Module 3

Criminalisation of Online Speech

Advanced Modules on Digital Rights and Freedom of Expression Online in Sub-Saharan Africa

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MODULE 3

CRIMINALISATION OF ONLINE SPEECH

This module aims to:

- **Provide an overview of current trends in the criminalisation of online speech in sub-Saharan Africa;**
- **Set out the applicable international human rights standards and fundamental international and regional legal principles;**
- **Understand the impact of criminalisation of speech on freedom of expression and identify legitimate purposes for limiting freedom of expression;**
- **Examine the different forms of criminalisation, including hate speech, cybercrime, and disinformation; and**
- **Identify practical ways to deal with the competing interests of dealing with criminality and protecting free speech.**

1. INTRODUCTION

As usage of the internet and social media has increased rapidly in recent years, so too have efforts by states to control the spread of certain forms of speech online, whether legitimate or otherwise. This has resulted in a growing trend of criminalising some forms of online speech. Many states have attempted to justify this as a response to threats of hate speech, national security, the mushrooming of cybercrimes, and the proliferation of disinformation in the online realm. In many instances, however, this has led to overly broad regulation that stifles freedom of expression and access to information. While some of the online harms that prompt criminalisation are indeed genuine concerns and may warrant responses from states, there is an urgent need to ensure that states do not use these to justify restricting speech or controlling content.

This module provides an overview of the criminalisation of online speech. It looks at the applicable legal framework that guides what is permissible in terms of restrictions on the right to freedom of expression, and the relevant considerations for balancing competing rights. It sets out several common justifications for the criminalisation of speech, such as national security, counter-terrorism, and the preservation of public order, and evaluates some of the common forms of speech commonly criminalised in sub-Saharan Africa.

2. OVERVIEW OF CRIMINALISING ONLINE SPEECH

Criminalisation, in the context of online speech, refers to the enactment of laws and policies that render specific forms of online expression illegal. Such criminalisation may be targeted at a range of harmful expressions, including:

- Hate speech;
- Threats or incitement to terrorism and violence;
- Disinformation;
- Defamation;
- Sexual abuse material including child sexual abuse material (CSAM), the non-consensual dissemination of intimate images (NCII), and sexual exploitation online; and
- Cybercrimes.

From a criminal justice perspective, certain actions may warrant criminal consequences. However, in the context of online speech offences, there are a variety of competing considerations in the interplay between protecting the public from harmful content and limiting and deterring free speech.

Walking the tightrope: criminalising online speech

The complexities of criminalising online speech should not be underestimated. The digital landscape, which in many ways has brought people together and facilitated free speech and dissent, has also created spaces that breed divisiveness, division, and exclusion. Supremacist ideologies, populist nationalism, gendered violence, racism, and xenophobia are some of the social ills that can and have taken root in both our offline and online societies. Balancing dignity, equality, autonomy, and development against the right to free speech is not an easy task, particularly in the complicated world of online content.

It is arguable that states' moves to impose restrictive measures on harmful speech, instead of addressing the systemic issues, such as the factors that enable the spread of misinformation online, are short-sighted solutions that restrict both those who are affected by online harms and those who are lawfully and legitimately expressing themselves. Governments the world over are adopting legislation that curtails free expression rights on the internet, either through the criminalisation of specific actions, such as cybercrimes or through laws aimed at combating certain content online.[1]

The right to freedom of expression is a fundamental human right that is protected in, amongst other international human rights instruments, the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the African Charter on Human and People's Rights (African Charter). Freedom of expression is valuable

[1] CIPESA, 'Why are African Governments Criminalising Online Speech? Because They Fear Its Power,' (2018) (accessible here) and Council on Foreign Relations, 'Where Speech Goes, Repression Follows: The Global Trend of Criminalizing Online Speech,' (2017) (accessible here).

not only in and of itself but is also necessary for the realisation of a range of other rights, as well as enabling good governance and economic and social progress by ensuring accountability by allowing people to freely debate and raise concerns with the state.[2]

Nevertheless, freedom of expression is not a right that is immune to restrictions in appropriate circumstances. In terms of article 19(3) of the ICCPR, the exercise of freedom of expression "carries with it special duties and responsibilities" and "may therefore be subject to certain restrictions…"[3]

Understanding the role of online speech offences, and their intended and unintended consequences requires careful navigation. Many laws that criminalise online speech are seen to be vague and overbroad and often fail to strike the appropriate balance between competing rights. These laws result in a chilling effect on the right to freedom of expression in which individuals steer clear of controversial topics because there is uncertainty about what is permitted and what is not.[4] The chilling effect may be exacerbated where penalties for breach of the law are unduly harsh, as is often the case with certain laws that criminalise online speech in sub-Saharan Africa.

3. APPLICABLE INTERNATIONAL HUMAN RIGHTS STANDARDS

3.1. Overview of the right to freedom of expression and associated rights

It is trite that the right to freedom of expression is deeply entrenched as a fundamental human right and given protection through various international and regional instruments. Article 19 of the UDHR states that:

> "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."

Article 19 of the ICCPR gives further effect to this, and article 20 provides for certain restrictions on speech:

> "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."

These fundamental instruments have been bolstered over time with the release of several supporting guidelines such as General Comment No 34 on Freedom of Opinion and Expression,[5] as well as reports of the United Nations (UN) Special Rapporteurs on freedom of opinion and expression, privacy, freedom of peaceful assembly and of association, violence against women and girls, its causes and consequences, etc.

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[2] ARTICLE 19, 'Hate Speech' Explained: Toolkit (2015) (accessible here).
[3] Accessible here.
[4] Centre for Law and Democracy 'Restriction on freedom of expression' (2015) (accessible here)
[5] UNHRC, 'General Comment No 34 - Article 19 Freedoms of opinion and expression' (2011) (accessible here).

For example, the 2017 Report of the UN Special Rapporteur on Freedom of Opinion and Expression (UNSR on FreeEx) sets out states' obligations under article 19 of the ICCPR. States may not interfere with, or in any way restrict, the holding of opinions, unless there are instances that warrant restriction — which must be provided by law and necessary for the respect of the rights or reputations of others or for the protection of national security or public order, or public health or morals.[6] States are also under an obligation to take steps to protect individuals from undue interference with human rights when committed by private actors, including taking appropriate steps to prevent, investigate, punish, and redress private actors' abuse. Such steps include the adoption and implementation of legislative, judicial, administrative, educative, and other appropriate measures that require or enable businesses to respect freedom of expression, and, where private sector abuses occur, access to an effective remedy.

Despite these strong protections in international law, many challenges remain in realising the right to freedom of expression in the online age. By way of example, in 2023, the UNSR on FreeEx, together with several other special mandate holders in international and regional bodies, released a Joint Declaration on Media Freedom and Democracy that expressed deep concern about the growing threats to democracy, freedom of opinion and expression, and media freedom globally as well also an overall lack of understanding of the role of the media as an essential pillar of democracy, human rights, and sustainable development.[7]

Balancing rights: the example of children's rights

In the context of online content, it is also notable that children and young people constitute one of the largest and fastest-growing audiences for online content in the world. As such, the rights of the child are significantly implicated in decisions on how to treat online content. In terms of article 3 of the UN Convention on the Rights of the Child, the best interests of the child must be a primary consideration in all actions concerning children, and states are required to take appropriate measures to ensure the child is protected as such by taking all appropriate legislative and administrative measures.

The specific audience of children using online tools demonstrates the complexity of regulating online speech. While children must be protected from harmful online content such as hate speech or abusive materials, they must also be able to meaningfully exercise the right to freedom of expression in terms of article 13, which includes 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 other media of the child's choice" and to access information in terms of article 17.

In 2021, the UN Committee on the Rights of the Child published General Comment 25 on children's rights in relation to the digital environment, which provides guidance for State implementation of the UNCRC in relation to the digital environment and with regard to relevant legislation, policy, and other measures to ensure compliance with the

[6] UNHRC, 'Report on UNSR on FreeEx' (2017) (accessible here).
[7] Joint Declaration on Media Freedom and Democracy (2023) (accessible here).

Convention.[8] General Comment 25 states that content moderation and content controls should be balanced with the right to protection against violations of children's other rights, notably their rights to freedom of expression and privacy. The General Comment further notes that restrictions to children's right to freedom of expression such as filters and safety measures should be lawful, necessary, and proportionate.

This need to balance the competing rights was emphasised in the 2017 UNICEF Report on Children's Rights and Business in a Digital World: Freedom of Expression, Association, Access to Information and Participation.

Importantly, freedom of expression may even extend to speech that may be regarded as deeply offensive by some people and applies both to verbal and non-verbal communications as well as all modes of expression, including audio-visual, electronic, and internet-based communication.

In the African context, of central importance is article 9 of the African Charter, which provides that:

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

Case note: limiting freedom of expression

African case law defining the appropriate contours of limitations on freedom of expression in the offline realm has advanced over the years with several foundational cases being heard in regional and continental fora:

- In the case of *Agnes Uwimana-Nkusi & Saidati Mukakibibi v Rwanda* (2021), the African Commission on Human and Peoples Rights evaluated the convictions of two journalists under several laws limiting freedom of expression on the grounds of defamation and national security. The Commission found that criminal defamation laws violate article 9 of the African Charter and directed **Rwanda** to attend to the necessary amendments. In arriving at its decision, the Commission held that "the law cannot give persons in charge of its application unlimited powers of decision on the restrictions of freedom of expression" and that "any limitation on freedom of expression must be therefore adjudicated considering its importance to democracy and the impact such a limitation would have on the principles considered as fundamental to a democratic society."

