

Module 1

**KEY
PRINCIPLES OF
INTERNATIONAL
LAW AND
FREEDOM OF
EXPRESSION**

*Summary Modules
on Litigating Digital
Rights and Freedom
of Expression Online*



Published by Media Defence: www.mediadefence.org
This module was prepared with the assistance of ALT Advisory: <https://altadvisory.africa/>

December 2020

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MODULE 1

KEY PRINCIPLES OF INTERNATIONAL LAW AND FREEDOM OF EXPRESSION

- Human rights have become firmly entrenched in international law since the adoption of the seminal [Universal Declaration of Human Rights](#) in 1948.
- Since then, international human rights law has become increasingly influential in domestic courts and has set a global standard for the protection of human rights.
- Freedom of expression is one such right that has benefitted from this trend, but it is increasingly under threat from the dramatic changes to the media and information eco-system occasioned by the rise of the internet.
- African regional instruments, if properly understood and utilised, constitute a powerful tool in the arsenal of defenders of freedom of expression.

INTRODUCTION

Since at least the formation of the United Nations ([UN](#)) and the construction of a human rights regime founded in international law in 1948, the right to freedom of expression became universally acknowledged. An example of this universal acknowledgement is found in the case of [Madanhire and Another v Attorney General](#) from the Zimbabwean Constitutional Court, where the Court stated that:

“There can be no doubt that the freedom of expression, coupled with the corollary right to receive and impart information, is a core value of any democratic society deserving of the utmost legal protection. As such, it is prominently recognised and entrenched in virtually every international and regional human rights instrument.”¹

Because the principle of freedom of expression is explicit in so many treaties, soft law instruments, and widely acknowledged in domestic and regional law, it has come to be regarded as a principle of customary international law.² Nevertheless, today’s rapidly evolving world is presenting new and unprecedented threats to the full realisation of the right to freedom of expression for many around the world, especially journalists and the media.

¹ Zimbabwean Constitutional Court, Constitutional Application No. CCZ 78/12, para. 7 (2014) (accessible at: <https://globalfreedomofexpression.columbia.edu/wp-content/uploads/2015/03/Madhanhire-v.-Attorney-General-CCZ-214.pdf>).

² See article 38 of the Statute of the International Court of Justice (1948) (accessible at https://legal.un.org/avl/pdf/ha/sicj/icj_statute_e.pdf) which documents the four recognised sources of international law.

In order for African defenders of freedom of expression to adequately address these new challenges, it is crucial to have a firm understanding of freedom of expression in international and regional law. This module seeks to provide an overview of the key principles related to freedom of expression in international law, as well as in African regional instruments, and provide a foundation for understanding how to use these principles in the new digitally-connected world.

KEY PRINCIPLES OF INTERNATIONAL LAW

Human rights in international law

Human rights are inherent to all persons and dictate the minimum standard that must be applied to all people. They are enshrined in both national and international law and all persons are entitled to enjoy such rights without discrimination. When fully realised, human rights reflect the minimum standards to enable persons to live with dignity, freedom, equality, justice and peace.

The cornerstones of human rights are that they are inalienable and therefore cannot be taken away; interconnected and therefore dependant on one another; and indivisible, meaning that they cannot be treated in isolation. Not all rights are absolute, and some rights may be subject to certain limitations and restrictions in order to balance competing rights and interests.

Human rights under international law are generally considered to be rooted in the Universal Declaration of Human Rights ([UDHR](#)), which was agreed to by the United Nations in 1948 following the end of World War II. The UDHR is not a binding treaty in itself, but countries can be bound by those UDHR principles that have acquired the status of customary international law. The UDHR has further been the catalyst to creating other binding legal instruments, most notably the International Covenant on Civil and Political Rights ([ICCPR](#)) and the International Covenant on Economic, Social and Cultural Rights ([ICESCR](#)). Together, these three instruments constitute what is known as the [International Bill of Rights](#). Since their adoption, additional thematic treaties have been developed to address certain topics:

- [The International Convention on the Elimination of All Forms of Racial Discrimination](#);
- [The Convention on the Elimination of All Forms of Discrimination against Women](#);
- [The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment](#);
- [The Convention on the Rights of the Child](#);
- [The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families](#);
- [The Convention on the Rights of Persons with Disabilities](#); and
- [The International Convention for the Protection of All Persons from Enforced Disappearance](#).

