



**Training Manual on  
International and Comparative  
Media and Freedom of  
Expression Law**

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## I. INTRODUCTION

This manual has been produced as a resource material for training workshops on media and freedom of expression law. It contains resources and background material to help trainers prepare and participants to understand the issues being discussed.

It is expected that participants in the workshops will be primarily lawyers. The assumption is that they are qualified and competent lawyers, with experience of litigation, but not necessarily of media, freedom of expression or human rights law.

The manual covers a wide variety of topics and it is not, of course, necessary that its entire contents be covered in a single workshop. However, it is expected that the material here could be covered in its entirety, albeit in a very introductory fashion, in a full three-day workshop.

The purpose of this manual is threefold:

- It can be used by trainers to prepare the workshops. The material contained here should give all that is necessary to run an introductory workshop on freedom of expression and media law. Workshop training plans and materials (PowerPoint presentations and hand-outs) accompany this manual.
- It can be used by participants to prepare for a workshop. Experience in adult pedagogy shows that learning is most effective when it focuses on developing and practising skills rather than attempting to impart knowledge. If participants are familiar with some of the general principles outlined here, training exercises will be more effective.
- The manual is available to participants to use as a reference guide *after* the workshop. The manual contains guidance and reference to case materials that will be useful for understanding the principles of freedom of expression and media law and preparing litigation in the future.

At a national level, each topic will usually also address the status of national law on any given topic – defamation, incitement, privacy etc. What are generally presented in this manual are the international law standards and the most progressive comparative law from a variety of jurisdictions. Of course, national governments and courts may often not comply with the most advanced standards contained here – so it is important that journalists do not understand this manual as a statement of the rights they can expect to enjoy under national law. Trainers using this manual should be very clear on that and indicate in which respects national law differs from the international standards described here.

What we do hope, however, is that the contents of this manual will help the process of informing litigators and national courts of the most advanced jurisprudence and standards in defence of media freedom. We also hope it will equip lawyers who want to bring media freedom cases to international courts with the arguments needed to do so.

## II. FREEDOM OF EXPRESSION: UNDERLYING PRINCIPLES AND SOURCES

### A. *The importance of freedom of expression*

The importance of freedom of expression is not a new idea. In early modern Europe, thinkers such as John Milton and John Locke emphasized their opposition to censorship as a part of the development of democratic government. Most famously, the First Amendment to the United States Constitution said:

“Congress shall make no law... abridging the freedom of speech, or of the press.”

The French Declaration of the Rights of Man and the Citizen, in similar vein, proclaims in Article 11:

“The free communication of thoughts and opinions is one of the most precious of the rights of man. Every citizen may therefore speak, write, and print freely, if he accepts his own responsibility for any abuse of this liberty in the cases set by the law.”

However, it was only with the formation of the UN and the construction of a human rights regime founded in international law that the right to freedom of expression became universally acknowledged.

An example of this universal acknowledgement is found in the case *Madanhire and another v. Attorney General* from the Zimbabwean Constitutional Court, where the Court stated that:

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

Article 19 of the 1948 Universal Declaration of Human Rights (the “UDHR”) states:

“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.”<sup>2</sup>

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<sup>1</sup> Zimbabwean Constitutional Court, *Madanhire and another v. Attorney General*, Judgment No. CCZ 2/14, par. 7.

<sup>2</sup> UN General Assembly, *Universal Declaration of Human Rights*, Resolution 217 A (III) (10 December 1948).

Subsequently, this right was enshrined in binding treaty law in Article 19 of the International Covenant on Civil and Political Rights (the “ICCPR”).<sup>3</sup> This was adopted by the UN General Assembly in 1966 and came into force a decade later. Article 19 echoes the wording of the UDHR, but adds some explicit grounds on which the right may be limited:

- “1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
  - (a) For respect of the rights or reputations of others;
  - (b) For the protection of national security or of public order (ordre public), or of public health or morals.”<sup>4</sup>

The regional human rights treaties also provide binding protection of freedom of expression.