- In *Isaac Olamikan & Anor v. Federal Republic of Nigeria* (2023), the Economic Community of West African States Community Court of Justice (ECOWAS Court) declared sections of the **Nigerian** Press Council Act inconsistent with article 9(1) of the African Charter for failing to recognise the public interest nature of media and

[8] UN Committee on the Rights of the Child General comment No 25 (2021) on children's rights in relation to the digital environment, (accessible here).

imposing a minimum educational requirement, age limits, and registration requirements on media that unjustifiably interfered with the right to freedom of expression.[9]

These cases show the narrow confines within which limitations on the right to freedom of expression must fit.

In April 2020, the African Commission on Human and Peoples Rights Declaration of Principles on Freedom of Expression and Access to Information in Africa (the Declaration) came into force to supplement Article 9 of the African Charter.[10] It provides additional guidance on appropriate limitations to freedom of expression in several sections:

- **Principle 2** emphasises that states should not interfere with freedom of opinion;
- **Principle 5** highlights the need to protect the rights to freedom of expression and access to information both offline and online;
- **Principle 9** speaks to the justifiable limits that may be placed on the exercise of these rights, noting that such limitations must be prescribed by law, serve a legitimate aim, and be a necessary and proportionate means to achieve the stated aim in a democratic society, as well as providing requirements that must be met by law limiting these rights;
- **Principle 22** which calls on states to repeal criminal laws on sedition, insult, and publication of false news, decriminalise defamation and libel, and review all criminal laws restricting content to ensure alignment with international standards;
- **Principle 23** sets out the types of speech that must be prohibited by states, noting that speech should be criminalised only as a last resort and only for the most severe cases and that states should not prohibit speech that merely lacks civility, or which offends or disturbs; and
- **Principle 38** directs states not to interfere with the rights to seek, receive, and impart information through any means, including online, by removing, blocking, or filtering content unless justifiable and compatible with international standards.

3.2. Other implicated rights

Freedom of expression as an enabling right

Beyond the obvious interlinkages, such as with the right to freedom of assembly and the rights of the child, freedom of expression serves as an enabling right for several other human rights. For example, General Comment 21 on the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR) underlines how freedom of expression underpins the right to participate in cultural life.[11] General Comment No 34 on the ICCPR stresses the interdependency of the rights to opinion, expression, and participation in

[9] ECOWAS Court, 'Court declares sections of Nigerian Press Council Act inconsistent with human rights laws, orders amendment,' (2023) (accessible here).

[10] ACHPR, 'Declaration of Principles on Freedom of Expression and Access to Information in Africa' (2019) (accessible here).

[11] UN Committee on Economic, Social, and Cultural Rights, 'General Comment 21' (2009) (accessible here).

public affairs as well as the fact that freedom of expression is a necessary condition for the realisation of the principles of transparency and accountability.[12]

At the same time, other rights may occasionally come into conflict with the right to freedom of expression. For example, the right to equality and non-discrimination may arguably need to be protected through the regulation of hate speech. The right to privacy may be implicated when content is published about a specific individual (see Advanced Module 4 on Privacy and Security Online in this series for more on the balance between privacy and freedom of expression). Exercising the right to freedom of expression may implicate the right to reputation or dignity when involving content about a specific individual.

Ultimately, the balancing acts required in managing these potential tensions can sometimes be difficult, which underscores the need for such evaluations to occur in conformity with the extensive body of international human rights law and standards that exists.

Online speech and gender

Research has shown that women, particularly those in prominent positions such as politicians and journalists, are most targeted by harmful online speech and digital security attacks that seek to stifle their freedom of expression and discourage women's participation online.[13] As highlighted in the UNSR on FreeEx's 2023 statement to the UN Human Rights Council:[14]

> "Gendered censorship is pervasive, with women's voices being suppressed by State, communities, religious and private actors. Online gender-based violence is a serious barrier to women's ability to speak, engage and organize online."

4. RESTRICTING FREEDOM OF SPEECH ONLINE

As a result of the dramatic changes in the spread of information occasioned by the internet, there has been a proliferation of attempts to address issues relating to terrorism and national security, cybercrimes, and the spreading of disinformation online. Many of these attempts are, to varying degrees, in conflict with the right to freedom of expression.[15] As discussed above, although the right to freedom of expression is a fundamental human right, it is not absolute. As with most rights, freedom of expression may be lawfully restricted where the restrictions are reasonable and justifiable in an open and democratic society. However, as confirmed in General Comment 34 and Principle 9 of the African Declaration,[16] the restrictions imposed by states should not put the right to freedom of expression in jeopardy.

[12] UNHRC, General Comment 34 above n 5.
[13] UNESCO, 'The Chilling: global trends in online violence against women journalists,' (2021) (accessible here).
[14] UNHRC, 'UNSR FreeEx Report on gendered disinformation' (2023) (accessible here).
[15] Shepard, 'Extremism, Free Speech and the Rule of Law: Evaluating the Compliance of Legislation Restricting Extremist Expressions with Article 19 ICCPR' Utrecht Journal of International and European Law (2017) (accessible here).
[16] African Declaration above n 6.

Article 19(3) of ICCPR sets out the grounds upon which the right to seek, receive and impart information and ideas on the internet may be limited. Namely, the restriction must be:

- Provided by law.
- Necessary for respect for the rights of others, and for the protection of national security or of public order, or of public health or morals.

It is important to note that articles 19(3) and 20 of the ICCPR are compatible, and the prohibited grounds listed in article 20 can also be restricted in terms of article 19(3) and must also pass the three-stage test. It is further necessary to note that within the context of article 20, there is a need to recognise the distinction between protected and unprotected speech, and between what is prohibited and what is discriminatory, derogatory, and demeaning discourse. Article 4(a) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) also provides that certain forms of expression are prohibited and punishable by law. These include:

- Dissemination of ideas based on racial superiority or hatred;
- Incitement to racial discrimination;
- Acts or incitement of violence against any race or group of persons of another colour or ethnic origin of racially motivated violence; and
- The provision of assistance, including of a financial nature, to racist activities.

Three-stage test for the justifiable criminalisation of online speech

To determine whether a limitation of the right to freedom of expression is justifiable, a **three-stage test** must, therefore, be applied in which it must be established that the limitation is:

- Provided by law;
- Pursues a legitimate aim; and
- Necessary for a legitimate purpose.[17]

The **first limb** (that the restriction is **provided for by law**) is relatively straightforward in relation to the criminalisation of online speech. The legislation must be clear, accessible, apply equally to everyone and be consistent with international human rights norms. Despite this, governments continue to enact laws that are vague, and which give themselves wide-ranging powers, including the power to decide what constitutes a legitimate purpose to restrict freedom of expression. On counter-terrorism measures, General Comment 34 provides that any offences relating to the encouragement of terrorism or extremist activity, or to the praising, glorifying, or justifying of terrorism, should be clearly defined to ensure that they do not lead to unnecessary or disproportionate interferences with freedom of expression. Excessive restrictions on access to information must also be avoided.

[17] For a detailed outline of the limitation of freedom of expression see Module 2 on Restricting Access and Content at 4-5.

The **second limb** (that it pursues a **legitimate aim**) is more complicated. In the current digital and political climate, the criminalisation of online speech is commonly used for political or other illegitimate purposes. Although there are legitimate grounds to restrict freedom of expression on the basis of national security, it is frequently subject to abuse. The African Declaration states that a limitation serves a legitimate aim where it is to preserve respect for the rights or reputations of others or to protect national security, public order, or public health, noting also that national security grounds require a real risk of harm and a close causal link between the risk of harm and the expression.[18]

The **third limb** requires an assessment of whether the restriction is **necessary**, where legislation provides for restricting freedom of expression for the legitimate purposes of protecting national security, countering terrorism, ensuring public order, or respecting the rights of others. In respect of necessity and **proportionality**, a 2019 Report of the UNSR on FreeEx notes that "restrictions must be demonstrated by the state as necessary to protect a legitimate interest and to be the least restrictive means to achieve the purported aim."[19] A 2018 UNESCO report also explains that this leg of the test can also cause controversy when national security concerns are cited by states.[20] States are often quick to justify restrictions without fully considering the principle of necessity and whether less restrictive means are available. With new online threats, states are also becoming more restrictive, often in violation of the above test.

The different legitimate aims and the potential concerns that arise are discussed below.