In Africa, the African Charter on Human and Peoples' Rights ([African Charter](#)) is the primary treaty governing human rights on the continent. States are the primary duty-bearers for the realisation of human rights, which encompasses both negative and positive duties. With negative duties, states must avoid violating the rights of individuals and communities within their territories and protect them against violations by others. On the other hand, the obligation to fulfil human rights requires states to take positive steps to enable the full enjoyment of these rights. By ratifying treaties, states commit to put in place domestic measures, such as legislation, to give effect to their treaty obligations.

Applying international law in a domestic context

International and regional human rights law not only sets a standard for domestic law to follow, but is in many cases binding on states. However, the exact way in which international law obligations are implemented domestically varies around the world.

The ICCPR creates a binding obligation on states. Regional human rights standards are also particularly influential, especially since there is near-universal ratification of the African Charter by African states.³

The way in which international law applies domestically is largely determined by whether a state applies monist or dualist principles:

- **Monist** states are those where international law is automatically part of the domestic legal framework. However, their exact status — whether above or on par with a state's constitution or domestic law — varies.
- **Dualist** states are those where international treaty obligations only become domestic law once they have been enacted by the legislature. Until this has happened, courts are not expected to comply with these obligations in a domestic case, although there are states wherein some parts of international law may be automatically applied or used as a tool to interpret domestic law.

States with common law systems are invariably dualist, and while States with civil law systems are more likely to be monist, many are not. Because the application of international law is so varied and complicated, practitioners must evaluate the specific context in a given country to understand how to apply international and regional law most effectively.

THE RIGHT TO FREEDOM OF EXPRESSION UNDER INTERNATIONAL LAW

Freedom of expression under international law

The rights contained under article 19 of the ICCPR comprise three core tenets: the right to hold opinions without interference (freedom of opinion); the right to seek and receive information (access to information); and the right to impart information (freedom of expression).

³ African Commission on Human and Peoples' Rights, 'Ratification Table – African Charter on Human and Peoples' Rights' (accessible at: <https://www.achpr.org/ratificationtable?id=49>).

The UN Human Rights Committee's (UNHRC) [General Comment No. 34](#) on the ICCPR notes that the right to freedom of expression includes, for example, political discourse, commentary on one's own affairs and on public affairs, canvassing, discussion of human rights, journalism, cultural and artistic expression, teaching, and religious discourse.⁴ It also embraces expression that may be regarded by some as deeply offensive.⁵ The right covers communications that are both verbal and non-verbal, and all modes of expression, including audio-visual, electronic and internet-based modes of communication.⁶

In terms of article 19(3) of the ICCPR, the right to freedom of expression contained in article 19(2) may be subject to certain restrictions:

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.”

With respect to a limitation on the right to freedom of expression under article 19(2) of the ICCPR, a three-part test is used to assess whether such a limitation is justified: (i) the limitation must be provided for in law; (ii) it must pursue a legitimate aim; and (iii) it must be necessary for a legitimate purpose.⁷ This test applies similarly to limitations of the right to freedom of expression under other legal instruments, including the African Charter.

Freedom of expression online

Article 19(2) of the ICCPR stipulates that the right to freedom of expression applies regardless of frontiers and through any media of one's choice. General Comment No. 34 further explains that article 19(2) includes internet-based modes of communication.⁸

In a 2016 resolution, the UN Human Rights Council ([UNHRC](#)) affirmed that:⁹

⁴ OHCHR, General Comment No. 34 at para 11. (2011) (accessible at: <https://www2.ohchr.org/english/bodies/hrc/docs/GC34.pdf>).

⁵ *Ibid* at para 11. For further discussion on this, see Nani Jansen Reventlow, 'The right to 'offend, shock or disturb', or the importance of protecting unpleasant speech' in Perspectives on harmful speech online: A collection of essays, Berkman Klein Center for Internet & Society, 2016 at pp 7-9 (accessible at: <http://nrs.harvard.edu/urn-3:HUL.InstRepos:33746096>).

⁶ *Ibid* General Comment No. 34 at para 12.

⁷ For a fuller discussion on how freedom of expression may be legitimately limited, see the training manual published by Media Defence on the principles of freedom of expression under international law: Richard Carver, 'Training manual on international and comparative media and freedom of expression law' at pp 14-16 (2018) accessible at:

<https://www.mediadefence.org/sites/default/files/resources/files/MLDI.FoEManual.Version1.1.pdf>).

For more on proportionality see the 2002 decision of *Attorney-General v 'Mopa* in the Lesotho Court of Appeal (accessible at: <https://lesotholii.org/ls/judgment/high-court/2002/3>) and *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Zimbabwe* in the ACHPR (2009)

(accessible at: <https://africanlii.org/afu/judgment/african-commission-human-and-peoples-rights/2009/98>)

⁸ General Comment No. 34 above at n 4 at para 12.