The Convention for the Protection of Human Rights and Fundamental Freedoms (also known as the European Convention on Human Rights or the “ECHR”) was adopted in 1950 and entered into force in 1953. The ECHR was developed under the aegis of the Council of Europe. All but three recognized states on the European land mass are parties to the Convention today (the exceptions are the Vatican City, Belarus and Kazakhstan).

Article 10 of the ECHR protects freedom of expression in the following terms:

- “1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the

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<sup>3</sup> UN General Assembly, *International Covenant on Civil and Political Rights* (ICCPR), Resolution 2200A (XXI) (16 December 1966).

<sup>4</sup> *Id.*, Art. 19.

protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”<sup>5</sup>

As with Article 19 of the ICCPR, however, Article 10 also details a number of grounds on which the right to freedom of expression may be limited.

The American Convention on Human Rights (the “ACHR”), sometimes known as the Pact of San José, guarantees the right to freedom of expression in terms very similar to the UDHR and ICCPR, allowing limitations identical to those in the latter. It also provides some additional explicit protections, ruling out the use of prior censorship or the use of indirect methods.

Article 13 of the Convention states:

“1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.

2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:

- a. respect for the rights or reputations of others; or
- b. the protection of national security, public order, or public health or morals.

3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.

4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.

5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, colour, religion, language, or national origin shall be considered as offenses punishable by law.”<sup>6</sup>

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<sup>5</sup> Art. 10, The Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950: Rome, Italy.

<sup>6</sup> Art. 13, Organization of American States (OAS), *American Convention on Human Rights*, Inter-American Specialized Conference on Human Rights, 22 November 1969: San José, Costa Rica.

The ACHR was adopted in 1969 and came into force in 1978.

The African Charter on Human and Peoples' Rights (the "ACHPR"), or Banjul Charter, guarantees the right to freedom of expression in Article 9:

- "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."<sup>7</sup>

While this does not list the itemized grounds for state limitation contained in the other regional and international instruments, it does require that the right to express and disseminate opinions is to be "within the law." The ACHPR was adopted in 1981 and came into force in 1986.

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

In addition, freedom of expression is protected in almost every national constitution. This obviously means that it will have supremacy within the law of the land, but also suggests that it should be seen as a general principle of law, applicable in all circumstances.

### *B. Why is freedom of expression important?*

#### **Brainstorm**

Make a list of reasons why freedom of expression is an important human right.

Your list probably starts with freedom of expression as an *individual* right. It is closely connected to the individual's freedom of conscience and opinion (see the wording of Article 19 in both the UDHR and the ICCPR, and Article 10 of the ECHR). But the list very quickly broadens out into issues where freedom of expression is thought to have a general social benefit. In particular, this is a right that is seen to be crucial for the functioning of democracy as a whole. It is a means of ensuring an open flow of ideas and holding authorities to account. The European Court of Human Rights (the "ECtHR") has made this point repeatedly:

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<sup>7</sup> Art. 9, Organization of African Unity (OAU), *African (Banjul) Charter on Human and Peoples' Rights (the "Charter")*, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58.

“Freedom of expression constitutes one of the essential foundations of such [democratic] society, one of the basic conditions for its progress and for the development of every man. Subject to Article 10(2), it is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society’”.<sup>8</sup>

These words were found in a relatively early Article 10 judgment, but are repeated word for word in many later decisions. Courts around the world have made similar statements. The East African Court of Justice (the “EACJ”) has held that, “the principles of democracy must of necessity include adherence to press freedom ... [A] free press goes hand in hand with the principles of accountability and transparency.”<sup>9</sup>

In South Africa, Judge Cameron (then in the Johannesburg High Court) emphasised the links between freedom to criticise those in power and the success of a constitutional democracy, stating that “the success of our constitutional venture depends upon robust criticism of the exercise of power. This requires alert and critical citizens.”<sup>10</sup>

The Supreme Court of Appeal in South Africa also commented on why the right is so intrinsic to democracy and development.

