



Training Manual for Judges on International Standards on Freedom of Opinion and Expression

Toolkit

**Centre for Law and Democracy
December 2021**



CENTRE FOR LAW
AND DEMOCRACY

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Table of Contents

Table of Contents	5
Acronyms	8
Acknowledgements	9
Introduction	10
Agenda For a One-Day Training Programme on Freedom of Expression for Jordanian Judges	12
Agenda For a Three-Day Training Programme on Freedom of Expression for Jordanian Judges	13
Opening, Introductions and Welcome	15
Module 1: International and National Guarantees of Freedom of Expression	16
Learning Objectives	16
A. The Justification for Protecting Freedom of Expression	16
B. International Guarantees of Freedom of Expression	18
a) The Right in International Treaties	18
b) Other Relevant Sources of International Law	20
c) The Scope and Content of the Right	20
C. Status of International Law in the Jordanian Legal System	26
Module 2: The Legitimate Scope of Criminal and Civil Law Restrictions on the Right to Freedom of Expression	28
Learning Objectives	28
A. International Law Requirements for Restrictions on Freedom of Expression	28
a) Restrictions Must be Provided by Law	29
b) Restrictions Must Protect a Legitimate Interest	33
c) Restrictions Must be Necessary	34
B. Common Types of Restrictions	37
a) Hate Speech	37
b) Defamation	42
c) Privacy and Private Life	48
d) National Security and Public Order	50
e) Administration of Justice	52
f) Religion and Morals	56
C. Derogations in Times of Public Emergency	57





Training Manual for Judges on International Standards on Freedom of Opinion and Expression

Module 3: Legal Resolution of Attacks on Freedom of Expression	59
Learning Objectives	59
A. Attacks on Freedom of Expression	59
a) “Censorship by Killing” Including Threats Against Safety and Security	59
b) Recent Trends and Ongoing Challenges	61
B. State Obligations in the Context of Both Private and Public Attacks	62
a) The Obligation to Prevent Attacks	64
b) The Obligation to Protect Speakers at Risk of Being Attacked	65
c) The Obligation to Investigate and Prosecute Attacks	67
C. The Role of Judges in Responding to Attacks on Freedom of Expression	69
Module 4: The Right to Access Public Information	71
Learning Objectives	71
A. International Developments Regarding the Right to Information	71
a) Human Rights Roots in Right to “Seek” and “Receive” Information	71
b) Global Growth in Right to Information Laws	74
B. Elements of a Strong Right to Information Law	75
a) The Right of Access and Scope of the Law	75
b) Proactive Disclosure	76
c) Requesting Procedures	78
d) Exceptions and Refusals	79
e) Appeals	82
f) Sanctions and Protections	83
g) Promotional Measures	83
C. Assessing Right to Information Laws: the RTI Rating	84
Module 5: Media Regulation to Promote Free, Independent and Diverse Media	86
Learning Objectives	86
A. General Principles Governing Media Regulation	87
a) Independent and Transparent Regulatory Regimes and Bodies	87
b) Promoting Media Diversity	88
c) Preserving Editorial Independence and Avoiding Censorship	89
B. Special Concerns in the Regulation of Different Media Sectors	90
a) Journalism	90



b) Print Media	93
c) Broadcast Media	95
d) Public Service Media	97
Module 6: Regulating Freedom of Expression in the Digital Era	100
Learning Objectives	100
A. New Trends in the Digital Era Internationally	100
B. Legal Issues	101
a) Internet Slowdowns and Shutdowns	101
b) Content Restrictions	103
c) Blocking and Filtering	104
d) Privacy and the Use of Personal Data	105
e) The Role and Responsibilities of Intermediaries	107
f) Jurisdiction	108
g) Encryption, Anonymity and Surveillance	110
h) Access to the Internet and New Information Sharing Platforms	112
i) The Licensing of Online Speech	113
Annexes	114
A. Annex 1: Common Questions and Answers	116
B. Annex 2: Exercises	117
Exercise 1: Restrictions on Freedom of Expression (Privacy)	117
Exercise 2: Restrictions on Freedom of Expression (Administration of Justice)	117
Exercise 3: Addressing Crimes against Freedom of Expression	118
Exercise 4: Access to Information and Jordan's Exception Regime	118
Exercise 5: Media Regulatory Bodies	119
Exercise 6: Regulating Online Speech	119
C. Annex 3: Additional Reference Material	120
Module 1	120
Module 2	121
Module 3	121
Module 4	122
Module 5	122
Module 6	123





Training Manual for Judges on International Standards on Freedom of Opinion and Expression

Acronyms

ACHPR	African Commission on Human and Peoples' Rights
CERD	International Covenant on the Elimination of all forms of Racial Discrimination
ECtHR	European Court of Human Right
ECOWAS	Economic Community of West African States
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
IMS	International Media Support
JPA	Jordan Press Association
JRTV	Jordan Radio and Television Corporation
OAS	Organization of American States
OSCE	Organization for Security and Co-operation in Europe
RTI	Right to Information
SIM	Subscriber Identity Module
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization



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Training Manual for Judges on International Standards on Freedom of Opinion and Expression

Introduction

Freedom of expression is a foundational right and a key prerequisite for a flourishing democracy. By guaranteeing the free exchange of information and ideas, it ensures that robust public debate about matters of public importance can occur. This in turn promotes transparency in government decision-making and accountability of the public sector.

Most countries now guarantee the right to freedom of expression in their constitutions but respecting this right in practice can still be a struggle around the world. In Jordan as well, constitutional guarantees for freedom of expression do not translate perfectly into respect for freedom of expression either in the law or in practice. In this context, the Toolkit seeks to provide an overview of international standards relating to freedom of expression, with the aim of promoting access to these standards by judicial actors in Jordan.

This is part of a broader effort by UNESCO, which started in Latin America in 2013 and was then expanded to Africa in 2017, to strengthen the capacity of judges and other judicial actors to protect and promote freedom of expression. This Toolkit for the Judiciary in Jordan, produced with the help of International Media Support, is accordingly designed primarily to accompany a training course for judges. It consists of six modules focusing on different freedom of expression issues, followed by a list of common questions and answers, exercises and a list of sources for further reading. When this Toolkit is used in the context of a course, the exercises may be used with the appropriate modules, as time allows. Upon completion of the course, UNESCO may award participants a certificate of attendance.

Module 1 introduces the right to freedom of expression as it is guaranteed in international human rights law, including in human rights treaties, as further elaborated upon by other sources of international law.

The right to freedom of expression is not absolute and Module 2 examines the complicated question of what restrictions on freedom of expression are permitted under international law. It outlines the three-part test for whether a restriction on freedom of expression is legitimate and examines the application of that test in a number of specific areas, such as hate speech, defamation, national security and the administration of justice. These sections provide an overview of the leading decisions in these areas by international courts.

The third module addresses the all too common challenge of attacks which aim to silence those exercising their right to freedom of expression, sometimes referred to as “censorship by killing”. It focuses on States’ obligations to prevent such attacks by private parties, to provide protection to those who are at risk of being attacked and to ensure that, where attacks do occur, those responsible are brought to justice.

Module 4 explores the right to access information held by the government (public authorities). Over the last two decades, this right has come to be recognised globally as an integral part of the wider right to freedom of expression. As of today, nearly 130 countries have adopted right to information laws and there is an increasingly clear and detailed set of international standards governing what constitutes a strong right to information law.



The topic of Module 5 is media regulation. It outlines general principles governing the regulation of the media, including the need for regulatory bodies to be independent and transparent, the overriding objective of promoting media diversity and the need to avoid censorship and to respect editorial independence. The module then looks at the implications of international guarantees for freedom of expression for the regulation of different media sectors, specifically journalists, print media, broadcasters and public service media.

The last module, Module 6, explores new challenges to protecting freedom of expression in the digital age. These challenges are multi-faceted and prone to rapid change as new technologies and new means of communication emerge. However, some recurrent legal issues can be identified. This module surveys some of these legal issues, including Internet shutdowns, content restrictions, blocking and filtering, privacy concerns, the role of intermediaries, jurisdiction, encryption and anonymity and access to the Internet.

By reviewing the major legal issues surrounding freedom of expression, this Toolkit aims to equip judges to better address challenging freedom of expression cases that come before them. In particular, it is hoped that this Toolkit can help judges to understand international standards better and, as a result, be better able to rely on those standards, within the context and rules of the Jordanian legal framework, when they are interpreting Jordanian legal rules. While this Toolkit is primarily addressed to judges, it may prove insightful for other members of the Jordanian government, civil society and the general public, particularly for those who are interested in promoting freedom of expression within the country.





Training Manual for Judges on International Standards on Freedom of Opinion and Expression

Agenda For a One-Day Training Programme on Freedom of Expression for Jordanian Judges

DAY 1

08:30 – 09:00	Registration
09:00 – 09:15	Opening, Introductions and Welcome
09:15 – 9:45	Module 1: International and National Guarantees of Freedom of Expression
9:45 – 10:30	Module 2: The Legitimate Scope of Criminal and Civil Law Restrictions on the Right to Freedom of Expression
10:30 – 11:00	Exercise
11:00 – 11:30	Tea/Coffee Break
11:30 – 12:00	Module 3: Legal Resolution of Attacks on Freedom of Expression
12:00 – 13:00	Module 4: The Right to Access Public Information
13:00 – 14:00	Lunch Break
14:00 – 15:00	Module 5: Media Regulation to Promote Free, Independent and Diverse Media
15:00 – 15:30	Exercise
15:30 – 16:00	Tea/Coffee Break
16:00 – 17:00	Module 6: Regulating Freedom of Expression in the Digital Era
17:00 – 18:00	Closing and Presentation of Certificates



Agenda For a Three-Day Training Programme on Freedom of Expression for Jordanian Judges

DAY 1

08:30 – 09:00	Registration
09:00 – 09:30	Opening, Introductions and Welcome
09:30 – 10:30	Module 1: International and National Guarantees of Freedom of Expression
10:30 – 11:15	Module 2: The Legitimate Scope of Criminal and Civil Law Restrictions on the Right to Freedom of Expression, part I
11:15 – 11:45	Tea/Coffee Break
11:45 – 12:30	Exercise
12:30 – 13:15	Module 2: The Legitimate Scope of Criminal and Civil Law Restrictions on the Right to Freedom of Expression, part II
13:15 – 14:00	Exercise
14:00 – 14:30	Review, Questions and Open Discussion
14:30 – 15:30	Lunch





Training Manual for Judges on International Standards on Freedom of Opinion and Expression

DAY 2

09:00 – 10:30	Module 3: Legal Resolution of Attacks on Freedom of Expression
10:30 – 11:15	Exercise
11:15 – 11:45	Tea/Coffee Break
11:45 – 13:15	Module 4: The Right to Access Public Information
13:15 – 14:00	Exercise
14:00 – 14:30	Review, Questions and Open Discussion
14:30 – 15:30	Lunch

DAY 3

09:00 – 10:30	Module 5: Media Regulation to Promote Free, Independent and Diverse Media
10:30 – 11:15	Exercise
11:15 – 11:45	Tea/Coffee Break
11:45 – 13:15	Module 6: Regulating Freedom of Expression in the Digital Era
13:15 – 14:00	Exercise
14:00 – 14:30	Review, Questions and Open Discussion
14:30 – 15:00	Closing and Presentation of Certificates
15:00 – 16:00	Lunch



Opening, Introductions and Welcome

This is an informal introductory part of the course which allows participants to introduce themselves to each other and for a brief discussion about the purpose of the course, participants' expectations and the agenda.

It starts with a round of introductions, starting with the course facilitator and then going around the room and having participants introduce themselves briefly. Participants should indicate where they work and what they do there. They should also indicate one expectation they have for the course (only one so that space is left for others to indicate their expectations). The facilitator will return to these expectations at the end of the course for a review of the extent to which they were in fact met.

Following this, the facilitator will introduce the purposes of the course. These are, broadly:

- ➔ To raise awareness about international standards and developments regarding the right to freedom of expression.
- ➔ To help participants – who should mostly be judges – to understand better how they might undertake their judicial functions in a way that might lead to better alignment between the Jordanian legal framework for freedom of expression and international standards.

Discussion Point

Are there any other purposes that you feel are important and that should be added? Does this largely conform to your expectations?

The facilitator will then provide an overview of the way in which the course will be conducted. Key points here include:

- ➔ That the course will be interactive in nature. Participants should always feel free to interject queries, comments or observations, regardless of what is happening at that particular point in the training. While the facilitator is leading the course, the idea is that everyone should participate. Among other things, this will help ensure that the course is as responsive as possible to participants' needs and that participants understand the material being covered.
- ➔ That the course will employ various methodological approaches. These will include: presentations, open discussions and different sorts of exercises.
- ➔ That the course will include a number of exercises. The purpose of exercises is to allow participants to work together in smaller groups to discuss the material and thereby to obtain a greater understanding of it. In most cases, the exercises will ask participants to work in groups of two or three people to work out a response to the question posed in the exercise. In most cases, there will be a plenary discussion about these responses, so each group should appoint someone who will be ready to provide feedback on their discussions to the whole group.

The facilitator will then introduce the agenda briefly and participants will be given an opportunity to provide feedback and comments on it.





Training Manual for Judges on International Standards on Freedom of Opinion and Expression

Module 1: International and National Guarantees of Freedom of Expression

Learning Objectives

- ➔ To understand why it is important to protect freedom of expression
- ➔ To learn the relevant sources of international law governing freedom of expression
- ➔ To examine the scope of protection provided by international guarantees of freedom of expression

A. The Justification for Protecting Freedom of Expression

Freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society. They constitute the foundation stone for every free and democratic society.

-UN Human Rights Committee, General Comment No. 34

Independent and pluralistic media are essential to a free and open society and accountable systems of government ... Freedom of expression is not only a fundamental human right in and of itself, but it has ramifications for economic development as well. The media has a “corrective” function by bringing to the public attention corruption and inequitable practices. Lack of a free media can often lead to economic stagnation and improper practises by both governments and businesses.

-Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 1999

[A] free, pluralistic and independent press is an essential component of any democratic society....

-Sana'a Declaration on Promoting Independent and Pluralistic Arab Media (quoting UNESCO General Conference Resolution 4.3)

Discussion Point

Why do you think freedom of expression is important? What are its inherent characteristics and why are they important? What other social benefits does it support? Are there also drawbacks to freedom of expression?



International human rights treaties recognise that freedom of opinion and the freedom to express oneself represent integral conditions for the development and flourishing of human beings within society. These rights also serve as necessary preconditions for the exercise of other rights, such as political participation or creating civic associations with others (freedom of association). As noted by the Human Rights Committee: “The freedoms of opinion and expression form a basis for the full enjoyment of a wide range of other human rights.”¹

Freedom of expression also plays a crucial role in maintaining and developing a transparent, democratic and efficient system of government. Government accountability and responsible decision-making depends on external voices which can debate and criticise official actions and decisions. The public, and especially journalists and the media, serve as a necessary corrective on potential government abuses. When people criticise policies, decisions or institutions, tensions may arise and governments may be tempted to respond by imposing undue restrictions. Effective protection for freedom of expression is therefore necessary to ensure that, in the heat of any particular debate or controversy, governments do not penalise dissenting speech. As noted in the quote from the 1999 Joint Declaration of the special rapporteurs, freedom of expression also underpins sustainable economic growth and development.

A free media plays an especially important role here, by providing citizens with verified information and by promoting vigorous debate and discussion over matters that impact public policy. By providing a diversity of information sources to the public, they enhance participation and the exchange of ideas. An independent media can also ensure that minority voices and perspectives are included in public discourse. It may be noted, in this regard, that journalists, as professionals, may commit to respect standards or ethical codes which go beyond the strict confines of the law. This should be respected, as their own voluntary or professional commitments, but such standards should not be treated as legally binding.

Recognising the value of freedom of opinion and expression, this Module outlines existing protections for this right under international standards.

Judges have a very important role to play in protecting freedom of expression. Two aspects of this may be noted. First, judges have a role to play in determining and then addressing cases where the law goes beyond what is internationally or constitutionally permitted, for example in terms of restrictions on the use of this fundamental freedom. Second, judges need to assess the legitimacy of cases against those accused of exceeding the boundaries of legitimate expression, keeping in mind that the default should be the free exercise of the right and that restrictions are exceptions to that. While judges’ role is to apply law, this involves engaging in complex interpretation of laws. Understanding international standards can be helpful in this regard.

Flowing from this rule, authoritative actors have noted the importance, for judges, of maintaining their knowledge about the right to freedom of expression and indeed all human rights. For example, Value 6.4 of The Bangalore Principles of Judicial Conduct, formally recognised in 2006 by the United Nations Economic and Social Council (ECOSOC), states:

A judge shall keep himself or herself informed about relevant developments of international law, including international conventions and other instruments establishing human rights norms.²

1. UN Human Rights Committee, General Comment No. 34, Article 19: Freedoms of opinion and expression, 12 September 2011, CCPR/G/GC/34, para. 3. Available in all six UN languages at: <http://undocs.org/ccpr/c/gc/34>.

2. The Bangalore Draft Code of Judicial Conduct 2001 adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002. Available at: https://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf.





Training Manual for Judges on International Standards on Freedom of Opinion and Expression

B. International Guarantees of Freedom of Expression

Almost all States now guarantee freedom of expression in their domestic constitutions, given its intrinsic value, including to promote transparent and accountable government. As with other human rights, international law provides strong guarantees for freedom of expression. Because States are the subjects of international law, the inclusion of human rights in international law provides a check on potential abuses by States and represents an affirmation of the rights of persons against even their own government. It also requires States to protect individuals against interference with their rights by private third parties.

The sources of international law are commonly summarised as: 1) international treaties; 2) international custom; 3) general principles of international law; and 4) as a subsidiary source, judicial decisions and the writings of international experts.³ In the human rights context, international treaties are of primary importance and those relevant to freedom of expression are summarised below. However, other international declarations, expert opinions and non-binding agreements have also contributed to our understanding of international human rights law. Statements issued by international bodies responsible for implementing or supporting the relevant treaty text are highly persuasive since these bodies can offer the most authoritative interpretation of the text of a treaty.

a. The Right in International Treaties

Modern international human rights law traces its origins to the Universal Declaration of Human Rights (UDHR),⁴ adopted by the UN General Assembly in 1948. This document is not a treaty and is not formally legally binding, but the rights it outlines have formed the basis of subsequent treaty language. In addition, many provisions, including those guaranteeing freedom of expression, are so broadly recognised that they have become binding on States as a matter of customary international law. Freedom of expression is provided for in Article 19 of the UDHR:

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.

States have subsequently adopted a number of treaties setting out the core content of international human rights law, notably the International Covenant on Civil and Political Rights (ICCPR)⁵ and the International Covenant on Economic, Social and Cultural Rights,⁶ which together elaborate and concretise the provisions of the UDHR. Together, these three documents are referred to as the “International Bill of Rights”. Article 19 of the ICCPR guarantees freedom of expression 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.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (ordre public), or of public health or morals.

3. See Statute for the International Court of Justice, Article 38(1).

4. UN General Assembly Resolution 217A (III), 10 December 1948.

5. UN General Assembly Resolution 2200A (XXI), adopted 16 December 1966, in force 23 March 1976.

6. UN General Assembly Resolution 2200A (XXI), adopted 16 December 1966, in force 3 January 1976.



Subsequent international human rights treaties have emphasised this right in the context of specific human rights issues, such as the rights of women, children and other groups.

Examples

Article 13 of the Convention on the Rights of the Child affirms the protection of freedom of expression for children.⁷ Article 5 of the Convention on the Elimination of Racial Discrimination calls on States to guarantee the right of everyone, “without distinction as to race, colour, or national and ethnic origin,” to equality before the law in enjoyment of the rights to opinion and expression.⁸ Article 21 of the Convention on the Rights of Persons with Disabilities adds important language, obliging States to ensure that persons with disabilities can exercise their freedom of expression, such as by providing public information in accessible formats and facilitating the use of alternative communication methods such as sign languages or Braille.⁹ Article 1 of the Convention on the Elimination of Discrimination against Women also places a responsibility on States to take measures to prohibit discrimination against women, which includes any discrimination in their ability to enjoy equally fundamental rights, including the right to freedom of expression.¹⁰

Regional human rights treaties in Africa,¹¹ the Americas¹² and Europe¹³ contain similar protections for freedom of expression. The Arab Charter on Human Rights¹⁴ also protects the right to freedom of expression, in Article 32:

1. The present Charter guarantees the right to information and to freedom of opinion and expression, as well as the right to seek, receive and impart information and ideas through any medium, regardless of geographical boundaries.
2. Such rights and freedoms shall be exercised in conformity with the fundamental values of society and shall be subject only to such limitations as are required to ensure respect for the rights or reputation of others or the protection of national security, public order and public health or morals.

As an international treaty which came into force in 2008, the Arab Charter is formally binding on those States which have ratified it, including Jordan, which was the very first State to ratify the Charter on 28 October 2004.¹⁵

7. Adopted 20 November 1989, in force 2 September 1990.

8. Adopted 21 December 1965, in force 4 January 1969.

9. Adopted 13 December 2006, in force 3 May 2008.

10. Adopted 18 December 1979, in force 3 September 1981.

11. African Charter on Human and People's Rights, adopted 26 June 1981, in force 21 October 1986, Article 9. While the African Charter's language on permissible restrictions is less clear than that of the ICCPR, later jurisprudence has affirmed the international test. See Box 1.

12. American Convention on Human Rights, adopted 22 November 1969, in force 18 July 1978, Article 13.

13. European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted 4 November 1950, in force 3 September 1953, Article 10.

14. Adopted 22 May 2004, in force 15 March 2008. Translation as printed in 12 International Human Rights Report 893 (2005). Available at: <http://hrlibrary.umn.edu/instreet/loas2005.html>.

15. A full list of countries which have ratified the Charter is available at: <http://unipd-centrodirittiumani.it/en/spilli/Ratification-and-signature-status-of-the-Arab-Charter-on-Human-Rights-2004/147>.





Training Manual for Judges on International Standards on Freedom of Opinion and Expression

Discussion Point

Do you notice any differences between the guarantees for freedom of expression at Article 19 of the ICCPR and Article 32 of the Arab Charter? Do you think they are important? Which document do you feel provides for stronger protection for freedom of expression?

b. Other Relevant Sources of International Law

A key source for guidance in interpreting the treaty language on freedom of expression is the bodies established by those treaties, which are generally responsible for overseeing implementation of the treaty. In the case of the ICCPR, this body is the UN Human Rights Committee, a group of 18 international experts who serve in their personal capacity (not as representatives of their respective governments).

The Human Rights Committee receives and comments on regular reports from States on their implementation of the ICCPR and also decides individual cases from countries which have accepted this oversight system. The Committee also issues interpretations of the legal provisions of the ICCPR in a format known as “general comments”. The first general comment on freedom of expression, adopted in 1983, only comprises a few short paragraphs.¹⁶ It was replaced in 2011 by General Comment No. 34, which provides much more detailed guidance on interpreting freedom of expression, derived in part from its existing body of decisions and comments on State reports.¹⁷

The regional human rights systems in Africa, Europe and the Americas all have analogous bodies to the Human Rights Committee with varying degrees of authority. Each of these systems also now has an active human rights court, with powers to issue judgments which are formally binding on States. While this jurisprudence does not extend to other regions, these courts have played a key role in developing our understanding of human rights law and their decisions have contributed to the development of more detailed norms relating to freedom of expression (see Box 1). Non-binding comments and standards issued by regional human rights bodies provide a further subsidiary source for interpreting treaty language.

Currently, the only treaty body associated with the Arab Charter of Human Rights is the Arab Human Rights Committee. Although a statute for a human rights court exists, the court is not operational and remains controversial.¹⁸ Since its establishment in 2009, the Arab Human Rights Committee has provided concluding observations on several State reports and represents an important monitoring body. However, the Committee has a narrow mandate and its observations are generally brief. So far, the observations have provided only limited guidance on interpreting the rights in the Charter, including freedom of expression.¹⁹

16. UN Human Rights Committee, General Comment 10, Article 19 (Freedom of opinion and expression), 29 June 1983, HRI/GEN/1/Rev.9 (Vol. 1). Available at: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolNo=INT%2fICCPR%2f-GEC%2f6627&Lang=en.

17. UN Human Rights Committee, General Comment No. 34, note 1.

18. One criticism is that there is no mechanism for non-State parties (i.e. victims) to bring a complaint.

19. See Hossein Esmaeili, Irmgard Marboe, Javaid Rehman, *The Rule of Law, Freedom of Expression and Islamic Law* (2017, Oxford, Hart Publishing), p. 105; Mohamed Y. Mattar, “Article 43 of the Arab Charter on Human Rights: Reconciling National, Regional, and International Standards”, 26 *Harvard Human Rights Journal* 91, 143 (2013), available at: <http://harvardhrj.com/wp-content/uploads/2013/05/V26-Mattar.pdf>; and GIZ, “The Arab Human Rights System: Annex to the ABC of Human Rights for Development Cooperation”, December 2017, available at: <https://www.giz.de/fachexpertise/downloads/giz2015-en-annex-abc-human-rights-for-dc-africa-bf.pdf>.



Box 1: The Impact of Regional Human Rights Bodies on Freedom of Expression Jurisprudence

Regional human rights bodies provide binding interpretations of their own treaties and often influence the development of national law within their respective regions. Frequently, however, they are also influential beyond their own regions, given their specific human rights mandates and the expertise they bring to bear on interpreting and applying human rights treaties.

The 1976 European Court of Human Rights case *Handyside v. United Kingdom*,²⁰ for example, has frequently been cited by national and international courts around the world.²¹ It involved a British publisher who distributed a book targeted at teenagers which included sexual content. The United Kingdom seized the material, found the publisher guilty of violating obscenity laws and ordered him to pay a fine.

The European Court of Human Rights found that, on the facts of the case, it was legitimate to restrict the publisher's freedom of expression. However, in making this decision, it articulated several principles which have been influential. First, although in this case the expression was permissibly restricted, the Court affirmed that "freedom of expression...is applicable not only to "information" or "ideas" that are favourably received...but also those that offend, shock or disturb the State or any sector of the population."²² Second, the Court articulated a strict test for when freedom of expression may be permissibly restricted. Third, it suggested that there is a permissible "margin of appreciation" afforded to States in determining whether restrictions are "necessary in a democratic society...for the protection of morals".²³ All of these principles have been influential in the development of subsequent doctrine regionally and internationally.

For the Inter-American Court of Human Rights, the early Advisory Opinion in *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*²⁴ became highly influential in the Americas both in ruling out mandatory membership for journalists in professional organisations and for its discussion of freedom of expression more generally.²⁵ In a response to a request by Costa Rica, the Court unanimously held that "the compulsory licensing of journalists is incompatible with Article 13 of the American Convention on Human Rights if it denies any person access to the full use of the news media as a means of expressing opinions or imparting information."²⁶

The African Court on Human and Peoples' Rights, although established more recently, has also had some landmark cases. One of the most significant is undoubtedly *Lohe Issa Konate v. Burkina Faso*,²⁷ which involved a conviction for defamation, public insult and contempt of court for articles alleging corruption on the part of the Prosecutor and others. The sentence was imprisonment for 12 months, a fine and damages of 6 million CFA Francs (about USD 12,000) and suspension of the weekly for six months. The Court held that imprisonment could never be justified for defamation and that the fine and damages award, as well as the six-month suspension of the weekly were excessive. This decision has been followed in a number of other African countries.

20. 7 December 1976, Application No. 5493/72. Available at: <https://hudoc.echr.coe.int/eng?i=001-57499>.

21. See Global Freedom of Expression Columbia University, "*Handyside v. United Kingdom*", giving a partial list of cases that have cited *Handyside v. United Kingdom*. Available at: <https://globalfreedomofexpression.columbia.edu/cases/handyside-v-uk/>.

22. *Handyside v. United Kingdom*, note 20, para. 49.

23. *Handyside v. United Kingdom*, note 20, para. 47.

24. Advisory Opinion OC-5/85 of 13 November 1985, Series A, No. 5. Available at: http://www.worldcourts.com/iacthr/eng/decisions/1985.11.13_Compulsory_Membership.pdf.

25. Thomas Buergenthal, "Remembering the Early Years of the Inter-American Court of Human Rights", Center for Human Rights and Global Justice Working Paper No. 1, 2005, p. 8, available at: <https://chrgi.org/wp-content/uploads/2015/01/s05buergenthal.pdf>; and OAS Special Rapporteurship for Freedom of Expression, Mandatory membership in a professional association for the practice of journalism: <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=154&IID=1>.

26. Note 24, para. 85.

27. 5 December 2014, Application No. 004/2013. Available at: <http://en.african-court.org/images/Cases/Judgment/Judgment%20Appl.004-2013%20Lohe%20Issa%20Konate%20v%20Burkina%20Faso%20-English.pdf>.





Training Manual for Judges on International Standards on Freedom of Opinion and Expression

The United Nations and some of the regional human rights systems have also created special rapporteurships on freedom of expression: individual expert offices with a dedicated mandate to address freedom of opinion and expression. The first of these was the UN Special Rapporteur on freedom of opinion and expression, created by the UN Human Rights Commission in 1993. Regional systems followed with the Organization of American States (OAS) Special Rapporteur for Freedom of Expression in 1997, the Organization for Security and Cooperation in Europe (OSCE) Representative on Freedom of the Media in 1997, and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information in 2004.²⁸

In addition to making statements in their individual capacities, since 1999 the existing special rapporteurs have issued Joint Declarations annually on themes of international concern, covering topics such as “On the Media and Elections”, “Freedom of Expression and the Internet”, and “Media Independence and Diversity in the Digital Age”.²⁹ As authoritative interpretations of binding human rights law, developed by experts with a specific responsibility to address freedom of expression, these represent an important source of soft law. As they are referenced and relied upon by international and national courts, they may progressively develop into hard law.

Discussion Point

Would you feel comfortable referring to a judgment of one of the regional human rights courts in one of your own decisions? Why or why not? What about a statement in one of the Joint Declarations of the special rapporteurs?

Other declarations, resolutions, and statements by international bodies may present important guidance. For example, a UNESCO-supported seminar in 1991 produced the Windhoek Declaration on Promoting an Independent and Pluralistic African Press,³⁰ which has become an influential international standard and has been followed by similar declarations in other regions.

Examples

The Sana'a Declaration on Promoting Independent and Pluralistic Arab Media, after recalling protections for freedom of expression in the UDHR and condemning attacks on media practitioners, declares:

Arab States should provide, and reinforce where they exist, constitutional and legal guarantees of freedom of expression and of press freedom and should abolish those laws and measures that limit the freedom of the press; government tendencies to draw limits/ 'red lines' outside the purview of the law restrict these freedoms and are unacceptable....³¹

28. Toby Mendel, “History of the Joint Declarations” in OSCE, “Joint Declarations of the representatives of intergovernmental bodies to protect free media and expression (2013, Vienna, OSCE). Available at: <https://www.osce.org/fom/99558?download=true>. For more information, see the websites of the UN Special Rapporteur on Freedom of Expression (<https://www.ohchr.org/en/issues/freedomopinion/pages/opinionindex.aspx>), the ACHPR Special Rapporteur on Freedom of Expression and Access to Information (<http://www.achpr.org/mechanisms/freedom-of-expression>), the OAS Special Rapporteur for Freedom of Expression (<http://www.oas.org/en/iachr/expression/index.asp>), and the OSCE Representative on Freedom of the Media (<https://www.osce.org/representative-on-freedom-of-media>).

29. These are all online at OSCE, Joint Declarations: <https://www.osce.org/fom/66176>.

30. UNESCO Seminar on Promoting an Independent and Pluralistic African Press, Windhoek, Namibia, 29 April – 3 May 1991. Available at: <http://unesdoc.unesco.org/images/0009/000931/093186EB.pdf>.

31. UNESCO Seminar on Promoting Independent and Pluralistic Arab Media, Sana'a, Yemen, 7-11 January 1996. Available at: <https://al-bab.com/documents-reference-section/sanaa-declaration-arab-media>.



c. The Scope and Content of the Right

The right to freedom of expression extends to “everyone”. Under Article 2 of the ICCPR, States are responsible for the rights (including the right to freedom of expression) of “all individuals within its territory and subject to its jurisdiction...without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” This means that the right extends to non-citizens, including refugees, migrant workers, and stateless persons.³² Prisoners and children are also included.

