Legal Standards on Freedom of Expression

Toolkit for the Judiciary in Africa
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<td>ACHPR</td>
<td>African Commission on Human and Peoples’ Rights</td>
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<td>ACRWC</td>
<td>African Charter on the Rights and Welfare of the Child</td>
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<td>AU</td>
<td>African Union</td>
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<tr>
<td>CRPD</td>
<td>Convention on the Rights of Persons with Disabilities</td>
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<tr>
<td>EAC</td>
<td>East African Community</td>
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<tr>
<td>EACJ</td>
<td>East African Court of Justice</td>
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<tr>
<td>ECOWAS</td>
<td>Economic Community of West African States</td>
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<tr>
<td>ECtHR</td>
<td>European Court on Human Rights</td>
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<tr>
<td>HRC</td>
<td>United Nations Human Rights Council</td>
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<tr>
<td>HRCtte</td>
<td>United Nations Human Rights Committee</td>
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<td>IACHR</td>
<td>Inter-American Commission on Human Rights</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<tr>
<td>ICERD</td>
<td>International Convention on the Elimination of All Forms of Racial Discrimination</td>
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<tr>
<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
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<tr>
<td>ICTs</td>
<td>Information and communication technologies</td>
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<tr>
<td>IP</td>
<td>Internet protocol</td>
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<tr>
<td>ISP</td>
<td>Internet service provider</td>
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<tr>
<td>NGO</td>
<td>Non-governmental organisation</td>
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<td>OHCHR</td>
<td>Office of the High Commissioner on Human Rights</td>
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<td>SADC</td>
<td>Southern African Development Community</td>
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<td>SDG(s)</td>
<td>Sustainable Development Goal(s)</td>
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<td>UDHR</td>
<td>Universal Declaration of Human Rights</td>
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<td>UN</td>
<td>United Nations</td>
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<tr>
<td>UNESCO</td>
<td>United Nations Educational, Scientific and Cultural Organization</td>
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<tr>
<td>UNGA</td>
<td>United Nations General Assembly</td>
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<td>UNSR</td>
<td>United Nations Special Rapporteur on Freedom of Opinion and Expression</td>
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Foreword

Freedom of expression is a cornerstone human right. It is a fundamental right in itself — the right to seek, receive; and impart all ideas regardless of frontiers by any means, but it is also a right that enables other fundamental rights such as the right to peaceful assembly and the right and opportunity to vote. Indeed, it is difficult for individuals to make informed decisions related to one’s life without societal respect for the right to freedom of expression.

As the United Nations’ specialized agency with a specific mandate to promote and protect freedom of expression and its corollaries, press freedom and access to information, UNESCO seeks to sensitize all relevant actors and in particular those working in justice systems, such as judges, lawyers, and prosecutors, on the importance of guaranteeing these fundamental human rights.

Because there is a clear and intimate link between freedom of expression, press freedom and the safety of journalists, UNESCO also actively works to promote a free and safe environment for media professionals in both conflict and non-conflict situations. According to UNESCO data, 1,010 journalists were killed around the world in the 12 years between 2006 and 2017. The rate of impunity for killings of journalists remains staggeringly high, with fewer than one out of nine cases ultimately resolved with the perpetrators brought to justice. This high level of impunity emboldens other potential perpetrators of these crimes, creating a vicious cycle that can lead to more attacks and that sends a message to society that killing journalists engenders few consequences.

To tackle this important issue, the UN Chief Executives Board adopted the UN Plan of Action for the Safety of Journalists and the Issue of Impunity on 12 April 2012. The UN Plan of Action was further recognized by the United Nations General Assembly Resolution A/RES/68/163, adopted on 18 December 2013. The General Assembly tasked UNESCO with coordinating the UN Plan and works with all concerned actors to translate international norms into concrete actions.

It is within this context that UNESCO has developed a comprehensive programme to reinforce the knowledge and expertise of members of the judiciary with further training on legal standards related to freedom of expression. Judiciary actors play a crucial role in upholding freedom of expression in all its dimensions, including press freedom, freedom of information and the safety of journalists.

UNESCO launched the first training programme for judicial professionals in 2013 in Latin America in cooperation with the Inter-American Commission on Human Rights. Over 7,500 judges, lawyers, and prosecutors participated in this program, which included a massive open online course (MOOC) and on-the-ground workshops on sub-
jects including legal standards for freedom of expression, the legitimate restrictions to free speech, and the role of the Judiciary in protecting journalists.

UNESCO began working with judicial actors in Africa following a seminar held in Arusha, Tanzania, on the occasion of the commemoration of the International Day to End Impunity for Crimes against Journalists in 2016. The following year, UNESCO launched a project to advance levels of knowledge and understanding among judicial officials in Africa in partnership with the University of Pretoria’s Centre for Human Rights, the African Court on Human and Peoples’ Rights and the African Commission on Human and Peoples’ Rights.

This toolkit for judicial officials in Africa on international and regional standards on freedom of expression was developed as part of this program and it aims to foster a thorough theoretical and practical understanding of the main issues and challenges linked to promoting and protecting freedom of expression and related issues.

The toolkit encompasses a broad variety of issues, which should be considered by judicial actors in the course of their work to protect human rights. It covers legal standards of freedom of expression according to international and regional instruments and core texts and surveys pertinent jurisprudence on freedom of expression from regional and sub-regional courts or quasi-judicial bodies that deal with human rights issues.

The toolkit explicates conditions under which speech can be legitimately restricted, while also giving prominence to the safety of journalists and the issue of impunity, the latter representing one of the main obstacles to guaranteeing freedom of expression and freedom of information. Finally, the toolkit also addresses recent challenges to freedom of expression on the internet, including on social media, which have become vital means for sharing information and expressing views. The question of gender representation in media content and careers, and gender-specific threats for women journalists, are also addressed.

The protection of freedom of expression requires the active efforts of a great variety of actors. While this toolkit has been conceived primarily for judges, prosecutors, trainers of judges, lawyers and other legal experts, it is my hope that civil society actors, members of security forces and media professionals will also find its contents of great value to their work. Given the importance of freedom of expression as a foundational value of free societies, I believe the toolkit’s material and messages will be of relevance to all concerned stakeholders — that is to say, to all individuals everywhere.
We cannot repeat and underline this point enough: fostering freedom of expression is essential for the respect of the rule of law and human rights, and it is key to the achievement of the 2030 Agenda's Sustainable Development Goals (SDGs), particularly for achieving SDG 16 of promoting just, peaceful and inclusive societies for all.

It is our hope at UNESCO that those using this toolkit will gain a deeper understanding of the theoretical frameworks underpinning the fundamental human right of freedom of expression as well as the skills to put this theory into practice.

Moez Chakchouk
UNESCO Assistant Director-General for Communication and Information
Introduction

In democratic societies everywhere, there is strong interdependence between the role of the judiciary and that of the journalists and media. The judiciary’s role is to regulate the society and uphold its laws. The role of journalists is to highlight instances of bad governance, corruption, or any other wrongdoing and, as such, to be the citizens’ voice. In short, the judiciary needs journalists, and journalists need the judiciary.

Yet journalists are often considered unwelcome, and are in some cases outright persecuted, by those who have the most to lose from the truth becoming known. In light of this, it is important that judicial professionals be aware of this pernicious tendency whereby journalists are often perceived as enemies of the people, rather than as vitally important actors in a free and open society. By protecting journalists from abuse, members of the judiciary can uphold their own role as stewards of the right to inform and express oneself freely.

One of the main goals of this toolkit is to underline the importance of regional and international legal standards on freedom of expression. It is of utmost importance that legal professionals be adequately informed with regard to the relevant core legal texts of international law and decisions of supranational courts such as those of the African Court of Human and Peoples’ Rights.

The African Court’s approach to upholding standards on freedom of expression is not only progressive but also highly informative. At its creation in 1998, the Court was mandated to adjudicate cases of alleged violations of the African Charter on Human and Peoples’ Rights and other international human rights instruments, and to issue legally binding orders to be implemented by Member States of the African Union. Since it started its operation in 2006, the Court has made a number of landmark decisions, some of which have had a significant impact on the adoption and application of national legislations on freedom of expression. The Court has therefore positioned itself as a leading guardian of fundamental human rights such as freedom of expression and the rights of journalists.

This is but one element of the training contained in this toolkit. The protection and security of journalists is another important element, as it is a crucial step in guaranteeing a free and pluralistic flow of information and ideas in the public especially in emerging African democratic societies. Finally, pressing contemporary issues, such as the regulation of free speech on the internet and the question of gender representation and gender-specific threats in media professions, are also discussed extensively in this toolkit, adding to its value in helping judicial professionals deal with recent and emerging issues, whose importance will likely grow in the coming years.

It is therefore my hope that this toolkit can provide training and guidance to the judges, prosecutors, lawmakers, civil society leaders, and all professionals dedicated to protecting people’s fundamental rights in Africa.

Justice Sylvain Oré
President of the African Court on Human and Peoples’ Rights
Overview

“The importance of the right to freedom of expression cannot be understated. It is not only important as a self-standing right, but also as a crucial enabling right that serves to realise openness, accountability and transparency. It is through the exercise of the right that it is possible to ensure a well-informed citizenry, to ensure openness and transparency, and to hold those in power to account. This is fundamental to ensure that the prescripts of the rule of law are fully met. The judiciary is key to safeguarding against the erosion of the right, and ensuring that states and other relevant actors meet their obligations to respect, protect, promote and fulfil the right to freedom of expression.

The purpose of this toolkit is to provide a theoretical and practical understanding of the key issues impacting the exercise and enjoyment of the right to freedom of expression in today’s context. In doing so, it highlights the pertinent legal frameworks at the regional and international levels, developments in respect of jurisprudence, guidelines and principles, as well as sectoral initiatives being undertaken. While the toolkit is aimed primarily at judicial officers in Africa, it may similarly be of relevance to legal practitioners, policy-makers, the media and civil society organisations, both in Africa and further abroad.

The toolkit comprises six modules. Modules 1 to 3 of the toolkit focus on the existing legal frameworks under regional and international law in respect of freedom of expression and access to information. More specifically, Module 1

General Comment No. 34 on Article 19 of the International Covenant on Civil and Political Rights
sets out the legal frameworks regarding the right to freedom of expression, and how this right has been given effect to in the regional context. However, the right is not absolute. Accordingly, **Module 2** explores the legitimate restrictions on the right to freedom of expression, as provided for in law and interpreted through various court decisions. **Module 3** sets out the legal frameworks regarding the right of access to information, with a particular emphasis on the important role that this plays in ensuring democratic political processes and sustainable development.

Modules 4 to 6 focus on particular challenges that members of the public and the media face in realising these rights. **Module 4** examines the safety of journalists and the issue of impunity, highlighting the physical risks that many journalists face in the pursuit of the truth. **Module 5** explores contemporary challenges to freedom of expression that have arisen particularly through the exercise of the right online, and how existing legal frameworks can be applied online. **Module 6**, drawing on certain topics from the preceding modules, offers a gendered perspective to the enjoyment of the right to freedom of expression, and the ways in which some of the challenges experienced affect women in unique and disproportionately severe ways.

The toolkit has been designed to put theory into practice and aims for users to gain a practical understanding of the legal standards. Moreover, the modules contain various assessments to test one’s knowledge and command of the topics under consideration. Each module contains three types of assessments:

- **Q&A:** Each module contains a multiple-choice quiz that covers a range of topics dealt with in the module. It is intended to offer a quick and general assessment of the level of knowledge acquired through the module. The answers to the quiz appear at the end of the assessments for each module.

- **Group activities:** The practical activities are exercises that can be conducted in groups during in-person training sessions. They are designed to facilitate discussion amongst the participants. The practical activities include, for instance, questions to debate and role-playing exercises.

- **Individual analysis:** The individual analysis consists of a deep-dive into a particular aspect covered in the module. It calls on the user to consider and analyse the complexities of the issue, undertake independent research, and formulate an opinion. This may be used either as a self-assessment exercise, or by trainers to request a presentation or written submission on the questions posed.
Trainers should be cognisant of the level of legal knowledge of the participants. It is important to note that even participants who have legal experience may still not be familiar with the regional and international law frameworks and the application of these frameworks in the domestic context. Furthermore, principles that may seem commonplace or trite may nevertheless require further examination in light of the contemporary challenges experienced in today’s context.

Additionally, a list of resources is provided at the end of each module, comprising both required and recommended reading. These resources are key to gaining a full understanding of the complexities and dynamics of the issues discussed in this training manual. At the outset, participants should be familiar with all of the following legal instruments, which are of relevance throughout all the modules:

- **Universal Declaration on Human Rights (UDHR)**
- **International Covenant on Civil and Political Rights (ICCPR)**
- **General Comment No. 34 on Article 19 of the ICCPR (General Comment No. 34)**
- **African Charter on Human and Peoples’ Rights (African Charter)**
- **Declaration of Principles on Freedom of Expression in Africa (African Declaration on Freedom of Expression)**
- **African Charter on Democracy, Elections and Governance (ACDEG)**

Underlined words contain hyperlinks that can be clicked to access the sources directly online. For case law on freedom of expression, Columbia University’s Global Freedom of Expression website is a useful resource for updates on recent developments from different jurisdictions.

As a final note, it is not possible for this toolkit to cover all topics falling within the scope of freedom of expression. Freedom of expression is a dynamic and rapidly evolving area of the law. The intention, therefore, is to enrich the user’s understanding of the legal standards on freedom of expression, and to enable the user to distill the core principles and apply them in different scenarios.
Module 1

International and Regional Legal Frameworks

- To provide an overview of fundamental principles of international law.

- To understand the different sources of international law, and the weight that this carries in domestic contexts.

- To understand the importance of freedom of expression in enabling the enjoyment of other rights, and the need for media pluralism.

- To set out the key provisions on freedom of expression contained in international and regional instruments, and how these have been applied by regional and sub-regional courts.

- To examine the developing norm regarding the right of access to the internet.

Fundamental principles of human rights law

Human rights are fundamental and inherent to all persons. They are enshrined in both national and international law, and all persons are entitled to enjoy such rights without distinction, by virtue of their humanity. When fully realised, human rights reflect the minimum standards to enable persons to live with dignity, freedom, equality, justice and peace.

Human rights are typically described as being inherent, inalienable, interdependent, indivisible, and non-discriminatory. This means that they are the birthright of all persons and cannot be withdrawn without lawful basis for doing so. Moreover, each right is closely related to, and often dependent upon, the realisation of other rights. All rights should be treated with due regard to their importance and respected without prejudice.
Human rights under international law are generally rooted in the Universal Declaration of Human Rights (UDHR), which was proclaimed by the United Nations General Assembly in 1948 following the devastation wrought by World War II. The UDHR is not a binding treaty in itself, but has been the catalyst to create other binding legal instruments, most notably the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

• The ICCPR enshrines civil and political rights, sometimes referred to as first-generation rights, and includes the rights to life, liberty, freedom of expression, access to information, privacy, and assembly.

• The ICESCR enshrines economic, social and cultural rights, sometimes referred to as second-generation rights, and includes the rights to health, education, work, and to participate in cultural life. In recognition of the limited resources of many states, it is generally accepted that these rights are to be progressively realised over time.

The vast majority of states have signed and ratified the ICCPR and the ICESCR. Since then, a range of other treaties that have been developed that are more subject-matter focused, such as treaties focusing on the elimination of racial discrimination, the rights of women and children, cultural rights, or persons with disabilities.
There are also several important instruments at the regional levels:

- **Africa**: African Charter on Human and Peoples’ Rights;
- **Americas**: American Convention on Human Rights (American Convention) and the Additional Protocol to the American Convention on Human Rights in the Area of Social, Cultural and Economic Rights (Additional Protocol to the American Convention);
- **Europe**: European Convention on Human Rights (European Convention);
- **Middle East and North Africa**: Arab Charter of Human Rights (the Arab Charter);
- **Southeast Asia**: The Association of Southeast Asian Nations (ASEAN) Human Rights Declaration.

States are the primary duty-bearers for the realisation of human rights. In this regard, states have the duty to respect, protect and fulfil human rights. This entails both negative and positive duties on states. In the first place, governments are required to avoid violating the rights of individuals and communities within their territories, as well as to protect those individuals and communities against violations by others. Importantly, the obligation to fulfil human rights requires states to take positive steps to enable the full enjoyment of human rights. Additionally, corporations, organisations and individuals are required, at a minimum, to respect the rights of others.

![Diagram](image)

By ratifying treaties, states undertake to put in place domestic measures and legislation compatible with their treaty obligations. Domestic legal systems are therefore the primary interface for people to seek the protection of international human rights law at the national level, are generally set out in constitutions, human rights acts and/or other legislation, and are subject to legal jurisdiction. It is not permissible for states to rely on their domestic laws to justify non-compliance with their international law obligations. Most rights are not, however, absolute, and may be limited in appropriate circumstances; this is dealt with in Module 2.

Sources of law

When dealing with international law, the most common source of law that comes to mind is treaty law. Treaties that have been ratified by a state are binding on that state. However, treaties are not the only sources of international law. For instance, other instruments, such as resolutions and guidelines, are of persuasive value and meant to guide member states in their application of international law frameworks; it is expected that states will not act in conflict with these instruments. Article 38 of the Statute of the International Court of Justice identifies the following sources: (i) international conventions; (ii) international custom, as evidence of a general practice accepted as law; (iii) general principles of law recognised by nations; and (iv) judicial decisions and teachings of the most highly qualified publicists, as subsidiary means for the determination of the rules of law.

The African Commission on Human and Peoples’ Rights (African Commission or ACHPR), established by the African Charter to promote and protect the rights enshrined therein, can take into consideration a wide range of sources when determining a matter before it. This is contained in articles 60 and 61 of the African Charter:

“Article 60
The Commission shall draw inspiration from international law on human and peoples’ rights, particularly from the provisions of various African instruments on human and peoples’ rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples’ rights as well as from the provisions of various instruments adopted within the Specialised Agencies of the United Nations of which the parties to the present Charter are members
**Article 61**
The Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognized by member states of the Organization of African Unity, African practices consistent with international norms on human and people’s rights, customs generally accepted as law, general principles of law recognized by African states as well as legal precedents and doctrine.”

In respect of the African Court on Human and Peoples’ Rights (African Court), article 7 of the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of the African Court on Human and Peoples’ Rights (African Court Protocol) only expressly requires reliance to be placed on “the provisions of the [African] Charter and any other relevant human rights instrument ratified by the States concerned”. In practice, however, the African Court relies on an array of sources of law – and understandably so, given the necessity of considering a wide range of sources when determining complex and challenging matters that impact fundamental rights.

**Sources of Law considered by the African Court**

The judgment of the African Court in *Konaté v Burkina Faso*, Application No. 004/2013 (Konaté) is a good indication of the range of different sources of law that can be applied. In that case – which ultimately ordered Burkina Faso to amend its legislation to repeal custodial sentences for acts of defamation, and to adapt its legislation to ensure that other sanctions for defamation are in accordance with its obligations under the African Charter and other legal instruments – the African Court took into account the following sources of law in reaching its decision:

- African Charter
- Revised Treaty of the Economic Community of West African States (ECOWAS)
- Declaration of the Principles on Freedom of Expression in Africa
- ICCPR and General Comment No. 34 on Article 19 of the ICCPR
- Previous decisions of the African Court
- Previous communications of the African Commission
- Previous decisions of the United Nations Human Rights Committee (HRCtte)
- Previous decisions of the European Court on Human Rights (ECtHR)
- Previous decisions of the Inter-American Commission on Human Rights (IACHR)
Decisions handed down by the regional courts, such as the African Court, are binding on the state against whom the case is brought, and are of serious consequence to the other states within the court’s jurisdiction as they are likely to be similarly binding on those other states once the precedent has been set. Other bodies – such as the ACHPR and the HRCtte – are not courts, and are therefore only empowered to hand down recommendations rather than judgments. Even between each other, the ACHPR differs from the HRCtte in that the ACHPR holds a quasi-judicial mandate, which the HRCtte does not. Nevertheless, as with the regional courts, the ACHPR and the HRCtte must still apply the relevant legal instruments within its jurisdiction, and the communications and recommendations provided give important guidance on the interpretation and application of the rights under consideration.

It should also be noted that different sources of law carry different weight when applied domestically. The weight attached to different sources of law may also be affected by whether the particular state is a common law or civil law country. The main difference between these two systems is that in common law countries, case law and judicial decisions are of primary importance, whilst civil law countries place greater emphasis on codified statutes.

The importance of the right to freedom of expression

The Right to Defend, Shock or Disturb

In *Handyside v United Kingdom*, European Court of Human Rights (ECtHR), Application No. 5493/72, para 49, the ECtHR stated as follows:

“[The right to freedom of expression] is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society’. This means, amongst other things, that every ‘formality’, ‘condition’, ‘restriction’ or ‘penalty’ imposed in this sphere must be proportionate to the legitimate aim pursued.”

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The right to freedom of expression has repeatedly been recognised as a core value of a democratic society, and deserving of the utmost protection. It serves four broad objectives: (i) helping individuals obtain self-fulfillment; (ii) assisting in the discovery of truth (iii) promoting political and social participation; (iv) strengthening the capacity of individuals to participate in decision-making; and (v) providing a mechanism by which it is possible to establish a reasonable balance between stability and change.

Freedom of expression is not only important in its own right, but also as an enabler of other rights. For instance, the United Nations Human Rights Committee (HRCtte) has recognised in General Comment No. 25 on the ICCPR – which deals with the right to participate in public affairs, voting rights and the right of equal access to public service – the interplay between these rights and the rights to freedom of expression and opinion. It is clear that the right, both for the public and for the media, has an important role in securing an open and democratic society.

As stated in General Comment No. 25 (at para 8): “Citizens can also take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves. This participation is supported by ensuring freedom of expression, assembly and association.” It states further (at para 19): “Voters should be able to form opinions independently, free of violence or threat of violence, compulsion, inducement or manipulative interference of any kind.

An important development that took place nearly three decades ago was the Declaration of Windhoek 1991 – a product of the Seminar on Promoting an Independent and Pluralistic African Press hosted by the United Nations and UNESCO (the United Nations Educational, Scientific and Cultural Organisation) in 1991. It stated (at para 1) that the establishment, maintenance and fostering of an independent, pluralistic and free press is essential to the development and maintenance of democracy, and for economic development. The Declaration of Windhoek was endorsed by UNESCO member states the same year of its adoption, and led to 3 May being proclaimed World Press Freedom Day by the UN General Assembly in 1993. World Press Freedom Day continues to be celebrated annually around the world.

Since then, the right to freedom of expression has been developed in the face of new platforms, new opportunities and new challenges. The internet and the development of the right to freedom of expression online has had a particularly prominent impact on the right to freedom of assembly. It has created opportunities for new communities of people to interact regardless of
their physical location or other social constraints, to organise and mobilise, and to document protests in real time, including documenting efforts of repression or intimidation. It may also have an impact on the enjoyment of socio-economic rights, such as the right to education, the right to an adequate standard of living, and the right to health and welfare, which can arguably be made more available and accessible to the public through the use of information and communication technologies (ICTs), and the ability that this provides to share and receive information.

When understanding the ambit of the right to freedom of expression, an important component is the need for diversity in media and content. This has been recognised internationally. For instance, General Comment No. 34 (at para 40) calls on states to take appropriate action, in line with the ICCPR, to prevent undue media dominance or concentration by privately controlled media groups in monopolistic situations that may be harmful to a diversity of sources and views. Similarly, Principle III of the Declaration on Principles on Freedom of Expression in Africa provides that:

“Freedom of expression imposes an obligation on the authorities to take positive measures to promote diversity, which include among other things:

- Availability and promotion of a range of information and ideas to the public;
- Pluralistic access to the media and other means of communication, including by vulnerable or marginalised groups, such as women, children and refugees, as well as linguistic and cultural groups;
- The promotion and protection of African voices, including through media in local languages; and
- The promotion of the use of local languages in public affairs, including in the courts.”

UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions

The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions notes in its preamble that cultural diversity is a “defining characteristic of humanity”, and proposes the following measures be implemented at the national level:

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2 See, also, UNESCO's Recommendation concerning the Promotion and Use of Multilingualism and Universal Access to Cyberspace, 2003.
• Regulatory measures aimed at protecting and promoting diversity of cultural expressions;

• Measures that provide opportunities for domestic cultural activities, goods and services among all those available within the national territory for the creation, production, dissemination, distribution and enjoyment of such activities, goods and service;

• Measures aimed at providing domestic independent cultural industries and activities in the informal sector effective access to the means of production, dissemination and distribution of cultural activities, goods and services;

• Measures aimed at providing public financial assistance;

• Measures aimed at encouraging non-profit organizations, as well as public and private institutions and artists and other cultural professionals, to develop and promote the free exchange and circulation of ideas, cultural expressions and cultural activities, goods and services, and to stimulate both the creative and entrepreneurial spirit in their activities;

• Measures aimed at establishing and supporting public institutions;

• Measures aimed at nurturing and supporting artists and others involved in the creation of cultural expressions;

• Measures aimed at enhancing diversity of the media, including through public service broadcasting.

As discussed in more detail below, the internet can play an important role in ensuring that diverse information is shared and received, and that diverse forms of media are readily accessible to the population. This toolkit focuses on various aspects of the right to freedom of expression, both online and offline. However, as a point of departure, it is necessary to understand the application of the right in the broader context of international and regional human rights law.

The international and regional framework relating to freedom of expression

There are three tenets at the core of the right to freedom of expression:

• The right to hold opinions without interference;
• The right to seek and receive information;
• The right to impart information of all kinds through any media regardless of frontiers.

The right is broadly framed, and should be interpreted in a permissive manner having due regard to the importance of the right and the aims pursued through its exercise.

The specific tenets of the right are contained in various regional and international instruments, and have been further applied through a wide number of judicial pronouncements. For the purpose of this toolkit, the ICCPR and the African Charter are the two primary instruments dealing with freedom of expression that are of relevance. However, there are other international and African human rights instruments dealing with particular subject-matter topics that also implicate the right to freedom of expression.

**International treaties**

The first record of the right can be found in article 19 of the UDHR, which states as follows:

“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”

This was later encapsulated in similar terms in article 19 of the ICCPR, which states as follows:

“(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.”

Article 20 of the ICCPR, discussed in more detail later, is also of relevance to the right to freedom of expression as it provides for certain restrictions on speech. In this regard, article 20 states as follows:

“(1) Any propaganda for war shall be prohibited by law. (2) Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”
The United Nations HRCtte, which is the body established to oversee the implementation of the ICCPR, developed General Comment No. 34 on Article 19 of the ICCPR in 2011. This General Comment provides useful guidance on how the right to freedom of expression should be interpreted.

General Comment No. 34 notes that the right to freedom of expression includes, for example, political discourse, commentary on one’s own affairs and on public affairs, canvassing, discussion of human rights, journalism, cultural and artistic expression, teaching, and religious discourse. It may even embrace expression that may be regarded as deeply offensive by some people (although other forms of expression may be restricted, as dealt with in Module 2). The right covers communications that are both verbal and non-verbal (such as artistic works), as well as all modes of expression, including audio-visual, electronic and internet-based modes of communication.

Numerous treaties, in dealing with specific subject-matter, also address the right to freedom of expression, either broadly or in reference to a specific component of the right. For instance, article 15(3) of the ICESCR states that: “The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.”

The right to freedom of expression of children, in particular, is entrenched in a number of instruments. For instance, the Convention on the Rights of the Child, under articles 12 and 13, contains comprehensive provisions relating to the right to freedom of expression as enjoyed by children. In this regard, article 12 provides that:

“(1) States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

(2) For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.”

Further, article 13 goes on to provide that:

“(1) The child 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 the child’s choice.
(2) The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; or (b) For the protection of national security or of public order (ordre public), or of public health or morals.”

Article 21 of the Convention on the Rights of Persons with Disabilities (CRPD), which applies to persons with disabilities, is one of the most comprehensive treaty-based provisions regarding freedom of expression and access to information. One of its most notable features is that it refers specifically to technology and the internet. It provides as follows:

“States Parties shall take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice, as defined in article 2 of the present Convention, including by:

(a) Providing information intended for the general public to persons with disabilities in accessible formats and technologies appropriate to different kinds of disabilities in a timely manner and without additional cost;
(b) Accepting and facilitating the use of sign languages, Braille, augmentative and alternative communication, and all other accessible means, modes and formats of communication of their choice by persons with disabilities in official interactions;
(c) Urging private entities that provide services to the public, including through the Internet, to provide information and services in accessible and usable formats for persons with disabilities;
(d) Encouraging the mass media, including providers of information through the Internet, to make their services accessible to persons with disabilities;
(e) Recognizing and promoting the use of sign languages.”

African regional instruments

In the African context, article 9 of the African Charter (adopted by the Organisation of African Unity Assembly in 1981) provides as follows:

“(1) Every individual shall have the right to receive information.
(2) Every individual shall have the right to express and disseminate his opinions within the law.”
The reference to “within the law” contained in article 9(2) of the African Charter is sometimes referred to as a claw-back clause, with the concern being that states could rely on their domestic laws, regardless of the effect, to negate the rights guaranteed by the African Charter. This has led to article 9 being regarded as the weakest of the freedom of expression provisions within international human rights treaties.

However, this concern has been cured by the ACHPR in its interpretation of article 9. In *Media Rights Agenda and Constitutional Rights Project v Nigeria*, the ACHPR interpreted “within the law” as “within international law”, explaining (at para 4) that to do otherwise would “defeat the purpose of the rights and freedoms enshrined in the Charter”, and that “international human rights standards must always prevail over contrary national law”.

**Interpreting the Claw-back Clause in Article 19 of the African Charter**

In *Constitutional Rights Project v Nigeria* (2000) AHRLR 227 (ACHPR 1999), paras 57-58, the ACHPR explained as follows in the context of article 9 of the African Charter:

“The government justifies its actions with regard to the journalists and proscription of publications by reference to the ‘chaotic’ situation that transpired after the elections were annulled. The Commission decided, in its decision on communication 101/93, with respect to freedom of association, that ‘competent authorities should not enact provisions which limit the exercise of this freedom. The competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution and international human rights standards’ …

With these words, the African Commission states a general principle that applies to all rights, not only freedom of association. Government should avoid restricting rights, and take special care with regard to those rights protected by constitutional or international human rights law. No situation justifies the wholesale violation of human rights. In fact, general restrictions on rights diminish public confidence in the rule of law and are often counter-productive.”

To supplement the freedom of expression provision of the African Charter, the ACHPR adopted the Declaration of Principles on Freedom of Expression in Africa, in October 2002. In its preamble, it notes “the fundamental importance of freedom of expression as an individual human right, as a cornerstone of democracy and as a means of ensuring respect for all human rights and
freedoms”, and “the important contribution that can be made to the realisation of the right to freedom of expression by new information and communication technologies”.

Principle I(2) reaffirms that: “Everyone shall have an equal opportunity to exercise the right to freedom of expression and access to information without discrimination”. Moreover, Principle XVI calls on states parties to the African Charter to make every effort to give practical effect to the principles contained in the Declaration of Principles on Freedom of Expression in Africa.

The African Charter on Democracy, Elections and Governance (ACDEG) was adopted in 2007 as the African Union’s main normative instrument to set standards for better governance across the continent. It is also an important legal instrument, recognising the importance of freedom of expression to political, economic and social governance through article 27(8), which obliges states to commit themselves to “Promoting freedom of expression, in particular, freedom of the press and fostering a professional media”.

**African sub-regional instruments**

The sub-regional courts – particular in East Africa and West Africa – have made significant strides in freedom of expression jurisprudence, having interpreted and developed the legal frameworks in a rights-based manner. Litigating freedom of expression cases before these courts has therefore yielded positive results for persons whose rights had been infringed.

- **East African Community (EAC)**

  The Treaty for the Establishment of the EAC does not contain an express right to freedom of expression, but does include amongst its fundamental principles, in article 6(d), the principle of good governance, which include the principles of democracy, the rule of law, accountability, transparency, and the rights contained in the African Charter. The sub-regional court for the EAC is the East African Court of Justice (EACJ). Article 6(d) mentioned above was relied on by the EACJ in upholding the right to freedom of expression brought before it such as *Burundi Press Union v Attorney General of Burundi* and *Managing Editor, Mseto and Another v Attorney General of the United Republic of Tanzania*.

  In this case, the EACJ expressly provided declaratory relief to this effect, stating that the impugned order banning the publication of a newspaper in Tanzania “constitutes a violation of the Respondent’s obligation under
the Treaty to uphold and protect the principles of democracy, rule of law, accountability, transparency and good governance as specified under Articles 6(d) and 7(2) of the Treaty” and that the order “violates the right to freedom of expression and constitutes a violation of the Respondent’s obligations under the Treaty to promote, recognize and protect human and peoples’ rights and to abide by the universally accepted human rights standard as stipulated under Articles 6(d) and 7(2) of the Treaty”.

• Economic Community of West African States (ECOWAS)

In West Africa, the Revised Treaty of ECOWAS of 2010 also has as one of its fundamental principles in article 4(g), the recognition, promotion and protection of human rights in accordance with the African Charter. The sub-regional court for ECOWAS is the ECOWAS Court of Justice. The Revised Treaty of ECOWAS has been applied in freedom of expression cases such as Deyda Hydro v The Republic of the Gambia, Ebrima Manneh v The Republic of the Gambia and Federation of African Journalists and Others v The Gambia.

Furthermore, article 66 provides that in relation to freedom of expression member states amongst other things, (i) maintain within their borders, and between one another, freedom of access for professionals of the communication industry and for information sources; (ii) to facilitate exchange of information between their press organs; (iii) promote and foster effective dissemination of information within the Economic Community of West African states; and (iii) ensure respect for the rights of journalists. In addition, the ECOWAS Protocol on Democracy and Good Governance of 2001 also obliges member states in article 37 to ensure pluralism of the information sector and the development of the media and to support financially, privately-owned media.

• Southern African Development Community (SADC)

In Southern Africa, the SADC Protocol on Culture, Information and Sport of 2001 in article 19 requires states parties to cooperate in improving the free flow of information within the region; and article 20 provides that states parties will take the necessary measures to ensure the development of media that are editorially independent and conscious of their obligations to the public and greater society. However, at present, the SADC Tribunal has limited powers, and thus its effectiveness is constrained.

(These legal instruments are amongst the most pertinent, but are not intended to be considered a comprehensive list.)
The application of freedom of expression standards by the regional and sub-regional courts

Interplay between the Jurisprudence of the Regional Courts and the Domestic Courts

The Africa Court’s decision in *Konaté v Burkina Faso* is a prime example of how the jurisprudence from a regional court can have a knock-on effect in other countries in the region. In addition to Burkina Faso having to comply with the African Court’s judgment, the judgment has also since been applied and followed in the following decisions regarding criminal defamation:

- **In Zimbabwe:** *Misa-Zimbabwe and Others v Minister of Justice and Others*, Case No CCZ/07/15 – in 2016, the Constitutional Court of Zimbabwe declared the offence of criminal defamation unconstitutional and inconsistent with the right to freedom of expression as protected under the Zimbabwean constitution.

- **In Kenya:** *Okuta v Attorney-General* [2017] eKLR (Petition No 397 of 2016) – in 2017, the High Court of Kenya similarly declared the offence of criminal defamation under the Penal Code unconstitutional, finding it to disproportionate and excessive for the purpose of protecting personal reputation, and that there existed an alternative civil remedy for defamation.

- **In Lesotho:** *Peta v Minister of Law, Constitutional Affairs and Human Rights and Others*, Case No CC 11/2016 – in 2018, the Constitutional Court of Lesotho also declared the offence of criminal defamation inconsistent with the right to freedom of expression and therefore unconstitutional.

Decisions of regional and sub-regional courts have the potential to influence case law of the domestic courts. It is therefore advisable for litigators and judges to stay abreast of the developments in other fora, and consider how these can be applied domestically.

There are mechanisms at the regional and international levels that seek to monitor states’ compliance with their duties under international law, and provide recourse in instances where states are failing to meet their obligations. These bodies have different functions and jurisdiction, as set out in the diagram below, and may include deciding complaints against states; engaging in independent
monitoring through country visits and reporting; and reviewing states’ reports on their own compliance with human rights standards:

The ACHPR is, in accordance with article 45 of the African Charter, mandated to promote and protect human rights in Africa. As part of its protective mandate, the ACHPR receives communications (or complaints) from states or individuals, alleging violation of the rights guaranteed by the African Charter, hears them and makes a finding regarding the alleged violation.

The Special Rapporteur on Freedom of Expression and Access to Information of the ACHPR has been a key role-player in developing the right to freedom of expression, both offline and online. This has included through the development of principles and guidelines, recommendations to states through the treaty-body reporting mechanisms, proposing resolutions, and undertaking fact-finding missions. The Special Rapporteur has also issued responsive statements to domestic developments, both complimenting positive developments and condemning acts that are considered inimical to freedom of expression.
The Special Rapporteur for the ACHPR also works with the special procedure mechanisms from other regional and international bodies, namely the UN, the Organization for Security and Co-operation in Europe and the Organization of American States.

As indicated above, however, the ACHPR is a quasi-judicial body which issues ‘recommendations’ and thus lacks the enforcement power of a court. It became clear that steps had to be taken to ensure that remedies for violations of the rights contained in the African Charter are enforced. Thus, in 2004, the African Court was established to complement the work of the ACHPR in protecting human rights in Africa.

It is important to note that the African Court can only hear cases brought against member states that have ratified the Protocol which establishes it. So far, 30 member States of the African Union (AU) out of 55 have ratified the African Court Protocol.

In the ordinary course, an individual or non-governmental organisation cannot directly lodge a complaint alleging the violation of his or her rights by a member state before the African Court. This right is reserved for the ACHPR, member states and African inter-governmental organisations. However, in terms of Article 34(6) of the African Court Protocol, a member state can make a declaration recognising the jurisdiction of the African Court to accept cases brought by individuals and NGOs. To date, only ten member states have made this declaration. In 2016, Rwanda withdrew its declaration, thus making it only nine countries presently allowing individual access to the African Court.3 Nevertheless, the jurisprudence of the court is influential beyond the specific member countries.

### Judgment of the African Court in Umuhoza v. The Republic of Rwanda

On 24 November 2017, the African Court delivered a judgment in the case of *Ingabire Victoire Umuhoza v Republic of Rwanda*. According to this judgment, Rwanda violated Victoire Ingabire Umuhoza’s rights as a citizen. Specifically, the African Court ruled that Rwanda violated Umuhoza’s right to freedom of expression under article 9(2) of the African Charter and article 19 of the ICCPR. The African Court also found a violation of Umuhoza’s right to defense under article 7(1) of the African Charter.