⁹ UNHRC, 'Resolution on the promotion, protection and enjoyment of human rights on the internet', A/HRC/32/L.20 (2016) at para 1 (accessible at: <https://digitallibrary.un.org/record/845728?ln=en>).

“[T]he same rights that people have offline must also be protected online, in particular freedom of expression, which is applicable regardless of frontiers and through any media of one’s choice, in accordance with articles 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.”

In 2016, the African Commission on Human and Peoples’ Rights ([ACHPR](#)) affirmed the UNHRC’s declaration and called on states to respect and to take legislative and other measures to guarantee, respect and protect citizens’ rights to freedom of information and expression through access to internet services.¹⁰

While freedom of expression is clearly protected by a considerable body of treaty law, it can also be regarded as a principle of customary international law, given how frequently the principle is enunciated in treaties, as well as other soft law instruments.¹¹ Most human rights treaties, including those dedicated to the protection of the rights of specific groups — such as women, children and people with disabilities — also make explicit mention of freedom of expression.¹²

Freedom of expression in the digital age

In recent years, freedom of expression has been under attack from a variety of new and challenging sources. First, the rise of social media and new media platforms has in many places decimated the revenue model for independent media, leaving many media houses weakened or bankrupt and unable to play their crucial role of holding power to account. Secondly, the rise of the internet has upended the traditional information eco-system in various ways. This has resulted in a backlash from governments seeking to regulate growing cybercrimes and a flood of misinformation, often to the detriment of freedom of expression and legitimate dissent.¹³ Nigeria and Ethiopia are just two examples of this rising trend.¹⁴

The importance of protecting freedom of expression in this new digital age is emphasised by the new [ACHPR Declaration on Freedom of Expression and Access to Information in Africa](#), published in April 2020. The Declaration differs from the 2002 Declaration in the following notable ways:

¹⁰ ACHPR, ‘Resolution on the right to freedom of information and expression on the internet in Africa’, ACHPR/Res.362, (2016) (accessible at: <https://www.achpr.org/sessions/resolutions?id=374>).

¹¹ Carver above at n 7 at p. 5.

¹² *Ibid* at p 5.

¹³ For more see Washington Post, ‘There’s a worrying rise in journalists being arrested for ‘fake news’ around the world’ (2019) (accessible at: <https://www.washingtonpost.com/world/2019/12/12/theres-worrying-rise-journalists-being-arrested-fake-news-around-world/>) and Freedom House, ‘The Rise of Digital Authoritarianism: Fake news, data collection and the challenge to democracy’ (2018) (accessible at: <https://freedomhouse.org/article/rise-digital-authoritarianism-fake-news-data-collection-and-challenge-democracy>).

¹⁴ Al Jazeera ‘Nigerians raise alarm over controversial Social Media Bill’ (2019) (accessible at: <https://www.aljazeera.com/news/2019/12/18/nigerians-raise-alarm-over-controversial-social-media-bill>) and Al Jazeera, ‘Ethiopia passes controversial law curbing ‘hate speech’ (2020) (accessible at <https://www.aljazeera.com/news/2020/02/ethiopia-passes-controversial-law-curbing-hate-speech-200213132808083.html>).

- It emphasises the importance of access to information by dedicating an entire section to the subject, where the 2002 Declaration mentioned it only in the Preamble.
- It calls on States to “recognise that universal, equitable, affordable and meaningful access to the internet is necessary for the realisation of freedom of expression [and] access to information.”¹⁵
- The Declaration “articulates State obligations with respect to internet intermediaries, noting that States must ensure that internet intermediaries provide access to the internet in a non-discriminatory manner and that the use of algorithms or other artificial intelligence uses do not infringe on international human rights standards;”¹⁶
- It provides guidance on requests to remove online content.¹⁷
- It addresses the protection of personal information and communication surveillance and requires States to adopt laws regulating the processing of personal information.¹⁸

WHO CONSTITUTES A JOURNALIST?

A particular challenge that arises in the context of digital rights is the changing roles of journalists and publishers online. Journalists are vitally important protagonists when discussing digital rights and freedom of expression because they investigate and criticise the actions of the state and other powerful actors as part of the exercise of their functions. The particular role that the media plays in achieving an open and democratic society, and the special protections that this deservedly engages, have frequently been emphasised by the courts. Of course, the media industry has also experienced dramatic and rapid change as a result of the rise of the internet and social media, thus defending press freedom has become more complicated and needs to be tailored to the new and evolving dynamics of the media eco-system.