4.1. National security

Citing national security concerns as a justification for restricting freedom of expression has been a common trend in SSA, and other regions of the world, for some time.[21] Several sets of soft law principles have been developed to provide guidance on this commonly misused ground of justification. For example, the 1985 Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR define a legitimate national security interest as one that aims "to protect the existence of the nation or its territorial integrity or political independence against force or threat of force."[22] The Siracusa Principles further provide that a national security limitation "cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order" and "cannot be used as a pretext for imposing vague or arbitrary limitations and may only be invoked when there exist adequate safeguards and effective remedies against abuse."[23]

The Johannesburg Principles on National Security, Freedom of Expression and Access to Information were drawn up in 1996 by a group of experts in international law, national security,

[18] African Declaration above n at 16 principles 9 and 22.
[19] UN General Assembly, 'Promotion and protection of the right to freedom of opinion and expression' (2019) (accessible here).
[20] UNESCO, 'World Trends in Freedom of Expression and Media Development,' (2018) (accessible here).
[21] Id.
[22] Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR (1985) (accessible here) at principle 29.
[23] ACHPR, Declaration above n at 16 at principles 30 and 31.

and human rights.[24] The principles state that in order for expression to be punished as a threat to national security, a government must show that:

- The expression is intended to incite imminent violence.
- It is likely to incite such violence.
- There is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

The Johannesburg Principles further provide that punishment (for disclosure of information) based on national security grounds is prohibited if the disclosure does not actually cause harm and is not likely to harm a legitimate national security interest.

The 2019 Declaration of the ACHPR further provides that "[f]reedom of expression shall not be restricted on public order or national security grounds unless there is a real risk of harm to a legitimate interest and there is a close causal link between the risk of harm and the expression."[25]

Case note: Restricting access to online content through an internet shutdown

While not relating directly to the criminalisation of online speech, *Amnesty International Togo v The Togolese Republic* provides valuable insight into the reasoning behind a foundational decision by the ECOWAS Court relating to restricting access to online content through an internet shutdown, particularly regarding a national security justification and the requirement that a limitation of freedom of expression be provided for in law.[26]

In 2017, political protests broke out in **Togo** around presidential term limits in the country. The government implemented a full internet shutdown in response over two periods in September 2017. A group of civil society organisations instituted proceedings in the ECOWAS Court alleging that the shutdown violated the right to freedom of expression in violation of article 25 of the Togolese Constitution and article 9 of the African Charter, in addition to violating their rights to work.

The government argued that the shutdown was necessary to protect national security, claiming that the spread of hate speech and incitement online risked the country sliding into "civil war." The Court held that while access to the internet was not a direct right, it is a "derivative right" in that it enhances the exercise of freedom of expression, making it an "integral part" of the right.

While recognising that national security can, in certain circumstances, justify an interference with the right to freedom of expression, the Court raised the requirement that any limitation must be in accordance with the law, noting that no national legislation provided the means through which an internet shutdown could be implemented. As a result, it held that the

[24] Article 19, 'Johannesburg Principles on National security, Freedom of Expression and Access to Information' (2018) (accessible here).
[25] Id at principle 22(5).
[26] *Amnesty International Togo and Ors v. The Togolese Republic* (2020) (accessible here).

shutdown was a violation of the right to freedom of expression and directed Togo to take "all necessary measures" to prevent the re-occurrence of such a situation, including by enacting laws to meet the state's obligations under international law.

In the case of *Director General of the Namibian Central Intelligence Service v Haufiku* (2019) national security was dismissed as a legitimate aim to stifle freedom of expression.[27] **Namibia's** Supreme Court upheld a prior High Court decision that denied the government's request to prohibit the publication of a news article on national security grounds, finding that the government had failed to provide evidence of the national security threat.

Case note: Restrictions must be necessary, serve a legitimate interest and be provided for by law

In the case of *Good v Republic of Botswana* (2010), Mr Good, a political studies professor at the University of Botswana, was declared an undesirable inhabitant following the publication of a co-authored article which was critical of Botswana's presidential succession.[28] Good was deported without reason and was not provided with an opportunity to challenge the decision. After unsuccessfully exhausting all internal remedies, Good approached the ACHPR, where he alleged that his right to be heard, his right to freedom of expression, his right to freedom of movement and his right to family life, all contained in the African Charter, had been violated.

In response to the allegation regarding the restriction of Good's right to freedom of movement, the Botswanan government relied on national security as a justification, arguing that the ACHPR does not have competency over such issues as "States must be left alone and allowed to deal with matters of peace and national security." The Botswanan government did not address the alleged restriction on freedom of expression, and Good argued that it failed to illustrate the nature of the so-called national security threat posed and why the deportation could be justified as proportionate in severity and intensity to the publication of the academic paper.

Despite the lack of a full response from the state, the ACHPR analysed the alleged infringement and found that there is international consensus on the need to restrict freedom of expression for national security, but such a restriction must be **necessary**, serve a **legitimate interest** and be **provided for by law**. The ACHPR went on to note that notwithstanding the fact that:

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

[27] *Director General of the Namibian Central Intelligence Service v. Haufiku* (2019) (accessible here).
[28] *Kenneth Good v. Republic of Botswana* (2010) (accessible here).

When conducting the limitations analysis, the ACHPR emphasised that a "higher degree of tolerance is expected when it is a political speech, and an even higher threshold is required when it is directed towards the government and government officials." The ACHPR found that there was nothing in the article co-authored by Good that could potentially create instability, unrest, or violence in the country; rather, it was merely the expression of opinions and views and did not amount to defamatory, disparaging, or inflammatory expression.

Ultimately, the ACHPR found that:

> "The action of the Respondent State was unnecessary, disproportionate, and incompatible with the practices of democratic societies, international human rights norms, and the African Charter in particular. The expulsion of a non-national legal resident in a country, for simply expressing their views, especially within the course of their profession, is a flagrant violation of Article 9(2) of the Charter."

As evinced in these cases, there are times when states will rely on national security when it is in fact not a legitimate aim. In such instances, courts should be quick to find the distinction between legitimate threats and critical expression.

4.2. Counter-terrorism

Terrorism and extremism, which are largely undefined and often misused terms, are frequently the basis for states to invoke restrictive measures on online content. International human rights law provides extensive guidance for states on how to balance the real need to respond to terrorism with the fundamental right to freedom of expression.

The 2015 Joint Declaration on Freedom of Expression and Responses to Conflict Situations by several regional mandate holders on Freedom of Expression and the UNSR on FreeEx provides that:

> "States should refrain from applying restrictions relating to 'terrorism' in an unduly broad manner. Criminal responsibility for expression relating to terrorism should be limited to those who incite others to terrorism; vague concepts such as glorifying', 'justifying' or 'encouraging' terrorism should not be used."

This was subsequently followed by the 2016 Joint Declaration on Freedom of Expression and Countering Violent Extremism by the same mandate holders which noted that:

> "Everyone has the right to seek, receive and impart information and ideas of all kinds, especially on matters of public concern, including issues relating to violence and terrorism, as well as to comment on and criticise the manner in which States and politicians respond to these phenomena."

It further provides that states are obliged to ensure that there is an enabling environment for the media to keep society informed, "particularly in times of heightened social or political tensions." This point is also emphasised in General Comment No 34 on the ICCPR, which states that the media plays an important role in informing the public about acts of terrorism

and that it should be able to perform its legitimate functions and duties in this regard without hindrance.[29]

At a minimum, if there is to be a limitation of access to the internet or to content online on the grounds of anti-terrorism, there should be transparency regarding the laws, policies, and practices relied upon, clear definitions of terms such as 'national security' and 'terrorism,' and independent and impartial oversight being exercised.

There is also a general presumption in international law that prior restraint — restricting access to content before it has been published — is unnecessary and disproportionate. Although there may be a strong argument for the need to step in to stop the dissemination of information prior to the publication of content relating to terrorism, the courts have stressed that prior restraint can only be allowed in exceptional circumstances and must be robustly justified.[30]

4.3. Public order offences

The term 'public order' can have a wide and vague meaning, but generally refers to a general sense of peace in which members of society broadly comply with the law of the land.

Public order offences can be developed and implemented to provide for legitimate aims, especially in the context of security forces. This means that laws which allow security forces to limit free speech to protect public order may be legitimate, as long as they comply with the requirements listed above. This legitimate aim is one that should not be abused due to the significant impact it can have on the people affected by the restriction on freedom of speech.

As a concept, 'public order' is closely related to that of 'national security' and often conflated by states in justifying restrictions on accessing certain content or platforms. This is particularly evident in the recent proliferation of internet shutdowns during crucial election periods.[31] These acts are usually commissioned under the guise of maintaining public order, whereas they may, in reality, constitute an effort by states to silence dissent. The consequences of internet shutdowns are that the public's right to access information, which may be crucial at a particular time, is violated.[32] For more on internet shutdowns, see Advanced Module 2 of this series on Restricting Access and Content.

Case note: Nigeria suspended the operations of Twitter

The *SERAP v the Federal Republic of Nigeria* (2022) case in the ECOWAS Court dealt with the Nigerian government's response to Twitter's (now X's) removal of content tweeted by the President from its platform for violation of its rules.[33] Nigeria suspended the operations of Twitter arguing that its ongoing operations constituted threats to the stability of Nigeria and that "Twitter is undermining Nigeria's corporate existence" by allowing content that referred to separatist politics.