“The importance of the right to freedom of expression has often been stressed by our courts. Suppression of available information and of ideas can only be detrimental to the decision-making process of individuals, corporations and governments. It may lead to the wrong government being elected, the wrong policies being adopted, the wrong people being appointed, corruption, dishonesty and incompetence not being exposed, wrong investments being made and a multitude of other undesirable consequences. It is for this reason that it has been said ‘that freedom of expression constitutes one of the essential foundations of a democratic society and is one of the basic conditions for its progress and the development of man’.”<sup>11</sup>

The Supreme Court of Zimbabwe has stated the following:

“Freedom of expression has four broad special objectives to serve:

- (i) It helps an individual to obtain self-fulfilment,
- (ii) It assists in the discovery of truth and in promoting political and social participation,

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<sup>8</sup> ECtHR, *Handyside v. United Kingdom*, Application No. 5493/72 (1976).

<sup>9</sup> EACJ, *Burundi Journalists’ Union v. The Attorney General of the Republic of Burundi*, Reference No. 1 of 2014 (2015), par. 82-83.

<sup>10</sup> High Court of Johannesburg, *Holomisa v. Argus Newspapers Ltd*, (2) SA 588 (W) (1996), p. 609.

<sup>11</sup> South African Supreme Court of Appeal, *Hoho v. The State*, Case No. 493/05 (2008), par. 29.

- (iii) It strengthens the capacity of an individual to participate in decision making, and
- (iv) It provides a mechanism by which it would be possible to establish a reasonable balance between stability and change.”<sup>12</sup>

The Supreme Court of India, in *Gandhi v. Union of India*,<sup>13</sup> provided a concise summary of the inter-relationship between freedom of expression and democracy.

“Democracy is based essentially on a free debate and open discussion for that is the only corrective of government action in a democratic set up. If democracy means government of the people by the people, it is obvious that every citizen must be entitled to participate in the democratic process and in order to enable him to intelligently exercise his right of making a choice, free and general discussion of public matters is absolutely essential.”<sup>14</sup>

Freedom of expression is not just an individual right; it also has a strong *societal* aspect. It addresses both the right of someone to express an opinion or a fact and the right of others to hear that opinion or fact. The Inter-American Court of Human Rights (the “IACtHR”) has repeatedly addressed this dual aspect:

“It requires, on the one hand, that no one be arbitrarily limited or impeded in expressing his own thoughts. In that sense, it is a right that belongs to each individual. Its second aspect, on the other hand, implies a collective right to receive any information whatsoever and to have access to the thoughts expressed by others”.<sup>15</sup>

The benefits of freedom of expression are not only in the sphere of democratization and politics. The Nobel prize-winning economist Amartya Sen even went as far as to say that countries with a free press do not suffer famines.<sup>16</sup> Whether or not that claim is literally true, the general point is that freedom of expression – encompassing media freedom – is a precondition for the enjoyment of other rights.

The very first session of the UN General Assembly in 1946 put it thus:

“Freedom of information is a fundamental human right and... the touchstone of all of the freedoms to which the UN is consecrated.”<sup>17</sup>

Freedom of information is understood here to be an inseparable part of freedom of expression – as in the “freedom to seek, receive and impart information” contained in Article 19 of the UDHR. A touchstone is an assaying tool, used to determine the purity of precious metals. So the metaphor means that freedom of expression and

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<sup>12</sup> The Supreme Court of Zimbabwe, *Mark Giva Chavunduka and another v. The Minister of Home Affairs and another*, Supreme Court Civil Application No. 156 (1999).

<sup>13</sup> The Supreme Court of India, *Maneka Gandhi v. Union of India*, SCR 597 (1978), p. 621.