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3 These states are: Benin, Burkina Faso, Côte d’Ivoire, The Gambia, Ghana, Malawi, Mali, Tanzania and Tunisia.
The ACHPR and the African Court require that local remedies must be exhausted before a matter is brought before them. (This is not required by the EACJ or the ECOWAS Court of Justice.) Local remedies relate to any judicial or legal mechanisms put in place at the domestic level to ensure the effective settlement of disputes, the requirement generally means that the matter must have been brought before the highest appellate court for a decision. In Jawara v The Gambia, the ACHPR explained (at para 32) that the onus rests on the respondent state to establish that the local remedies are available (the petitioner can pursue it without impediment); effective (it offers a reasonable prospect of success); and sufficient (it is capable of redressing the complaint). The exceptions to the rule of exhaustion of local remedies are those situations where local remedies are non-existent; are unduly and unreasonably prolonged; recourse to local remedies is made impossible; or from the face of the complaint there is “no justice” or there are no local remedies to exhaust.

In practical terms, this means that most cases for the enforcement of human rights should be brought at the domestic level first. The benefits of bringing a case at the domestic level are that domestic courts are generally seen as being better placed to judge facts and interpret domestic laws, and it is usually also easier to enforce the decisions of domestic courts because domestic legal systems have developed mechanisms of enforcement that are absent from international forums. However, judgments taken at the regional or sub-regional level have the potential to have a wider impact across the region for all the member states falling within the jurisdiction of that court.
Snapshot of the Litigation before Regional and Sub-Regional Fora

Each regional and sub-regional court has its own procedural requirements for filing a case. For a discussion on litigating freedom of expression and digital rights cases before these fora, see the Digital Rights Litigation Guide published by the Media Legal Defence Initiative in April 2018.

Here are some key facts about litigating before these fora:

- **Exhaustion of local remedies**: As discussed, this a requirement applied by the ACHPR and the African Court, but not required by the EACJ and the ECOWAS Court of Justice.

- **Human rights jurisdiction**: Unlike the ACHPR, African Court and the ECOWAS Court of Justice, the EACJ does not have express human rights jurisdiction. However, the EACJ has held that it can hear cases relating to freedom of expression and the press, as this links to the principles of accountability, democracy and good governance that member states are obliged to uphold.

- **Concept of ongoing violations**: In determining the time period in which a case must be brought, the African Court and the ECOWAS Court of Justice have recognised the concept of ongoing violations. This, however, was expressly rejected by the EACJ, which has applied a strict time bar to the filing of cases.

- **Amici curiae**: The ACHPR, the African Court and the EACJ make provision for the admission of amici curiae in their rules of procedure. Although the ECOWAS Court of Justice does not expressly provide for this, amici curiae have nevertheless been admitted by the court. Amici curiae have frequently played an important role in freedom of expression cases, for instance by providing relevant context, technical expertise on digital matters, or offering comparative law analysis.

Rights must be protected both offline and online

The right to freedom of expression is deeply entrenched as a fundamental human right. Both the United Nations and the African Commission have affirmed that the same rights that people have offline must also be protected online. In 2016, the United Nations Human Rights Council adopted Resolution 32/13, which noted that the internet is a driving force that can accelerate
progress towards development in different forms, and affirmed the importance of applying a rights-based approach in providing and expanding access to the internet, requesting states to make efforts to bridge the many forms of the digital divide. The Resolution notes that the internet plays an important role in facilitating a wide range of rights, notably, the right to education, which plays a decisive role in development, and calls on states to promote digital literacy and facilitate access to information on the internet. In particular, the resolution calls on all states to bridge the gender divide and enhance the use of enabling technology to promote the empowerment of all women and girls and also to take appropriate measures to promote the design, development, production and distribution of information and communications technology and systems that are accessible to persons with disabilities. This was again reaffirmed by the United Nations Human Rights Council in Resolution 38/35 in July 2018.

In 2016, the African Commission adopted Resolution 362(LIX), which similarly notes the transformative nature of the internet in terms of giving a voice to billions around the world, and calls on states to respect and take legislative and other measures to guarantee, respect and protect citizen’s right to freedom of information and expression through access to internet services. Notably, it also makes specific reference to the appropriate conduct of citizens, and urges African citizens to exercise their right to freedom of information and expression on the internet responsibly.

The role and importance of the internet has had a tremendous impact on freedom of expression. The speed and global reach of the internet provides unparalleled opportunities for the enjoyment of human rights, and information rights in particular. The internet has directly affected the ways in which rights are exercised. For the right to freedom of expression, for instance, people around the world are able to communicate quickly and effectively across borders, and to use digital technologies to mobilise, associate, share information and ideas, and engage in robust debate on matters of public importance. This has also led to an increase in citizen journalism and user-generated content, which has fundamentally altered the traditional way in which the media was previously conceived.

Considering the important role that the internet has in the enjoyment of human rights, it is clear that those without such access might be deprived of such enjoyment. In many instances, this can serve to exacerbate already
existing socio-economic divides. Some of the ways in which the internet has fundamentally changed aspects of our society include:\(^4\)

- The production, trade and consumption of goods and services;
- The nature of work and the distribution between work and leisure in people’s lives;
- The (potential) availability of information of all kinds, at all times, in all places, and the capacity to bring different sources of information together;
- Interactions amongst individuals, between individuals and businesses, and between citizens and governments;
- Relationships amongst nation-states and between national and international jurisdictions.

**Joint Declaration on Freedom of Expression and the Internet, 2011**

This joint declaration was signed by the UN Special Rapporteur on Freedom of Opinion and Expression, OSCE Representative on Freedom of the Media, OAS Special Rapporteur on Freedom of Expression and ACHPR Special Rapporteur on Freedom of Expression and Access to Information.

“Giving effect to the right to freedom of expression imposes an obligation on States to promote universal access to the Internet. Access to the Internet is also necessary to promote respect for other rights, such as the rights to education, health care and work, the right to assembly and association, and the right to free elections.”

Source: Joint Declaration on Freedom of Expression and the Internet, 1 June 2011, para 1(a)

Many of the international human rights frameworks identified above were developed before the internet became increasingly an integral part of many people’s daily lives. While in some instances, such as with article 19 of the ICCPR, the provisions were drafted in a manner that sought to be technologically-neutral, it is unlikely that the drafters could have conceived of the implications of the digital age in which we currently live.

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General Comment No. 34 (at para 15) states as follows:
“States parties should take account of the extent to which developments in information and communication technologies, such as internet and mobile based electronic information dissemination systems, have substantially changed communication practices around the world. There is now a global network for exchanging ideas and opinions that does not necessarily rely on the traditional mass media intermediaries. States parties should take all necessary steps to foster the independence of these new media and to ensure access of individuals thereto.”

There is currently an important debate taking place regarding whether or not there is – or should be – a universal right of access to the internet recognised under international human rights law. The question of access to the internet has two inter-related dimensions: the first is access to content online; and the second relates to access to the physical infrastructure to enable access to such online content.

**The Developing Norm at the Domestic Level**

Although there is not as yet a binding international standard on access to the internet, certain states have adopted domestic laws to give effect to this as a right. For instance:

- In Estonia, the Telecommunications Act added internet access to its universal service list, providing in article 5(1) that internet service would be “universally available to all subscribers regardless of their geographical location, at a uniform price”.

- In Greece, article 5A(2) of the Constitution provides that: “All persons have the right to participate in the Information Society. Facilitation of access to electronically submitted information, as well as the production, exchange and diffusion thereof, constitutes an obligation of the State, always in observance of the guarantees of articles 9, 9A and 19”.

- The Constitutional Court of France has held that “given the generalized development of public online communication services and the importance of the latter for the participation in democracy and the expression of ideas and opinions; the free communication of ideas and opinions enshrined in the Declaration of the Rights of Man and the Citizen of 1789 implied freedom to access such services.

- In Finland, section 60C of the Communications Market Act has been amended to require telecommunications operators that are defined as
universal service providers to provide every permanent residence and business office with access to a reasonably priced and high-quality connection with a downstream rate of at least 1 Mbit/s.

- In Costa Rica, the Constitutional Court has stated that: “In the context of a society based on information or knowledge, this imposes upon public authorities, for the benefit of those under their administration, to promote and guarantee universal access to these new technologies”.

Source: *Right to access the internet: The countries and the laws that proclaim it*, Diplo Foundation, 2 May 2011

There is, yet, no binding legal instrument that declares a universal right of access to the internet. However, it is apparent that there is at least a developing norm at the international level that urges states to take steps to facilitate access to the internet in order to realise other rights, including the right to freedom of expression, access to information and education, amongst others. As stated in the 2016 UN Resolution, states are urged to “consider formulating, through transparent and inclusive processes with all stakeholders, and adopting national Internet-related public policies that have the objective of universal access and enjoyment of human rights at their core”. Furthermore, this is a priority of the 2030 Agenda for Sustainable Development (read more about the 2030 Agenda in Module 3). SDG Target 9.c aims to “significantly increase access to information and communications technology and strive to provide universal and affordable access to the Internet in least developed countries by 2020”.
Module 1 Assessments & Resources

The assessments for Module 1 cover a broad range of topics. In particular, the practical activities look at topics relating to sources of law; the impact of regional courts on courts at the national level; and how the existing frameworks might be amended in line with technological developments in the digital age. It also calls for independent research through a review of case law of the regional and sub-regional courts. These practical exercises are intended to get participants to start grappling with some of the complexities relating to freedom of expression, and will be expanded upon further in later modules. The topic for the individual analysis relates to access to the internet, and poses several questions for the participants to consider.

Test your knowledge: Q&A

1. Human rights are rights we have by virtue of:
   a. Race
   b. Class
   c. Culture
   d. Being human
   e. Nationality

2. What is the core component of the right of freedom of expression?
   a. The right to hold opinions without interference
   b. The right to seek and receive information
   c. The right to impart information through any media regardless of frontiers
   d. All of the above
   e. None of the above

3. Freedom of expression is important for the enjoyment of which other human right?
   a. Freedom of association
   b. Freedom to participate in political life
   c. Freedom of religion
   d. Freedom of assembly
   e. All of the above
4. Which of the following is a human rights treaty that can be relied upon for the protection of freedom of expression in Africa?
   a. The African Charter on Human and Peoples’ Rights
   b. The United Nations Convention on the Rights of the Child
   c. The African Youth Charter
   d. All of the above
   e. None of the above

5. Which document was adopted by the African Commission on Human and Peoples’ Rights in 2002, to supplement the provisions of article 9 of the African Charter on Human and Peoples Rights?
   a. The Protocol to the African Charter on the Establishment the African Court on Human and Peoples’ Rights
   b. The African Charter on Democracy, Elections and Governance
   c. The Declaration of Principles on Freedom of Expression in Africa
   d. The Model Law on Access to Information for Africa
   e. The Windhoek Declaration

6. How many African States have ratified the Protocol Establishing the African Court and also made the declaration allowing individual and NGO access to the African Court?
   a. 30
   b. 24
   c. 9
   d. 13

7. Freedom of expression is guaranteed by which sub-regional human rights system?
   a. East African Community
   b. Economic Community of West African States
   c. Southern African Development Community
   d. All of the above
   e. None of the above

8. What key principle of freedom of expression is recognised by international and regional human rights standards on freedom of expression as necessary for preventing monopoly or domination of the media, whether publicly or privately owned?
   a. Self-regulation
   b. Registration
   c. Accountability
d. Pluralism and diversity

e. Good governance

9. The same level of protection of freedom of expression offline is guaranteed to freedom of expression online (on the internet). True or False?
   a. True
   b. False

10. Which international treaty has been adopted to ensure universal access to the internet?
   a. The Universal Declaration of Human Rights
   b. The Declaration of Principles on Freedom of Expression in Africa
   c. The International Covenant on Civil and Political Rights
   d. All of the above
   e. None of the above

   (10 marks)

Group activities

Exercise 1

Consider the decision of the Lesotho Constitutional Court in *Peta v Minister of Law, Constitutional Affairs and Human Rights and Others*, Case No. CC 11/2016.

1. List the sources of law that the Constitutional Court took into consideration in reaching its decision.

2. Which of these sources were directly binding on the Constitutional Court, and which were of persuasive authority?

Exercise 2

Divide into three groups:

- Group 1 is assigned the African Court.
- Group 2 is assigned the EACJ.
- Group 3 is assigned the ECOWAS Court of Justice.

Each group is tasked with finding case law from the assigned court on the right
to freedom of expression. Identify the case and the key findings of the court. Each group will then be asked to report back to the broader group for discussion.

**Exercise 3**

Consider the 2016 UN Resolution 32/12 and the 2018 UN Resolution 38/35 dealing with the promotion, protection and enjoyment of human rights on the internet. Compare the resolutions and note any observations for discussion with the broader group.

**Exercise 4**

Consider the Declaration of Principles on Freedom of Expression in Africa, which was adopted by the African Commission in October 2002, and how this can be applied to freedom of expression online.

1. Which principles, if any, would you amend to make it more relevant or applicable to freedom of expression online?

2. Are there any additional principles that you would propose adding, particularly in light of contemporary opportunities and challenges that the internet presents?

Propose wording for the amendments or additions.

**Exercise 5**

Consider the role that regional courts play in protecting and promoting freedom of expression and other fundamental rights.

1. Has your country signed or ratified African Court Protocol?

2. If yes, has your country deposited the declaration allowing individuals and NGOs access to file a case before the African Court?

3. What are the consequences of the ratification of the African Court Protocol for the national courts?

4. What are the opportunities and challenges that regional courts, such as the African Court, present to national courts and to prospective litigants?
Individual analysis

Access to the internet has been recognised by the African Commission and the United Nations as an important enabler of other rights, such as the freedom of expression, but has not been recognised as a self-standing right as such. Consider the following questions:

1. The term “access” in the context of access to the internet has multiple facets to it. What do you understand this term to mean?

2. Consider the following research paper: Association of Progressive Communications (APC) & Derechos Digitales, Internet access and economic, social and cultural rights, September 2015.

   a. The research paper presents various arguments for and against the recognition of access to the internet as a self-standing right. Which argument do you think is the most persuasive in favour of, and the most persuasive against? Explain.

   b. Access to the internet is most commonly recognised as an enabler of civil and political rights, such as freedom of expression, access to information, and freedom of assembly. However, it can also enable socio-economic rights. What implications can access to the internet have on socio-economic rights?

   c. What other rights or implications can access to the internet have on the realisation of fundamental rights?

Answers to the quiz: 1. (d); 2. (d); 3. (e); 4. (d); 5. (c); 6. (c); 7. (d); 8. (d); 9. (a); 10. (e)
Module 1. International and Regional Legal Frameworks

Resources

• For a discussion on the right to freedom of expression:

• The following communications of the ACHPR are important:
  • Civil Liberties Organization (in respect of the Nigerian Bar Association) v Nigeria (Communication 101/93): [http://www.achpr.org/communications/decision/101.93/]
  • Media Rights Agenda and Constitutional Rights Project, Civil Liberties Organization and Media Rights Agenda v Nigeria (Communication 140/94-141/94-145/95): [http://www.achpr.org/files/sessions/26th/comunications/140.94-141.94-145.95/achpr26_140.94_141.94_145.95_eng.pdf]

• The following academic resources explore some of these challenges to the enjoyment of human rights in Africa, and what can be done to address them:
• For an overview of the similarities and differences amongst the African, European and Inter-American regional human rights systems and mechanisms, see:


• The following materials are useful as a general introduction to human rights and the internet:


  • Joint declaration on freedom of expression on the internet (2011): <http://www.osce.org/fom/78309>
Module 2
Legitimate Restrictions on Freedom of Expression

- To assess how to strike the proper balance between competing rights and interests, and to apply the three-part test to establish whether the limitation of a right is justifiable.

- To examine the limitations to the right to freedom of expression contained in the legal frameworks.

- To explore the justifiability of particular measures aimed at restricting the right to freedom of expression.

- To understand the impact of regional developments in respect of the decriminalisation of defamation.

- To identify the circumstances under which a derogation of rights might be permissible.

Limitations clauses in international treaties

Most rights are not absolute. Rights may be lawfully restricted, subject to specific requirements or conditions that are laid down by law, where those restrictions are reasonable and justifiable in an open and democratic society. Striking the appropriate balance between competing rights and interests lies at the heart of many disputes concerning rights. This may be affected, for instance, based on social inequalities, manifestations of discrimination, power imbalances, and so on. For the purpose of this module, the terms ‘limitations’ and ‘restrictions’ in reference to rights are used interchangeably.
Unjustifiable Limitations of the Right to Freedom of Expression

There have been a number of rulings by the regional and sub-regional courts across the continent, in which the courts have applied the three-part test and ultimately found an unjustifiable limitation on the right to freedom of expression. For instance:

- **Zongo v Burkina Faso:** The African Court held that the state had violated the right to freedom of expression under article 9 of the African Charter by failing to investigate and prosecute the murderers of Mr Zongo, a media professional.

- **Konaté v Burkina Faso:** The African Court held that the right to freedom of expression in terms of article 9 of the African Charter was unjustifiably infringed by aspects of the criminal defamation law, particularly the provisions that imposed a sanction of imprisonment.

- **Hydara Jr v The Gambia:** The ECOWAS Court of Justice held that a state will be in violation of its international obligations if it fails to protect media practitioners.

- **Federation of African Journalists and Others v The Gambia:** The ECOWAS Court of Justice ordered the state to immediately repeal or amend its laws on criminal defamation, sedition and false news as the impugned provisions did not comply with the state’s obligation under international law.

Some rights may be subject to internal limitations within the right itself, or as part of the general limitations clause of the relevant treaty. Any restriction of a right must be capable of being justified both in terms of any internal limitation, as well as the general limitations clause in the treaty.

**Internal limitations of freedom of expression**

Article 19(3) of the ICCPR and article 9(2) of the African Charter present the internal limitations clauses to the right to freedom of expression in both treaties. In this regard, article 19(3) of the ICCPR states that:

“The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:“
(a) For respect of the rights or reputations of others;
(b) For the protection of national security or of public order (ordre public), or of public health or morals.”

The Relationship between Sub-Articles 19(1) and 19(3) of the ICCPR

The UN Human Rights Committee’s General Comment No. 34 on Article 19 of the ICCPR explains the relationship between sub-articles 19(1) and 19(3) of the ICCPR as follows:

“Paragraph 3 expressly states that the exercise of the right to freedom of expression carries with it special duties and responsibilities. For this reason two limitative areas of restrictions on the right are permitted, which may relate either to respect of the rights or reputations of others or to the protection of national security or of public order (ordre public) or of public health or morals. However, when a State party imposes restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself. The Committee recalls that the relation between right and restriction and between norm and exception must not be reversed …

States parties should put in place effective measures to protect against attacks aimed at silencing those exercising their right to freedom of expression. Paragraph 3 may never be invoked as a justification for the muzzling of any advocacy of multi-party democracy, democratic tenets and human rights. Nor, under any circumstance, can an attack on a person, because of the exercise of his or her freedom of opinion or expression, including such forms of attack as arbitrary arrest, torture, threats to life and killing, be compatible with article 19. Journalists are frequently subjected to such threats, intimidation and attacks because of their activities. So too are persons who engage in the gathering and analysis of information on the human rights situation and who publish human rights-related reports, including judges and lawyers. All such attacks should be vigorously investigated in a timely fashion, and the perpetrators prosecuted, and the victims, or, in the case of killings, their representatives, be in receipt of appropriate forms of redress.”

Article 9(2) of the African Charter provides a much wider restriction, in that it requires that freedom of expression is exercised ‘within the law’. It states:

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

As explained above, in Media Rights Agenda and Constitutional Rights Project v Nigeria, the ACHPR interpreted “within the law” as “within international law”,

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explaining that to do otherwise would “defeat the purpose of the rights and freedoms enshrined in the Charter”, and that “international human rights standards must always prevail over contrary national law”.

**General limitations of freedom of expression**

Article 29 of the UDHR, on the other hand, contains a general limitations clause, which provides as follows:

“In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.”

In a similar vein, article 27(2) of the African Charter provides that: “The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.”

The grounds for limitation contained in the UDHR, the ICCPR and the ACHPR may be summarised, respectively, as follows:

<table>
<thead>
<tr>
<th>Grounds for the limitation of a right</th>
<th>UDHR</th>
<th>ICCPR</th>
<th>ACHPR</th>
</tr>
</thead>
<tbody>
<tr>
<td>Determined by law</td>
<td>X</td>
<td></td>
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<tr>
<td>Rights of others</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Morality</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>General welfare</td>
<td>X</td>
<td>X</td>
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<tr>
<td>Public order</td>
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<tr>
<td>Public health</td>
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<tr>
<td>National / collective security</td>
<td>X</td>
<td></td>
<td></td>
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<tr>
<td>Common interest</td>
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</tr>
</tbody>
</table>

Rights may only be limited on the basis of the specific conditions prescribed in the applicable treaty. To be justified, any limitation of the right to freedom of expression must meet the three-part test requiring that: (i) it must be provided for in law; (ii) it must pursue a legitimate aim; and (iii) it must be necessary for a legitimate purpose. This is dealt with in more detail below.
Module 2. Legitimate Restrictions on Freedom of Expression

General Comment No. 34 (at para 21) provides that restrictions on the right to freedom of expression may not put the right itself in jeopardy. This coheres with article 5(1) of the ICCPR, which provides that “nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant”.

Thus, rights cannot be limited in a way that would render the right itself nugatory. As stated by the Zimbabwe Constitutional Court, for instance, in *Chimakure v Attorney-General of Zimbabwe*: “To control the manner of exercising a right should not signify its denial or invalidation”. Furthermore, a restriction or limitation must not undermine or jeopardise the essence of the right of freedom of expression, and the relationship between the right and the limitation – or between the rule and the exception – must not be reversed.

Importantly, all restrictions and limitations must be interpreted holistically, in the light and context of the particular right concerned. Furthermore, it must be consistent with other rights recognised under the treaty in question and other international human rights instruments, as well as with the fundamental principles of universality, interdependence, equality and non-discrimination (on the basis of race, colour, sex, language, religion, political or other belief, national or social origin, property, birth or any other status). The burden of proving this congruence rests on the state.

Wherever doubt exists as to the interpretation or scope of a law imposing limitations or restrictions, the protection of fundamental human rights shall be the prevailing consideration. Restrictions already established must be reviewed and their continued relevance analysed periodically.

While, indeed, all speech can arguably be limited in line with provisions of the applicable limitations clauses, certain forms of speech – for instance, political speech, or matters relating to corruption or human rights issues – should be carefully guarded in light of the important public interest role that it serves.
In *Amnesty International v Zambia*, the ACHPR found that freedom of expression is a fundamental human right essential to an individual’s personal development, political consciousness and participation in the public affairs of a country. Furthermore, in *Kenneth Good v Botswana*, the ACHPR added that “a higher degree of tolerance is expected when it is political speech and even higher threshold is required when it is directed towards the government and government officials”.

**Guidance on the Application of Article 19(3) of the ICCPR**

The United Nations Human Rights Council (HRC), in *Resolution 12/16 on Freedom of Opinion and Expression*, noted that although article 19(3) of the ICCPR provides that the exercise of the right to freedom of expression carries special duties and responsibilities, states should still refrain from imposing restrictions that are not consistent with article 19(3) of the ICCPR, including on the following categories of information:

- Discussion of government policies and political debate; reporting on human rights, government activities and corruption in government; engaging in election campaigns, peaceful demonstrations or political activities, including for peace or democracy; and expression of opinion and dissent, religion or belief, including by persons belonging to minorities or vulnerable groups.

- The free flow of information and ideas, including practices such as the banning or closing of publications or other media and the abuse of administrative measures and censorship.

- Access to or use of information and communication technologies, including radio, television and the internet.

Moreover, the HRC’s General Comment No. 34 on Article 19 of the ICCPR provides that the following is not compatible with article 19(3):

- To suppress or withhold information from the public on matters of legitimate public interest where such disclosure would not harm the public interest;

- To prosecute journalists, researchers, environmental activists, human rights defenders, or others for having disseminated such information;

- To include categories of information relating to the commercial sector, banking or scientific progress under the remit of national security;

- To restrict the issuing of a statement in support of a labour dispute, including for the convening of a national strike, on the basis of national security.
Justifiability of a limitation: The three-part test

The Declaration of Principles on Freedom of expression, states clearly in Principle II that “No one shall be subject to arbitrary interference with his/her freedom of expression”. Most importantly, “Any restrictions on freedom of expression shall be provided by law, serve a legitimate aim and be necessary in a democratic society”.

Thus, in *Kenneth Good v Botswana* (at para 188), the ACHPR said:

> “Though in the African Charter, the grounds of limitation to freedom of expression are not expressly provided as in other international and regional human rights treaties, the phrase ‘within the law’ under article 9(2) provides a leeway to cautiously fit in legitimate and justifiable individual, collective and national interests as grounds of limitation.”

It is important to note that all three legs of the three-part test must be satisfied in relation to a limitation of the right: (i) it must be provided for by law; (ii) it must pursue a legitimate aim; and (iii) it must be necessary for a legitimate purpose. Ultimately, when contested, it is for a court or appropriate tribunal to determine whether the test has been properly met both procedurally and substantively, following due process of the law.

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**Order Banning Newspaper Held to be Unlawful, Disproportionate and Without a Legitimate Purpose**

In *Managing Editor, Mseto and Another v Attorney General of the United Republic of Tanzania*, Reference No. 7 of 2016, the EACJ declared that an order issued by the Tanzanian Minister for Information, Culture, Arts and Sports, dated 10 August 2016, restricted freedom of expression and press freedom and thereby constituted a violation of the respondent’s obligation under the Treaty for the Establishment of the EAC to uphold and protect the principles of democracy, rule of law, accountability, transparency and good governance.

On 10 August 2016, the Minister issued an order directing the applicants to cease publication of *Mseto* for a period of three years. The Minister’s order read as follows: “The newspaper title “MSETO” shall cease publication including any electronic communication as per the Electronic and Postal Communications Act for the duration of thirty-six months with effect from 10th August, 2016.“The applicants were prohibited from publishing or disseminating information by any means, including the internet.
The Minister was purportedly empowered to make such an order in terms of section 25 of the Newspapers Act, 1979, which read as follows: “Where the Minister is of the opinion that it is in the public interest, or in the interest of peace and good order so to do, he may, by order in the Gazette, direct that the newspaper named in the order shall cease publication as from the date (hereinafter referred to as “the effective date”) specified in the order.” Section 25(1) has since been repealed by the Media Service Act, 2016, but the order banning the publication of Mseto has still been in force.

After considering the relevant treaty provisions, the EACJ held that the Minister’s order had the following “obvious unreasonable, unlawful and disproportionate anomalies”: there were no reasons proffered in the order issued on 10 August 2016; the applicants were not afforded a reasonable opportunity to respond; the order violated the principles of freedom of expression and press freedom by failing to give proper and cogent reasons as to why a duly registered publisher should cease publication of its newspaper; the order was made without there being established how the publication of the newspaper specifically violated public interest, interest of the peace and/or good order of the Tanzanian people; the order made no reference to the earlier correspondence or the previously-held position that the newspaper could only publish sports news; it was unclear why the offending article would be in violation of section 25(1) of the Newspapers Act.

The EACJ therefore concluded that the restrictions imposed by the Minister were unlawful, disproportionate and did not serve any legitimate or lawful purpose. In this regard, the EACJ stated as follows:

“The Respondent having failed to establish how the publication in the Mseto newspaper violated the public interest, or the interest of peace and good order of the people, can only lead to the conclusion that the impugned order was made in violation of the right of freedom of expression ... The order indeed derogates from the principles of democracy and adherence to the principles of good governance, the rule of law and social justice. Further, the order failed to conform with and adhere to the principles of accountability and transparency. By issuing orders whimsically and which were merely his ‘opinions’ and by failing to recognize the right to freedom of expression and press freedom as a basic human right which should be protected, recognized and promoted in accordance with the provisions of the African Charter, the Minister acted unlawfully.”

We turn next to examine each aspect of the three-part test in turn.
It must be provided for by law

Limitations must be provided for by a prior existing law in the domestic legal framework of the state seeking to limit the right. Such law must have been adopted by the legislative body of the relevant state. The law must be publicly accessible, and formulated with sufficient precision to enable the public to regulate their conduct accordingly. In other words, the law must be concrete, clear and unambiguous, such that it can be understood and applied by everyone. Furthermore, as stated in General Comment No. 34 (at para 25), the law must provide sufficient guidance to those charged with its execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not. The requirement of ‘provided for by law’ might also mean that even through there exists a law on the statute books, a restriction might not be ‘provided by law’ where it lacks the quality of law or is contrary to the rule of law.

Laws imposing restrictions or limitations must not be arbitrary or unreasonable and must not be used as a means of political censorship or of silencing criticism of public officials or public policies. According to General Comment 34 (at para 24), a limitation or restriction must also not be enshrined in a traditional, religious or other customary law. The law must be both compatible with the provisions, aims and objectives of international human rights law, and should not provide for penalties that are incompatible with international human rights law, such as corporal punishment.

General Comment No. 34 (at para 27) provides further that it is for states to justify the legal basis for any restriction imposed on freedom of expression. Laws imposing a restriction or limitation must set out the remedy against or mechanisms for challenging the illegal or abusive application of that limitation or restriction, which must include a prompt, comprehensive and efficient judicial review of the validity of the restriction by an independent court or tribunal.

As mentioned in Module 1, article 9(2) of the African Charter provides that: “Every individual shall have the right to express and disseminate his opinions within the law.” The reference to “within the law” has been interpreted by the ACHPR in Constitutional Rights Project v Nigeria (at paras 57-58), with reference to its earlier decision in Civil Liberties Organisation v Nigeria, as follows:

“The Commission decided, in its decision on communication 101/93, with respect to freedom of association, that ‘competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution and international human rights standards’ …
With these words the Commission states a general principle that applies to all rights, not only freedom of association. Government should avoid restricting rights, and take special care with regard to those rights protected by constitutional or international human rights law. No situation justifies the wholesale violation of human rights. In fact, general restrictions on rights diminish public confidence in the rule of law and are often counter-productive.”

The African Commission has therefore made it clear that a state cannot rely on its domestic framework to justify non-compliance with its obligations under international human rights law. In *Media Rights Agenda and Constitutional Rights Project v Nigeria*, the government had by decree proscribed certain newspapers. In finding a violation of Article 9(2) of the African Charter, the ACHPR explained (at para 66) that: “According to Article 9.2 of the Charter, dissemination of opinions may be restricted by law. This does not mean that national law can set aside the right to express and disseminate one’s opinions; this would make the protection of the right to express one’s opinions ineffective. To allow national law to have precedent over the international law of the Charter would defeat the purpose of the rights and freedoms enshrined in the Charter. International human rights standards must always prevail over contradictory national law. Any limitation on the rights of the Charter must be in conformity with the provisions of the Charter.”

**It must pursue a legitimate aim**

Earlier in this module, we looked at the wording of the relevant articles of the UDHR, the ICCPR and the ACHPR, and the particular grounds that can be relied upon to justify a limitation of a right. In this section, we will look specifically at some of the common grounds relied on to limit freedom of expression, namely the reputation of others, morality, and national security. In *Media Rights Agenda and Constitutional Rights Project v Nigeria*, the ACHPR noted (at paras 68-69) that: “The only legitimate reasons for limitations to the rights and freedoms of the African Charter are found in Article 27.2, that is, that the rights of the Charter ‘shall be exercised with due regard to the rights of others, collective security, morality and common interest.’ The reasons for possible limitations must be founded in a legitimate State interest and the evils of limitations of rights must be strictly proportionate with and absolutely necessary for the advantages which are to be obtained.”
(i) The reputation of others

Most states have domestic laws allowing civil claims for defamation where a person’s reputation has been unjustifiably harmed. Some states also maintain the criminal law offence of criminal defamation (and criminal libel), although this has been held by the African Court on Human and Peoples’ Rights to be incompatible with the African Charter, and is dealt with separately in more detail below. According to General Comment No. 34 (at para 47), any defamation law should be crafted with care to ensure that it does not stifle freedom of expression.

Article 17 of the ICCPR protects citizens against attacks on their honour and reputation. However, this limitation of freedom of expression should never be used to protect the state or public officials from public opinion or criticism. Furthermore, Principle XII(1) of the Declaration of Principles on Freedom of Expression in Africa, under the heading “Protecting reputations” provides as follows:

“States should ensure that their laws relating to defamation conform to the following standards:

- no one shall be found liable for true statements, opinions or statements regarding public figures which it was reasonable to make in the circumstances;
- public figures shall be required to tolerate a greater degree of criticism; and
- sanctions shall never be so severe as to inhibit the right to freedom of expression, including by others.”

In respect of public figures, the African Court in *Konaté v Burkina Faso* (at para 155) confirmed that public officials are expected to withstand more scrutiny and criticism that the average citizen. In this regard, the African Court stated that:

“[F]reedom of expression in a democratic society must be the subject of a lesser degree of interference when it occurs in the context of public debate relating to public figures. Consequently, as stated by the [African] Commission [on Human and People’s Rights], ‘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.’”
(ii) Morality

As stated in the UN Human Rights Committee’s General Comment No. 22 on Article 18 of the ICCPR (General Comment No. 22), relating to freedom of thought, conscience or religion, the HRCtte observed (at para 8) that: “[T]he concept of morals derives from many social, philosophical and religious traditions; consequently, limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition”. General Comment No. 22 goes further to state that: “The fact that a religion is recognized as a State religion or that it is established as official or traditional or that its followers comprise the majority of the population, shall not result in any impairment of the enjoyment of any of the rights under the Covenant, including articles 18 and 27, nor in any discrimination against adherents to other religions or non-believers.”

At stated in General Comment No. 34 (at para 32), any limitation sought to be justified on the ground of morality must therefore be understood in the light of the universality of human rights and the principle of non-discrimination. It states further (at para 48) that legal provisions relating to an alleged lack of respect for a religion or other belief system, such as blasphemy laws, are generally incompatible with international human rights law, as they would run contrary to the principle of non-discrimination. Furthermore, it would also be inappropriate for prohibitions on speech to be used to prevent or punish criticism of religious leaders or commentary on religious doctrine.

(iii) National security

While the protection of national security interests is certainly a legitimate aim, it is the ground that is arguably most vulnerable to abuse. This is due, in part, to states refusing to disclose complete information about the content and extent of the national security threat, and courts and other institutions generally being deferent to the state and allowing it significant leeway in determining what constitutes national security. As noted by the UN Special Rapporteur on Freedom of Expression (at para 60):

“The use of an amorphous concept of national security to justify invasive limitations on the enjoyment of human rights is of serious concern. The concept is broadly defined and is thus vulnerable to manipulation by the State as a means of justifying actions that target vulnerable groups such as human rights defenders, journalists or activists. It also acts to warrant often unnecessary secrecy around investigations or law enforcement activities, undermining the principles of transparency and accountability.”
It is important, therefore, that national security laws – whether they relate to, for instance, official secrets or treason – should be framed narrowly to ensure that they comply with the international law provisions.

Thus, Principle XIII(2) of the Declaration of Principles on Freedom of Expression in Africa provides that freedom of expression should not be restricted on public order or national security grounds “unless there is a real risk of harm to a legitimate interest and there is a close causal link between the risk of harm and the expression”.

The Johannesburg Principles on National Security, Freedom of Expression and Access to Information (Johannesburg Principles) was adopted by a group of international law experts in 1996, and endorsed by the UN Special Rapporteur on Freedom of Expression. While not binding law, the Johannesburg Principles reflect a statement of the legal position under international law, and may be considered a useful interpretive aid when considering the difficult questions that arise in the context of national security.

Under Principle 2, it states as follows:

“(a) A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government.

(b) In particular, a restriction sought to be justified on the ground of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest.”

Principles 6 and 7 deal specifically with the interplay with the right to freedom of expression (both of which are subject to Principles 15 and 16, which deal with the disclosure of secret information and information obtained through the public service, respectively). Principle 6 provides that expression may be punished as a threat to national security only if a government can demonstrate that (i) the expression is intended to incite imminent violence; (ii) it is likely to
incite such violence; and (iii) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

Principle 7 goes further to state that the peaceful exercise of the right to freedom of expression shall not be considered a threat to national security or subjected to any restrictions or penalties. Principle 7(3) states that: “No one may be punished for criticizing or insulting the nation, the state or its symbols, the government, its agencies, or public officials, or a foreign nation, state or its symbols, government, agency or public official unless the criticism or insult was intended and likely to incite imminent violence.”

This is in accordance with the ACHPR’s decision in *Media Rights Agenda and Constitutional Rights Project v Nigeria*, in which it stated (at para 75) that:

“It is important for the conduct of public affairs that opinions critical of the government be judged according to whether they represent a real danger to national security. If the government thought that this particular article represented merely an insult towards it or the Head of State, a libel action would have been more appropriate than the seizure of the whole edition of the magazine before publication.”

In that case, the ACHPR found that the limitation could not be justified on the ground of national security, and that there had consequently been a breach of article 9(2) of the African Charter.

Another important principle contained in the Johannesburg Principles is Principle 23, which provides that: “Expression shall not be subject to prior censorship in the interest of protecting national security, except in time of public emergency which threatens the life of the country under the conditions stated in Principle 3”. As a general proposition, prior restraint of expression is impermissible. The implementation of prior restraints on publication can have a chilling effect on the enjoyment of the right to freedom of expression.

Counter-terrorism measures may also fall within the ambit of national security, but must also comply with all three legs of the test to establish a justifiable limitation. Counter-terrorism measures do not enjoy any heightened status in terms of its permissibility for the limitation of the right to freedom of expression. Moreover, as noted in the HRCtte’s General Comment No. 34 (at para 46), any offences relating to the encouragement of terrorism or extremist activity, or to the praising, glorifying or justifying of terrorism, should be clearly defined to ensure that they do not lead to unnecessary or disproportionate interferences
with freedom of expression. General Comment No. 34 notes further that the media plays an important role in informing the public about acts of terrorism, and it should be able to perform its legitimate functions and duties without hindrance.

**It must be necessary for a legitimate purpose**

The third part of the test is that restrictions must be necessary for a legitimate purpose. A restriction will not meet the necessity threshold if the protection could be achieved in other ways that would not restrict the right to freedom of expression. This leg of the test requires that the restriction should be (i) effective, i.e. appropriate for attaining the legitimate interest pursued; (ii) the least restrictive measure available to achieve the legitimate end pursued; and (iii) proportionate, i.e. it should not sacrifice freedom of expression to an inordinate extent in comparison with the advantages to be had from protecting the aim pursued.

The proportionality analysis is particularly important in this regard. The principles relating to proportionality have been distilled in the HRCtte’s General Comment No. 34 (at para 34) to include the following:

- Restrictive measures must be appropriate to achieve their protective function;
- They must be proportionate to the interest to be protected;
- The principle of proportionality must be respected both in law and by the authorities applying the law;
- The principle of proportionality must take into account the form of expression and the means of dissemination, for instance if it pertains to a public debate concerning figures in the public and political domain.

In the 2002 decision of **Attorney-General v ‘Mopa**, the Lesotho Court of Appeal, quoting with approval the decision of the Canadian Supreme Court in **R v Oakes**, stated (at para 33) as follows:

“...There are, in my view, three important components of a proportionality test. First, the measures adapted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Secondly, the means, even if rationally connected to the objective in this first sense, should impair as little as possible the right or freedom in question ... Thirdly there must be a proportionality between...
the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of sufficient importance.”