[29] UNHRC, General Comment 34 above n 5.
[30] For example, see *New York Times Co. v United States (1971)* and *Amnesty International Togo and Ors v. The Togolese Republic.*
[31] Access Now, 'Who is shutting down the internet in 2023? A mid-year update,' (2023) (accessible here).
[32] For more on internet shutdowns see Module 2 on Restricting Access and Content.
[33] Media Defence and Mojirayo Ogunlana-Nkanga represented the applicants in this case.

The ECOWAS Court emphasised the role of social media platforms such as Twitter as enablers of the rights to freedom of expression and access to information and held that the suspension was not made under any law or order of a court. It held further that the government's mere reference or allusion to national security threats posed by protests in the country and their supposed potential to destabilise Nigeria did not constitute legal justification for the infringement on the right to freedom of expression.

UNESCO Training Modules on Public Order and Freedom of Expression

In response to tensions between the maintenance of public order and the restrictions on freedom of expression, particularly in the context of journalism, UNESCO has developed training modules to empower both security forces and journalists to understand the law and their respective roles and responsibilities.

- The 2015 Freedom of Expression and Public Order Training Manual provides legal references and tools for security forces to promote transparency, facilitate and improve relations between security forces and the media, and encourage respect for the safety of journalists in the field.
- The 2018 report from UNESCO on Freedom of Expression and Public Order: Fostering the Relationship between Security Forces and Journalists seeks to facilitate the relationship between security forces and journalists in order to establish an enabling environment for journalists. This training manual aims to empower journalists and citizens in order for them to exercise their rights to freedom of expression and access to information and focuses on the importance of transparent law enforcement institutions which respect freedom of expression and the right to information and promote accountability and the rule of law while respecting human rights.
- In 2022, UNESCO, together with the International Police Association and IBZ Gimborn Castle, launched a joint Massive Open Online Course (MOOC) for members of law enforcement and police officers to raise awareness of international and regional standards on freedom of expression, access to information, and safety of journalists.[34]

The use of public order laws to stifle freedom of expression is, unfortunately, an ongoing challenge in countries across the world. In 2023, the UN High Commissioner for Human Rights issued a stern rebuke against the government of the United Kingdom (UK) for its passing of the Public Order Act, 2023, which expanded the powers of the police to stop and search people prohibited objects, enabled bans on specific individuals from being in a certain place at a certain or with particular people, and created new crimes for actions commonly used by protesters such as "locking in," the act of a protester intentionally attaching themselves to other or to buildings and causing a "serious disruption."[35] The High Commissioner criticised the

[34] UNESCO, 'Just launched: Free online course for police officers on freedom of expression and safety of journalists,' (2022) (accessible here).
[35] OHCHR, 'The Public Order Act will have a chilling effect on your civic freedoms – it must be repealed,' (2023) (accessible here).

vague scope of these offences and the chilling effect they would have on participation in society.

5. FORMS OF CRIMINALISATION

While there is an array of actions and forms of speech that have attracted criminal sanctions, this section focuses on those that are most commonly criminalised in Africa: hate speech, cybercrimes, and disinformation.[36]

5.1. Hate speech

The reconciliation of values

A 2019 Report by the UNSR on FreeEx found that:

> "Under international human rights law, the limitation of hate speech seems to demand a reconciliation of two sets of values: democratic society's requirements to allow open debate and individual autonomy and development with the compelling obligation to prevent attacks on vulnerable communities and ensure the equal and non-discriminatory participation of all individuals in public life. Governments often exploit the resulting uncertainty to threaten legitimate expression, such as political dissent and criticism or religious disagreement."

The above statement illustrates some of the complexities regarding the criminalisation of hate speech. The escalation of prejudice and intolerance has led many governments to prioritise limiting and punishing such speech online, including through criminalisation. However, hate speech is a vague term that is deeply contextual and lacks universal understanding, and such provisions are open to abuse that can restrict a wide range of lawful expression.

5.1.1. Overview of international instruments dealing with hate speech

- Article 20(2) of the ICCPR obliges states to prohibit by law "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence."

- The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) calls upon States in article 4 (a) to ban a broader range of speech, notably that State should "declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred [and] incitement to racial discrimination"[37] as well as "organised and all other propaganda activities, which promote and incite racial discrimination."[38]

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[36] For more on specific types of speech-related offences, Media Defence, 'Training Manual on Digital Rights and Freedom of Expression Online' (accessible here) at 48-61.
[37] International Convention on the Elimination of All forms of Racial Discrimination (1965) (accessible here) at article 4 (a).
[38] Id at article 4(b).

- The Rabat Plan of Action was introduced in 2012 to bring together conclusions and recommendations on regulating hate speech from several workshops by the UN Office of the High Commissioner for Human Rights (OHCHR). It provides recommendations on the prohibition of advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence. It outlines six factors that should be considered when determining whether a speaker intends and is capable of having the effect of inciting their audience to engage in violent or discriminatory action through the advocacy of discriminatory hatred.

- The UN Strategy and Plan of Action on Hate Speech recognises that public discourse is being weaponized for political advantage, with minorities, migrants, refugees, women, and other marginalized groups often the target of inflammatory language designed to stigmatise and dehumanise.

- The 2019 report of the UNSR on FreeEx also evaluates the human rights law that applies to the regulation of online hate speech and recommends that States should not treat online hate speech as a separate category from offline hate speech with higher penalties, should strictly define what constitutes prohibited content in their domestic laws, and should resist criminalising speech except in the gravest situations.

- The Convention on the Prevention and Punishment of the Crime of Genocide also deals with matters related to hate speech and calls on “direct and public incitement to commit genocide” to be punishable by law.

- Although the African Charter does not deal explicitly with hate speech, Article 28 states that “every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.”

- The African Declaration aligns with international standards in providing in principle 23(1) that “States should prohibit any speech that advocates for national, racial, religious or other forms of discriminatory hatred which constitutes incitement to discrimination, hostility or violence.” It likewise emphasises that States should criminalise prohibited speech “only as a last resort and only for the most severe cases” taking into six key factors: context, status of the speaker, intent, content and form, extent, and likelihood and imminence of harm.[39]

It is generally agreed under international human rights law that the prohibition against hate speech should be applied narrowly and with great caution, ensuring that it addresses only cases of real and imminent danger of incitement of violence in order not to infringe on the right to freedom of expression. As stated in the African Declaration, “States shall not prohibit speech that merely lacks civility, or which offends or disturbs.”[40]

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[39] African Declaration above n 6 at principle 23(2).

[40] Id at principle 23(3).

Rabat Plan of Action: Six-part threshold test for expressions considered criminal offences

The Rabat Plan of Action sets out six criteria to be used for determinations of hate speech that provide guidance on how to ensure this narrow and cautious approach in practice:[41]

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

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

- **Intent**: Article 20 of the International Covenant on Civil and Political Rights anticipates intent. Negligence and recklessness are not sufficient for an act to be an offence under article 20 of the Covenant, as this article provides for "advocacy" and "incitement" rather than the mere distribution or circulation of material. In this regard, it requires the activation of a triangular relationship between the object and subject of the speech act as well as the audience.

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

- **Extent of the speech act**: Extent includes such elements as the reach of the speech act, its public nature, its magnitude, and the size of its audience. Other elements to consider include whether the speech is public, what means of dissemination are used, for example, a single leaflet or broadcast in the mainstream media or the Internet, the frequency, quantity, and extent of the communications, whether the audience had the means to act on the incitement, whether the statement (or work) is circulated in a restricted environment or widely accessible to the general public.

- **Likelihood, including imminence**: Incitement, by definition, is an inchoate crime. The action advocated through incitement speech does not have to be committed for said speech to amount to a crime. Nevertheless, some degree of risk of harm must be identified. It means that the courts will have to determine that there was a reasonable probability that the speech would succeed in inciting actual action against the target group, recognising that such causation should be rather direct."

5.1.2. Identifying hate speech

It is sometimes tricky to distinguish between speech that is protected and that which constitutes hate speech.

- Hate speech may be prohibited only if the prohibition meets the standards of Article 19(3) of the ICCPR, namely:[42]
    - **Legality**: laws criminalising hate speech must be precise, public, and transparent;
    - **Legitimacy**: laws should be justified to protect and respect the rights or reputations of others or to protect national security, public order, public health, or morals;
    - **Necessity and proportionality**: the criminalising legislation must protect a legitimate interest and be the least restrictive means to achieve the purported aim.

- Hate speech is lawful and should be protected if it is:
    - Inflammatory or offensive expression that does not meet the above thresholds. Notably, this may include speech that is critical or that causes shock or offence.

5.1.3. Online hate speech

The nature of online domains, such as social media, creates conditions for the sharing and spreading of hate speech that are relevant to considerations of how to appropriately regulate hate speech. For example:

- Content is more easily posted online without due consideration or thought. Regulation must distinguish between poorly considered statements posted hastily online, and an actual threat that is part of a systemic campaign of hatred.

- Once content is online, it can be difficult (or impossible) to remove entirely. Hate speech posted online can persist in different formats across multiple different platforms, which can make it difficult to police.

- Online content is frequently posted under the cover of anonymity, which presents an additional challenge to dealing with hate speech online.

- The internet has transnational reach, which raises cross-jurisdictional complications in terms of legal mechanisms for combatting hate speech.

[42] Article 19, 'Hate Speech Explained: A Toolkit,' (2015) (accessible here).

