukong v. Cameroon*, Views adopted on 21 July 1994, at para. 9.8; Communication No. 560/1993, *A. v. Australia*, Views adopted on 3 April 1997, at para. 9.2.

incomunicado detention. The Committee concludes that in the circumstances, the author's arrest and detention were neither reasonable nor necessary but, at least in part, of a punitive character and thus arbitrary, in violation of article 9, paragraph 1.

6.2 The Committee notes the author's uncontested claim that he was not informed of the reasons for his arrest and that he was charged only on 25 November 1999, 40 days after his arrest on 16 October 1999. It considers that the chief investigator's statement, on 16 October 1999, that the author was held as a *UNITA* prisoner, did not meet the requirements of article 9, paragraph 2. In the circumstances, the Committee concludes that there has been a violation of article 9, paragraph 2.

6.3 As regards the author's claim that he was not brought before a judge during the 40 days of detention, the Committee recalls that the right to be brought "promptly" before a judicial authority implies that delays must not exceed a few days, and that incomunicado detention as such may violate article 9, paragraph 3.<sup>17</sup> It takes note of the author's argument that his 10-day incomunicado detention, without access to a lawyer, adversely affected his right to be brought before a judge, and concludes that the facts before it disclose a violation of article 9, paragraph 3. In view of this finding, the Committee need not pronounce itself on the alleged violation of article 14, paragraph 3(b).

6.4 As to the author's claim that, rather than being detained in custody for 40 days, he should have been released pending trial, in the absence of a risk of flight, the Committee notes that the author was not charged until 25 November 1999, when he was also released from custody. He was therefore not "awaiting" trial within the meaning of article 9, paragraph 3, before that date. Moreover, he was not brought before a judicial authority before that date, which could have determined whether there was a lawful reason to extend his detention. The Committee therefore considers that the illegality of the author's 40-day detention, without access to a judge, is subsumed by the violations of article 9, paragraphs 1 and 3, first sentence, and that no issue of prolonged pre-trial detention arises under article 9, paragraph 3, second sentence.

6.5 As regards the alleged violation of article 9, paragraph 4, the Committee recalls that the author had no access to counsel during his incomunicado detention, which prevented him from challenging the lawfulness of his detention during that period. Even though his lawyer subsequently, on 29 October 1999, applied for habeas corpus to the Supreme Court, this application was never adjudicated. In the absence of any information from the State party, the Committee finds that the author's right to judicial review of the lawfulness of his detention (article 9, paragraph 4) has been violated.

6.6 With respect to the author's claim under article 9, paragraph 5, the Committee recalls that this provision governs the granting of compensation for arrest or detention that is "unlawful" either under domestic law or within the meaning of the Covenant.<sup>18</sup> It recalls that the circumstances of the author's arrest and detention gave rise to violations of article 9, paragraphs 1 to 4, of the Covenant, and notes the author's uncontested argument that the State party's failure to bring him before a judge during his 40-day detention also violated

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<sup>17</sup> Communication No. 277/1988, *Terán Jijón v. Ecuador*, Views adopted on 26 March 1992, at para. 5.3.

<sup>18</sup> See Communication No. 560/1993, *A. v. Australia*, Views adopted on 3 April 1997, at para. 9.5.

article 38 of the Angolan Constitution. Against this background, the Committee deems it appropriate to deal with the issue of compensation in the remedial paragraph.

6.7 The next issue before the Committee is whether the author's arrest, detention and conviction, or his travel constraints, unlawfully restricted his right to freedom of expression, in violation of article 19 of the Covenant. The Committee reiterates that the right to freedom of expression in article 19, paragraph 2, includes the right of individuals to criticize or openly and publicly evaluate their Governments without fear of interference or punishment.<sup>19</sup>

6.8 The Committee refers to its jurisprudence that any restriction on the right to freedom of expression must cumulatively meet the following conditions set out in paragraph 3 of article 19: it must be provided for by law, it must serve one of the aims enumerated in article 19, paragraph 3 (a) and (b), and it must be necessary to achieve one of these purposes. The Committee notes that the author's final conviction was based on Article 43 of the Press Law, in conjunction with Section 410 of the Criminal Code. Even if it were assumed that his arrest and detention, or the restrictions on his travel, had a basis in Angolan law, and that these measures, as well as his conviction, pursued a legitimate aim, such as protecting the President's rights and reputation or public order, it cannot be said that the restrictions were necessary to achieve one of these aims. The Committee observes that the requirement of necessity implies an element of proportionality, in the sense that the scope of the restriction imposed on freedom of expression must be proportional to the value which the restriction serves to protect. Given the paramount importance, in a democratic society, of the right to freedom of expression and of a free and uncensored press or other media,<sup>20</sup> the severity of the sanctions imposed on the author cannot be considered as a proportionate measure to protect public order or the honour and the reputation of the President, a public figure who, as such, is subject to criticism and opposition. In addition, the Committee considers it an aggravating factor that the author's proposed truth defence against the libel charge was ruled out by the courts. In the circumstances, the Committee concludes that there has been a violation of article 19.

6.9 The last issue before the Committee is whether the author's prevention from leaving Angola on 12 December 2000 and the subsequent confiscation of his passport were in violation of article 12 of the Covenant. It notes the author's contention that his passport was confiscated without justification or legal basis, as his bail restrictions no longer applied, and that he was denied access to information about his entitlement to travel. In the absence of any justification advanced by the State party, the Committee finds that the author's rights under article 12, paragraph 1, have been violated.

7. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal violations of article 9, paragraphs 1, 2, 3 and 4, and of articles 12 and 19 of the Covenant.

8. In accordance with article 2, paragraph 3, of the Covenant, the author is entitled to an effective remedy, including compensation for his arbitrary arrest and detention, as well as for the violations of his rights under articles 12 and 19 of the Covenant. The State party is under

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<sup>19</sup> See Communications Nos. 422/1990, 423/1990 and 424/1990, *Aduayom et al. v. Togo*, Views adopted on 12 July 1996, at para. 7.4.

<sup>20</sup> See Human Rights Committee, General Comment 25 [57], 12 July 1996, at para. 25.

an obligation to take measures to prevent similar violations in the future.

9. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, that State party has undertaken to ensure all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

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