The term “expression” is construed broadly to incorporate all forms of communications, captured by the term “any other media of his choice” in Article 19(2) of the ICCPR. This includes non-verbal communications – such as images, dress or gestures – where they convey meaning. All forms of media are included, both traditional (books, newspapers, broadcasters) and new and evolving (Internet and other electronic systems). Legal submissions also constitute a form of expression (the Convention on the Rights of the Child explicitly extends this to children, who have an opportunity to be heard in judicial or administrative proceedings).³³

Expression is also protected regardless of its subject matter, as reflected in the term “of all kinds” in Article 19(2) of the ICCPR. This includes speech on political, religious and public matters; cultural and artistic expression; scientific and technological research; journalism; and any other type of content. Even “deeply offensive” speech is prima facie covered by the right although it may (and in some cases must) be restricted in strict accordance with the norms set out in human rights law.³⁴

While expression is often perceived as primarily a right of the speaker, freedom of expression also protects the rights to “seek” and “receive” information and ideas. As articulated by the Inter-American Court of Human Rights, this implies that a correlate to the individual right to expression is a “collective right to receive any information whatsoever and to have access to the thought expressed by others... For the average citizen it is just as important to know the opinions of others or to have access to information generally as is the very right to impart his own opinions.”³⁵ The right to access public information is accordingly a key component of freedom of expression (Module 4 is dedicated to this topic).

Freedom of expression also applies “regardless of frontiers”. This means that individuals have a right to access information from abroad and to communicate with people in other countries.

States have both negative and positive obligations to respect freedom of expression. Negative obligations require States to refrain from actions which would violate freedom of expression. This includes both unduly broad or harsh restrictions (such as laws which inappropriately ban or criminalise speech) and the deliberate targeting of individuals.

Positive obligations, in contrast, are affirmative steps which States must take to ensure the full realisation of freedom of expression. For all of the rights recognised in the ICCPR, States must “adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations.”³⁶ The core idea here is that sometimes States need to take measures to ensure the free flow of information and ideas in society.

32. Human Rights Committee, General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 29 March 2004, CCPR/C/21/Rev.1/Add.13, para. 10 (General Comment No. 31). Available at: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.13&Lang=en.

33. General Comment No. 34, note 1, para. 12; Convention on the Rights of the Child, note 7, Article 12.

34. General Comment No. 34, note 1, para. 11.

35. Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, note 24, paras. 30, 32.

36. General Comment No. 31, note 32, para. 8.





Training Manual for Judges on International Standards on Freedom of Opinion and Expression

The positive obligations of States are usually understood in relatively general terms, so that States have some flexibility in how they decide to implement them. However, in the context of freedom of expression, some specific obligations are enumerated. These include promoting media diversity, protecting speakers from attack and proactively disclosing certain government information, all more fully explored in later modules. With the growth of the Internet as a dominant means of communication, there is also an emerging understanding that States have an obligation to promote universal access to the Internet.³⁷ Additional obligations may apply in discrete circumstances. In Africa, for example, the African Commission on Human and Peoples' Rights has called for the "promotion and protection of African voices, including through media in local languages",³⁸ as part of the wider obligation to promote diversity.

Discussion Point

Are there examples where Jordan has taken positive steps to defend or promote freedom of expression? What are some examples? Do you think the country needs to do more in this regard or it is doing enough already?

In addition, States must ensure that effective remedies are available to those whose rights have been violated, that persons claiming remedies have access to competent authorities to decide on and order them, and that remedies are enforced.³⁹ While States cannot be fully responsible for the actions of private parties, they do have certain positive obligations to protect those come under attack from private parties merely for exercising their right to freedom of expression (see Module 3).

States must carry out their treaty obligations in good faith. This is a general rule of treaty interpretation, articulated in Article 26 of the Vienna Convention on the Law of Treaties, but it also applies specifically to the rights contained in the ICCPR.⁴⁰ The obligations apply to all State organs, including the executive, legislative and judicial branches, as well as some acts of quasi-State entities.⁴¹

While the scope of freedom of expression is broad, some restrictions are permitted and appropriate (see Article 19(3) of the ICCPR). These restrictions must: 1) be provided by law; 2) aim to protect a legitimate interest; and 3) be necessary to protect that interest. Legitimate interests are limited by the ICCPR to respect for the rights or reputations of others, and the protection of national security, public order, or public health or morals. This test is applied strictly. The challenge of balancing competing concerns has given rise to a developed set of international standards and jurisprudence on the legitimacy of restrictions, explored in depth in Module 2.

37. See, for example, International Mechanisms for Promoting Freedom of Expression, Joint Declaration on Freedom of Expression and the Internet (2011), para. 6(a), available at: <https://www.osce.org/fom/78309?download=true>.

38. African Commission on Human and Peoples' Rights, Declaration of Principles on the Freedom of Expression in Africa, adopted at the 32nd Ordinary Session, 17-23 October 2002. Available at: <http://www.achpr.org/sessions/32nd/resolutions/62>.

39. ICCPR, Article 2(3).

40. General Comment No. 31, note 32, para. 3.

41. General Comment No. 31, note 32, para. 4; General Comment No. 34, note 1, para. 7.



Box 2: Freedom of Expression for Judges

Judges also have the right to freedom of expression, although the principle of judicial integrity may require judges to exercise special care when exercising this right. As stated in the United Nations Basic Principles on the Independence of the Judiciary, “members of the judiciary are like other citizens entitled to freedom of expression...provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.”⁴²

The regional human rights systems have affirmed the right of judges to freedom of expression. In 2015, the Inter-American Court of Human Rights decided *López Lone and others v. Honduras*, involving Honduran judges who had expressed opposition to the 2009 coup.⁴³ Two judges were present at anti-coup protests, a third participated in filing an amparo (a claim to enforce a constitutional right) on behalf of the deposed president, and a fourth wrote an article and gave a lecture arguing that what had happened constituted a coup d'état. All four were either removed from office or faced disciplinary measures. The Court found that these actions all constituted protected speech and that the proceedings against the judges constituted an improper restriction of their freedom of expression.⁴⁴ The decision notes that even though judges are normally under an obligation to avoid political activity, this may be suspended during a coup d'état, where moral or legal obligations may compel judges to defend the democratic order.⁴⁵

Protection for the right to freedom of expression for judges is not, however, limited to times when democracy is at risk. For example, in *Baka v. Hungary*, the president of the Hungarian Supreme Court had publicly criticised proposed parliamentary bills which would have impacted the judiciary, after which his presidency was terminated prematurely. The European Court of Human Rights found that this was an improper infringement of his right to freedom of expression.⁴⁶ Several similar cases have made their way to the European Court, meaning that it has had an opportunity to develop its jurisprudence around how to balance the need for judicial integrity with protection of freedom of expression for judges. This is examined further in Module 2.

42. Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in Milan from 26 August to 6 September 1985 and endorsed by General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, principle 8. Available at: <https://www.ohchr.org/en/professionalinterest/pages/independencejudiciary.aspx>.

43. 5 October 2015, Series C, No. 30. Available at: www.corteidh.or.cr/docs/casos/articulos/seriec_302_ing.pdf.

44. *López Lone et al. v. Honduras*, note 43, paras. 178-183.

45. *López Lone et al. v. Honduras*, note 43, para. 174.

46. 23 June 2016, Application No. 20261/12, paras. 172 and 175-176. Available at: <https://www.icj.org/wp-content/uploads/2016/06/Hungary-CASE-OF-BAKA-v.-HUNGARY.pdf>.





Training Manual for Judges on International Standards on Freedom of Opinion and Expression

C. Status of International Law in the Jordanian Legal System

Article 27 of the Vienna Convention on the Law of Treaties provides that States “may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”⁴⁷ Although Jordan is not a signatory to the Vienna Convention on the Law of Treaties, this rule is recognised as having matured into customary international law and it applies to human rights treaties as it does to other treaties.⁴⁸

Beyond this obligation, however, States have some discretion as to how international law is incorporated into their domestic legal frameworks, and how to handle conflicts between international and domestic law. Some automatically recognise the provisions of international treaties as equal or superior to domestic law – described as monist systems – while others – operating under what is known as the dualist system – require additional procedural steps for treaties to come into force domestically. Most subject international law obligations to the Constitution.

In Jordan, the Constitution provides that the King has the power to conclude treaties and international agreements. Treaties which affect the public or private rights of Jordanians must then be ratified by Parliament.⁴⁹ Although human rights treaties would impact the rights of Jordanians and presumably require ratification, the ICCPR, the Arab Charter on Human Rights, and the other major international treaties mentioned in this module have been ratified by Parliament.⁵⁰ Indeed, Jordan was a regional leader in signing some of these treaties, including being one of the first countries in the region to ratify the ICCPR, which it did with no reservations.⁵¹

The Jordanian Constitution does not provide clear guidance as to how to resolve conflicts between international treaty obligations and domestic laws, and does not establish a clear hierarchy between international and domestic laws. However, some national laws specify that they are not applicable to the extent that they are incompatible with an international treaty (see, for example, Article 24 of the Civil Code).⁵² In addition, in several cases the Court of Cassation has indicated that an international treaty should prevail over domestic law where there is a conflict between the two.

Discussion Point

Have you ever faced a situation in your court where there appeared to be a conflict between international and domestic legal obligations? If so, how did you handle it? If not, how would you propose to handle it?

47. Vienna Convention on the Law of Treaties, adopted 23 May 1969, entered into force 27 January 1980.

48. See, for example, General Comment No. 31, note 32, para. 4 (citing to the Vienna Convention on the Law of Treaties).

49. Constitution of Jordan, 2011, Article 33.

50. Ratification Status for Jordan, OHCHR, https://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=88&Lang=EN.

51. Ratification Status for Jordan, OHCHR, https://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=88&Lang=EN.

52. As translated in the National report submitted in accordance with paragraph 5 of the annex to Human Rights Council Resolution 16/21: Jordan, 29 July 2013, A/HRC/WG.6/17/JOR/1. Available at: undocs.org/A/HRC/WG.6/17/JOR/1.



Box 3: Relying on International Standards to Address Overly Expansive Authorisation for Restrictions on Freedom of Expression in the African Human Rights System

The African Charter on Human and Peoples' Rights also includes a problematic provision in its guarantee of freedom of expression which permits overly expansive restrictions on freedom of expression. It states, in Article 9(2): "Every individual shall have the right to express and disseminate his opinions within the law." This provision has been broadly criticised as representing a significant weakness in the African Charter.

However, the oversight bodies for the African Charter have significantly constrained the potential abuse of this provision. In *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v. Nigeria*, the African Commission on Human and Peoples' Rights stated:

According to Article 9.2 of the Charter, dissemination of opinions may be restricted by law. This does not however mean that national law can set aside the right to express and disseminate one's opinions guaranteed at the international level; this would make the protection of the right to express one's opinion ineffective. To permit national law to take precedence over international law would defeat the purpose of codifying certain rights in international law and indeed, the whole essence of treaty making.⁵³

The Commission went on to emphasise that restrictions must be strictly proportionate and absolutely necessary to meet a legitimate purpose.

Similarly, in the Declaration of Principles on Freedom of Expression in Africa, the African Commission affirmed: "Any restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary and in a democratic society."⁵⁴ This is accordingly a strong example of how a problematically permissive restriction provision can be interpreted so as to align with international law standards.

Key Points from Module 1:

- ⇒ International human rights law treaties, including those which Jordan has ratified, have strong guarantees for freedom of expression.
- ⇒ While treaties represent the primary source of international human rights law, including in relation to freedom of expression, the jurisprudence of treaty bodies and other regional human rights bodies, as well as authoritative expert statements, are strong persuasive authority of what freedom of expression means.
- ⇒ The scope of freedom of expression is broad, covering the right to seek, receive and impart all expressive content, regardless of how it is disseminated, and placing positive as well as negative obligations on States to protect the right. It may be limited, however, according to a strict test.

53. Communications Nos. 140/94, 141/94 and 145/95, 5 November 1999, para. 40. Available at: http://www.achpr.org/files/sessions/26th/communications/140.94-141.94-145.95/achpr26_140.94_141.94_145.95_eng.pdf.

54. Adopted at the 32nd Ordinary Session, 17-23 October 2002, Principle II(2). Available at: <http://www.achpr.org/sessions/32nd/resolutions/62>.





Training Manual for Judges on International Standards on Freedom of Opinion and Expression

Module 2: The Legitimate Scope of Criminal and Civil Law Restrictions on the Right to Freedom of Expression

Learning Objectives

- ➔ To understand the three-part test for restrictions on freedom of expression under international human rights law
- ➔ To examine international standards in areas where freedom of expression is commonly restricted

A. International Law Requirements for Restrictions on Freedom of Expression

[The exercise of the right to freedom of expression] 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.

-Article 19(3), ICCPR

Discussion Point

What do you think about these conditions for restrictions on freedom of expression? Do they seem to make sense? Would you add any further conditions or remove any?

A few human rights are considered absolute, meaning that the right cannot be restricted in any circumstance. For example, under the ICCPR the right to be free from torture and the right to not be held in slavery are absolute rights.⁵⁵ The State is able to restrict other rights, however, but only when certain requirements are met.

55. ICCPR, Articles 7 and 8.



Freedom of opinion is an absolute right, meaning it cannot be restricted on any grounds. This means that States cannot criminalise holding certain opinions and cannot arrest, imprison, charge or otherwise harass or intimidate a person simply because of the opinions that person holds.⁵⁶ The expression of those opinions, however, may be restricted in certain narrowly defined circumstances. Article 19(3) of the ICCPR, allowing for freedom of expression to be restricted, formulates a three-part test for this:

1. restrictions must be provided by law,
2. they must protect a legitimate interest, and
3. they must be necessary for the protection of that interest.

Each part of this test is examined in-depth below.

When applying the test described below, there is a broad presumption that any particular expression is permitted. Where an interference with freedom of expression has occurred, States bear the legal burden of showing that the restriction meets the test.⁵⁷ In addition, restrictions “may not put in jeopardy the right itself,” nor may the exception become the norm.⁵⁸

Some categories of speech have heightened protection. This means that in applying the test to these categories of speech, especial weight should be given to protecting the speech in question, and therefore restrictions on these kinds of speech bear a heavy burden of justification. Laws which specifically target journalists, human rights defenders, researchers or environmental activists are not legitimate and speech which is critical of the government or a “political social system espoused by the government” is almost always protected.⁵⁹ The UN Human Rights Council has highlighted the following areas where it is especially important that States refrain from imposing restrictions that are not consistent with Article 19(3) of the ICCPR:

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;⁶⁰

a . Restrictions Must be Provided by Law

The ICCPR requires that any restriction on freedom of expression be “provided by law” and the UDHR requires any restriction on fundamental rights to be “determined by law.”⁶¹ This means that the restriction must have a basis in domestic law, but also requires that the law meets certain quality standards.⁶²

56. General Comment No. 34, para. 9.

57. General Comment No. 34, para. 27.

58. General Comment No. 34, para. 21.

59. General Comment No. 34, paras. 30 and 42.

60. Resolution 12/16, Freedom of Opinion and Expression, 12 October 2009, U.N. Doc. A/HRC/RES/12/16, para. 3(p)(i). Available at: <http://undocs.org/A/HRC/RES/12/16>.

61. ICCPR, Article 19(3); UDHR, Article 29.

62. *Sanoma Uitgevers B.V. v. the Netherlands*, 14 September 2010, Application No. 38224/03, para. 81. Available at: <http://hudoc.echr.coe.int/eng?i=001-100448>.





Training Manual for Judges on International Standards on Freedom of Opinion and Expression

Discussion Point

What do you think is the primary reason for this condition on restrictions on freedom of expression? Would you say it is an important condition? Can you think of any disadvantages of it?

“Laws” will generally include a Constitution and primary legislation. The Inter-American Court of Human Rights (IACtHR), in its Advisory Opinion on the Word “Laws” in Article 30 of the American Convention on Human Rights, defines “laws” as a “general legal norm tied to the general welfare, passed by democratically elected legislative bodies established by the Constitution, and formulated according to the procedures” set out in the respective domestic constitutions.⁶³ The core idea here is that only the legislature has the power to restrict freedom of expression. However, this does not necessarily prohibit the legislature from delegating this power, subject to certain constraints (see below). In addition, as noted by the European Court of Human Rights (ECtHR), respect is given to the diversity of legal systems, such that judge-made law in common law countries is also considered “law”.⁶⁴

Subsidiary regulations or other norms developed by the executive branch or other actors under delegated powers are subject to strict conditions. Such delegations will be problematic where they confer “unfettered discretion for the restriction of freedom of expression on those charged with its execution.”⁶⁵

63. The Word “Laws” in Article 30 of the American Convention on Human Rights, 9 May 1986, Advisory Opinion OC-6/86, para. 38.

64. *Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6537/74. Available at: <http://hudoc.echr.coe.int/eng?i=001-57584>.

65. General Comment No. 34, para. 25.



Examples

As noted by the ECtHR:

In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise.⁶⁶

The IACtHR has similarly noted that delegations of power are only appropriate if they “are authorised by the Constitution, are exercised within the limits imposed by the Constitution and the delegating law, and that the exercise of the power delegated is subject to effective controls, so that it does not impair nor can it be used to impair the fundamental nature of the rights and freedoms protected by the Convention.”⁶⁷

The requirement in article 9 of the African Charter on Human and Peoples’ Rights that restrictions on freedom of expression must be “within the law” has been interpreted by the African Commission on Human and Peoples’ Rights in *Constitutional Rights Project v. Nigeria* as follows:

[C]ompetent 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 expression. 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.⁶⁸

Laws themselves must also meet certain quality standards to pass this part of the test. This means that they cannot be overly vague and must be accessible. As stated in General Comment 34, “a norm, to be characterised as a ‘law’, must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public.”⁶⁹ In other words, laws imposing restrictions “must be accessible, concrete, clear and unambiguous such that they can be understood by everyone and applied to everyone.”⁷⁰ (See Box 4).

Finally, the governing law must itself comply with other obligations under human rights law. For example, laws which are discriminatory or provide for penalties that are not allowed under human rights law, for example because they are cruel and unusual, are not legitimate.⁷¹

66. *Sanoma Uitgevers B.V. v. the Netherlands*, note 62, para. 82.

67. The Word “Laws” in Article 30 of the American Convention on Human Rights, note 63, para. 36.

68. 31 October 1998, Application 102/93, paras. 57-58. Available at: http://www.achpr.org/files/sessions/24th/comunications/102.93/achpr24_102_93_eng.pdf.

69. General Comment No. 34, para. 25.

70. Report of the Special Rapporteur on the promotion and protection of the right to freedom of expression, 20 April 2010, UN Doc. A/HRC/14/23, para. 79. Available at: <http://undocs.org/A/HRC/14/23>.

71. General Comment No. 34, para. 26.



Box 4: Precision in Laws Regulating Expression

It is very important that laws providing for restrictions on freedom of expression are accessible and clear. If laws are not clear and accessible, they will not give adequate notice to individuals as to what expression is prohibited. Because individuals are uncertain as to whether their speech is protected, they will self-censor beyond what the law requires. This creates what is sometimes called a “chilling effect”, because unclear laws “chill” or discourage freedom of expression beyond the speech that the law actually prohibits.

Although laws must be precise, just how precise they should be is a more difficult question. The ECtHR uses a test of whether the consequences of an action can be reasonably foreseeable. This language is articulated in the landmark *Sunday Times v. The United Kingdom* case:

A norm cannot be regarded as a “law” unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances.⁷²

Sunday Times involved an assessment of the legitimacy of an injunction against the publication of an article, which had been issued based on the Common Law doctrine of contempt of court. The Court determined that the injunction was properly prescribed by law. After reviewing United Kingdom legal authorities, the Court was satisfied that the relevant contempt of court doctrine in the United Kingdom was sufficiently clear that those subject to it could reasonably foresee, with legal advice, the sorts of articles that may face problems under contempt of court rules. Even though contempt of court rules had not been applied to a case precisely like the one at hand, and there were competing legal theories as to interpretation of the contempt of court rules, the Court was satisfied that the core relevant legal principles were sufficiently well-established.⁷³ The restriction was therefore properly provided by law, although the Court found it was nonetheless an inappropriate restriction on freedom of expression (see the discussion under “Administration of Justice”, below).

In contrast, in *Altuğ Taner Akçam v. Turkey*, the ECtHR found that the “prescribed by law” requirement had not been met, citing the same language as in *Sunday Times*. In that case, Turkey had brought criminal charges against a Turkish historian who wrote an article criticising the prosecution of an Armenian journalist. The historian was charged under Article 301 of the Penal Code, which prohibited publicly degrading the Turkish Nation, the State of the Republic of Turkey, or the government, judiciary or legislature. This language was an amended version; the legislature, in an attempt to constrain abuse of the provision, had changed “Turkishness” to “Turkish Nation” and “Republic” to “State of the Republic of Turkey”.⁷⁴ However, the ECtHR noted that despite the apparent legislative intent to constrain interpretation of the provision, Turkish courts still interpreted it in substantially the same manner. This interpretation, which referenced general national values, feelings and traditions, was expansive and vague so that individuals could not foresee in advance whether or not their actions would fall within the scope of its proscriptions.⁷⁵

72. *Sunday Times v. United Kingdom*, note 64, para. 49.

73. *Sunday Times v. United Kingdom*, note 64, paras. 46-53.

74. 25 October 2011, Application No. 27520/07, paras. 43-44. Available at: <http://hudoc.echr.coe.int/eng?i=001-107206>.

75. *Ibid.*, paras. 45, 92-96.

b .Restrictions Must Protect a Legitimate Interest

A law which restricts freedom of expression must have as its aim the goal of protecting one of a set number of public interests. These legitimate interests, as articulated in the ICCPR, are: the rights or reputations of others, national security, public order, or the protection of public health or morals.⁷⁶ The UDHR contains a slightly broader version, referencing “recognition and respect for the rights and freedoms of others and...meeting the just requirements of morality, public order and the general welfare in a democratic society.”⁷⁷ Note, however, that the language for restrictions in the UDHR applies to all rights and is not specific to freedom of expression, so that the more specific language in the ICCPR sets the general international standard for that right.

Discussion Point

Do you think that these grounds for restricting freedom of expression are expansive enough or are other grounds needed? If you feel other grounds are needed, what would you suggest should be added?

Restrictions must be based only on those grounds listed in the ICCPR (the rights or reputations of others, national security, public order and public health or morals). No other grounds represent a legitimate basis for restricting freedom of expression.⁷⁸ For example, if a law restricts freedom of expression in order to protect the government’s image or on the basis of concepts such as “national unity”, those are not legitimate aims under the ICCPR.

That being said, these categories are already quite broad and, as is explored further below, international human rights law has had to develop standards to constrain their misuse in certain contexts. In most international cases involving freedom of expression, courts accept that the restrictions serve to protect one of the legitimate interests, and the case is largely decided on the other two parts of the test. This being said, these categories do impose some constraints on what restrictions are permissible; for example, interests such as the economy are not listed in Article 19(3). A few comments on this are warranted here, although the contours of the concept of “national security” and elements of the “the rights or reputations of others” are discussed in-depth below.

The rights of others includes, but is not limited to, human rights recognised in international human rights law,⁷⁹ so it also includes other rights protected in domestic law. However, where there is a conflict between a right that is protected under human rights law and a right that is not, weight should be given to the fact that the ICCPR seeks to protect “the most fundamental rights and freedoms.”⁸⁰

76. ICCPR, Article 19(3).

77. UDHR, Article 29(2).

78. General Comment No. 34, para. 22.

79. General Comment No. 34, para. 28.

80. Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, 1 July 1984, Principle 36. Available at: <https://www.icj.org/wp-content/uploads/1984/07/Siracusa-principles-ICCPR-legal-submission-1985-eng.pdf> (Siracusa Principles).





Training Manual for Judges on International Standards on Freedom of Opinion and Expression

Public health and morals are both difficult to define and morals are subject to change over time and across cultures. As the UN Human Rights Committee has noted: “the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations...for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition”.⁸¹ Any restrictions based on morality must adhere to the principle of non-discrimination and therefore cannot undermine the freedom of religion, including of a minority group. While States have some flexibility to determine how to apply potential restrictions on freedom of expression “to reflect their own traditions, culture and values”, there is also a “core of freedom of expression” which States cannot restrict solely by referencing local values.⁸² “Public order” is also a potentially broad and amorphous phrase.

Examples

The European Court of Human Rights has recognised a broad scope for the phrase “public order”, extending it to not only public order in society generally but also “the order that must prevail within the confines of a specific social group.”⁸³ The Inter-American Court of Human Rights has also noted the inherent difficulties in precisely defining the concept of “public order”. In an attempt to constrain abuse, and noting that the concept “can be used as much to affirm the rights of the individual against the exercise of governmental power as to justify the imposition of limitations on the exercise of those rights in the name of collective interests”, the Court notes that public order “must be subjected to an interpretation that is strictly limited to the ‘just demands’ of ‘democratic society’”.⁸⁴

While these legitimate interests can be construed broadly, when placed in the context of the other parts of the test, they are far more constrained. This is particularly true when applying the “necessity” part: even where a concern is deemed to be legitimate, it still needs to be considered in light of the requirement that it is a necessary and proportionate response, as discussed in the next section.

c. Restrictions Must be Necessary

Restrictions must be “necessary” to protect one of the above-described legitimate interests. This means that a State party “must demonstrate in specific and individualised fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.”⁸⁵ The restriction must be based on a “compelling public interest” or a “pressing public or social need” to protect the rights or reputations of others, national security, public order, or public health or morals.⁸⁶

81. General Comment No. 34, para. 32 (citing to General Comment No. 22).

82. Special Rapporteurs for Promoting Freedom of Expression, 2014 Joint Declaration on Universality and the Right to Freedom of Expression, paras. 1(d)-(e). Available at: <https://www.osce.org/fom/118298>.

83. Engel v. the Netherlands, 8 June 1976, Application Nos. 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72, para. 98. Available at: <http://hudoc.echr.coe.int/eng?i=001-57478>.

84. Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, 13 November 1985, Advisory Opinion OC-5/85, Series A, No. 5, para. 67. Available at: http://www.worldcourts.com/iacthr/eng/decisions/1985.11.13_Compulsory_Membership.pdf.

85. General Comment No. 34, para. 35.

86. IACtHR, Claude Reyes and Others v. Chile, 19 September 2006, Series C., No. 151, para. 91. Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.pdf. See also Siracusa Principles, note 80, Principle 10(b).



Discussion Point

Necessity is a rather general term. Can you think of specific sub-elements of this term that should be understood to be part of it? Put differently, how should we understand the specific implications of this part of the test?

The necessity requirement also requires a close connection between the restriction and that restriction's ability to protect the threatened public interest. In determining whether a restriction meets this part of the test, "necessary" should be interpreted as not quite so strong as "indispensable", but more than simply "useful", "reasonable" or "desirable".⁸⁷

A proportionality requirement is incorporated into the necessity part of the test, meaning that the restriction must be proportionate to the protection of the legitimate interest. In other words, restrictions "must be appropriate to achieve their protective function".⁸⁸ In evaluating whether a restriction is proportionate, the State must consider "the form of expression at issue as well as the means of its dissemination."⁸⁹ For example, the value placed on freedom of expression is particularly high in the context of a public debate concerning public and political figures.⁹⁰

Another element of proportionality is that the restriction must not be overbroad: a restriction should interfere "as little as possible with the effective exercise of the right."⁹¹ If there is an effective alternate means of protecting the public interest in question, this alternative approach must be taken instead. Similarly, where the objective may be achieved through a variety of means, the option which restricts the right the least must be selected.⁹²

Proportionality is also required in relation to any sanctions imposed under a restriction on freedom of expression. This means, for example, that the imposition of criminal penalties must be balanced against the public interest at stake. As stated by the Inter-American Court of Human Rights:

In a democratic society punitive power is exercised only to the extent that is strictly necessary in order to protect fundamental legal rights from serious attacks which may impair or endanger them. The opposite would result in the abusive exercise of the punitive power of the State . . . The Court does not deem any criminal sanction regarding the right to inform or give one's opinion to be contrary to the provisions of the Convention; however, this possibility should be carefully analyzed, pondering the extreme seriousness of the conduct of the individual who expressed the opinion, his actual malice, the characteristics of the unfair damage caused, and other information which shows the absolute necessity to resort to criminal proceedings as an exception.⁹³

87. IACtHR, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, note 84, para. 46 and ECtHR, *Sunday Times v. United Kingdom*, note 64, para. 59.

88. General Comment No. 34, para. 34.

89. *Ibid.*

90. *Ibid.*

91. IACtHR, *Claude Reyes and Others v. Chile*, note 86, para. 91. See also *Siracusa Principles*, note 80, Principle 10(b).

92. IACtHR, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, note 84, para. 46.

93. *Kimel v. Argentina*, 2 May 2008, Series C, No. 177, paras. 76 and 78. Available at: http://corteidh.or.cr/docs/casos/articulos/seriec_177_ing.pdf.





Training Manual for Judges on International Standards on Freedom of Opinion and Expression

Reading the Three-Part Test into More General Freedom of Expression Provisions: The African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights guarantees the right to freedom of expression. However, unlike other international or regional treaties, it does not contain a limitations clause which clearly articulates the test or standard for restricting this right. Instead, Article 9 states that every individual has the right to express and disseminate opinions "within the law". The Charter also contains a general limitations clause, at Article 27, specifying that all rights in the Charter should be exercised with due regard to the rights of others, collective security, morality and common interest.

However, human rights bodies across Africa have still applied the three-part test or variations of the three-part test when interpreting the African Charter, relying on the same underlying principles of necessity, pursuing a legitimate aim and legality. The African Commission on Human and Peoples' Rights, in its decisions on communications in *Malawi African Association and Others v. Mauritania*⁹⁴ and *Kenneth Good v. Republic of Botswana*,⁹⁵ reasoned: "The expression 'within the law' must be interpreted in reference to the international norms". These international norms, in turn, provide grounds for assessing the legitimacy of restrictions on freedom of expression.

The African Court on Human and Peoples' Rights, in the landmark *Lohé Issa Konaté v. Burkina Faso* judgment, cited these African Commission decisions to stress the applicability of international standards in determining whether a restriction was "provided by law".⁹⁶ In making its decision, the Court wove together its discussion of whether Burkina Faso had violated Article 19 of the ICCPR and Article 9 of the African Charter, relying on the approach of the three-part test for both. This reflects a clear embrace of the three-part test as the relevant standard for interpreting restrictions on freedom of expression under Article 9 of the Charter.

Other regional African bodies have taken a similar approach. For example, the ECOWAS Community Court of Justice has cited the formulation of the three-part test found in the Commission's Declaration of Principles on Freedom of Expression in Africa, originally adopted in 2002, which provides: "Any restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary in a democratic society."⁹⁷ These Principles have also been a key authority for the African Commission and Court in interpreting Article 9 of the Charter.

The East African Court, in deciding how to interpret restrictions on African Charter rights, has noted that the treaty itself does not provide clear guidance on this matter. It has therefore decided to follow the High Court of Kenya in *CORD v. Kenya and Others*, which itself followed the Supreme Court of

94. 11 May 2000, Communication Nos. 54/91, 61/91, 98/93, 164/97-196/97 and 210/98 (1998), para. 102. Available at: https://www.escr-net.org/sites/default/files/Malawi_African_Assoc_v_Mauritania_ACHPR_Decision.html

95. 12-26 May 2010, Communication No. 313/05, para. 188. Available at: <https://www.achpr.org/sessions/descions?id=195>.

96. 5 December 2014, Application No. 004/2013, para. 129. Available at: <http://en.african-court.org/images/Cases/Judgment/Judgment%20Appl.004-2013%20Lohe%20Issa%20Konate%20v%20Burkina%20Faso%20-English.pdf>.

97. *Ogwuche v. Nigeria*, 11 December 2018, Judgment No. ECW/CCJ/JUD/31/18, para. 63 (citing African Commission on Human and Peoples' Rights, Declaration of Principles on Freedom of expression in Africa (32nd Session, 17-23 October, 2002) Banjul, The Gambia, Article XII (2)). Available at: https://globalfreedomofexpression.columbia.edu/wp-content/uploads/2019/09/ECW_CCJ_JUD_31_18.pdf.

Canada in *R. v. Oakes*, by adopting the so-called “Oakes Test” (from the case bearing that name).⁹⁸ The Oakes Test requires that the limitation be prescribed by law; the objective of the law must be pressing and substantial, meaning it must be important to society; and it must respect the principle of proportionality. This test, while slightly different from the traditional three-part test applied specifically to freedom of expression in international human rights law, nonetheless reflects a number of the same underlying principles and considerations. In addition, where the East African Court of Justice has relied on other international human rights authorities for further interpretive guidance, its application of the Oakes Test brings it close to the approach found in the ICCPR’s three-part test under⁹⁹ international human rights law

B. Common Types of Restrictions

It is not possible, within the scope of this Module, to explore all of the various types of restrictions which States have relied upon to justify or attempt to justify restrictions on freedom of expression. However, most States impose certain types of restrictions – for example almost every State has a defamation law of one sort or another – and the following sections review these to present the key international standards governing them.

a. Hate Speech

Discussion Point

In your opinion, what are the key characteristics of speech that make it hate speech? Given that in many countries the criminal law prohibits hate speech, how can we define it in a sufficiently narrow fashion to ensure that merely ‘racist’ statements are not covered?