ARTICLE 19 Hate Speech Explained: A Toolkit

ARTICLE 19 has published a toolkit on identifying and countering hate speech while protecting the rights to freedom of expression and equality. It defines hate speech as containing three core elements:

- "Intense and irrational emotion of opprobrium, enmity, and detestation towards an individual or group;
- Any expression of hate towards an individual or group defined by protected characteristics;
- Any expression imparting opinions or ideas — bringing an internal opinion or idea to an external audience."

Some of the peculiar elements of online hate speech were highlighted in recent incidents in Africa:

- In the run-up to the elections in **Kenya** in August 2022, there was a concerning rise in hate speech and calls for ethnic violence circulating on social media.[43] The National Cohesion and Integration Commission (NCIC) issued an ultimatum to Meta to tackle hate speech and incitement on its platform within seven days or risk being suspended.

- In **Ethiopia**, reports of calls for violence targeting ethnic minorities on social media platforms have abounded amidst the ongoing conflict in the Tigray region of the country.[44] The conflict between the Ethiopian federal government and the Tigray Peoples Liberation Front has resulted in the closure of media outlets and the arrest of journalists and online bloggers. On 3 November 2021, Facebook removed Ethiopian Prime Minister Abiy Ahmed's social media post stating that it had violated the platform's policies against inciting violence.[45]

- In **South Africa**, online hate speech has fuelled xenophobic sentiment against non-South African workers in what appears to be a coordinated attempt to manipulate online conversations by seeding and sharing xenophobic hate speech.[46] Research by Global Witness and the Legal Resource Centre in 2023 revealed the wholesale failure of the online platforms to identify and remove such content, even where it clearly violated their own community standards.[47]

[43] Duncan Miriri, 'Kenya orders Meta's Facebook to tackle hate speech or face suspension' (2022) (accessible here).
[44] Amnesty International. 'Ethiopia: Sweeping Emergency powers and alarming rise in online hate speech as Tigray conflict escalates' (2021) (accessible here).
[45] BBC News, 'Facebook deletes Ethiopia PM's post that urged citizens to 'bury' rebels' (2021) (accessible here).
[46] Defence Web, 'UCT cyber analysts uncover campaign to promote xenophobia on Twitter,' (2020) (accessible here).
[47] Global Witness, '"We need to kill them": Xenophobic hate speech approved by Facebook, TikTok and YouTube,' (2023) (accessible here).

Gendered hate speech

In her 2023 report to the UN General Assembly, the UNSR on FreeEx emphasised the strong connections between online gender-based violence and hate speech, noting that gendered disinformation is a common tactic used by both public and private actors online to target and discourage participation from women.[48] In turn, gendered disinformation intersects with hate speech, with many disinformation campaigns attacking women including incitement to violence, hostility, and discrimination.

At the same time, the UNSR emphasises the need for differentiated but aligned responses to the various threats posed by gender-based violence, gendered disinformation, and gendered hate speech online that respond to the varying international legal standards applicable to each phenomenon.

5.1.4. Incidences of hate speech regulation

Unfortunately, there are numerous examples of countries attempting to pass, or successfully passing, hate speech legislation that includes criminal penalties, particularly in Africa:

- In 2020 **Ethiopia** enacted the Hate Speech and Disinformation Prevention and Suppression Proclamation which, while having seemingly well-intentioned objectives, has been decried by civil society as a threat to freedom of expression and access to information online.[49]

- In **Nigeria**, the National Commission for the Prohibition of Hate Speech Bill (known as the Hate Speech Bill) was tabled in 2019 which sought to prohibit "abusive, threatening, and insulting behaviour," and provided for life imprisonment for the crime of hate speech.[50] Nigerian CSO Media Rights Agenda instituted an action in the Federal High Court in Lagos challenging the constitutionality of the bill in 2020.[51] The sponsor of the Bill reportedly committed to amending the Bill in response to the public backlash.[52] Another bill was tabled in 2022 to establish a National Electoral Offences Commission that proposed to classify hate speech as an electoral offence that would attract a jail term of 10 years or a fine of N40m or both.

- On 5 December 2023, **South Africa's** legislature passed the Prevention and Combating of Hate Crimes and Hate Speech Bill, which is currently awaiting Presidential Signature before it comes into force. The Bill has been criticised for its potential to be used to silence free speech and criticism and to stymie difficult discussions about race, gender,

[48] UNHRC, 'UNSR FreeEx Report on gendered disinformation' above n 14.
[49] CIPESA, Edrine Wanyama, 'Ethiopia's New Hate Speech and Disinformation Law Weighs Heavily on Social Media Users and Internet Intermediaries' (2020) (accessible here).
[50] Tomiwa Ilori, 'Beyond the law: Toward alternative methods of hate speech interventions in Nigeria,' (2023) (accessible here).
[51] IFEX, 'MRA sues National Assembly over Hate Speech Bill,' (2020) (accessible here).
[52] Mondaq, 'Nigeria: Revisiting Nigeria's Legal Framework On Hate Speech And Fake News Post 2023 General Elections,' (2023) (accessible here).

and sexuality and, as such, there have been multiple calls from civil society for the President to not sign it.[53]

Research has also pointed out that the wording of article 20 of the ICCPR is rarely found in domestic legislation on the continent.[54]

Case note: Vague, ambiguous and overbroad hate speech provisions

In the recent case of *The Incorporated Trustees of Expression Now Human Rights Initiative v. Federal Republic of Nigeria* (2023), the ECOWAS Court held that provisions of Nigeria's Broadcasting Code violated the right to freedom of expression in the African Charter because its provisions on offensive and hate speech prohibited speech that was protected, were too vague, ambiguous and overbroad, and the sanctions imposed were excessive. The Court ordered Nigeria to bring the provisions into alignment with international standards.

Taking action on hate speech

As states are not always fulfilling their duties regarding hate speech, lawyers, civil society organisations (CSOs), individuals, and community members need to work together to ensure that states are acting in compliance with their international human rights obligations in regulating hate speech. This can include strategic litigation, policy reform and advocacy, such as:

- Ensuring that states are creating an **enabling environment** for the right to freedom of expression. This can include ratifying international and regional human rights instruments, adopting domestic laws to protect freedom of expression and repealing any laws that unduly limit the right to freedom of expression.

- Ensuring that states **safeguard** the rights of individuals who exercise their right to freedom of expression. This requires ensuring that states make a concerted effort to end impunity for attacks on independent and critical voices.

- Ensuring that **domestic laws** guarantee equality before the law and equal protection of the law. That includes protection against discrimination on all grounds recognised under international human rights law.

- Ensuring that states establish or strengthen the role of **independent equality institutions** or expand the mandate of national human rights institutions.

- Ensuring that states adopt a **regulatory framework** for diverse and pluralistic media, which promotes pluralism and equality.

[53] For example, see Barthelemy, 'New hate speech bill has 'worrying' flaws that could lead to self-censorship' (2023) (accessible here) and the petition from Dear South Africa, (accessible here).
[54] Henry Maina, 'The prohibition of incitement to hatred in Africa: Comparative review and proposal for a threshold,' (2011) (accessible here).

5.2. Cybercrime

There is no single uniform or universally accepted definition for cybercrime, and there is an ongoing debate as to what the term entails. Some of the explanations and definitions advanced cover "a whole slew of criminal activity" including the theft of personal information, fraud, and the dissemination of ransomware.[55] Cybercrimes can also be the online extension of existing offline crimes such as harassment and sexual abuse, or producing, offering to make available, or making available, and distributing racist and xenophobic material.[56] Cybercrimes may be categorised as follows:[57]

Category	**Examples of crimes**
Offences against the confidentiality, integrity and availability of computer data and systems	Illegal access (hacking) • Password breaking • Distributed denial-of-service (DDoS) attacks • Automated attacks and botnets
	Illegal data acquisition (data espionage) • Scanning for unprotected ports • Circumventing protection measures • Social engineering • Phishing
	Illegal interception • Intercepting communications to record the information exchanges • Setting up fraudulent access points
	Data interference • Deleting, suppressing, or altering computer data • Creation of malware and computer viruses
Content-related offences	• Sexual exploitation material • Child sexual abuse material (CSAM) • Non-consensual dissemination of intimate images (NCII) • Racist and xenophobic speech, hate speech and promotion of violence • Mis- and disinformation
Copyright and trademark-related offences	• Reproduction of material • Exchange of copyright-protected material (songs and movies) • Certain file-sharing systems • Domain name-related offences

[55] Microsoft, 'Cybercrime and freedom of speech – a counterproductive entanglement' (2017) (accessible here).
[56] See UNODC, 'Module 2: General Types of Cyber Crime; E4J University Module Series: Cybercrime (2019) (accessible here) and UNODC 'Module 3: Legal Frameworks and Human Rights' E4J University Module Series: Cybercrime (2019) (accessible here).
[57] Id. See further ITU 'Understanding cybercrime: Phenomena, challenges and legal response' (2012) (accessible here).