**Application of the Proportionality Test**

In February 2018, the ECOWAS Court of Justice in the case of *Federation of African Journalists and Others v The Gambia* held that the Gambian laws on libel, sedition and false news disproportionately interfere with the rights of Gambian journalists, and accordingly directed that the Gambia immediately repeal or amend these laws in line with its obligations under international law. The set of laws on sedition, false news and defamation, had been used in the case against four journalists Fatou Camara, Fatou Jaw Manneh, Alhagie Jobe, and Lamin Fatty, who were arrested and tortured by the regime of Yahya Jammeh. The laws were found to have violated freedom of the press and access to information, and the Gambian government was pointed out as having arbitrarily arrested, harassed and detained the journalists, and forced them into exile for fear of persecution as a consequence of their work as journalists. In assessing the proportionality of the limitation, the ECOWAS Court of Justice stated as follows:

“In analyzing the criminal laws of the Gambia, one can certainly infer that these laws do not guarantee a free press within the spirit of the African Charter on Human and Peoples’ Rights and the International Covenant on Civil and Political Rights (ICCPR). The restrictions and vagueness with which these laws have been framed and the mens rea (seditious intention), makes it difficult to discern with any certainty what constitutes seditious offence.

The practice of imposing criminal sanctions on sedition, defamation, libel and false news publication has a chilling effect that may unduly restrict the exercise of freedom of expression of journalists. The application of these laws will amount to a continued violation of the internationally agreed rights of the Applicants.

Having critically examined the criminal laws of the Gambia, the Court declares that the criminal sanctions imposed on the applicants are disproportionate and not necessary in a democratic society where freedom of speech is a guaranteed right under the international provisions cited.”

In May 2018, in the case of *Gambia Press Union and Others v Attorney General*, SC Civil Suit No. 1/2014, the Gambian Supreme Court declared the criminal defamation law and the law on false news on the internet to be unconstitutional. However, in respect of the law on sedition, it was held that the law was only unconstitutional to the extent that a publication relates to government and other public officials, but retained the law in respect of the president.
There are certain key lessons to be drawn from the above decisions. Firstly, the different speech offences – in this case, libel, sedition and false news – each have different elements. Although a court may ultimately arrive at the same outcome for each, they should not be conflated. Rather, each offence should be analysed separately, looking at the wording and purpose of each offence. Furthermore, courts should be cautious about presuming a law to be constitutional, particularly when considering legislation that dates back to the colonial era. Courts have important and necessary powers in terms of national constitutions to assess the constitutionality of laws precisely to act as a safeguard in cases where legislatures overstep their constitutional mandate. Furthermore, it must be remembered that it is for the state to justify that the onus rests on the state to justify a limitation of a right by placing appropriate factual material, policy considerations and legal argument before the court.

**Criminal defamation and other criminal laws limiting freedom of expression**

As mentioned above, many countries have domestic laws regarding civil claims for defamation in instances where a person feels aggrieved about the harm that a statement or publication has caused to that person's reputation. In instances where a person is successfully able to prove a civil claim for defamation, and the person responsible for the statement or publication is not able to successfully raise a defence, the person who has suffered reputational harm is typically entitled to monetary compensation in the form of civil damages. For many journalists, the risk of excessive monetary awards also contributes to self-censorship.

However, many countries worldwide still have the criminal law offence of criminal defamation on their statute books as well. Both the United Nations and the African Commission have urged states to reconsider this. For instance, the HRCtte's General Comment No. 34 provides (at para 47) that: “States Parties should consider the decriminalization of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty”. Moreover, Principle XIII(1) of the Declaration of Principles on Freedom of Expression in Africa calls on states to review all criminal restrictions on content to ensure that they serve a legitimate interest in a democratic society.
In the decision handed down by the African Court in 2013, in the matter of *Konate v Burkina Faso*, it was held that imprisonment for defamation violates the right to freedom of expression, and that criminal defamation laws should only be used in restricted circumstances. The facts of the case are as follows: In 2012, the editor of a weekly publication in Burkina Faso was sentenced to 12 months in prison and a fine of 4 000 000 CFA francs for defaming a state prosecutor, after he published two articles alleging abuse of power in the prosecutor’s office.

In its analysis, the African Court found that the offence of criminal defamation was prescribed in the domestic law of Burkina Faso. The court also found that its objective of protecting the honour and reputation of magistrates, jurors and assessors in the performance of their duties was legitimate. Turning then to the third leg of the test, the African Court posed three questions: (i) are there sufficient reasons to justify the action; (ii) is there a less restrictive solution; and (iii) does the action destroy the essence of the rights guaranteed by the African Charter? The African Court also had regard to the fact that the prosecutor is a public figure, noting that “freedom of expression in a democratic society must be the subject of a lesser degree of interference when it occurs in the context of public debate relating to public figures”.

In concluding that the applicable criminal defamation laws were incompatible with article 9 of the African Charter, the African Court stated (at paras 165-166) as follows:

“Apart from serious and very exceptional circumstances for example, incitement to international crimes, public incitement to hatred, discrimination or violence or threats against a person or a group of people, because of specific criteria such as race, colour, religion or nationality, the Court is of the view that the violations of laws on freedom of speech and the press cannot be sanctioned by custodial sentences, without going contrary to the above provisions.

The Court further notes that other criminal sanctions, be they (fines), civil or administrative, are subject to the criteria of necessity and proportionality; which therefore implies that if such sanctions are disproportionate, or excessive, they are incompatible with the Charter and other relevant human rights instruments.”

Since the African Court’s decision, there have been important developments in domestic courts on the continent. For instance, in 2016, *Misa-Zimbabwe and Others v Minister of Justice and Others*, the Constitutional Court of Zimbabwe declared the offence of criminal defamation unconstitutional and inconsistent
with the right to freedom of expression as protected under the Zimbabwean constitution. The following year, in 2017, in *Okuta v Attorney-General*, the High Court of Kenya similarly declared the offence of criminal defamation under the Penal Code unconstitutional, finding it to disproportionate and excessive for the purpose of protecting personal reputation, and that there existed an alternative civil remedy for defamation. More recently, this has also been confirmed in the cases of *Peta v Minister of Law, Constitutional Affairs and Human Rights and Others*, in which the Constitutional Court of Lesotho declared the offence of criminal defamation to be inconsistent with the right to freedom of expression and therefore unconstitutional.

Apart from criminal defamation, there are other criminal laws that are often used to restrict freedom of expression. In Africa, these include offences such as sedition, insult to a head of state, and the publication of false news. Usually, these criminal offences are vaguely worded, broadly formulated and attract lengthy prison sentences and/or fines. Thus, while the stated purpose of these laws are usually in line with international law, the effect of their application could be to ‘chill speech’ by stifling general debate or criticism on a wide range of political and governance related issues. The recognition of the potential negative impact of these laws has in recent years, led some African governments and/or their judiciaries to repeal criminal defamation and similar laws. For example, in 2001, the Ghanaian government repealed the offences of criminal defamation, criminal libel and sedition while the Togolese government in August 2004 repealed criminal defamation and insult laws. In Uganda, laws on the publication of false news and sedition have been declared unconstitutional by the Supreme Court in the cases of *Onyango-Obbo v Attorney General* and *Mwenda v Attorney General* respectively.

**Prohibited speech**

Not all speech is protected under international law. Some kinds of speech are required to be prohibited by states. Article 20 of the ICCPR is important in this regard. It provides that:

“(1) Any propaganda for war shall be prohibited by law.
(2) Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”

The HRCtte’s General Comment No. 34 states (at para 50) that articles 19 and 20 of the ICCPR are compatible and complement each other. Accordingly, the
prohibited grounds listed in article 20 of the ICCPR are also subject to restriction
in accordance with article 19(3), and must also be capable of justification in
terms of the three-part test. The key distinction, therefore, is that article 20
provides for a specific response to such speech: it must be prohibited by law.

Article 20 of the ICCPR is not alone in this regard. In similar – although not
identical – terms to article 20 of the ICCPR, article 4(a) of the International
Convention on the Elimination of All Forms of Racial Discrimination requires
that the dissemination of ideas based on racial superiority or hatred, incitement
to racial discrimination, as well as all acts of violence or incitement to such acts
against any race or group of persons of another colour or ethnic origin, must be
declared an offence that is punishable by law. There are therefore six activities
under article 4(a) that must be declared as offences punishable by law:

- Dissemination of ideas based on racial superiority;
- Dissemination of ideas based on racial hatred;
- Incitement to racial discrimination;
- Acts of racially motivated violence;
- Incitement to acts of racially motivated violence; and
- The provision of assistance, including of a financial nature, to racist
  activities.

The criminalisation of incitement for certain forms of speech is also well-
established under international criminal law. In this regard, Article III(c) of the
Convention on the Prevention and Punishment of the Crime of Genocide
states that “direct and public incitement to commit genocide” shall be
punishable. Similarly, the Rome Statute of the International Criminal Court
criminalises the incitement to commit international crimes, including a
prohibition on incitement to commit genocide as contained in article 25(3)
(e) thereof.

While the provisions above refer to hatred, they do not use the term ‘hate speech’.
This, however, has become a popular term used in domestic contexts, although
it has proven difficult to define. For instance, under the ICCPR, the following
types of hate speech can be distinguished:

- Hate speech that must be prohibited (article 20(2) of the ICCPR);
- Hate speech that may be prohibited (such as article 19(3) of the ICCPR);
and
- Lawful hate speech that should be protected from restriction, but
  nevertheless raises concerns in terms of intolerance and discrimination, and
  may merit a critical response by the state (such as article 19(2) of the ICCP
The Rabat Plan of Action

Central to the question of whether hate speech rises to the threshold of being criminal relates to the severity of the speech in question. The Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, compiled by a meeting of experts coordinated by the United Nations Office of the High Commissioner on Human Rights (OHCHR), proposes the following six-part threshold test to establish whether expression is criminally prohibited:

- **Context**: Context is of great importance when assessing whether particular statements are likely to incite to discrimination, hostility or violence against the target group and it may have a bearing directly on both intent and/or causation. Analysis of the context should place the speech act within the social and political context prevalent at the time the speech was made and disseminated;

- **Speaker**: The position or status of the speaker in the society should be considered, specifically the individual's or organisation's standing in the context of the audience to whom the speech is directed;

- **Intent**: Article 20 of the ICCPR requires intent. Negligence and recklessness are not sufficient for an article 20 situation that which requires “advocacy” and “incitement” rather than mere distribution or circulation. In this regard, it requires the activation of a triangular relationship between the object and subject of the speech as well as the audience;

- **Content or form**: The content of the speech constitutes one of the key foci of the court’s deliberations and is a critical element of incitement. Content analysis may include the degree to which the speech was provocative and direct, as well as a focus on the form, style, nature of the arguments deployed in the speech at issue or in the balance struck between arguments deployed, etc.;

- **Extent of the speech**: This includes elements such as the reach of the speech, its public nature, magnitude and the size of its audience. Further elements are whether the speech is public, what the means of dissemination are, considering whether the speech was disseminated through one single leaflet or through broadcasting in the mainstream media or internet, what was the frequency, the amount and the extent of the communications, whether the audience had the means to act on the incitement, whether the statement (or work of art) was circulated in a restricted environment or widely accessible to the general public;
• **Likelihood, including imminence:** Incitement, by definition, is an inchoate crime. The action advocated through incitement speech does not have to be committed for that speech to amount to a crime. Nevertheless, some degree of risk of resulting harm must be identified. It means the courts will have to determine that there was a reasonable probability that the speech would succeed in inciting actual action against the target group, recognising that such causation should be rather direct.

As stated in the *Joint Declaration on Racism and the Media*, published by the International Mechanisms for Promoting Freedom of Expression in 2001, hate speech laws have in the past been used against those they should be protecting. Accordingly, the Declaration provides that any such hate speech laws should, at a minimum, conform with the following: (i) no one should be penalised for statements which are true; (ii) no one should be penalised for the dissemination of so-called ‘hate speech’ unless it has been shown that they did so with the intention of inciting discrimination, hostility or violence; (iii) the right of journalists to decide how best to communicate information and ideas to the public should be respected, particularly when they are reporting on racism and intolerance; (iv) no one should be subject to prior censorship; and (v) any imposition of sanctions by courts should be in strict conformity with the principle of proportionality.

**Derogations of rights**

Article 4 of the ICCPR provides for the derogation of rights in times of public emergency. This is generally considered to be a drastic measure, and one that states should only invoke subject to the prescripts contained in article 4. In this regard, article 4 of the ICCPR provides as follows:

“(1) In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

(2) No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.
(3) Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.”

General Comment No. 29 deals with derogations during a state of emergency. As noted (at para 2), a measure derogating from the ICCPR must be of “an exceptional and temporary nature”, and must meet two fundamental pre-conditions before it can be invoked: (i) the situation must amount to a public emergency which threatens the life of the nation; and (ii) the state party must have officially proclaimed a state of emergency. Even in instances where a lawful derogation has been invoked, there are still important restrictions on a state’s conduct. For instance, General Comment No. 29 provides (at para 13) that no declaration of a state of emergency may be invoked as justification for a state party to engage in propaganda for war, or in advocacy of national, racial or religious hatred that would constitute incitement to discrimination, hostility or violence.

The rights listed in article 4(2) of the ICCPR are non-derogable. Notably, the African Charter does not contain an express derogations clause akin to Article 4 of the ICCPR. As such, in terms of the African Charter, all restrictions on rights must be subject to the limitations analysis discussed above.
Module 2 Assessments & Resources

The focus of the assessments contained in Module 2 are to give practical application to the three-part limitations analysis, and understand how this has been applied and implemented in different court decisions when seeking to strike the appropriate balance with the right to freedom of expression. Participants are invited to critically assess particular laws, with due regard to the legal frameworks discussed in Module 1. The individual analysis focuses specifically on the issue of criminal defamation and the rationale and legal bases relied upon by the different courts across Africa in decriminalising defamation.

Test your knowledge: Q&A

1. The African Charter on Human and Peoples’ Rights allows for any of the rights contained therein to be limited on grounds of-

   a. The rights of others
   b. Collective security
   c. Morality
   d. Common interest
   e. All of the above

2. To be justified, any limitation of freedom of expression must-

   a. pursue a legitimate aim
   b. be provided by law
   c. be necessary for a legitimate purpose
   d. all of the above
   e. none of the above

3. The internal limitation clause ‘within the law’ in article 9(2) of the African Charter on Human and Peoples’ Rights means ‘within…’

   a. National law
   b. Customary law
   c. International human rights law
   d. National security law
   e. None of the above
4. In which landmark decision did the African Court on Human and Peoples’ Rights rule that imprisonment for criminal defamation is a violation of the African Charter on Human ad Peoples’ Rights?

   a. Konaté v Burkina Faso
   b. Kenneth Good v Botswana
   c. Constitutional Rights Project v Nigeria
   d. Okutua v Attorney General
   e. Media Rights Agenda and Constitutional Rights Project v Nigeria

5. The offence of criminal defamation has been repealed or declared unconstitutional by the highest courts in which country in Africa?

   a. Zimbabwe
   b. Kenya
   c. Lesotho
   e. All of the above

6. Freedom of expression can only be limited on national security grounds where in circumstances in which –

   a. There is a real risk of harm to a legitimate interest
   b. The limitation is in line with the rights and freedoms guaranteed by the relevant treaty
   c. There is a close causal link between the risk of harm and the expression
   d. It is necessary to protect a country’s existence or its territorial integrity against the use or threat of force
   e. All of the above

7. Which of the following types of speech are states required to adopt laws to prohibit?

   a. Incitement to discrimination
   b. Propaganda for war
   c. Incitement to hostilities
   d. Incitement to violence
   e. All of the above
8. Which of the following international treaties contains provisions prohibiting certain types of speech?

   a. The International Covenant on Civil and Political Rights
   b. The Rome Statute of the International Criminal Court
   c. The Convention on the Elimination of All Forms of Racial Discrimination
   e. All of the above

9. Which of the following rights cannot be derogated from under international law?

   a. Freedom of expression
   b. Freedom of movement
   c. Right to be equal before courts and tribunals
   d. Right to life
   e. Right to liberty and security of the person

10. The African Charter permits the derogation of which of these rights in instances of public emergency?

   a. Freedom of thought, conscience and religion
   b. Freedom of expression
   c. Freedom of movement
   d. Right to fair trial
   e. None of the above

(10 marks)

Group activities

Exercise 1

In the decision of Burundi Journalists Union v Attorney General of the Republic of Burundi, Reference No. 7/2013, the East African Court of Justice was called upon to assess whether the impugned provisions of Law No. 1/11 of 4 June 2013 regulating the press in Burundi violated the right to press freedom.
This included:

- A duty on journalists to communicate only balanced information, the sources of which have been rigorously checked (article 17);

- A duty on journalists to refrain from publishing or broadcasting information which contravenes national unity, public order and security, morality and common decency, honour and human dignity, national sovereignty, privacy, individuals and presumption of innocence (article 18);

- A duty on journalists not to disseminate information which relate to national defence secrets, the stability of the currency, privacy (including personal and medical files), confidentiality of a legal investigation at the pre-trial stage, affronts and insults against the Head of State, calls and advertisements that incite revolt, civil disobedience, unauthorised demonstrations, defend crimes, blackmail or fraud, racial ethnic hatred, defamatory, insulting, libellous, offensive articles or reports regarding public or private persons, propaganda against Burundi, information that may harm the credit of the state and national economy, information concerning military operations, national defence, diplomacy, scientific research and reports of commissions of inquiry by the State, identity of rape victims, protection of minors against obscene and/or images and debates held in closed session concerning minors without prior authorisation (article 19);

- A duty on journalists to reveal their sources of information before the competent authorities in situations where the information relates to State security, public order, defence secrets and the moral and physical integrity of one or more persons (article 20).

Assessing these provisions in light of the legal frameworks on freedom of expression discussed above, consider what your approach would be if you had to determine whether these provisions violated the right to press freedom under regional and international law.

Once this has been discussed in groups, examine the judgment (in particular, paras 93-111) and consider the similarities and differences between your reasoning and that of the EACJ.
Exercise 2

Divide into groups and select a law from one or more of the participants’ domestic contexts – either existing or proposed – that will have an impact on the enjoyment of human rights online. (This may include, for instance, legislation or policy dealing with cybercrimes, data protection, regulation of content online, broadband rollout, etc.)

What impact will this law have on the enjoyment of human rights online? In this regard, consider the competing interests at stake, the harm that it intends to address, and any negative consequences that such a law may have on particular rights.

Exercise 3

In May 2015, the African Commission adopted the Principles and Guidelines on Human and Peoples’ Rights while Countering Terrorism in Africa. It recognises in Part I that states must not use the combatting of terrorism as a pretext to restrict fundamental freedoms, including freedom of expression. In particular, have regard to Part 11: The right to privacy, and Part 12: Right of access to information and the right to truth. Consider how national security and counter-terrorism can and have been used as the basis to restrict the rights to freedom of expression, access to information and privacy. What safeguards should be put in place to ensure that this is not subject to abuse?

Discuss in groups.

Exercise 4

Watch the video of the international human rights lawyer Nani Jansen Reventlow, where she explains the arguments she developed when representing Ms. Ismailova in her case before the ECtHR against Azerbaidjan: https://www.youtube.com/watch?v=Go3OfrjWOkU. Compile and explain in writing the main legal arguments used by Ms. Jansen Reventlow. To what extent could similar arguments be applied in the African context?

Individual analysis

Consider the following questions:

1. Is criminal defamation an offence in your country?
2. With regard to the case law discussed above, what are the key arguments in support of the decriminalisation of defamation?

3. In November 2014, in *Motsepe v S*, the High Court of South Africa concluded that: “In my view, having regard to the above-mentioned, prosecution of the media journalists who committed a crime of defamation is not inconsistent with the constitution. In exercising their rights under section 16 of the Constitution, the media should also guard against rights of others as freedom of expression is not unlimited. It must be construed in the context of other rights such as the right to human dignity.” Analyse this judgment in light of the decisions on criminal defamation that have been discussed above, and critique whether or not you agree with the findings made by the High Court of South Africa.

Answers to the quiz: 1. (e); 2. (d); 3. (c); 4. (a); 5. (e); 6. (e); 7. (e); 8. (e); 9. (d); 10. (e)
Resources

Required resources

• For a general discussion on justifiable limitations of the right to freedom of expression, and key judicial pronouncements in this regard, the following resource provides a useful overview:


• The following judgments are of particular importance to understand how the limitations analysis has been applied by the regional and sub-regional courts:


• The following decisions of the African Commission are of relevance in understanding the practical application of the limitations clauses, and the narrow interpretation such clauses have been given, with particular regard to the requirement that a limitation must be necessary and proportionate:

Module 2. Legitimate Restrictions on Freedom of Expression


The following domestic case law is of relevance:

- The following national jurisdictions have dealt with the constitutionality of criminal defamation, sedition and publication of false news:
  
  - Okuta v Attorney-General [2017] eKLR (Petition No. 397 of 2016): [https://globalfreedomofexpression.columbia.edu/cases/okuta-v-attorney-general/]
  
  
  - MISA-Zimbabwe v Minister of Justice, CCZ/07/15: [https://globalfreedomofexpression.columbia.edu/cases/misa-zimbabwe-et-al-v-minister-justice-et-al/]
  
  

- The following documents provide useful guidance on the scope of particular challenges being faced, and the proposed approaches to be taken to address these challenges in a manner that is compliant with a human rights framework:
  
• Declaration of Table Mountain on Abolishing Insult Laws in Africa and Setting Free Press Higher on the Agenda:  
<http://www.wan-ifra.org/microsites/declaration-of-table-mountain>

• Camden Principles on Freedom of Expression and Equality:  

• For a comprehensive discussion on hate speech under international law, see Article 19, ‘Hate speech explained: A toolkit’ (2015):  

**Recommended reading**

• The African Commission on Human and Peoples’ Rights has delivered guidance in previous communications on the approach and interpretation of the national security provisions in the African Charter on Human and Peoples’ Rights:

    <http://www.achpr.org/communications/decision/102.93/>

  • Sudan Human Rights Organisation and Another v Sudan (2009) AHRLR 153 (ACHPR 2009):  
    <http://www.achpr.org/communications/decision/279.03-296.05/>

• For a discussion on prohibited speech, and the interplay between the right to freedom of expression and those types of speech that are not covered by the right, see:

  • Gagliardone, I., Gal, D., Alves, T., and Martinez, G. ‘Countering Online Hate Speech. UNESCO Series on Internet Freedom (2015)’:  
    <http://unesdoc.unesco.org/images/0023/002332/233231e.pdf>

  • Article 19, Expert meeting on the links between articles 19 and 20 of the ICCPR (2008):  
Module 3
The Right to Access Information

• To understand the importance of the right of access to information, and the scope of the right.

• To examine the legal framework on the right of access to information, the way in which the right has been interpreted, and the core principles of the right.

• To examine the impact of other initiatives, such as the Sustainable Development Goals (SDGs), the Open Government Partnership (OGP) and the Extractives Industry Transparency Initiative (EITI).

• To explore the particular importance of access to information during elections.

• To consider the impact of the internet on access to information.

The importance of the right of access to information

Access to Information as a Cross-cutting Right

As stated in the preface to the ACHPR Guidelines on Access to Information and Elections in Africa (ATI Guidelines):

“The right of access to information guaranteed by Article 9 of the African Charter on Human and Peoples’ Rights (the African Charter) is an invaluable component of democracy, as it goes a long way in facilitating participation in public affairs. The importance of the right of access to information is underpinned by the fact that it is a crosscutting right. It is a right that is necessary for the realisation of other human rights, including the right to participate in government directly or through freely chosen representatives, as guaranteed by Article 13 of the African Charter.”
Access to information, commonly referred to also as ‘freedom of information’, the ‘right to information’ or the ‘right to know’, is an important element of democratic governance, as it goes a long way in ensuring transparency and accountability of elected representatives and ensuring public participation in the planning and implementation of government policies which affect the day to day life of citizens. It is a tool for combating arbitrary exercise of government power, corruption and mismanagement of national resources and in ensuring that in all its dealings, governments act “rationally and with due deliberation”.

Since 2016, UNESCO has marked 28 September as the International Day for Universal Access to Information, which is used as an opportunity to advocate to encourage more countries to adopt freedom of information legislation, developing policies for multilingualism and cultural diversity in the cyberspace, and ensuring that women and men with disabilities are integrated.

Unlike most other internationally recognised human rights, access to information is an offshoot of a separately recognised human right. Treaties such as the ICCPR and the African Charter do not refer to an express right of access to information, but rather recognise this within the right to freedom of expression which includes the ‘right to seek and receive’ or ‘freedom of’ information. This has evolved over time, and is largely recognised both as an integral element of the right to freedom of expression, as well as an independent self-standing right. Notably, Article 13 of the UN Convention against Corruption requires each state party to take appropriate measures to promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organisations and community-based organisations, in the prevention of and the fight against corruption – including by “[e]nsuring that the public has effective access to information”.

Successive UN Special Rapporteurs on the Promotion and Protection of Freedom of Expression and Opinion (UNSRs) have incrementally elaborated principles on access to information. Initially, access to information was regarded as ‘one of the essential elements of freedom of speech and expression” but soon declared a ‘freedom on its own’ and ‘not simply a converse of the right to freedom of opinion and expression’ and as ‘a right in and of itself’ and not ‘merely a corollary of freedom of opinion and expression’. Another important landmark in the evolution of the right was the declaration that the right imposes a positive

obligation on States‘ to allow access to information in their possession’, marking a break from the conception of access to information as imposing the negative obligation-requiring States to refrain from interfering with individuals in their quest to seek and receive information.

The HRCtte’s General Comment No. 34 on Article 19 of the ICCPR has reiterated this position by stating that article 19(2) of the ICCPR embraces a right to access information held by public bodies regardless of the form in which it is stored, source and date of production. The General Comment views this right as imposing three main obligations on States Parties, which are: to make available in the public domain, ‘Government information of public interest’; to ensure easy, prompt, effective and practical access to such information; and to enact procedures to give effect to this right in the form of legislation.

Thus, the importance of the right of access to information in any society is underpinned by the fact that it is a ‘cross-cutting right’, in that it is interconnected with all other human rights, whether civil and political or socio-economic. This interconnectedness of access to information with all other human rights contributes to its utility as a leverage right—one which can be used for the realisation of all other human rights.

In this regard, General Comment No. 34 identifies other rights guaranteed by the ICCPR, in respect of which the right of access to information is necessary for their realisation. These include:

- Article 10 of the ICCPR: a prisoner is entitled to access his or her medical records;
- Article 14 of the ICCPR: persons accused of a criminal offence are entitled to access a range of information pertaining to the charge;
- Article 17 of the ICCPR: the right of individuals to ascertain in an intelligible form, whether, and if so, what personal data is stored in automatic data files; for what purposes; and which public authorities or private individuals or bodies control such files;
- Article 25 of the ICCPR: the right of access to information includes the right of the media to access to information on public affairs and the right of the general public to receive media output;

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• Article 27 of the ICCPR: a state’s decision that may substantively compromise the way of life and culture of a minority group should be undertaken in a process of information-sharing and consultation with affected communities.

With particular reference to access to information in relation to the culture of minority groups, the importance of access to information in the environmental decision making process has been recognised in the Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Affairs (the Aarhus Convention) adopted by the European Commission.

A recent important development has been the adoption of the Escazú Convention on 4 March 2018, which was adopted in Latin America after a six-year negotiation process by 24 countries. In addition to being the region’s first ever legally binding treaty on environmental rights, it is also known as the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters, and is also designed to make it easier to obtain information, participate in decision-making processes and hold powerful interests to account.

The connection between access to information and socio-economic rights is equally established. Numerous cases exist of the use of access to information as a tool for improving socio-economic conditions around the world.10 Ranging from uncovering corruption by government-approved shops in the allocation of food rations for the poor in India, the revelation of corruption in public schools in Serbia and the uncovering of inaction by local government despite suspected bid-rigging in local government projects in Japan,11 Other examples include the provision of safe drinking water and housing for villagers of the Ntambanana Municipality in KwaZulu-Natal, South Africa,12 and the successful fight for an equal right to education in Thailand.13

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A common feature of these instances in which access to information has been successfully utilised for realising socio-economic progress, is the existence of domestic legal frameworks in the form of constitutional provisions guaranteeing access to information as a human right, and/or specific laws laying down the processes and procedure for requesting access to information. Over one hundred countries worldwide have adopted access to information legislation.

In 2018 in Africa, countries that have specific constitutional provisions on access to information include the following: Egypt (section 47), Ethiopia (section 29(5)), Kenya (section 52), Malawi (section 37), Morocco (section 27), Niger (section 31), South Africa (section 32), Uganda (section 41) and Zimbabwe (section 62). However, more generally, most other constitutions provide for the ‘right to seek, receive and impart information’ or for ‘the right to information’ usually as components of the right to freedom of expression, which can be relied upon in giving effect to the right of access to information. In terms of laws, African countries that have adopted specific legislation laying down the process for enforcing the right of access to information include Angola, Ethiopia, Côte d’Ivoire, Guinea, Kenya, Liberia, Malawi, Mozambique, Niger, Nigeria, Rwanda, Sierra Leone, South Africa, South Sudan, Sudan, Tanzania, Togo, Tunisia, Uganda and Zimbabwe.

**The United Nations Sustainable Development Goals, access to information and development**

Since the start of the new millennium, numerous multi-stakeholder initiatives have been developed at the international level to improve socio-economic development. A golden thread that runs through these initiatives is the disclosure of information whether through the adoption of access to information legislation setting out a regime for proactive and ‘request oriented’ disclosure of information or through the proactive disclosure of information relating to certain categories of development related information.

With the end of the implementation of the Millennium Development Goals in 2015, world leaders adopted the [2030 Agenda for Sustainable Development](https://unsdg.un.org/sustainabledevelopment). For the implementation of this development agenda, [17 SDGs were adopted](https://unsdg.un.org/sustainabledevelopment) and came into force on 1 January 2016. The SDGs are a set of goals seeking to end poverty, protect the planet and ensure prosperity for all as part of a new sustainable development agenda. Each goal contains specific targets to be met by 2030. Access to information is key to the implementation of this development
agenda, particularly in goal 16 concerning the promotion of just, peaceful and inclusive societies.

**Goal 16: Promote just, peaceful and inclusive societies**

This goal focuses on promoting peaceful and inclusive societies through effective and accountable institutions. Of the 16 targets associated with this goal, the following are particularly relevant to this discussion:

- **Target 4**: By 2030, significantly reduce illicit financial and arms flows, strengthen the recovery and return of stolen assets and combat all forms of organized crime.
- **Target 5**: Substantially reduce corruption and bribery in all their forms.
- **Target 6**: Develop effective, accountable and transparent institutions at all levels.
- **Target 7**: Ensure responsive, inclusive, participatory and representative decision-making at all levels.
- **Target 8**: Broaden and strengthen the participation of developing countries in the institutions of global governance.
- **Target 10**: Ensure public access to information and protect fundamental freedoms, in accordance with the national legislations and international agreements.

UNESCO is the UN’s designated convening agency for monitoring and reporting on global progress on Target 10, using the indicator “Number of countries that adopt and implement constitutional, statutory and/or policy guarantees for public access to information”. According to the **2017 report of the UN Secretary General** on the progress of SDG 16.10:

“Legislation that calls for freedom of information has increased steadily, but slow or inefficient implementation of such laws remains a concern. More than 110 countries have adopted freedom of information legislation and policies. However, expert assessments suggest that 47 of those countries fall short of having clear legal provisions for exceptions to that right, while another 47 countries lack sufficient provisions for public education.”

Access to information is also to varying extents, contained in the targets of the following goals:

- **Goal 2(c): End hunger, achieve food security and improved nutrition and promote sustainable agriculture**.
  Adopt measures to ensure the proper functioning of food commodity
markets and their derivatives and facilitate timely access to market information, including on food reserves, in order to help limit extreme food price volatility.

- **Goal 5(b): Achieve gender equality and empower all women and girls.** Enhance the use of enabling technology, in particular information and communications technology, to promote the empowerment of women.

- **Goal 9(c): Build resilient infrastructure, promote inclusive and sustainable industrialization and foster innovation.** Significantly increase access to information and communications technology and strive to provide universal and affordable access to the Internet in least developed countries by 2020.

There are other multi-stakeholder initiatives that emphasise and require action to promote access to information for the purpose of development. In each case, the requirement of proactive disclosure of information and/or the adoption of an access to information law requiring proactive disclosure of information is a key principle.

**The legal framework on the right of access to information**

The right of access to information has its origins in the right of freedom of expression. Specifically, with reference to the right to “seek receive and impart information” in the UDHR and the ICCPR, and the right to “receive information” under the African Charter.
Article 19 of the UDHR in this regard provides that:

Everyone has the right to freedom of expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any medium regardless of frontiers.

Similarly, article 19 of the ICCPR states:

(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.”

The UN Convention against Corruption, in articles 10 and 13, also provides for access to information in the context of transparency in public administration as well as public participation as a tool for fighting corruption. Furthermore, World Press Freedom Day conferences have also adopted declarations on the right of access to information such as the Brisbane Declaration and the Finlandia Declaration.

In Africa, the African Charter and several other regional treaties provide for access to information in various contexts. Article 9 of the African Charter provides that:

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

Principle IV of the Declaration of Principles on Access to Information, in supplementing the provisions of article 9 of the African Charter in the context of access to information, provides that:

“Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.”

Specifically, Principle IV requires that access to information laws are to be adopted by state parties in accordance with the following principles:

• Everyone has the right to access information held by public bodies;
• Everyone has the right to access information held by private bodies which is necessary for the exercise or protection of any right;
• Any refusal to disclose information shall be subject to appeal to an independent body and/or the courts;
• Public bodies shall be required, even in the absence of a request, actively to publish important information of significant public interest;
• No one shall be subject to any sanction for releasing in good faith information on wrongdoing, or that which would disclose a serious threat to health, safety or the environment save where the imposition of sanctions serves a legitimate interest and is necessary in a democratic society; and
• Secrecy laws shall be amended as necessary to comply with freedom of information principles.

Socio-Economic Rights and Accountability Project v Nigeria

In *Socio-Economic Rights and Accountability Project v Nigeria*, Case No. 248/11, the Federal High Court of Nigeria found a violation of the right of access to information. In that case, SERAP requested the government to disclose information concerning the recovered stolen public funds since Nigeria’s return to democratic rule in 1999. The government, however, rejected the request on the ground that the governing Freedom of Information Act does not retroactively apply to those records that occurred prior to the law’s enactment in 2011.

The Federal High Court of Nigeria found that the government’s refusal was contrary to fundamental principles of transparency and accountability and in violation of Articles 9, 21, and 22 of the African Charter on Human and Peoples’ Rights. In its ruling, the Court held that information pertaining to the government expenditure of stolen public funds since 1999 fell squarely within the country’s Freedom of Information Act and therefore, the government was required to disclose and widely publish that information.

This is an important example of how regional and international legal frameworks can be used where the domestic law is insufficient to provide adequate rights and protections.

Access to information increasingly features in human rights treaties adopted by the African Union. In this regard, article 2 of the ACDEG lists as one of its objectives, “the establishment of the necessary conditions to foster citizen participation, transparency, access to information, freedom of the press and accountability in the management of public affairs”.

Article 9 of the *AU Convention on Preventing and Combating Corruption* obliges state parties to “adopt such legislative and other measures to give effect to the
right of access to any information that is required to assist in the fight against corruption and related offences”.

Article 6 of the African Charter on Values and Principles of Public Service and Administration provides for access to information in the context of public service and administration as follows:

Access to Information
“(1) Public Service and Administration shall make available to users information on procedures and formalities pertaining to public service delivery.
(2) Public Service and Administration shall inform users of all decisions made concerning them, the reasons behind those decisions, as well as the mechanisms available for appeal.
(3) Public Service and Administration shall establish effective communication systems and processes to inform the public about service delivery, to enhance access to information by users, as well as to receive their feedback and inputs.
(4) Public Service and Administration shall ensure that administrative procedures and documents are presented in a user-friendly and simplified manner.”

The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa also reinforces the need for access to information. This includes in relation to eliminating discrimination against women (article 2(2)); the elimination of harmful practices (article 5(a)); health and reproductive rights (article 14(2)(a)); and the right to a healthy and sustainable environment (article 18(2)(b)).

In addition to affirming the need for access to information in the context of health and reproductive rights, General Comment No. 2 on Article 14 of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa further specifically provides that: ‘Information on health expenditures should be available to facilitate monitoring, control and accountability’.

The African Youth Charter contains several provisions on the right of access to information in the context of development in article 10(3). Of particular relevance is article 10(3)(d), which obliges state parties to:

“Provide access to information and education and training for young people to learn their rights and responsibilities, to be schooled in democratic processes,
citizenship, decision-making, governance and leadership such that they develop the technical skills and confidence to participate in these processes."

Lastly, article 3 of the African Charter on Statistics requires statistics authorities in member states to facilitate transparency by providing “information on their sources, methods and procedures that have been used in line with scientific standards” and further requires that “the domestic law governing operation of the statistical systems must be made available to the public”.

The Model Law on Access to Information for Africa

In 2010, the ACHPR adopted Resolution 167 (XLVIII) 2010 on Securing the Effective Realisation of Access to Information in Africa, which authorised the African Commission’s Special Rapporteur on Freedom of Expression and Access to Information to develop a model access to information law for Africa. Following an extensive process of consultation, the Model Law on Access to Information in Africa (the Model Law) was launched in April 2013. As stated at the launch of the Model Law, its rationale lies in the imperatives of good governance and democracy:

Democracy

“In a participatory, people-centred democracy, information should not as a rule be viewed as ‘secret’, and as only accessible to the citizenry at the unguided discretion of officials. Rather, information should be made as freely available as possible, to enable the people – who are after all the chief stakeholders in a democracy – to participate in the democratising process, to hold government accountable and ultimately to exercise informed democratic choices. In other words, the adoption of access to information legislation signals a shift towards a state and society where the fall-back position is that information is available unless valid reason for security or confidentiality exist, and not the other way around.

Good governance

“Access to information is an instrument of good governance and may play a role in poverty eradication and the realisation of socio-economic rights. Openness is a tool to combat governance ills such as corruption, secret deals between government and multi-national companies to sell off land, and misappropriation of taxpayers’ contributions. In South Africa, the Access to Information Act was recently used to force a parastatal company to reveal information about a secret deal with a trans-national mining company that had a significant effect on the price of and access to electricity in the country”. 
As explained in the preface to the Model Law, a model law is typically a detailed set of provisions that set out the international, regional or sub-regional standards on a particular subject that can be adopted – and adjusted, as appropriate to the domestic context – as national legislation in the particular state. It is a non-binding instrument that can serve as a guide to lawmakers. A model law assists states to comply with article 1 of the African Charter, which obliges states to adopt legislative or other measures to give effect to the rights, duties and freedoms enshrined in the African Charter.