Nevertheless, General Comment No. 34¹⁹ expressly provides that journalism is a function shared by a wide range of actors, from professional full-time reporters and analysts to bloggers and others who engage in forms of self-publication in print and on the internet. Thus, journalistic protections should be construed broadly to apply to both professional and citizen journalists who are disseminating information in the public interest, so as not to unduly constrain freedom of expression.

In 2013, the [UN Special Rapporteur on freedom of expression](#) stated that²⁰ “[n]ew technologies have provided unprecedented access to means of global communication, and

¹⁵ ACHPR, ‘Declaration of Principles on Freedom of Expression and Access to Information in Africa’, Principle 37(2) (2019) (accessible at: <https://www.achpr.org/legalinstruments/detail?id=69>).

¹⁶ International Justice Resource Center, ‘New ACHPR Declaration on Freedom of Expression & Access to Information’ (2020) (accessible at: <https://ijrcenter.org/2020/04/22/new-achpr-declaration-on-freedom-of-expression-access-to-information/>).

¹⁷ ACHPR above at n 15 at Principle 39(4).

¹⁸ *Ibid* at Principle 42.

¹⁹ General Comment No. 34 above at n 4.

²⁰ Report of the UNSR on Freedom of Expression to the UN General Assembly (UNGA), A/65/284, at para 21 (2013) (accessible at:

have therefore introduced new means of reporting on news and events around the world.” The report notes that, although citizen journalists are not trained professional journalists, it is nevertheless an important form of journalism as it can contribute to a richer diversity of views and opinions, and can provide an immediate, insider’s view of a conflict or catastrophe.

In interpreting the ICCPR in relation to freedom of the press, General Comment No. 34 states:²¹

“The Covenant embraces a right whereby the media may receive information on the basis of which it can carry out its function. The free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion. The public also has a corresponding right to receive media output... As a means to protect the rights of media users, including members of ethnic and linguistic minorities, to receive a wide range of information and ideas, States parties should take particular care to encourage an independent and diverse media.”

Recently, the High Court of South Africa provided a resounding defence of freedom of the press in their role of providing access to information for the public and enabling freedom of expression in the 2019 case of *amaBhungane v Minister of Justice*.²² In defending the right of journalists to protect the confidentiality of their sources and to be safe from surveillance, the judgment stated:

“Despite much lauding of the role of the media and the express guarantee of freedom of expression and of the media, in particular, in section 16(1)(a) of the Constitution, there has been a reluctance to take the next step needed to recognise journalists as a special class of persons whose intrinsic working methods warrant especial protection, such as lawyers enjoy.²³

In a country that is as wracked by corruption in both our public institutions and in our private institutions as ours is, and where the unearthing of wrongdoing is significantly the work of investigative journalists, in an otherwise, seemingly, empty field, it is hypocritical to both laud the press and ignore their special needs to be an effective prop of the democratic process.”²⁴

UNITED NATIONS

The United Nations was the first international entity to enshrine the right to freedom of expression in international law in 1948 with the *Universal Declaration of Human Rights*. Article 19 states: “Everyone has the right to freedom of opinion and expression; this right includes

https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.40_E_N.pdf).

²¹ General Comment No. 34 above at n 4.

²² High Court of South Africa in Pretoria, Case No. 25978/2017, (2019) (accessible at: <http://www.saflii.org/za/cases/ZAGPPHC/2019/384.html>).

²³ High Court of South Africa Case No. 25978/2017 at para.130 (accessible at: <http://www.saflii.org/za/cases/ZAGPPHC/2019/384.html>).

²⁴ *Ibid* at para 131.

freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.” This was the foundation of what later became article 19 of the [ICCPR](#), and was further elaborated on in [General Comment No. 34](#) by the UNHRCte.²⁵

The ICCPR is not the only treaty within the United Nations framework to address the right to freedom of expression. For instance:

- Article 15(3) of the [ICESCR](#) specifically refers to the freedom required for scientific research and creative activity, providing that: “The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.”
- Articles 12 and 13 of the UN Convention on the Rights of the Child ([CRC](#)) contain extensive protections relating to the right to freedom of expression enjoyed by children in articles 12 and 13.
- Article 21 of the United Nations Convention on the Rights of Persons with Disabilities ([CRPD](#)) contains extensive protections relating to freedom of expression and access to information of persons with disabilities in article 21.