Computer-related offences	• Computer-related fraud • Online auction fraud • Advance fee fraud • Identity theft • Cyberstalking, cyber harassment, and cyberbullying

Cybercrime and cybersecurity are two interlinked issues in an interconnected digital environment. Cybersecurity, or the management and prevention of cybercrime, refers to the collection of tools, policies, security concepts, security safeguards, guidelines, risk management approaches, actions, training, best practices, assurance, and technologies that can be used to protect the cyber-environment and organisational and user's assets, such as computing devices, applications, and telecommunication systems.[58]

5.2.1. Overview of international instruments

Currently, three prominent international instruments engage the topic of cybercrime:[59]

- The 2001 Council of Europe Convention on Cybercrimes (Budapest Convention) is the first international treaty that seeks to address internet and computer crimes. Its main objective is to pursue a common criminal policy aimed at the protection of society against cybercrimes by adopting appropriate legislation and fostering international co-operation. It has been widely ratified by countries outside of Europe as well and served as a guide for the development of many domestic cybercrime laws in Africa.

- The Council of Europe Additional Protocol to the Convention on Cybercrimes (Treaty No. 189) concerns the criminalisation of acts of a racist and xenophobic nature committed through computer systems. As an international legal instrument, the Protocol provides guidance and plays a key role in facilitating harmonisation across different legal regimes on the issue of specific forms of online speech.

- The 2014 African Union Convention on Cybersecurity and Personal Data (Malabo Convention), is a treaty dealing with cybercrime, data protection and related issues for the African continent. In 2023, the Malabo Convention finally came into effect after ratification by the 15th state party.[60] It encourages states to take necessary legislative and/or regulatory measures to establish criminal offences relating to several cybercrimes as well as data protection violations. Of relevance, it defines, in Section II, article 29(3), the content-related offences which state parties should criminalise. These relate to CSAM, xenophobic and racist content, as well as threats to commit offences or insults against a person based on their protected characteristics. This raises some concerns about the potential effects of free speech in the online context. For instance, it uses vague language which may be open to abuse by states. An example is the provision that criminalises the use of insulting language, which may be seen to contrast with international law standards as discussed above This can lead to subjective

[58] ITU Definition of Cybersecurity, (accessible here).
[59] Global Action on Cybercrime Extended, 'Comparative analysis of the Malabo Convention of the African Union and the Budapest Convention on Cybercrime' (2016) (accessible here).
[60] ALT Advisory, 'Africa: AU's Malabo Convention set to enter force after nine years,' (2023) (accessible here).

prosecutions and, eventually, may lead to criminal convictions for what should be protected speech.

5.2.2. The rise in cybercrime laws

The UNODC has found that cybercrime laws are of particular relevance to the criminalisation of online speech because the laws that are enacted to regulate cybercrimes can result in the restriction of freedom of expression. One of the main concerns about the plethora of cybercrime laws is that many of them lack clear definitions and are susceptible to being used to regulate online content and restrict freedom of expression.[61] This is a growing concern among human rights defenders, as many have been subjected to a wave of arrests and convictions in what is an escalating assault on freedom of expression through cybercrime laws.

In addition, the UN Ad Hoc Committee to Elaborate a Comprehensive International Convention on Countering the Use of Information and Communications Technologies for Criminal Purposes, which is currently considering the development of a UN Cybercrime Treaty, has been criticised for the inclusion of speech-related offences.[62] The final text of the treaty is expected to be presented to the UN General Assembly in 2024.[63]

Cybercrime laws in Nigeria

While there may be legitimate aims in enacting these laws, there are serious concerns that many are vague and overbroad and are susceptible to being used to restrict freedom of expression. Amnesty International has reported a growing trend of arrests, detention and torture of journalists and bloggers as well as pointed attacks on major media houses under the guide of cybercrime enforcement under the Cybercrime Act and the Terrorism (Prevention) (Amendment) Act.[64]

This situation may be exacerbated if the proposed Protection from Internet Falsehoods and Manipulation Bill (known as the Social Media Bill) is passed into law. The Bill is aimed at enabling measures to be taken to detect, control and safeguard against uncoordinated and inauthentic behaviour and other misuses of online accounts and bots, enabling measures to be taken to enhance disclosure of information regarding paid content directed towards a political end and to sanction offenders.

The Bill seeks to criminalise, among other things, prohibited statements of facts which include false statements of fact and statements that are likely to be prejudicial to the country's security, public health, public safety, public tranquillity or finances, prejudice Nigeria's relations with other countries, influence the outcome of an election or referendum, incite feelings of enmity,

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[61] Access Now, 'When "cybercrime" laws gag free expression: stopping the dangerous trend across MENA,' (2018) (accessible here).

[62] Electronic Frontier Foundation, 'Speech-Related Offenses Should be Excluded from the Proposed UN Cybercrime Treaty,' (2022) (accessible here) and ARTICLE 19, 'UN: Cybercrime treaty must not put human rights at risk,' (2023) (accessible here).

[63] Id.

[64] Amnesty International, 'Nigeria: Endangered voices: Attack on freedom of expression in Nigeria,' (2019) (accessible here).

hatred towards a person, ill will between a group of persons, or diminish public confidence in the performance or exercise of any duty, function or power by the government.

If this Bill is passed, it could mean a further affront to freedom of expression in Nigeria, which as it stands is under threat due to the cybercrime legislation that is already in existence. Further, the Bill gives the State wide-ranging powers, which may be susceptible to abuse.[65]

It is also notable that in *The Incorporated Trustees Of Laws And Rights Awareness Initiatives v. Federal Republic of Nigeria* (2020) ECOWAS Court found that Section 24 of the Cybercrime (Prohibition, Prevention, etc.) Act, 2015 violated the right to freedom of expression in article 9 of the African Charter and article 19 of the ICCPR because the provision was not necessary in a democratic society and disproportionate and thus ordered Nigeria to repeal or amend the offending provision.[66] Section 24 criminalised the sending of messages that were, among other things, grossly offensive, obscene, or menacing, or which were known to be false and could cause annoyance, insult, enmity, or needless anxiety, and had, as reported by the Applicants, been used to repeatedly intimidate its members, associates, and employees which were journalists, bloggers, and activists.

In addition to being used to harass or punish speakers online, cybercrime laws can and have also been used to surveil activists and journalists. For example, the *2019 Report* of the UNSR on FreeEx noted:

> "A surge in legislation and policies aimed at combating cybercrime has also opened the door to punishing and surveilling activists and protesters in many countries around the world. While the role that technology can play in promoting terrorism, inciting violence, and manipulating elections is a genuine and serious global concern, such threats are often used as a pretext to push back against the new digital civil society."

The Sudanese Cybercrime Law

As another example of problematic cybercrime legislation on the continent, ARTICLE 19 has criticised Sudan's Cybercrime Law of 2018 for:

> "punish[ing] numerous content-based offences that have nothing to do with preventing cybercrime. These include provisions on provoking hatred against foreigners, defamation, insults, and abuses that fail to comply with freedom of expression standards. The Cybercrime Law has been used in the past to suppress independent journalism and reporting during the Covid-19 pandemic. Several Sudanese journalists and activists were persecuted and threatened using the law over publications they posted on social media criticising the authorities."

[65] For further commentary on trends in Africa see CIPESA, 'Why are African Governments Criminalising Online Speech? Because They Fear Its Power' (2018) (accessible here).
[66] *The Incorporated Trustees Of Laws And Rights Awareness Initiatives v. Federal Republic of Nigeria* (2020) (accessible here).

5.3. Mis- and disinformation

Several forms of information disorders have become of increasing relevance in the information age due to their ability to be rapidly and widely spread online and their impacts in undermining access to accurate information and enabling coordinated propaganda and other political campaigns.

Importantly, misinformation and disinformation should be distinguished as follows:[67]

Disinformation	Information that is false is disseminated by a person who knows it is false. "It is a deliberate, intentional lie, and points to people being actively disinformed by malicious actors."[68]
Misinformation	Misinformation is information that is false, but the person who is disseminating it believes that it is true.

Disinformation that is designed to look like news content is sometimes popularly referred to as "fake news" or "false news," but this term has been criticised for:[69]

- Being inadequate to capture the complex problem of disinformation, which involves content that blends fabricated information with facts.
- Being misleading as it has been appropriated by some politicians and their supporters to dismiss coverage that they find disagreeable and has thus become a weapon with which powerful actors can interfere in the circulation of information and attack and undermine independent news media.

The extensive problems of the mis- and disinformation epidemic were made clear in recent years with revelations of concerted online disinformation campaigns being operated by foreign state and non-state actors to interfere in several election processes.[70] The COVID-19 pandemic also highlighted the capacity for the rapid spread of disinformation, which undermined efforts to address the disease and roll-out treatments and vaccines.