<sup>14</sup> *Id.*

<sup>15</sup> IACtHR, *Herrera-Ulloa v. Costa Rica* Judgment, Series No.107 (2004)

<sup>16</sup> Amartya Sen, *Democracy as a Universal Value*, (1999) Vol. 10 No. 3 Journal of Democracy, p. 3-17.

<sup>17</sup> UN General Assembly Resolution 59(I) (14 December 1946).

information are a means of determining how far rights and freedoms in general are respected.

The right to freedom of expression is now widely interpreted as including the right of access to information held by or under the control of public authorities.<sup>18</sup> The Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Cooperation in Europe (the “OSCE”) Representative on Freedom of the Media and the Organization of American States (the “OAS”) Special Rapporteur on Freedom of Expression of December 2004 reads:

“The right to access information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation (for example Freedom of Information Acts) based on the principle of maximum disclosure, establishing a presumption that all information is accessible subject only to a narrow system of exceptions.”<sup>19</sup>

In connection with the right to access information, the ECtHR has emphasised that the right to gather information is “an essential preparatory step in journalism and is an inherent, protected part of press freedom.”<sup>20</sup>

A consequence of this is that access to information is seen as essential in achieving other social benefits, such as combatting corruption or reducing adverse environmental impact. The UN Convention Against Corruption, for example, requires that the public has “effective access to information” (Article 13), as well as adopting procedures or regulations to allow the public to obtain information about the “organization, functioning and decision-making processes of its public administration and, with due regard for the protection of privacy and personal data, on decisions and legal acts that concern members of the public” (Article 10).<sup>21</sup> Within the African Union, a similar convention was adopted in 2003: the Convention on Preventing and Combating Corruption.<sup>22</sup> Article 9 requires States to “adopt such legislative and other measures to give effect to the right of access to any information that is required to assist in the fight against corruption and related offences.” Under Article 12, States are required to “[c]reate an enabling environment that will enable civil society and the media to hold governments to the highest levels of transparency and accountability in the management of public affairs...”

The right of access to information is similarly centrally positioned in treaties protecting the environment. The UN Economic Commission for Europe Convention on Access to

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<sup>18</sup> See e.g.: ECtHR, *Társaság a Szabadságjogokért v. Hungary*, Application No. 37374/05 (2009); ECtHR, *Youth Initiative for Human Rights v. Serbia*, Application No. 48135/06 (2013).

<sup>19</sup> UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, *Joint Declaration* (6 December 2004); see also: ECtHR, *Youth Initiative for Human Rights v. Serbia*, Application No. 48135/06 (2013).

<sup>20</sup> ECtHR, *Társaság a Szabadságjogokért v. Hungary*, Application No. 37374/05 (2009), par. 27

<sup>21</sup> UN General Assembly, *United Nations Convention Against Corruption*, General Assembly Resolution 58/4 (31 October 2003).

<sup>22</sup> Available at: [http://www.africa-union.org/Official\\_documents/Treaties\\_%20Conventions\\_%20Protocols/Convention%20on%20Combating%20Corruption.pdf](http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/Convention%20on%20Combating%20Corruption.pdf). As of October 2007, the Convention had been ratified by 24 countries. It came into force in August 2006.

Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters sees public access to information as an essential pillar of protection of the environment. The Aarhus Convention, as it is usually known, requires both that States respond to public requests for information about environmental issues (Article 4) and that they publish information (Article 5).<sup>23</sup>

### **Point for discussion**

Given the importance of freedom of expression, one approach might be to say (as the US Supreme Court often does) that it has a higher status than other rights. Would you agree with this approach? Do other judicial or international bodies share this view? And what might be the drawbacks?