The key features of the model law include the following:

**i. Definition of information (section 1):** Information is defined as including “any original or copy of documentary material irrespective of its physical characteristics, such as records, correspondence, fact, opinion, advice, memorandum, data, statistic, book, drawing, plan, map, diagram, photograph, audio or visual record, and any other tangible or intangible material, regardless of the form or medium in which it is held, in the possession or under the control of the information holder to whom a request has been made under this Act”.

**ii. Distinction between public and private bodies (section 2(a) and (b)):** Every person has a right of access to information held by either a public body or a private body, as defined in section 1. Importantly, in respect of private bodies, the requester must establish that the information sought “may assist in the exercise or protection of any right”. It is not required that a requester establish this when the information is made to a public body.

**iii. Presumption of disclosure (section 2(c)):** It is stated as a general principle that any law or policy that creates a right of access to information must be interpreted and applied on the basis of a presumption of disclosure, with non-disclosure only being permitted in “exceptionally justifiable circumstances” as set out in law. A further general principle, contained in section 2(g), is that no one is subject to any sanction for releasing information under the law in good faith.

**iv. Duty to create, keep, organise and maintain information (section 6):** Essential to the right of access to information is the availability and accessibility of the information being sought. This not only requires that records be created, but that can be provided voluntarily or on request in a manner and format that is useful to the requester and the public. Section 6 provides that the information holder must create, keep, organise and maintain its information in a manner that facilitates the right of access to information.
v. Proactive disclosure (section 7): While the Model Law deals predominately with access to information requests, the Model Law also urges relevant bodies to proactively disclose certain types of information, as set out in section 7, including for instance the details of the information officers, and any prescribed forms or procedures for engaging with members of that body.

vi. Designation of an information officer and deputy information officers (sections 10 and 11): In order to comply with the requirements of the Model Law, it is required that an information holder designate competent and suitable persons as information officers and deputy information officers to exercise the powers, and perform the functions and duties, that are contemplated.

vii. Requests for information (section 13): A person who wishes to obtain access to information must make a request either orally or in writing to the information officer. As a general rule, a requester does not have to provide a justification or reason for requesting any information. There are two exceptions to this provided in the Model Law: (i) if the requester believes that the information is necessary to safeguard the life or liberty of a person, the request must include a statement to that effect, including the basis for that belief (section 13(6)(b)); and (ii) if the request is made to a private body, it must provide an explanation of why the requested information may assist in the exercise or protection of any right (section 13(6)(c)). Additionally, the request must provide sufficient detail as is reasonably necessary to enable the information officer to identify the information; identify the nature of the form and language in which the requester prefers access; and provide the relevant authorisation if the request is made on behalf of someone else.

viii. Response to requests for information (section 15): Responses to requests should be provided as soon as reasonably practicable, but in any event within 21 days after the request is submitted. The response must be provided in writing. Where a request has been granted, the requester may be required to first pay a reproduction, translation or transcription fee before access is given. Where a request is refused, adequate reasons must be provided. If an information officer fails to provide a response within the specified time period, the information officer is deemed to have refused the request (section 18).

ix. Exemptions (part III): An information holder may refuse to grant access for information only if the information falls within an exemption stated in
part III. The grounds of exemption are as follows:

a. Classified information (section 26);
b. Personal information of a third party (section 27);
c. Commercial and confidential information of an information holder or third party (section 28);
d. Protection of life, health and safety of an individual (section 29);
e. National security and defence (section 30) (this is dealt with further below);
f. International relations (section 31);
g. Economic interests of the state (section 32);
h. Law enforcement (section 33);
i. Legally-privileged documents (section 34);
j. Academic or professional examination and recruitment processes (section 35).

x. Severance (section 36): Where a portion of a record or document requesting information is exempt from release, the exempt portion of the information must be severed or redacted, and access to the remainder of the information must be granted to the requester.

xi. Public interest override (section 25): Section 25 provides as follows:

“Public interest override
(1) Notwithstanding any of the exemptions in this Part, an information holder may only refuse a requester access to information if the harm to the interest protected under the relevant exemption that would result from the release of the information demonstrably outweighs the public interest in the release of the information.
(2) An information officer must consider whether subsection (1) applies in relation to any information requested before refusing access on the basis of an exemption stated in this Part.”

The burden of proof rests on the information officer that refuses to grant access to establish that the requested information is exempt from disclosure, and that the harm to the protected interest under the relevant exemption that would result from the release of the information outweighs the public interest in the release of the information (section 38).

xii. Right of internal review (section 40): A requester may apply for an internal review of any decision of an information officer. Similarly, a third party may apply for an internal review of a decision of an information officer to grant access to information containing its third party information.
The head of the information holder must make a fresh decision and notify the requester as soon as reasonably practicable, but in any event within 15 days after the internal review request is submitted by the information officer (section 42), failing which the head of the body is deemed to have affirmed the original decision of the information officer (section 44).

**xiii. Oversight mechanism (part V):** Part V provides for an independent and impartial oversight mechanism comprised of information commissioners for the purposes of the promotion, monitoring and protection of the right of access to information. A requester or third party may apply to the oversight mechanism for a review of any decision (section 71). Subject to the provisions regarding direct access, this may only be done if the internal review procedure has been exhausted (sections 73 and 74). The oversight mechanism may issue binding orders or recommendations on any matter before it (section 81).

**xiv. Judicial review (section 83):** An application for judicial review may be made to the appropriate court for judicial review of a decision of the oversight mechanism.

**xv. Protection against criminal and civil liability (section 87):** As set out in section 87, no person is criminally or civilly liable, or may be subject to any detriment in the course of their employment, for the disclosure or authorisation of the disclosure of information in good faith.

These are the key tenets of the Model Law, and are contained in varying degrees in access to information legislation in domestic contexts. However, even in countries with comprehensive access to information laws, the challenge remains the meaningful implementation of the laws in a manner that truly gives effect to the right.

**Guidelines on Access to Information and Elections in Africa**

An important development has been the publication of the ACHPR’s *Guidelines on Access to Information and Elections in Africa* (ATI Guidelines) in 2017. As explained in the ATI Guidelines:

“Access to information empowers the electorate to be well-informed about political processes with due regard to their best interests: to elect political office holders; to participate in decision-making processes on the implementation of laws and policies; and to hold public officials accountable for their acts or omissions in the execution of their duties.
Thus, access to information is a foundational requirement of the practice of democratic governance. It has been rightly stated that: ‘No democratic government can survive without accountability and the basic postulate of accountability is that people should have information about the functioning of government.’ It is the responsibility of State Parties to create an atmosphere that fosters access to information and to ensure ‘adequate disclosure and dissemination of information’ in a manner that offers ‘the necessary facilities and eliminates existing obstacles to its attainment.’

A fundamental element of democracy is the freedom to choose political leaders through elections. Free and fair periodic elections expose candidates’ records and proposed policies to a level of public scrutiny that is capable of positively influencing the responsiveness of elected representatives. At the macro level, elections allow electors to determine the acquisition or retention of political power in a peaceful and structured manner and elections are as such crucial for the overall legitimacy of political leadership. They are a necessary element of democracy.

For elections to be free, fair and credible, the electorate must have access to information at all stages of the electoral process. Without access to accurate, credible and reliable information about a broad range of issues prior, during and after elections, it is impossible for citizens to meaningfully exercise their right to vote in the manner envisaged by Article 13 of the African Charter. The importance of access to information in the electoral process and for democratic governance is recognised in the African Charter on Democracy, Elections and Governance, as well as other sub-regional treaties and standards.

As noted further in the ATI Guidelines, recent experiences across the continent illustrate the dangers that the lack of information during the electoral process poses to peace, security and stability. At best, the failure of stakeholders in the electoral process to proactively provide information breeds distrust and lack of confidence. At worst, when combined with simmering ethnic, religious and other such tensions, it can easily ignite into violence when voters express their frustration at real or perceived disenfranchisement. Civil tension and conflict resulting in loss of life, internal displacement and despair have far too often left their mark in the aftermath of contested elections. Being proactive in providing information on the electoral process is thus imperative.

The ATI Guidelines place emphasis on the need for proactive disclosure and the development of appropriate legal frameworks in line with the requirement under article 1 of the African Charter that requires states to adopt legislative
and other measures to give effect to the rights, duties and freedoms enshrined in the African Charter. In particular, the ATI Guidelines provide direction to stakeholders in the electoral process who have a responsibility to proactively disclose various categories of information in their possession or control that are necessary for safeguarding the integrity and legitimacy of the electoral process. Guidance is provided in relation to the following stakeholders:

- Election management bodies (EMBs) and the authorities responsible for appointing the EMBs;
- Political parties and candidates;
- Law enforcement agencies;
- Election observers and monitors;
- Media and online media platform providers;
- Media regulatory bodies; and
- Civil society organisations.

### Disclosure of Political Party Funding

The ATI Guidelines provide for the proactive disclosure of political party funding. In *My Vote Counts NPC v President of the Republic of South Africa and Others*, Case No. 13372/16, the High Court of South Africa declared the Promotion of Access to Information Act 2 of 2000 (PAIA) constitutionally invalid to the extent that it fails to require political parties and independent candidates to record, preserve and disclose information on their private funding. The applicant sought a declaration that information about the private funding of political parties and independent candidates registered for elections was reasonably required for the effective exercise of the political rights contained in the Constitution. The applicant further argued that PAIA was inconsistent with the Constitution and invalid insofar as it did not allow for the continuous and systematic recordal and disclosure of private funding information.

The High Court agreed with the applicant that the information sought was indeed required for the exercise of the right to vote. The High Court noted that, while section 32(1) of the Constitution gives a right of access to information, the ambit of PAIA is restricted to recorded information, and as such information can be deleted, destroyed or never recorded without falling foul of PAIA. Furthermore, political parties may rely on an exemption under PAIA, giving voters the arduous task of meeting the test for the public interest override.

Accordingly, the High Court concluded that PAIA’s limitation of sections 19 and 32 of the Constitution was unjustifiable, therefore rendering PAIA unconstitutional and invalid insofar as it did not allow for the disclosure of
information about private funding of political parties. However, while the High Court concluded that it could order disclosure, it stopped short of ordering the disclosure to be ‘continuous and systematic,’ finding that to be in the remit of Parliament to determine.

In June 2018, in *My Vote Counts v Minister of Justice and Correctional Services and Another* [2018] ZACC 17, the Constitutional Court confirmed the order of the High Court, ordering in relevant part as follows:

1. It is declared that information on the private funding of political parties and independent candidates is essential for the effective exercise of the right to make political choices and to participate in the elections.

2. It is declared that information on private funding of political parties and independent candidates must be recorded, preserved and made reasonably accessible.

3. It is also declared that [PAIA] is invalid to the extent of its inconsistency with the Constitution by failing to provide for the recordal, preservation and reasonable disclosure of information on the private funding of political parties and independent candidates.

4. Parliament must amend PAIA and take any other measure it deems appropriate to provide for the recordal, preservation and facilitation of reasonable access to information on the private funding of political parties and independent candidates within a period of 18 months.”

In a similar vein, the ATI Guidelines provide for the proactive disclosure of political party funding.

**The Tshwane Principles on National Security and the Right to Information**

Most domestic access to information laws will permit requests for information to be refused on national security grounds. This presents serious challenges to the enjoyment of the right of access to information, particularly as national security is often defined in broad, ambiguous terms. The Tshwane Principles on National Security and the Right to Information (Tshwane Principles) – finalised in Tshwane, South Africa in 2013 – seeks to provide guidance on how to ensure public access to government information without jeopardising legitimate efforts to protect against national security threats. This process was coordinated by the Open Society Justice Initiative, together with 22 academic and civil society groups and the special rapporteurs on freedom of expression.
The need to strike the correct balance between access to information and national security is explained in the Tshwane Principles as follows:

“National security and the public’s right to know are often viewed as pulling in opposite directions. While there is at times a tension between a government’s desire to keep information secret on national security grounds and the public’s right to information held by public authorities, a clear-eyed review of recent history suggests that legitimate national security interests are, in practice, best protected when the public is well informed about the state’s activities, including those undertaken to protect national security.

Access to information, by enabling public scrutiny of state action, not only safeguards against abuse by public officials but also permits the public to play a role in determining the policies of the state and thereby forms a crucial component of genuine national security, democratic participation, and sound policy formulation. In order to protect the full exercise of human rights, in certain circumstances it may be necessary to keep information secret to protect legitimate national security interests.

Striking the right balance is made all the more challenging by the fact that courts in many countries demonstrate the least independence and greatest deference to the claims of government when national security is invoked. This deference is reinforced by provisions in the security laws of many countries that trigger exceptions to the right to information as well as to ordinary rules of evidence and rights of the accused upon a minimal showing, or even the mere assertion by the government, of a national security risk. A government’s over-invocation of national security concerns can seriously undermine the main institutional safeguards against government abuse: independence of the courts, the rule of law, legislative oversight, media freedom, and open government.”

As summarised by the Open Society Justice Initiative, the Tshwane Principles comprise 15 key points:

- The public has a right of access to government information, including information from private entities that perform public functions or receive public funds. (Principle 1)

- It is up to the government to prove the necessity of restrictions on the right to information. (Principle 4)

- Governments may legitimately withhold information in narrowly defined areas, such as defence plans, weapons development, and the operations
and sources used by intelligence services. Also, they may withhold confidential information supplied by foreign governments that is linked to national security matters. (Principle 9)

• But governments should never withhold information concerning violations of international human rights and humanitarian law, including information about the circumstances and perpetrators of torture and crimes against humanity, and the location of secret prisons. This includes information about past abuses under previous regimes, and any information they hold regarding violations committed by their own agents or by others. (Principle 10A)

• The public has a right to know about systems of surveillance, and the procedures for authorising them. (Principle 10E)

• No government entity may be exempt from disclosure requirements – including security sector and intelligence authorities. The public also has a right to know about the existence of all security sector entities, the laws and regulations that govern them, and their budgets. (Principles 5 and 10C)

• Whistleblowers in the public sector should not face retaliation if the public interest in the information disclosed outweighs the public interest in secrecy. But they should have first made a reasonable effort to address the issue through official complaint mechanisms, provided that an effective mechanism exists. (Principles 40, 41, and 43)

• Criminal action against those who leak information should be considered only if the information poses a “real and identifiable risk of causing significant harm” that overrides the public interest in disclosure. (Principles 43 and 46)

• Journalists and others who do not work for the government should not be prosecuted for receiving, possessing or disclosing classified information to the public, or for conspiracy or other crimes based on their seeking or accessing classified information. (Principle 47)

• Journalists and others who do not work for the government should not be forced to reveal a confidential source or other unpublished information in a leak investigation. (Principle 48)
• Public access to judicial processes is essential: “invocation of national security may not be relied upon to undermine the fundamental right of the public to access judicial processes.” Media and the public should be permitted to challenge any limitation on public access to judicial processes. (Principle 28)

• Governments should not be permitted to keep state secrets or other information confidential that prevents victims of human rights violations from seeking or obtaining a remedy for their violation. (Principle 30)

• There should be independent oversight bodies for the security sector, and the bodies should be able to access all information needed for effective oversight. (Principles 6, 31–33)

• Information should be classified only as long as necessary, and never indefinitely. Laws should govern the maximum permissible period of classification. (Principle 16)

• There should be clear procedures for requesting declassification, with priority procedures for the declassification of information of public interest. (Principle 17)

Importantly, the burden rests on the state to justify its reliance on national security grounds when refusing a request for access to information on this basis. This limitation of the right of access to information is only justifiable strictly in accordance with the three-part test. Although the Tshwane Principles are focused on national security as a ground for withholding information, all other public grounds should similarly at least meet these standards.

**The Extractive Industry Transparency Initiative**

The establishment of the **Extractive Industry Transparency Initiative (EITI)** in June 2003, as a coalition of governments, companies and civil society organisations aiming to improve openness and accountability in the management of natural resource revenues, recognises the role access to information plays in fostering socio-economic development.

In particular, the EITI aims to strengthen government and company systems, inform public debate and promote understanding, by requiring information along the extractive industry value chain (from the point of extraction, to how the revenue makes its way through the government, to how it benefits the public).
The EITI is underpinned by 12 core principles, which include:

- Public understanding of government revenues and expenditure over time could help public debate and inform choice of appropriate and realistic options for sustainable development.
- The importance of transparency by governments and companies in the extractive industries and the need to enhance public financial management and accountability.
- The achievement of greater transparency must be set in the context of respect for contracts and laws.
- The principle and practice of accountability by government to all citizens for the stewardship of revenue streams and public expenditure.
- Encouraging high standards of transparency and accountability in public life, government operations and in business.

In addition to these principles, the EITI requires that states comply with specific minimum requirements prior to application as an ‘EITI candidate’, followed by a rigorous process of validation as an ‘EITI compliant’ State. The EITI Standard enumerates these requirements, with proactive disclosure being at the core:

- Legal and institutional framework governing the extractive industry sector: this includes information on license allocations, contracts and owners of corporate entities that bid or invest in extractive assets and state participation in the extractive sector.
- Exploration and production activities: this includes information on exports.
- Revenue collection: this includes information on taxes and revenues, sale of state’s shares of production, infrastructure provisions, state owned enterprises transactions, transportation revenues, subnational payments.
- Revenue allocation: this includes distribution of revenues, sub-national transfers and revenue management and expenditures.
- Social and economic spending: this includes social expenditures by companies, state owned enterprises quasi-fiscal expenditures, and an overview of the contribution of the extractive sector to the economy.

In 2018, there are over 23 EITI implementing countries in Africa. Notably, two African states, Equatorial Guinea and Gabon, have lost their status as EITI implementing countries.

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14 Burkina Faso, Cameroon, Central African Republic, Chad, Cote d’Ivoire, Democratic Republic of Congo, Ethiopia, Ghana, Guinea, Liberia, Madagascar, Malawi, Mali, Mauritania, Mozambique, Nigeria, Republic of the Congo, Sao Tomé-et-Principe, Senegal, Seychelles, Sierra Leone, Tanzania, Togo, and Zambia.
The Open Government Partnership

The Open Government Partnership (OGP) is a multi-stakeholder initiative launched in September 2011 to promote open, accountable and responsive governance. In particular, the initiative focuses on securing concrete commitments from governments to strengthen governance through promoting transparency, empowering citizens, fighting corruption and harnessing new technologies.

To join the OGP, countries must endorse the Open Government Declaration, develop a country action plan through public consultation, and commit to independent reporting on the progress towards the achievement of the action plan. However, to qualify for participation, interested countries must meet the eligibility criteria of fiscal transparency; adoption of an access to information law; asset disclosure by public officials; and openness in respect of citizen engagement in policy making and governance.

The Open Government Declaration comprises four core principles to which member countries must commit namely: (1) increasing the availability of information about governmental activities; (2) supporting civic participation; (3) implementing the highest standard of professional integrity in public administration; and (4) increasing access to new technologies for openness and accountability. Furthermore, participating countries commit to reporting publicly on actions undertaken to realise these principles, consulting with the public on their implementation, and updating these commitments in light of new challenges and opportunities.

In 2018 there were 10 participating countries in Africa that form part of the OGP. In June 2017, Tanzania withdrew from the OGP.

The African Platform on Access to Information

The African Platform on Access to Information (APAI) comprises a network of civil society organisations working on the promotion of access to information in Africa through the implementation of the APAI Declaration. The APAI declaration was adopted during the Pan African Congress on Access to Information held in September 2013 in South Africa. The document sets out 14 key principles on access to information, the practical application of these principles in various

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15 Burkina Faso, Cote d’Ivoire, Ghana, Kenya, Malawi, Morocco, Nigeria, Senegal, Sierra Leone, and South Africa.
spheres and recommendations to international and regional institutions, member states, civil society, media, companies and co-operations, as well as public and private donors on actions to be taken for the promotion and protection of access to information on the continent.

In particular, the application of the key principles draws attention to the importance of access to information for the purposes of socio-economic development by linking access to information to environmental rights; the fulfilment of the right to education; the fulfilment of the right to health; the fight against corruption; aid transparency and natural resource transparency. As a result of advocacy by APAI, UNESCO member states in 2015 declared 28 September as the International Day for Universal Access to Information.

The impact of the internet on the right of access to information

The developing norm of a right of access to the internet was discussed in Module 1. It is clear that the internet has an unparalleled role to play in realising the right of access to information. In 2003, the UNESCO member states adopted a Recommendation Concerning the Promotion and Use of Multilingualism and Universal Access to Cyberspace, which provides:

“(7) Member States and international organizations should promote access to the Internet as a service of public interest through the adoption of appropriate policies in order to enhance the process of empowering citizenship and civil society, and by encouraging proper implementation of, and support to, such policies in developing countries, with due consideration of the needs of rural communities.

... 

(15) Member States should recognize and enact the right of universal online access to public and government-held records including information relevant for citizens in a modern democratic society, giving due account to confidentiality, privacy and national security concerns, as well as to intellectual property rights to the extent that they apply to the use of such information. International organizations should recognize and promulgate the right for each State to have access to essential data relating to its social or economic situation.”

As noted in the SDGs, “[t]he spread of information and communications technology and global interconnectedness has great potential to accelerate human progress, to bridge the digital divide and to develop knowledge societies”.

Challenges in realising the right of access to information

A final note on this topic is in relation to the challenges in realising the right of access to information. Even in countries with comprehensive access to information laws, there is a frequent trend in public and private bodies ignoring requests or refusing on spurious grounds, and therefore causing the requester to pursue litigious action in order to obtain the information. Litigation in this regard is often costly and time-consuming, and therefore ineffective where the information sought is time-sensitive. For instance, members of the media who seek information for a story may find that the story is no longer relevant and of interest to the public once the information has finally been obtained. As a mark of displeasure of unnecessary refusals or dilatory conduct, some courts have awarded punitive costs orders against bodies that cause requesters to institute litigious proceedings in circumstances where it was manifestly appropriate to disclose the information.

Punitive Costs Orders in Access to Information Litigation

An example from South Africa is in *M&G Centre for Investigative Journalism NPC and Another v Minister of Defence and Military Veterans*, Case No. 33729/15, where the applicant had sought certain records from the relevant public body. There were considerable delays in dealing with the request, followed by a refusal and a dismissal of an internal appeal on the basis that “the disclosure of the requested record could reasonably be expected to cause prejudice to international relations of the Republic”. This therefore caused the applicants to launch proceedings in the High Court of South Africa. However, at the hearing of the matter, the public body informed the applicants that it would no longer oppose the relief sought. The applicants sought a punitive costs order against the public body. In granting the punitive costs order, the High Court of South Africa held as follows:

“...When eventually the request was substantively addressed, there was nothing in the response which suggested that the reason for the refusal to furnish the information could not have been made earlier. The applicants had to resort to litigation to exercise their rights. The respondents opposed the application, and only on the eve of the hearing, they withdrew their opposition to the application. As stated earlier, no reasons were furnished for this about-turn. This is after four years of a simple request which, ordinarily, and in the scheme of PAIA, should have taken a few months, at most, to dispose of. There could well be a plausible reason for the respondents’ change of heart. But in the absence of an explanation, one can only assume that it was based on the realisation of the futility of its opposition to the application. The litigation was totally unnecessary, and should have been avoided by the respondents taking a pro-active approach to the applicants’ request, instead of the supine one they adopted.

... [W]hen the information was sought at that time, the controversy generated by it was still very much in the public space. Now, four years later ... counsel for the applicants put it, ‘the delay means that the information has lost a considerable amount of currency.’”
Module 3 Assessments & Resources

The assessments are aimed at understanding the legal frameworks on access to information, and comparing regional standards with that provided for under domestic frameworks. The assessments provide for various topics to be discussed and debated, and participants are encouraged to rigorously analyse the laws in question and consider the extent to which such laws meaningfully give effect to the right of access to information. The individual analysis focuses specifically on the Model Law, and the extent to which national laws align with its terms. Participants are also invited to discuss the voluntary multi-stakeholder initiatives, and the extent to which states are meeting their objectives in terms thereof.

Test your knowledge: Q&A

1. The right of access to information has its foundations in and is derived from which other internationally recognised human right?
   
   a) Freedom of opinion, conscience and religion  
   b) The right to participate in political life  
   c) Freedom of expression  
   d) Right to education  
   e) None of the above

2. General Comment 34 on article 19 of the International Covenant on Civil and Political Rights, specifies that which of the following rights implicates the right of access to information in its realisation?
   
   a) Article 25: the right of the media to access and of the public to receive media output on public affairs  
   b) Article 14: the right of a person accused of a criminal offence to be informed of the charge(s)  
   c) Article 10: the right of prisoner to access his or her medical records;  
   d) Article 17: the right to know whether and what personal data is stored and for what purposes by the public bodies  
   e) All of the above

3. The Declaration of Principles on Freedom of Expression in Africa provides what in respect of access to the information held by public bodies?
a) Public bodies must only release information when a request is made
b) Public bodies hold information as custodians of the public good.
c) Public bodies must never release information without knowing the intended use.
d) None of the above

4. Apart from the African Charter on Human and Peoples’ Rights, what other African Union treaty contains provisions relating to the right of access to information?

a) The African Charter on Democracy, Elections and Governance
b) The African Charter on the Values and Principles of Public Service and Administration
c) The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa
d) The African Youth Charter
e) All of the above

5. The Model Law on Access to Information for Africa makes the key distinction between a request for access to information made to a public body and a request made to a private body as follows:

a) A request to a public body is free, whilst a request to a private body is subject to the payment of a fee.
b) A public body is obliged in all instances to respond to a request for access to information, while a private body is not
c) A public body must grant access to information inexpensively and expeditiously, while a private body should not
d) A request to a private body must be such that the information sought may assist in the exercise or protection of any right
e) A public body must respond to a request for access to information within 60 days, whilst a private body must respond within 30 days

6. In terms of exemption provisions in Part III of the Model Law, which of the following assertions below is correct?

a) An information holder may only refuse a request for access to information if the harm to the interest protected under the relevant exemption demonstrably outweighs the public interest in the release of the information.
b) An information officer that refuses to grant access to information
has the burden of proving that the information is exempt from disclosure and that the harm to the interest protected under the relevant exemption outweighs the public interest in the release of the information.

c) Information is not exempt from access merely on the basis of it being designated as ‘classified’ information.

d) Where certain parts of requested information is exempted and other parts are not, the information officer may release the parts of the information which is not exempted.

e) All of the above.

7. Goal 16 of the United Nations’ 2030 Sustainable Development Goals (SDGs) provides:

a) All states should adopt a Model Law.

b) Copyright and patents should not apply to publicly-held information.

c) Public access to information and protection of fundamental freedoms should be ensured in accordance with national legislation and international agreements.

d) All private companies should proactively disclose their financial information.

e) All of the above.

8. The Extractive Industry Transparency Initiative requires implementing countries to proactively disclose what type of information about the extractive industry?

a) Social and economic spending

b) Exploration and production activities

c) Revenue collection and allocation

d) Legal and institutional framework governing the extractive industry sector

e) All of the above

9. To be eligible to join the Open Government Partnership, a state must

a) Ensure asset disclosure by public officials

b) Adopt an access to information law

c) Facilitate citizen engagement

d) All of the above

e) None of the above
10. What does UNESCO’s ‘Recommendation Concerning the Promotion and Use of Multilingualism and Universal Access to Cyberspace’ call on member states to do?

a) Exercise caution in the expansion of internet infrastructure  
b) Take steps to regulate online content to restrict access to certain types of information  
c) Promote access to the internet in urban areas as a matter of priority before considering the needs of rural communities  
d) Promote access to the internet as a service of public interest through the adoption of appropriate policies  
e) Rely solely on internet companies, to provide access to the internet for the people

(10 marks)

Group activities

Question 1

In the August 2017 Kenyan national election in August 2017 the Supreme Court granted an application for access to information to enable scrutiny and audit of the technology used by the Independent Electoral and Boundaries Commission (IEBC). What are the advantages and disadvantages – viewed specifically through the lens of the right of access to information – to electronic voting and the use of the internet and other information communication technologies in the electoral process?

Question 2

What voluntary or multi-stakeholder initiatives does your state belong to in relation to access to information? What has been the impact of this, and has the state complied with its obligations?

Question 3

Divide into two groups, and consider the following question: Should states facilitate universal free access to government information online, and is it feasible to do so? One group should be tasked with arguing in favour of such access, and the other group tasked with arguing against.
Once the different viewpoints have been considered, the further question for discussion is: if universal free access to online information in the public interest were to be implemented, what categories of content/websites should be granted access to guarantee a balance of information?

**Question 4**

Does your country have a law that provides for access to information during elections? Critically assess this law in comparison with the ATI Guidelines.

**Individual analysis**

Does your country have a comprehensive access to information law? If so, compare your country’s access to information law with the Model Law. If not, consider the access to information law of a neighboring or nearby country.

1. To what extent does the access to information law align with the Model Law?

2. Are there examples of provisions in the access to information law that offer greater protections or rights to the requester than the Model Law?

3. Are there examples of provisions in the access to information law that offer fewer protections or rights to the requester than the Model Law?

4. Does the access to information law contain a public interest override? If so, how does this compare to the provision in the Model Law?

5. How effective is the access to information law in giving meaningful access to information in a timely and effective manner? What could be done to improve this? Justify your response.

**Answers to the quiz:** 1. (c); 2. (e); 3. (b); 4. (e); 5. (d); 6. (e); 7. (c); 8. (e); 9. (d); 10. (d)
Resources

Required reading

• The Model Law on Access to Information in Africa provides guidance on best practice normative framework on access to information. This was adopted by the African Commission in 2013:

• The following legal instruments are relevant:
  
  • Convention on the Rights of Persons with Disabilities:
  
  • Convention on the Elimination of All Forms of Discrimination against Women:
    <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx>
  
  • Convention on the Rights of the Child:
    <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>
  
  • Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa:
    <http://www.achpr.org/instruments/women-protocol/>
  
  • General Comment on Article 14(1)(d) and(e) of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa:
    <http://www.achpr.org/instruments/general-comments-rights-women/>
  
  • General Comment No. 2 on Article 14.1(a), (b), (c) and (f) and Article 14.2(a) and (c) of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa:
    <http://www.achpr.org/instruments/general-comment-two-rights-women/>
  
  • African Charter on Democracy, Elections and Governance:
  
  • AU Convention on Preventing and Combating Corruption:
    <https://au.int/sites/default/files/treaties/7786-treaty-0028_-_african_union_convention_on_preventing_and_combating_corruption_e.pdf>
• The following guidelines, declarations and principles are relevant:


• For a discussion on the right of access to information and the rights of women in Africa:


• For a discussion on the balance between the right of access to information and the right to privacy:


• For updated information on right to information legislation and implementation globally, you can also consult the website: [http://www.rti-rating.org/]
Module 4
Safety of Journalists and the Issue of Impunity

• To provide an overview of the legal standards that guarantee the safety and protection of journalists to enable them to perform their functions.

• To examine who is considered a journalist and therefore entitled to the protections afforded.

• To explore the key challenges being faced by journalists today, including killings, arrests, intimidation and harassment.

• To consider the right of journalists to refuse to disclose the identities of their sources, and the importance of the right to privacy that journalists should enjoy.

• To understand the measures that can be taken by stakeholders, including the judiciary, to hold perpetrators accountable.

The importance of journalists and the media

It is worthwhile to take a moment to reflect on the important role that journalists play in a democracy, in order to fully appreciate why they may find themselves as target and, importantly, why it is crucial to ensure their safety and accountability for attacks against them.

The media lies at the heart of the full realisation of the public’s right to receive and access information under the ambit of the right to freedom of expression. In particular, the media plays a crucial role in ensuring transparency and accountability, rooting out corruption, increasing public awareness so that they may make informed decisions, and being a watchdog and safeguard of democratic institutions and good governance. However, as stated in the preamble to the 2011 ACHPR Resolution on the Safety of Journalists and Media Practitioners in Africa (2011 African Commission Resolution), freedom of expression, press freedom and access to information can only be enjoyed when journalists and media practitioners are free from intimidation, pressure and coercion.
General Comment No. 34 (at para 13) provides as follows:

“A free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other [ICCPR] rights. It constitutes one of the cornerstones of a democratic society. The [ICCPR] embraces a right whereby the media may receive information on the basis of which it can carry out its function. The free communication of information and ideas about public and political issues between citizens, candidates and elected representatives 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. The public also has a corresponding right to receive media output.”

The media can only be “free, uncensored and unhindered” if journalists are able to perform their work without fear of reprisals, attacks or other forms of intimidation and harassment.

UN Plan of Action on the Safety of Journalists and the Issue of Impunity

The **UN Plan of Action on the Safety of Journalists and the Issue of Impunity** (UN Plan of Action) aims to create a free and safe environment for journalists and media workers, both in conflict and non-conflict situations, with a view to strengthening peace, democracy and development worldwide. Its measures include, among other undertakings, the establishment of a coordinated inter-agency mechanism to handle issues related to the safety of journalists, assisting countries to develop legislation and mechanisms favourable to freedom of expression and information, and raising capacities of the judiciary and law enforcement on freedom of expression standards. The UN Plan was endorsed by the UN System Chief Executives Board for Coordination in 2012 and has been welcomed by the UN General Assembly, UNESCO and the Human Rights Council. The UN Plan of Action states that:

“Without freedom of expression, and particularly freedom of the press, an informed, active and engaged citizenry is impossible. In a climate where journalists are safe, citizens find it easier to access quality information and many objectives become possible as a result: democratic governance and poverty reduction; conservation of the environment; gender equality and the empowerment of women; justice and a culture of human rights, to name a few. Hence, while the problem of impunity is not restricted to the failure to
investigate the murders of journalists and media workers, the curtailment of their expression deprives society as a whole of their journalistic contribution and results in a wider impact on press freedom where a climate of intimidation and violence leads to self-censorship.”

Notwithstanding the manifest importance of the role that journalists play, many journalists find themselves subjected to various personal attacks. One of the key challenges identified by the UN and other international organisations is the high level of impunity in the case of attacks, including fatal attacks, on journalists. The relevance of such impunity to respect for the wider rule of law and for public confidence in the justice system of a country is underlined in many UN resolutions. When such attacks go unpunished, it sends a public signal that the state and the public authorities do not truly value the important role that the media plays in that country.

**What is journalism?**

Before we turn to look at the legal protections afforded to journalists, it is important to understand who constitutes a journalist for the purpose of these protections. While the question of precisely who enjoys journalistic protections will need to be decided on a case-by-case basis, the principles set out below should be considered to apply broadly, to the extent appropriate, both to professional and citizen journalists who are disseminating information about public affairs, having regard to the behaviours and practices being carried out. With the advent of the internet and the proliferation of technological devices that make it possible for anyone to share information quickly and easily with large audiences, the traditional conceptions of who constitutes a journalist has necessarily had to evolve to recognise the important role that members of the public can play in sharing relevant information.
UN General Assembly Resolution on the Safety of Journalists and the Issue of Impunity

The UN General Assembly has recognised the evolving nature of journalism in its Resolution 70/162 on the Safety of Journalists and the Issue of Impunity, adopted on 17 December 2015, in which it stated that:

“[J]ournalism is continuously evolving to include input from media institutions, private individuals and a range of organizations that seek, receive and impart information and ideas of all kinds, online as well as offline, in the exercise of freedom of opinion and expression, in accordance with article 19 of the International Covenant on Civil and Political Rights, thereby contributing to the shaping of public debate”.

As noted in General Comment No. 34 (at para 44), journalism is a function shared by a wide range of actors, from professional full-time reporters and analysts to bloggers and others engaging in self-publication whether in print, on the internet or elsewhere.

The UN Special Rapporteur on the Protection and Promotion of Freedom of Opinion and Expression explained in a 2010 report to the UN General Assembly (at para 21) that a journalist is defined as follows:

“Journalists are understood to be individuals who are dedicated to investigating, analysing and disseminating information, in a regular and specialized manner, through any type of written media, broadcast media (television or radio) or electronic media. With the advent of new forms of communication, journalism has extended into new areas, including citizen journalism”.

The report went on to note (at para 62) that while there is no universal definition of the term ‘citizen journalist’, it is usually understood as independent report, often by amateurs on the scene of an event, which is disseminated globally through modern media, such as the internet, through social media, blogs, and so on.

Importantly, the report noted (at para 77) that while citizen journalists cannot replace professional journalists,
“the growing phenomenon of threats, attacks, arrests, arbitrary detention, surveillance and prosecution of citizen journalists must be recognized, and their rights protected in accordance with States’ obligations under international human rights law”.

Thus, the report reminded states of their obligations to respect, protect and fulfil the right of citizen journalists to seek, receive and impart information and ideas of all kinds without fearing for their security. This includes developing legislation and mechanisms guaranteeing freedom of expression and information and effectively investigating and prosecuting crimes against freedom of expression.

For its part, the African Commission has also recognised the broad category of persons that may be regarded as journalists by its use of the term ‘media practitioners’ rather than ‘journalists’ in relation to issues of promoting professionalism, safety and protection of sources in principles X, XI and XV respectively of the Declaration of Principles on Freedom of Expression.

Likewise, in its work on press freedom, UNESCO seeks to protect journalism and its function as a watchdog in society, with a view to promoting the free flow of ideas by word and by image. As such, legal protections should ideally be defined in connection with ‘acts of journalism’, rather than through the definition of the professional functions of a journalist. Thus, UNESCO uses the term journalist to cover traditional reporters as well as ‘media workers’ and social media producers who generate content in the public interest, which would include, for instance, bloggers. This was the formulation used by the Intergovernmental Council of UNESCO’s International Programme for the Development of Communication in its decision of 23 March 2012 and UNESCO General Conference in its decision of 11 November 2017.

**Legal protection for journalists under international law**

The issue of safety of journalists has been a preoccupation both under international human rights law and international humanitarian law. Apart from the work of the UN Human Rights Committee, notably through General Comment 34 of article 19 of the ICCPR, the UN Security Council, the UN General Assembly and the UN Human Rights Council have adopted Resolutions on the issue. As the UN agency responsible for promoting the free flow of information by word and image, UNESCO is at the forefront on the issue. At the regional level, the ACHPR has also been a crucial role player on this issue.
As a point of departure, the right to freedom of expression set out in article 19 of the ICCPR and article 9 of the African Charter provide clear and important legal frameworks for the protection of the media and journalists. General Comment No. 34 provides (at para 23) that an attack on any person because of the exercise of his or her right to freedom of expression, including forms of attack such as arbitrary arrest, torture, threats to life and killing, cannot be justified under article 19 of the ICCPR. In Principle XI of the Declaration of Principles on Freedom of Expression in Africa, the ACHPR also identifies attacks on media practitioners as a violation of the right to freedom of expression guaranteed by article 9 of the African Charter, and goes further to state that:

“Attacks on media practitioners
(1) Attacks such as the murder, kidnapping, intimidation of and threats to media practitioners and others exercising their right to freedom of expression, as well as the material destruction of communications facilities, undermines independent journalism, freedom of expression and the free flow of information to the public.
(2) States are under an obligation to take effective measures to prevent such attacks and, when they do occur, to investigate them, to punish perpetrators and to ensure that victims have access to effective remedies.
(3) In times of conflict, States shall respect the status of media practitioners as non-combatants.”