In response to this growing trend, several states in SSA have enacted legislation criminalising the online publication of false statements. Such responses continue to increase in speed and magnitude and cause demonstrable and significant public harm. The 2017 Joint Declaration on Fake News, Disinformation and Propaganda by the UNSR on FreeEx, together with regional counterparts, noted that countering these issues poses complex challenges that could result in censorship and the suppression of critical thinking. It emphasised that restrictions on speech must meet the limitations test under international law and that "general prohibitions… based on vague and ambiguous ideas, including "false news" or "non-objective

[67] UNESCO 'Journalism, 'Fake News' and Disinformation: A Handbook for Journalism Education and Training' (2018) (accessible here).
[68] Id.
[69] European Commission, 'Final report of the High Level Expert Group on Fake News and Online Disinformation,' (2018) (accessible here).
[70] The Guardian, 'Cambridge Analytica boasts of dirty tricks to swing elections,' (2018) (accessible here).

information," are incompatible with international standards… and should be abolished."[71] Importantly, the Joint Declaration also emphasised the positive obligations of states to promote a free, independent, and diverse media environment as a means of addressing disinformation and propaganda, which includes establishing a clear regulatory framework, supporting a strong public service media, and advancing media and digital literacy.

The UNSR on FreeEx also stated very clearly in 2023 that:

> "It is important to note that international law does not allow speech to be prohibited solely on grounds of falsity. What is or is not false is a contentious issue. Furthermore, speech often consists of opinions and perspectives not suited to this binary categorisation. State practice shows that laws that prohibit "false news", purportedly as a measure against disinformation, are used in effect to suppress speech that is critical of the Government."[72]

The African Declaration adopts a similar stance under principle 22 which requires states to repeal all laws that criminalise the publication of false news.[73]

According to LEXOTA, an interactive tool to track and analyse government responses to online disinformation across SSA, three countries in the region have disinformation-specific laws while 84 have general speech laws that address false information and pose risks to freedom of expression. Some examples include:

- **Cameroon:** The Penal Code in Cameroon, under Section 113, criminalises the sending out or propagation of false information and imposes a penalty of imprisonment and a fine. In 2019, the Committee to Protect Journalists (CPJ) noted with concern the arrest and detention of journalists under this provision, in particular, a journalist who was sent to maximum-security prison on charges of defamation and spreading false news.[74]

- **Kenya:** Kenya's Computer Misuse and Cybercrime Act criminalises the "publication of false information in print, broadcast, data or over a computer system" in articles 22 and 23. Despite legal challenges to various provisions that were alleged to stifle freedom of expression online, the Act was upheld as constitutional and came into effect in 2020.[75]

- **COVID-19 false news laws:** the COVID-19 pandemic sparked a raft of oppressive false news laws across the world. The Disinformation Tracker, a collaborative civil society initiative, documented the various responses, including laws criminalising false publications, across the continent.

This warrants close attention from civil society and activists to monitor the criminalisation of mis- and disinformation and to advocate for alternative measures that can more meaningfully deter such content while protecting freedom of expression online.

[71] UN Office of the High Commissioner, 'Joint Declaration on Fake News, Disinformation and Propaganda' (2017) (accessible here) at 2(a).
[72] UNSR on FreeEx above n. 48 at p. 7.
[73] African Declaration above n 6.
[74] CPJ, 'Cameroonian journalist detained on criminal defamation and false news charges,' (2019) (accessible here).
[75] Freedom House, 'Freedom on the Net 2020: Kenya,' (2020) (accessible here).

5.3.1. Addressing mis- and disinformation

While addressing mis- and disinformation is crucial, regulations often become tools for suppressing freedom of expression. The criminalisation of the dissemination of fake news is likely to increase and may cause significant violence to freedom of expression. Various international bodies, states and organisations have grappled with different responses to the complexities of mis- and disinformation. It is vital to find approaches that avoid harsh legislation that does not strike an appropriate balance between addressing disinformation and protecting the right to freedom of expression. International law unequivocally states that efforts to combat online misinformation must respect the right to freedom of expression as outlined in article 19 of the ICCPR and article 9 of the African Charter. For instance, the UNHRC has clarified that the ICCPR "does not allow a blanket prohibition on expressions of erroneous opinions or incorrect interpretations of historical events."[76] Thus, any restrictions on online expression, including mis- and disinformation, must adhere to the three-part test for permissible limitations outlined in ICCPR article 19(3) above.

Media and information literacy campaigns can effectively counter disinformation by providing a flood of accurate, reliable information instead and immunising audiences against mis- and disinformation before they are exposed to it. International bodies, states, and CSOs are continually presenting new and innovative ways to address disinformation. Some notable contributions from international bodies include:

- **UNESCO**: UNESCO has developed a training handbook that shares international good practices and serves as an internationally-relevant model curriculum, open to adoption or adaptation, which responds to the emerging global problem of disinformation that confronts societies in general, and journalism in particular.

- **European Union**: In 2018, the European Union published its Code of Practice on Disinformation. The purpose of the Code is to identify the actions that signatories could put in place to address the challenges related to disinformation. The Code discusses the need for safeguards against disinformation, implementation of reasonable policies, effective measures to close discernible fake accounts; and the improvement of the scrutiny of advertisement placements. The Code identifies best practices that signatories — such as Facebook, Google, X, and Mozilla — should apply when implementing the Code's commitments.

At a state level, there have also been promising developments. In 2019, the US Library of Congress produced a report on Initiatives to Counter Fake News in Selected Countries. Some positive initiatives include:

- **Argentina:** The Commission for the Verification of Fake News was established. The Commission is envisaged to form part of the National Election Chamber, to assist with overcoming issues of disinformation during elections.

[76] UNHRC, General Comment 34 above n 5.

- **Sweden**: Bamse the Bear, a popular cartoon character in Sweden, has adopted a new role in teaching children about the dangers of disinformation by illustrating what happens to the bear's super-strength when false rumours are circulated about him.

- **Kenya:** The United States Embassy in Kenya started a media literacy campaign known as "YALI Checks: Stop.Reflect.Verify" to counter the spread of false information in Kenya. The campaign relies on an email series, an online quiz, blog posts, online chats, public outreach, educational videos, and an online pledge to engage with the Kenya chapter of the Young African Leaders Initiative (YALI) about disinformation.

- **Finland**: Finland has been lauded for its initiatives aimed at teaching residents, students, journalists, and politicians how to counter false information.[77] The initiatives include courses at community colleges and the introduction of lessons in schools about disinformation.[78]

Poynter has also developed a map of misinformation actions around the world that sets out a range of initiatives being implemented, ranging from reports, the establishment of task forces, and investigations to media literacy programmes and more.[79]

Determining limitations on freedom of expression

Global Partners Digital, in an attempt to determine how to tackle disinformation in a way that respects human rights, proposes an information-gathering approach to determine if disinformation amounts to a justifiable limitation of freedom of expression.[80] Some of the suggested questions include:

- Is the basis for any restrictions on what information individuals can search for, receive, or impart set out in law?
- Is there clarity over the precise scope of the law so that individuals will know what is and is not restricted?
- Is speech restricted only where it is in pursuance of a legitimate aim?
- Are there exceptions or defences where the individual reasonably believed the information to be true?
- Are determinations made by an independent and impartial judicial authority?
- Are responses or sanctions proportionate?
- Is disinformation clearly defined?
- Are intermediaries liable for third-party content?

[77] CNN, 'Finland is winning the war on fake news. What it's learned may be crucial to Western democracy,' (2019) (accessible here).
[78] The Guardian, 'How Finland starts its fight against fake news in primary schools,' (2020) (accessible here).
[79] Poynter, 'A guide to anti-misinformation actions around the world,' (2024) (accessible here).
[80] Global Partners Digital, 'How can we tackle disinformation in a way that respects human rights?' (2019) (accessible here).

5.3.2. Mis- and disinformation in the courts

In Africa, false news laws have been challenged in the courts both domestically and at the regional level. In the case of *Chipenzi v The People* (2014), the High Court of **Zambia** found that a provision of Zambia's Penal Code that prohibited the publication of false information likely to cause public fear violated the Constitution as it did not amount to a reasonable justification for limiting the freedom of expression.

The ECOWAS Court and the East African Court of Justice (EACJ) have also delivered landmark rulings in cases on this topic.

Case note: Sedition, false news, and criminal defamation

In *Federation of African Journalists and Others v The Republic of The Gambia* (2018), the ECOWAS Court considered the offences of sedition, false news, and criminal defamation in The Gambia's Criminal Code. Several journalists were arrested on charges of spreading false news. They argued that their rights to freedom of expression had been violated and sought a declaration from the Court that certain provisions of The Gambia's Criminal Code were inconsistent with regional and international law. The ECOWAS Court found that the criminal laws of the Gambia imposed criminal sanctions that are disproportionate and not necessary in a democratic society where freedom of speech is a guaranteed right and ordered that the legislation be reviewed. The Criminal Code was found to be broad and capable of casting an:

> "[E]xcessive burden upon the applicants in particular and all those who would exercise their right of free speech and violates the enshrined rights to freedom of speech and expression under Article 9 of the African Charter, Article 19 of the ICCPR and Article 19 of UDHR".

Case note: Criminalising the publication of false news

In *Media Council of Tanzania and Others v Attorney-General of the United Republic of Tanzania* case, the applicants challenged various provisions of the Tanzanian Media Services Act on the basis that "the Act in its current form is an unjustified restriction on the freedom of expression, which is a cornerstone of the principles of democracy, the rule of law, accountability, transparency and good governance which [Tanzania] has committed to abide by, through the Treaty." The applicants argued that it violated freedom of expression by restricting the types of news or content without reasonable justification, criminalising the publication of false news and rumours, criminalising seditious statements, and vesting the Minister with absolute power to prohibit the import of publications or to sanction media content. The respondent argued that all the provisions were just and did not violate the right to freedom of expression and associated rights.