Generally, human rights law permits certain restrictions of freedom of expression, but does not mandate or require them. There are two exceptions to this, as provided in Article 20 of the ICCPR:

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.¹⁰⁰

98. Media Council of Tanzania et al. v. Tanzania, Reference No. 2 of 2017, 28 March 2019, para. 60, available at: <https://globalfreedomofexpression.columbia.edu/wp-content/uploads/2019/05/Referene-No.2-of-2017.pdf>; and Burundian Journalists Union v. Attorney General of the Republic of Burundi, Reference No. 7 of 2013, 15 May 2015, para. 85, available at: <https://www.eacj.org/wp-content/uploads/2015/05/Reference-No.7-of-2013-Final-15th-May-2c-2015-Very-Final.pdf>.

99. See, for example, their citation to General Comment No. 34 in Media Council of Tanzania et al. v. Tanzania, note 98, para. 79.

100. For purposes of this Toolkit, hate speech shall be understood as speech falling within the scope of Article 20(2) of the ICCPR. However, it should be noted that the term is often used to describe a broader range of biased speech: not all racist speech, for example, constitutes hate speech. Inasmuch as States impose criminal restrictions which go beyond Article 20(2), they are not legitimate, although other measures should be employed to address biased speech which falls short of the definition of hate speech.





Training Manual for Judges on International Standards on Freedom of Opinion and Expression

The ICCPR only focuses on three types of hate speech, namely national, racial and religious. Other treaties expand this list to include other grounds, such as ethnicity (see box below). It is also increasingly recognised that hate speech in other contexts needs to be prohibited, particularly sexist or gendered hate speech. Other categories of hate speech may also be legitimate, but care should be taken to avoid using hate speech too broadly or as a general term for any kind of biased speech. Any legal prohibition of hate speech should always be governed by the principles described in this section.

Examples

Other international treaties affirm and expand the obligations of States to prohibit certain kinds of hate speech. The Genocide Convention establishes the offence of “direct and public incitement to commit genocide”.¹⁰¹ The Convention on the Elimination of Racial Discrimination requires that States establish as an offence the dissemination of “ideas based on racial superiority or hatred,” incitement to racial discrimination or incitement to acts of violence “against any race or group of persons of another colour or ethnic origin”.¹⁰² In 2013, the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence was adopted under the auspices of the United Nations. It sets out detailed rules on the scope and nature of States’ both legal and other obligations to counter hate speech.¹⁰³

While States are obliged to prohibit hate speech, as defined in Article 20(2) of the ICCPR, this obligation does not override the provisions of Article 19 of the ICCPR protecting freedom of expression. Rather, like any other restrictions on expression, restrictions on hate speech must conform to the three-part test for restrictions laid out in Article 19(3) of the ICCPR: they must be provided in law, protect a legitimate interest and be necessary to protect that interest.¹⁰⁴ One of the legitimate grounds for restricting freedom of expression is the “rights of others”. “Others” here includes not just individuals but also groups asserting their rights collectively. Thus, it may be permissible to restrict hate speech which targets groups of persons based, for example, on their race or religion.

However, the other elements of the three-part test for restrictions on expression must also be met. This means that hate speech restrictions must be clear, narrowly defined, not overbroad, the least intrusive method available and proportionate.¹⁰⁵ Not all speech which is morally wrong or even racist necessarily triggers the legal sanctions outlined in Article 20(2) of the ICCPR. As stated by the international special rapporteurs on freedom of expression in their 2006 Joint Declaration:

101. Convention on the Prevention and Punishment of the Crime of Genocide, adopted 9 December 1948, in force 12 January 1951, Article III(c).

102. Convention on the Elimination of All Forms of Racial Discrimination, adopted 21 December 1965, in force 4 January 1969, Article 4(a).

103. 11 January 2013. Available at: <http://undocs.org/A/HRC/22/17/Add.4>.

104. General Comment 34, para. 50; and *Ross v. Canada*, 18 October 2000, Communication No. 736/1997, paras. 11.1-11.2, available at: <http://hrlibrary.umn.edu/undocs/736-1997.html>.

105. Article 19, Camden Principles on Freedom of Expression and Equality, April 2009. Available at: <https://www.article19.org/data/files/pdfs/standards/the-camden-principles-on-freedom-of-expression-and-equality.pdf> (Camden Principles).



Although it is legitimate to sanction advocacy that constitutes incitement to hatred, it is not legitimate to prohibit merely offensive speech. Most countries already have excessive or at least sufficient 'hate speech' legislation. In many countries, overbroad rules in this area are abused by the powerful to limit non-traditional, dissenting, critical, or minority voices, or discussion about challenging social issues.¹⁰⁶

When drawing a distinction between what constitutes merely offensive speech and what constitutes hate speech that should be restricted, a few key standards provide important guidance. First, laws penalising hate speech should include intent requirements: the ICCPR's reference to "advocacy" implies that one must intend to promulgate hatred to be held liable for hate speech. As the special rapporteurs indicated in their 2001 Joint Statement on Racism and the Media, hate speech laws should require that "no one should be penalised for the dissemination of 'hate speech' unless it has been shown that they did so with the intention of inciting discrimination, hostility or violence".¹⁰⁷

Box 5: The Importance of Establishing Intent When Penalising Hate Speech

An intent requirement in anti-hate speech laws prevents their use against persons, and especially journalists, who are attempting to highlight the existence of racism or racist groups or who are seeking to engage in discourse about preventing and addressing hate speech. This can be seen in the European Court of Human Rights case *Jersild v. Denmark*. Denmark had convicted a journalist of a criminal offence after he included in his programme racist statements made by some youth whom he had interviewed. The Court noted that while the statements of the youth constituted unprotected hate speech, it was undisputed that the purpose of the journalist in compiling the programme was not racist (rather, the journalist was highlighting the views of "a group of extremist youths" so as to expose the depth of the problem of racism in Danish society).¹⁰⁸

Second, to constitute hate speech, the speech must generally constitute incitement to certain results. The ICCPR requires incitement to discrimination, hostility or violence; the Genocide Convention is specific to incitement to genocide; and the CERD prohibits incitement to racial discrimination or race-based violence (notably, however, it prohibits the dissemination of ideas of racial superiority or hatred without requiring that it incites to any particular result).¹⁰⁹

106. Special Rapporteurs for Promoting Freedom of Expression, 2006 Joint Declaration. Available at: <https://www.osce.org/fom/99558?download=true>. Overbroad hate speech rules, for example, may be used improperly against minority ethnic groups who are discussing their culture or those who question policies related to governance of culturally diverse regions. They may also be applied to those who are trying to raise awareness about racism or other hateful conduct, instead of against those who are inciting hatred.

107. Special Rapporteurs for Promoting Freedom of Expression, 2001 Joint Statement on Racism and the Media. Available at: <https://www.osce.org/fom/40120?download=true>.

108. 23 September 1994, Application No. 15890/89, paras. 24 and 35-36. Available at: <http://hudoc.echr.coe.int/eng?i=001-57891>.

109. ICCPR, Article 20(2); Convention on the Prevention and Punishment of the Crime of Genocide, note 101, Article III(c); and Convention on the Elimination of All Forms of Racial Discrimination, note 102, Article 4(a).





Training Manual for Judges on International Standards on Freedom of Opinion and Expression

The “incitement” requirement means that there must be a sufficiently close nexus between the speech in question and the hostility, discrimination or violence. Some advocates propose that “incitement” should be interpreted as statements “which create an imminent risk” of discrimination, hostility or violence.¹¹⁰ The Human Rights Committee has relied on contextual factors to establish whether a sufficient nexus exists. For example, in one case it considered that the fact that the speaker was a teacher of young students increased the risk of discrimination¹¹¹ and, in another case, it gave weight to the close connection between holocaust denial and anti-Semitism in finding the application of a genocide-denial law to be appropriate in the circumstances of that case (see the discussion in the box below).¹¹²

Although highly offensive speech may not always rise to the level of legitimately proscribable hate speech, government officials (including judges) may be subject to higher standards in this area. First, inasmuch as they are agents of the State, they are responsible for respecting the non-discrimination principles contained in human rights law. Statements made in their official capacity which target religious, racial, ethnic or other groups may be impermissible even where they are permitted for private individuals. Second, they may be under non-legal moral or ethical obligations to set high standards. As stated in the Camden Principles on Freedom of Expression and Equality:

Politicians and other leadership figures in society should avoid making statements that might promote discrimination or undermine equality, and should take advantage of their positions to promote intercultural understanding, including by contesting, where appropriate, discriminatory statements or behaviour.¹¹³

110. Camden Principles, note 105, Principle 12.1.iii.

111. *Ross v. Canada*, note 104.

112. *Faurisson v. France*, 8 November 1996, Communication no. 550/1993, available at: <http://hrlibrary.umn.edu/undocs/html/VWS55058.html>; and *Ross v. Canada*, note 104.

113. Camden Principles, note 105, Principle 10.1.



Hate Speech and Genocide Denial

Generally, statements or opinions about historical events are given heightened protection under international human rights law, because of the importance of having open debates about historical events for academic, social and cultural reasons. Therefore, laws prohibiting the expression of opinions about historical facts will face challenges in passing the three-part test.¹¹⁴

However, in some limited circumstances, speech which denies genocide may properly be restricted as a form of hate speech. The UN Human Rights Committee considered this problem in the case of *Faurisson v. France*. France had enacted a law which criminalised questioning the existence of actions by the Nazi regime which had been held by courts to constitute crimes against humanity. Under this law, France convicted a professor who argued that the Nazi gas chambers at Auschwitz and other concentration camps were used for disinfection rather than for killing people. The Committee found that this conviction was an acceptable limit on freedom of expression given that it aimed to protect the rights of others. Because denial of the Holocaust was “the principal vehicle for anti-semitism” in France, and the statements made by the professor were likely to strengthen anti-Semitic feelings in France and had been made with this objective, the restriction was necessary to protect the rights of the Jewish community in France to leave free from fear.¹¹⁵

However, this is a narrow category. The European Court of Human Rights, in a case again involving France, considered a conviction related to a publication which attempted to rehabilitate the image of a French World War II leader who, after the war, was found guilty of treason. The publication failed to mention the leader’s role in deporting French Jews knowing they would be sent to concentration camps. The Court, which held that the conviction was not justified, noted that these statements did not fall clearly in the category of hate speech and so the conviction could not be justified as a restriction on the right to freedom of expression:

*The Court considers that it is not its task to settle this point, which is part of an ongoing debate among historians about the events in question and their interpretation. As such, it does not belong to the category of clearly established historical facts – such as the Holocaust – whose negation or revision would be removed from the protection of Article 10 by Article 17. In the present case, it does not appear that the applicants attempted to deny or revise what they themselves referred to in their publication as “Nazi atrocities and persecutions” or “German omnipotence and barbarism”.*¹¹⁶

The African Court of Human Rights has also addressed this issue, in a case which highlights the manner in which charges of genocide denial can be weaponised against political opponents. In *Ingabire Victoire Umuhoza v. Rwanda*, a prominent Rwandan political opposition leader faced criminal charges for minimisation of genocide. The charges related to a number of statements, but especially comments made at a genocide memorial to Tutsi victims of Rwanda’s 1994 genocide, where she stated that it was important to remember the Hutu victims of crimes against humanity as well as the Tutsi victims. The Court determined that there was nothing in these statements “which denies or belittles” the genocide committed against the Tutsi and found that the criminal charges infringed her right to freedom of expression.¹¹⁷

114. General Comment No. 34, para. 49.

115. *Faurisson v. France*, 8 November 1996, Communication no. 550/1993, paras. 9.6-9.7.. Available at: <http://hrlibrary.umn.edu/undocs/html/VWS55058.html>.

116. *Lehideux & Isorni v. France*, 23 September 1998, Judgment, 55/1997/839/1045, para. 47. Available at: <http://hudoc.echr.coe.int/eng/?i=001-58245>.

117. Application No. 003/2014, 24 November 2017, paras. 158-159. Available at: <http://www.african-court.org/en/images/Cases/Judgment/003-2014-Ingabire%20Victoire%20Umuhoza%20v%20Rwanda%20-%20Judgement%2024%20November%202017.pdf>.





Training Manual for Judges on International Standards on Freedom of Opinion and Expression

b. Defamation

Respect for the “reputations of others” is a legitimate basis for restricting freedom of expression and, accordingly, laws penalising defamation, libel and slander are permissible. However, “defamation laws must be crafted with care to ensure that they comply” with the conditions of Article 19(3) of the ICCPR and “that they do not serve, in practice, to stifle freedom of expression.”¹¹⁸

Human rights law has developed standards for ensuring defamation laws strike an appropriate balance between protecting reputations and respecting freedom of expression. The special rapporteurs on freedom of expression have summarised the minimum standards for defamation laws as follows:

- ➔ the repeal of criminal defamation laws in favour of civil laws should be considered, in accordance with relevant international standards;
- ➔ the State, objects such as flags or symbols, government bodies and public authorities of all kinds should be prevented from bringing defamation actions;¹¹⁹
- ➔ defamation laws should reflect the importance of open debate about matters of public concern and the principle that public figures are required to accept a greater degree of criticism than private citizens; in particular, laws which provide special protection for public figures, such as desacato laws, should be repealed;
- ➔ the plaintiff should bear the burden of proving the falsity of any statements of fact on matters of public concern;
- ➔ no one should be liable under defamation law for the expression of an opinion;
- ➔ in relation to a statement on a matter of public concern, it should be a defence to show that publication was reasonable in the given circumstances; and
- ➔ civil sanctions for defamation should not be so large as to exert a chilling effect on freedom of expression and should be designed to restore the reputation harmed, not to compensate the plaintiff or to punish the defendant; in particular, pecuniary awards should be strictly proportionate to the actual harm caused and the law should prioritise the use of a range of nonpecuniary remedies.¹²⁰

Discussion Point

What do you think of these standards? Are they appropriate or are they too protective of speech and not enough of reputations? How does Jordanian law measure up to these standards?

118. General Comment No. 34, para. 47.

119. This follows from the principle that restrictions on freedom of expression under the ICCPR should protect the rights and reputations of persons. Symbols or institutions do not have reputations that can be harmed in the same way as individuals. Defamation laws which prohibit defaming the flag, government bodies and so on are therefore not appropriate.

120. Special Rapporteurs for Promoting Freedom of Expression, 2010 Joint Declaration on Current Challenges to Media Freedom. Available at: <https://www.osce.org/fom/99558?download=true>.



This represents a fairly comprehensive survey of the key standards governing defamation laws, but a few key elements should be emphasised. First, to sustain a defamation case, the statement in question must refer to a particular individual. A member of a group, such as an official, cannot sue personally just because the public authority where he or she works is criticised. In the case of *Dyuldin and Kislov v. Russia*, before the European Court of Human Rights, the charges were based on a statement that included the following phrase: “the regional authorities have started reprisals against the independent media”. The Court found a violation of the right to freedom of expression, among other things because this phrase was not capable of sustaining a defamation charge:

[The Court] reiterates that a fundamental requirement of the law of defamation is that in order to give rise to a cause of action the defamatory statement must refer to a particular person. If all State officials were allowed to sue in defamation in connection with any statement critical of administration of State affairs, even in situations where the official was not referred to by name or in an otherwise identifiable manner, journalists would be inundated with lawsuits. Not only would that result in an excessive and disproportionate burden being placed on the media, straining their resources and involving them in endless litigation, it would also inevitably have a chilling effect on the press in the performance of its task of purveyor of information and public watchdog.¹²¹

Second, defamation laws should be a response to false statements, meaning that the truth of a statement should always be a defence and that defamation laws should not restrict expression which, by its nature, cannot be subject to verification (such as opinions).¹²² In the case of *Castells v. Spain*, before the European Court of Human Rights, the domestic courts had not allowed the applicant to prove the truth of his allegation that the government had refused to investigate certain murders because it believed the victims belonged to a separatist movement. The Court focused on this refusal by the domestic courts:

It is impossible to state what the outcome of the proceedings would have been had the Supreme Court admitted the evidence which the applicant sought to adduce; but the Court attaches decisive importance to the fact that it declared such evidence inadmissible for the offence in question.¹²³

A corollary of this is that defendant’s should not be required to prove the truth of opinions or value judgments. The very first case on defamation before the European Court of Human Rights, *Lingens v. Austria*, involved a journalist who had published strong criticisms of the Federal Chancellor of Austria, including by accusing him of the “basest opportunism”, and of “immoral” and “undignified” behaviour. The Austrian courts had convicted the journalist in part because he was unable to prove the truth of his statements. The European Court highlighted the important differences between statements of fact and value judgments:

121. *Dyuldin and Kislov v. Russia*, 7 June 2007, Application No. 1914/02, para. 43.

122. General Comment No. 34, para. 47.

123. 23 April 1992, Application No. 11798/85, para. 48.





Training Manual for Judges on International Standards on Freedom of Opinion and Expression

In the Court's view, a careful distinction needs to be made between facts and value-judgments. The existence of facts can be demonstrated, whereas the truth of value-judgments is not susceptible of proof. ...

Under paragraph 3 of Article 111 of the Criminal Code, read in conjunction with paragraph 2, journalists in a case such as this cannot escape conviction for the matters specified in paragraph 1 unless they can prove the truth of their statements (see paragraph 20 above).

As regards value-judgments this requirement is impossible of fulfilment and it infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10 (art. 10) of the Convention.¹²⁴

Third, defamation laws should not shield public figures from criticism or stifle debate on matters of public interest. This means that where public figures or public interest matters are involved, the standards for defamation-based restrictions should be higher, not lower. As stated by the European Court of Human Rights in *Lingens v. Austria*, politicians “inevitably and knowingly” make themselves open to public scrutiny, and accordingly must “display a greater degree of tolerance” of public criticism than private individuals.¹²⁵ A similar degree of tolerance is demanded of civil servants, while the government itself must tolerate an even higher level of criticism.¹²⁶ Matters of public debate generally also should have greater protection against defamation laws: General Comment 34 provides that, in the context of criticism of officials, “a public interest in the subject matter of the criticism should be recognised as a defence.”¹²⁷

124. 8 July 1986, Application No. 9815/82, para. 46. See also *Dichand and others v. Austria*, 26 February 2002, Application No. 29271/95, para. 42.

125. 8 July 1986, Application No. 9815/82, para. 41. Available at: <http://hudoc.echr.coe.int/eng?i=001-57523>.

126. ECtHR, *Castells v. Spain*, 23 April 1992, Application No. 11798/85, para. 46; and ECtHR, *Thoma v. Luxembourg*, 29 March 2001, Application No. 38432/97, para. 47.

127. General Comment No. 34, para. 47.



Box 6: Criticism of Judges and Defamation

In its 2010 decision in the case of *Morice v. France*, the European Court of Human Rights found that the conviction of a lawyer for defamation of a judge infringed the lawyer's freedom of expression. The lawyer had accused the judge of a lack of impartiality and fairness in a letter and statements published in a newspaper.

The Court acknowledged that the justice system can only function where there is public trust and support and that the judiciary should be protected from "gravely damaging attacks that are essentially unfounded".¹²⁸ However, it is important that lawyers are able to advocate for their clients and speak in the public interest when necessary. While the judiciary should be protected from "gratuitous and unfounded attacks", it also must be "subject to wider limits of acceptable criticism than ordinary citizens."¹²⁹ The lawyer's comments were part of a debate on a matter of public interest and, while the comments were harsh, they constituted value judgments with a sufficient "factual basis" to make defamation charges inappropriate.¹³⁰

In a case before the Inter-American Court of Human Rights, *Kimel v. Argentina*, the Court reached a similar conclusion. The case involved a journalist who published a book about the murders of five clergymen during Argentina's military dictatorship. The book criticised the judge who had handled the investigation into the massacre. In response, the judge in question brought criminal actions against the journalist for calumny and defamation and the journalist was ultimately convicted and sentenced to a suspended prison sentence and a fine.¹³¹

The Court affirmed that all people, including judges, have a right to have their reputation protected. However, criticisms of acts carried out by a person in public office enjoy heightened protection.¹³² Furthermore, in this instance, there was high public interest in knowing about the judge's actions in relation to the investigation of the massacre.¹³³ The Court found that the restriction on the journalist's freedom of expression was disproportionate compared to any potential violation of the judge's right to reputation.¹³⁴

Fourth, many national have developed doctrines which recognise a defence for the media if they can show that they acted reasonably, or in accordance with professional ethics, in publishing critical statements. The European Court has never explicitly endorsed such a doctrine but it has developed standards which are similar in practice. For example, in *Dalban v. Romania*, the Court recognised that a strict requirement of proof of truth was too rigid and that the media needed "a breathing space for error", stating:

*[T]here is no proof that the description of events given in the articles was totally untrue and was designed to fuel a defamation campaign against G.S. and Senator R.T. Mr Dalban did not write about aspects of R.T.'s private life, but about his behaviour and attitudes in his capacity as an elected representative of the people (see paragraphs 13 and 14 above).*¹³⁵

128. 23 April 2015, Application No. 29369/10, para. 128. Available at: <http://hudoc.echr.coe.int/eng/?i=001-154265>.

129. *Ibid.*, paras. 131 and 134.

130. *Ibid.*, para. 174.

131. Judgment of 2 May 2008, Series C No. 177, paras. 41-45. Available at: https://corteidh.or.cr/docs/casos/articulos/seriec_177_ing.pdf.

132. *Ibid.*, para. 86.

133. *Ibid.*, paras. 89-90.

134. *Ibid.*, para. 94.

135. 28 September 1999, Application No. 28114/95, para. 50.





Training Manual for Judges on International Standards on Freedom of Opinion and Expression

In this regard, and as noted above, the Court has recognised the pressure on journalists to report in a timely fashion.¹³⁶

The Court has also accepted that journalists may, at least in certain circumstances, rely on rumours when reporting on matters of public interest in an otherwise acceptable manner:

In short, the applicant was essentially reporting what was being said by others about police brutality. He was convicted by the Reykjavik Criminal Court of an offence under Article 108 of the Penal Code partly because of failure to justify what it considered to be his own allegations, namely that unspecified members of the Reykjavik police had committed a number of acts of serious assault resulting in disablement of their victims, as well as forgery and other criminal offences (see paragraphs 9(9)-(10), 10(15) and 24 above). In so far as the applicant was required to establish the truth of his statements, he was, in the Court's opinion, faced with an unreasonable, if not impossible task.¹³⁷

Fifth, the media and others are entitled to rely on official reports without necessarily verifying their accuracy. For example, in *Colombani v. France*, the European Court of Human Rights stated:

*In the view of the Court, the press should normally be entitled, when contributing to public debate on matters of legitimate concern, to rely on the content of official reports without having to undertake independent research. Otherwise, the vital public-watchdog role of the press may be undermined. The Court thus finds that it was reasonable for *Le Monde* to rely on the OGD's report, without needing to check for itself the accuracy of the information it contained. [references omitted]¹³⁸*

The Court has also held that journalists should not necessarily be held liable simply for repeating a statement published by others which is potentially defamatory. In the case of *Thoma v. Luxembourg*, a journalist was convicted of defamation for quoting from a newspaper article which claimed that only one of the eighty forestry officials in Luxembourg was not corrupt. The Court held that this was a breach of his right to freedom of expression, noting:

[P]unishment of a journalist for assisting in the dissemination of statements made by another person ... would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so.¹³⁹

Finally, proportionality in the application of defamation laws, and particularly in imposing penalties, is imperative. General Comment No. 34 only states that States should consider decriminalisation of defamation, but it completely rules out imprisonment as a penalty for defamation. Furthermore, subsequent and developing norms suggest any criminal penalties for defamation are per se inappropriate. At a minimum, imprisonment is a disproportionate penalty.¹⁴⁰ As noted above, in *Konaté v. Burkina Faso*, the African Court of Human Rights addressed the imprisonment on defamation charges of a journalist who accused a prosecutor of corruption. The Court found that the criminal defamation law in question infringed the journalist's freedom of expression and that in order to comply with the requirements of the African Charter, Burkina Faso must amend the law to remove the penalty of imprisonment.¹⁴¹ Following this decision, Burkina Faso repealed its criminal defamation law. The decision also prompted courts in a number of African nations to overturn criminal defamation laws as unconstitutional.¹⁴²

136. *Observer and Guardian v. the United Kingdom*, 26 November 1991, Application No. 13585/88, para. 60.

137. *Thorgeir Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 65.

138. *Colombani v. France*, 25 June 2002, Application no. 51279/99, para. 65.

139. *Thoma v. Luxembourg*, 29 March 2001, Application No. 38432/97, para. 62.

140. General Comment No. 34, para. 47.

141. 5 December 2014, Application No. 004/2013, para. 176(8). Available at: <http://en.african-court.org/images/Cases/Judgment/Judgment%20Appl.004-2013%20Lohe%20Issa%20Konate%20v%20Burkina%20Faso%20-English.pdf>.

142. See *Misa-Zimbabwe and Others v. Minister of Justice and Others*, Case No. CCZ/07/15 (Zimbabwe); *Okuta v. Attorney-General*, 6 February 2017, Petition No. 397 of 2016 (Kenya), available at: https://globalfreedomofexpression.columbia.edu/wp-content/uploads/2017/02/Petition_397_of_2016.pdf; *Peta v. Minister of Law, Constitutional Affairs and Human Rights and Others*, 18 May 2018, Case No. CC 11/2016 (Lesotho), available at: <https://globalfreedomofexpression.columbia.edu/wp-content/uploads/2018/05/Peta.pdf>; and *Gambia Press Union and Others v. the Attorney General*, 9 May 2018, SC Civil Suit No. 1/2014, available at: https://www.mediadefence.org/sites/default/files/blog/files/201805%20Judgment%20GPU%20and%20ors%20v%20AG_0.docx.



Disproportionate Damages Awards for Civil Defamation

It is clear, under international standards, that imprisonment is a disproportionate penalty for defamation. However, monetary fines or civil damages may also be disproportionate.

In the case of *Tolstoy Miloslavsky v. the United Kingdom*, before the European Court of Human Rights, the applicant had been ordered to pay £1,500,000 in damages for publishing a pamphlet accusing a high-ranking army officer of sending 70,000 prisoners of war and refugees to Soviet authorities without authorisation, after which they were massacred or sent to labour camps. The accusation appeared to be related to a personal grievance and the applicant had been unable to provide evidence of their truth before the British courts.

The European Court recognised that such a gravely defamatory statement warranted a harsh sanction. However, the damages in this case were three times higher than any other prior defamation award in the history of the United Kingdom. They were also much higher than the damages that would be imposed even for negligence resulting in serious bodily injury.

The Court stressed that sanctions, like any restriction on freedom of expression, must bear a “reasonable relationship of proportionality to the injury to reputation suffered”. The Court found that, while States enjoyed a margin of appreciation in terms of the level of damages they could choose to impose, in this case the requirement of proportionality was not met, given the substantial size of the damages, as well as the lack of a legal requirement in Britain that damages must be proportionate.¹⁴³

Beyond the specific context of defamation and a few other contexts (such as fraud), it is clear that international law generally protects statements which are merely false. It is almost inherent in the exercise of free speech that one may make mistakes and it is not legitimate to penalise individuals for that. As the special rapporteurs for freedom of expression stated in their 2017 Joint Declaration on Freedom of Expression and “Fake News”, Disinformation and Propaganda:

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.¹⁴⁴

143. *Tolstoy Miloslavsky v. the United Kingdom*, 13 July 1995, Application No. 18139/91, para. 49.

144. 3 March 2017, para. 2(a). Available at: <https://www.law-democracy.org/live/legal-work/standard-setting/>.





Training Manual for Judges on International Standards on Freedom of Opinion and Expression

c. Privacy and Private Life

The right to privacy and private life and the right to freedom of expression are not inherently contradictory. Rather, privacy rights can serve to strengthen freedom of expression. For example, protections for personal data and information may help to prevent retaliation against persons who are voicing controversial opinions. However, these rights can also conflict where journalists or others seek to reveal private information about a person that the latter wishes to keep secret. This section briefly examines how these rights can be balanced, first for public figures and then for non-public figures.

Although public figures are also protected by human rights law, when it comes to matters of public debate concerning public figures, the value of “uninhibited expression is particularly high.”¹⁴⁵ In balancing the rights of privacy and freedom of expression for public figures, regional human rights bodies have accordingly given particularly heavy weight to freedom of expression.

Example

In *Fontevicchia and D’Amico v. Argentina*, the Inter-American Court of Human Rights determined that the standards developed in relation to defamation/reputation should apply in cases involving the right of privacy for public figures.¹⁴⁶ Accordingly, it was not appropriate to impose a punishment for the publication of information about the Argentine President’s illegitimate son. The Court, in reaching this conclusion, considered the public interest in the speech, the fact that the information had been already published elsewhere and the fact that the President himself did not take an interest in safeguarding the information as highly relevant.¹⁴⁷

The European Court of Human Rights has also shown that it values highly the importance of public speech about politicians, even where that infringes on their privacy. The case of *Éditions Plon v. France* involved the planned publication of a book about former French President Mitterrand’s illness from cancer, including details obtained from one of his personal physicians. After Mitterrand’s death, his wife and children sought and obtained an injunction to prevent publication of the book, on the basis that it breached his privacy.

The Court upheld an initial temporary injunction against publication of the book, but it also found that a subsequent decision to continue that injunction less than a year later was not legitimate, on the basis that “the more time that elapsed, the more the public interest in discussion of the history of President Mitterrand’s two terms of office prevailed over the requirements of protecting the President’s rights with regard to medical confidentiality.”¹⁴⁸

145. General Comment No. 34, para. 34.

146. 29 November 2011, Series C, No. 238, para. 59. Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_238_ing.pdf.

147. *Ibid.*, paras. 61-65.

148. *Éditions Plon v. France*, 18 May 2004, Application No. 58148/00, para. 53. Available at: <http://www.oas.org/en/iachr/expression/docs/jurisprudence/european/CASE%20OF%20C3%89DITIONS%20PLON%20v.%20FRANCE.doc>.



In assessing whether the publication of a particular statement represents a breach of private life, international courts have focused on where the overall public interest lies. In one of a series of cases involving the publication of photos of Princess Caroline of Monaco, the European Court of Human Rights stated:

*The Court considers that a fundamental distinction needs to be made between reporting facts – even controversial ones – capable of contributing to a debate in a democratic society relating to politicians in the exercise of their functions, for example, and reporting details of the private life of an individual who, moreover, as in this case, does not exercise official functions.*¹⁴⁹

In the second case involving the publication of photos of Princess Caroline of Monaco, the European Court articulated the following factors as relevant to balancing the right to privacy with freedom of expression:

- ➔ Contribution to a debate of general interest;
- ➔ How well the person concerned is known;
- ➔ The subject of the report;
- ➔ Prior conduct of the person concerned;
- ➔ Content, form and consequences of the publication; and
- ➔ Circumstances in which the photos were taken.¹⁵⁰

Discussion Point

Can you think of other factors that should be taken into account when balancing privacy and freedom of expression?

Applying these principles, the Court noted that the German court had properly enjoined the publication of two photos which depicted the Princess on holiday, as neither they nor the articles they accompanied made any contribution to a debate of general interest. It also found that the German Court had acted properly in not preventing publication of a third photo. This photo had a sufficient link to the accompanying article, which discussed the health of the Prince (a matter of public concern), and therefore it would not have been appropriate to prevent its publication.¹⁵¹

In terms of non-public figures, given that their private information is unlikely to be of high public interest, the above standards would counsel a greater weighting towards protecting privacy. For example, in *Sciacca v. Italy*, the European Court of Human Rights noted that “status as an ‘ordinary person’ enlarges the zone of interaction which may fall within the scope of private life.”¹⁵²

149. *Von Hannover v. Germany*, 24 June 2004, Application No. 59320/00, para. 63.

150. *Von Hannover v. Germany* (No. 2), 7 February 2012, Applications Nos. 40660/08 and 60641/08 (summarising headings contained in paras. 108-113). Available at: <https://globalfreedomofexpression.columbia.edu/wp-content/uploads/2012/02/CASE-OF-VON-HANNOVER-v.-GERMANY-No.-2.pdf>.

151. *Ibid.*, para. 117.

152. 1 November 2005, Application No. 50774/99, para. 29. Available at: <http://hudoc.echr.coe.int/eng?i=001-67930>.