### *C. Freedom of expression and media freedom*

It follows from what has been said so far that the role of the mass media is of particular importance in realising the right to freedom of expression. Again, the role of “public watchdog” is something that the ECtHR has stressed on many occasions:

“Not only does [the press] have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of ‘public watchdog’.”<sup>24</sup>

The Court has also stated the following:

“Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.”<sup>25</sup>

What this means – a point made both by the ECtHR and national courts around the world – is that the right to freedom of the press does not only benefit individual journalists. As we have seen, it is an important aspect of the right that the public receive the messages that journalists communicate. The French *Conseil Constitutionnel*, for example, has said that this right is enjoyed not only by those who write, edit and publish, but also by those who read.<sup>26</sup>

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<sup>23</sup> UN Economic Commission for Europe, *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, 25 June 1998: Aarhus, Denmark.

<sup>24</sup> ECtHR, *Thorger Thorgeirson v. Iceland*, Application No.13778/88 (1992), par. 63.

<sup>25</sup> ECtHR, *Castells v. Spain*, Application No. 11798/85 (1992), par. 43.

<sup>26</sup> Conseil Constitutionnel, *Décision No. 86-210 DC* (1986), par. 16.

In a famous advisory opinion on press freedom, the IACtHR said:

“When an individual’s freedom of expression is unlawfully restricted it is not only the right of that individual [journalist] that is being violated, but also the right of all others to ‘receive’ information and ideas.”<sup>27</sup>

The UN Human Rights Committee (the “UNHRC”) is the UN treaty body that considers complaints and offers authoritative interpretation of the ICCPR. In its General Comment 34, which offers an interpretation of Article 19, the UNHRC said:

“The Covenant embraces a right whereby the media may receive information on the basis of which it can carry out its function. The free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion. The public also has a corresponding right to receive media output... As a means to protect the rights of media users, including members of ethnic and linguistic minorities, to receive a wide range of information and ideas, States parties should take particular care to encourage an independent and diverse media.”<sup>28</sup>

*D. How may freedom of expression be legitimately limited?*

Freedom of expression is not an absolute right. It is a general principle of human rights law, found in the UN instruments, the ECHR (Article 17), the ACHR (Article 29) and the ACHPR (Article 27(2)) that human rights may not be exercised in a manner that violates the rights of others. Article 19 of the ICCPR lays out a number of purposes for which freedom of expression may be limited:

“The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (ordre public), or of public health or morals.”

The ACHR offers the same possible grounds for restriction,<sup>29</sup> while the ECHR expands the list:

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<sup>27</sup> IACtHR, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 (1985), par. 30.

<sup>28</sup> UHRC, *General Comment No. 34: ICCPR, Article 19: Freedoms of opinion and expression*, UN Doc. No. CCPR/C/GC/34 (12 September 2011), par. 20.

<sup>29</sup> ACHR, *supra* note 6, Art. 13(13).

“The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”<sup>30</sup>

The list of potential limitations is a long one and perhaps, from the perspective of a journalist or other defender of media freedom, it is a rather frightening one.

However, the process of limiting freedom of expression (or any other human right) is not a blank cheque for dictators. It is not sufficient for a government simply to invoke “national security” or one of the other possible limitations and then violate human rights.

There is a well-established process for determining whether the right to freedom of expression (or any other human right) may be limited.

The process takes the form of a *three-part test*.

Step 1: Any restriction on a right must be prescribed by law.

Step 2: The restriction must serve one of the prescribed purposes listed in the text of the human rights instrument.

Step 3: The restriction must be *necessary* to achieve the prescribed purpose.

These steps are elaborated on below.

#### *Step 1: Prescribed by law*

This is simply a statement of the *principle of legality*, which underlies the concept of the rule of law. The law should be clear and non-retrospective. It must be unambiguously established by pre-existing law that freedom of expression may be limited (for example, in the interests of safeguarding the rights and reputations of others).

The UNHRC adds that any law restricting freedom of expression must comply with the principles in the ICCPR as a whole, and not just Article 19. In particular, this means that restrictions must not be discriminatory and the penalties for breaching the law should not violate the ICCPR.<sup>31</sup> The law must be precise and accessible to the public,

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<sup>30</sup> ECHR, *supra* note 5, Art. 10(2).