The right to freedom of expression is not the only right of relevance in this context. For instance, under the ICCPR, also of relevance is article 3, which provides for the right to an effective remedy; article 6, which provides for the right to life; article 7, which provides for the prohibition of torture or to cruel, inhuman or degrading treatment or punishment; and article 9, which provides for the right to liberty and security of the person. Similarly, under the African Charter, also of relevance is article 4, which guarantees against the arbitrary deprivation of the right to life; article 5, which prohibits torture and other inhuman or degrading treatment; and article 6, which guarantees the right to liberty and security of the person.

In addition to these protections in human rights law, there are further protections guaranteed under international humanitarian law for journalists working in areas of armed conflict. These protections are guaranteed subject to the proviso that the journalist in question does not participate in the hostilities.
Federation of African Journalists and Others v The Republic of The Gambia

In *Federation of African Journalists and Others v The Republic of The Gambia*, Case No. ECW/CCJ/APP/36/15, the second to fifth applicants – all of whom were journalists – alleged having been arrested and unlawfully detained, and the fourth to fifth applicants further alleged having been subjected to torture by agents of the state while in detention.

The arrest and detention of the applicants were predicated on the sedition, criminal libel and false news laws in The Gambia. The applicants argued that the laws were in violation of their rights as journalists, and their rights to liberty and freedom of expression, as they were forced into exile for fear of being re-arrested for exercising their rights as journalists.

In addition to finding a violation of the right to freedom of expression under article 9 of the African Charter and 19(2) of the ICCPR, the ECOWAS Court of Justice also held that:

- The action of the state in enforcing the provisions of its law on sedition against the second to fifth applicants, which forced them into exile, violated the rights of the applicants under articles 6 and 12(2) of the Africa Charter and articles 9 and 12(4) of the ICCPR.

- The subjection of the fourth to fifth applicants to torture and inhumane and degrading treatment violates their rights under article 5 of the African Charter and Article 7 of the ICCPR.

Accordingly, the court ordered the state to pay the second to third applicants 1 million Gambia Dalasi each as damages for the violation of their rights, and to pay the fourth to fifth applicants an amount of 2 million Gambian Dalasi each as damages for the violation of their rights, including the right to freedom of expression and the right to freedom from torture.

As stated in Resolution 70/162 on the Safety of Journalists and the Issue of Impunity, “journalists, media professionals and associated personnel engaged in dangerous professional missions in areas of armed conflict shall be considered as civilians and shall be respected and protected as such, provided that they take no action adversely affecting their status as civilians".
Of particular relevance here are the four Geneva Conventions, adopted in 1949, for the protection of persons in situations of armed conflict. The last of these, the Fourth Geneva Convention, deals with the protection of civilians, and in particular, Protocol I Additional to the Geneva Convention expressly extends this protection accorded to civilians also to journalists. It provides as follows:

“Measures of protection for journalists
(1) Journalists engaged in dangerous professional missions in areas of armed conflict shall be considered as civilians within the meaning of Article 50, paragraph 1.
(2) They shall be protected as such under the Conventions and this Protocol, provided that they take no action adversely affecting their status as civilians, and without prejudice to the right of war correspondents accredited to the armed forces to the status provided for in Article 4A(4) of the Third Convention.
(3) They may obtain an identity card similar to the model in Annex II of this Protocol. This card, which shall be issued by the government of the State of which the journalist is a national or in whose territory he resides or in which the news medium employing him is located, shall attest to his status as a journalist.”

Should citizen journalists find themselves in situations of armed conflict, they would also be protected under international humanitarian law as civilians. This is in addition to the provisions under international human rights law as highlighted above.

Attacks on journalists and the issue of impunity

There exists a wide range of international standards, from international and regional human rights bodies to media practitioners and civil society organisations that unequivocally condemn attacks on journalists. This includes, for instance, the African Commission on Human and Peoples’ Rights Resolution of 2011 and the UN Human Rights Council Resolution of 2016 dealing with the safety of journalists.


The Declaration of Windhoek notes (at para 6) that:
"In Africa today, despite the positive developments in some countries, in many countries journalists, editors and publishers are victims of repression—they are murdered, arrested, detained and censored, and are restricted by economic and political pressures such as restrictions on newsprint, licensing systems which restrict the opportunity to publish, visa restrictions which prevent the free movement of journalists, restrictions on the exchange of news and information, and limitations on the circulation of newspapers within countries and across national borders. In some countries, one-party States control the totality of information.”

The Windhoek Declaration states further that journalists, as well as other persons involved in gathering and analysing information about human rights situations such as lawyers and judges, are frequently subjected to threats, intimidation and attacks because of their activities.

As the UN organ tasked with maintaining international peace and security under the Charter of the United Nations, the Security Council for the first time in 2006 adopted a resolution condemning attacks against ‘journalists, media professionals and associated personnel’, and urged states and other parties to armed conflict to prevent violations of international humanitarian law against them. Subsequently, the Security Council adopted Resolution 2222 of 2015, which goes further to urge notably “the immediate and unconditional release of journalists, media professionals and associated personnel who have been kidnapped or taken as hostages, in situations of armed conflict” by state parties as well as respect by all parties in armed conflict of the “professional independence and rights of journalists, media professionals and associated personnel”. To see which African countries have sponsored UN resolutions on safety of journalists see pp. 168-169 of UNESCO’s 2017/2018 World Trends in Freedom of Expression and Media Development Report (at pp 168-169).

What is required in the face of attacks on journalists is swift and firm justice, holding those responsible for such attacks to account. However, the reality is that many perpetrators commit criminal acts of violence against journalists and other members of the media with impunity. Impunity perpetuates a cycle of violence against journalists, which is why it is important to address the worrying numbers of journalists killed. The root cause of the continuing trend of impunity has been attributed to lack of political will to pursue investigations, including for fear of reprisals from criminal networks in addition to inadequate legal frameworks, a weak judicial system, lack of resources allocated to law enforcement, negligence, and corruption.
The figures are staggering. Worldwide, 1010 journalists lost their lives in the period between 2006-2017. Only 11% of these cases have been resolved. The Committee to Protect Journalists’ 2016 Global Impunity Index indicates that between 2006-2016, approximately 30 percent of murdered journalists were first taken captive, the majority of whom were tortured, thus amplifying the killers’ message of intimidation to the media community.

Prevent and Punish: In Search of Solutions to Fight Violence Against Journalists

According to the 2015 background paper titled ‘Prevent and punish: In search of solutions to fight violence against journalists’, authored by Eduardo Bertoni and published by UNESCO, it is noted that:

“Any threat or act of violence against a media worker endangers not only that individual’s ability to exercise his or her right to freedom of expression, but also the rights of many other members of society to receive and access information freely. This situation is perpetuated by impunity, and the statistics demonstrate a correlation between high rates of violence against journalists and high rates of impunity more broadly.

…”

“There are a number of steps that states can take to improve the efficacy of these programs and policies. Promoting coordination among local and federal prosecutors, police, legislators, and other government agencies is one way to improve efficiency in combatting impunity. It is equally important for governments to ensure that the departments charged with investigating and prosecuting crimes against the media have the requisite resources to do so. Without an adequate budget and sufficient personnel, delays and lapses in investigations will continue, and effective prosecutions will remain rare. Prioritizing this issue, coordinating efforts among various governmental bodies, and providing adequate funding are crucial to ending violence against journalists and impunity in the region. Moreover, governments should take into account the ‘proposed actions’ included in the UN Plan of Action on the Safety of Journalists and the Issue of Impunity mentioned above, mainly when they are in the process to design or implement policies to end impunity in crimes against journalists. Particularly they should ‘develop legislation and mechanisms guaranteeing freedom of expression and information, including, for example, requirements that States effectively investigate and prosecute crimes against freedom of expression’; States should also improve national

legislation on safeguarding journalists and take an active role in the prevention of attacks against journalists.

“For judicial actors in particular, there is potential to raise levels of knowledge about the wider importance of protecting journalists as a means towards safeguarding freedom of expression and strengthening the rule of law more broadly. There are strong norms that can be referenced in guiding decision-making and which can galvanise attention to the issue. There is emerging jurisprudence from around the world, as well as growing numbers of good practices in how best to investigate cases so these come before the courts for due assessment. It is, in short, evident that lawyers, judges, prosecutors and police have a key role to play, within their mandate, in ending a scourge that has wide social visibility and ramification.”

In 2017, 80 journalists were killed according to UNESCO data. Ninety percent of them were local journalists covering local stories. International reporters accounted for only 10% of the journalists killed. Local journalists are often killed because they covered stories on politics, organised crime and corruption. This is part of the reason why investigations are rarely solved and perpetrators rarely condemned. More than half of the killings of journalists in 2017 took place in countries where there has not been armed conflict, with 44 cases (55% of all cases). According to the 2018 UNESCO Director General Report on the Safety of Journalists and the Danger of Impunity, while women represent only 14 percent of journalists killed worldwide in 2017 – the vast majority of killed journalists are men – the number of women killed has steadily increased over the past years.

Focusing specifically on the data available from the last reported period the following is a breakdown of the journalists killed per region between 2006 and 2017, and the extent to which the cases have been resolved according to UNESCO data:

- Western Europe & North America: 14 out of 25 cases resolved (56 percent)
- Central and Eastern Europe: 17 out of 40 cases (43 percent)
- Latin America and the Caribbean: 41 out of 226 cases (18 percent)
- Africa: 16 out of 117 cases (14 percent)
- Asia and the Pacific: 22 out of 264 cases (8 percent)
- Arab States: 5 out of 338 cases (1.5 percent)

In Africa in particular, 117 journalists have been killed between 2006 and 2017. Of these, only 16 have been resolved (representing 14 percent of cases). Below is a breakdown of the resolved cases by country in Africa:
• Somalia: 9 of 59 cases
• South Africa: 1 of 1 case
• Guinea: 3 of 4 cases
• Tanzania: 1 of 2 cases
• Rwanda: 1 of 1 case
• Madagascar: 1 of 1 case

Access to information is an integral component of understanding the magnitude of the challenge and finding appropriate solutions to address this. In this regard, under SDG 16.10 – which provides that states must ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements – the UN has included an indicator requiring states to report on the number of verified cases of killing, kidnapping, enforced disappearance, arbitrary detention and torture of journalists, associated media personnel, trade unionists and human rights advocates in the previous 12 months.

In a similar vein, UNESCO’s Director-General has condemned killings of journalist as a crime against society and requested information from member states on the status of judicial enquiries into the killings of journalists condemned by UNESCO. Member states’ rate of response has fluctuated; while they showed relatively high responsiveness in 2017, with 74% responding, in 2018 only 64% of those requested to do so provided information on the status of judicial enquiries. In their responses, several member states reported on concrete measures taken to address the specific risks faced by women journalists in the exercise of their work. For example, Kenya reported on specific safety training sessions for women journalists and two other member states informed that quotas to ensure the participation of women journalists were in place for general safety trainings for journalists.

Apart from killings, women journalists face gender-specific safety risks such as sexual harassment, sexual violence and threats of violence. Recent studies have shown that women journalists in particular are targeted by online harassment. This is not an issue that affects journalists alone. Other government critics, including members of civil society organisations and opposition parties, risk facing reprisals for expressing their viewpoints. This can take the form of

17 For more information, see studies by the International Federation of Journalists (2017), the International Women’s Media Foundation (2018).
threats, harassment, violent attacks, arrests and other forms of punishment. Such conduct is a blatant violation of the right to freedom of expression and deserving of similar appropriate condemnation.

**The protection of sources, encryption and anonymity**

The protection of journalistic sources is central to the ability of journalists to properly investigate stories, as well as for the protection of individuals and whistleblowers who provide information to them. Compelling the disclosure of sources has a chilling effect on freedom of speech and media freedom, in addition to hindering the free flow of information.

Thus, General Comment No. 34 provides that state parties “should recognise and respect that element of the right of freedom of expression that embraces the limited journalistic privilege not to disclose sources.”

Particularly, principle XV of the Declaration of Principles on Freedom of Expression in Africa deals with issue of protection of sources by providing as follows:

> “Media practitioners shall not be required to reveal confidential sources of information or to disclose other material held for journalistic purposes except in accordance with the following principles:
> 1. the identity of the source is necessary for the investigation or prosecution of a serious crime, or the defence of a person accused of a criminal offence;
> 2. the information or similar information leading to the same result cannot be obtained elsewhere;
> 3. the public interest in disclosure outweighs the harm to freedom of expression; and
> 4. disclosure has been ordered by a court, after a full hearing.”

The 2016 UN Resolution provides as follows:

> “Also calls upon States to protect in law and in practice the confidentiality of journalists’ sources, in acknowledgement of the essential role of journalists in fostering government accountability and an inclusive and peaceful society, subject only to limited and clearly defined exceptions provided in national legal frameworks, including judicial authorization, in compliance with States’ obligations under international human rights law; Emphasizes that, in the digital age, encryption and anonymity tools
have become vital for many journalists to exercise freely their work and their enjoyment of human rights, in particular their rights to freedom of expression and to privacy, including to secure their communications and to protect the confidentiality of their sources, and calls upon States not to interfere with the use of such technologies, with any restrictions thereon complying with States’ obligations under international human rights law …”

In its application however, limitations to this protection are conceded in certain circumstances. The 2008 Joint Declaration on Defamation of Religions, and Anti-terrorism and Anti-extremism Legislation identifies only two circumstances in which journalists should be required to reveal their sources by stating:

“Normal rules on the protection of confidentiality of journalists’ sources of information – including that this should be overridden only by court order on the basis that access to the source is necessary to protect an overriding public interest or private right that cannot be protected by other means – should apply in the context of anti-terrorist actions as at other times.”

It is important to note that the protection of sources has acquired new significance in the digital age in the context of its intersection with the right to privacy of communications. The technological advances in the world today has made surveillance, often justified as necessary for the protection of national security, a problem for the protection of sources. In this regard, the 2016 UN Resolution emphasised “the particular risks with regard to the safety of journalists in the digital age, including the particular vulnerability of journalists to becoming targets of unlawful or arbitrary surveillance and/or interception of communications, in violation of their rights to privacy and to freedom of expression”. This is echoed in the 2018 resolution on the safety of journalists adopted at the Human Rights Council.

**Bosasa Operations (PTY) LTC v Basson and Another**

In *Bosasa Operations (Pty) Ltd v Basson and Another*, Case No. 09/29700, the High Court of South Africa refused to order the journalist in question to reveal his source, thereby upholding the journalistic right of source protection.

As noted by the court, “it is apparent that journalists, subject to certain limitations, are not expected to reveal the identity of their sources. If indeed freedom of the press is fundamental and sine qua non for democracy, it is essential that in carrying out this public duty for the public good, the identity of their sources...
should not be revealed, particularly, when the information so revealed, would not have been publicly known. This essential and critical role of the media, which is more pronounced in our nascent democracy, founded on openness, where corruption has become cancerous, needs to be fostered rather than denuded.”

The court went on to conclude as follows:

“In the circumstances of this matter I find that the plaintiff has failed to prove that its right to a fair trial has been infringed. On the contrary, to order the defendants to reveal their sources would infringe their freedom of the press. Had it not been the defendants’ sources, the public’s right to know whether the plaintiff won the tender fairly would never have been known. The public would be poorer for it. The public interest will, in my view, be served by not revealing the identity of the defendants’ sources at this stage. The defendants have a valid objection to revealing their sources.”

As noted in the 2015 Report of the Secretary General of the United Nations on the Safety of Journalists and the Issue of Impunity (at paras 14-16), surveillance can have a chilling effect on the enjoyment of media freedom, and renders it more difficult to communicate with sources and share and develop ideas, which may lead to the imposition of self-censorship.

The report notes further, with reference to an earlier report by the UNSR on Freedom of Expression, that encryption and anonymity provide the privacy and security necessary to exercise the right to freedom of opinion and expression in the digital age, and that these tools have become vital for journalists to exercise their profession and their human rights freely.

In this regard, the UN Human Rights Council Resolution of 2016 states (at para 13):

“encryption and anonymity tools have become vital for many journalists to exercise freely their work and their enjoyment of human rights, in particular their rights to freedom of expression and to privacy, including to secure their communications and to protect the confidentiality of their sources, and calls upon States not to interfere with the use of such technologies, with any restrictions thereon complying with States’ obligations under international human rights law”.

The Resolution goes on to call on states to protect both in law and in practice the confidentiality of journalists’ sources, in acknowledgement of the essential
role of journalists in fostering government accountability and an inclusive and peaceful society.

In 2013, UNESCO’s member states recognised at its General Conference that “privacy is essential to protect journalistic sources, which enable a society to benefit from investigative journalism, to strengthen good governance and the rule of law”.

**Measures to ensure the safety of journalists and accountability for perpetrators**

The African Commission Resolution on the Safety of Journalists of 2011 has noted that killings, attacks and kidnapping of journalists, which are contrary to international humanitarian and human rights law, are often committed in an environment of impunity. According to the UN Human Rights Committee Resolution of 2016, such impunity constitutes one of the greatest challenges to the safety of journalists, and ensuring accountability for crimes committed against journalists is a key element in preventing future attacks.

The UN Plan of Action is an important effort at the international level to provide a coordinated multi-stakeholder approach through the development of a ‘comprehensive, coherent, and action-oriented UN-wide approach to the safety of journalists and the issue of impunity’. It is worth highlighting that the UN Plan of Action advocates a strategy of undertaking proactive preventive measures in dealing with the safety of journalists and ensuring accountability of perpetrators. As set out in the introduction to the UN Plan of Action (at para 1.6):

“Promoting the safety of journalists and fighting impunity must not be constrained to after-the-fact action. Instead, it requires prevention mechanisms and actions to address some of the root causes of violence against journalists and of impunity. This implies the need to deal with issues such as corruption, organized crime and an effective framework for the rule of law in order to respond to negative elements. In addition, the existence of laws that curtail freedom of expression (e.g. overly restrictive defamation laws), must be addressed. The media industry also must deal with low wages and improving journalistic skills. To whatever extent possible, the public must be made aware of these challenges in the public and private spheres and the consequences from a failure to act. The protection of journalists should adapt to the local realities affecting
The Duty to Prevent, Protect and Prosecute

Following the adoption of the 2016 UN Resolution, civil society organisation ARTICLE19 published a report titled Acting on UN Human Rights Council Resolution 33/2 on the Safety of Journalists: Prevent – Protect – Prosecute. The report lists specific actions that must be taken in order to realise the duty to prevent, protect and prosecute, as enshrined in the text of the resolution.

Under the **duty to prevent**, states are required to:

- Create and maintain an enabling environment for journalists.
- Ensure national laws do not interfere with journalists’ independence.
- Release arbitrarily arrested or detailed journalists.
- Do not spy on journalists or intercept their communications.
- Allow encryption and anonymity.
- Protect journalists’ confidential sources.
- Train key stakeholders (including judges, law enforcement, military, journalists and civil society) on the states’ international legal obligations and commitments on the safety of journalists.

Under the **duty to protect**, states are required to:

- Publicly, unequivocally and systematically condemn violence and attacks.
- Establish early warning systems and rapid response mechanisms.
- Regularly monitor and report on attacks against journalists.
- Protect journalists covering protests and elections.
- Protect media outlets against attacks and forced closure.
- Protect journalists in armed conflict as civilians.
- Recognise the role of media organisations in advancing safety.

Under the **duty to prosecute**, states are required to:

- Adopt strategies to combat impunity.
- Investigate.
- Prosecute.
- Ensure victims of crimes against journalists and their families have access to appropriate remedies.
- Reinvigorate their efforts to effectively implement the international human rights framework on the safety of journalists.
journalists. Journalists reporting on corruption and organized crime, for example, are increasingly targeted by organized crime groups and parallel powers. Approaches that are tailored to local needs should be encouraged."

In its implementation, the UN Plan of Action thus adopts an interrelated approach of awareness raising; standard setting and policy making; monitoring and report; capacity building; academic research; and coalition building. This is based on the following principles:

- Joint action in the spirit of enhancing system-wide efficiency and coherence.
- Building on the strengths of different agencies to foster synergies and to avoid duplication.
- A results-based approach, prioritizing actions and interventions for maximum impact.
- A human rights-based approach.
- A gender-sensitive approach.
- A disability-sensitive approach.
- Incorporation of the safety of journalists and the struggle against impunity into the United Nation's broader developmental objectives.
- Implementation of the principles of the February 2005 Paris Declaration on Aid Effectiveness (ownership, alignment, harmonisation, results and mutual accountability).
- Strategic partnerships beyond the UN system, harnessing the initiatives of various international, regional and local organizations dedicated to the safety of journalists and media workers.
- A context-sensitive, multi-disciplinary approach to the root causes of threats to journalists and impunity.
- Robust mechanisms (indicators) for monitoring and evaluating the impact of interventions and strategies reflecting the UN's core values.

This section now considers the measures that can be implemented by states, media organisations and the judiciary to ensure accountability for attacks against journalists.\(^1\)

**The role of states**

The ACHPR Resolution on the Safety of Journalists of 2011 enjoins states to, amongst other things:

- Take all necessary measures to uphold their obligations under the African Charter and other international and regional instruments, providing for the right to freedom of expression and access to information;
- Implement the principles enshrined in the Declaration of Principles on Freedom of Expression in Africa; and
- Fulfil their obligation on preventing and investigating all crimes allegedly committed against journalists and media practitioners and also to bring the perpetrators to justice.

More generally, the Resolution urges all parties involved in situations of armed conflict to respect the independence and freedom of journalists and media practitioners to exercise their profession and guarantee their safety and security in accordance with international humanitarian law.

These obligations on states can be distilled into two categories: (i) measures, including legislative and others, to ensure that journalists are protected from attacks and that their rights are respected and protected; and (ii) measures to ensure accountability for perpetrators who have committed attacks against journalists.

As noted in the preamble to the Human Rights Council Resolution of 2016, national legal frameworks consistent with states international human rights obligations and commitments are an essential condition for a safe and enabling environment for journalists. However, these frameworks are also being misused to hinder or limit the ability of journalists to perform their work independently and without undue interference.

The 2016 UN Resolution (at para 6) goes further to propose specific measures that can be developed and implemented by states to combat impunity:

- The creation of special investigative units or independent commissions;
- The appointment of a specialised prosecutor;
- The adoption of specific protocols and methods of investigation and prosecution;
• The training of prosecutors and the judiciary on the safety of journalists;
• The establishment of information-gathering mechanisms, such as databases, to permit the gathering of verified information about threats and attacks against journalists;
• The establishment of an early warning and rapid response mechanism to give journalists, when threatened, immediate access to the authorities and protective measures.

Importantly, in a notable development by the Human Rights Council, the 2016 UN Resolution urged (at para 9) for “the immediate and unconditional release of journalists and media workers who have been arbitrarily arrested or arbitrarily detained, taken hostage or who have become victims of enforced disappearances”.

In the November 2017 Resolution on the Safety of Journalists and the Issue of Impunity (2017 UNGA Resolution), the UN General Assembly reaffirmed earlier resolutions – including that of the Human Rights Council in 2012 and 2014, as well as that of the UN General Assembly in 2013, 2014 and 2015. It further called on states to create and maintain, both in law and in practice, a safe and enabling environment for journalists to perform their work independently and without undue interference, inter alia by means of:

**Legislative measures.**

• Supporting the judiciary in considering training and awareness-raising and supporting training and awareness-raising among law enforcement officers and military personnel, as well as among journalists and civil society, regarding international human rights and international humanitarian law obligations and commitments relating to the safety of journalists, including with a strong focus on sexual and gender-based discrimination, and violence against women journalists, as well as the particularities of online threats and harassment of women journalists.
• Regular monitoring and reporting of attacks against journalists.

• Collecting and analysing concrete quantitative and qualitative data on attacks or violence against journalists, that are disaggregated by, among other factors, sex.

• Publicly and systematically condemning violence and attacks.
• Dedicating the resources necessary to investigate and prosecute such
attacks and to develop and implement gender-sensitive strategies for
combating impunity for attacks and violence against journalists, including
by using, where appropriate, good practices such as those identified in
Human Rights Council resolution 33/2.

• Putting in place safe gender-sensitive investigative procedures, in order
to encourage women journalists to report attacks against them and
provide adequate support, including psychosocial support, to victims and
survivors.

In seeking accountability for attacks against journalists, the 2017 UNGA Resolution
urged states to ensure accountability through the conduct of impartial, speedy,
thorough, independent and effective investigations into all alleged violence,
threats and attacks against journalists and media workers falling within their
jurisdiction, to bring perpetrators, including those who command, conspire
to commit, aid and abet or cover up such crimes to justice, and to ensure that
victims and their families have access to appropriate remedies.

It is self-evident that each state must abstain from inciting or directly engaging
in hostility or violence against journalists, communicators and media workers,
and to this extent it has an obligation to respect the rights to life, personal
integrity, personal safety and freedom of expression of journalists. A failure by
a state in the duty to guarantee and protect people who express themselves
against the risks posed by individuals may compromise the state’s international
responsibility. This includes instances in which the state has failed to adopt
protective measures, or when journalists or communicators are victims of acts
of violence or threats coming from individuals, who in turn were encouraged,
incited or invited by statements made by government officials against the
media, particularly in a context of social tension or disturbances of public order.
The state thus has the obligation to adopt a public discourse that contributes
to preventing the risks faced by journalists and communicators, instead
of deepening them – a point made in the 2018 HRC Resolution on safety of
journalists.

Other role-players that can also contribute include civil society organisations,
professional associations, national human rights institutions and possibly
intergovernmental organisations. This could include, for instance, awareness
campaigns, public condemnation or demands for accountability of wrongdoers,
and support and assistance to affected members of the media.

**The role of media organisations**

The state could further assist media organisations to facilitate and implement measures and best practices for the benefit of their journalists. This may include, for instance, as noted in the [International Declaration on the Protection of Journalists](#):

- general safety training for all journalists (item 9);
- the development and implementation of procedures and tools aimed at ensuring the physical, psychological and digital safety and security of journalists (item 10);
- training for journalists on their rights and duties under national and international law (item 11);
- promoting public support for journalism and journalists (item 13); and
- building solidarity amongst journalists (item 14).

The judiciary has a particularly important role in ensuring that there is accountability for attacks against journalists. As mentioned above, it has been

**The role of the judiciary**

**Interview by UNESCO with Justice Lillian Tibatemwa-Ekirikubinza**

In an [interview](#) with Justice Lillian Tibatemwa-Ekirikubinza from Uganda, following her participation in a judicial training workshop as well as a massive open online course on freedom of expression in Africa, Justice Lillian Tibatemwa-Ekirikubinza shared her insights on the insights on the plight being faced by journalists and what can be done to address this:

“What do you think the future holds for freedom of expression and safety of journalists in the African legal framework?

I think the African human rights regime has taken up this issue, which is illustrated in the way the African Commission on Human and People’s Rights has expounded on the right to access to information as a tool for socio-economic development. This will have a trickle-down effect as we are dealing with the issues at the regional level. However, it is also important to deal with these issues at the national level through institutions that we all ascribe to, such as the African Commission on Human and People’s Rights and the African Court on Human and People’s Rights, because that jurisprudence cannot be
questioned by Member States. I also think that, the fact that social media today has thrived, really helps spreading the information on violations out there.

How do you suppose continued efforts in the sphere of judicial trainings and MOOCs for members of the judiciary, will affect the African human rights framework especially concerning freedom of expression issues, in the future?

The more judges you train, the more the chances are that when the rights of journalists are violated, somebody who is in charge of the specific case will do the right thing as a judicial agent. Because, as I said, previously judicial officers in the African legal framework do not go looking for specific cases, so if you have only a few judicial officers in the region who have been trained to handle cases where the journalist’s rights have been violated, it may happen that these particular officers do not hear of the case and the cases are put before judges who are yet to be trained. This is the reason why I say that as long as we train more and the trained ones train others, we can be surer that the rights of journalists will be protected at the court level, as long as judges across the board know what to do.”

noted that it is important to strengthen the capacity of the judiciary to be able to deal with these issues in a meaningful and effective manner, fully cognisant of the developing media environment of the digital age in which journalists currently operate.

Judges, as the ultimate and final barrier against arbitrariness, play a predominant role in the protection of human rights. The role of judges as guarantors of human rights is particularly important in the case of the rights to freedom of expression and access to public information. Firstly, regarding the promotion and protection of these rights, judges not only guarantee individual rights, but their decisions also define conflict resolution criteria, which may become key precedents for a more structural protection of these rights and institutional guarantees for a more robust and uninhibited public debate. Court decisions also set the standards and indications for positive actions of public bodies, particularly administrative agencies in charge of promotion and protection of human rights. Judges are also an essential mechanism in fostering and guaranteeing the adoption of the highest international standards on human rights in national law.

Secondly, this means that judicial rulings engaged with the protection of universal rights foster a more guarantee-based interpretation of domestic
legislation and strengthen the protection of rights. This type of judicial action is not only useful to protect a person and foster an institutional environment that is more favourable to democratic deliberation, but also frequently affects the international liability of the state for actions violating the international treaties it has ratified, as well as other soft law and political commitments it has adopted.

Finally, training in freedom of expression and access to public information favours the adoption of suitable, guarantee-based judicial rulings, as well as policies and practices to satisfy these rights within the judiciary. This clearly shows the importance of knowing the international standards on access to information to adopt the necessary measures within the judiciary itself, and to ensure the public can access judicial or administrative information held by this branch of government.

It is therefore clear that the judiciary has a role to play in ensuring that states fulfil their obligations both under domestic and international human rights law.

South African National Editors Forum v Black Land First

In South African National Editors Forum v Black Land First, the South African High Court granted an interdict in favour of the media broadly, prohibiting the respondent from:

“engaging in any of the following acts directed towards the applicants: Intimidation; Harassment; Assaults; Threats; Coming to their homes; or acting in any manner that would constitute an infringement of their personal liberty”, and from “making any threatening or intimidating gestures on social media … that references any violence, harm and threat.”

The court subsequently held the respondent in contempt of court for continuing to engage in certain activities, including the harassment of members of the media, following the interdict having been granted.

Through the judiciary, these legal provisions can be interpreted and given effect to in the specific context of the media and the need to ensure the protection of journalists. Where journalists allege imminent threats to their safety, courts are empowered to grant interdictory relief in appropriate circumstances and subject to the relevant legal requirements. The judiciary also has a role to play in ensuring accountability and redress for journalists who have been subject to attack or who have had their rights
violated. This arises in a number of different instances: affording protection to journalists who are under attack; safeguarding against the arbitrary detention of journalists; holding wrongdoers to account; ensuring that states and other actors meet their obligations; and providing for appropriate recourse where wrongdoing has occurred.

It is therefore clear that the judiciary has had and can continue to have a significant role in ensuring the protection of journalists, and ensuring accountability for attacks that are perpetrated. The developing body of jurisprudence at the national and regional level can serve to ensure that states and other perpetrators are firmly aware that they cannot act with impunity without some measure of redress being granted by the courts. One such measure is an award of damages to a journalist who has suffered a violation.

Examples of Damages Awarded by the Regional and Sub-Regional Courts

There are a number of examples from the regional and sub-regional courts for damages having been awarded for attacks on journalists. The judgment of Federation of African Journalists v The Gambia has already been mentioned above. Further examples include the following:

• In *Ebrima Manneh v Republic of The Gambia*, the ECOWAS Court of Justice found in favour of the plaintiff, a journalist, who had been arrested without a warrant of arrest and without reasons being provided for his arrest. The court held that the arrest and detention were contrary to articles 6 and 7(1) of the African Charter, and that the plaintiff was entitled to the restoration of his personal liberty and security of the person. The court determined that an award of compensatory damages was justified, and ordered the Republic of The Gambia to pay the plaintiff US$ 100 000 as damages.

• In *Musa Saidykhan v the Republic of The Gambia*, the plaintiff, a journalist, had been arrested without a warrant and held incommunicado for twenty-two days and subjected to torture. The ECOWAS Court of Justice found a violation of the right to freedom from torture, freedom from unlawful arrest, the right to be presumed innocence until proven guilty and the right to be tried within a reasonable time. Accordingly, the court awarded damages in the amount of $200 000.
• In *Beneficiaries of the late Norbert Zongo and Another v Burkina Faso*, the African Court awarded damages posthumously to the beneficiaries of the murdered journalist. In this case, the African Court held that the state had violated article 7 of the African Charter, as it had not shown due diligence to seek out, investigate, prosecute and put to trial the killings of the deceased. Furthermore, the African Court found that the state violated article 1 of the African Charter, by failing to take appropriate legal measures to guarantee respect for the rights of the applicants in terms of article 7 of the African Charter.

• In *Deyda Hydara Jr and Others v Republic of The Gambia*, the ECOWAS Court of Justice dealt with the 2004 disappearance of Mr Hydara, a prominent Gambian journalist and advocate of media freedom, who had been critical of the government. The court held that the state did not conduct a proper investigation, and in doing so, allowed impunity in violation of the right to freedom of expression. It held further that the state was obligated to provide redress to Hydara’s family because of its failure to investigate the crime. As such, the court awarded the applicants US$50 000 in damages.
Module 4 Assessments & Resources

There is a wide range of legal instruments regionally and internationally that address issues relating to attacks on journalists and the need for accountability for such attacks. The assessments below are aimed at assisting in understanding the ambit of these instruments, both binding and non-binding, through exercises that require participants to engage in some independent research. The assessments and resources set out below are also intended to provide context and a practical understanding of the challenges being experienced, and to invite participants to work together to develop strategies to deal with the attacks and the issue of impunity.

Test your knowledge: Q&A

1. Article 79 of the Additional Protocol I to the Geneva Convention of 1949, requires that journalists working in areas of armed conflict are by international humanitarian law treated as
   (a) Journalists with a special designation
   (b) Journalists accredited as war correspondents
   (c) civilians
   (d) Journalists protected as prisoners of war
   (e) Journalists engaged in combat

2. Which statement is correct regarding citizen journalists?
   (a) The recognition of citizen journalists undermines the work being done by professional journalists.
   (b) Citizen journalists have come to play a significant part in newsgathering, especially in times of crisis.
   (c) Citizen journalists place professional journalists at risk.
   (d) There is no distinction between citizen journalists and professional journalists.
   (e) All of the above

3. According to United Nations Human Rights Committee’s General Comment No. 34, the arbitrary arrest, torture, threats to life and killing of journalists -
   (a) cannot be justified under article 19 of the ICCPR
   (b) may be justified in appropriate circumstances
   (c) must be viewed in the context of the current socio-political regime
   (d) are infrequent and of little concern
   (e) none of the above
4. The Declaration of Principles on Freedom of Expression in Africa provides that journalists can only be required to reveal their sources or disclose confidential material where -
   (a) it is necessary for the investigation or prosecution of a serious crime or the defence of a criminal charge
   (b) the information or similar information cannot be found elsewhere
   (c) the public interest in the disclosure outweighs the harm to freedom of expression
   (d) disclosure is ordered by a court of law
   (e) all of the above

5. The African Commission on Human and Peoples’ Rights Resolution on the Safety of Journalists and Media Practitioners in Africa of 2011 calls on states to -
   (a) Respect the independence and freedom of journalists and media practitioners to exercise their profession and guarantee their safety in accordance with international humanitarian law.
   (b) take all necessary measures to uphold their obligations under the African Charter and other international and regional instruments, providing for the right to freedom of expression and access to information.
   (c) implement the principles enshrined in the Declaration of Principles on Freedom of Expression in Africa.
   (d) fulfil their obligation to prevent and investigate all crimes allegedly committed against journalists and media practitioners and also to bring the perpetrators to justice.
   (e) All of the above.

6. United Nations Human Rights Council Resolution on the Safety of Journalists of 2016 and 2018, and other legal instruments and reports recognise that women journalists face specific challenges and risks in the course of their work. As a result -
   (a) women should not be permitted to work as journalists in the light of these specific challenges and risks.
   (b) it is necessary to take a gender-sensitive approach when considering the measures to address the safety of journalists.
   (c) A uniform approach should be adopted to address the challenges faced by both men and women in the same way.
   (d) it is not necessary to address these risks and challenges.
   (e) None of the above
7. The UN Plan of Action on Safety of Journalists and Impunity proposes which of the following measures to combat impunity for attacks committed against journalists?
   a) awareness raising
   b) capacity building
   c) academic research
   d) coalition building
   e) all of the above

8. The Economic Community of West African States (ECOWAS) Community Court of Justice in *Ebrima Manneh v The Gambia* held that the journalist’s arrest and detention was -
   (a) justified, because it was provided for by law.
   (b) justified, because he had been critical of the government.
   (c) contrary to articles 6 and 7(1) of the African Charter, and that he was entitled to an award of compensatory damages.
   (d) contrary to articles 6 and 7(1) of the African Charter, but as he suffered no harm, compensatory damages could not be awarded.
   (e) justified, because it was necessary to safeguard national security.

9. The African Court on Human and Peoples’ Right in *Nobert Zongo v Burkina Faso* held that
   (a) The state had not shown due diligence to seek out, investigate, prosecute and put to trial the killings of the deceased.
   (b) That the state was not required to investigate the death of Mr Zongo.
   (c) That the state had taken adequate measures to investigate the death of Mr Zongo.
   (d) That the ECOWAS Court could not award damages, because Mr Zongo was deceased.
   (e) None of the above

10. According to the UNESCO Director-General’s 2016 report titled ‘Report on the safety of journalists and the danger of impunity’, the number of killings of journalists, media workers and social media producers documented by UNESCO between 2006-2017 is -
    (a) 0
    (b) 250
    (c) 880
    (d) 1010
    (e) 110

(10 marks)
Group activities

Exercise 1

Divide into groups and research the following:
1. How many journalists have been killed in your country?
2. Have there been any other forms of attacks on journalists in your country?
3. How many of these cases have been investigated?
4. How many of these cases have been resolved?
5. What are the key challenges in ensuring that these cases are resolved and that there is accountability for the killings or other attacks?
6. What measures are in place in your country to ensure accountability for such killings or other attacks?
7. What strategies would you advise the government (such as the Ministry of Interior or the Ministry of Justice) to put in place to address this issue?

Exercise 2

Working in groups, compile a list of all relevant legal documents published by the organs of the UN and the ACHPR on the safety of journalists and the issue of impunity. Each group only has 15 minutes to find as many documents as possible, including declarations, principles, guidelines and resolutions.

After the 15 minutes are up, the groups should share each of their lists in order to compile a consolidated list of resources.

(Hint: The UNESCO World Trends Report at pp 166-167 might be a helpful place to start.)

Exercise 3

Working as a group, consider the arguments for and against affording a broad definition to the term ‘journalist’ to include citizen journalists, bloggers and other members of the public. Propose your own wording for a definition of the term ‘journalist’.
Exercise 4

Divide into groups and consider the following scenario: You are a judge presiding over the case of Journalist A and Journalist B. Both journalists have been well-known critics of the government, and have been subject to various forms of harassment (both online and offline) by members of the public who are loyal to the President. The journalists had brought this to the attention of the police and other public authorities, but were not given any assistance or protection.