Training Manual for Judges on International Standards on Freedom of Opinion and Expression

This section does not discuss the question of privacy online and related freedom of expression concerns. The digital age presents several new challenges at the intersection of privacy rights and freedom of expression which are more fully discussed in Module 6. Similarly, privacy issues in the context of access to information are discussed in Module 4.

d. National Security and Public Order

Laws restricting freedom of expression to protect national security go by a number of names, such as treason or sedition laws, State secrets laws, anti-terrorism laws, cyber security laws and others. For all of these “extreme care” must be taken to ensure that they are written and enforced in a manner which is compatible with the three-part test for restrictions.¹⁵³

To ensure this, careful definition of “national security” and clarity in the laws is crucial. Where national security is left as an amorphous concept, there is a high risk it will be abused:

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.¹⁵⁴

Terms such as “national security,” “extremism” and “incitement to hatred” should be clearly and narrowly defined, while inherently vague notions like “information security” and “cultural security” should not be used at all as a justification for restricting freedom of expression.¹⁵⁵ In the anti-terrorism context, vague offenses like “the ‘glorification’ or ‘promotion’ of terrorism or extremism” should not be used.¹⁵⁶ Secrecy laws should “indicate clearly the criteria which should be used in determining whether or not information can be declared secret”.¹⁵⁷

Discussion Point

Can you think of key considerations that should be included within the idea of national security to avoid it being abused to unduly limit freedom of expression? Or of other ways to keep it within appropriate limits?

In addition to avoiding overbroad terms in laws, when applying these rules to restrict expression in any particular context States should take care to ensure that a legitimate national security is involved, that the statements were made with the intent to harm national security, and that there is a sufficient nexus between the speech in question and the national security risk.

153. General Comment No. 34, para. 30.

154. Report of the Special Rapporteur on the promotion and protection of the right to freedom of expression, 17 April 2013, A/HRC/23/40, para. 60. Available at: <http://undocs.org/A/HRC/23/40>.

155. Special Rapporteurs for Promoting Freedom of Expression, 2018 Joint Declaration on Media Independence and Diversity in the Digital Age. Available at: https://www.ohchr.org/Documents/Issues/Opinion/JointDeclaration2May2018_EN.pdf.

156. Special Rapporteurs for Promoting Freedom of Expression, 2008 Joint Declaration on Defamation of Religions, and Anti-Terrorism and Anti-Extremism Legislation. Available at: <https://www.osce.org/fom/99558?download=true>.

157. Special Rapporteurs for Promoting Freedom of Expression, 2004 Joint Declaration on Access to Information and on Secrecy Legislation. Available at: <https://www.osce.org/fom/99558?download=true>.



What constitutes a legitimate national security interest is not precisely defined in international law. However, international standards suggest that it should be limited to situations where force or the threat of force threatens the existence of a nation, its territorial integrity or its political independence.¹⁵⁸ The Johannesburg Principles, a set of principles on national security and freedom of expression adopted by a group of international experts, define a legitimate national security interest as follows:

*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.*¹⁵⁹

There are also several areas which will not generally constitute a national security threat. These include suppressing public interest speech which does not harm national security, particularly as a tool for prosecuting “journalists, researchers, environmental activists, human rights defenders, or others” who disseminate such information.¹⁶⁰ National security also should not be used as a pretext to protect the government from embarrassment or hide wrongdoing; suppress information related to the commercial sector, banking or scientific purposes; suppress trade disputes; or be used as a basis for perpetrating repressive practices or suppressing opposition to human rights abuses.¹⁶¹

One of the most important means used by courts to prevent over-application of restrictions on expression on national security grounds is to require a sufficiently close nexus between the speech and the threat to national security. The test in the Johannesburg Principles is that there is a “direct and immediate connection” between the expression and the likelihood or occurrence of imminent violence.¹⁶² General Comment 34 uses the same phrase when describing the general necessity and proportionality requirement contained in the Article 19(3) test for restrictions on freedom of expression.¹⁶³ Whether the expression is likely, in fact, to incite such violence is also relevant.¹⁶⁴ In *Piermont v. France*, for example, the European Court of Human Rights considered the expulsion of a Member of the European Parliament from French Polynesia after she spoke at a demonstration. It noted that although the political environment was tense and the parliamentarian’s conduct potentially inflammatory, the speech itself was not seditious and was given in the context of a peaceful demonstration where no violence in fact occurred. Accordingly, the expulsion was an inappropriate restriction on her freedom of expression.¹⁶⁵

158. Siracusa Principles, note 80, Principle 29.

159. The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, 1 October 1995, Principle 2(a). Available at: <https://www.article19.org/data/files/pdfs/standards/joburgprinciples.pdf>.

160. General Comment No. 34, para. 30.

161. See General Comment No. 34, para. 30; Siracusa Principles, note 80, Principle 32; and Johannesburg Principles, note 159, Principle 2(b).

162. Johannesburg Principles, note 159, Principle 6(c).

163. General Comment No. 34, para. 35.

164. Johannesburg Principles, note 159, Principle 6(b).

165. 27 April 1995, Application Nos. 15773/89 and 15774/89, para. 77. Available at: <http://www.legal-tools.org/doc/b99fd2/pdf/>.



Examples

The Human Rights Committee, in *Kuen-Tae Kim v. Republic of Korea*, considered the case of a critic of the South Korean government who was convicted under the National Security Law for distributing pamphlets which criticised the government and called for reunification with North Korea. Specifically, he was convicted under a provision which criminalised praising or encouraging the activities of an anti-State organisation or distributing documents which benefit an anti-State organisation.

The Committee found that South Korea had not shown how the critic's activities would benefit North Korea or the precise way in which this would create a public security risk:

[T]he Committee has to consider whether the author's political speech and his distribution of political documents were of a nature to attract the restriction allowed by article 19 (3) namely the protection of national security. It is plain that North Korean policies were well known within the territory of the State party and it is not clear how the (undefined) "benefit" that might arise for the DPRK from the publication of views similar to their own created a risk to national security, nor is it clear what was the nature and extent of any such risk. There is no indication that the courts, at any level, addressed those questions or considered whether the contents of the speech or the documents had any additional effect upon the audience or readers such as to threaten public security, the protection of which would justify restriction within the terms of the Covenant as being necessary . . . The Committee considers, therefore, that the State party has failed to specify the precise nature of the threat allegedly posed by the author's exercise of freedom of expression . . .¹⁶⁶

The European Court of Human Rights, in *Gürbüz and Bayer v. Turkey*, found that Turkey had violated the right to freedom of expression of the owner and editor of a Turkish newspaper who were fined for publishing statements by the Kurdistan Workers' Party, an illegal armed organisation. The Court noted that while restricting terrorist messages is a legitimate aim, the statements published in the newspaper did not call for violence. On the contrary, they included an expressed desire to find a peaceful resolution to political problems. The context of the statement is therefore important to considering whether a restriction made in the name of preventing terrorism is actually "necessary" under the third part of the test.¹⁶⁷

e. Administration of Justice

Freedom of expression protects commentary and reporting on court proceedings and recognises the importance of public access to information about court proceedings. This is reflected in the 2002 Joint Declaration of the special rapporteurs for freedom of expression, which outlines the following principles governing freedom of expression and the administration of justice:

166. Keun Tae Kim v. Republic of Korea, 4 January 1999, Communication No. 574/1994, paras 12.4-12.5. Available at: <https://www.refworld.org/cases,HRC,3f588eff7.html>.

167. 27 November 2012, Application No. 37569/06. Not available in English but a summary in English is available at: <https://globalfreedomofexpression.columbia.edu/cases/bayar-v-turkey/>.

- ➔ Special restrictions on commenting on courts and judges cannot be justified; the judiciary play a key public role and, as such, must be subject to open public scrutiny.
- ➔ No restrictions on reporting on ongoing legal proceedings may be justified unless there is a substantial risk of serious prejudice to the fairness of those proceedings and the threat to the right to a fair trial or to the presumption of innocence outweighs the harm to freedom of expression.
- ➔ Any sanctions for reporting on legal proceedings should be applied only after a fair and public hearing by a competent, independent and impartial tribunal; the practice of summary justice being applied in cases involving criticism of judicial proceedings is unacceptable.
- ➔ Courts and judicial processes, like other public functions, are subject to the principle of maximum disclosure of information which may be overcome only where necessary to protect the right to a fair trial or the presumption of innocence.¹⁶⁸

Statements made during court proceedings are protected by freedom of expression, especially for lawyers. Lawyers must be allowed to advocate for their clients both inside and outside of the courtroom, to speak in the public interest when necessary and to comment in public on the administration of justice.¹⁶⁹ As the European Court of Human Rights has noted, these protections serve to strengthen the fair administration of justice: “equality of arms’ and other considerations of fairness therefore also militate in favour of a free and even forceful exchange of argument between the parties.”¹⁷⁰ Furthermore, judges’ right to freedom of expression “should be subject only to such narrow and limited restrictions as are necessary to protect their independence and impartiality.”¹⁷¹

However, these principles must also be balanced against the right to a fair trial, which is protected by international human rights law. Article 14 of the ICCPR states:

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the Parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or guardianship of children.

Restrictions in this area are generally understood as protecting one of two interests, namely the impartiality and the authority of the courts. In terms of the former, certain restrictions on expression are understood to be necessary, such as prohibitions on perjury or witness intimidation. More challenging questions arise in the context of statements made by defence lawyers, given the importance of ensuring a fair trial.

168. Special Rapporteurs for Promoting Freedom of Expression, 2002 Joint Declaration. Available at: <https://www.osce.org/fo-m/39838?download=true>.

169. ECtHR, *Morice v. France*, note 128, paras. 134 and 138.

170. *Nikula v. Finland*, 21 March 2002, Application No. 31611/96, para. 49. Available at: <http://hudoc.echr.coe.int/eng/?i=001-60333>.

171. Special Rapporteurs for Promoting Freedom of Expression, 2002 Joint Declaration. Available at: <https://www.osce.org/fo-m/39838?download=true>.





Training Manual for Judges on International Standards on Freedom of Opinion and Expression

Examples

The European Court of Human Rights, in *Nikula v. Finland*, has said that defence counsel's freedom of expression in the context of a trial is not unlimited, but it should be restricted only in "exceptional cases" even when the penalty is lenient.¹⁷² Furthermore, as the UN Human Rights Committee has noted: "[S]uch proceedings and the penalty imposed must be shown to be warranted in the exercise of a court's power to maintain orderly proceedings. Such proceedings should not in any way be used to restrict the legitimate exercise of defence rights."¹⁷³

Extreme care should be taken in restricting freedom of expression to protect the authority of the court, given that this is very well established in most countries and is not placed at risk merely due to criticism. As discussed in the section on defamation, and the first bullet point from the 2002 Joint Declaration cited above, the judiciary should also be subject to "wider limits of acceptable criticism than ordinary citizens."¹⁷⁴ Furthermore, actual judicial decisions should almost always be published.

172. Note 170, para. 55.

173. General Comment No. 34, para. 31.

174. ECtHR, *Morice v. France*, note 128, para. 131.



Contempt of Court Rules When There is High Public Interest in the Speech in Question: The Sunday Times Case in the European Court of Human Rights

Sunday Times v. The United Kingdom was a landmark early European Court of Human Rights case related to freedom of expression. The Sunday Times newspaper had published a series of articles criticising proposed settlements in legal proceedings involving the manufacturers of thalidomide, a drug prescribed to pregnant women that caused severe birth defects. A British court issued an injunction, on contempt of court grounds, to stop the Sunday Times from publishing another article on the topic which it had announced was forthcoming. The primary concern was that the article would constitute a prejudgment of the legal issues involved and would prejudice the public debate which, in turn, would interfere with the fair administration of justice.¹⁷⁵

The ECtHR determined that the restriction passed two parts of the three-part test. First, contempt of court rules in a common-law system were sufficiently well established to be “prescribed by law”.¹⁷⁶ Second, contempt of court rules also served to protect the impartiality and authority of the judiciary, as well as the rights of litigants, and were therefore motivated by a legitimate aim. However, the Court found that the injunction did not pass the third part of the test. The Court’s reasoning on this was detailed, but a crucial consideration was the high public interest in the information. This high public interest outweighed the interests of maintaining the authority of the judiciary, meaning that the restriction was not necessary. As explained by the Court:

To assess whether the interference complained of was based on “sufficient” reasons which rendered it “necessary in a democratic society”, account must thus be taken of any public interest aspect of the case. . . The thalidomide disaster was a matter of undisputed public concern. It posed the question whether the powerful company which had marketed the drug bore legal or moral responsibility towards hundreds of individuals experiencing an appalling personal tragedy or whether the victims could demand or hope for indemnification only from the community as a whole; fundamental issues concerning protection against and compensation for injuries resulting from scientific developments were raised and many facets of the existing law on these subjects were called in question.

As the Court has already observed, Article 10 (art. 10) guarantees not only the freedom of the press to inform the public but also the right of the public to be properly informed . . . In the present case, the families of numerous victims of the tragedy, who were unaware of the legal difficulties involved, had a vital interest in knowing all the underlying facts and the various possible solutions. They could be deprived of this information, which was crucially important for them, only if it appeared absolutely certain that its diffusion would have presented a threat to the “authority of the judiciary”.¹⁷⁷

175. Sunday Times, note 64, para. 57.

176. Sunday Times, note 64, para. 53.

177. Sunday Times, note 64, paras. 65-66





Training Manual for Judges on International Standards on Freedom of Opinion and Expression

Discussion Point

As judges, do you agree with these standards or do you feel that judges need more protection? If the latter, why should judges be protected when other officials are not?

f. Religion and Morals

As discussed in the section on hate speech, racist speech which constitutes incitement to discrimination, hostility or violence should be prohibited by States. Such prohibitions should align with the protections for freedom of expression in the ICCPR, and their aim is to protect the safety and equality of religious groups, as well as the individuals which make up the group.

However, while it is important to protect the safety and equality of religious groups, religion or any particular religion, in the abstract, is not a rights-holding entity for purposes of hate speech. This means that while freedom of expression may be properly restricted in the context of religiously-motivated hate speech, it may not be restricted on the basis of criticising tenets of a particular religion. This serves to protect both freedom of expression and freedom of religion and belief for religious minorities.

For example, a law which prohibited incitement to violence or discrimination against people based on their religion might be legitimate. However, a law which prohibited criticism of a religion per se would not be appropriate. If someone intentionally distributed a publication using hateful language about a religious group and urging others to mistreat or discriminate against that group, that publication might constitute hate speech. But a publication which expressed disagreement with the tenets of that religion, even if it is used strongly worded language, would not constitute hate speech.

Given this, blasphemy laws and other laws which prohibit speech which exhibits disrespect for a religion are not proper under the ICCPR, except where that speech meets the specific conditions for hate speech under Article 20(2).¹⁷⁸ Furthermore, as noted above, hate speech laws should not discriminate between religions or belief systems and should not be used to prevent or punish criticism of certain religious leaders or doctrines. Blasphemy laws, in contrast, are “often used to prevent legitimate criticism of powerful religious leaders and to suppress the views of religious minorities”.¹⁷⁹ In addition, blasphemy laws “have a stifling impact on the enjoyment of freedom of religion or belief, and healthy dialogue and debate about religion.”¹⁸⁰ It is not legitimate for States to reference only local culture or values as a basis for restricting freedom of expression in relation to laws which protect religions from criticism or prohibit dissenting religious beliefs.¹⁸¹

There has been a significant move away from acceptance of blasphemy laws over the last decade. Earlier jurisprudence from the European Court of Human Rights, for example, suggested

178. General Comment No. 34, para. 48.

179. Special Rapporteurs for Promoting Freedom of Expression, 2008 Joint Declaration on Defamation of Religions, and Anti-Terrorism and Anti-Extremism Legislation. Available at: <https://www.osce.org/fom/99558?download=true>.

180. Rabat Plan of Action, 11 January 2013, para. 25. Available at: https://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf.

181. Special Rapporteurs for Promoting Freedom of Expression, 2014 Joint Declaration on Universality and the Right to Freedom of Expression, para. 1(f). Available at: <https://www.osce.org/fom/118298>.



blasphemy laws were not necessarily incompatible with human rights law.¹⁸² However, the emerging consensus is that hate rules speech are adequate to address religious based hate speech, while still preserving protection for the dissenting religious beliefs that are often, in practice, targeted by blasphemy laws.

When it comes to the broader notion of “morals” as a grounds for restricting freedom of expression, the UN Human Rights Committee has made it clear that such restrictions are only legitimate if they are derived from many different traditions, since otherwise imposing morals associated with only one tradition would represent a form of discrimination. On this, the Committee has stated:

The Committee observed in general comment No. 22, that “the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations... for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition”. Any such limitations must be understood in the light of universality of human rights and the principle of non-discrimination.¹⁸³

C. Derogations in Times of Public Emergency

Article 4 of the ICCPR provides that, generally, States may derogate from their human rights obligations in times of “a public emergency which threatens the life of the nation.” Internal unrest or conflict alone is not sufficient to meet this threshold and neither are economic troubles.¹⁸⁴ Such derogations must follow an official proclamation of the emergency and States must notify the Secretary-General of the United Nations of what provisions will be derogated from and the reasons for doing so.

Derogations must only be “to the extent strictly required by the exigencies of the situation” and cannot conflict with other international law obligations or involve discrimination based on race, colour, sex, language, religion or social origin.¹⁸⁵ Any derogation should be assessed individually, according to the principle of strict necessity, and if a measure is not required by the exigencies of the situation, the ordinary restrictions on rights apply instead.¹⁸⁶ Any derogations must be “of an exceptional and temporary nature.”¹⁸⁷

Some rights are “non-derogable” and are, therefore, not subject to this provision. This includes the right to be free from torture and from slavery, the right to life and freedom of religion, among others. Although freedom of opinion is not explicitly named in the ICCPR as a non-derogable right, the Human Rights Committee considers it to also fall into this category.¹⁸⁸

Freedom of expression, however, may be derogated from under this provision, provided the strict requirements described above are met. Since they are limited to the requirements of the emergency, a state of emergency, even if responding to a true threat to the life of the nation and with proper notification to the UN Secretary General, is not a blank cheque for overriding freedom of expression (see Box 7).

182. See, for example, ECtHR, *Otto-Preminger-Institut v. Austria*, 20 September 1994, Application No. 13470/87. Available at: <http://hudoc.echr.coe.int/eng?i=001-57897>.

183. General Comment No. 34, note 1, para. 32.

184. *Siracusa Principles*, note 80, Principle 40.

185. ICCPR, Article 4.

186. *Siracusa Principles*, note 80, Principles 52-54.

187. Human Rights Committee, General Comment No. 29: Article 4: Derogations during a State of Emergency, CCPR/C/21/Rev.1/Add.11, 31 August 2001.

188. General Comment No. 34, para. 5.





Training Manual for Judges on International Standards on Freedom of Opinion and Expression

Box 7: Freedom of Expression during States of Emergencies

Two cases from the European Court of Human Rights highlight how, even where a state of emergency is legitimately declared, it does not necessarily justify additional restrictions on freedom of expression. Both involved journalists who were placed in pre-trial detention on suspicion of being a member of a terror organisation based on articles and statements they made criticising the government and both occurred in the context of the aftermath of the 2016 attempted coup in Turkey.

In both cases, the Court accepted that the attempted military coup could constitute a legitimate reason for declaring a state of emergency and that Turkey had completed the proper notification procedure under the European Convention on Human Rights. However, it noted that the existence of a public emergency “must not serve as a pretext for limiting freedom of political debate”.¹⁸⁹ Even in a state of emergency, it considered that “every effort should be made to safeguard the values of a democratic society,” and that in this context, criminal charges for offenses such as belonging to a terrorist organisation were an inappropriate response to criticism of the government or the publication of information deemed to compromise national interests.¹⁹⁰

Key Points from Module 2:

- ➔ Restrictions on freedom of expression must meet the following three-part test to be justified under international law:
 - ➔ They must be provided by law.
 - ➔ They must aim to protect one of the following interests: the rights and reputations of others, national security, public order, or public health or morals.
 - ➔ They must be necessary to protect one of those interests including in the sense that the measure responds to a pressing social need, is carefully designed to protect the interest, is the least intrusive, effective way of protecting the interest, is not overbroad and is otherwise proportionate. This applies to both the legal measures in question and their application in any particular case.
- ➔ International standards and case law provide guidance on applying this test in a number of areas where States commonly restrict freedom of expression but often do so in ways that fail to meet the test. Some of the key elements established by these standards are:
 - ➔ Legal provisions need to be clearly and narrowly drafted so as not to leave too much discretion to those applying the rules.
 - ➔ Individual should not be subject to criminal liability in the absence of a specific intent to cause harm.
 - ➔ The closeness of the nexus between the speech and the risk of harm is often a key consideration.
 - ➔ Appropriate defences should be available for both defamation and criminal charges.

189. Şahin Alpay v. Turkey, 20 March 2018, Application No. 16538/17, paras. 180-181, available at: <http://hudoc.echr.coe.int/eng?i=001-181866>; and Mehmet Hasan Altan v. Turkey, 20 March 2018, Application No. 13237/17, paras. 210-211, available at: <http://hudoc.echr.coe.int/eng?i=001-181862>.

190. Ibid.



Module 3: Legal Resolution of Attacks on Freedom of Expression

Learning Objectives

- ➔ To highlight threats to the safety of those exercising their right freedom of expression, including journalists and media actors
- ➔ To outline State obligations to prevent, protect and investigate and prosecute crimes against freedom of expression

A. Attacks on Freedom of Expression

a. “Censorship by Killing” Including Threats Against Safety and Security

Freedom of expression extends to speech that is controversial, unpopular or that angers either the government or third-party actors. As has been established, protecting this kind of speech plays a key role in a democracy by, among other things, allowing for healthy criticism of wrongdoing, corruption and other misconduct by government officials or by private parties. However, where powerful interests are threatened by such speech, those interests may attempt to silence the speaker, including, in extreme cases, through attacks or threats of attacks. This sort of retaliation restricts freedom of expression by creating a climate in which it is not safe to express oneself.

In their 2012 Joint Declaration, the special rapporteurs on freedom of expression expressed concern over the chilling effect created where those exercising their right to freedom of expression, including journalists, media actors and human rights defenders, are attacked, describing this as “censorship by killing”. They also expressed “abhorrence over the unacceptable rate of incidents of violence and other crimes against freedom of expression, including killings, death-threats, disappearances, abductions, hostage takings, arbitrary arrests, prosecutions and imprisonments, torture and inhuman and degrading treatment, harassment, intimidation, deportation and confiscation of and damage to equipment and property”.¹⁹¹

Similarly, the UN Human Rights Committee’s General Comment No. 34 stresses that under no circumstance “can an attack on a person, because of the exercise of his or her freedom of opinion and expression, including such forms of attack as arbitrary arrest, torture, threats to life and killing, be compatible with article 19.”¹⁹² It draws special attention to the fact that journalists are frequent subjects of attacks, threats and intimidation because of the exercise of their profession, as are persons who gather and publish information on human rights, including judges and lawyers.¹⁹³

191. Special Rapporteurs for Promoting Freedom of Expression, 2012 Joint Declaration on Crimes against Freedom of Expression, preamble. Available at: <https://www.osce.org/fom/91595?download=true>.

192. General Comment No. 34, para. 23.

193. Ibid.





Training Manual for Judges on International Standards on Freedom of Opinion and Expression

Discussion Point

Can you think of reasons why attacks against journalists and others for what they have written are more serious in general than other attacks? Can you think of any special measures that States might take to address these attacks?

Concerns over safety, in particular of journalists, have resulted in a series of UN resolutions on the topic. These include UN Security Council Resolutions 1738 and 2222 which, given the Security Council's responsibility for peace and security issues, focus on the safety of journalists in times of armed conflict. They affirm that journalists working in conflict areas shall be accorded civilian status and protected as such. They also call on States to prevent violations of international humanitarian law committed against journalists, to prosecute those responsible for such acts and to reaffirm the professional independence and rights of journalists during armed conflict.¹⁹⁴

In 2015, the Sustainable Development Goals (SDGs) were adopted by the Member States of the United Nations as a common standard of achievement for development progress. SDG Target 16.10 calls on States to: "Ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements". The first indicator under this, Indicator 16.10.1, refers to killings of journalists, among others, stating: "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".

Examples

Both the UN General Assembly and the UN Human Rights Council have also adopted resolutions which deal generally with journalistic safety. The Human Rights Council's Resolutions 21/12,¹⁹⁵ 27/5¹⁹⁶ and 33/2¹⁹⁷ on the safety of journalists all express concern over the prevalence of attacks against journalists and media workers, condemn such attacks, call on States to take measures to address them and offer best practices for doing so. UN General Assembly Resolutions 68/163,¹⁹⁸ 69/185¹⁹⁹ and 70/162²⁰⁰ all mirror this language and reiterate the concerns and recommendations contained in the Human Rights Council resolutions. HRC Resolution 33/2 and UN General Assembly Resolution 72/175 also express concern over attacks on women journalists by, for example, noting the need for gender-sensitive strategies for preventing violence and gender-sensitive investigative procedures.²⁰¹

194. UN Security Council Resolution 1738, 23 December 2006, paras. 2, 6-8, available at: [https://undocs.org/S/RES/1738\(2006\)](https://undocs.org/S/RES/1738(2006)); and UN Security Council Resolution 2222, 27 May 2015, paras. 3, 6, 13, available at: <https://undocs.org/S/RES/2222>.

195. 9 October 2012. Available at: <http://undocs.org/A/HRC/RES/21/12>.

196. 2 October 2014. Available at: http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/27/5.

197. 6 October 2016. Available at: <http://undocs.org/A/HRC/RES/33/2>.

198. 21 February 2014. Available at: <https://undocs.org/A/RES/68/163>.

199. 11 February 2015. Available at: <https://undocs.org/A/RES/69/185>.

200. 10 February 2016. Available at: <https://undocs.org/A/RES/70/162>.

201. UN General Assembly Resolution 72/175, 29 January 2018, para. 11. Available at: <https://undocs.org/A/RES/72/175>.



b. Recent Trends and Ongoing Challenges

Violent attacks designed to retaliate against speech are a persistent and recurring phenomenon, as is impunity for those attacks. There was an increase in “the frequency and regularity of harassment and violence directed towards journalists” between 2012 and 2017, particularly in terms of journalists killed while carrying out their work, of which there were at least 530 cases.²⁰² Other forms of violence against journalists, such as kidnapping, enforced disappearance, arbitrary detention and torture, have also increased. Attacks on human rights defenders, which is often based on their exercising their right to freedom of expression, remains high as well; one organisation estimates that over 300 human rights defenders were killed in 2017, with impunity for the attacks being routine.²⁰³ Killings of human rights defenders are most frequent in Latin America, linked to a number of forms of activism, especially around land, environmental and indigenous peoples’ rights. Killings of journalists, on the other hand, are especially linked to armed conflict, with 56% of all journalists who were killed having been killed in countries suffering from armed conflict.²⁰⁴

These crimes also have gendered aspects that should be taken into account by those seeking to prevent and prosecute them. Most journalists who are killed are men.²⁰⁵ Other forms of violence, however, pose particularly grave risks to women. Women journalists may encounter sexual violence, sexual harassment and rape linked to their work, although such experiences are often unreported and undocumented.²⁰⁶ Threats and harassment against women journalists and their families often also have highly sexist overtones, with serious impacts on their work. A 2017-2018 global survey of women journalists found that 37% had avoided reporting on certain topics and 29% considered leaving their profession because of the harassment they had been subjected to.²⁰⁷ Other women exercising their right to freedom of expression experience similar forms of harassment, for example women human rights defenders.

Impunity for attacks on those exercising their right to freedom of expression is very high, compounding this already very serious problem. According to UNESCO data, of the 1,009 journalists killed from 2006 to 2017, less than one case out of nine has been judicially solved, a rate of less than ten percent. This very high level of impunity sends a chilling message across society.²⁰⁸

The Arab Region, in the period from 2012-2017, had the highest number of journalist deaths. These were largely concentrated in Syria and Iraq and linked to ongoing conflict in these countries. Notably, however, killings have been declining since a peak in 2012. On the other hand, there are still high rates of abduction and torture, especially by insurgent groups, as well as arbitrary detention of journalists.²⁰⁹ With only 1.5% of crimes against journalists in the region being resolved, the Arab region also accounts for the highest impunity rate among the different regions of the world.

202. UNESCO, World Trends in Freedom of Expression and Media Development: Global Report 2017/2018 (2018, Paris), p. 130. Available at: <http://unesdoc.unesco.org/images/0026/002610/261065e.pdf>.

203. Front Line Defenders, Annual Report on Human Rights Defenders at Risk in 2017, p. 6. Available at: https://www.frontlinedefenders.org/sites/default/files/annual_report_digital.pdf.

204. Front Line Defenders, Annual Report on Human Rights Defenders at Risk in 2017, note 203, p. 6; and UNESCO, World Trends in Freedom of Expression and Media Development: Global Report 2017/2018, note 202, p. 140.

205. Only around 7% of journalists killed between 1992-2020 were women, although there is no good data available which evaluates how this compares to women’s overall participation among journalists during that time. Report of the Special Rapporteur on Violence against Women, Combating Violence against Women Journalists, 6 May 2020, para. 23, undocs.org/A/HRC/44/52.

206. Report of the Special Rapporteur on Violence against Women, *ibid*.

207. Michelle Ferrier, Attacks and Harassment: The Impact on Female Journalists and Their Reporting, International Women’s Media Foundation and Trollbusters, 2018, p. 44. Available at: <https://www.iwmf.org/wp-content/uploads/2018/09/Attacks-and-Harassment.pdf>.

208. See UNESCO, Concept Note on the Occasion of the International Day to End Impunity for Crimes Against Journalists, 2 November 2018. Available at: https://en.unesco.org/sites/default/files/idei_concept_note_beirut_18_05_2018.pdf.

209. UNESCO, World Trends in Freedom of Expression and Media Development: Global Report 2017/2018 note 202, p. 130.





Training Manual for Judges on International Standards on Freedom of Opinion and Expression

Discussion Point

Have you heard of any attacks against journalists or others in retaliation for their statements in Jordan? Do you see this as a possible risk in future?

While we look at challenges of the digital era generally in Module 6, it should be noted here that the digital era presents new tools for freedom of expression but also new threats for journalists and others speaking about sensitive issues. For example, encryption and anonymity tools have become crucial for journalists to exercise their right to freedom of expression by securing communications and protecting confidentiality of sources.²¹⁰ On the other hand, digital safety is an increasing challenge for journalists, who have been subject to arbitrary surveillance and online harassment.²¹¹ Women journalists, in particular, report high rates of abuse and harassment online, with evidence suggesting that this has been increasing over the last decade.²¹²

B. State Obligations in the Context of Both Private and Public Attacks

The primary subject of human rights law is States, the entities which ratify the relevant treaties and which are responsible for complying with the obligations therein. However, human rights guarantees impose not only negative obligations on States to refrain from violating rights but also positive obligations to create an enabling environment for their full realisation.²¹³ This does not mean that States are responsible for all actions by private parties, but they do bear an obligation to regulate the actions of private parties. This means that they must “ensure that persons are protected from any acts by private persons or entities that would impair the enjoyment of the freedoms of opinion and expression to the extent that these Covenant rights are amenable to application between private persons or entities.”²¹⁴

Discussion Point

What do you think the positive obligations of States might be in the context of attacks on freedom of expression? What special measures do you think States might put in place to respond to this sort of attack? How can these measures take into account the special needs of women or marginalised groups?

210. UN Human Rights Council Resolution 33/2, note 197, para. 13.

211. UNESCO, World Trends in Freedom of Expression and Media Development: Global Report 2017/2018, note 202, p. 134.

212. Julie Posetti, et al., Online Violence against Women Journalists: A Global Snapshot of Incidence and Impacts, UNESCO, p. 5. Available at: <https://unesdoc.unesco.org/ark:/48223/pf0000375136/PDF/375136eng.pdf.multi>.

213. General Comment No. 31, paras. 6 and 8.

214. General Comment No. 34, para. 7.



This obligation of States to regulate private conduct requires them “to exercise due diligence to prevent, punish, investigate or redress the harm caused by ... private persons or entities.”²¹⁵ This section accordingly looks separately at each of these obligations, namely to prevent, punish and prosecute crimes against freedom of expression.

States also have a direct responsibility to ensure their own agents are not responsible for any sort of retaliatory attack on persons who exercise their freedom of expression. In addition to comprising part of their obligation to respect freedom of expression, this flows from other human rights obligations, such as the right to life, freedom from torture and freedom from arbitrary detention. Where State authorities commit crimes against freedom of expression, this represents “a particularly serious breach of the right to freedom of expression”.²¹⁶

An agent of the State includes not just government officials, but also those who effectively act as agents of the State. Non-state actors impose “repression and intimidation by proxy” where the persons involved are “clearly affiliated with the ruling party” or such a proxy relationship “can be inferred from the facts presented.”²¹⁷

Where States do not have effective control over their territory, for example due to internal armed conflict, they may not be able properly to prevent, investigate or prosecute crimes against freedom of expression. Even in this context, however, the State still has longer-term obligations to exercise due diligence as soon as this becomes possible. Furthermore, while attempting to gain control of territory, States cannot take actions that infringe upon the rights of innocent persons who are affected by the conflict.²¹⁸

These obligations apply to crimes against freedom of expression regardless of who the speaker is. Because journalists, human rights defenders and other prominent persons are frequent targets, some of the international resolutions and documents primarily reference these actors. However, this should not be construed narrowly or be taken to imply that other actors do not also benefit from these obligations. Similarly, the term “journalist” should not be read in an overly formal manner, as “a person’s status as a journalist is determined by the work that he or she performs and is not subject to any job title or form of registration.”²¹⁹

Example

As noted in General Comment No. 34, “journalism is a function shared by a wide range of actors, including professional full-time reporters and analysts, as well as bloggers and others who engage in forms of self-publication in print, on the internet or elsewhere”.²²⁰

215. General Comment No. 31, para. 8.

216. Special Rapporteurs for Promoting Freedom of Expression, 2012 Joint Declaration on Crimes against Freedom of Expression, note 191, preamble.

217. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 13 February 2001, para. 51. Available at: <http://undocs.org/E/CN.4/2001/64>.

218. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, note 217, para. 52.

219. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 20 April 2010, para. 95. Available at: <http://undocs.org/A/HRC/14/23>.

220. General Comment No. 34, para 44.





Training Manual for Judges on International Standards on Freedom of Opinion and Expression

a. The Obligation to Prevent Attacks

Promoting the safety of journalists and others exercising their freedom of expression “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.”²²¹ States have an obligation to prevent crimes against freedom of expression in countries where there is a risk that such crimes may occur generally, as well as in specific situations where authorities “know or should have known of the existence of a real and immediate risk of such crimes”.²²²

One aspect of preventing attacks is to create, to use the language of the UN Human Rights Council, a “safe and enabling environment for journalists to perform their work independently and without undue interference”.²²³ This requires, first of all, ensuring that the legal framework adequately addresses crimes against freedom of expression. The special rapporteurs on freedom of expression jointly recommend the following legal measures:

i. the category of crimes against freedom of expression should be recognised in the criminal law, either explicitly or as an aggravated circumstance leading to heavier penalties for such crimes, taking into account their serious nature; and

ii. crimes against freedom of expression, and the crime of obstructing justice in relation to those crimes, should be subject to either unlimited or extended statutes of limitations (i.e. the time beyond which prosecutions are barred).²²⁴

The European Union Recommendation of the Committee of Ministers to Member States on the Protection of Journalism and Safety of Journalists and other Media Actors contains Guidelines on how to fulfil obligations to ensure the safety of journalists. It recommends the following legislative measures as part of the “prevention” pillar:

Member States should put in place a comprehensive legislative framework that enables journalists and other media actors to contribute to public debate effectively and without fear. Such a framework should reflect the principles set out in this appendix and thereby guarantee public access to information, privacy and data protection, confidentiality and security of communications and protection of journalistic sources and whistle-blowers.²²⁵

The Guidelines also stress the importance of putting in place labour and employment laws which protect media actors from arbitrary dismissals or reprisals, of ensuring that defamation law is aligned with international standards and of clarifying surveillance laws to prevent their abuse. This entire legislative framework should then be subject to “independent, substantive review to ensure that safeguards for the exercise of the right to freedom of expression are robust and effective in practice and that the legislation is backed up by effective enforcement machinery.”²²⁶

221. UN Plan of Action on the Safety of Journalists and the Issue of Impunity, CI-12/CONF.202/6, para. 1.6. Available at: https://en.unesco.org/sites/default/files/un-plan-on-safety-journalists_en.pdf.

222. Special Rapporteurs for Promoting Freedom of Expression, 2012 Joint Declaration on Crimes against Freedom of Expression, note 191, para. 2(a).

223. Human Rights Council Resolution 21/12, note 195, para. 8.

224. Special Rapporteurs for Promoting Freedom of Expression, 2012 Joint Declaration on Crimes against Freedom of Expression, note 191, para. 2(b).

225. Appendix to Recommendation CM/Rec (2016)4 of the Committee of Ministers to Member States on the protection of journalism and safety of journalists and other media actors, 13 April 2016, para. I(2). Available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016806415d9#_ftn1.

226. Ibid., paras. I(3), (6) and (7).



Preventing crimes against freedom of expression goes beyond legislative measures, however. Awareness-raising, monitoring and reporting on attacks, public condemnation of attacks and dedicating resources to investigation and prosecution all play a preventative role.²²⁷ States should also provide effective access to information about crimes against freedom of expression.²²⁸

Discussion Point

Can you think of any other measures that might help prevent attacks on freedom of expression? Has Jordan put in place any of these sorts of measures? Does it need to?

b. The Obligation to Protect Speakers at Risk of Being Attacked

States “should put in place effective measures to protect against attacks aimed at silencing those exercising their right to freedom of expression.”²²⁹ This should be available on an urgent basis to those at risk of being targeted.²³⁰ Protection requires effective implementation of the legal framework, given that these attacks are crimes, including through “enforcement mechanisms with the capacity to pay systematic attention” to the safety of those at risk.²³¹ It also means regularly monitoring and reporting on attacks and ensuring a rapid response to threats (through, for example, early warning mechanisms).²³²

To assess whether authorities have engaged in sufficient efforts to protect a threatened person, the ECtHR and IACtHR have both relied on standards of reasonableness and the authority’s knowledge of the risk. The ECtHR, for example, has assessed what could be “reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge. This is a question which can only be answered in the light of all the circumstances of any particular case.”²³³ (see Box 8). Similarly, the IACtHR has said that a State’s “obligations to adopt prevention and protection measures for individuals in their relationships with each other are conditioned by the awareness of a situation of real and imminent danger for a specific individual or group of individuals and to the reasonable possibilities of preventing or avoiding that danger.”²³⁴ Importantly, it is not necessary that an individual should request protection for these obligations to be triggered.²³⁵

227. Human Rights Council Resolution 21/12, note 195, para. 8.

228. Special Rapporteurs for Promoting Freedom of Expression, 2012 Joint Declaration on Crimes against Freedom of Expression, note 191, para. 2(c)(iv).

229. General Comment No. 34, para. 23.

230. Special Rapporteurs for Promoting Freedom of Expression, 2012 Joint Declaration on Crimes against Freedom of Expression, note 191, para. 3(a).

231. Human Rights Council Resolution 33/2, note 197, para. 7.

232. Human Rights Council Resolution 33/2, note 197, para. 6.

233. *Osman v. United Kingdom*, 28 October 1998, Application No. 23452/94, para. 116. Available at: <http://hudoc.echr.coe.int/eng?i=001-58257>.

234. *Pueblo Bello Massacre v. Colombia*, 31 January 2006, Series C, No. 140, para. 123. Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_140_ing.pdf.

235. *IACtHR, Vélez Restrepo and Family v. Colombia*, 3 September 2012, Series C, No. 248, para. 201. Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_248_ing%20.pdf.





Training Manual for Judges on International Standards on Freedom of Opinion and Expression

Box 8: Özgür Gündem v. Turkey

Özgür Gündem was a Turkish Kurdish newspaper which, until it closed in 1994, was subject to attacks including killings, assaults, arson attacks and other violent incidents involving the newspaper itself as well as persons associated with it. The newspaper believed it was subject to a coordinated campaign designed to stop its publication.²³⁶ In determining whether the authorities responded appropriately to these incidents, the ECtHR dealt extensively with the question of what level of responsibility States bear:

The Court recalls the key importance of freedom of expression as one of the preconditions for a functioning democracy. Genuine, effective exercise of this freedom does not depend merely on the State's duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals. . . . In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which is inherent throughout the Convention. The scope of this obligation will inevitably vary, having regard to the diversity of situations obtaining in Contracting States, the difficulties involved in policing modern societies and the choices which must be made in terms of priorities and resources. Nor must such an obligation be interpreted in such a way as to impose an impossible or disproportionate burden on the authorities".²³⁷

In that case, the Court noted that the authorities knew the newspaper had been subject to violent attacks and harassment and that, despite this, the Government could only identify one protective measure it had provided. These measures did not constitute "adequate or effective responses" to what the newspaper alleged was a concerted campaign against it. The ECtHR therefore found that the government had failed to meet its positive obligations to protect freedom of expression.²³⁸

In some countries, creating specialised protection programmes or mechanisms may be necessary²³⁹ to provide effective protection:

Specialised protection programmes, based on local needs and challenges, should be put in place where there is an ongoing and serious risk of crimes against freedom of expression. These specialised programmes should include a range of protection measures, which should be tailored to the individual circumstances of the person at risk, including his or her gender, need or desire to continue to pursue the same professional activities, and social and economic circumstances.²⁴⁰

236. ECtHR, *Özgür Gündem v. Turkey*, 16 March 2000, Application No. 23144/93, para. 41. Available at: <http://hudoc.echr.coe.int/eng?i=001-58508>.

237. *Ibid.*, para. 43.

238. *Ibid.*, paras. 44 and 46.

239. For a detailed discussion about how to establish such a mechanism, see Toby Mendel, *Supporting Freedom of Expression: A Practical Guide to Developing Specialised Safety Mechanisms* (April 2016, UNESCO and Centre for Law and Democracy). Available at: http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CI/CI/pdf/publications/Supporting-Freedom-of-Expression_Guide-Safety-Mechanisms.pdf.

240. Special Rapporteurs for Promoting Freedom of Expression, 2012 Joint Declaration on Crimes against Freedom of Expression, note 191, para. 3(b).



For example, Mexico and Colombia have established sophisticated national safety programmes, including, in Mexico, special prosecutorial, investigative and monitoring units and, in Colombia, a committee for assessing risk and recommending protective measures requested by victims.²⁴¹

Discussion Point

Protection measures, and especially specialised mechanisms, cost money. At what point of risk do you think States need to put these measures into place? How widespread would attacks need to be before a State should create a specialised mechanism? Can you imagine a court ever ordering a State to do this?

Finally, during certain events or times of unrest, States may need to take special steps to ensure the safety of journalists or other at-risk persons. During media coverage of elections or demonstrations, for example, States may need to take into account the “specific role, exposure and vulnerability of journalists”.²⁴² Similarly, when journalists are targeted during armed conflict, States have obligations under international humanitarian law as well as human rights law to protect them. In Security Council Resolution 2222, the UN Security Council stated:

The Security Council . . . Recalls its demand that all parties to an armed conflict comply fully with the obligations applicable to them under international law related to the protection of civilians in armed conflict, including journalists, media professionals and associated personnel;²⁴³

c. The Obligation to Investigate and Prosecute Attacks

When crimes against freedom of expression go unpunished, the resulting impunity contributes to a recurrence of such crimes.²⁴⁴ These crimes should be “vigorously investigated in a timely fashion”, the perpetrators prosecuted and the victims afforded appropriate redress.²⁴⁵ To ensure accountability, investigations should be “impartial, speedy, thorough, independent and effective”,²⁴⁶ and criminal charges should be brought against those responsible.²⁴⁷

A failure to provide timely investigations and prosecutions can be a “strong indication” that a State is not meeting its positive obligations to protect human rights.²⁴⁸

241. For an in-depth discussion of these programmes, as well as specialised protective measures generally, see Natalia Torres, Institutional Design and Effectiveness of the Agencies Charged with Protecting Journalists and Investigating Crimes against the Press: Mexico, Colombia and Guatemala (2012, Buenos Aires, Centro de Estudios en Libertad de Expresión y Acceso a la Información). Available at: <http://www.palermo.edu/cele/pdf/english/Internet-Free-of-Censorship/Institutional-Design.pdf>.

242. Human Rights Council Resolution 33/2, note 197, para. 10.

243. UN Security Council Resolution 2222, note 194, para. 7.

244. Human Rights Council Resolution 27/5, note 196, para. 2.

245. General Comment No. 34, para. 23.

246. Human Rights Council Resolution 27/5, note 196, para. 3.

247. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 20 April 2010, para. 95. Available at: <http://undocs.org/A/HRC/14/23>.

248. ECtHR, Mazepa and Others v. Russia, 17 July 2018, Application No. 15086/07, para. 80. Available at: <http://hudoc.echr.coe.int/eng?i=001-184660>.





Training Manual for Judges on International Standards on Freedom of Opinion and Expression

Examples

In a case involving the high-profile assassination of journalist Anna Politkovskaya, the ECtHR noted that Russia had not provided “highly convincing and plausible reasons to justify the length of the proceedings”, such that the excessive delay in the investigation itself was sufficient basis for finding that Russia had breached its obligations under the European Convention on Human Rights.²⁴⁹ Similarly, the IACtHR has held that “unjustified procedural inactivity” was a factor leading to its conclusion that the investigations had not guaranteed the rights of the victims.²⁵⁰ In the case of *Norbert Zongo v. Burkina Faso*, the African Court on Human and Peoples’ Rights found the State to be in breach of its obligations to properly investigate after Mr. Zongo was killed for his reporting and, specifically, for an investigation into the murder of the driver of the brother of the President. The Court held Burkina Faso responsible for failing to investigate the case properly.²⁵¹

In addition to a timely investigation and prosecution, the investigative process should be sufficiently thorough and rigorous. As stated by the special rapporteurs on freedom of expression, “sufficient resources and training should be allocated to ensure that investigations into crimes against freedom of expression are thorough, rigorous and effective and that all aspects of such crimes are explored properly.”²⁵² The ECtHR has suggested that one aspect of a diligent investigation is that authorities examine sufficiently whether freedom of expression was a motive for the crimes (such as whether a murder of a journalist was linked to his work as a journalist).²⁵³

Independence and impartiality in the prosecution of crimes against freedom of expression require court proceedings to have integrity. States must “ensure the safety of judges, prosecutors, lawyers and witnesses involved in prosecutions for crimes against journalists and other media actors.”²⁵⁴ Witness protection for those testifying against perpetrators may also be necessary.²⁵⁵ For example, in a case involving the assassination of a journalist, the ECOWAS Community Court of Justice faulted the Gambian intelligence agency for being “quick to put the docket away knowing full well that the eyewitnesses had been scared off”, instead of providing guarantees to ensure the safety of witnesses.²⁵⁶

249. *Ibid.*, paras. 80-82.

250. *Rios v. Venezuela*, 28 January 2009, Series C, No. 194, para. 331. Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_194_ing.pdf.

251. 28 March 2014, Application 013/2011. Available at: <http://en.african-court.org/images/Cases/Judgment/Nobert%20Zongo%20Judgment-%20English.pdf>.

252. Special Rapporteurs for Promoting Freedom of Expression, 2012 Joint Declaration on Crimes against Freedom of Expression, note 191, 4(c)(i)

253. *Huseynova v. Azerbaijan*, 14 April 2017, Application No. 10653/10, para. 115. Available at: <http://hudoc.echr.coe.int/eng?i=001-172661>.

254. Appendix to Recommendation CM/Rec(2016)4 of the Committee of Ministers to Member States on the protection of journalism and safety of journalists and other media actors, note 225, para. II(22).

255. Medellín Declaration, UNESCO Conference on Press Freedom, Safety of Journalists and Impunity, 3-4 May 2007. Available at: <http://www.unesco.org/new/en/unesco/events/prizes-and-celebrations/celebrations/international-days/world-press-freedom-day/previous-celebrations/worldpressfreedomday2009000/medellin-declaration/>.

256. *Hydara v. The Gambia*, 10 June 2014, Case No. ECW/CCJ/APP/30/11, p. 10. Available at: <https://www.opensocietyfoundations.org/sites/default/files/Hydara%20Judgment.pdf>.



In addition to investigating and prosecuting crimes against freedom of expression, there is a legal obligation to provide remedies to victims in appropriate cases. The flows from general obligations, for example under the ICCPR, to provide redress to victims of human rights violations.²⁵⁷ Victims should also be able to pursue civil remedies as appropriate when crimes against freedom of expression have occurred. However, systems should also be in place to ensure that victims can obtain remedies without needing to pursue an independent legal action.²⁵⁸ Remedies should be “proportionate to the gravity of the violations” and include both financial measures and rehabilitation measures to facilitate the safe return of victims to their homes or work, as they might desire.²⁵⁹ Where the victim has been killed, his heirs should benefit from any remedies.²⁶⁰ It is significant that in the Zongo case, noted above, the Court awarded reparations of 25 million CFA (approximately USD 53,000 at the time) for a spouse, 15 million CFA (approximately USD 32,000 at the time) for a child and 10 million CFA (approximately USD 21,000 at the time) for a parent.²⁶¹

C. The Role of Judges in Responding to Attacks on Freedom of Expression

Effectively ending impunity for crimes against freedom of expression requires the coordination of multiple branches of government. However, the judicial branch plays a key role in upholding values of impartiality and independence in the prosecution of these cases. In addition, judicial decisions can create important precedents regarding the obligations of States to prevent, protect and prosecute and award appropriate remedies to victims. Box 9 provides examples of national courts around the world which have done this.

Discussion Point

Do you feel that judges have special responsibilities in these cases? If so, what should they do to make sure they are meeting those responsibilities? Do you feel comfortable with this?

257. ICCPR, Article 2(3).

258. Special Rapporteurs for Promoting Freedom of Expression, 2012 Joint Declaration on Crimes against Freedom of Expression, note 191, para. 5.

259. Special Rapporteurs for Promoting Freedom of Expression, 2012 Joint Declaration on Crimes against Freedom of Expression, note 191, para. 5(b).

260. General Comment No. 34, para. 23.

261. Norbert Zongo v. Burkina Faso, 15 June 2015 (reparations), Application 013/2011. Available at: <http://en.african-court.org/images/Cases/Ruling%20on%20Reparation/Application%20No%20013-2011%20-%20Beneficiaries%20of%20late%20Norbert%20%20Zongo-Ruling%20on%20Reparation.PDF>.





Training Manual for Judges on International Standards on Freedom of Opinion and Expression

Box 9: National Courts and Crimes against Freedom of Expression

Duque v. Ministry of the Interior and Justice, decided by the Colombian Constitutional Court in 2008, involved a claim brought by a journalist after the government cancelled the special protective measures she had benefitted from. The Court ordered the government to conduct a study of the risks to the journalist, to instruct officials on the importance of respecting situations where persons believe their life is in danger, to re-institute the security measures for the petitioner and to meet with her about adapting them to meet her current needs.²⁶²

South African National Editors Forum v. Black Land First involved a group of journalists who were concerned about their safety following an incident outside one of their homes. It involved persons associated with the Black Land First organisation who had protested against their reporting, alleging it was racist. During the protest, two journalists were assaulted by protesters, who also damaged their property and followed them to their places of worship. The South African High Court granted injunctions to prohibit the organisation from directing any acts of intimidation, harassment, assaults or threats towards the applicants, from coming to their homes, from acting in any other manner that would infringe their personal liberty and from making threatening or intimidating gestures on social media that referenced violence, harm or threats.²⁶³

The decision in Softić v. Montenegro by the Court of Montenegro is notable for its finding that awarding damages for moral harm caused by violations of international human rights law fell within its jurisdiction. The case involved two life-threatening attacks on a journalist who was reporting on drug trafficking. Over a period of seven years, the authorities failed meaningfully to investigate the attacks and no prosecutions were initiated. Referencing ECtHR jurisprudence extensively, the Montenegrin Constitutional Court found that authorities had an obligation to investigate attempted murders effectively and thoroughly and that, in this case, prosecutors did not take all reasonable steps to pursue the investigation. It accordingly awarded damages of 7,000 euros.²⁶⁴

Key Points from Module 3:

- ➔ Attacks on journalists and others exercising the right to freedom of expression ('censorship by killing') are a serious and growing problem in countries around the world.
- ➔ States, in addition to refraining from violating freedom of expression themselves, have positive obligations to prevent crimes against freedom of expression being committed by both public and private parties.
- ➔ These include obligations to prevent attacks before they become a problem, protect those who are at risk, and pay special attention to investigating and prosecuting these crimes when they do occur.

262. 23 October 2008, Case No. T-1037/08, as summarised in "Duque v. Ministry of the Interior and Justice", Global Freedom of Expression, Columbia University. Available at: <https://globalfreedomofexpression.columbia.edu/cases/duque-v-ministerio-del-interior-y-de-justicia/>.

263. High Court of South Africa, Gauteng Local Division, Johannesburg, South African National Editors Forum and others v. Black Land First and others, 7 July 2017, Case No. 23897/17, para. 29. Available at: <http://www.saflii.org/za/cases/ZAGPJHC/2017/179.pdf>.

264. As summarised in "Softić v. Montenegro (Constitutional Court)", Global Freedom of Expression, Columbia University. Available at: <https://globalfreedomofexpression.columbia.edu/cases/softic-v-montenegro> (judgment in Montenegrin only).



Module 4: The Right to Access Public Information

Learning Objectives

- ➔ To understand the historical development of the right to access public information globally and in international human rights law.
- ➔ To review features of a strong right to information law under established international standards.

A. International Developments Regarding the Right to Information

The right of access to information is a critical tool for democratic participation, oversight of the State and public administration, and the monitoring of corruption. In democratic systems, in which the State's conduct is governed by publicity and transparency, the right of access to information in the State's possession is a fundamental requirement for ensuring democratic participation, good and transparent conduct of public affairs, and the oversight of government and its authorities by public opinion, as it enables civil society to scrutinize the actions of the authorities.²⁶⁵

-- Office of the Special Rapporteur for Freedom of Expression, Interamerican Commission on Human Rights

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.²⁶⁶

--Declaration on Principles on Freedom of Expression in Africa, Principle IV(1)

a. Human Rights Roots in Right to “Seek” and “Receive” Information

Discussion Point

Based on the text of the guarantee of freedom of expression under international law, what reasoning do you think courts used to find a right to information as part of freedom of expression? Can you think of other bases for this right?

265. Office of the Special Rapporteur for Freedom of Expression, Interamerican Commission on Human Rights, Report 2009: The right of access to information. Available at: http://www.oas.org/dil/access_to_information_iachr_guidelines.pdf.

266. African Commission on Human and Peoples' Rights, Declaration of Principles on the Freedom of Expression in Africa, adopted at the 32nd Ordinary Session, 17-23 October 2002. Available at: <http://www.achpr.org/sessions/32nd/resolutions/62>.





Training Manual for Judges on International Standards on Freedom of Opinion and Expression

The roots of the right to information are in the right to seek and receive information, which is included in the guarantees of freedom of expression found in UDHR and the ICCPR, as well as in the Arab Charter on Human Rights.²⁶⁷ Early on, these provisions were interpreted to refer generally to the free flow of information. For example, the UN General Assembly, in a 1946 Resolution, described freedom of information as follows:

Freedom of information implies the right to gather, transmit and publish news anywhere and everywhere without letters. As such it is an essential factor in any serious effort to promote the peace and progress of the world;²⁶⁸

However, it was not until the 1990s that a consensus began to emerge that the right to freedom of expression also includes the right to access information held by public authorities.

Examples

In 1987, the ECtHR refrained from explicitly recognising that freedom of expression placed disclosure obligations on public authorities.²⁶⁹ However, international discourse on the topic developed significantly in the 1990s and, in 2004, the special rapporteurs for freedom of expression dedicated their annual Joint Declaration to the right to access information held by public authorities.²⁷⁰ The same right also began to be recognised in specific contexts, such as in environmental matters (see, for example, the Aarhus Convention)²⁷¹ or public administration (see the UN Convention against Corruption).²⁷²

In 2006, the Inter-American Court of Human Rights issued a landmark decision recognising that the right to freedom of expression included a right to access information held by public authorities (see Box 10). The ECtHR's position also evolved towards recognising this right with the 2009 decision in *Társaság A Szabadságjogokért v. Hungary*,²⁷³ and in 2011, the Human Rights Committee explicitly acknowledged the right to information as part of freedom of expression in General Comment No. 34.²⁷⁴

267. UDHR, Article 19; ICCPR, Article 19(2); and Arab Charter on Human Rights, Article 32(2).

268. UN General Assembly Resolution 59(I), Calling of an International Conference on Freedom of Information, 14 December 1946. Available at: [http://undocs.org/A/RES/59\(I\)](http://undocs.org/A/RES/59(I)).

269. *Leander v. Sweden*, 26 March 1987, Application No. 9248/81. Available at: <http://hudoc.echr.coe.int/eng?i=001-57519>.

270. Special Rapporteurs for Promoting Freedom of Expression, 2004 Joint Declaration. Available at: <https://www.osce.org/fo-m/99558?download=true>.

271. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, adopted 25 June 1998, in force 30 October 2001. Available at: <https://www.unece.org/env/pp/treatytext.html>.

272. UN Convention against Corruption, adopted 31 October 2003, in force 14 December 2005, Article 10.

273. *14 April 2009*, Application No. 37374/05, available at: <http://hudoc.echr.coe.int/eng?i=001-92171>.

274. General Comment No. 34, para. 19.



Box 10: Claude Reyes v. Chile

Marcel Claude Reyes, the Executive Director of a foundation promoting sustainable developing in Chile, had requested information from Chile's Foreign Investment Committee about a forestry exploitation project which was controversial due to its potential environmental impact. In response, the Committee only disclosed part of the requested information and gave no reason for not disclosing the remaining information.²⁷⁵ The IACtHR, in a groundbreaking development, recognised that a right to information was included within the guarantees for freedom of expression in the American Convention on Human Rights:

In relation to the facts of the instant case, the Court finds that, by expressly stipulating the right to “seek” and “receive” “information,” Article 13 of the Convention protects the right of all individuals to request access to State-held information, with the exceptions permitted by the restrictions established in the Convention. Consequently, this article protects the right of the individual to receive such information and the positive obligation of the State to provide it . . . The delivery of information to an individual can, in turn, permit it to circulate in society, so that the latter can become acquainted with it, have access to it, and assess it. In this way, the right to freedom of thought and expression includes the protection of the right of access to State-held information, which also clearly includes the two dimensions, individual and social, of the right to freedom of thought and expression that must be guaranteed simultaneously by the State.²⁷⁶

The Court went on to find that the restriction on Marcel Claude Reyes's right to information was not justified. Among other reasons, it could not be based on a law, because Chile had no legislation regulating restrictions on accessing State-held information.²⁷⁷

As discussed in Module 3, States have positive obligations under international human rights law as well as negative ones and these are clearly invoked in the context of the right to information. Thus, States are obligated to “ensure that legislation on the right to access information held by public authorities is in place and being implemented.”²⁷⁸ In addition, States have positive obligations to proactively disclose information and to put in place a system for handling and responding to requests for information. As stated in General Comment No. 34:

To give effect to the right of access to information, States parties should proactively put in the public domain Government information of public interest. States parties should make every effort to ensure easy, prompt, effective and practical access to such information. States parties should also enact the necessary procedures, whereby one may gain access to information, such as by means of freedom of information legislation.²⁷⁹

275. Marcel Claude Reyes v. Chile, 19 September 2006, Series C, No. 151, paras. 57(12), 57(13) and 66. Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.pdf.

276. *Ibid.*, para. 77.

277. *Ibid.*, para. 94.

278. 2018 Joint Declaration on Media Independence and Diversity in the Digital Age, para. 1(a). Available at: https://www.ohchr.org/Documents/Issues/Opinion/JointDeclaration2May2018_EN.pdf

279. Para. 19.





Training Manual for Judges on International Standards on Freedom of Opinion and Expression

The right to information has also been included in the Sustainable Development Goals (SDGs), notably in target 16.10, which states: “Ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements”. This is measured by SDG Indicator 16.10.2, which assesses: “Number of countries that adopt and implement constitutional, statutory and/or policy guarantees for public access to information.” For this purpose, the relationship between national and international norms may be very important.

b. Global Growth in Right to Information Laws

At the same time as the right to information was being recognised under international human rights law, an increasing number of national legislatures were adopting right to information laws. This trend was rapid and significant: in 1990, only 14 countries had right to information laws; by 2018, well over 120 countries have such laws.²⁸⁰

Discussion Point

Can you think what was the first country to adopt a right to information law and when that might have been? What do you think might have been the first non-Western country to adopt such a law?

Examples

The first wave of right to information laws occurred in Western countries. However, now such laws are a global phenomenon. Around 1995, countries in Eastern and Central Europe and Asia began adopting laws and then, in 2000, the Latin American, Caribbean and African regions saw significant adoption trends. The Arab region has been slow, in contrast, to enact these laws and, as at the time of writing, only six Arab countries had adopted right to information laws, with Jordan having been the first.²⁸¹

The strength of laws has generally increased over time, meaning laws adopted later are much stronger than those adopted earlier. As a result, right to information laws in Western Europe tend to be some of the lowest quality laws. In contrast, the top ten strongest laws globally are all found outside of western countries, with Afghanistan, Mexico, Serbia, Sri Lanka and Slovenia having the strongest laws.²⁸² Within the Arab World, Tunisia has the strongest right to information law.

280. “Access to Information Laws”, Right 2 Info, available at: <https://www.right2info.org/access-to-information-laws>; and the RTI Rating, available at: <https://www.rti-rating.org>.

281. Centre for Law and Democracy and Access Info Europe, RTI Rating Data Analysis Series: Overview of Results and Trends, 28 September 2013, pp. 8-9. Available at: <http://www.law-democracy.org/live/wp-content/uploads/2013/09/Report-1.13.09.Overview-of-RTI-Rating.pdf>.

282. RTI Rating. Available at: <https://www.rti-rating.org>.



B. Elements of a Strong Right to Information Law

The recognition of a human right to access information held by public authorities has been accompanied by the development of a number of international standards and model laws outlining what elements a strong law should contain.²⁸³ These are reviewed in this section.

a. The Right of Access and Scope of the Law

A fundamental principle underlying the right to information is that of maximum disclosure: there is a presumption in favour of access to information, which is only overcome in a limited set of circumstances.²⁸⁴ This means that the right should apply broadly to all sorts of information; as stated by the Inter-American Juridical Committee's Principles on the Right to Access Information, the right "applies to all significant information, defined broadly to include everything which is held or recorded in any format or media."²⁸⁵

Like other fundamental human rights, this right should accrue to everyone. This is well established in international standards, which variously provide that the right to request information should extend to "anyone present in the territory", "every individual", or "everyone....without discrimination on any ground, including that of national origin".²⁸⁶ This accordingly includes non-citizens. Legal entities should also be able to make requests, as this allows organisations acting in the public interest to obtain information.

Discussion Point

Governments often argue against extending the right to make requests for information to non-citizens. Do you believe that this argument has merit? Why or why not?

283. See, for example, Organization of American States, General Assembly AG/RES. 2607 (XL-)/10), adopting a "Model Inter-American Law on Access to Public Information", 8 June 2010, available at: https://www.oas.org/dil/AG-RES_2607-2010_eng.pdf; and African Commission on Human and Peoples' Rights, Model Law on Access to Information in Africa, available at: http://www.achpr.org/files/instruments/access-information/achpr_instr_model_law_access_to_information_2012_eng.pdf.

284. Special Rapporteurs for Promoting Freedom of Expression, 2004 Joint Declaration, note 270; and Article 19, Principles on Freedom of Information Legislation, June 1999, Principle 1, available at: <http://undocs.org/E/CN.4/2000/63>.

285. Resolution 147 of the 73rd regular period of sessions, 7 August 2008, Principle 3. Available at: https://www.oas.org/en/sla/dil/docs/CJI-RES_147_LXXIII-O-08_eng.pdf.

286. Principles on Freedom of Information Legislation, note 284, Principle 1; OAS Special Rapporteur for Freedom of Expression, Declaration of Principles on Freedom of Expression, Principle 4, available at: <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=26>; and Recommendation Rec(2002)2 of the Committee of Ministers to the Member States on Access to Official Documents, para. III, available at: <https://rm.coe.int/16804c6fcc>.





Training Manual for Judges on International Standards on Freedom of Opinion and Expression

Similarly, the public authorities to which the law applies should also be broad in scope:

For purposes of disclosure of information, the definition of public body should focus on the type of service provided rather than on formal designations. To this end, it should include all branches and levels of Government, including local government, elected bodies, bodies which operate under a statutory mandate, nationalized industries and public corporations, non-departmental bodies or “quangos” (quasi non-governmental organizations), judicial bodies and private bodies which carry out public functions (such as maintaining roads or operating rail lines). Private bodies themselves should also be included if they hold information whose disclosure is likely to diminish the risk of harm to key public interests, such as the environment and health.²⁸⁷

The right to information should include information held by the judicial and legislative branches, and not just the executive one, although some international standards are inconsistent on this point. The Council of Europe Recommendation on access to information, for example, simply provides that States should examine “in the light of their domestic law and practice” to what extent principles on the right to information could be applied to legislative and judicial bodies. Better practice, however, is to include the legislative and judicial branches.

b. Proactive Disclosure

Although the core of the right to information is an obligation on government to respond to requests for information, States also have obligations to disclose information proactively, regardless of whether it is requested. As stated in General Comment No. 34: “States Parties should proactively put in the public domain Government information of public interest. States parties should make every effort to ensure easy, prompt, effective and practical access to such information.”²⁸⁸ This ensures that important public information is broadly accessible to the public, especially those who may not have the knowledge or ability to lodge a request for information themselves. Routine proactive disclosure may also minimise the burden of responding to individual requests in the long run (see Box 11).