The EACJ held that although the sections were set out in law, the contents of these sections were vague, unclear, and imprecise. It noted that the use of the word "undermine" in the impugned provision, which formed the basis of the offence, was too vague to provide

assurance to a journalist or other person who sought to regulate their conduct within the law. The EACJ further noted that the words "impede", "hate speech", "unwanted invasion", "infringe lawful commercial interests", "hinder or cause substantial harm", "significantly undermines" and "damage the information holder's position" were too broad or vague.

It also stated that Section 52(1) of the Act failed the test of clarity and certainty in that the definitions of sedition hinged on the possible and potential subjective reactions of audiences to whom the publication was made. This makes it impossible for a journalist or other individual to predict and thus plan their actions. In conclusion, the EACJ declared that, among other things, all the challenged provisions were in violation of articles 6(d) and 7(2) of the Treaty for the establishment of the East African Court of Justice (EACJ Treaty) and directed the Republic of Tanzania to take such measures as are necessary to bring the Media Services Act in compliance with the EACJ Treaty.

These landmark judgments provide guidance on the appropriate balance between legislating disinformation and protecting freedom of expression, and it is hoped they will have a far-reaching impact on other jurisdictions across the African region in ensuring that any responses to disinformation are based on international freedom of expression standards.

5.4. Defamation

Defamation is an important legal remedy for people whose reputation and dignity are harmed by the statements or actions of others. However, it is also frequently abused to unjustly stifle dissent. In particular, criminalising defamation is generally considered, under international human rights law, to be disproportionate and an unjustifiable infringement on the right to freedom of expression. The spread of the internet, and particularly social media platforms, has made it easier than ever to publish content to a wide audience, resulting in a rise in defamation being used against critical statements published online, and in speech that should be protected being criminalised under criminal defamation laws.

Case note: Social media Influencers and defamation

Recently, in the South African case of *Native Child Africa (Pty) Ltd v Akinwale* (2023) the Court grappled with questions relating to social media influencers in the context of a defamation claim.[81] The applicant runs four small natural haircare salons, and the respondent is a student and a social media influencer with over 108,000 social media followers across Instagram, TikTok and X (formerly known as Twitter). The respondent began publishing a series of defamatory statements and videos against the applicant, allegedly calling on her followers to harass the applicant on its various social media pages. The Court ordered the respondent to refrain from publishing any defamatory content about the applicant on various platforms, including TikTok, Instagram, Facebook, X (formerly known as Twitter), and WhatsApp. Additionally, the respondent was prohibited from making statements that encouraged a public boycott of the applicant's business or products. The respondent was further ordered to remove all defamatory content by a specified date and issue a video and

[81] *Native Child Africa (Pty) Ltd v Akinwale* [2023] ZAGPPHC 2007 (accessible here).

written apology, to be displayed for at least 60 days. The order regarding the boycott will operate as an interim measure until legal proceedings are held.

As captured by the Court, this case demonstrates that—

> "The far-reaching influence of the internet, capable of impacting millions swiftly, underscores the urgency in addressing such conduct, particularly by individuals like the respondent with a significant online following. Without timely intervention, followers of such influencers could engage in damaging or even aggressive actions against brands, potentially leading to a disregard for law and order on social media platforms."[82]

5.4.1. Overview of international instruments

The foundation for defamation in international law is article 17 of the ICCPR, which provides for protection against unlawful attacks on a person's honour and reputation. Article 19(3) of the ICCPR also refers to the rights and reputation of others as a legitimate ground for limiting the right to freedom of expression. Reputation is therefore the underlying basis in any claim of defamation, whether slander or libel.[83] It is also noteworthy that in 2010 the ACHPR issued a Resolution calling on states to repeal criminal defamation laws or insult laws.[84]

Efforts to repeal criminal defamation

In 2023, the **South African** legislature, repealed the common law crime of criminal defamation, this was done through the passing of the Judicial Matters Amendment Bill. In clause 35(2) the Bill notes that there are well-established civil remedies to respond to defamation as opposed to the chilling criminal defamation laws. In 2022, Zambia introduced amended the Penal Code to abolish the offence of criminal defamation of the President.[85] In 2020, Sierra Leone's Parliament also repealed its 1965 Public Order Act by approving the Independent Media Commission Act 2020.

5.4.2. Defamation in the courts

In recent years, many countries around the world have taken steps to decriminalise defamation in line with human rights standards. General Comment 34 provides that: "States Parties should consider the decriminalisation of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty".[86] Principle 22 of the African Declaration calls on states to amend criminal laws on defamation and libel in favour of civil sanctions, and that

[82] Id at para 47.
[83] For a fuller discussion on the law on defamation, 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', Media Defence at pp 48-64 (2018) (accessible here).
[84] ACHPR 'Resolution on Repealing Criminal Defamation Laws in Africa,' (2010) (accessible here).
[85] International Bar Association, 'Zambia: IBAHRI welcomes death penalty abolition' (2023) (accessible here).
[86] UNHRC, General Comment 34 above n 5.

the imposition of custodial sentences for defamation is a violation of the right to freedom of expression.

Over the last decade, various judgments across Africa have addressed defamation, including the *Konaté v. Burkina Faso* in the African Court on Human and Peoples' Rights, *Misa-Zimbabwe et al v. Minister of Justice et al in the Zimbabwe Constitutional Court*, *Peta v. Minister of Law, Constitutional Affairs and Human Rights* in the Constitutional Court of Lesotho, and the 2018 case of *Federation of African Journalists and Others v. The Gambia* in the ECOWAS Court. In 2020, the ACHPR ruled that Rwanda's criminal defamation laws violated freedom of expression and impeded development in democracies. It noted that such laws "constitute a serious interference with freedom of expression, impeding the public's right to access information, and the role of the media as a watchdog, preventing journalists and media practitioners from practising their profession in good faith, without fear of censorship".

The growth of Strategic Lawsuits Against Public Participation (SLAPP) suits by political and corporate actors is on the rise. **South African** courts have seen several matters in which defamation and/or urgent proceedings have been used in an attempt to silence or intimidate activists and journalists:

- *Mineral Sands v. Redell* (2022): This case arose from Mining Companies issuing summons against activists for defamation.[87] The issue before the Constitutional Court was whether or not South African law prohibited a SLAPP suit under the abuse of process doctrine and if not, whether our law ought to be developed in that regard. In its 2022 judgment, the Court acknowledged that the common law doctrine of abuse of process can accommodate the SLAPP suit defence and ensures that courts can protect their own integrity by guarding over the use of their processes. Ultimately, it ensures that the law serves its primary purpose, namely, to see that justice is done and not be abused for odious, or for ulterior purposes. The Constitutional Court recognised that SLAPP suits described as 'lawsuits initiated against individuals or organisations that speak out or take a position on an issue of public interest… not as a direct tool to vindicate a *bona fide* claim, but as an indirect tool to limit the expression of others… and deter that party, or other potential interested parties, from participating in public affairs.'

- *Maughan v. Zuma and Others* (2023): Former South African President Jacob Zuma launched private criminal prosecution against a prominent journalist following the publication of an article she had written about him. In 2023, in dismissing Zuma's case the High Court found that "it is quintessential to the freedom of expression and freedom of the press to protect the abuse to intimidate, censor and silence journalists by means of SLAPP suits."[88]

- *Mazetti Management Services v. Amabhungane* (2023): The matter concerned an order of the High Court obtained on an urgent, *ex-parte* (only one party present), and in-camera (closed to the public) basis by a private company, ordering journalists to hand over certain documents and to interdicts them from reporting on

[87] Mineral Sands Resources (Pty) Ltd and Others v Reddell and Others [2022] ZACC 37 (accessible here).
[88] *Maughan v Zuma and Others* [2023] ZAKZPHC 59 (accessible here).

such material.[89] Following a reconsideration hearing, the High Court found that this original order demonstrated "an egregious example of the abuse of the *ex parte* procedure." Notably, in its reasoning, the Court cited the United Nations Joint Declaration on Media Freedom and Democracy of May 2023 and the recommendation that states must take measures to protect journalists and media outlets from strategic lawsuits against public participation and the misuse of criminal law and the judicial system to attack and silence the media, including by adopting laws and policies that prevent and/or mitigate such cases and provide support to victims.

While South African Courts are holding strong against SLAPP procedures and abuse of process it is likely that powerful actors – political and private – will continue to find ways to silence and intimidate. Fortunately, international, regional and comparative law provides a useful basis from which to fight such tactics.

6. CONCLUSION

The criminalisation of online speech presents an affront to the exercise of the right to freedom of expression online. However, as illustrated above, there are competing interests that need to be considered. With the rise of nefarious activities and feeble excuses from governments, it is important, now more than ever, that activists, lawyers, and individuals ensure that freedom of expression is protected, and only limited in terms of the clear prescripts of international human rights law.

[89] *Mazetti Management Services (Pty) Ltd and Another v Amabhungane Centre for Investigative Journalism NPC and Others* [2023] ZAGPJHC 771 (accessible here).