While working in the newsroom one evening, a group of the President’s supporters gathered outside to demonstrate against a story that the journalists had published alleging that the President had been involved in corruption. A petrol bomb was thrown into the newsroom, which resulted in the death of Journalist A, severe bodily injury to Journalist B, and the burning down of the building in which the journalists were working.

Discuss how you would proceed to consider this case, including the sources of law that you would have regard to and the different types of relief that you would grant. In addition to the relief for the individuals concerned, consider what systemic relief (if any) might be appropriate in the circumstances.

Individual analysis

In its fact sheet titled “Impunity against perpetrators of physical attacks on journalists”, regarding the right to life contained in article 2 of the European Convention on Human Rights, the Council of Europe summarises the position under European law as follows:

“Positive obligations to carry out effective investigations following journalists’ killing or disappearance

The obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State’s general duty under Article 1 of the Convention to secure to everyone within its jurisdiction the rights and freedoms defined in the Convention, requires that there should be some form of effective official investigation when journalists or other media workers have been killed as a result of the use of force. The essential purpose of such an investigation is to secure the effective implementation of the domestic laws which protect the
right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility.

What form of investigation will achieve those purposes may vary in different circumstances. However, whatever mode is employed, the authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigatory procedure.

For an investigation into an alleged unlawful killing by State agents to be effective, the persons responsible for and carrying out the investigation should be independent from those implicated in the events and to the identification and punishment of those responsible. The authorities must take all reasonable steps to secure the evidence concerning the incident. Any deficiency in the investigation which undermines its ability to establish the cause of death or the persons responsible, whether the direct offenders or those who ordered or organised the crime, risks falling foul of this standard.

There is also a requirement of promptness and reasonable expedition implicit in this context. A prompt response by the authorities in investigating the use of lethal force or a disappearance is essential in ensuring public confidence in their maintenance of the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.”

Consider the position under the African regional human rights system, taking into account relevant treaties, declarations, principles, resolutions, and decisions of the regional and sub-regional courts. Prepare a similar fact sheet distilling the core principles under the regional human rights law in respect of states’ obligations to investigate the killing or disappearance of a journalist.

Answers: 1. (c); 2. (b); 3. (a); 4. (e); 5. (e); 6. (b); 7. (e); 8. (c); 9. (a); 10. (d)
Module 4. Safety of Journalists and the Issue of Impunity

Resources

Required reading

• There are a number of statements, declarations and principles that are relevant to the role and protection of journalists. While this is not an exhaustive list, this includes:

  • Protocol I Additional to the Geneva Conventions of 12 August 1948, and Relating to the Protection of Victims of International Armed Conflicts (1977) at article 79:

  • Medellin Declaration: Securing the safety of journalists and combating impunity (2007):


  • African Commission on Human and Peoples’ Rights, Resolution on the safety of journalists and media practitioners in Africa:
    <http://www.achpr.org/sessions/49th/resolutions/185/>

• For an overview of the key issues and challenges relating to journalists and the efforts to ensure that perpetrators do not enjoy impunity:

  • UNESCO, ‘UN plan of action on the safety of journalists and the issue of impunity’
• UNESCO, ‘Director General’s report on the safety of journalists and the danger of impunity 2018:
  <http://en.unesco.org/dg-report>

• Strengthening the Implementation of the UN Plan of Action on the Safety of Journalists and the Issue of Impunity: Outcome document, August 2017:

• UNESCO, ‘World trends in freedom of expression and media development’, 2018:
  <http://unesdoc.unesco.org/images/0026/002610/261065e.pdf>

• In 2014, the African Court delivered judgment in a case concerning an investigative journalist who had been murdered in Burkina Faso:
  • Beneficiaries of late Zongo and Others v Burkina Faso (application 013/2011):

• The ECOWAS Community Court of Justice has also handed down judgments relating to attacks on journalists:
  • Deyda Hadara Jr and Others v Republic of The Gambia:
  
  • Musa Saidy Khan v Republic of the Gambia:

  • Ebrima Manneh v Republic of the Gambia:

• In 2007, the United Nations Human Rights Committee found Cameroon in breach of its obligations under the International Covenant on Civil and Political Rights in respect of activities relating to the persecution of a journalist:
• **Njaru v Cameroon** (2007) AHRLR 21 (HRC 2007)  

• The European Court of Human Rights has held that a request for disclosure of a confidential source in a journalistic context is an impermissible violation of the right to freedom of expression contained in article 10 of the European Convention on Human Rights:

  • **Goodwin v United Kingdom** (case no. 17488/90):  
    <https://globalfreedomofexpression.columbia.edu/cases/goodwin-v-united-kingdom/>

• For a general overview on the safety of journalists, see:

  • Centre of Governance and Human Rights, University of Cambridge, ‘Safety of journalists research pack’, 2012:  
    <http://www.cghr.polis.cam.ac.uk/research-themes/right_to_life/safety-of-journalists-research-pack>

• For a discussion on the particular challenges being faced by journalists in the digital age:

  • Henrichsen J.R., Betz M. & Lisosky J.M., ‘Building digital safety for journalism’, 2015:  
    <http://unesdoc.unesco.org/images/0023/002323/232358e.pdf>

• The Committee to Protect Journalists has maintained a record of the number of journalists killed, by country, from 1992 to date. This database is accessible here:  
  <https://cpj.org/killed>
Module 5
Protecting Freedom of Expression in the Digital Age

• To explore the opportunities and challenges that the internet poses to the enjoyment of the right to freedom of expression.

• To understand how the legal principles relating to freedom of expression under regional and international law find application in the online context.

• To assess the proper application of the three-part test for a justifiable limitation of the right to freedom of expression when applied online.

• To consider specific challenges that are prevalent in the digital age, including hate speech online, cyberbullying, ‘fake news’ and disinformation, intentional network disruptions, intermediary liability, and challenges in respect of founding jurisdiction.

Contemporary challenges to freedom of expression

In the digital age, with the advent of the internet, we are able to generate and share more content, more easily than ever before. There are therefore various new forums, platforms and opportunities for members of the public and the media to exercise the right to freedom of expression. However, while states tend to recognise the commercial benefit that the internet can offer, some states mistrust the expanded opportunities for expression, mobilisation and other exercises of civil and political rights online. As such, the expanded opportunities have also given rise to new challenges to the full enjoyment of the right.

The right to freedom of expression, access to information and the legitimate restrictions that can be placed on these rights have already been covered. While article 19 of the ICCPR and article 9 of the African Charter were drafted before the existence of the internet, the rights set out within them are fully applicable to the digital sphere. Article 19 of the ICCPR states that the right to freedom of
expression is applicable to any media and regardless of frontiers. Furthermore, as mentioned above, the ACHPR and the UN have firmly established that individuals’ rights offline must also be protected online, in particular the right to freedom of expression.

The corollary to this is that the right to freedom of expression, whether exercised through digital or non-digital means, can also be justifiably limited if it meets the requirements of the three-part test: (i) it must be provided for in law; (ii) it must pursue a legitimate aim; and (iii) it must be necessary for a legitimate purpose. The three-part test for a justifiable limitation, as well as certain types of limitations, such as hate speech and the law of defamation, have also been addressed above. This module focuses on particular challenges that are seen to be more prevalent in the digital age and which find application online.

Broadly speaking, as noted in the UNESCO publication titled ‘Freedom of connection, freedom of expression: The changing legal and regulatory ecology shaping the internet’ (at p 11), there are typically three possible ways in which freedom of expression on the internet is seen to be limited:

- Obstacles to access, including restrictions imposed by governmental policy or economic conditions, such as a lack of infrastructure;
- Limits to content, such as through self- or government-censorship, when self-censorship includes that imposed by the Internet industry;
- Restrictions on the rights of users, such as (un)lawful disconnection.

In addition to this, it is also important to recognise the chilling effect of online harassment, surveillance, bullying and other similar acts in limiting freedom of expression online.

It must be noted at the outset that these are complex challenges that are being grappled with the world over, and each case must necessarily be assessed on its own merits. While the basic principles of human rights law remain applicable, the challenge is to interpret and apply these principles in a manner that addresses the particular challenges that the internet has given rise to, while still meaningfully giving effect to the right to freedom of expression.

While the internet offers many significant benefits and opportunities, it can also have harmful consequences on the enjoyment of fundamental rights. These issues are nascent in our legal frameworks and jurisprudence, and as such, the purpose of this module is to facilitate informed discussion and debate on these topics.
Suggested Readings

In addition to the recommended resources listed at the end of the module, the following suggested readings are useful to get an overview of the challenges and a better understanding of the context:


- The African Declaration on Internet Rights and Freedoms, a civil society initiative to promote human rights standards and principles of openness in Internet policy formulation and implementation on the continent: http://africaninternetrights.org

- A recent publication produced by the Berkman Klein Center for Internet & Society at Harvard University entitled “Perspectives on harmful speech online: A collection of essays” (dated August 2017): https://dash.harvard.edu/bitstream/handle/1/33746096/2017-08_harmfulspeech.pdf?sequence=5

Particular aspects of these resources are highlighted in more detail below.

Internet shutdowns and the blocking or filtering of content

Some of the ways in which information is censored or restricted is through the blocking of websites (or particular pages of websites) and the intentional disruption or shutdown of the internet. African countries also experience the enforced takedown of content, which is distinct from blocking, filtering or limiting connectivity. It is linked to the issue of internet intermediaries discussed later in this module. These are serious restrictions on the right to freedom of expression, including access to information, and must comply with the three-part test in order to be justifiable.

According to Access Now, an internet shutdown may be defined as “an intentional disruption of internet or electronic communications, rendering them inaccessible or effectively unusable, for a specific population or within a
location, often to exert control over the flow of information’. In other words, this arises when someone, be it the government or a private sector actor, intentionally disrupts the internet or a mobile application, arguably to control or curb what people say or do. This is sometimes also referred to as a “kill switch”.

This may take different forms. In some instances, this may entail there being a total network outage, whereby access to the internet is shutdown in its entirety. In other circumstances, this may also arise when access to mobile communications, websites or social media and messaging applications is blocked, throttled or rendered effectively unusable. Shutdowns may affect towns or regions within a country, an entire country, or even multiple countries, and have been seen to range from several hours to several months. Typically, the government seeking to impose an internet shutdown will order private actors in charge of operating networks to shut down or limit internet traffic.

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**Internet Shutdowns in Context**

*Insights from the Shutdown Tracker Optimization Project (STOP)*

Internet shutdowns have been increasing in frequency between 2016 and 2017.

- **55** documented shutdowns in 2016
- **61** documented shutdowns in Q1-Q3 2017

At least 30 countries experienced internet shutdowns in the past 21 months.

- **54** India
- **10** Pakistan
- **5** Syria
- **5** Iraq
- **4** Egypt
- **1** USA
- **1** Somalia
- **1** South Africa
- **1** Kenya
- **1** Cameroon
- **1** Botswana
- **1** Bulgaria
- **1** Chile
- **1** DRC
- **1** Congo
- **1** Guine
- **1** North Korea
- **1** Bangladesh
- **1** Togo
- **1** Vietnam
- **1** Gabon
- **1** Morocco
- **1** Indonesia
- **1** Chad
- **1** Uganda
- **1** Mali
- **1** Estonia
- **1** Malta
- **1** Montenegro
- **1** Ukraine
- **1** Korea
- **1** Bahrain
- **1** Thailand
- **1** Algeria
- **1** Yemen
- **1** Iran
- **1** Libya
- **1** Brazil

What the authorities said versus what we think caused the shutdowns.

- **Nothing At All**
- **Unknown**
- **Quell Political Instability**
- **Control Elections**
- **Control Information**
- **Lobbying from Telcos**
- **Government Officials Visits**
- **Other**

Lines illustrate the correlation between stated causes and suspected actual causes of shutdown instances.

[1] Based on our research, officials gave no public justification for the disruption.
[2] Such as “Contempt of Court,” “License Requirements,” or “Tests.”
[3] Including “Safeguarding Other Telcos,” “Surveillance,” etc.

Source: STOP: the #KeepItOn Internet Shutdown Tracker, published by Access Now
The 2011 Joint Declaration on Freedom of Expression and the Internet, published by the International Mechanisms for Freedom of Expression, stated as follows:

“(a) Mandatory blocking of entire websites, IP addresses, ports, network protocols or types of uses (such as social networking) is an extreme measure – analogous to banning a newspaper or broadcaster – which can only be justified in accordance with international standards, for example where necessary to protect children against sexual abuse.

(b) Content filtering systems which are imposed by a government or commercial service provider and which are not end-user controlled are a form of prior censorship and are not justifiable as a restriction on freedom of expression.

(c) Products designed to facilitate end-user filtering should be required to
be accompanied by clear information to end-users about how they work and their potential pitfalls in terms of over-inclusive filtering.”

As set out in General Comment No. 34 (at para 43):

“Any restrictions on the operation of websites, blogs or any other internet-based, electronic or other such information dissemination system, including systems to support such communication, such as internet service providers or search engines, are only permissible to the extent that they are compatible with [Article 19(3) of the ICCPR]. Permissible restrictions generally should be content-specific; generic bans on the operation of certain sites and systems are not compatible with [Article 19(3) of the ICCPR]. It is also inconsistent with [Article 19(3) of the ICCPR] to prohibit a site or an information dissemination system from publishing material solely on the basis that it may be critical of the government or the political social system espoused by the government.”

Such measures to restrict access to the internet have been the subject of repeated condemnation. For instance, in 2015, in the Joint Declaration on Freedom of Expression and Responses to Conflict Situations, the mandate holders on freedom of expression, including the Special Rapporteurs for the United Nations and the African Commission, stated that: “Filtering of content on the Internet, using communications ‘kill switches’ (i.e. shutting down entire parts of communications systems) and the physical takeover of broadcasting stations are measures which can never be justified under human rights law”. Furthermore, in its resolution in 2016, the United Nations Human Rights Council stated that it “condemns unequivocally measures to intentionally prevent or disrupt access to or dissemination of information online in violation of international human rights law, and calls upon all States to refrain from and cease such measures”.

As noted in the UNSR Report (at para 22): “The blocking of internet platforms and the shutting down of telecommunications infrastructure are persistent threats, for even if they are premised on national security or public order, they tend to block the communications of often millions of individuals”. Notably, in addition to the impact that this may have on the right to freedom of expression, this also impacts the way in which people are able to enjoy basic services such as banking, healthcare and other opportunities for development.

Further to the impact of network disruptions on the enjoyment of fundamental rights, it also has an economic impact. According to a 2016 study by the Brookings Institute titled ‘Internet shutdowns cost countries $2.4 billion last year’, internet shutdowns between 1 July 2015 and 30 June 2016 cost at least $2.6
billion (USD) globally. The report states that these losses include $968 million in India, $465 million in Saudi Arabia, $320 million in Morocco, $209 million in Iraq, $116 million in Brazil, $72 million in the Republic of the Congo, $69 million in Pakistan, $69 million in Bangladesh, $48 million in Syria, $35 million in Turkey, and $20 million in Algeria, among other places. These figures only account for the reduction in economic activity, and do not account for tax losses, or drops in investor, business and consumer confidence. In April 2017, thirty governments of the Freedom Online Coalition declared their commitment to fight internet shutdowns, calling on all governments to “to end such violations of the rights to freedom of expression and peaceful assembly”.

Although a less drastic measure than a complete internet shutdown, the blocking and filtering of content online can also hinder the free enjoyment of the right to freedom of expression. According to a 2016 publication by ARTICLE 19 titled ‘Freedom of expression unfiltered: How blocking and filtering affect free speech’, blocking/filtering has been defined (at p 7) as follows:

“[T]he difference between “filtering” and “blocking” is a matter of scale and perspective. 
• Filtering is commonly associated with the use of technology that blocks pages by reference to certain characteristics, such as traffic patterns, protocols or keywords, or on the basis of their perceived connection to content deemed inappropriate or unlawful; 
• Blocking, by contrast, usually refers to preventing access to specific websites, domains, IP addresses, protocols or services included on a blacklist.”

A related topic in this regard is what is commonly referred to as “net neutrality”. The Electronic Frontier Foundation defines this as a principle that internet service providers should treat all data that travels over their networks fairly, without improper discrimination in favour of a particular application, website or service. According to the American Civil Liberties Union, discrimination in this regard may relate to affecting information in a way that halts, slows or otherwise tampers with the transfer of any data, except for a legitimate network management purpose, such as easing congestion or blocking spam.

According to the 2011 Joint Declaration on Freedom of Expression and the Internet, in respect of network neutrality:

(a) There should be no discrimination in the treatment of Internet data and traffic, based on the device, content, author, origin and/or destination of the content, service or application.
(b) Internet intermediaries should be required to be transparent about any traffic or information management practices they employ, and relevant information on such practices should be made available in a form that is accessible to all stakeholders.

As stated by the United Nations Special Rapporteur on Freedom of Expression (at para 23):

“Network neutrality — the principle that all Internet data should be treated equally without undue interference — promotes the widest possible access to information. In the digital age, the freedom to choose among information sources is meaningful only when Internet content and applications of all kinds are transmitted without undue discrimination or interference by non-state actors, including providers. The State’s positive duty to promote freedom of expression argues strongly for network neutrality in order to promote the widest possible non-discriminatory access to information.”

As noted by the United Nations Special Rapporteur on Freedom of Expression (at para 23), there are two key ways in which net neutrality may be affected:

- Paid prioritisation schemes, in terms of which providers give preferential treatment to certain types of internet traffic over others for payment or other commercial benefit; and
- Zero rating, which is the practice of not charging for the use of Internet data associated with a particular application or service; other services or applications, meanwhile, are subject to metered cost.

In Africa, this debate is increasingly playing out as service providers are offering users access to particular services for free, on the basis of access to those services being zero-rated, such as Facebook’s ‘Free Basics’. In South Africa, for example, the government has stated at a public hearing that: “All [i]nternet traffic must be treated equally, without discrimination, restriction or interference, regardless of the sender, receiver, content, device, service, or application”.

UNESCO member states have endorsed the Internet Universality Framework and the R.O.A.M. Principles, which advocate for a human-rights based, open, accessible internet governed by multi-stakeholder participation. By promoting the R.O.A.M principles, the Internet Universality Framework serves as a bridge to preserve a free, open and trusted internet, which contributes to the realisation of internet-enabled knowledge societies and the achievement of 2030 SDGs. Intentional network disruptions are a limitation of the right to freedom of
expression, as well as potentially other rights as well. As with all limitations of rights, such limitations must be subject to the three-part test to assess whether the limitation is justifiable. In assessing the limitation to the right to freedom of expression that is caused by an internet shutdown, the 2017 Report of the UNSR on Freedom of Expression has noted (at para 9) that internet shutdowns are often ordered covertly and without a legal basis, and violate the requirement that the restrictions must be provided for in law. Similarly, the report notes further (at para 10) that shutdowns ordered pursuant to vaguely formulated laws and regulations, or in terms of laws and regulations that are adopted and implemented in secret, also fail to satisfy the legality requirement. In some countries, this has led to the government enacting new laws to expressly allow for shutdowns to take place.

The Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules in India

In August 2017, following the internet reportedly having been shut down more than 40 times during the course of 2017, the Department of Telecommunications in India issued new rules – the Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules – in August 2017 allowing the government to shut down telephone and internet services during a public emergency or for public safety. The government had previously relied on section 144 of the criminal code that was aimed at preventing “obstruction, annoyance or injury” to impose internet restrictions. This legal development has been met with mixed responses. On the one hand, the new rules would potentially mean that, if the government were to persist with internet shutdowns, this could arguably be done in a more organised manner.

On the other hand, however, concerns have been raised about the lack of definitions for the terms ‘public emergency’ or ‘public safety’, and the potential that these new rules may have for censorship online. There is also concern that suppressing connectivity may also prevent the dissemination of legitimate information that could help to calm down an emergency situation, and whether action against, for example, perpetrators of incitement to violence can be a less extreme step than stopping a particular service or connectivity altogether.

The 2017 Report of the UN Special Rapporteur on Freedom of Expression has further noted (at paras 14-15) that network shutdowns invariably fail to meet the standard of necessity, and are generally disproportionate. States frequently seek to justify this on the ground of national security, which has been dealt with in Module 2.
National Security as a Ground of Justification

National security is often raised as a ground of justification for an internet shutdown. However, this concept is typically broadly defined and therefore easily susceptible to abuse. Principle XIII(2) of the Declaration of Principles on Freedom of Expression in Africa provides that freedom of expression should not be restricted on public order or national security grounds “unless there is a real risk of harm to a legitimate interest and there is a close causal link between the risk of harm and the expression”.

In *CM Pak Limited v Pakistan Telecommunication Authority*, FAO No. 42 of 2016, the Islamabad High Court in Pakistan ruled that the Federal Government and the Pakistan Telecommunication Authority had impermissibly suspended or caused the suspension of mobile cellular services or operations in Pakistan. The petitioners had argued that the Telecommunication Authority compelled licensees to suspend telecommunications services from time to time, on the basis of mere apprehensions of national security risks. According to the court, the only instance permitted under domestic law whereby mobile services or operations could be suspended was if the President proclaimed a state of emergency. In the present circumstances, in the absence of any such proclamations – and notwithstanding the concerns that the state may have in relation to national security – any actions, orders or directives issued by the Federal Government or the Telecommunication Authority was declared to be illegal, ultra vires and without lawful authority and jurisdiction. The court noted further that causing the suspension of services or operations outside of instances permitted under the law may expose the Federal Government and the Telecommunication Authority to claims of compensation or damages by the licensees or the users of mobile services.

In relation to the blocking and filtering of content, there may indeed be circumstances where such measures are justifiable, for example in relation to websites distributing child pornography. Such measures still constitute a limitation of rights, and are therefore required to meet the three-part test for a justifiable limitation. This should assessed on a case by-case basis, giving consideration to the fact that such measures can often be ineffective at achieving a targeted outcome, and lack transparency with little to no judicial oversight exercised. In this regard, the following measures have been proposed by ARTICLE 19 when dealing with the blocking and filtering of content:
• Blanket filtering must be prohibited by law, and should be user-controlled and transparent.
• Any requirement to block unlawful content must be provided for in law.
• Blocking should only be ordered by an independent and impartial court or adjudicatory body, and such blocking orders must be strictly proportionate to the aim pursued.

Similarly, limitations to network neutrality may also be permissible in certain circumstances, for example for legitimate network management purposes. However, as stated in the abovementioned Joint Declaration (at para 5), as a general principle there should be no discrimination in the treatment of internet data and traffic, regardless of the device, content, author, origin and/or destination of the content, service or application. Further, internet intermediaries should be required to be transparent about any traffic or information management practices they employ, and relevant information on such practices should be made available in a form that is accessible to all stakeholders.

A recent issue concerns special taxes on connectivity and/or publishing online, and courts may be approached to assess whether these constitute a justifiable restriction on freedom of expression or whether they constitute indirect attempts to control content that do not surmount the threshold of the three part test.

This trend seeking to impose a tax on the use of over-the-top services (such as WhatsApp, Facebook and Twitter), increases the cost to communicate, but is not purely a fiscal matter.

ACHPR Press Release on the Growing Trend of Stringent Regulation of the Internet in East Africa

On 12 July 2018, the ACHPR issued a statement expressing its concern at various regulatory measures that have been recently implemented in East African countries. The statement reads as follows:

“The African Commission on Human and Peoples’ Rights (the Commission), acting through the Special Rapporteur on Freedom of Expression and Access to Information in Africa (the Special Rapporteur) Commissioner Lawrence Mute, and the Country Rapporteur responsible for monitoring the human rights situation in Kenya and Tanzania Commissioner Solomon Dersso, wishes to express concern on the growing trend of States in East Africa adopting stringent regulation measures on the Internet and Internet platforms.

The Commission is in particular concerned about the adoption of the Electronic and Postal Communications (Online Content) Regulations 2018 in Tanzania.
which introduced licensing requirements for bloggers who are now required to pay up to 2,100,000 Tanzanian Shillings (around USD 930) for the licences. In Uganda, the Commission is concerned by the coming into force of the Excise Duty (Amendment) Bill 2018 on 01 July 2018, which requires users of ‘over the top’ services such as social media platforms to pay UGX 200 (USD 0.05), per user, per day of access. Finally, the Commission is concerned by the directive issued by the Kenya Film and Classification Board (KFCB) on 14 May 2018, requiring licences for anyone posting videos for public exhibition or distribution online on their social media accounts.

These regulations may negatively impact the ability of users to gain affordable access to the Internet, which goes against States’ commitment to protect the right of every individual to receive information, as well as the right to express and disseminate one’s opinion within the law which is provided under Article 9 of the African Charter on Human and Peoples’ Rights.

The Commission wishes to respectfully remind States of the Resolution on the Right to Freedom of Information and Expression on the Internet in Africa (ACH-PR/Res. 362(LIX) 2016) which recognises the importance of the Internet in advancing human and peoples’ rights in Africa, particularly the right to freedom of information and expression. Further, the 2018 Joint Declaration on Media Independence and Diversity in the Digital Age stresses the positive obligation of States to create a general enabling environment of promoting universal access to the Internet.

The Commission urges Tanzania, Uganda and Kenya to ensure that regulations do not undermine their commitment to ensure freedom of expression and access to information on the Internet and social media platforms."

**Intermediary liability**

According to the 2011 Joint Declaration on Freedom of Expression and the Internet, in respect of intermediary liability:

(a) No one who simply provides technical Internet services such as providing access, or searching for, or transmission or caching of information, should be liable for content generated by others, which is disseminated using those services, as long as they do not specifically intervene in that content
or refuse to obey a court order to remove that content, where they have the capacity to do so (‘mere conduit principle’).

(b) Other intermediaries should be fully insulated from liability for content generated by others under the same conditions as in paragraph 2(a). At a minimum, intermediaries should not be required to monitor user-generated content and should not be subject to extrajudicial content takedown rules which fail to provide sufficient protection for freedom of expression (which is the case with many of the ‘notice and takedown’ rules currently being applied).

There are a number of different intermediaries that find application on the internet, including internet service providers, search engines, internet exchange points, content delivery networks, and social networking platforms. UNESCO has argued in a 2013 publication titled ‘Fostering freedom online: The role of intermediaries’ (at pp 179-180) that part of the state’s duty to protect human rights is to facilitate and support intermediaries’ respect for freedom of expression. Some of the issues identified in this regard included:

- Limiting the liability of intermediaries for content published or transmitted by third parties is essential to the flourishing of internet services that facilitate expression.
- Laws, policies, and regulations requiring intermediaries to carry out content restriction, blocking, and filtering in many jurisdictions are not sufficiently compatible with international human rights standards for freedom of expression.
- Laws, policies, and practices related to government surveillance and data collection from intermediaries, when insufficiently compatible with human rights norms, impede intermediaries’ ability to adequately protect users’ privacy. 20
- Whereas due process generally requires that legal enforcement and decision-making are transparent and publicly accessible, governments are frequently opaque about requests to companies for content restriction, the handover of user data, and other surveillance requirements.

In reference to takedowns of content, this measure can be understood as a more proportionate response than either blanket or even targeted blocking/filtering. It avoids preemptive suppression of expression and access to information.

20 Cannataci et al discuss the interface of the right to privacy and the right to freedom of expression in the digital age in the 2017 UNESCO publication “Privacy, free expression and transparency”. 
Companies providing internet services are encouraged, in the 2018 report of the UN Special Rapporteur David Kaye, to align with international standards on freedom of expression in terms of how they deal with government demands to remove content, as well as with regard to their own internal content rules which they enforce through terms of service and moderation/curation of content.

**Access to the internet and the need for digital literacy**

We have already discussed the developing norm at the international level regarding a right of access to the internet, in recognition of the indispensable nature of the internet in realising other fundamental rights, and the fact that both the ACHPR and the UN have recognised that the rights that people have offline must also be protected online. The 2016 UN Resolution also urges states to “consider formulating, through transparent and inclusive processes with all stakeholders, and adopting national Internet-related public policies that have the objective of universal access and enjoyment of human rights at their core”.

However, physical access to the internet is not the end goal in itself. Rather, states should seek to foster a digitally literate society in which persons using the internet can do so in an effective and meaningful way. Central to this is also being able to address the challenges that arise when using the internet. As stated in the 2017 Internet Society publication entitled ‘Global internet report: Paths to our digital future’: “Just as the [i]nternet is a mirror to society, we must better understand that it reflects both the good and the bad that exists in the world”. For UNESCO, digital literacy is best understood as a wider set of media and information literacies, covering inter alia privacy literacy, global citizenship, security literacy, intercultural competencies, etc.

As such, as steps are taken to expand user access to the internet, steps must commensurately be taken by all relevant stakeholders to ensure that these challenges are addressed, both in the interests of individual safety and the future of internet economy, in a way that strikes the appropriate balance in upholding fundamental rights online.

**INTERNET LIVE STATISTICS**

Levels of internet penetration and online access change by the second. For updated information on access to the internet and other related information, visit the Internet Live Stats website: [http://www.internetlivestats.com/](http://www.internetlivestats.com/).
The impact of social media, including social messaging

Social media (or social networking site or service) and social messaging are a common platform through which information is shared online. Given the ease with which information can be shared, individuals can share information quickly and with a wide audience; it is public to greater or lesser degrees. As a general rule of thumb, if a statement would be impermissible in terms of international human rights standards to publish in a newspaper or broadcast on television, it is similarly impermissible when posted on social platforms.

In the judgment of *H v W* in South Africa, the court explained (at para 11) that a social networking site or service is a web-based service with the following characteristics: it allows users to construct a public or semi-public profile within a bounded system; it articulates a list of other users with whom they share a connection; and it allows users to view and traverse their list of connections and those made by others within the system.

One of the challenges when dealing with cases regarding social media is that each platform operates differently, for instance using different terminology and allowing for different levels of public access. When litigating such cases, petitioners should seek to ensure that the court is made properly aware, to the extent necessary, of the relevant practicalities of the particular social media site or service; in the absence of this, the court itself should not be hesitant to invite the parties to make submissions and provide particularities on the platform in question.

In cases where there has been a breach of rights that have occurred online, such as defamatory material that has been published and cannot be justified in terms of truth or public interest, the courts have the typical remedies available, for instance the granting of an interdict or the award of damages. However, when considering whether or not to grant an interdict, courts should bear in mind the efficacy that this may have in circumstances where the material has already been widely disseminated on social media.

**Isparta v Richter and Another**

In *Isparta v Richter and Another* [2013] ZAGPPHC 243, the first defendant posted several comments on her Facebook wall, each time tagging the second defendant. The plaintiff contended that two of these posts were defamatory, in particular that they were disparaging and belittling, malicious, and aimed at
damaging her reputation by implying that she was a bad mother.

In upholding the plaintiff’s claim of defamation, the court reached the following findings:

• Even though the second defendant was not the author of the posts, the court held that he was as liable as the first defendant on the basis that the second defendant knew about the posts and had allowed his name to be coupled with that of the first defendant.

• An apology on the same medium would have had an impact in mitigating the plaintiff’s damages. In this regard, the court noted that an apology to the plaintiff, or a retraction in writing, in the same forum that the offending statements had been made would also clear the name of the plaintiff. However, on the facts of the case, the defendants had not apologised and had instead continued to hold their view.

• The court awarded damages to the plaintiff in the amount of R40 000 (ZAR) to be paid jointly and severally by the first and second defendants.

One of the ways in which social media also finds application in court proceedings is through, for example, live updates on social media sites like Twitter. In this regard, a practice that has become common in many high profile cases is for journalists and members of the public attending a hearing to use social media to share information about the hearing as it happens. As noted in the judgment of the South African Supreme Court of Appeal in *van Breda v Media24 Limited and Others; National Director of Public Prosecutions v Media 24 Limited and Others* (at para 64), with reference to a lecture presented by Canadian Chief Justice McLachlin:

“For, even as we grapple with television in the courtroom, there are many (particularly younger viewers) who are increasingly turning to the internet to keep up to date with news and current affairs. Many people now use social media as their main source of information, resulting in a shift in how information is disseminated and received. As McLachlin CJ observed: ‘The explosive growth of new media signals a shift in who reports on legal proceedings. Court decisions may no longer be the preserve of trained professional journalists. Anyone with a keyboard and access to a blog can now be a reporter. And who is to say they are not? Some bloggers will be professionals and academics providing thoughtful commentary and analysis. Others will fall short of basic journalistic standards. Will accuracy
and fairness be casualties of the social media era? What will be the consequences for public understanding of the administration of justice and confidence in the judiciary? How can a medium such as Twitter inform the public accurately or adequately in 140 characters or less? If witness or juror contamination is a concern with television, is it not even more so with ubiquitous social media accessed or received automatically via a hand-held device?"

While this is a new reality of court reporting in the digital age, it is permitted in many countries around the world in the spirit of open justice and in recognition of the valuable information it can offer to those who are not themselves able to attend the hearings.

**Hate speech online**

Hate speech has already been discussed in Module 2. As set out therein, any restriction or penalty on speech as a result of it being labelled as ‘hate speech’ must still conform to the three-part test for a lawful limitation or restriction of the right to freedom of expression. There is presently no uniform definition for hate speech, and as such it is often a challenge to identify precisely what constitutes hate speech, and whether it falls within the realm of speech that must be prohibited (such as that referred to in article 20(2) of the ICCPR), speech that may be prohibited (such as that referred to in article 19(3) of the ICCPR), and speech that should be protected from restriction, but nevertheless raises concerns in terms of intolerance and discrimination, and may merit a critical response by the state (such as that referred to in article 19(2) of the ICCPR).

The legal principles set out in Module 2 apply irrespective of whether one is dealing with hate speech online or offline. However, the context of hate speech online does differ. Some of the considerations that arise in this regard is the immediacy with which one can share hate speech online, the size of the audience with whom it can be shared, and difficulties that may arise in identifying the person responsible for the speech. As noted in the UNESCO its publication, *Countering online hate speech* (at pp 13-15), the following factors may distinguish hate speech online and offline:

- There is the danger of conflating a rant tweeted without thinking of the possible consequences, with an actual threat that is part of a systematic campaign of hatred.
- Hate speech can stay online for a long time in different formats across
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multiple platforms, which can be linked repeatedly.

- Hate speech online can be itinerant, and even when content is removed, it may find expression elsewhere, possibly on the same platform under a different name or on different online spaces.
- Anonymity can also present a challenge to dealing with hate speech online.
- The internet has transnational reach, which raises issues of cross-jurisdictional cooperation in regard to legal mechanisms for combatting hate speech.

There is a plethora of legislation that seeks to regulate hate speech online, together with similarly vague terms, such as ‘violent extremism’, without providing for clear and narrowly circumscribed definitions of what is meant by these terms, or objective criteria that can be applied. Care should be exercised by states to avoid over-regulating hate speech online, and in doing so, violating the right to freedom of expression. As has been noted, key considerations in this regard include that views on what is considered offensive or acceptable speech will inevitably change according to who is judging the speech; that allowing offensive ideas to be expressed verbally serves as an important safety valve against the expression of such ideas by means of physical violence; and that we cannot get closer to a functioning ‘marketplace of ideas’ if the only ideas allowed into that marketplace consist of speech that everyone agrees with or feels neutral towards.\(^{21}\) Importantly, hate speech should not be conflated with offensive speech, as the right to freedom of expression includes speech that is robust. The Rabat Plan of Action cited in Module 2 is equally relevant in assessing ‘hate’ issues online.

In the European Union, for example, agreements have been entered into with internet intermediaries, such as Facebook, Twitter and YouTube, to prevent the spread of illegal hate speech online, to educate and raise awareness with their users about illegal hate speech, to develop internal “procedures and staff training to guarantee that they review the majority of valid notifications for removal of illegal hate speech in less than 24 hours and remove or disable access to such content, if necessary”. Internet intermediaries also announced that they would “continue to work with the EU to identify and discredit extremist speech by promoting so called ‘counter-narratives’ and supporting educational programs that encourage critical thinking”. Of course, it must be noted that any such measures must guard against unjustifiably limiting legitimate expression.

\(^{21}\) Reventlow N.J., ‘The right to ‘offend, shock or disturb’, or the importance of protecting unpleasant speech’ in Perspectives on harmful speech online: A collection of essays, August 2017, p 8, accessible at https://dash.harvard.edu/bitstream/handle/1/33746096/2017-08_harmfulspeech.pdf?sequence=5.
CIVIL AND CRIMINAL CONSEQUENCES FOR HATE SPEECH

Hate speech can have dire consequences for persons responsible for the speech. When this is uttered online, for example on Facebook or Twitter, the wide audience and speed with which it can be disseminated can cause it to be all the more egregious. The example of Penny Sparrow in South Africa is illustrative of the consequences.

On 3 January 2016, Penny Sparrow – a South African estate agent – posted the following on social media in reference to a photograph depicting predominately black people at a beach: “These monkeys that are allowed to be released on New Year’s Eve and onto public beaches towns etc. obviously have no education whatsoever. So to allow them loose is inviting huge dirt and troubles and discomfort to others. I’m sorry to say I was among the revelers and all I saw were black on black skins what a shame. I do know some wonderful thoughtful black people. This lot of monkeys just don’t want to even try. But think they can voice opinions about statute and their way. Dear oh dear. From now I shall address the blacks of South Africa as monkeys as I see the cute little wild monkeys do the same pick drop and litter.”

Two separate court proceedings were instituted against Sparrow. First, before the Equality Court, it was held that Sparrow words constituted hate speech in terms of section 10 of the South African Promotion of Equality and Prevention of Unfair Discrimination Act, 2000. The Equality Court ordered Sparrow to pay R150 000 (ZAR) in damages to the Oliver and Adelaide Tambo Foundation, an organisation that promotes tolerance and non-racialism. Second, before the Magistrate’s Court, she pleaded guilty to a charge of crimen injuria, which is a criminal offence relating to the unlawful impairment of the dignity of another. She was convicted and sentenced to a fine of R5 000 or 12 months’ imprisonment. She was further ordered to make a public apology for her remarks on Facebook.

The Equality Court decision is accessible here: ANC v Penny Sparrow, [2016] ZAEQC 1 The Magistrate’s Court decision – S v Sparrow, Case No. 708/2016 – was not reported.

Outside of legal measures, an important response to hate speech can be a counter-narrative. As suggested by UNESCO in its publication titled Countering hate speech online (at p 58):
“Initiatives promoting greater media and information literacy have begun to emerge as a more structural response to hate speech online. Given young people’s increasing exposure to social media, information about how to identify and react to hate speech may become increasingly important. While some schools have expressed interest in progressively incorporating media and information literacy in their curriculum, these initiatives, however, are still patchy and have often not reached the most vulnerable who need the most to be alerted about the risk of hate speech online and offline. It is particularly important that anti-hate speech modules are incorporated in those countries where the actual risk of widespread violence is highest. There is also a need to include in such programmes, modules that reflect on identity, so that young people can recognise attempts to manipulate their emotions in favour of hatred, and be empowered to advance their individual right to be their own masters of who they are and wish to become. Pre-emptive and preventative initiatives like these should also be accompanied by measures to evaluate the impact upon students’ actual behaviour online and offline, and on their ability to identify and respond to hate speech messages.”