Discussion Point

Even though, as we shall see, the Jordanian right to information law does not provide for proactive disclosure, that does not prevent public authorities from performing well in this area. Do you feel that Jordanian public authorities disclose a lot of information or not? Are there types of information that you feel they should additionally be disclosing?

287. Principles on Freedom of Information Legislation, note 284, Principle 1.

288. General Comment No. 34, para. 19.



**Box 11: Österreichische Vereinigung zur Erhaltung, Stärkung
und Schaffung eines wirtschaftlich gesunden land- und
forstwirtschaftlichen Grundbesitzes v. Austria**

This case resulted from an Austrian public authority's refusal to provide information on transfers of ownership of agricultural and forest land. The ECtHR, in finding that this restriction on the public's access to information was not justified, noted that the failure of the authority to disclose the information proactively, creating an effective monopoly for itself over the information, was the real cause of the authority's claimed difficulties in responding to the request for information:

Given that the Commission is a public authority deciding disputes over "civil rights" within the meaning of Article 6 of the Convention (see, *Eisenstecken v. Austria*, no. 29477/95, § 20, ECHR 2000-X, with further references), which are, moreover, of considerable public interest, the Court finds it striking that none of the Commission's decisions was published, whether in an electronic database or in any other form. Consequently, much of the anticipated difficulty referred to by the Commission as a reason for its refusal to provide the applicant association with copies of numerous decisions given over a lengthy period was generated by its own choice not to publish any of its decisions.²⁸⁹

In other words, the authority could not rely on difficulties created by its own failure to disclose information proactively as justification for denying requests for information.

Information that should be disclosed proactively includes "important information of significant public interest".²⁹⁰ This includes information the disclosure of which promotes transparency and efficiency in public administration, or which encourages informed public participation in matters of public interest.²⁹¹

289. 28 November 2013, Application No. 39534/07, para. 46. Available at: <http://hudoc.echr.coe.int/eng?i=001-139084>.

290. African Commission on Human and Peoples' Rights, Declaration of Principles on the Freedom of Expression in Africa, note 266, Principle IV(2).

291. Recommendation Rec(2002)2 of the Committee of Ministers to the Member States on Access to Official Documents, para. XI. Available at: <https://rm.coe.int/16804c6fcc>.





Training Manual for Judges on International Standards on Freedom of Opinion and Expression

Examples

Some standards have offered guidance on what information should, at a minimum, be disclosed proactively, such as operational information about public authorities, information on how the public can make complaints or give input into policy decisions and the content of decisions or policies which affect the public. 292 The Inter-American Juridical Committee proposes the following:

Public bodies should disseminate information about their functions and activities – including, but not limited to, their policies, opportunities for consultation, activities which affect members of the public, their budget, and subsidies, benefits and contracts – on a routine and proactive basis, even in the absence of a specific request, and in a manner which ensures that the information is accessible and understandable.²⁹³

Beyond these minimum expectations, more extensive proactive disclosure may not be immediately possible for all public authorities, given capacity and resource constraints. However, in the meantime, States should put in place systems “to increase, over time, the amount of information subject to such routine disclosure.”²⁹⁴

c. Requesting Procedures

A right to information can only be fully exercised if the procedure for requesting information is sufficiently accessible (user friendly). Procedures should accordingly be “simple, rapid and free or low-cost.”²⁹⁵ This should include special provisions for certain groups, such as those who are illiterate, do not speak the language of record or have disabilities such as blindness.²⁹⁶ Exercising fundamental rights should not require justifying those rights, and therefore persons requesting information should not be required to give their reasons for making the request.²⁹⁷

Timelines for authorities to respond to requests should be “clear and reasonable.”²⁹⁸ The Aarhus Convention, governing access to information on environmental matters, provides that information should be provided “as soon as possible” and at the latest within one month. It permits an extension of up to two months if the “volume and the complexity of the information” justify it, in which case the requestor must be informed of the extension.²⁹⁹

Although ideally requesting and receiving information would entail no costs, to facilitate equal access to information, realistically the financial burdens of reproducing information may justify the imposition of some limited fees by public authorities. General Comment No. 34 establishes that fees for requesting government information should not be “such as to constitute an unreasonable impediment to access to information.”³⁰⁰ Other international standards have established more specific parameters for what constitutes an “unreasonable impediment”, namely that fees should not exceed the cost of copying and sending the requested information.³⁰¹

292. Principles on Freedom of Information Legislation, note 284, Principle 2.

293. Resolution 147, note 285, Principle 4.

294. Special Rapporteurs for Promoting Freedom of Expression, 2004 Joint Declaration, note 270. Available at: <https://www.osce.org/fom/38632?download=true>.

295. Special Rapporteurs for Promoting Freedom of Expression, 2004 Joint Declaration, note 270.

296. Principles on Freedom of Information Legislation, note 284, Principle 5.

297. Recommendation Rec(2002)2 of the Committee of Ministers to the Member States on Access to Official Documents, note 291, para. (1).

298. Inter-American Juridical Committee, Resolution 147, note 285, Principle 5.

299. Note 271, Article 4(2).

300. General Comment No. 34, para. 19.

301. Inter-American Juridical Committee, Resolution 147, note 285, Principle 4.



Finally, the right to information is understood to have social and individual dimensions. When individuals request information and share that information, they contribute to the social dimension of the right and increase overall public access to the information. Accordingly, requestors should be able freely to share and otherwise reuse information which has been disclosed by public authorities.³⁰²

d. Exceptions and Refusals

It is clear that there should be a “narrow, carefully tailored system of exceptions to protect overriding public and private interests”³⁰³ Otherwise, the regime of exceptions can undermine the right to information entirely. As an initial matter, the general three-part test for restrictions on freedom of expression under international law also applies to exceptions to the right to information. Any restrictions must be provided for by law, protect a legitimate interest and be necessary to protect that interest.³⁰⁴

Under international law, this has also been translated into a slight different three-part test specifically for exceptions to the right to information, as follows:

The law should set out clearly the legitimate interests which might override the right of access.

Second, access should be denied only where disclosure of the information poses a risk of harm to a legitimate interest.

Finally, the law should provide for a public interest override in cases where the overall public interest would be served by disclosure, even where releasing the information would cause harm to a legitimate interest.

Discussion Point

Does this test make sense to you? If not, what are the problems with it? In practice, where do you suppose most right to information laws are weakest in relation to this test?

In terms of the first part of the test, there is broad international agreement in terms of what interests exceptions may legitimately protect.

302. Marcel Claude Reyes v. Chile, note 275, para. 77.

303. Special Rapporteurs for Promoting Freedom of Expression, 2004 Joint Declaration, note 270..

304. Ibid., para. 77.



Examples

The Council of Europe Recommendation on this issue provides:

1. Member states may limit the right of access to official documents. Limitations should be set down precisely in law, be necessary in a democratic society and be proportionate to the aim of protecting:

- i. national security, defence and international relations;
- ii. public safety;
- iii. the prevention, investigation and prosecution of criminal activities;
- iv. privacy and other legitimate private interests;
- v. commercial and other economic interests, be they private or public;
- vi. the equality of parties concerning court proceedings;
- vii. nature;
- viii. inspection, control and supervision by public authorities;
- ix. the economic, monetary and exchange rate policies of the state;
- x. the confidentiality of deliberations within or between public authorities during the internal preparation of a matter.³⁰⁵

The Inter-American Commission on Human Rights take a more general approach:

Access to information held by the state is a fundamental right of every individual . . . This principle allows only exceptional limitations that must be previously established by law in case of a real and imminent danger that threatens national security in democratic societies.³⁰⁶

Regardless of the specific interest being protected, access should not be refused merely because it falls within the scope of the exception. Rather, a harm test should apply, in which access to information may be refused only where disclosure poses a real risk of harm to the interest.³⁰⁷ Furthermore, even where there is such a risk of harm, the information should still be disclosed where the benefits that flow from this are greater than the harm to the protected interest. Such an approach should help ensure that exceptions are applied in an appropriately narrow fashion.

A few other principles should be respected as part of the regime of exceptions. First, requested information should be released as soon as an exception ceases to apply. Right to information laws should include severability clauses so that if only part of a document is sensitive, that part

305. Recommendation Rec(2002)2 of the Committee of Ministers to the Member States on Access to Official Documents, note 291, para. IV.

306. Inter-American Commission on Human Rights, Declaration of Principles on Freedom of Expression, note 286, Principle 4.

307. Special Rapporteurs for Promoting Freedom of Expression, 2004 Joint Declaration, note 270.



should be redacted and the remainder of the information should still be disclosed.³⁰⁸ Finally, authorities should be required to provide reasons for any refusal of a request.³⁰⁹

In order to ensure that a narrowly tailored regime of exceptions is applied appropriately, it is also important the broader legal framework (beyond the right to information law itself) reflects the principles of openness and transparency. This means that where there is a conflict between laws, the right to information law should prevail over other legislation to the extent of any inconsistency.³¹⁰ In the long term, States should commit to reviewing and, as necessary, revising legislation generally to bring it into line with right to information standards.³¹¹ In particular, secrecy laws should be amended to comply with right to information principles.³¹²

Box 12: Addressing Refusals to Disclose Information in the Human Rights Committee

The UN Human Rights Committee has addressed the right to information held by public authorities, and the corresponding positive obligations of States, in recent years. Toktakunov v. Kyrgyzstan involved a request for information on the number of individuals who had been sentenced to death, which Kyrgyzstan had denied on the grounds that the information was confidential. The Committee, citing resolutions of the Commission on Human Rights on the matter, noted that “the general public has a legitimate interest in having access to information on the use of the death penalty” and, in the absence of any explanation as to why this information needed to be kept secret, found that the restriction was not necessary for the protection of a legitimate interest under the ICCPR.³¹³

In contrast, the Human Rights Committee determined that freedom of expression was not violated in Castañeda v. Mexico. In that case, a journalist had requested access to paper ballots following an election, which Mexico refused (among other reasons because, by law, paper ballots were destroyed after the conclusion of the electoral process). The Committee noted that a legal mechanism was in place for verifying the vote count, which included ballot paper accounts which the journalist was given access to. Given this, and “the nature of the information and the need to preserve its integrity; and of the complexity of providing access to the information requested by the author”, the Committee found that the exception was “intended to guarantee the integrity of the electoral process in a democratic society”. As a result, no violation of freedom of expression had occurred.³¹⁴

308. Recommendation Rec(2002)2 of the Committee of Ministers to the Member States on Access to Official Documents, note 291, para. VII(2).

309. General Comment No. 34, para. 19.

310. Special Rapporteurs for Promoting Freedom of Expression, 2004 Joint Declaration, note 270.

311. Principles on Freedom of Information Legislation, note 284, Principle 8.

312. African Commission on Human and Peoples' Rights, Declaration of Principles on the Freedom of Expression in Africa, note 266, Principle IV(2).

313. Human Rights Committee, 28 March 2011, Communication No. 1470/2006, para. 7.7. Available at: http://www.bayefsky.com/pdf/kyrgyzstan_t5_iccpr_1470_2006.pdf.

314. Human Rights Committee, 9 August 2013, Communication No. 2202/2012, paras. 7.6 and 7.7 Available at: <http://hrlibrary.umn.edu/undocs/2202-2012.html>.





Training Manual for Judges on International Standards on Freedom of Opinion and Expression

e. Appeals

Appeal procedures should be in place for when a request for information is either refused or is otherwise not processed in accordance with the rules.³¹⁵ Such appeal procedures should be “expeditious and inexpensive”.³¹⁶ Procedures should be available, first, at the level of an internal appeal. This means that public authorities should provide for an internal appeal to a designated higher official within the same authority who has the power to review the initial decision.³¹⁷

Requestors should have a right to lodge an appeal with an “independent body with full powers to investigate and resolve such complaints.”³¹⁸ It is important that members of this independent body are appointed in an open manner, and that they are held to strict standards of professionalism, independence and competence.³¹⁹ The body should be able to issue binding orders on the matters before it.³²⁰

Discussion Point

One of the biggest challenges here in many countries is ensuring that the administrative oversight body is independent. Do you think it is possible to establish a truly independent administrative oversight body in Jordan? What sorts of procedures for appointing members could be adopted to ensure this?

Finally, requestors should also have the right to appeal to the courts against the decisions of the administrative oversight body.³²¹ In this case, the courts should have the power to review the case on its merits.³²² Note that the government should bear the burden of justifying any decision not to disclose information and other actions it has taken under the right to information law.³²³

315. General Comment No. 34, para. 19.

316. Recommendation Rec(2002)2 of the Committee of Ministers to the Member States on Access to Official Documents, note 291, para. IX.

317. Principles on Freedom of Information Legislation, note 284, Principle 5.

318. Special Rapporteurs for Promoting Freedom of Expression, 2004 Joint Declaration, note 270.

319. Principles on Freedom of Information Legislation, note 284, Principle 5.

320. African Commission on Human and Peoples' Rights, Model Law on Access to Information for Africa (2012), Article 81. Available at: http://www.achpr.org/files/instruments/access-information/achpr_instr_model_law_access_to_information_2012_eng.pdf.

321. Inter-American Juridical Committee. Resolution 147, note 285, Principle 8.

322. Principles on Freedom of Information Legislation, note 284, Principle 5.

323. Special Rapporteurs for Promoting Freedom of Expression, 2004 Joint Declaration, note 270.



f. Sanctions and Protections

An effective right to information system requires that there is sufficient accountability when officials seek to unlawfully hide or otherwise obstruct access to information. Accordingly, the law should provide for sanctions to be imposed on those who “wilfully obstruct access to information”.³²⁴ In most cases, right to information laws provide that obstructing access to or wilfully destroying records is a criminal offense³²⁵ but administrative sanctions for obstructing access can also be very useful.

In addition to sanctioning wrong, there should be legal protections for both those who release information in good faith pursuant to the right to information law and for whistleblowers.

Examples

According to the African Commission on Human and Peoples’ Rights, no one should 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”.³²⁶ The special rapporteurs on freedom of expression, in their 2004 Joint Declaration, also that those who disclose breaches of human rights or humanitarian law should be protected.³²⁷

Provisions on whistleblowers should provide protection against legal, administrative and employment-related sanctions.³²⁸

g. Promotional Measures

Right to information laws need support to be implemented properly and States therefore have obligations to promote the right to information. It is, for example, necessary to educate the public about their rights and to combat the culture of impunity and secrecy that can undermine right to information legislation.³²⁹ Appropriate promotional measures will vary among countries, depending on local contexts and needs. However, there are some specific elements that should be established in law and implemented in practice.

First, there should be an institutional infrastructure in place to promote the right to information. This includes having each public authority appoint officials (information officers) with dedicated responsibilities to implement the right to information law. A central body should also be given overall responsibility for promoting the right to information.³³⁰

324. *Ibid.*, note 270.

325. Principles on Freedom of Information Legislation, note 284, Principle 1.

326. African Commission on Human and Peoples’ Rights, Declaration of Principles on the Freedom of Expression in Africa, note 266, Principle IV(2).

327. Special Rapporteurs for Promoting Freedom of Expression, 2004 Joint Declaration, note 270.

328. *Ibid.*, note 270.

329. Principles on Freedom of Information Legislation, note 284, Principle 3.

330. See RTI Indicators 54 and 55, under “Scoring”, Global Right to Information Rating. Available at: <https://www.rti-rating.org/country-data/scoring/>.





Training Manual for Judges on International Standards on Freedom of Opinion and Expression

Second, public authorities should be required to meet minimum records management standards. Systems should be put in place to promote higher standards in this area over time³³¹ and States should establish clear rules for preserving and destroying documents.³³² Public authorities should also dedicate sufficient resources to ensuring adequate levels of public record-keeping.³³³ It is also important that public authorities should “as far as possible, make available information on the matters or activities for which they are responsible, for example by drawing up lists or registers of the documents they hold.”³³⁴

Third, the law should require public awareness raising efforts, as well as training programmes for officials on the right to information. Similarly, there should be mandatory reporting by public authorities on the measures they have taken to implement the right to information, including processing of requests for information,³³⁵ while a central body should prepare a consolidated annual report providing an overview of everything that has been done in this regard.

C. Assessing Right to Information Laws: the RTI Rating

The RTI Rating is a methodology developed by two civil society organisations, the Centre for Law and Democracy and Access Info Europe. It provides a standardised means of assessing the strength of the legal framework for the right to information. First launched in 2011, it has been applied to all national right to information laws so that it now includes ratings of the laws in over 120 countries.³³⁶

The rating assesses laws based on 61 separate indicators, derived from international standards and better national practice. These, in turn, are grouped into seven main categories, which largely correspond to the headings in part B of this module above. The categories of the RTI Rating are:

1. Right of Access
2. Scope
3. Requesting Procedures
4. Exception and Refusals
5. Appeals
6. Sanctions and Protections
7. Promotional Measures

Jordan was originally a leader in the Arab region on this issue, being the first Arab country to adopt a right to information law, namely Law No. 47 of 2007 Guaranteeing the Right to Obtain Information. Despite this significant achievement, the law itself is relatively weak when assessed against international standards. As of December 2020, the Jordanian Law ranks in the bottom ten from among all laws globally, at number 119 out of 128 countries. The breakdown of the scores of the Jordanian Law according to the seven categories of the RTI Rating are provided in the table below.

331. Special Rapporteurs for Promoting Freedom of Expression, 2004 Joint Declaration, note 270.

332. Recommendation Rec(2002)2 of the Committee of Ministers to the Member States on Access to Official Documents, note 291, para. X(2)(ii).

333. Principles on Freedom of Information Legislation, note 284, Principle 1.

334. Recommendation Rec(2002)2 of the Committee of Ministers to the Member States on Access to Official Documents, note 291, para. X(2)(iii).

335. Inter-American Juridical Committee, Resolution 147, note 285, Principle 10.

336. Available at: <https://www.rti-rating.org/>.



RTI Scores: Jordan

Category	Max Points	Score	Percentage
1. Right of Access	6	0	0 %
2. Scope	30	26	87 %
3. Requesting Procedures	30	6	20 %
4. Exceptions and Refusals	30	10	33 %
5. Appeals	30	9	30 %
6. Sanctions and Protections	8	0	0 %
7. Promotional Measures	16	5	31 %
Total score	150	56	37 %

Discussion Point

Does this assessment of the Jordanian Law surprise you? What about the performance of the Law in the different categories? Does it seem odd that the Law does so well in terms of Scope but does not even get a passing grade on the other categories?

It should be stressed that the RTI Ranking does not look at implementation, which is crucial for ensuring actual protection for the right to information. A country with a strong law can fail when it comes to implementation. On the other hand, it is possible for a country with a weak law to nonetheless have a fairly rigorous right to information system. Even in the absence of a progressive legal framework, strong right to information policies can be developed.

CLD has also developed a methodology for assessing implementation of right to information laws. It is designed as a comprehensive method for evaluating progress on implementing the many facets of a right to information regime. For more information, see www.rti-evaluation.org.

Key Points from Module 4:

The right to information held by public authorities is now recognised as a human rights, specifically as part of the right to freedom of expression. This imposes positive obligations on States to disclose information proactively and to respond to requests for information.

Enacting right to information legislation will help to realise this obligation. International standards indicate what elements should be included in a strong right to information law.





Training Manual for Judges on International Standards on Freedom of Opinion and Expression

Module 5: Media Regulation to Promote Free, Independent and Diverse Media

Learning Objectives

To understand the overarching international law standards governing regulation of the media.

To examine the application of international standards in different media sectors, namely journalism, print media, broadcasting and public service media.

General Principles Governing Media Regulation

Discussion Point

Can you think of any general principles that should govern the regulation of the media? What might these be?

Much of the content of the prior modules in this Toolkit focuses on the need broadly to protect freedom of expression and the free flow of information, as well as the narrow and careful application of any limits on freedom of expression. This is especially true in the context of the media. The UN Human Rights Committee's General Comment No. 34 states:

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 Covenant rights. It constitutes one of the cornerstones of a democratic society . . . The free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential.³³⁷

Nonetheless, appropriate regulation of the media is not only permissible but in some contexts necessary to guarantee a free and vibrant exchange of information and ideas in society. This Module, in examining the proper scope of media regulation, begins by reviewing the key general standards which apply here.

337. Para. 13.



a. Independent and Transparent Regulatory Regimes and Bodies

Any media regulation should be overseen by an independent body and operate in a transparent fashion to avoid undue or abusive restrictions on freedom of expression or permitting undue political or other influences over the media. Regulatory bodies, in particular, should make fair and impartial decisions. As stated by the special rapporteurs for freedom of expression in their 2003 Joint Declaration: “[A]ll public authorities which exercise formal regulatory powers over the media should be protected against interference, particularly of a political or economic nature”.³³⁸

The exact means of ensuring such independence will vary depending on the context and political systems of any given country. However, there are several general measures which can be taken to promote independence and transparency. Various Council of Europe Recommendations on regulating the media, summarising these concerns, highlight the importance of accountability of any regulatory body, clarity in its mandate and structure, the appointment process for its members and the manner in which funding is provided to it.³³⁹ The latter two points are of particular importance here.

Examples

These approaches are reiterated in various international standards on media regulatory bodies, especially relating to broadcasting authorities. For example, the special rapporteurs for freedom of expression call for an appointments process for members of any regulatory body which is transparent, incorporates public input and is not be controlled by a particular political party.³⁴⁰ Similarly, the Declaration of Principles on Freedom of Expression in Africa calls for broadcasting regulatory authorities to be “formally accountable to the public through a multi-party body.”³⁴¹

Discussion Point

Do you believe that it would be possible to create an independent body to regulate the media in Jordan? How is it currently? What needs to be done to make the existing regulators more independent?

338. Special Rapporteurs for Promoting Freedom of Expression, 2003 Joint Declaration. Available at: <https://www.osce.org/fo-m/28235?download=true>.

339. See, for example, Recommendation (2000) 23 of the Committee of Ministers to Member States on the Independence and Functions of Regulatory Authorities for the Broadcasting Sector, 20 December 2000, available at: [https://www.ebu.ch/files/live/sites/ebu/files/Publications/Reference%20texts/CoE%20-%20Media%20Freedom%20and%20Pluralism/REF%20COE-CM-Rec\(2000\)23.pdf](https://www.ebu.ch/files/live/sites/ebu/files/Publications/Reference%20texts/CoE%20-%20Media%20Freedom%20and%20Pluralism/REF%20COE-CM-Rec(2000)23.pdf); and Recommendation (2012) 1 of the Committee of Ministers to Member States on Public Service Media Governance, 15 February 2012, available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805cb4b4.

340. 2003 Joint Declaration, note 338.

341. African Commission on Human and Peoples' Rights, adopted at the 32nd Ordinary Session, 17-23 October 2002, Principle VII(2). Available at: <http://www.achpr.org/sessions/32nd/resolutions/62>.





Training Manual for Judges on International Standards on Freedom of Opinion and Expression

b. Promoting Media Diversity

Freedom of expression includes the right to seek and receive information, as well as to express one's opinions. As discussed in Module 4, this places an obligation on States to provide access to information held by public authorities. But it also places a positive obligation on States to encourage a diverse flow of information and ideas in society, in particular as part of the right of everyone to seek and receive information. Promoting media diversity should accordingly be an important goal of any system for regulation of the media.

This is important, first of all, to ensure that minority groups and voices participate in the exchange of and have access to information in society. As stated by the IACtHR, "freedom of expression requires, in principle. . . that there be no individuals or groups that are excluded from access" to the media.³⁴² Promoting a diverse media can ensure that the rights of all media users, including members of ethnic and linguistic minorities, are protected.³⁴³

Similarly, a diverse media plays a key role in promoting the kind of discourse necessary to sustain a healthy democracy. As stated by the ECtHR:

As [the Court] has often noted, there can be no democracy without pluralism. Democracy thrives on freedom of expression. It is of the essence of democracy to allow diverse political programmes to be proposed and debated, even those that call into question the way a State is currently organised, provided that they do not harm democracy itself.³⁴⁴

In order to ensure that a diversity of voices participate in the media, State action to limit media monopolies is appropriate. As stated in General Comment No. 34:

The State should not have monopoly control over the media and should promote plurality of the media. Consequently, States parties should take appropriate action, consistent with the Covenant, 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.³⁴⁵

States are also obligated to foster diversity in other ways. As summarised in the section on broadcasting, these include measures to promote different types of broadcasters (diversity of outlet), diversity of source (ownership), and diversity of content (see Box 14).

Discussion Point

Can you think of some of the benefits that media diversity creates for society? Do you feel that media diversity is strong in Jordan or that this is an area where more attention is needed.

342. IACtHR, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, Advisory Opinion OC-5/85, 13 November 1985, Series A, No. 5, para. 34. Available at: http://www.worldcourts.com/iacthr/eng/decisions/1985.11.13_Compulsory_Membership.pdf.

343. General Comment No. 34, para. 14.

344. *Centro Europa 7 S.R.L. and Di Stefano v. Italy*, 7 June 2012, Application No. 38433/09, para. 129. Available at: <http://hudoc.echr.coe.int/eng?i=001-111399>.

345. General Comment No. 34, para. 40.



c. Preserving Editorial Independence and Avoiding Censorship

States have positive obligations to guarantee a respect for media independence, especially editorial independence.³⁴⁶ In part, this is an extension of the idea of independent governing bodies. States should respect media independence and not engage in behaviour which undermines that.

Editorial independence means that media must have discretion in deciding what to publish and what not to publish, and in making other decisions related to content. These decisions should be made by media staff themselves (not, for example, by governing bodies where the media is publicly-owned and ideally also not by the owners of private media). Editorial independence may be undermined by abuse of State powers, State advertising or requirements that the media carry messages from certain political figures.³⁴⁷

In order for a free exchange of ideas to occur around public issues, there must also be “a free press and other media able to comment on public issues without censorship”.³⁴⁸ Direct or prior forms of censorship designed to limit media coverage of sensitive political or social issues are inappropriate outside of the extremely limited cases where the strict three-part test for restrictions on freedom of expression is met. As the ECtHR has stated:

The Convention does not in terms prohibit the imposition of prior restraints on publication, as such . . . On the other hand, the dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court. This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest.³⁴⁹

Indirect forms of censorship are problematic as well. As noted by the UN Special Rapporteur for Freedom of Expression: “[M]any Governments have resorted to indirect ways to censor or shut down media outlets that express independent voices . . . the main impact of these policies is to create an uncertain environment for media professionals, thus fostering self-censorship and shunning any meaningful criticism of public policies and authorities.”³⁵⁰ Indirect censorship may also take the form of abuse of other means of control over the media. Accordingly, in applying administrative rules related to tax, registration or other matters, States should develop “particularly stringent criteria” to ensure that such rules are not abused to harass the media.³⁵¹

346. Special Rapporteurs for Promoting Freedom of Expression, 2018 Joint Declaration on Media Independence and Diversity in the Digital Age, para. 1(b)(ii). Available at: https://www.ohchr.org/Documents/Issues/Opinion/JointDeclaration2May2018_EN.pdf.

347. 2003 Joint Declaration, note 338; and Special Rapporteurs for Promoting Freedom of Expression, 2010 Tenth Anniversary Joint Declaration: Ten Key Challenges to Freedom of Expression in the Next Decade, para. 1(d), available at: <https://www.osce.org/fom/41439?download=true>.

348. General Comment No. 34, para. 13.

349. *Observer and Guardian v. United Kingdom*, 26 November 1991, Application No. 13585/88, para. 60. Available at: <http://hudoc.echr.coe.int/eng?i=001-57705>.

350. Report of the Special Rapporteur on the promotion and protection of the right to freedom of expression, 28 February 2008, para. 21. Available at: <http://undocs.org/A/HRC/7/14>.

351. Special Rapporteurs for Promoting Freedom of Expression, 2018 Joint Declaration on Media Independence and Diversity in the Digital Age, note 346, paras. 1(b)(iv) and 3(e).





Training Manual for Judges on International Standards on Freedom of Opinion and Expression

B. Special Concerns in the Regulation of Different Media Sectors

The general principles described above are necessarily applied differently according to the type of media being regulated. This section examines the permissible scope of regulation under international law for journalism, print media, broadcasting and public service media. It does not include a discussion of the regulation of the Internet, as this is discussed in Module 6.

a. Journalism

A “vibrant, active investigative journalism” plays an important role in democracy and society as a whole.³⁵² It is therefore imperative that regulation of journalists does not impede this work. This section looks at licensing and accreditation schemes for journalists and protection of confidential sources.

Individual journalists should not have to obtain a license or even to register and the law should not restrict who may engage in journalistic activities.³⁵³ State mandated systems of registration for journalists do not fall within the permissible scope of restrictions on freedom of expression.³⁵⁴ This is mainly based on the fact that what journalists do, as opposed to other professions, is itself an exercise of the right to freedom of expression. It also reflects the fact that journalist activities are pursued by wide range of actors, extending beyond professional reporters to those who self-publish or blog.³⁵⁵ While professional media organisations may engage in self-regulation or set internal standards for their members, the State should not require journalists to belong to any such organisation by law. The IACtHR provided an extensive discussion of the rationale for this in a 1985 Advisory Opinion (see Box 13).

352. 2003 Joint Declaration, note 338.

353. Ibid.

354. General Comment No. 34, para. 44.

355. Ibid.



Box 13: The Inter-American Court on Mandatory Membership in a Professional Journalism Association

In its Advisory Opinion on Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, the IACtHR determined that requiring journalists to join a professional journalist association before they might engage in journalistic activities was not compatible with the guarantee of freedom of expression contained in the American Convention.

In reaching this conclusion, the IACtHR differentiated journalism from other professions, such as law and medicine, on the basis that the practice of those professions is not itself a universally protected human right. In contrast, it is not possible “to distinguish freedom of expression from the professional practice of journalism” and, accordingly, restrictions on journalist activities must, unlike similar restrictions on other professions, meet the test for restrictions on freedom of expression. While concern for public order, understood broadly, may justify compulsory licensing of other professions, it “would violate the basic principles of a democratic public order” to require journalists to join a particular professional association or even to meet certain conditions, such as having a university degree. Instead, the goal of public order was better served by allowing anyone to engage in journalistic activities.³⁵⁶

Similarly, while strengthening professional associations for journalist in order to guarantee their independence is a legitimate State interest, requiring membership of such organisations by law is not necessary to secure this goal. Rather, other efforts can be undertaken to strengthen such associations which do not unduly limit freedom of expression.³⁵⁷

The Court especially criticised the idea that engaging in journalism requires the application of special knowledge or training, which would justify requirements of expertise for engaging in journalistic activities:

Within this context, journalism is the primary and principal manifestation of freedom of expression of thought. For that reason, because it is linked with freedom of expression, which is an inherent right of each individual, journalism cannot be equated to a profession that is merely granting a service to the public through the application of some knowledge or training acquired in a university or through those who are enrolled in a certain professional “colegio.”³⁵⁸

Discussion Point

There has been a lot of debate about this issue in Jordan with some arguing that the rules requiring journalists to belong to the JPA should be done away with and others arguing that this is normal for a profession. What is your view on this? Are there ways to protect the professional nature of journalism that do not breach international law in this respect?

356. IACtHR, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, note 342, paras. 73 and 74.

357. *Ibid.*, paras. 78 and 79.

358. *Ibid.*, para. 71.





Training Manual for Judges on International Standards on Freedom of Opinion and Expression

While licensing requirements for journalist are inappropriate, accreditation may occasionally be appropriate. Accreditation schemes include protocols which require journalists to obtain a press pass or badge as a precondition to accessing certain events or locations. They apply in contexts where public access to a space is restricted and providing accreditation creates a system for ensuring that journalists can gain access to that space. This allows them to report on what happens there to the wider public. Examples include parliaments and (in certain contexts) courts.

Example

As outlined in General Comment No. 34, “limited accreditation schemes are permissible only where necessary to provide journalists with privileged access to certain places and/orevents.”³⁵⁹

Accreditation schemes must be compatible with the three-part test for restrictions, must be non-discriminatory and must take into account the wide range of actors who participate in journalism.³⁶⁰ The bodies overseeing accreditation schemes should be independent and decisions should be made according to “a fair and transparent process, based on clear and non-discriminatory criteria published in advance.”³⁶¹ Accreditation should never be withdrawn solely because of the content of an individual journalist’s work.³⁶²

Example

Gauthier v. Canada required the Human Rights Committee to assess whether Canada’s accreditation system for journalists to observe meetings of Parliament respected the right to freedom of expression. The system limited full access rights to members of the Canadian Press Gallery, a private journalist association. The Committee, finding the system to be inadequate, stated:

The Committee agrees that the protection of Parliamentary procedure can be seen as a legitimate goal of public order and an accreditation system can thus be a justified means of achieving this goal. However, since the accreditation system operates as a restriction of article 19 rights, its operation and application must be shown as necessary and proportionate to the goal in question and not arbitrary . . . The relevant criteria for the accreditation scheme should be specific, fair and reasonable, and their application should be transparent. In the instant case, the State party has allowed a private organisation to control access to the Parliamentary press facilities, without intervention. The scheme does not ensure that there will be no arbitrary exclusion from access to the Parliamentary media facilities. In the circumstances, the Committee is of the opinion that the accreditation system has not been shown to be a necessary and proportionate restriction of rights within the meaning of article 19, paragraph 3, of the Covenant, in order to ensure the effective operation of Parliament and the safety of its members.³⁶³

359. General Comment No. 34, para. 44.

360. Ibid.

361. 2003 Joint Declaration, note 338.