It is therefore clear that the right to freedom of expression is firmly entrenched within the United Nations system, both as an important right on its own, as well as a crucial enabling right. For example, as stated in [General Comment No. 25](#), in the context of the right to participate in public affairs, voting rights and the right of equal access to public service, it was noted that:

“Citizens can also take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves. This participation is supported by ensuring freedom of expression, assembly and association.”²⁶

AFRICAN REGIONAL INSTRUMENTS

A number of regional instruments guarantee the right to freedom of expression in Africa. For example, article 9 of the African Charter provides for it as follows:

1. Every individual shall have the right to receive information.
2. Every individual shall have the right to express and disseminate his opinions within the law.”²⁷

Oversight and interpretation of the African Charter is the sole domain of the African Commission on Human and Peoples' Rights ([ACHPR](#)), which was established in 1987. A protocol to the African Charter was adopted in 1998 which created an African Court on Human and Peoples' Rights ([ACtHPR](#)), and which came into effect in 2005.²⁸

²⁵ General Comment No. 34 above at n 4 at para 11.

²⁶ UNHRCte General Comment No. 25 at para 8 (1996) (accessible at: <https://www.equalrightstrust.org/ertdocumentbank/general%20comment%2025.pdf>).

²⁷ African Charter on Human and Peoples' Rights (1981) (accessible at: <https://www.achpr.org/legalinstruments/detail?id=49>).

²⁸ *Ibid.*

It should be noted that reference to “within the law” in article 9(2) the African Charter should not be seen as permitting states to enact laws that violate the right to freedom of expression. The ACHPR made clear in *Constitutional Rights Project v Nigeria*²⁹ that “[g]overnment[s] 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.”

The right to freedom of expression is further underscored in the *Declaration of Principles on Freedom of Expression in Africa* (revised in 2019),³⁰ and the *ACHPR Guidelines on Freedom of Association and Assembly in Africa*.³¹

There are also a number of sub-regional instruments that engage the right to freedom of expression, such as the *Treaty Establishing the East African Community* (EAC)³², the *Revised Treaty of the Economic Community of West African States* (ECOWAS), and the *Protocol on Culture, Information and Sport of the Southern African Development Community* (SADC).

Other regional bodies also provide useful guidance on how to interpret the right to freedom of expression. For example, the *European Court of Human Rights* has published a *Case-Law Guide*³³ providing insight into the decisions of the Court pertaining to article 10 of the *European Convention on Human Rights*, which deals with freedom of expression. Likewise, the *Inter-American Court of Human Rights* provides a jurisprudence booklet on freedom of expression.³⁴

CONCLUSION

The right to freedom of expression is firmly established in international and regional human rights law, which has proven instrumental in ensuring binding domestic and regional judgments against states seeking to violate this fundamental and touchstone right. However, the right is increasingly being challenged in new ways as a result of the dramatic changes

²⁹ ACHPR, Communication No. 102/93 (1998) at paras 57-58 (accessible at: <https://www.achpr.org/sessions/descions?id=100>).

³⁰ ACHPR above at n 15.

³¹ ACHPR, Guidelines on Freedom of Association and Assembly in Africa (accessible at <https://www.achpr.org/presspublic/publication?id=22>).

³² See, for instance, *Burundi Journalists' Union v The Attorney General of the Republic of Burundi*, Reference No. 7 of 2013 (2015) (accessible at: <https://www.eacj.org/?cases=burundi-journalists-union-vs-the-attorney-general-of-the-republic-of-burundi>).

³³ European Court of Human Rights, ‘Guide on Article 10 of the European Convention on Human Rights’ (2020) (accessible at: https://www.echr.coe.int/Documents/Guide_Art_10_ENG.pdf). For more, see also the ECHR’s Factsheets on Access to the Internet and Freedom to Receive and Impact Information and Ideas (accessible at: https://www.echr.coe.int/Documents/FS_Access_Internet_ENG.pdf), on Hate Speech (accessible at: https://www.echr.coe.int/Documents/FS_Hate_speech_ENG.pdf), on the Protection of Journalistic Sources (accessible at: https://www.echr.coe.int/Documents/FS_Journalistic_sources_ENG.pdf), and on the Protection of Reputation (accessible at: https://www.echr.coe.int/Documents/FS_Reputation_ENG.pdf).

³⁴ Inter-American Court of Human Rights, ‘Cuadernillo de Jurisprudencia de la Corte Interamericana de Derechos Humanos n° 16: libertad de pensamiento y de expresión’ (accessible at: <https://www.corteidh.or.cr/sitios/libros/todos/docs/cuadernillo16.pdf> in Spanish).

wrought upon the world by the growth of the internet and technology, particularly for journalists and the media. Leveraging the international law and jurisprudence that exists to continue to protect this fundamental right in a rapidly evolving world is more important than ever.