Harassment and threats online

Harassment, threats and online violence severely restricts the enjoyment that persons have of their rights online, and the ability to exercise the right to freedom of expression freely and without undue hindrance. Persons from vulnerable, marginalised or disenfranchised groups are typically most affected by this. While the internet provides a forum for people to seek information about their identities and sexual orientation, to articulate themselves on these topics and to express themselves artistically, many people suffer a wide range of attacks in doing so, including attacks on sexuality, cyber-bullying, exposing personal information, and the manipulation of images that are then used for blackmail and destroying credibility.

This can lead to self-censorship and serious concerns for people’s physical safety. However, as noted by the Association for Progressive Communications, one of the key challenges is in getting lawmakers and law enforcement officials to recognise the severity of such harassment and threats, and to treat it with the appropriate levels of concern, recognising that the real and persistent harm suffered applies whether the harassment and threats take place online or offline. Two further challenges that arise that are exacerbated in the online sphere relates to the volume of threats that can be received given the relative ease with which this can be done via social media platforms, for instance; and
the concurrent difficulties in identifying perpetrators who are sometimes able to mask their online identities.

While this is experienced by both men and women, harassment and threats appear to be more prevalent against women. This is therefore dealt with in more detail in Module 6, when we consider the gendered perspective on the right to freedom of expression.

‘Fake news’, disinformation and propaganda

“Fake news” is used by diverse actors to mean many different things, with just one being the sense of referring to disinformation in the form of news items that are intentionally and verifiably false, and seek to mislead readers. The efforts to regulate “fake news” present a myriad of challenges. Most importantly, it is essential to ensure that any such regulatory effort strikes an appropriate balance with the right to freedom of expression. As has been seen in the past, the crime of publishing false news may be used by governments against the media to quell criticism and dissent, in blatant violation of the right to freedom of expression. It is essential that notwithstanding any other measures that are implemented, states and other role-players ensure that there is appropriate media and information literacy training and critical thinking skills developed, as well as appropriate dialogues and exchanges, to assist affected persons to make informed assessments of whether something is indeed fake or not.

One of the key challenges is of definition. While the terms ‘fake news’ and ‘false news’ are often used interchangeably, the arguably more accurate nomenclature now leans towards the intentional dissemination of ‘disinformation’. In particular, this is targeted at the dissemination of knowingly or recklessly false, inaccurate or misleading information. Authentic journalism may make mistakes, which should be corrected, but in terms of the professional standards of aspiring to verifiable information in the public interest, such inaccuracies would not constitute disinformation. Different narrative perspectives in journalism which may select different facts to emphasize also do not amount to disinformation which intentionally uses falsehoods to contaminate a pluralistic information environment. According to a 2018 UNESCO publication titled ‘Journalism, ‘fake news’ and disinformation’: Handbook for journalism education and training’, the distinction between ‘disinformation’ and ‘misinformation’ is explained (at p 7) as follows:

“[D]isinformation is generally used to refer to deliberate (often orchestrated) attempts to confuse or manipulate people through delivering dishonest information to them. This is often combined with parallel and intersecting communications strategies and a suite of other tactics like hacking or
compromising of persons. Misinformation is generally used to refer to misleading information created or disseminated without manipulative or malicious intent. Both are problems for society, but disinformation is particularly dangerous because it is frequently organised, well resourced, and reinforced by automated technology.”

However, the right to impart information and ideas, protected under the right to freedom of expression, does not only protect statements that are factually correct, it also protects information and ideas that may shock, offend and disturb. Notably, any efforts to regulate the spread of disinformation must ensure that there are appropriate exceptions built in for the sharing of opinions, satirical information, artistic creations and other information in the public interest. According to international standards, the right to hold opinions is absolute and cannot be subject to any exception or restriction.

In March 2017, the Joint Declaration on Freedom of Expression and “Fake News”, Disinformation and Propaganda (Joint Declaration) was issued by the relevant freedom of expression mandate-holders of the United Nations, the Organization for Security and Co-operation in Europe, the Organization of American States, and the ACHPR. The Joint Declaration noted the growing prevalence of disinformation and propaganda, both online and offline, and the various harms to which they may contribute or be a primary cause. The quandary remains that the internet both facilitates the circulation of disinformation and propaganda, and provides a useful tool to enable responses to this.

Importantly, the Joint Declaration stressed that general prohibitions on the dissemination of information based on vague and ambiguous ideas, such as “false news”, are incompatible with international standards for restrictions on freedom of expression. However, it went further to state that this did not justify the dissemination of knowingly or recklessly false statements by official or state actors. (Although the Joint Declaration does not expressly state so, this could arguably be extended to non-state actors as well who similarly spread false statements in a knowing and reckless manner.)

In this regard, the Joint Declaration called on state actors to take care to ensure that they disseminate reliable and trustworthy information, and not to make, sponsor, encourage or further disseminate statements that they know (or reasonably should know) to be false or which demonstrate a reckless disregard for verifiable information. The Joint Declaration identified the following standards on disinformation and propaganda:
“Standards on disinformation and propaganda
(a) General prohibitions on the dissemination of information based on vague and ambiguous ideas, including ‘false news’ or ‘non-objective information’, are incompatible with international standards for restrictions on freedom of expression, as set out in paragraph 1(a), and should be abolished.
(b) Criminal defamation laws are unduly restrictive and should be abolished. Civil law rules on liability for false and defamatory statements are legitimate only if defendants are given a full opportunity and fail to prove the truth of those statements and also benefit from other defences, such as fair comment.
(c) State actors should not make, sponsor, encourage or further disseminate statements which they know or reasonably should know to be false (disinformation) or which demonstrate a reckless disregard for verifiable information (propaganda).
(d) State actors should, in accordance with their domestic and international legal obligations and their public duties, take care to ensure that they disseminate reliable and trustworthy information, including about matters of public interest, such as the economy, public health, security and the environment.”

The Joint Declaration noted further that states have a positive obligation to promote a free, independent and diverse communications environment, including media diversity, which is a key means of addressing disinformation and propaganda. Two of the concrete proposals offered in the Joint Declaration are for states to put in place other measures to promote media diversity, such as providing subsidies or other forms of financial or technical support to produce diverse, quality media content; and for states to take measures to promote media and digital literacy, including by covering these topics in the school curriculum. The Joint Declaration also called on media outlets to, amongst other things, consider including critical coverage of disinformation and propaganda as part of their news services and in line with their watchdog role in society, particularly during elections and regarding debates on matters of public interest.

In the matter of Chavunduka and Another v Minister of Home Affairs and Another, the Zimbabwe Supreme Court dealt with the constitutionality of the criminal offence of publishing false news under Zimbabwean law. In 1999, following the publication of an article in The Standard titled “Senior army officers arrested”, the editor and a senior journalist were charged with contravening section 50(2) (a) of the Law and Order Maintenance Act, on the basis that they had published a false statement that was likely to cause fear, alarm or despondency among the public or a section of the public. The editor and journalist challenged the
constitutionality of this provision as being an unjustifiable limitation of the right to freedom of expression and the right to a fair trial.

Of particular relevance, in finding that the section was indeed unconstitutional, the Supreme Court stated that:

“Because s 50(2)(a) is concerned with likelihood rather than reality and since the passage of time between the dates of publication and trial is irrelevant, it is, to my mind, vague, being susceptible of too wide an interpretation. It places persons in doubt as to what can lawfully be done and what cannot. As a result, it exerts an unacceptable ‘chilling effect’ on freedom of expression, since people will tend to steer clear of the potential zone of application to avoid censure, and liability to serve a maximum period of seven years of imprisonment.

The expression ‘fear, alarm or despondency’ is over-broad. Almost anything that is newsworthy is likely to cause, to some degree at least, in a section of the public or in a single person, one or other of these subjective emotions. A report of a bus accident which mistakenly informs that fifty instead of forty-nine passengers were killed, might be considered to fall foul of s 50(2)(a).

The court went on to explain that the use of the word “false” is wide enough to embrace a statement, rumour or report which is merely incorrect or inaccurate, as well as a blatant lie; and actual knowledge of such condition is not an element of liability; negligence is criminalised. In this regard, it noted that failure by the person accused to show, on a balance of probabilities, that any or reasonable measures to verify the accuracy of the publication were taken, suffices to incur liability even if the statement, rumour or report that was published was simply inaccurate. Accordingly, the court held that the criminalisation of false news, as contained in section 50(2)(a), was unconstitutional and a violation of the right to freedom of expression.

In *Federation of African Journalists and Others v The Gambia*, discussed above, the ECOWAS Court of Justice ordered the Gambia to immediately repeal or amend its laws on, amongst others, false news in line with its obligations under international law. In that case, one of the legal provisions relied on by The Gambia to arrest and detain the journalists in question was section 59 of the Criminal Code, read with section 181A, which related to false news. Section 59 of the Criminal Code provided as follows:
“[A] person who publishes or reproduces any statement, rumour or report which is likely to cause fear and alarm to the public or to disturb the public peace, knowing or having reason to believe that the statement, rumour or report is false, commits a misdemeanour and is liable on conviction to imprisonment for a term of two years.”

The plaintiffs argued that as the possibility of error in journalistic work cannot be avoided, the existence of criminal liability for such errors would impede the right to freedom of expression. In its judgment, the ECOWAS Court of Justice agreed with the plaintiffs and upheld the claim. As stated in the judgment: “A reading of [section 59 of the Criminal Code] espouses expressions of inexactitude which are also so broad as to be capable of diverse subjective interpretations. It indeed amounts to censorship on publication. The jurisprudence of freedom of expression suggests that the erosion of freedom of expression by indirect means as [section 59] seems to have done suggests that a finding of violation is obvious.”

The ECOWAS Court of Justice went further to hold that the practice of imposing criminal sanctions on false news, sedition, criminal libel and defamation has a chilling effect that may unduly restrict the exercise of freedom of expression of journalists, and cast an excessive burden in violation of the right to freedom of expression contained under international law. As such, the ECOWAS Court of Justice directed that the legislation on false news, sedition, criminal libel and defamation of The Gambia must be reviewed and decriminalised to be in conformity with the international provisions on freedom of expression under the African Charter and the ICCPR.

Following this decision, the Gambian Supreme Court also declared the law on false news on the internet to be unconstitutional in the judgment of Gambian Press Union and Others v Attorney-General, again highlighting the important influence of the decisions of regional and sub-regional courts in the jurisprudence of domestic courts.

**Data protection and the ‘right to be forgotten’**

The so-called ‘right to be forgotten’ – which is perhaps better described as ‘the right to erasure’ or ‘the right to be de-listed’ – entails a right to request that commercial search engines or other websites that gather personal information
Anti-Fake News Act in Malaysia

In April 2018, Malaysia passed the Anti-Fake News Act, 2018. The Malaysian law applies to “news, information, data and reports which is or are wholly or partly false,” including features, visuals and audio recordings, and covers digital publications and social media. It also applies to offenders outside of Malaysia, including foreign nationals, if Malaysia or a Malaysian citizen is affected. Offences in terms of the Anti-Fake News Act carries a penalty of up to six years’ imprisonment and a maximum fine of RM500,000. The law also provides for the government to seek an order for published articles to be removed and, if national security concerns were cited, for the order not to be capable of being challenged in court.

Later that same month, a Malaysia court convicted a Danish citizen over inaccurate criticism of the police on social media. Mr Sulaiman had been charged with spreading false news after he posted a video on YouTube accusing the police of taking 50 minutes to respond to distress calls following the shooting of a Palestinian lecturer, when in fact the police had taken 6 minutes to respond. Mr Sulaiman pleaded guilty and opted to spend a month in jail because he reportedly could not afford to pay the fine.

This was received with much concern and criticism, with opponents arguing that it would be used to stifle criticism of state officials. In particular, concerns were raised about the vagueness of the wording, the speed with which it went through the parliamentary processes without extensive public participation, and the provision for the police to exercise arrest powers.

In a positive development in June 2018, following a change of political leadership in Malaysia, the ambassador and permanent representative of Malaysia to the United Nations wrote a letter to David Kaye, UNSR on Freedom of Expression, stating that: “I wish to inform you that the new government of Malaysia has decided to repeal the Anti-Fake News (AFN) Act. The process to do so has already begun, and a specific proposal is expected to be tabled during the upcoming parliamentary session beginning on 16 July.”

for profit, such as Google, should remove links to private information when asked. This arises in terms of data protection laws that provide that personal information held about a person should be erased in circumstances where it is inadequate, irrelevant or no longer relevant, or excessive in relation to purposes for which it was collected, and was expounded on by the Court of Justice of the European Union in the case of Google Spain v Gonzalez.

In that case, the court held (at para 94) that a data subject is permitted to request that information about him or her no longer be made available to the general
public by its inclusion in a list of search results in a search engine – such as Google – where, having regard to all the circumstances, the information appears to be inadequate, irrelevant or no longer relevant, or excessive in relation to purposes of the processing carried out by the operator of the search engine. In such circumstances, the information and links concerned in the list of results must be erased. In sum, the CJEU held (at para 97) that:

“As the data subject may, in the light of his fundamental rights (…) request that the information in question no longer be made available to the general public by its inclusion in such a list of results, it should be held (…) that those rights override, as a rule, not only the economic interest of the operator of the search engine but also the interest of the general public in finding that information upon a search relating to the data subject’s name. However, that would not be the case if it appeared, for particular reasons, such as the role played by the data subject in public life, that the interference with his fundamental rights is justified by the preponderant interest of the general public in having, on account of inclusion in the list of results, access to the information in question”.

The ‘right to be forgotten’ has also been recognised in domestic contexts, although there is as yet no jurisdiction from any African states. According to the Global Principles of Freedom of Expression and Privacy (Global Principles), the ‘right to be forgotten’ – to the extent that it is recognised in a particular jurisdiction – should be limited to the right of individuals under data protection law to request search engines to delist inaccurate or out-of-date search results produced on the basis of a search for their name, and should be limited in scope to the domain name corresponding to the country where the right is recognised and the individual has established substantial damage. It states further that de-listing requests should be subject to ultimate adjudication by a court or independent adjudicatory body with relevant expertise in freedom of expression and data protection law. A court dealing with such issues will need to assess the balance of issues such as an individual’s right to dignity or reputation, and the public’s interest in expression and access to information. In some cases, links to journalistic content of historical and enduring public interest have been removed under a ‘right to be forgotten’.

As noted above, a justifiable restriction or limitation of a right must be in terms of law. However, the effective regulation of content online remains a persistent challenge. It is commonly seen that states seek to rely on outdated laws that are not appropriate or applicable to expression online.
Examples of Criminal Sanctions for Online Speech

As noted in a 2017 report published by CIPESA on the State of Internet Freedom in Africa, there are a number of examples of persons being charged or arrested by state officials on the basis of statements or other conduct online. For example:

- In 2016, Botswana security services arrested an individual for allegedly producing and disseminating a satirical digitally manipulated image of President Ian Khama.

- In Tanzania, six people have been charged under section 16 of the Cybercrime Act, 2015 for insulting or criticising the leadership style of president Magufuli through posts on Facebook and WhatsApp.

- In Uganda, Dr. Stella Nyanzi was taken by law enforcement officials, detained and later charged with two counts of cyber harassment and offensive communication under section 24 (1)(2)(a) and 25 of the Computer Misuse Act 2011 for “repeatedly insulting the person of the President” on her Facebook page, and was remanded in prison for 33 days before being freed on bail in May 2017.

On the other hand, what is also being seen is the passing of new laws that are targeted at expression online, but that are unduly restrictive and, in some instances, create a disparity in consequences between expression online and offline.

As noted in the 2011 UNESCO publication titled ‘Freedom of connection, freedom of expression: The changing legal and regulatory ecology shaping the internet’, when considering the trends in online policy regulation, this may be divided into six broad categories:

- technical initiatives, related to connection and disconnection, such as content filtering;
- digital rights, including those tied directly to freedom of expression and censorship, but also indirectly, through freedom of information, and privacy and data protection;
• industrial policy and regulation, including copyright and intellectual property, industrial strategies, and ICTs for development;
• users, such as measures focused on fraud, child protection, decency, libel and control of hate speech;
• network policy and practices, including standards, such as around identity, and regulation of Internet Service Providers; and
• security, ranging from controlling spam and viruses to protecting national security.

The UNSR Report identifies (at paras 12-16) three key concerns relating to the legality condition. The first is that many such laws, whether old or new, are often overbroad and vague. This grants authorities significant discretion to restrict the right to freedom of expression, with limited guidance on how this ought to be applied. The second concern raised related to legislative processes not allowing adequate time for public engagement, and an effort to fast-track complex pieces of legislation. Furthermore, the third related to laws often not providing for reviews by courts or other independent third parties to evaluate claims of violations.

A common trend being seen is the enactment of cybercrimes laws that also seek to restrict and criminalise various forms of content and publication. These laws have been the subject of some concern, and have given rise to constitutionality challenges in certain countries.

**Jurisdiction and the borderless exercise of freedom of expression online**

The internet enables the borderless enjoyment of the right to freedom of expression. The corollary, however, is that it is possible to violate the rights of another, for instance through harassment or threats, from a different country. This creates significant difficulties for law enforcement officials. Consideration should be given to appropriate cooperation amongst states, as well as appropriate cooperation with the telecommunications companies, both in understanding the technological aspects of the network, as well as to assist in securing redress where it is appropriate in law to do so.

In applying considerations relating to jurisdiction, the 2011 Joint Declaration on Freedom of Expression and the Internet provides as follows:22

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22 Joint Declaration on Freedom of Expression and the Internet (2011) at p 68: https://www.osce.org/fom/99558?download=true
(a) Jurisdiction in legal cases relating to Internet content should be restricted to States to which those cases have a real and substantial connection, normally because the author is established there, the content is uploaded there and/or the content is specifically directed at that State. Private parties should only be able to bring a case in a given jurisdiction where they can establish that they have suffered substantial harm in that jurisdiction (rule against ‘libel tourism’).

(b) Standards of liability, including defences in civil cases, should take into account the overall public interest in protecting both the expression and the forum in which it is made (i.e. the need to preserve the ‘public square’ aspect of the Internet).

For content that was uploaded in substantially the same form and at the same place, limitation periods for bringing legal cases should start to run from the first time the content was uploaded and only one action for damages should be allowed to be brought in respect of that content, where appropriate by allowing for damages suffered in all jurisdictions to be recovered at one time (the ‘single publication’ rule).

A further aspect that may bear some consideration in this regard is whether the website URL ends in a national or international domain. For example, a website address that ends in .zw or .ke would reflect that the website has opted for the internet country code domain for Zimbabwe or Kenya, respectively; whereas a website that ends in .com might connote an international character. However, as more domains become available – such as the recently launched .africa domain – this is not necessarily determinative, and might instead reflect a preference by the website owners.
Module 5 Assessments

& Resources

The assessments below focus in particular on the challenges posed by the internet to the enjoyment of the right to freedom of expression in the digital age. They are intended to encourage debate and discussion, and facilitate a practical understanding of the challenges. For instance, the group exercises invite participants to draft a short judgment regarding online speech, engage in a debate on the criminalisation of hate speech online, and develop a 'Social Media Charter'. The individual analysis focuses on the recent report of the UNSR on Freedom of Expression relating to the regulation of online content. As these issues are complex and often nuanced, enough time should be allowed for group discussions for participants to share different viewpoints.

Test your knowledge: Q&A

1. The Joint Declaration on Freedom of Expression and “Fake News”, Disinformation and Propaganda (Joint Declaration) provides guidance on how to deal with this challenge. What does it provide?
   (a) General prohibitions on the dissemination of information based on vague and ambiguous ideas, such as “false news”, are incompatible with international standards for restrictions on freedom of expression.
   (b) States should implement legislation that criminalises the dissemination of “false news”.
   (c) The dissemination of “false news” should be banned during election periods.
   (d) The dissemination of “false news” is permissible when disseminated by private actors, but not when disseminated by public actors.
   (e) All of the above

2. What did the Zimbabwe Supreme Court hold in Chavunduka and Another v Minister of Home Affairs and Another regarding the criminal offence of publishing false news under Zimbabwean law?
   (a) The criminalisation of false news was held to be a justifiable limitation when it was likely to cause fear, alarm or despondency among the public
   (b) The criminalisation of false news was held to be permissible when dealing with information disseminated online
   (c) The criminalisation of false news was held to be unconstitutional as an unjustifiable limitation of the right to freedom of expression.
(d) The criminalisation of false news was held to be constitutional, but undesirable in the digital age.
(e) None of the above

3. What does the 2016 UN Resolution state in relation to measures that intentionally prevent or disrupt access to information online?
   (a) Such measures are permissible in appropriate circumstances, in the light of national security or public order considerations
   (b) Such measures are only permissible during states of emergency
   (c) Such measures are condemned unequivocally, unless done in terms of existing law
   (d) Such measures are condemned unequivocally, and states are called on to refrain from and cease such measures
   (e) Such measures are permissible to protect the rights of others

4. In the Report of the United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion in 2016, particular concerns were raised about the legality condition when dealing with information online and the internet. Which of the following were amongst those concerns?
   (a) The applicable laws are often overbroad and vague
   (b) The legislative process often does not allow adequate time for public engagement
   (c) The laws often do not provide for reviews by courts or other independent third parties to evaluate claims of violations
   (d) All of the above
   (e) None of the above

5. The UNSR Report deals with surveillance as one of the contemporary restrictions on expression. What does it state in this regard?
   (a) The UNSR Report calls on the United Nations to recognise the importance of national security and public order
   (b) The UNSR Report takes the view that digital surveillance can never be justified under international law
   (c) The UNSR report states that surveillance, both bulk collection of data and targeted attacks on specific individuals and communities, interferes directly with the privacy and security necessary for freedom of opinion and expression
   (d) The UNSR Report provides that surveillance activities are essential to secure national security interests, and that states should be given a wide leeway in this regard
   (e) All of the above
6. Which of the following statement correctly reflects the content of the African Declaration on Internet Rights and Freedoms (African Declaration)?
   (a) Access to the internet should be available and affordable to all persons in Africa without discrimination
   (b) Access to the internet is an important, but not the most pressing, concern in Africa.
   (c) No restrictions on access to the internet are permissible
   (d) Everyone has the right to communication, but this does not include the right to communicate anonymously
   (e) Only individuals who act responsible must be allowed freely express themselves on the internet

7. What did the ECOWAS Court of Justice order in Federation of African Journalists v The Gambia?
   (a) It overturned the decision of the Zimbabwe Supreme Court in Chavunduka and Another v Minister of Home Affairs and Another.
   (b) It ordered The Gambia to immediately repeal or amend its laws on, amongst others, false news in line with its obligations under international law.
   (c) It ordered the Federation of African Journalists to withdraw its application.
   (d) It concluded that the impugned provisions did restrict the right to freedom of expression, but that this was a justifiable limitation in the interests of national security.
   (e) It concluded that it did not have jurisdiction to hear the matter.

8. Consider the judgment in Isparta v Richter. Which of the following statements is correct?
   (a) The court ordered Facebook to remove the content online.
   (b) The court reached the conclusion that the content was not defamatory.
   (c) The court ordered the first defendant, who was responsible for writing the original Facebook post, to pay damages to the plaintiff.
   (d) The court ordered the first and second defendants to pay damages to the plaintiff jointly and severally.
   (e) The court concluded that it did not have jurisdiction to hear the matter.

   (a) The African Commission is of the view that the regulations are not sufficiently stringent to protect national security interests.
(b) The African Commission is concerned that more states are not adopting similar regulations.
(c) The African Commission is concerned that this may negatively impact the ability of users to gain affordable access to the internet.
(d) The African Commission is concerned that this will contravene the principle of net neutrality.
(e) The African Commission is concerned that this will contravene competition laws in the domestic jurisdictions.

10. UNESCO’s publication titled ‘Countering online hate speech’ deals with the issue of jurisdiction in relation to hate speech online. What does it state in this regard?
   (a) That exercising jurisdiction for hate speech online is an impossibility given the cross-border information flows that the internet facilitates
   (b) That local authorities do not have jurisdiction over hate speech online
   (c) That internet intermediaries should be primarily responsible for responding to hate speech online
   (d) That internet intermediaries have been playing an increasing important role regarding hate speech online, both in allowing and constraining expression
   (e) All of the above

(10 marks)

Answers: 1. (a); 2. (c); 3. (d); 4. (d); 5. (c); 6. (a); 7. (b); 8. (d); 9. (c); 10. (d)

Group activities

Exercise 1

Assume the Parliament of Country ABC has approved an amendment to the Criminal Code to include the following provision:

Speech offences

(1) Any person who makes a statement online that is intended to ridicule, bring into contempt or incite hatred towards any public official, is guilty of a criminal offence, punishable by imprisonment for a period not exceeding three years.
(2) Any person who makes a statement online that is false, irrespective of whether the person responsible for the statement knows or should reasonably have known that the statement is false, is guilty
of a criminal offence, punishable by imprisonment for a period not exceeding three years.

(3) Telecommunications providers and internet service providers must cooperate with any law enforcement official in providing information regarding the person or persons responsible for the publication of the harmful speech contemplated in sub-sections (1) and (2). In doing so, law enforcement officials may only make such a request if authorised by law in terms of a warrant issued by a court of law, or if such official can show good cause for not having a warrant in light of the seriousness of the harmful speech.

A local civil society organisation has challenged the permissibility of this provision, arguing that it is an unjustifiable limitation of the right to freedom of expression, and does not comply with regional and international human rights law, in particular the African Charter and the ICCPR. In response, the state accepts that the amendment is a limitation on the right to freedom of expression, but argues that the limitation is justifiable when applying the three-part test.

Working in groups, draft a short judgment in which you assess the abovementioned provision and whether it is indeed a justifiable limitation of the right to freedom of expression.

**Exercise 2**

Consider the following questions:

1. Has your country ever been subject to an intentional network shutdown?
2. Is there any provision under your domestic law that permits such a shutdown?
3. Discuss the wide-ranging impacts that network shutdowns can have. What rights can be affected by it?

**Exercise 3**

Consider the following scenario: Your country is in the midst of national elections, during which there are ongoing protests against an ethnic minority in one region of the country. Message inciting to violence against this minority are spread through one specific social media platform. The President instructs directly the relevant service providers to shutdown access to all major social media platforms in the country, stating that such platforms are being used to
spread misinformation and organise violent protest action against an ethnic minority. Already, few people were killed by angry mob. The President invokes national security as the basis for this instruction.

Divide into four groups. The first group represents the President in support of the shutdown; the second group represents a civil society organisation seeking to challenge the shutdown; and the third group represents the service provider, who may decide who the service provider will support. The fourth group will represent the judging panel.

This exercise should proceed as follows: To begin with, each group should discuss their approach to the scenario. Thereafter, the groups will have seven minutes to present arguments to the judging panel.

Groups 1 to 3 will each have 7-10 minutes to present their arguments, during which the judging panel can ask questions. After hearing arguments from the three groups, the judging panel should deliberate and indicate whether or not the shutdown will proceed.

Note to consider: could the shutdown be valid according to international standards if it was ordered by a judge, limited in time and space, and/or limited to the social network that is used to incite to violence?

**Exercise 4**

Divide into groups and consider the challenges involved in litigating matters pertaining to freedom of expression online. Consider, for instance, the following:

- The speed with which information can be disseminated.
- The cross-border nature of the interactions.
- The challenges that may arise in identifying the person responsible for making the statements.
- The differences in the way in which platforms operate, and the need for technical expertise that may arise.

What do you think are the most significant challenges when litigating such cases, as well as when deciding on such cases? What support does the judiciary need to address these challenges?
Exercise 5

Judicial officers, as well as lawyers and other members of the legal profession, can also be users of social media. Consideration should be had when posting content on social media as to whether such content might implicate the ethical code of the profession or be impermissible in another way.

Working in groups, draft a ‘Social Media Charter’ that sets out principles and guidelines that you propose judicial officers and other members of the profession should consider. It is important to ensure that the document strikes the appropriate balance with the enjoyment of the right to freedom of expression online, and other relevant considerations.

Individual analysis

The UNSR on Freedom of Expression, David Kaye, published his report to the UN HRC in June 2018 addressing the issue of content regulation in the digital age. The report is accessible at <https://freedex.org/a-human-rights-approach-to-platform-content-regulation/>

Read the report and summarise the key findings and recommendations that are made therein. Your summary should be between 3-5 pages in length.
Resources

Required reading

• The following resolutions are relevant:


• For a discussion on ‘fake news’, misinformation and propaganda, see:


• For a discussion on the blocking and filtering of content, and how this impacts the right to freedom of expression, see:


  • Cannataci, et al, ‘Privacy, free expression and transparency: Redefining their new boundaries in the digital age’ (2016):
    <http://unesdoc.unesco.org/images/0024/002466/246610e.pdf>

• For an assessment on the impact of internet shutdowns, see:


  • Odhiambo S.A., ‘Internet shutdowns during elections’ (2017):

• For a discussion on the role of internet intermediaries, see:

    <http://unesdoc.unesco.org/images/0023/002311/231162e.pdf>

• For a discussion on the challenges regarding the exercise of jurisdiction for acts committed online, see:

    <https://www.internetjurisdiction.net/about/annual-reports>

  • Internet & Jurisdiction Policy Network, ‘Cross-border content take-down: Problem framing’ (May 2017):
• For other UNESCO material related to the digital era, see:

    <http://unesdoc.unesco.org/images/0023/002344/234435e.pdf>

  • UNESCO (2015). Keystones to foster inclusive Knowledge Societies: Access to information and knowledge, Freedom of Expression, Privacy, and Ethics on a Global Internet
    <http://unesdoc.unesco.org/images/0023/002325/232563E.pdf>

    <http://unesdoc.unesco.org/images/0024/002480/248054e.pdf>

    <http://unesdoc.unesco.org/images/0024/002465/246527e.pdf>

  • UNESCO (2015). Countering Online Hate Speech.
    <http://unesdoc.unesco.org/images/0023/002332/233231e.pdf>
Module 6
A Gendered Perspective on Freedom of Expression

• To understand the gendered perspective on the right to freedom of expression and the particular challenges faced by women in exercising the right.

• To examine the disparity in access to ICTs experienced by women and girls, and the reasons for this.

• To examine the physical attacks experienced by women journalists, and the impact that this has on their ability to do their work.

• To explore the non-physical violence that women experience online, including threats, harassment and breaches of privacy, and to examine how this limits their enjoyment of freedom of expression.

• To consider the importance of media diversity and gender equality.

The gendered dynamic to freedom of expression: The double attack

The right to gender equality is a component of the right to equality. As one of the Sustainable Development Goals it is widely regarded as an enabler of other goals and indeed other rights. This module deals with the intersection of gender equality and freedom of expression.

It must be noted at the outset that the challenges set out in this module are not only experienced by women. Men, too, are subject to attacks during the course of their journalistic activities both online and offline. In 2017, 86% of journalists killed were men, and 14% women. However, the proportion of women is increasing, as reflected in this graph from the 2018 UNESCO Director General’s Report on the Safety of Journalists and the Danger of Impunity:
The subject of attacks against journalists and the issue of impunity has been dealt with more generally in module 4, and the issue of the particular challenges posed by the internet has been dealt with in module 5.

The reason for the focus on women in this module is the recognition that women experience particular challenges in the exercise and enjoyment of the right to freedom of expression.

**Figure 5: Number of killed women journalists worldwide 2006-2017**

![Graph showing number of killed women journalists worldwide from 2006 to 2017. The highest number is in 2017 with 11 victims.]

Interviews by UNESCO with Justice Lillian Tibatemwa-Ekirikuniza

In an interview with Justice Lillian Tibatemwa-Ekirikubinza from Uganda, following her participation in the Massive Open Online Course on freedom of expression in Africa, Justice Lillian Tibatemwa-Ekirikuniza shared her insights on the insights on the plight being faced by journalists and what can be done to address this:

“Considering your scholarly work in the field of law which has frequently accounted for the role played by societal norms, what is your view on the specific threats faced by women journalists and how they affect freedom of expression?

When we talk about the need to protect journalists, both men and women must be protected. But there is no doubt that women journalists are more vulnerable to certain kinds of violations of rights which perhaps men are not as vulnerable to. It is important to recognize that, when discussing the protection..."
of rights, the groups we talk about are not homogenous. This is the reason why we must talk about violence against women specifically when discussing violence against journalists. This is not to say that violence against men is correct but certainly the challenges and kind of vulnerabilities that women are exposed to, is different from that which men are exposed to. You really have to think very carefully and establish what challenges are faced by women journalists that are not faced by men. In other words actors interested in protecting the human rights of journalists must put on a gender lens and mainstream gender into their work.”

There are myriad reasons for this, including societal pressures and perceived vulnerabilities. In respect of women journalists, in particular, this is often referred to as the ‘double attack’, as they are attacked both for being women and for being journalists. A 2014 report prepared by the International Women’s Media Foundation (IWMF), titled ‘Violence and harassment against women in the news media: A global picture’, revealed the following key findings:

- Nearly two-thirds of respondents (64.8%/597 of 921) said they had experienced acts of “intimidation, threats and abuse” in relation to their work.
- More than one-fifth (21.6%/118 out of 547) of respondents said they had experienced physical violence in relation to their work.
- Of 546 respondents, 14.3% (78 of 546) said they had experienced sexual violence in relation to their work.
- Nearly half (47.9%/327 of 683) of respondents said they had experienced sexual harassment at their jobs.
- More than one-fifth of respondents (21.1%/106 of 502) said they had experienced “digital/online account surveillance”. About the same number reported “email or other digital/online account hacking” (20.3%/104 of 512), and “phone tapping” (20.9%/111 of 532). A smaller number (17.3%/74 of 428) reported “hacking” (of websites, etc.).

Harassment against women journalists often takes the form of personal attacks, which often focus on the journalist’s character or body parts rather than the content of her article or broadcast. Harassment may include threats of sexual violence.23 In a report published in 2018 by Trollbusters and the International

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Women’s Media Foundation, a survey conducted among 597 women journalists and media workers revealed that nearly two out of three respondents stated that they had been threatened or harassed online at least once. Among them, around 40 percent said they avoided reporting certain stories as a consequence of online harassment. Fifty-eight percent of the women journalists surveyed stated that they had already been threatened or harassed in person, while 26% indicated that they had been physically attacked.

The specific plight faced by women has been highlighted in the 2017 UN General Assembly Resolution on the Safety of Journalists and the Issue of Impunity, in which it was stated *inter alia* as follows:

- “Acknowledging the specific risks faced by women journalists in the exercise of their work, and underlining in this context the importance of taking a gender sensitive approach when considering measures to address the safety of journalists, including in the online sphere, in particular to effectively tackle gender-based discrimination, including violence, inequality and gender-based stereotypes, and to enable women to enter and remain in journalism on equal terms with men while ensuring their greatest possible safety, to ensure that the experiences and concerns of women journalists are effectively addressed and gender stereotypes in the media are adequately tackled”;

- “Also condemns unequivocally the specific attacks on women journalists in the exercise of their work, including sexual and gender-based discrimination and violence, intimidation and harassment, online and offline”;

- “Also calls upon States to tackle sexual and gender-based discrimination, including violence and incitement to hatred, against women journalists, online and offline, as part of broader efforts to promote and protect the human rights of women, eliminate gender inequality and tackle gender-based stereotypes in society”.

For a number of women around the world, including across Africa, the consequence of the challenges discussed in this module are either censorship or reprisals for exercising their right to freedom of expression.
Access to information and ICTs

Atlanta Declaration for the Advancement of Women’s Rights of Access to Information

Published in February 2018, the Atlanta Declaration contains the following conclusions:

• The right of women to access information is essential to their economic empowerment, participation in public life, and the promotion and protection of their human rights. Yet, women from all walks of life and regions of the world continue to be denied access to critical public information they need to transform their own lives.

• Women need a wide scope of transformative information that can further women’s equality.

• Women’s right to a full scope of public information should be made explicit in existing human rights instruments, such as the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW), and in the strategic planning and work of intergovernmental agencies and platforms.

• The Sustainable Development Goals provide an opportunity to demonstrate the value of access to information for women, and correspondingly, without information reaching women, the goals will not be achieved.

• The Open Government Partnership (OGP), a voluntary compact among 75 countries, offers an opening to advance women’s engagement and the right of access to information. The OGP should strive for increased women’s participation in the co-creation, implementation, and validation of national commitments. National Action Plans should include commitments that are gender-transformative.

• Although CEDAW\(^{24}\) calls for all public policy to be reviewed through a gendered lens, the existing access to information laws have not been developed with gender-sensitivity nor reviewed to ensure that the statutory provisions and its implementation do not adversely impact women. In some cases, rather than amend freedom of information laws, implementation solutions to address barriers would be more effective in supporting women’s right of access to information.

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\(^{24}\) The Convention on the Elimination of All Forms of Discrimination Against Women
• Public bodies must develop and disseminate information that is relevant to women and to ensure that official data is disaggregated by sex.
• Structural and cultural obstacles - such as women’s double-burden of paid and non-paid work and family care, fear, and violence against women - undermine women’s ability to exercise fully the right of access to information.

• Women’s ability to exercise their right of access to information is a critical but insufficient step to transforming their lives. An enabling environment that supports women’s use of that information leading to action also is necessary.

• The Internet and communication technologies have become indispensable tools for realizing human rights, combating inequality, and accelerating development and human progress, but access and connectivity for women remain limited. Women can be excluded from the potential benefits of digital and online spaces by lack of digital literacy and different forms of systematic discrimination and gender-based violence. Focus should be placed on making the internet more amenable and safe for women, increasing women’s connectivity, and including the telecoms and internet service providers in efforts to reach women. The internet should be considered a complement to other efforts to ensure women’s meaningful right of access to information.

• Schools offer an opportunity to increase awareness of women’s right to information and to build capacity to exercise their right. Urgent attention is needed to develop and adopt age appropriate curriculum with an emphasis on enhancing girl’s and women’s confidence, leadership, and engagement of the right to information.

• Resources will be critical to support efforts to advance women’s right of access to information, including training at the national level for government/public servants and for civil society; research; and pilot projects.

The issue of access to information and ICTs (information and communications technology), particularly the internet, does not only directly implicate the right to freedom of expression, but also the right to equality. As stated in principle 13 of the African Declaration on Internet Rights:
“To help ensure the elimination of all forms of discrimination on the basis of gender, women and men should have equal access to learn about, define, access, use and shape the Internet. Efforts to increase access should therefore recognise and redress existing gender inequalities, including women’s under-representation in decision-making roles, especially in Internet governance.”