362. Ibid.

363. Communication No. 633/1995, 5 May 1999, para. 13.6. Available at: <http://hrlibrary.umn.edu/undocs/session65/view633.htm>.



State regulation of journalists should also provide protection for confidential journalist sources. As noted in General Comment No. 34, the “limited journalistic privilege not to disclose information sources” is integral to freedom of expression.³⁶⁴ This right to keep sources confidential should extend beyond traditional journalists to “natural and legal persons who are regularly or professionally engaged in the collection and dissemination of information to the public via any means of communication”.³⁶⁵

In *Goodwin v. United Kingdom*, the ECtHR provided a well-known articulation of the importance of protection for confidential sources:

Protection of journalistic sources is one of the basic conditions for press freedom. . . Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected.³⁶⁶

Both of these protections – namely ensuring that journalists have special access to limited space venues through accreditation and providing protection for confidential sources of information – are designed to support the ability of journalists to provide information to the general public. As such, they are not special rights for the benefit of journalists, per se, but, rather, measures which are designed to protect the right of everyone to receive information.

b. Print Media

Discussion Point

Do you feel that it is necessary to license print media outlets? What objective does this serve that cannot be equally well protected in other ways?

Licensing requirements for the print media are not acceptable under international law because they allow for the possibility of extensive control over the print media and are not necessary to achieve any legitimate State interest. The African Commission on Human Rights, considering a rule that was effectively a licensing requirement, summarised the problems with requiring print media to obtain licences, noting: “[T]he total discretion and finality of the decision of the registration board, which effectively gives the government the power to prohibit publication of any newspapers or magazines they choose ... invites censorship and seriously endangers the rights of the public to receive information”.³⁶⁷

364. General Comment No. 34, para. 45.

365. Special Rapporteurs for Promoting Freedom of Expression, 2015 Joint Declaration on Freedom of Expression and Responses to Conflict Situations, para. 5(a). Available at: <https://www.osce.org/fom/154846?download=true>.

366. 27 March 1996, Application No. 17488/90, para. 39. Available at: <http://hudoc.echr.coe.int/eng?i=001-57974>.

367. *Media Rights Agenda and Others v. Nigeria*, Application Nos. 105/93, 128/94 and 152/96, 31 October 1998, para. 57. Available at: http://www.achpr.org/files/sessions/24th/comunications/105.93-128.94-130.94-152.96/achpr24_105.93_128.94_130.94_152.96_eng.pdf.





Training Manual for Judges on International Standards on Freedom of Opinion and Expression

Registration requirements are different from licensing regimes inasmuch as they are technical administrative law requirements which essentially consist of requiring an applicant to provide certain information to the authorities as opposed to an application for permission to conduct an activity. While in theory registration systems are permissible, special registration regimes for the print media should be avoided, as they are unnecessary and create potential for abuse. Systems which “allow for discretion to refuse registration, which impose substantive conditions on the print media or which are overseen by bodies which are not independent of government” are not acceptable.³⁶⁸

Technical requirements associated with registration, if overly burdensome, may also be impermissibly restrictive. Registration fees, for example, “should not be more than necessary to ensure administrative expenses of the registration ... excessively high fees are essentially a restriction on the publication of news media.”³⁶⁹ Similarly, forms of discriminatory taxation are not legitimate.³⁷⁰

Examples

Laptsevich v. Belarus, a case before the Human Rights Committee, addressed a requirement that any leaflets with a print run of 200 or more had to be registered prior to publication. The Committee determined that this was a violation of freedom of expression, given that Belarus had not shown why such a requirement would be necessary.³⁷¹

Similarly, in Gawęda v. Poland, the ECtHR found that the application of a Polish registration requirement to refuse registration based on the proposed title of a periodical was inappropriate.³⁷²

Publication bans on the print media are only acceptable within the bounds of the three-part test for restrictions on freedom of expression. As such, a particular publication may not be banned unless it contains content which may otherwise legitimately be restricted under international law and which cannot be severed from the publication.³⁷³

As always, content restrictions should strictly conform with the three-part test. Content restrictions that are specific to the print media are often unnecessary, as explained by the international rapporteurs for freedom of expression:

Content restrictions are problematical. Media-specific laws should not duplicate content restrictions already provided for in law as this is unnecessary and may lead to abuse. Content rules for the print media that provide for quasi-criminal penalties, such as fines or suspension, are particularly problematical.³⁷⁴

368. 2003 Joint Declaration, note 338.

369. African Commission on Human and Peoples' Rights, *Media Rights Agenda and Others v. Nigeria*, note 367, para. 56.

370. The Sana'a Declaration on the Arab Media, UNESCO Seminar on Promoting Independent and Pluralistic Arab Media, Sana'a, Yemen, 7-11 January 1996. Available at: <https://al-bab.com/documents-reference-section/sanaa-declaration-arab-media>.

371. Communication No. 780/1997, 13 April 2000, para. 8.5. Available at: <http://hrlibrary.umn.edu/undocs/session68/view780.htm>.

372. 13 March 2002, Application No. 26229/95, para. 43. Available at: <http://hudoc.echr.coe.int/eng?i=001-60325>

373. General Comment No. 34, para. 39.

374. 2003 Joint Declaration, note 338.



c. Broadcast Media

While licensing regimes for the print media are not appropriate, broadcast licensing is not only acceptable but a well-established practice in democracies and potentially even necessary to promote diversity in this sector. Historically, limits in terms of the number of frequencies meant that regulation was needed to ensure that a diversity of voices had access to the airwaves and that access to frequencies was allocated fairly. Furthermore, licensing was justified by the fact that the airwaves are a public resource. While the advent of the Internet and other technologies has started to reduce scarcity, other rationales for licensing, including the power of broadcasting, remain relevant.

The best practice for allocating broadcasting licences is to establish an independent licensing authority.³⁷⁵ Direct government control over broadcast licensing, or allocation by a body which is not independent in law or practice, represents a serious threat to freedom of expression.³⁷⁶ Accordingly, members of public authorities regulating broadcasting should be appointed through an open and transparent process which allocates a role to civil society and is not controlled by any particular political party.³⁷⁷

Discussion Point

What do you think about the rule that broadcast regulators should be independent? Do you feel that this sector has been regulated in a fair enough way in Jordan even though the regulator is not fully independent and final decisions on this still rest with government?

In allocating broadcasting frequencies, States should rely on “democratic criteria” and “ensure equitable opportunity of access.”³⁷⁸ Consideration should also be given to promoting media diversity through the allocation of broadcasting frequencies (see Box 14). States should not require registration of broadcast media in addition to obtaining a broadcasting license,³⁷⁹ and licensing conditions and fees should not be unduly onerous.³⁸⁰

375. General Comment No. 34, para. 39.

376. 2010 Joint Declaration, note 347, para. 1(c).

377. African Commission on Human and Peoples' Rights, Declaration of Principles on Freedom of Expression in Africa, note 341, Principle VII(2).

378. 2003 Joint Declaration, note 338.

379. Ibid.

380. General Comment No. 34, para. 39.





Training Manual for Judges on International Standards on Freedom of Opinion and Expression

Box 14: Diversity in Broadcasting

The special rapporteurs for freedom of expression, in their 2007 Joint Declaration, affirm the importance of promoting three types of diversity in broadcasting:

Diversity of Outlet: Different types of broadcasters (commercial, public service and community) should have access to broadcasting platforms. Community broadcasting should also benefit from simple and low-cost licensing procedures.

Diversity of Source: Media ownership should not be unduly concentrated in the hands of a few. Special anti-monopoly rules for the media are, therefore, appropriate.³⁸¹ In addition, it may be appropriate to provide support to new media outlets, if this is done based on equitable and objective criteria which are applied in a non-discriminatory manner.

Diversity of Content: Policy tools should be used to promote content diversity both among and within media outlets, such as rules requiring broadcasters to be politically impartial and balanced. Positive content requirements – such as requiring broadcasters to carry quotas of content prepared by independent producers or of news – may accordingly be appropriate, again if based on objective, equitable criteria which are applied in a non-discriminatory manner.³⁸²

Decisions about broadcasting licences should ultimately be based on objective criteria and legitimate public interest purposes (such as media diversity), rather than on silencing government critics. In *Granier and Others v. Venezuela*, the IACtHR found that Venezuela's decision not to renew a broadcasting license was based not on concerns for maintaining media diversity, as the government alleged, but rather on the fact of the broadcaster's criticism of the government. The Court found this to be an indirect restriction on the exercise of freedom of expression which represented a violation of the right.³⁸³

While the restriction in *Granier and Others v. Venezuela* was clearly abusive, properly enacted broadcasting content regulations can serve a legitimate purpose. Positive content rules, such as imposing minimum local content or cultural programming quotas, can further the goal of promoting a diversity of media content (see Box 14). On the other hand, positive obligations to carry specific messages, especially those which are political in nature, would interfere with editorial independence.

Special content restrictions for broadcasters may be proper, especially in the context of the protection of minors. As always, however, content restrictions based on silencing specific voices or opinions are not appropriate and any restrictions must meet the three-part test for restrictions on expression.

381. See Toby Mendel, Ángel García Castillejo and Gustavo Gómez, *Concentration of Ownership and Freedom of Expression: Global Standards and Implications for the Americas* (2017, Paris, UNESCO).

382. Special Rapporteurs for Promoting Freedom of Expression, 2007 Joint Declaration on Diversity in Broadcasting. Available at: <https://www.osce.org/fom/29825?download=true>.

383. 22 June 2015, Series C, No. 293, paras. 197-199. Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_293_esp.pdf (in Spanish only).



Example

The Convention on the Rights of the Child notes that, in the context of the media, appropriate guidelines should be developed to protect children from “material injurious to his or her well-being”.³⁸⁴

d. Public Service Media

Globally, government control over the media has historically been a significant problem for freedom of expression and represents an ongoing concern in many countries.³⁸⁵ The Sa’ana Declaration, as well as other international standards, accordingly calls for State-owned broadcasters and news agencies to be “granted statutes of journalistic and editorial independence as open public service institutions.”³⁸⁶

Public service broadcasters are broadcasters which are State-owned and yet independent of the government, which have editorial independence and which have a clearly defined public interest mandate. Public service broadcasters can play a crucial role in terms of enhancing the diversity of content available to citizens, including by providing high quality, reliable programming which serves all sectors of and groups in society.

For public service broadcasters to play this role effectively, they should have a “clear public service mandate”.³⁸⁷ As stated by the special rapporteurs for freedom of expression: “[T]he mandate of public service broadcasters should be clearly set out in law and include, among other things, contributing to diversity, which should go beyond offering different types of programming and include giving voice to, and serving the information needs and interests of, all sectors of society.”³⁸⁸ According to the Declaration of Principles on Freedom of Expression in Africa: “[T]he public service ambit of public broadcasters should be clearly defined and include an obligation to ensure that the public receive adequate, politically balanced information, particularly during election periods.”³⁸⁹

To ensure the independence of public broadcasters, States should guarantee their editorial freedom.³⁹⁰ States should avoid situations where there is “political influence or control over public media, so that they serve as government mouthpieces instead of as independent bodies operating in the public interest.”³⁹¹ The Declaration of Principles on Freedom of Expression in Africa accordingly stipulates: “[P]ublic broadcasters should be governed by a board which is protected against interference, particularly of a political or economic nature”.³⁹²

384. Adopted 20 November 1989 through UN General Assembly Resolution 44/25, entered into force 2 September 1990, Article 17(e).

385. 2010 Joint Declaration, note 347, para. 1.

386. Note 370.

387. 2010 Joint Declaration, note 347, para. 7(b).

388. Special Rapporteurs for Promoting Freedom of Expression, 2007 Joint Declaration on Diversity in Broadcasting, note 382.

389. African Commission on Human and Peoples’ Rights, note 341, Principle VI.

390. General Comment No. 34, para. 16.

391. 2010 Joint Declaration, note 347, para. 1(a).

392. African Commission on Human and Peoples’ Rights, note 341, Principle VI.





Training Manual for Judges on International Standards on Freedom of Opinion and Expression

States should provide funding to public service media in a manner that will not undermine independence.³⁹³ Where there are recurring challenges to public funding support for public broadcasters, this compromises their ability to satisfy the public's information needs.³⁹⁴ In some cases, “innovative funding mechanisms for public service broadcasting should be explored which are sufficient to enable it to deliver its public service mandate, which are guaranteed in advance on a multi-year basis, and which are indexed against inflation.”³⁹⁵

Example

The case of *Manole and Others v. Moldova*, before the ECtHR, involved journalists who claimed that the senior management of the Moldovan public broadcaster forced them to avoid topics which were considered to be embarrassing to the government. This reportedly included a list of words and phrases which had to be avoided, such as those referencing a shared culture between Romania and Moldova and human rights violations during the Soviet era. The Court noted:

A list of this nature, containing words and topics which journalists and other individuals appearing on national television were not permitted to mention, would in any circumstances require strong justification to be compatible with freedom of expression, but the Government have not advanced any grounds to explain how the restriction could be compatible with the requirements of Article 10. In the context of the on-going debate in Moldova about national identity and geo-political alignment, moreover, the Court considers that there was a strong public interest in such issues being openly and exhaustively discussed on national television, with air-time being given to all the competing points of view.³⁹⁶

The Court also noted that States have positive obligations to ensure a pluralistic media environment. In this context, the Court stated:

The Court notes that during most of the period in question TRM was the sole Moldovan broadcasting organisation producing television programmes which could be viewed throughout the country . . . Moreover, approximately 60% of the population lived in rural areas, with no or limited access to cable or satellite television . . . In these circumstances, it was of vital importance to the functioning of democracy in Moldova that TRM transmitted accurate and balanced news and information and that its programming reflected the full range of political opinion and debate in the country and the State authorities were under a strong positive obligation to put in place the conditions to permit this to occur.³⁹⁷

Given the “virtual monopoly” enjoyed by the public broadcaster over audiovisual broadcasting in Moldova, as well as the censorship of content, the Court found that Moldova had violated both positive and negative obligations imposed by the right to freedom of expression.³⁹⁸

393. General Comment No. 34, para. 16.

394. 2010 Joint Declaration, note 347, para. 7.

395. Special Rapporteurs for Promoting Freedom of Expression, 2007 Joint Declaration on Diversity in Broadcasting, note 382.

396. 17 September 2009, Application No. 13936/02, para. 104. Available at: <http://hudoc.echr.coe.int/eng?i=001-94075>.

397. *Ibid.*, para. 108.

398. *Ibid.*, paras. 106 and 111.



Discussion Point

How do you feel about the development of the Al-Mamlaka television station? Do you think it will make an important contribution to media diversity in Jordan? Would it not have been better to transform JRTV into an independent public service broadcaster?

Key Points from Module 5:

Regulation of the media should be undertaken by regulatory bodies which are independent and which operate in a transparent manner.

Other important principles governing the regulation of the media include the need to use regulation to promote media diversity, the need to respect editorial independence, and the need to avoid censorship.

A number of specific principles govern the regulation of different media sectors, including journalism, print media and broadcasters.

Any State-controlled media should be transformed into public service media.





Training Manual for Judges on International Standards on Freedom of Opinion and Expression

Module 6: Regulating Freedom of Expression in the Digital Era

Learning Objectives

To understand general trends in terms of digital communications and how they are affecting the overall communications environment.

To examine the human rights implications of the changes brought about by digital technologies.

A. New Trends in the Digital Era Internationally

The digital era's transformation of global means of communication and information have had a profound impact on the exercise of freedom of expression. On the one hand, new platforms for exchanging opinions and ideas globally have enhanced the free flow of information across national and other boundaries. Such platforms have also provided new opportunities for civil society to organise and call for reforms, and created new means for journalists to generate and share content.

These technological changes also present new challenges, however, which are still just beginning to be fully explored. Legal and regulatory regimes, for example, are generally ill suited to be able to adapt at the rapid pace of change of information technologies. This is a real concern, given that just as new means of communication have enhanced the full exercise of freedom of expression, they have also amplified the reach and impact of harmful speech. For example, harassment and hate speech online is a growing concern. Similarly, some social media sites exacerbate the problem of their users living in "information silos" rather than being exposed to a diversity of opinions and perspectives.

Discussion Point

What do you think are the most positive and negative implications of the digital revolution? Do you think it is possible to address these through regulation?

As elsewhere in the world, the digital era has caused significant shifts in Jordan's media landscape, with traditional print media outlets struggling even as news websites and blogging have flourished.³⁹⁹ Internet access is growing rapidly: as of 2015, 67% of adults use the Internet or own a smartphone, a jump of 20% from 2013.⁴⁰⁰ The increase in online news readership correlates with increased diversity in information sources for those with Internet access, but legal reforms in the area of regulation of digital content have also restricted some of this diversity.⁴⁰¹

399. UNESCO, Assessment of Media Development in Jordan (2015), pp. 23 and 24. Available at: <http://unesdoc.unesco.org/images/0023/002344/234425e.pdf>.

400. Jacob Pousher, "Internet Access Growing Worldwide but Remains Higher in Advanced Economies", 22 February 2016, Pew Research Center. Available at: <http://www.pewglobal.org/2016/02/22/internet-access-growing-worldwide-but-remains-higher-in-advanced-economies/#internet-access-rates-vary-by-country-and-region>.

401. Rana F. Sweis and Dina Baslan, Mapping Digital Media in Jordan (2013, Open Society Foundations), pp. 7-9. Available at: <https://www.opensocietyfoundations.org/sites/default/files/mapping-digital-media-jordan-20131121.pdf>.



B. Legal Issues

Freedom of expression is protected both offline and online and is applicable “regardless of frontiers and through any media of one’s choice”.⁴⁰² This means that the same legal protections which are applicable to freedom of expression generally also apply in the context of content conveyed digitally:

Freedom of expression applies to the Internet, as it does to all means of communication. Restrictions on freedom of expression on the Internet are only acceptable if they comply with established international standards, including that they are provided for by law, and that they are necessary to protect an interest which is recognised under international law (the ‘three-part’ test).

When assessing the proportionality of a restriction on freedom of expression on the Internet, the impact of that restriction on the ability of the Internet to deliver positive freedom of expression outcomes must be weighed against its benefits in terms of protecting other interests.⁴⁰³

Nonetheless, the digital era raises a number of new legal issues regarding how this test is applied. This section reviews some of the key legal issues in light of the relevant international human rights framework.

a. Internet Slowdowns and Shutdowns

Internet shutdowns “involve measures to intentionally prevent or disrupt access to or dissemination of information online in violation of human rights law.”⁴⁰⁴ They are conducted by governments, often with the help of the operators of private networks, although large-scale cyber attacks by private actors (such as distributed denial-of-service attacks) can have a similar effect, albeit usually only temporarily. Slowdowns, such as throttling or rendering mobile communications, websites, social media or messaging applications “effectively unusable”, may effectively have a similar impact as a shutdown and present similar legal issues.⁴⁰⁵

Recognising that freedom of expression requires States to promote universal access to the Internet, the special rapporteurs for freedom of expression have stated that Internet slowdowns and shutdowns cannot be justified:

Cutting off access to the Internet, or parts of the Internet, for whole populations or segments of the public (shutting down the Internet) can never be justified, including on public order or national security grounds. The same applies to slow-downs imposed on the Internet or parts of the Internet.⁴⁰⁶

402. Human Rights Council Resolution 38/7 on the promotion, protection and enjoyment of human rights on the Internet, 5 July 2018, para. 1. Available at: undocs.org/A/HRC/RES/38/7.

403. Special Rapporteurs for Promoting Freedom of Expression, 2011 Joint Declaration on Freedom of Expression and the Internet, para. 1(a)-(b). Available at: <https://www.osce.org/fom/78309?download=true>.

404. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 30 March 2017, para. 8. Available at: undocs.org/A/HRC/35/22.

405. Ibid.

406. Special Rapporteurs for Promoting Freedom of Expression, 2011 Joint Declaration on Freedom of Expression and the Internet, note 403, para. 1(b).





Training Manual for Judges on International Standards on Freedom of Opinion and Expression

Elsewhere, they have also noted that “using communications ‘kill switches’ (i.e. shutting down entire parts of communications systems) ... are measures which can never be justified under human rights law.”⁴⁰⁷ The Human Rights Council has similarly condemned unequivocally measures taken by States “to intentionally prevent or disrupt access to or dissemination of information online in violation of international human rights law”.⁴⁰⁸

Discussion Point

What do you think about this? Do you think it is sometimes legitimate to close down the Internet? What about the impact this has on business, to mention just one issue?

Box 15: Understanding How Internet Shutdowns Fail to Comply with the Three-Part Test for Restrictions on Freedom of Expression

The UN Special Rapporteur for Freedom of Opinion and Expression discussed the problem of Internet shutdowns extensively in his 2017 report to the Human Rights Council. He specifically highlighted why shutdowns do not meet the three-part test for restrictions on freedom of expression:

Covert shutdowns or those without obvious legal basis clearly violate the requirement that restrictions on freedom of expression be provided by law.

Shutdowns ordered pursuant to vaguely formulated laws and regulations also do not meet the “provided by law” requirement.

Shutdowns during demonstrations, elections and other events of high public interest are unlikely to meet the necessity requirement. Restrictions invoked to suppress advocacy for democratic rights are never appropriate.

Network shutdowns cannot meet the necessity requirement because, even if they prevent the spread of harmful information, they also prevent the sharing of helpful information. For example, a ban designed to prevent the spread of panic after a terrorist attack will also prevent sharing information that could mitigate safety concerns, identify suspects or restore public order.

Shutdowns will generally be disproportionate because they deny access to emergency services, health information, banking services, transportation, reporting on major crises and reporting on human rights investigations, among other things. They impact so many essential activities and services that they result in a restriction of expression and interference with other fundamental rights.⁴⁰⁹

407. Special Rapporteurs for Promoting Freedom of Expression, 2015 Joint Declaration on Freedom of Expression and Responses to Conflict Situations, para. 4(c). Available at: <https://www.osce.org/fom/154846?download=true>.

408. Human Rights Council Resolution 32/13 on the promotion, protection and enjoyment of human rights on the Internet, 18 July 2016, para. 10. Available at: <http://undocs.org/A/HRC/RES/32/13>.

409. UN Special Rapporteur, 2017 Report, note 404, paras. 9 and 15.



b. Content Restrictions

The enormous amount of content on the Internet, and the speed with which it is shared and developed, poses significant regulatory challenges, particularly in terms of responding appropriately to problematic content. In response, some States have created specific regulatory regimes governing content on the Internet. Such regimes present problems under human rights law because they risk penalising online speech where it would not be penalised offline. While it may be necessary to tailor regulatory approaches to the unique character of the Internet, there should not be special content restrictions for material disseminated over the Internet.⁴¹⁰ Accordingly, “member states should not subject content on the Internet to restrictions which go further than those applied to other means of content delivery.”⁴¹¹

In terms of identifying which Internet activities may need special regulation, the special rapporteurs for freedom of expression suggest that only “activities which are either new or fundamentally different in their digital forms (such as spamming)” should be subject to special restrictions designed for digital communications.⁴¹² In addition, such restrictions should always meet the three-part test for any restriction on freedom of expression and States should not adopt unnecessary or disproportionate laws which criminalise or impose harsher penalties for online expression as compared to its offline equivalent.⁴¹³

A particular problem here is the advent of cybercrimes laws, which are supposed to be designed precisely to address special crimes which are associated with digital communications systems. In all too many cases, however, States also include in their cybercrimes laws content restrictions which are not necessary because they are already covered by an offline rule and they are not fundamentally different in their online form. Thus, many cybercrimes laws include a new rule on defamation, even though the general rule on defamation already covers defamation committed using digital communications. Often, these new rules lack the protections and exceptions, as well as the extensive judicial interpretation, which has been used to develop the existing rules, often over decades of application.

One new challenge of the digital era is the weaponisation of social media and other digital platforms to engage in harassment, cyber-bullying or threatening behaviour. This includes tactics such as posting a person’s personal identifying information to the Internet (“doxing”) or sharing intimate photos of someone without their consent. Women are most often subject to these kinds of attacks, which limits their ability to exercise their right to freedom of expression.⁴¹⁴ Journalists are also often targets.

410. Special Rapporteurs for Promoting Freedom of Expression, 2011 Joint Declaration on Freedom of Expression and the Internet, note 403, para. 1(d).

411. Council of Europe Committee of Ministers, Declaration on Freedom of Communication on the Internet, 28 May 2003, Principle 1. Available at: <https://rm.coe.int/16805dfbd5>.

412. Special Rapporteurs for Promoting Freedom of Expression, 2018 Joint Declaration on Media Independence and Diversity in the Digital Age, para. 3(c). Available at: <https://www.osce.org/representative-on-freedom-of-media/379351?download=true>.

413. *Ibid.*, paras. 3(a) and 3(b).

414. Human Rights Council Resolution 38/7 on the promotion, protection and enjoyment of human rights on the Internet, note 402, preamble and para. 11 (“violations and abuses of women’s rights online are a growing global concern that hinder the equal exercise and enjoyment of human rights and fundamental freedoms on the basis of gender...”).





Training Manual for Judges on International Standards on Freedom of Opinion and Expression

While these are serious challenges, efforts to combat cyberbullying, gender-based violence and other online harmful content should take great care to avoid introducing sweeping new criminal prohibitions which fail to respect international human rights standards. For example, prohibitions on “cyber harassment” are often overbroad, poorly defined and not well-tailored to addressing specific harms. A better approach is often to focus on updating existing laws which prohibit actions such as stalking, harassment or invasions of privacy to reflect the realities of the online era. As always, such updates should align with the three-part test for any restriction on freedom of expression.

Discussion Point

Does this approach seem reasonable? Do you feel there are other cases where special rules for online content are needed? Most cybercrime laws include a lot of duplication of existing rules. Is there any justification for that?

As is the case offline, restrictions based solely on silencing speech that has heightened protection (such as information on human rights violations) could never be appropriate.

Example

General Comment No. 34 specifies that, pursuant to Article 19(3) of the ICCPR, it is not permissible “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.”⁴¹⁵

c. Blocking and Filtering

Blocking and filtering are techniques which limit access by Internet users to certain content. Filtering blocks access based on certain features, such as keywords or images which are deemed to be associated with inappropriate content, while blocking prevents access to certain websites or other specific services.⁴¹⁶

Both blocking and filtering present serious problems under international law. As stated by the Committee of Ministers of the Council of Europe:

Public authorities should not, through general blocking or filtering measures, deny access by the public to information and other communication on the Internet, regardless of frontiers. This does not prevent the installation of filters for the protection of minors, in particular in places accessible to them, such as schools or libraries.⁴¹⁷

415. Para. 43.

416. Article 19, Freedom of Expression Unfiltered: How Blocking and Filtering Affect Free Speech (London, 2016), p. 6. Available at: https://www.article19.org/data/files/medialibrary/38586/Blocking_and_filtering_final.pdf.

417. Council of Europe Committee of Ministers, Declaration on Freedom of Communication on the Internet, note 411, Principle 3.



Given the dominance of the Internet in the modern era, blocking measures can effectively silence a particular publisher and deny the public access to the blocked viewpoint:

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.⁴¹⁸

Similarly, State imposed content filtering cannot generally be justified under human rights law.⁴¹⁹ Any content-filtering system should be under the control of the end-user rather than the government. As explained by the special rapporteurs for promoting freedom of expression:

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 . . . 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.⁴²⁰

In those highly exceptional cases where mandatory blocking or filtering is permissible to restrict clearly illegal content – child pornography being the emblematic example – this should be “subjected to a strict balance of proportionality and be carefully designed and clearly limited so as to not affect legitimate speech that deserves protection. In other words, filtration or blocking should be designed and applied so as to exclusively impact the illegal content without affecting other content.”⁴²¹ To ensure that blocking is conducted properly, best practice is that only an independent court or other adjudicatory body should be able to impose a blocking order.⁴²²

d. Privacy and the Use of Personal Data

Module 2 of this Toolkit discusses the need to balance the right to privacy, also guaranteed under human rights law, with freedom of expression. These rights are closely linked in the context of the Internet, as violations of the privacy of communications have a chilling effect on the exercise of freedom of expression.⁴²³ This is highly relevant in the context of the right to anonymous speech, discussed below in the section on anonymity, surveillance and encryption. This section focuses on the question of the collection and use of personal data online.

418. Special Rapporteurs for Promoting Freedom of Expression, 2011 Joint Declaration on Freedom of Expression and the Internet, note 403, para. 3(a).

419. Special Rapporteurs for Promoting Freedom of Expression, 2015 Joint Declaration on Freedom of Expression and Responses to Conflict Situations, note 407, para. 4(c).

420. Special Rapporteurs for Promoting Freedom of Expression, 2011 Joint Declaration on Freedom of Expression and the Internet, note 403, para. 3(b)-(c).

421. Special Rapporteur for Freedom of Expression, Inter-American Commission on Human Rights, Freedom of Expression and the Internet (2013), para. 85. Available at: http://www.oas.org/en/iachr/expression/docs/reports/2014_04_08_internet_eng%20_web.pdf.

422. Article 19, Freedom of Expression Unfiltered: How Blocking and Filtering Affect Free Speech, note 416, Recommendation 4.

423. Special Rapporteur for Freedom of Expression, Inter-American Commission on Human Rights, Freedom of Expression and the Internet, note 421, para. 23.





Training Manual for Judges on International Standards on Freedom of Opinion and Expression

Discussion Point

In some ways, privacy has been the first casualty of the digital revolution. There are two theories about this: one says that we need stricter regulation to protect privacy; the other says that we simply need to adjust our expectations about privacy. To which theory do you subscribe? Why?

Inappropriate government access to personal data may cause Internet users to avoid controversial viewpoints, exchanging sensitive information or otherwise exercising their right to freedom of expression.⁴²⁴ States should therefore ensure that personal data collection and use is appropriately regulated.

Examples

In a 2018 Resolution, the UN Human Rights Council,

Urges States to adopt, implement and, where necessary, reform laws, regulations, policies and other measures concerning personal data and privacy protection online in order to prevent, mitigate and remedy the arbitrary or unlawful collection, retention, processing, use or disclosure of personal data on the Internet that could violate human rights;⁴²⁵

Similarly, in a 2013 Resolution, the UN General Assembly called on States to review “procedures, practices and legislation” regarding surveillance of communications and the interception and collection of personal data, and to “establish or maintain existing independent, effective domestic oversight mechanisms capable of ensuring . . . accountability for State surveillance of communications, their interception and the collection of personal data”.⁴²⁶

The UN Special Rapporteur provides further guidance on ensuring that personal data related to Internet and telecommunications use is appropriately protected, noting that laws which require private actors “to create large databases of user data accessible to the government raise necessity and proportionality concerns.”⁴²⁷ For example, laws requiring companies to retain and store large amounts of private data or mandatory SIM card registration laws effectively subject large portions of the population to data protection risks. In addition, providers should not be required to provide the authorities with access to user data except when ordered to do so by judicial authorities, who have certified that giving access to this data is necessary and proportionate to achieving a legitimate objective.⁴²⁸

In order to ensure that personal data is not misused, individuals should have access to information about who controls their personal information. The Human Rights Committee, in General Comment 17 on the right to privacy, explains:

424. UN Special Rapporteur, 2017 Report, note 404, para. 17.

425. Human Rights Council Resolution 38/7 on the promotion, protection and enjoyment of human rights on the Internet, note 402, para. 17.

426. UN General Assembly Resolution 68/167, 18 December 2013, para. 4(c)-(d). Available at: http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/68/167.

427. UN Special Rapporteur 2017, Report, note 404, para. 20.

428. *Ibid.*, para. 19.



In order to have the most effective protection of his private life, every individual should have the right to ascertain in an intelligible form, whether, and if so, what personal data is stored in automatic data files, and for what purposes. Every individual should also be able to ascertain which public authorities or private individuals or bodies control or may control their files. If such files contain incorrect personal data or have been collected or processed contrary to the provisions of the law, every individual should have the right to request rectification or elimination.⁴²⁹

e. The Role and Responsibilities of Intermediaries

Freedom of expression on the Internet is facilitated by a large variety of (mostly private) actors who provide services such as hosting material posted by others, routing Internet traffic, providing search functions, acting as social network platforms and so on. A question naturally arises as to the extent these “intermediaries” should be liable when this content is illegal or constitutes speech not protected under freedom of expression.