The reality across Africa is that factors such as employment, education, poverty, literacy and geographical location result in African women having lower levels of access than men do. The preamble to the 2016 UN Resolution expressly recognised that many forms of digital divides remain between men and women, boys and girls. The 2016 UN Resolution stressed the importance of empowering all women and girls by enhancing their access to information and communications technology, promoting digital literacy and the participation of women and girls in education and training on information and communications technology, and encouraging women and girls to embark on careers in the sciences and information and communications technology. It accordingly called on states (at para 6) to “bridge the gender digital divide and enhance the use of enabling technology, in particular information and communications technology, to promote the empowerment of all women and girls”. It further affirmed (at para 7) the importance of applying a comprehensive human rights-based approach in providing and in expanding access to internet, and requested all states to make efforts to bridge the many forms of digital divides.

**African Declaration on Internet Rights and Freedoms**

In addition to what is set out above regarding the digital divide, the African Declaration adopted by civil society groups in 2014 goes further to state as follows:

“Processes and mechanisms that enable the full, active and equal participation of women and girls in decision making about how the Internet is shaped and governed should be developed and strengthened.

“Conscious that the online environment reflects the inequality that women and girls face in wider society, the core principles underpinning the Internet – decentralisation, creativity, community and empowerment of users – should be used to achieve gender equality online. Wide-ranging efforts, including comprehensive legislation on rights to equality before the law and to non-discrimination, education, social dialogue and awareness-raising, should be the primary means to address the underlying problems of gender inequality and discrimination.”
Women and girls should be empowered to act against gender inequality replicated on the Internet, including by using tools enabling collective monitoring of various forms of inequality, individualised tools that allow them to track and limit the availability of personal information about them online (including public sources of data), and improved usability for anonymity and pseudonymity-protecting tools.

As noted in UNESCO’s 2017/2018 report World Trends in Freedom of Expression and Media Development (at p 63) in relation to access to information:

“Although there has been increased recognition of the importance of freedom of information, little emphasis has been placed on ensuring women have equal access to it. Social barriers such as illiteracy and lack of digital empowerment have created stark inequalities in navigating the tools used for access to information, often exacerbating lack of awareness of issues that directly relate to women and gender, such as sexual health. There have also been examples of other more extreme measures, such as local community authorities banning or restricting mobile phone use for girls and unmarried women in their communities.”

Media diversity and gender equality

Aside from addressing the digital divide, it is essential that there also be a commensurate focus on the creation and promotion of online content that is relevant and of interest to women, reflecting their needs and promoting women’s rights. As noted in the 2017/2018 UNESCO World Trends Report (at p 62), “[t]he freedom to participate in media, the rights of expression, and access to and production of media content are all issues that can be fully understood only by considering their gender equality dimensions.”

However, women do not enjoy full equality with men, nor do they have their work valued to the same extent as men, making it difficult for women to progress. A related challenge has been the absence of women’s voices as an issue in media freedom. In 2012, UNESCO published a report titled ‘Gender-sensitive indicators for media: Framework of indicators to gauge gender sensitivity in media operations and content’. The indicators are categorised in such a way so as to address issues related to internal institutional policy requirements necessary for ensuring gender-sensitivity in media; capacity building for media professionals;
the role of professional associations/union and academic institutions. Civil society groups, therefore, are the secondary target groups of this resource. It is divided into two interrelated rather than discrete categories, each addressing the main axes of gender and media: category A considers actions to foster gender equality within media organizations (including safe transport and/or dormitory facilities after late night duty for women, separate toilets for women, safety equipment for women covering war zones); and category B considers gender portrayal in media content. The GSI on gender sensitivity provides for a precise mapping of the situation for women’s work and representation in media and propose recommendations.

For instance, under the strategic objective to achieve a safe working environment, the listed indicators are (i) the existence of facilities taking into account the different needs of women and men; (ii) the existence and implementation of comprehensive prevention, complaints, support and redress system with regards to sexual harassment and bullying in the workplace; and (iii) the alignment of media policies to relevant articles of the Convention on the Elimination of All Forms of Discrimination Against Women concerning safe working environment for women and men and actions taken to address gaps.

Gender and Representation

As noted in the UNESCO World Trends Report:

“Many feminist media scholars have argued that what we see in front of the camera is determined to some extent by who is behind the camera and there is some reason to believe that more women in the newsroom would produce news that is more diverse. Several studies, including the GMMP (discussed above), show that women journalists are more likely to source women in their stories than men, leading to more balanced reporting which is better able to reflect the views of more and diverse communities. However, given the relative under-representation of women journalists identified in the preceding section, it is not surprising that most studies which focus on news content report a corresponding underrepresentation of women featured or quoted in stories. The 2015 GMMP was able to make comparisons across the 20 years in which it has been operating. Despite women’s considerable advancement over the past two decades in the public and private sectors, female appearances in television, radio and print rose by only seven percentage points between 1995 (17 percent) and 2015 (24 percent). Where women most often appear in media, it is when they speak from personal experience (representing 38 percent), while only 20 percent of spokespersons and 19 percent of experts featured in stories are women.
The underrepresentation of women in media content extends across regions. Women featured in stories as 32 percent of experts interviewed in North America, followed by the Caribbean (29 percent) and Latin America (27 percent). In the southern African region, Gender Links’ latest Gender and Media Progress Study covered 14 countries and found that women’s views and voices accounted for a mere 20 percent of news sources across Southern Africa media.

Simply increasing the number of women in decision-making roles does not automatically change the small proportion of women seen, heard and read about in the news. Even if more women appear in media, there may be limited impact on the entrenched biases and stereotypes present in media content. This can promote narrow gender roles that limit the choices and options available to everyone. In other words, simply addressing the quantity aspect may not improve the quality. This is why many actors continue to encourage all media workers to become more gender-sensitive through training and internal policies that monitor coverage and promote greater awareness of gender issues.

On a more positive note, the picture does appear to be changing. According to the UNESCO World Trends Report (at p 98), various initiatives have been developed to bring about improvements, recognition and representation, including in-house positive action programmes such as women’s leadership courses, to national projects such as directories of women experts, as well as regional initiatives such as the EU-funded project Advancing Gender Equality in Media Industries (AGEMI). Furthermore, the European Institute for Gender Equality and the Council of Europe’s Gender Equality Commission have brought together collections of methods, tools and good practices relating to women and the media. Examples of good practice include monitoring equality policies and plans, adoption of quotas, use of sex-disaggregated statistics, awareness-raising, training for women, training for women’s leadership, self-regulation, shadowing, buddies, mentoring, awards for gender-aware journalism and advertising, internal surveys (media houses) and commitments to monitor media content for gender-bias and do something different as a result.

**Physical attacks on female journalists**

Women journalists, whether they are working in the field or in a newsroom, face risks of physical assault, sexual harassment, sexual assault, rape and even murder. The two distinct but interrelated circumstances should be understood: on the one hand, women’s access to high risk reporting jobs; and on the other,
gendered attacks against female journalists. In this regard, they are vulnerable to attacks not only from those attempting to silence their coverage, but also from sources, colleagues and others. However, according to the World Trends Report (at p 153), one of the most significant challenges in understanding attacks against women journalists is that many incidences are not reported – particularly by young women and those in the early stages of their careers – an indication of the persistence of professional, social or cultural stigmas, and fears that reporting such incidents would affect them professionally.

Linked to this, the UN Plan of Action highlights the susceptibility of female journalists to sexual violence as reprisal for their work, as part of mob-related violence when covering public events or when in detention or captivity, and notes that these crimes often go unreported due to ‘powerful cultural and professional stigmas’.

According to the UNESCO World Trends Report, in 2006 women journalists represented 5% of the journalists killed (comprising 4 out of 84 killings). By 2016, this had increased to women journalists representing 10% of the journalists killed (comprising 10 out of 102 killings). Women journalists represented 14% of the journalists killed in 2017 (comprising 11 out of 79). The report notes further (at p 154) that “[t]he percentage of journalists killed who are women is significantly lower than their overall representation in the media workforce. This large gender gap is likely partly the result of the persistent underrepresentation of women reporting from warzones or insurgencies or on topics such as politics and crime. Recent research has suggested that women journalists working in conflict zones may not in reality face heightened risks of death due to their gender, but that prevailing stereotypes work to restrict the number of women journalists sent overseas as foreign correspondents in high-risk contexts.”

As noted in item 12 of the International Declaration on the Protection of Journalists, in additional to the safety hazards affecting all journalist, women journalists are confronted with gender-specific safety concerns, which require dedicated attention and appropriate measures. This was also noted in the 2016 UN Resolution, which acknowledged in its preamble, the specific risks faced by women journalists in the course of their work, and the importance of taking a gender-sensitive approach when considering measures to address the safety of journalists. The 2016 UN Resolution (at para 2) went further to condemn the specific attacks on women journalists, including sexual and gender-based discrimination and violence, intimidation and harassment, online and offline.
Efforts to address these challenges by civil society and inter-governmental groups have included heightening the visibility of attacks against women, capacity building and preventative measures, and gender-specific safety training that confronts specific risks facing women. However, what is urgently needed is serious and committed action from states, prosecutors and the judiciary to ensure accountability for such crimes. In this regard, the UN Plan of Action calls on states to, amongst other things:

- Adopt strategies to combat impunity, by developing and implementing strategies to combat pervasive impunity for crimes against journalists based on good practices and ensuring a consistent gender-sensitive approach; and

- Condemn unequivocally the specific attacks on women journalists in the exercise of their work, including sexual and gender-based discrimination and violence, intimidation and harassment, online and offline.

### Attacks against women online

Female journalists, activists and the broader public have come to rely on social media and digital tools as an important means of communicating, sharing information and views, and obtaining information. However, the rise in the use of these technologies has also seen a rise in online abuse. Although non-physical harm, it is harmful nevertheless, and can be caused, including emotional or psychological harm, harm to reputation, physical harm, sexual harm, invasion of privacy, loss of identity, limitation of mobility, censorship, and loss of property. This is significantly impacted by the advent of the internet, as it is possible for perpetrators to make such statements anonymously with relative ease. The Association for Progressive Communications has engaged in various work on these issues through its Online Violence Against Women programme. The association makes available various important resources, research reports and other tools that can assist persons who want to better understand the challenges and possible solutions related to online violence.

Digital threats and abuse tend to manifest in a particular way with women, with online sexual harassment, sexist comments, threats of rape and violence towards female journalists and their families and cyberstalking being prevalent. The safety of women journalists was the main focus of the UN Secretary-General’s 2017 report on “The safety of journalist and the issue of impunity”. Here are some examples of the threats experienced online:
The Tactical Technology Collective suggests the following lexicon when discussing these issues:

<table>
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<tr>
<th><strong>Key Concepts</strong></th>
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<tr>
<td><strong>Online harassment</strong></td>
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<td><strong>Cyber harassment</strong></td>
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<td><strong>Online gendered harassment</strong></td>
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<td><strong>Online abuse</strong></td>
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Tech-mediated violence against women/ tech-related violence against Women (VAW)/ online violence against women
An umbrella term referring to all types and strategies of violence targeting women online through the use of digital technologies, which includes regulating their use of digital devices, limiting their ownership of devices, surveilling their online activity, as well as online harassment and abuse.

Online Gender Based Violence
Violence incited on women, trans*, queer, non-binary and gender non-conforming individuals as a direct consequence of their gender identity through the use of digital technologies.

Cyber violence against women and girls
A term specifically established and used by the UN Broadband Commission and UN Women to refer to online harassment targeting women and girls.

As noted in the UNESCO World Trends Report, women journalists who routinely publish online – often on sensitive political or cultural issues – are rendered particularly vulnerable to online harassment and abuse. The gendered trends in online abuse have been highlighted in the UNESCO World Trends Report (at pp 156-157):

“Harassment of women online is distinctly gendered, with abusive comments often referencing a woman journalist’s appearance, ethnicity, or sexuality or using uniquely gendered hate speech. In a survey of 100 journalists from the African region, 75 percent of respondents reported that they had experienced some form of online harassment, with a significant proportion experiencing ‘double attacks’, that is being targeted both for their published material and for being a woman or for their ethnic background.

An analysis of more than two million tweets performed by the think tank Demos found that women journalists experienced approximately three times as many abusive comments as their male counterparts on Twitter, a finding that was reversed for the other categories studied (politicians, celebrities and musicians).

The Guardian surveyed the 70 million comments recorded on its website between 1999 and 2016 (only 22,000 of which were recorded before 2006). Of these comments, approximately 1.4 million (approximately two percent) were blocked for abusive or disruptive behaviour. Notably, of the 10 staff journalists who received the highest levels of abuse and ‘dismissive trolling’, eight were
women, and two were black men, with those articles written by women receiving the highest percentage of abusive comments. As the Guardian notes, abuse often extends beyond the website where their work was originally published.

Internet ‘trolls’ have become a major occupational hazard on social networking sites and it is often difficult to filter or remove abusive content from such platforms leaving journalists vulnerable to a literal ‘avalanche of abuse’ across multiple platforms from anonymous sources. In both the quantity and intensity of online abuse, women journalists have been disproportionately targeted.

Women tend to receive more threats or comments of a sexual nature, both from readers and sometimes from their peers in the media industry. Threats of rape or violence towards journalists or their families appear to be more prevalent toward women media professionals. The INSI and IWMF survey cited above found that more than 25 percent of ‘verbal, written and/or physical intimidation including threats to family and friends’ took place online.”

The impact of this can lead to women withdrawing entirely from social media to protect themselves psychologically. These threats also implicate the right to privacy. A particular form of harassment, typically towards women, is that of ‘revenge porn’ online. This relates to a gross violation of a person’s privacy where private and sexually explicit video and photographic images are published, without permission and consent, onto various websites for the purposes of extortion, blackmail and/or humiliation.

Such attacks and abuse can have a strikingly chilling effect on the enjoyment of the right to freedom of expression, and can disrupt online participation of various communities. This can lead to self-censorship or a complete abandon of the online space, and can severely curtail the enjoyment of the right to freedom of expression. However, according to PEN America, “[d]espite the gravity of their predicaments, cyber harassment victims are often told that nothing can or should be done about online abuse. . . . If victims seek legal help, they are accused of endangering the internet as a forum of public discourse. . . . These views are wrongheaded and counterproductive.”

Principle 17 of the Feminist Principles of the Internet, a civil society initiative published by the Association for Progressive Communications, urges the following:  

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25  <https://onlineharassmentfieldmanual.pen.org/legal-considerations/>
“Online violence
We call on all internet stakeholders, including internet users, policy makers and the private sector, to address the issue of online harassment and technology-related violence. The attacks, threats, intimidation and policing experienced by women and queers are real, harmful and alarming, and are part of the broader issue of gender-based violence. It is our collective responsibility to address and end this.”

While some countries have implemented new laws to address these challenges, others have relied on existing laws and applied them to the new platforms. For example, in Estonia, a specialized court has been established to deal with harassment online, meaning that judges and law enforcement agencies have the necessary expertise. On the other hand, in South Africa, for example, the Protection from Harassment Act has been used to address harassment both online and offline. In one particular example, it has been relied on to obtain a protection order for a victim of revenge pornography.27

Glossary of terms: What types of attacks do women face online?

The new types of attacks seen online have brought with it a new lexicon of terminology. The Tactical Technology Collective has put together a list of terms and how they are commonly understood.

<table>
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<tr>
<th>Tactics</th>
<th>Meaning</th>
<th>How does this tactic target politically-active women?</th>
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<tr>
<td>Account hijacking</td>
<td>The process of an account (whether email, social media, computer account or cloud account) being stolen or hijacked by an individual or group</td>
<td>Within the context of our research, several women shared with us that their devices were hacked, and their adversaries used their personal information to take control over their accounts. Several interviewees explained this was done to access their sensitive information, spread false news or psychologically harass the user.</td>
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27 <http://www.saflii.org/za/cases/ZAGPJHC/2017/297.html>
<p>| <strong>Cyber bullying</strong> | The use of electronic communication to bully a person, typically by sending messages of an intimidating or threatening nature | In order to intimidate and strong-arm women into revealing information or committing certain acts, adversaries cyber bullying women through digital devices in the form of ongoing and consistent negative messaging. Several women who participated in our research expressed that they received ongoing threatening messages that called on them to drop their investigations, human rights advocacy or political campaigns. |
| <strong>Cyber stalking</strong> | The use of digital technologies to track an individual and use their personal information to harass, intimidate and/or threaten the individual | Cyber stalking is usually carried out to inflict a ‘chilling effect’ - the act of discouraging individuals from practicing their rights - on individuals who use digital devices. Several women who participated in this research revealed that they received messages from anonymous social media accounts that said, “We know where your family lives” - all of which were gathered by adversaries through consistent cyber stalking. |
| <strong>Catfishing</strong> | The use of false online identities or fake profiles to tempt someone into a relationship | Several women who participated in our research revealed that they interacted with users who revealed false identities to trap them into sharing information about their sensitive research. |
| <strong>Dangerous speech</strong> | Speech that have a capacity to catalyse mass violence | Several women who participated in our research live contexts where there are tensions between different religious sects. They expressed that pro-government actors have used dangerous speech in the form of misinformation campaigns in order to mobilise hatred and potentially generate violence towards certain groups. |
| <strong>Online defamation</strong> | A process used to facilitate online attacks to negatively affect an individual or community's reputation through slander and/or libel | The majority of women who participated in our research expressed that they experienced online defamation designed to undermine their legitimacy and credibility in an attempt to discredit their work. |
| <strong>Distributed Denial of Service Attacks (DDOS)</strong> | A technical attack where multiple requests are sent to a website server in an attempt to overwhelm the server causing the site to go offline | Several websites of politically-active women or groups associated with them have been targets of DDOS attacks, which significantly impacted their operating capacity. Fighting back against DDOS attacks require resources, financially-active women often lack. |</p>
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<tr>
<th><strong>Doxing (Dropping Dox or Docs)</strong></th>
<th>A tactic used to intimidate or increase the physical risk of individuals by threatening to release their private information, particularly their home or work addresses or ID documents</th>
<th>Revealing sensitive personal information is an extremely dangerous act committed by adversaries, which put women at physical risk. For example, there have been cases where the hackers released information about the work/home addresses of pro-choice activists in order to induce a chilling effect on their work.</th>
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<td><strong>Reporting fake profiles</strong></td>
<td>A tactic used to prompt the removal of a profile or page to silence individuals or communities on social media platforms, particularly on Facebook, by reporting an individual profile as fake when in fact it isn't</td>
<td>Several politically-active women had their profiles reported as fake by mobs in an attempt to prevent them from carrying out their work using digital platforms and to stifle their online presence.</td>
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<td><strong>Flaming</strong></td>
<td>Sending an individual or group hostile messages including threats and insults</td>
<td>Several online forums, hashtags and campaigns by politically-active women have been targeted with gendered slurs and misinformation in an attempt to distract attention from advocacy campaigns or key messages.</td>
</tr>
<tr>
<td><strong>Gendered surveillance</strong></td>
<td>Surveillance targeting individuals as a direct consequence of their gender identity and/or sexual orientation</td>
<td>This type of surveillance targets women through their gender identity and sexual orientation. For example, there are several cases where politically-active women who are whistleblowers or journalists have had their homes sent to their accounts to enable blackmailing, extortion or to cause a chilling effect.</td>
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<tr>
<td><strong>Google bombing</strong></td>
<td>As a direct result of Search Engine Optimization (SEO), Google bombing works by causing a designed to be defamatory to a subject to rank high in a google search. The site could have irrelevant or negative links about a person or community that it seeks to target</td>
<td>Through google bombing, the search of a person yields irrelevant or negative content on websites as the top result, as harassers seek to highly rank negative content related to a person in search engine. In the past, adversaries used google bombing to discredit the efforts of women who work on contentious issues, such as religious violence, minority rights, or access to sexual and reproductive health rights. Google bombing provides space for misinformation and slander in online searches, and therefore effectively stifles debate and spreads false information.</td>
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<tr>
<td>Harmful speech</td>
<td>Different types of speech that often overlap and intersect, and cause different harms, including, but not limited to, demeaning or attacking a person, people or a community as a result of their race, gender, religion, sexual orientation, or disability. Several women who participated in our research expressed the type of harmful speech that they experienced online have caused them to inflict harm on themselves or their communities.</td>
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<td>Hate speech</td>
<td>Any advocacy of national, racial or religious hatred that incites discrimination, hostility or violence. Hate speech is speech that attacks a person or group on basis of attributes such as race, religion, disability, or gender. It is regulated by international law as well as domestic legislation in some countries.</td>
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<td>Honey trap</td>
<td>The practice of using the romantic and/or sexual relationships to amass information about the individual in order to use it for political or extortion purposes. Honey trapping is an investigative practice that uses romantic and/or sexual relationships for political or monetary purposes to the detriment of one party involved in this romantic or sexual affair. Later on, this information is used to leverage politically-active women temporarily or permanently leaving advocacy, political campaigns or investigations.</td>
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<td>Identity theft/impersonation</td>
<td>The theft of an individual or group's identity or the act of impersonating them online. Identity theft is the deliberate use of someone else's identity, usually as a technique to gain financial advantage or credit and other profits in other person's name, which comes at the expense of the other person.</td>
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<tr>
<td>Non-consensual image sharing/non-consensual distribution of images/revenge porn</td>
<td>The publishing of intimate photos or videos of an individual without their consent. This frequently involves revealing sexually explicit images or videos of a person posted on the internet and is typically carried out by a former sexual partner, without consent of the subject and in order to inflict emotional, physical or reputational harm. Non-consensual image sharing includes all forms of politically-active women being shared without their consent. Although the media places a lot of emphasis on the publishing of nude imagery of politically-active women, around the world non-consensual sharing of images is not limited to sharing pornographic images. It is also exercised through a number of methods, which includes, but is not limited to, releasing photos from demonstrations, conferences and other political events.</td>
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<tr>
<td>Sextortion</td>
<td>The use of intimate images or information as a coercion for sexual exploitation. This tactic is a form of sexual abuse where women are coerced into engaging in sexual acts without consent through ongoing blackmail.</td>
<td></td>
</tr>
</tbody>
</table>
How can the internet be made a safe space?

An important aspect to note that is that, in efforts intended at dealing with the challenges faced by women, including online, judicial officers and law-makers must ensure that gender is given due consideration why also exercising caution to not unjustifiably limit the right to freedom of expression when dealing with this issue. As noted, for example, the African Declaration on Internet Rights:

“[A]ll restrictions aimed at prohibiting gender-based hatred that constitutes an incitement to violence, discrimination or hostility (‘incitement’) should fully comply with the following conditions:

- Grounds for prohibiting advocacy that constitutes incitement should include gender;
- The intent to incite others to commit acts of discrimination, hostility or violence should be considered a crucial and distinguishing element of incitement;
- Legislation prohibiting incitement should include specific and clear reference to incitement to discrimination, hostility or violence with references to Article 20(2) of the ICCPR and should avoid broader or less specific language and should conform to the three-part test of legality, proportionality and necessity;
• Criminal law penalties should be limited to the most severe forms of incitement and used only as a last resort in strictly justifiable situations, when no other means appears capable of achieving the desired protection.”

For now, however (and as discussed above), there is often impunity for the attacks made online, and many of these attacks remain unresolved. This has the impact of emboldening perpetrators and would-be perpetrators, and also has a strong chilling effect on the right to freedom of expression. There is often seen to be a lack of will, resources and proper training on the investigation and prosecution of online crimes, which has resulted in such crimes going unpunished.

Different role-players have different functions and duties that they can play in ensuring that the internet is a safer space for women. As noted in the OSCE’s publication on ‘New challenges to freedom of expression: Countering online abuse of female journalists’, media organisations should, for instance:

• Adopt industry-wide guidelines on identifying and monitoring online abuse.
• Ensure that journalists experiencing online abuse, both staff and freelancers, have access to a comprehensive system of support including psychosocial and legal assistance.
• Create a company culture of gender equality and non-tolerance to threats and harassment against staff.
• Put in place clear and transparent procedures related to content moderation, with the view of protecting the right to freedom of expression, and train relevant staff accordingly, while ensuring that male and female staff be equally involved.
• Work with other media organizations and associations to create support systems, including training and mentorship programmes, for female journalists and media actors.

Social media platforms and other intermediaries are also crucial in this regard. This can include by taking active steps against their platforms being used to perpetrate violence against women, and being responsive in circumstances where such violence has occurred on their platforms, for example through prompt responses to take-down notices. As noted by the OSCE, social media companies and platforms should take the following steps:

• Inform properly about terms of services, guidelines and best practices in ensuring a safe space for all users.
• Ensure that terms of service, community guidelines and information about their enforcement are proportionate and adequate, clear, understandable and easily available to all users.
• Provide information to users about best practices for online safety and about technical solutions on how to best report abusive content.
• Engage in capacity building with civil society organizations on issues like counter-speech as a response to abusive content.
• Collect data and statistics on online abuse to help facilitate more comprehensive research on online abuse of female journalists and media actors.

**KS v AM: Protection Order**

In *KS v AM* [2017] ZAGPJHC 297, the High Court granted a protection order in favour of KS, interdicting AM from, among other things, directly or indirectly contacting KS “whether in person, telephonically (including SMS), or via social media (including Facebook, Whatsapp and LinkedIn)” and from “[p]osting explicit material (including comments, videos or photographs) of KS … on any platform, including any social media forum, or sending such material to any other third party”. The court further directed AM to hand over and place in the temporary custody of the sheriff of the court “all digital devices under his control in order for a forensic expert appointed by the Applicant’s attorneys to identify and permanently remove from any such devices any photograph, video, audio and or records relating to the Applicant.”

The important role of judicial officers in this regard cannot be denied. Well-informed judges who are comfortable with the terminology and application of the technology and online platforms will have a significant role to play in ensuring effective and timely relief for victims, ensuring that the role-players fulfil their necessary duties, and serving to implement measures aimed at guarding against continuing or repeated violations.
Concluding Remarks

“As multi stakeholder discussions on the development of approaches and policies to counter online abuse against female journalists proceed, the fundamental principles of international human rights law, particularly on freedom of expression, should not be forgotten. This body of relevant international human rights law includes international treaty law, specifically Article 19 of the ICCPR. But it also encompasses the “soft law” or non binding instruments developed by UN human rights bodies – notably the authoritative interpretation of the Human Rights Committee, the resolutions of the Human Rights Council and the recommendations of the Special Rapporteur on freedom of opinion and expression – that purport to interpret treaty law or advance the understanding of freedom of expression with respect to particular issues …

“First, state authorities and other relevant actors – media organisations, social media companies and civil society – need to publicly recognise the additional risks faced by female journalists in carrying out their work and adopt a gender sensitive approach in the development to approaches to promote online safety of journalists. Second, notwithstanding the important role of social media companies in this area, there still needs to be an overriding focus on the role of states, who owe a series of positive legal obligations to ensure the effective protection of female journalists from online threats by other individuals. Third and relatedly, the typology of state duties applicable in relation to physical attacks on journalists may be extended to the sphere of online attacks against female journalists. This typology encompasses the duty to investigate, prosecute and punish such gendered online attacks, the duty to protect female journalists at risk from such attacks, and the duty to prevent attacks from taking place at all. States are obliged to conduct independent, impartial, speedy and effective investigations into such online attacks, to prosecute those responsible and ensure that the female journalists subjected to such attacks have access to appropriate remedies.

“In this regard, states need to ensure that there is an appropriate criminal justice framework, including legal provisions and the law enforcement machinery backed up by sufficient resources to address such attacks. Police investigators should be given adequate training and prosecutors should be given guidance on the application of existing criminal legislation to tackle gendered online abuse. Given the impossibility of prosecuting every single type of abusive statement and in recognition of the range in severity of abusive statements, such guidance should emphasise that threats to life or physical integrity, including rape threats, should be prioritised for prosecution.
“Beyond these duties, states should take preventive operational measures to protect those female journalists who may be at risk from such attacks. This means that states should ensure a comprehensive prevention strategy or public policy framework for prevention of online attacks against female journalists. In doing so, they should foster a climate that prevents such online attacks from taking place in the first place. This could be done through a range of measures, including appropriate education and training of state officials, especially those involved in law enforcement duties, clear public condemnations of such gendered attacks by public figures and innovative initiatives to actively promote women’s freedom of expression online. But the particular nature of gendered online attacks requires states to also address the structural gender discrimination and wider societal misogyny that underpins and fuels them, a daunting but necessary task.

“Fourth and finally, international human rights law also directs us to the Guiding Principles on Business and Human Rights, a set of non binding principles concerning the responsibilities of corporate actors, including intermediaries and social media companies, to respect human rights. These principles call on corporations to undertake human rights “due diligence”, which means that they should “[assess] actual and potential human rights impacts, [integrate and act] upon the findings, [track] responses, and [communicate] how impacts are addressed.”

Source: OSCE, ‘New challenges to freedom of expression: Countering online abuse of female journalists’, 2016
Assessment
Module 6

The assessments are intended to encourage the participants to contribute to finding solutions to the challenges faced by women seeking to exercise their right to freedom of expression. Through the group activities, the participants are invited to discuss and debate various pertinent questions, such as what role the judiciary can play in making the internet a safe space and addressing technology-related violence against women, and the resources that would be needed to realise this. In the individual assessment, participants are encouraged to consider the Feminist Principles on the Internet, published by the Association for Progressive Communications, and assess their domestic contexts in light of the principles suggested therein.

Test your knowledge: Q&A

1. Which of the following statements is contained in the Atlanta Declaration?
   a. Women need a wide scope of transformative information that can further women’s equality.
   b. Public bodies must develop and disseminate information that is relevant to women and to ensure that official data is disaggregated by sex.
   c. Both of the above.
   d. None of the above.

2. True or false? The 2016 UN Resolution called on states to bridge the gender digital divide and enhance the use of enabling technology, in particular information and communications technology, to promote the empowerment of all women and girls.
   a. True.
   b. False.

3. How many women journalists were killed in 2017?
   a. 5
   b. 11
   c. 16
   d. None

4. The use of digital technologies to track an individual and use their per-
sonal information to harass, intimidate and/or threaten that individual is a tactic frequently used against women online. What is the term for this?
   a. Cyber bullying
   b. Cyber stalking
   c. Catfishing
   d. Doxing

5. The threat of releasing private information is another threat frequently used against women online. What is the term for this?
   a. Cyber bullying
   b. Cyber stalking
   c. Catfishing
   d. Doxing

6. How does gendered surveillance impact women?
   a. It targets women through their gender identity and sexual orientation.
   b. It disallows women’s right of access to ICTs.
   c. It typically involves the sending of hostile messages.
   d. It does not affect women.

7. According to the UNESCO World Trends Report, what percentage of journalists surveyed from the African region reported that they had experienced some form of harassment?
   a. 25%
   b. 50%
   c. 75%
   d. None

8. What does the term ‘double attack’ refer to?
   a. A woman has been attacked on two separate occasions.
   b. An attack that affects men and women equally.
   c. An attack on a woman because she is both a woman and a journalist.
   d. An attack that is perpetrated by two separate perpetrators.

9. Which of the following factors are attributed to women’s lower levels of access to ICTs when compared to men?
   a. Education
   b. Poverty
   c. Literacy
   d. All of the above
10. True or false? In 2016, the UN Human Rights Council recognised an unequivocal right to the internet for all women and girls.
   a. True
   b. False

(10 marks)

Answers: 1. (c); 2. (a); 3. (b); 4. (b); 5. (d); 6. (a); 7. (c); 8. (c); 9. (d); 10. (b)

Group activities

Exercise 1

The Association for Progressive Communications has published a paper titled ‘Good questions on technology-related violence’, accessible here: https://www.apc.org/en/pubs/good-questions-technology-related-violence. Set out below are a selection of questions raised. Discuss these questions as a group:

- What is technology-related or technology-mediated violence against women (VAW)?
- Why is technology-related violence against women not taken seriously by police, courts and other administrative systems?
- What are the legal remedies to deal with technology-related VAW in different countries?
- Which countries have specific laws to deal with technology-related VAW?
- What kind of technology-related violence against women takes place via social media platforms?
- What kind of technology-related violence against women takes place via telephony services?

Exercise 2

Question for discussion: what role can the judiciary play in making the internet a safe space and addressing technology-related violence against women? What support or resources would the judiciary need to realise this?

Exercise 3

The 2016 UN Resolution has called upon states “to bridge the gender digital divide and enhance the use of enabling technology, in particular information
and communications technology, to promote the empowerment of all women and girls”. It goes on to request that the High Commissioner on Human Rights prepares a report on ways to bridge the gender digital divide from a human rights perspective.

Imagine that you are the High Commissioner on Human Rights to whom the request has been made. Divide into groups and consider what you would propose including in the report on ways to bridge the gender digital divide from a human rights perspective. Each group should report back to the rest of the participants for a general discussion on how this issue can be addressed.

Exercise 4

Watch the following video titled “How Pakistani women are taking back the internet”: https://www.ted.com/talks/nighat_dad_how_pakistani_women_are_taking_the_internet_back/transcript?language=en

Now read the following article regarding of journalist Gertrude Uwitware in Uganda: https://cpj.org/2017/04/ugandan-journalist-abducted-assaulted.php

As a group, discuss your reflections on these resources. To what extent are the experiences alike? How does this compare with the experiences of women journalists and activists in your country?

Exercise 5

Should hate speech made against women be criminalised?

Divide into two groups. Group 1 should argue in favour of this proposition; and group 2 should argue against it. The debate should consider the legal frameworks relating to freedom of expression, including non-binding principles and guidelines; the three-part test for a justifiable limitation of a right; the effect that the criminalisation of speech may have on the enjoyment of the right to freedom of expression; and the impact that hate speech online can have on the women against whom such speech is directed. How would the Rabat Plan of Action considerations apply in such a debate?

The groups should present their arguments in a debate-style format.
Individual analysis

In 2016, the Association for Progressive Communications published the Feminist Principles on the Internet, accessible here: https://www.apc.org/en/pubs/feminist-principles-internet-version-20. As explained in the preamble: A feminist internet works towards empowering more women and queer persons – in all our diversities – to fully enjoy our rights, engage in pleasure and play, and dismantle patriarchy. This integrates our different realities, contexts and specificities – including age, disabilities, sexualities, gender identities and expressions, socioeconomic locations, political and religious beliefs, ethnic origins, and racial markers.” It then goes on to list certain principles that it identifies as critical towards realising a feminist internet.

Read the Feminist Principles on the Internet and answer the following questions:

1. Which of these principles are incorporated under your domestic law, either in whole or in part?
2. Which of these principles do you think should be incorporated under your domestic law? Explain why.
3. Are there any principles that you do not agree with? If so, explain why.
4. Are there any additional principles under the general theme of feminist principles on the internet that you would propose including?
Resources

Required reading

• For a general discussion on how technology is used to perpetuate violence against women, see:

  • Association for Progressive Communications, ‘Technology-related violence against women’, 2015: <https://www.apc.org/sites/default/files/HRC%2029%20VAW%202-pager_FINAL_June%202015_0.pdf>


• The following resolutions are relevant to understanding the gender perspective to freedom of expression:


• The following civil society-led declarations and principles provide an important perspective on how the existing principles under regional and international can be developed to address the particular challenges experienced by women in the exercise of their rights to freedom of expression:
The following UNESCO resources provide useful context:

  <http://unesdoc.unesco.org/images/0026/002610/261065e.pdf>

  <http://unesdoc.unesco.org/images/0023/002323/232358e.pdf>

- UNESCO (2012), ‘Gender-sensitive indicators for media: Framework of indicators to gauge gender sensitivity in media operations and content’:  

- For a report on gender trends in the media, see:

    <http://whomakesthenews.org/gmmp/gmmp-reports/gmmp-2015-reports>
This toolkit encourages a heuristic pedagogical model: it is not intended to be prescriptive, and users are encouraged to draw on their own experiences in light of the relevant contexts in which the toolkit is being used. Although it is aimed primarily at the judiciary in Africa, it may similarly be of use to a variety of others, including civil society organisations and members of the media. There are a number of different ways in which the toolkit can be used as a resource:

• **Comprehensive in-person workshop:** We would advise that a comprehensive in-person workshop covering all six modules should be over at least two days. In circumstances where participants are not familiar with the fundamental principles of international human rights law, we would advise that the workshop take place over at least three days.

• **Targeted workshop:** Workshops could also be held on selected modules within the toolkit. In such circumstances, trainers should still ensure that the foundation is laid from the other modules that may be necessary for the participants to fully grasp the concepts and complete the tasks.

• **Combined online course (such as a massive open online course) and in-person workshop:** This format would provide more time for participants to engage with the materials and the self-assessment exercises, before being brought together in the in-person setting. Ideally, the online component should be supported with online discussion forums and other support.

• **Self-study:** The toolkit is self-explanatory in nature, and can serve as a useful self-study resource to be engaged in individually or amongst a group of individuals working in a particular organisation. While there is often benefit in there being collaborative discussions and sharing of experiences, it can also be a useful starting point and reference for someone seeking to increase their understanding of these issues.

Although longer workshops will allow for more activities to be engaged in, it is unlikely that there will be time to conduct all of the suggested activities. This is in the discretion of the trainers. Trainers should seek to gauge from
the groups the aspects that are of most relevance to the participants and can be best be integrated into their work and domestic scenarios.

As a matter of practice, trainers may want to circulate a questionnaire to participants beforehand to ascertain their experience in this area of the law. The following template could be adapted depending on the expected participants:

| Legal Standards on Freedom of Expression: Questionnaire to Participants |
|---|---|
| **Participant details** | **Participant experience** |
| Name: | Do you have legal experience? |
| Organisation: | Do you have experience in freedom of expression? |
| Designation: | Please explain. |
| Country | |

**Which modules would be of most use to you and your work? Please select.**

- ☐ International and regional frameworks on freedom of expression
- ☐ Legitimate restrictions on freedom of expression
- ☐ Right of access to information
- ☐ Safety of journalists and the issue of impunity
- ☐ Contemporary challenges to freedom of expression
- ☐ Gendered perspectives to freedom of expression

Please explain. What are your objectives for this training?

Lastly, we note that this is a dynamic and evolving area of the law. As such, there are likely to be frequent new developments. Instructors should be cognisant to stay abreast of these developments and update the trainings accordingly.

We hope that you enjoy this toolkit and wish you all the best with your training!
This toolkit for the judiciary in Africa on freedom of expression standards was developed to foster a thorough theoretical and practical understanding of the main issues and challenges linked to promoting and protecting freedom of expression and related issues.

As the United Nations agency with a mandate to promote and protect freedom of expression and its corollaries, freedom of the press and access to information, UNESCO seeks to sensitize all relevant actors – particularly members of the judiciary – on the importance of guaranteeing these rights.

The protection of freedom of expression involves a great variety of actors; this toolkit has been conceived not only for judges, prosecutors and other legal experts, but also for civil society leaders, members of security forces and media professionals. It aims to help readers gain a deeper understanding of the theoretical frameworks underpinning this fundamental human right as well as the skills to put this theory into practice.

While fostering freedom of expression is essential for the respect of the rule of law and human rights, it is also key to the achievement of the 2030 Agenda’s Sustainable Development Goals (SDGs), particularly for SDG 16 to promote just, peaceful and inclusive societies for all.