As an initial matter, “any liability imposed on intermediaries should be in accordance with international standards and any legal obligation on online platforms to regulate content should also be in accordance with international standards.”⁴³⁰ In addition, under the “mere conduit principle”, intermediaries who merely provide technical Internet services should not generally be liable for third-party content:

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”).⁴³¹

The Council of Europe Committee of Ministers has also affirmed this principle, noting that Member States should ensure that service providers are not held liable for Internet content “when their function is limited ... to transmitting information or providing access to the Internet.”⁴³²

Much more challenging questions arise in the context of other intermediaries. A strict liability model is not compatible with freedom of expression. Among other reasons, this would require intermediaries to review all content flowing through their systems, which is impossible in practical terms and would “radically discourage the existence of the intermediaries necessary for the Internet to retain its features of data flow circulation.”⁴³³

429. Human Rights Committee, General Comment No. 17, 29 July 1994, para. 10. Available at: <http://undocs.org/HRI/GEN/1/Rev.1>.

430. Special Rapporteurs for Promoting Freedom of Expression, 2018 Joint Declaration on Media Independence and Diversity in the Digital Age, note 412, para. 3(d).

431. Special Rapporteurs for Promoting Freedom of Expression, 2011 Joint Declaration on Freedom of Expression and the Internet, note 403, para. 2(a).

432. Council of Europe Committee of Ministers, Declaration on Freedom of Communication on the Internet, note 411, Principle 6.

433. Special Rapporteur for Freedom of Expression, Inter-American Commission on Human Rights, Freedom of Expression and the Internet, note 421, paras. 26 and 27.





Training Manual for Judges on International Standards on Freedom of Opinion and Expression

A more limited liability model is a “notice and takedown” approach, which provides that once an intermediary has been notified of illegal content, it must remove such content. If these conditions are met (and sometimes other conditions, such as barring repeat offenders), the intermediary is safe from liability for the content.⁴³⁴ However, the special rapporteurs for freedom of expression have expressed concerns about the freedom of expression implications of this approach:

Consideration should be given to insulating fully other intermediaries, including those mentioned in the preamble, 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).⁴³⁵

Another approach is a “notice and notice” system, which requires intermediaries, when an allegation is made that expression is unlawful, to notify users of the allegation and to give those users an opportunity to either remove their own content or stand up and defend it. Where the user fails to take any action, the intermediary should remove the content. This provides a further layer of protection for both intermediaries and freedom of expression, since it gives users a chance to defend their content.

International law is not clear on the precise type of liability which is appropriate, although strict liability is clearly not appropriate and other liability systems should factor in the concerns described above.

Intermediaries have some responsibilities in other areas as well. For example, out of concern for network neutrality, “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.”⁴³⁶ Similarly, regulation to protect personal data collected by intermediaries is also appropriate (see the section on privacy and personal data). Such regulation should also be carefully tailored to reflect the principles of the test in Article 19(3) of the ICCPR for restrictions on freedom of expression.

f. Jurisdiction

The nature of the Internet, through which information can easily and quickly be shared, viewed and interacted with globally, creates numerous jurisdictional issues. A person in one country, for example, can write a social media post which references a news article published in a second country, which is then viewed by persons in multiple countries around the world. If some of this content is prohibited in one or more of these jurisdictions, this can create complex liability questions. Regulatory and investigatory authorities often struggle with the practical hurdles involved in enforcing laws online. But individual Internet users also may not understand what they can and cannot safely say online when different jurisdictions have conflicting rules.

434. Rebecca MacKinnon, et al., *Fostering Freedom Online: The Role of Internet Intermediaries* (2014, Paris, UNESCO), pp. 40 and 42. Available at: <http://unesdoc.unesco.org/images/0023/002311/231162e.pdf>.

435. Special Rapporteurs for Promoting Freedom of Expression, 2011 Joint Declaration on Freedom of Expression and the Internet, note 403, para. 2(b).

436. Special Rapporteurs for Promoting Freedom of Expression, 2011 Joint Declaration on Freedom of Expression and the Internet, note 403, para. 5(b).



In the context of human rights law, these jurisdictional challenges can translate into restrictions on freedom of expression. For example, if Internet users are liable for their content in every jurisdiction in which that content is available, they will need to adapt that content to meet the most restrictive jurisdiction (leading to a lowest common denominator approach). This will inhibit the exercise of freedom of expression on the Internet.

Examples

Recognising the problem of jurisdiction, the special rapporteurs for freedom of expression state:

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’).⁴³⁷

The OAS Special Rapporteur has also addressed the importance of avoiding forum shopping which results in restrictions on freedom of expression:

Effectively, in order to prevent the existence of indirect barriers that disproportionately discourage or directly limit the right to freedom of expression on the Internet, jurisdiction over cases connected to Internet expression should correspond exclusively to States to which the cases are most closely associated, normally because the perpetrator resides there, the expression was published from there, or the expression is aimed directly at a public located in the State in question. Private parties may only launch court action in the jurisdiction in which they can demonstrate having suffered substantial damages, thereby preventing what is known as “forum shopping.”

In this sense, it is important to warn that States’ right to jurisdiction or the prosecution of crimes should not become an indirect limitation that threatens the free circulation of information due to the threat of multiple layers of litigation and punishments in different jurisdiction. The Office of the Special Rapporteur deems it important that authorities adopt jurisdictional rules that are compatible with the notion of single publication that prevents both the undesirable effects of forum shopping and redundant trials over a single case (non bis in idem).⁴³⁸

Discussion Point

Jurisdiction can be one of the most frustrating areas for States because often digital speech simply falls outside of their ability to act. Can you think of any ways around this? Do we simply have to get used to this in the digital era?

437. Special Rapporteurs for Promoting Freedom of Expression, 2011 Joint Declaration on Freedom of Expression and the Internet, note 403, para. 4(a).

438. Freedom of Expression and the Internet, note 421, paras. 66 and 67.





Training Manual for Judges on International Standards on Freedom of Opinion and Expression

g. Encryption, Anonymity and Surveillance

Freedom of expression and the right to privacy protect anonymous speech. In the context of the Internet, this means that anonymity on the Internet should also be protected, unless identifying the speaker is necessary to identify criminal activity or activity which violates the human rights of others.⁴³⁹ As explained by the Council of Europe's Committee of Ministers:

In order to ensure protection against online surveillance and to enhance the free expression of information and ideas, member states should respect the will of users of the Internet not to disclose their identity. This does not prevent member states from taking measures and cooperating in order to trace those responsible for criminal acts, in accordance with national law, the Convention for the Protection of Human Rights and Fundamental Freedoms and other international agreements in the fields of justice and the police.⁴⁴⁰

Given concerns with protecting anonymity, as well as the right to privacy and freedom of expression more generally, States must take care that legal frameworks provide adequate protection for these rights in the context of State surveillance activities:

Concerns about national security and criminal activity may justify the exceptional use of communications surveillance technologies. However, national laws regulating what would constitute the necessary, legitimate and proportional State involvement in communications surveillance are often inadequate or non-existent. Inadequate national legal frameworks create a fertile ground for arbitrary and unlawful infringements of the right to privacy in communications and, consequently, also threaten the protection of the right to freedom of opinion and expression.⁴⁴¹

Any surveillance programme must strictly conform to international human rights law. Among other things, this means that "the law must authorize access to communications and personal information only under the most exceptional circumstances ... The collection of this information shall be monitored by an independent oversight body and governed by sufficient due process guarantees and judicial oversight, within the limitations permissible in a democratic society."⁴⁴²

439. *Ibid.*, para. 135.

440. Declaration on Freedom of Communication on the Internet, note 411, Principle 7.

441. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 17 April 2013, para. 3. Available at: undocs.org/A/HRC/23/40.

442. UN and OAS Special Rapporteurs on freedom of expression, Joint Declaration on Surveillance Programs and their Impact on Freedom of Exchange, 21 June 2013, para. 9. Available at: <http://www.oas.org/en/iachr/expression/showarticle.asp?artiD=927&>.



Box 16: Surveillance of Journalists and Media Outlets

Absent strong legal protections, journalists, human rights defenders and political activists are particularly vulnerable to arbitrary surveillance activities.⁴⁴³ When journalists are subject to surveillance, this limits their ability to report on controversial matters and gain the trust of confidential sources. The special rapporteurs for freedom of expression note:

States should not conduct surveillance, including of a digital nature, against media outlets or journalists unless this is provided by law and is necessary and proportionate to protect a legitimate State interest.

States should put in place effective practical and enforceable measures to avoid identifying confidential journalistic sources indirectly using digital means and should avoid taking actions that result in media outlets or journalists being used as an indirect means to pursue criminal investigations.⁴⁴⁴

One important tool for individuals (especially journalists and others engaged in discussions of sensitive matters) to protect anonymity and privacy is encryption technology. This rapidly evolving technology allows Internet users to protect information against the also rapidly evolving capacity of third parties to monitor electronic communications:

Encryption — a mathematical “process of converting messages, information, or data into a form unreadable by anyone except the intended recipient” — protects the confidentiality and integrity of content against third-party access or manipulation. Strong encryption, once the sole province of militaries and intelligence services, is now publicly accessible and often freely available to secure e-mail, voice communication, images, hard drives and website browsers.⁴⁴⁵

The Human Rights Council has called on States not to interfere with the use encryption and anonymity tools and for any restrictions placed upon such technologies to comply with international human rights law.⁴⁴⁶ For example, laws which mandate individuals to enable decryption undermine the security and anonymity of communications.⁴⁴⁷ In addition, States have positive obligations to encourage access to encryption technologies. For example, they should encourage the business sector to develop technical solutions to the problem of protecting the confidentiality of digital communications.⁴⁴⁸

443. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, note 441, para. 51.

444. Special Rapporteurs for Promoting Freedom of Expression, 2018 Joint Declaration on Media Independence and Diversity in the Digital Age, note 412, paras. 5(a) and 5(b).

445. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 22 May 2015, para. 7 (citing SANS Institute, “History of Encryption”, 2001). Available at: undocs.org/A/HRC/29/32.

446. Human Rights Council Resolution 38/7 on the promotion, protection and enjoyment of human rights on the Internet, note 402, para. 9.

447. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, note 441, para. 71.

448. Human Rights Council Resolution 38/7 on the promotion, protection and enjoyment of human rights on the Internet, note 402, para. 9.





Training Manual for Judges on International Standards on Freedom of Opinion and Expression

h. Access to the Internet and New Information Sharing Platforms

New information technologies are now integrated into almost every facet of modern communications, such that participating in the free flow of information in society often requires having access to these technologies. An emerging consensus now recognises that States accordingly have obligations to promote access to these technologies, especially the Internet. General Comment No. 34 provides:

States parties should take account of the extent to which developments in information and communication technologies, such as internet and mobile based electronic 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.⁴⁴⁹

The special rapporteurs for freedom of expression have accordingly indicated that States have a positive obligation to facilitate universal access to the Internet.⁴⁵⁰

Examples

The special rapporteurs on freedom of expression have put forward a number of ways that States could promote greater Internet access. They suggest this could include regulatory mechanisms, direct support via community-based centres or public access points, promoting Internet literacy, and developing special measures to ensure equitable access for disadvantaged persons. How States promote access to the Internet will vary depending on capacity, culture and local circumstances. However, “States should adopt detailed multi-year action plans for increasing access to the Internet which include clear and specific targets, as well as standards of transparency, public reporting and monitoring systems.”⁴⁵¹

Similarly, the Human Rights Council, acknowledging the role that the Internet plays in promoting the right to education, has called for States to promote digital literacy, facilitate access to information on the Internet and make efforts to “bridge the many forms of the digital divide”. It particularly notes the need to bridge the gender digital divide and encourages States to promote information and communications technology and systems that are accessible to persons with disabilities.⁴⁵²

449. Para. 15.

450. Special Rapporteurs for Promoting Freedom of Expression, 2011 Joint Declaration on Freedom of Expression and the Internet, note 403, para. 6.

451. Special Rapporteurs for Promoting Freedom of Expression, 2011 Joint Declaration on Freedom of Expression and the Internet, note 403, para. 6.

452. Human Rights Council Resolution 32/13 on the promotion, protection and enjoyment of human rights on the Internet, note 408, paras. 4 and 7.



Discussion Point

Do you think Jordan is doing enough to promote universal access to the Internet? Is this an area where you think the private sector needs to lead or do you see a more significant role for States? If the latter, what do you think needs to be done?

The digital divide is a major challenge for Arab women.⁴⁵³ How can Jordan respond to this reality? What about for other marginalised groups?

i. The Licensing of Online Speech

In some cases, States attempt to license different forms of online speech, in an analogous fashion to how they license offline media, such as broadcasting. However, while the airwaves are a limited public resource, no similar rationale exists for licensing online speech, where scarcity is no longer a feature. As the special rapporteurs for freedom of expression stated in their 2011 Joint Declaration on Freedom of Expression and the Internet: “Approaches to regulation developed for other means of communication – such as telephony or broadcasting – cannot simply be transferred to the Internet but, rather, need to be specifically designed for it.”⁴⁵⁴

Key Points from Module 6:

The digital era has brought new opportunities for promoting freedom of expression as well as new challenges in regulating it within the appropriate bounds of human rights law.

Strict standards should apply to any regulation of Internet content, surveillance programmes, lifting of anonymity and intermediary liability.

Evolving technologies require new and updated regulations.

453. See, for example, Sahar Khamis and Eliza Campbell, “Info-Deficiency in an Infodemic: The Gender Digital Gap, Arab Women and the COVID-19 Pandemic”, 27 September 2020, Arab Media and Society. Available at: https://www.arabmediasociety.com/info-deficiency-in-an-infodemic-the-gender-digital-gap-arab-women-and-the-covid-19-pandemic/#_ftn2.

454. 1 June 2011, note 403, para. 1(c).





Training Manual for Judges on International Standards on Freedom of Opinion and Expression

Annexes

Annex 1: Common Questions and Answers

What is freedom of expression?

Freedom of expression is protected under international human rights law and almost all national constitutions. Most notably, Article 19 of the International Covenant on Civil and Political Rights protects the right to freedom of expression including “the 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 media of his choice.” As a result, expression is defined broadly to include all means of communication and it extends to everyone, regardless of citizenship, political views or other status. It protects not only the speaker but also the rights of the listener to “seek” and “receive” information and ideas. The right imposes negative obligations on States to refrain from interfering with freedom of expression and positive obligations to take affirmative steps to promote its full realisation (i.e. by ensuring the free flow of information and ideas in society).

What is the three-part test for restrictions on freedom of expression?

Even deeply offensive speech is protected by freedom of expression. However, freedom of expression is not absolute and may, in accordance with international law, be restricted in certain strictly defined circumstances. These conditions are summarised in a three-part test, namely expression may only be restricted when: 1) the restriction is provided by law, 2) it protects a legitimate interest; and 3) it is necessary to protect that interest. Legitimate interests are limited to respect for the rights and reputations of others, or protection of national security, public order, or public health or morals. While a restriction which meets this test is appropriate, care must be taken to ensure that the exception does not become the rule and that laws designed to protect legitimate interests are not misused.

One of the more complex issues is regulating hate speech. This is one area where international human rights law actually requires States to restrict speech. However, international law also sets clear conditions on hate speech laws. Among other things, these laws should not be overbroad, should apply only where the speaker intended to incite hatred and should be limited to cases where the speech incited others to violence, discrimination or hatred. Another complex issue is defamation laws, which are again recognised as a legitimate area of restriction. However, these laws should not undermine public debate on matters of public concern, should not offer greater protection to public figures than others and should be civil rather than criminal in nature.

What is the right to information?

Under international law, freedom of expression includes the right to seek and receive (as well as impart) information. This places obligations on States not only to refrain from improperly restricting freedom of expression but also generally to disclose information held by public authorities. This is known as the freedom of information or the right to information.



What are the features of a strong right to information law?

Strong right to information laws can be assessed according to the following seven areas:

1. The law establishes a right of access based on the idea of “maximum disclosure” (i.e. broad coverage of the law). This involves a clear presumption in favour of access to information and coverage of all sorts of information and all branches and levels of government (public authorities).
2. An obligation on public authorities to proactively disclose information which is of significant public interest.
3. Requesting procedures are user-friendly and accessible, including by having clear and reasonable timeframes and minimum costs for information.
4. Exceptions are narrowly tailored to protect only overriding interests.
5. The system of appeals includes an internal appeal (i.e. within the relevant public authority) and appeals to an independent administrative body and the courts.
6. There are sanctions for officials who wilfully obstruct access to information and protections for those who release information under the law in good faith and whistleblowers.
7. Appropriate promotional measures are in place to ensure that the law is implemented properly, including measures to educate the public about the right.

What obligations do States have when third parties threaten or attack individuals because of what they say (crimes against freedom of expression)?

Cases where individuals threaten or attack others because of what they say or in an effort to silence them are referred to as “crimes against freedom of expression”. States have a primary obligation to ensure their own agents or officials do not perpetrate crimes against freedom of expression. They also have wider positive obligations in such cases including by exercising due diligence to prevent attacks, to protect speakers who are at risk, and to investigate and prosecute these crimes when they do occur.

What key general principles govern media regulation?

Any powers to regulate the media should be exercised by bodies that are independent and operate in a transparent and accountable manner. A key goal of media regulation should be to promote media diversity, including by ensuring that minority communities have access to the media and preventing the emergence of media monopolies. States should also ensure that regulatory rules further legitimate goals and respect editorial independence.

Is licensing of journalists, print media and/or broadcasters permissible under international law?

Requiring journalists to obtain a license or even to register or belong to a specific journalists’ association in order to practise journalism is not compatible with the right to freedom of expression.





Training Manual for Judges on International Standards on Freedom of Opinion and Expression

Licensing of the print media is also not legitimate. Even special registration regimes for the print media are discouraged, as they are unnecessary and prone to abuse. However, these may be legitimate as long as they merely require print media outlets to submit the relevant information and are not overly burdensome, and do not grant the authorities any discretion to refuse registration.

It is different with broadcasters where licensing is not only permissible but arguably also necessary. The airwaves are a limited public resource and licensing access to and use of the airwaves is a key means of promoting diversity in broadcasting. However, licences should be allocated by an independent licensing authority, based on democratic criteria which ensure equitable access opportunities for different types of broadcasters, including community.

What are public service broadcasters?

Public service broadcasters are broadcasters that are publicly owned, have editorial independence and serve the wider public interest. They are thus distinct from State or government broadcasters, which serve the government in power. They should provide high quality content which is not unduly influenced by private interests, including advertising, and thereby contribute to diversity in the airwaves. States with government-controlled broadcasters should transform them into public service broadcasters.

Does freedom of expression apply to the Internet and other new information technologies?

Freedom of expression protects speech online just as it protects speech offline (and indeed all speech regardless of how it is disseminated). This means that special regulation for speech on the Internet is inappropriate unless that regulation is appropriately tailored to suit the unique features of the Internet. Given how integral the Internet is to modern communication and indeed almost every area of life, Internet shutdowns are not appropriate. Blocking of online content should be restricted to clearly illegal content, as identified by the courts. At the same time, States have positive obligations to promote universal access to the Internet.

How should online privacy be protected and what are the limits of online surveillance?

The rights to both freedom of expression and privacy protect the right of individuals to engage in anonymous speech and to use encryption tools. Thus, digital anonymity and encryption tools should be permitted and protected, unless identifying the speaker is necessary to identify a specific instance of suspected criminal behaviour. States should also ensure that any surveillance strictly conforms with the international law tests for restrictions on freedom of expression and privacy, and avoid the requiring private intermediaries to engage in the indiscriminate collection of the personal data on their users.



Annex 2: Exercises

For each exercise, break into small groups of three or four participants. Each exercise corresponds with a module in the Toolkit, except for Exercises 1 and 2, which both correspond to Module 2 on restrictions on freedom of expression (so there is no exercise for Module 1).

For each exercise, one member of the group should be prepared to present the key findings of the group to the whole set of participants of the training programme.

Exercise 1: Restrictions on Freedom of Expression (Privacy)

Break into small groups for this exercise.

The Bugle newspaper is being sued by the Minister of Defence of the country of Utopia for breach of privacy. The facts are as follows. The Minister took a family holiday to Paris, where he stayed in the exclusive Ritz Hotel. The Bugle published a story on his holiday, noting that his hotel room had been paid for by the French Government. They found out this information by paying a bribe to someone working at the hotel and they were given documentary proof of this fact. As it happens, Utopia is about to conclude a major arms deal with France, to buy French weapons. The Bugle has accused the Minister of corruption for letting the French government pay for his hotel room.

The story in The Bugle includes some pictures of the Minister on holiday in France, and his wife and two young children appear on some of these photos. They also managed to get a picture of his room at the Ritz hotel, which was an extremely fancy room with fresh flowers and chocolates provided daily. They did this by paying the maid who was cleaning the room a bribe.

Analyse the following questions:

Is this scenario a restriction on freedom of expression?

If so, does this restriction meet the three-part test under international law for restrictions on freedom of expression?

Assuming this happened in Jordan, are there ways in which the local law could be applied so as to comply with the test? In other words, are there interpretations of the rules which could bring any vague or otherwise problematic provisions into closer alignment with international law?

Exercise 2: Restrictions on Freedom of Expression (Administration of Justice)

Read the following statements. For each, discuss whether the expression in question can legitimately be restricted under international law? If so, how should such a restriction be applied? What about under Jordanian law?

A prominent member of the local bar association publicly criticises a recent court decision. In his critique, he says the legal arguments in the decision “have no basis” and that he questions the impartiality of the judges.

A journalist is writing a story about an ongoing, high profile murder case. He finds out about a scandalous incident in the defendant’s past and publishes an exposé about this. One week later, he obtains access to a document which has been sealed (i.e. ordered to be kept secret) by the court and also publishes it.





Training Manual for Judges on International Standards on Freedom of Opinion and Expression

In the middle of a court proceeding, an activist sitting in the courtroom starts shouting political slogans, waving a flag and blasting political songs from a radio.

In a television interview, a defence lawyer accuses the prosecutor of failing to disclose evidence related to his client.

A judge is giving a lecture in which she says that she thinks the political party in power is not respecting the rule of law. Then, in response to a question from the audience, she names several Ministers she thinks are corrupt and says she assumes any action they take is a result of bribery.

Exercise 3: Addressing Crimes against Freedom of Expression

Assume each of the following scenarios occur in Jordan. For each, discuss: 1) what possible legal recourse is available to the person concerned; 2) if any legal recourse is available, what form of redress a court might order; and 3) whether there are types of legal recourse which are not currently offered in Jordan but which could offer effective solutions to the problems.

A journalist is investigating corruption in the allocation of government contracts with a view to writing a story on it. She has been receiving threatening SMS messages making references to her investigation but she is not sure where they are coming from.

An organisation of women activists makes posts about their activities through various social media websites. They are often subject to critical and harassing online comments but lately these have escalated in frequency and intensity. A few contain specific threats of violence directed at their members and one woman reports she thinks someone is following her home from work. The organisation has made several reports to the police but say the police have not taken their concerns seriously.

A newspaper published several articles with satirical comments about a popular and well-respected national leader. This attracted a great deal of negative attention, including several break-ins at the newspaper's headquarters during which computers and other items of significant value were destroyed. The journal is struggling financially and is considering shutting down.

A well-known and controversial activist was attacked in his home. As a result of the attack, he was hospitalised with life-threatening injuries and incurred significant medical expenses. The cause of the attack and its perpetrators remain unknown.

If time permits, discuss what you see as the primary dangers for journalists and others exercising their freedom of expression in Jordan. What new mechanisms (i.e. in addition to what is already available) would you recommend be put in place to respond to these dangers?

Exercise 4: Access to Information and Jordan's Exception Regime

The following is an excerpt from Jordan's right to information law. It outlines Jordan's regime of exceptions to the disclosure of information:

Article (13)

Subject to the provisions of the applicable legislations, the Official in Charge shall refrain from the disclosure of the information related to:

- a. The secrets and documents protected under another legislation.
- b. The documents classified as confidential and protected and to be granted by an agreement with another country.



- c. The secrets related to national defence, state security or foreign policy.
- d. The information that includes analysis, recommendations, proposals or consultations to be submitted to the Official in Charge before a decision is made in their concern. This includes the correspondences or information exchanged between the different governmental departments.
- e. The personal information and files related to educational or medical persons, professional records, bank accounts and transfers and professional confidentialities.
- f. The correspondences with personal or confidential nature, whether in the form of post, cable, phone call or any other technological means, with governmental departments and the replies thereto.
- g. The information whose disclosure will affect negotiations between the Kingdom and any other state or authority.
- h. The investigations made by the prosecution, judicial system or security authorities concerning any crime or lawsuit within their scope of power, as well as the investigations made by the appropriate authorities for unveiling financial, customs or banking breaches, unless the appropriate authority permits the disclosure thereof.
- i. The information with commercial, industrial or economic nature, information on scientific bids or researches or technology, whose disclosure will lead to the violation of its copyright, rights of intellectual property or fair or lawful competition or to illegal profit or loss for any person.

Identify three points in the regime of exceptions which you think are strong and three which you think are weak according to international standards. For the three which are weak, please suggest concrete improvements to bring the exceptions more closely into line with international standards.

Exercise 5: Media Regulatory Bodies

Each group should choose one of the following as its focus sector for this exercise: journalists, print media or broadcasters. For your sector, design an “ideal” regulatory body. How are its members appointed? What mandate and powers does it have? How is it funded? And so on.

Then, contrast this “ideal” regulatory body with the arrangements that currently exist in Jordanian. For areas where there are differences between the Jordanian approach and international standards, what would be the best way to align the current approach more closely with international standards?

Exercise 6: Regulating Online Speech

A social media platform allows users to create discussion groups and post comments. The platform is used by a large number of political activists and civil society organisations to share information and discuss issues of public interest. However, some problematic content has also been posted. These include:

A few individual users have been the target of online harassment campaigns. These have included racist and sexist comments and the public posting of their personal information.

In addition, in a group dedicated to celebrating the culture of Ethnic Group A, some members have posted negative comments about Ethnic Group B. In some cases, these posts advocate violence against members of Ethnic Group B.





Training Manual for Judges on International Standards on Freedom of Opinion and Expression

Discuss what responsibilities various different actors have in relation to this content. In particular, discuss:

Does the platform have any human rights responsibility as a corporate actor to address these sorts of behaviour? If so, what should it do?

Should the State impose any legal obligations on the platform vis-à-vis this sort of content? If the State rendered the platform directly liable for this content, how would that affect freedom of expression?

Should State actors try to impose direct legal responsibility for this sort of content on the authors? If so, what sort of responsibility (such as criminal or civil liability)? What challenges can you see with this?

Are there any other (alternative) regulatory approaches for addressing this sort of socially problematical content? What about non-legal options?

Annex 3: Additional Reference Material

Module 1

Reference Material	URL
Centre for Law and Democracy and International Media Support, Briefing Note Series: Freedom of Expression, 2015	https://www.mediasupport.org/publication/briefing-note-series-freedom-expression/
Centre for Law and Democracy and the International Federation of Journalists, Handbook on International Standards and Media Law in the Arab World (2013) Available in English and Arabic	https://www.law-democracy.org/live/cld-and-ifj-launch-handbook-on-international-standards-and-media-law-in-the-arab-world/
Joint Declarations by the Special Rapporteurs on Freedom of Expression (annual)	https://www.osce.org/fom/66176
UNESCO, Legal standards on freedom of expression: toolkit for the judiciary in Africa	https://unesdoc.unesco.org/ark:/48223/pf0000366340
Media Legal Defence Initiative, Training Manual on International and Comparative Media and Freedom of Expression Law	https://www.mediadefence.org/sites/default/files/resources/files/MLDI.FoEManual.Version1.1.pdf
Mendel, Toby, Freedom of Expression: A Guide to the Interpretation and Meaning of Article 10 of the European Convention on Human Rights (2012, Council of Europe)	https://rm.coe.int/16806f5bb3
UNESCO, Assessment of Media Development in Jordan (2015) Available in English and Arabic	http://www.unesco.org/new/en/communication-and-information/resources/publications-and-communication-materials/publications/full-list/assessment-of-media-development-in-jordan/
UNESCO, World Trends in Freedom of Expression and Media Development: Global Report 2017/2018 (2018)	http://unesdoc.unesco.org/images/0026/002613/261372e.pdf



Module 2

Reference Material	URL
Article 19, Defining Defamation: Principles on Freedom of Expression and Protection of Reputation, 2000	https://www.article19.org/data/files/pdfs/standards/definingdefamation.pdf
Article 19, The Camden Principles on Freedom of Expression and Equality, 2009	https://www.article19.org/data/files/pdfs/standards/the-camden-principles-on-freedom-of-expression-and-equality.pdf
Centre for Law and Democracy, Short Notes on International Standards for Criminal Restrictions, 2014 Available in English and Arabic	https://www.law-democracy.org/live/short-notes-outline-international-standards-on-criminal-content-restrictions/
Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, 11 January 2013	http://undocs.org/A/HRC/22/17/Add.4
Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, 1 July 1984	https://www.icj.org/wp-content/uploads/1984/07/Siracusa-principles-ICCPR-legal-submission-1985-eng.pdf

Module 3

Reference Material	URL
James, Barry, Press Freedom: Safety of Journalists and Impunity (2007, UNESCO)	http://unesdoc.unesco.org/images/0015/001567/156773e.pdf
Mendel, Toby, Supporting Freedom of Expression: A Practical Guide to Developing Specialised Safety Mechanisms (2016, Centre for Law and Democracy and UNESCO)	http://www.law-democracy.org/live/wp-content/uploads/2016/04/Safety-Report.16.04.20_final.pdf
Recommendation CM/Rec(2016)4 of the Committee of Ministers to Member States on the protection of journalism and safety of journalists and other media actors, 13 April 2016	https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016806415d9#_ftn1
UN Plan of Action on the Safety of Journalists and the Issue of Impunity, 12 April 2012	https://en.unesco.org/sites/default/files/un-plan-on-safety-journalists_en.pdf





Training Manual for Judges on International Standards on Freedom of Opinion and Expression

Module 4

Reference Material	URL
Article 19, The Public's Right to Know: Principles on Freedom of Information Legislation, 1999	https://www.article19.org/data/files/pdfs/standards/righttoknow.pdf
Centre for Law and Democracy and Access Info Europe, RTI Rating	https://www.rti-rating.org
Mendel, Toby, Freedom of Information: A Comparative Legal Survey, 2nd Ed. (2008, UNESCO) Available in English, Arabic and other languages	http://www.unesco.org/new/en/communication-and-information/resources/publications-and-communication-materials/publications/full-list/freedom-of-information-a-comparative-legal-survey-2nd-edition/
Toward a Media Regulatory Reform in the Middle East and North Africa: Workshop on the Right to Information: Workshop Statement Available in English and Arabic	https://www.law-democracy.org/live/regional-beirut-workshop-agrees-to-cooperate-on-right-to-information/

Module 5

Reference Material	URL
Article 19, Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation, 2002	https://www.article19.org/data/files/pdfs/standards/accessairwaves.pdf
Centre for Law and Democracy, Toward a Media Regulatory Reform in Middle East and North Africa: The Regulation of the Profession of Journalists, 2015 Available in English and Arabic	https://www.law-democracy.org/live/statement-on-regulation-of-journalists-in-the-arab-world/
Mendel, Toby, Public Service Broadcasting: A Comparative Legal Survey, 2nd Ed. (2011, UNESCO)	http://unesdoc.unesco.org/images/0019/001924/192459e.pdf
Mendel, Toby, Tuning into Development: International Comparative Survey of Community Broadcasting Regulation (2013, UNESCO)	http://www.unesco.org/new/en/communication-and-information/resources/publications-and-communication-materials/publications/full-list/tuning-into-development-international-comparative-survey-of-community-broadcasting-regulation/
Sana'a Declaration on Promoting Independent and Pluralistic Arab Media, UNESCO Seminar, Sana'a, Yemen, 7-11 January 1996	https://al-bab.com/documents-reference-section/sanaa-declaration-arab-media



Module 6

Reference Material	URL
7iber and Cyber Stewards Network, “Digital Privacy in Jordan: Perceptions and Implications among Human Rights Actors”, 9 November 2015	https://www.7iber.com/research/a-glimpse-into-the-perception-of-digital-privacy-in-jordan
Centre for Law and Democracy, A Truly World-Wide Web: Assessing the Internet from the Perspective of Human Rights, 2012	http://www.law-democracy.org/wp-content/uploads/2012/04/final-Internet.pdf
Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression to the Human Rights Council, 22 May 2015 (addressing the use of encryption and anonymity in digital communications)	http://undocs.org/A/HRC/29/32
Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression to the Human Rights Council, 30 March 2017 (addressing the role of private actors in Internet and telecommunications access)	http://undocs.org/A/HRC/35/22