<sup>31</sup> UNHRC, *General Comment No. 34: ICCPR, Article 19: Freedoms of opinion and expression*, UN Doc. No. CCPR/C/GC/34 (12 September 2011), par. 26.

and the “law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution.”<sup>32</sup>

The ECtHR has said that to be prescribed by law a restriction must be “adequately accessible” and “formulated with sufficient precision to enable the citizen to regulate his conduct.”<sup>33</sup>

In Zimbabwe, the Constitutional Court in *Chimakure v. Attorney-General of Zimbabwe* held that for a limitation to satisfy the principle of legality it must “specify clearly and concretely in the law the actual limitations to the exercise of freedom of expression.”<sup>34</sup> This is to “enable a person of ordinary intelligence to know in advance what he or she must not do and the consequences of disobedience.”<sup>35</sup>

What is a “law” that can prescribe freedom of expression?

A “law” restricting the right to freedom of expression will usually be a written statute, although common law restrictions are also allowed. According to General Comment 34 “a norm, to be characterized as a ‘law’, must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public. A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution.”<sup>36</sup>

The ECtHR has stated that “a norm cannot be regarded as a ‘law’ unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.”<sup>37</sup> In addition the ECtHR has noted that “many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.”<sup>38</sup> The UNHRC has also noted that, given the serious implications of limiting free expression, it is not compatible with the ICCPR for a restriction “to be enshrined in traditional, religious or other such customary law.”<sup>39</sup>

## Step 2: Serving a legitimate purpose

<sup>32</sup> *Id.*, par. 25.

<sup>33</sup> ECtHR, *The Sunday Times v. the United Kingdom*, Application No. 6538/74 (1979), par. 49.

<sup>34</sup> Zimbabwe Constitutional Court, *Chimakure v. Attorney-General of Zimbabwe*, Application No. CCZ 247/09, Judgment No. CCZ 6/201411 (2014), par. 24.

<sup>35</sup> *Id.*, par. 26.

<sup>36</sup> UNHRC, *General Comment No. 34: ICCPR, Article 19: Freedoms of opinion and expression*, UN Doc. No. CCPR/C/GC/34 (12 September 2011), par. 25.

<sup>37</sup> ECtHR, *Silver and others v. the United Kingdom*, Application No. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75 (1983), par. 88.

<sup>38</sup> *Id.*

<sup>39</sup> UNHRC, *General Comment No. 34: ICCPR, Article 19: Freedoms of opinion and expression*, UN Doc. No. CCPR/C/GC/34 (12 September 2011), par. 24.

The list of legitimate purposes for which rights may be restricted in each of the human rights instruments is an exhaustive one. Article 19(3) of the ICCPR provides for two possible types of restriction:

“The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (*ordre public*), or of public health or morals.”

There are no possible purposes for which freedom of expression may be limited, beyond those set out above. However, the term *ordre public* has a broad meaning (which the English translation of “public order” does not fully capture). The seven possible restrictions permitted under Article 10(2) of the ECHR are examples of these *ordre public* criteria (with the exception of the reputation and rights of others, which corresponds to Article 19(3)(a) of the ICCPR).

Legitimate restrictions in Article 10(2) of the ECHR:

- interests of national security;
- territorial integrity or public safety;
- prevention of disorder or crime;
- protection of health or morals;
- protection of the reputation or the rights of others;
- preventing the disclosure of information received in confidence; and
- maintaining the authority and impartiality of the judiciary.

It is noteworthy that a number of domestic courts have recognised that sometimes protecting rather than limiting free speech is more beneficial to the safety of a State. In *Free Press of Namibia v. The Cabinet for the Interim Government of South Africa*, the South West Africa High Court held:

“Because people (or a section thereof) may hold their government in contempt does not mean that a situation exists which constitutes a danger to the security of the state or to the maintenance of public order. In fact to stifle just criticism could as likely lead to those undesirable situations.”<sup>40</sup>

The House of Lords in the United Kingdom has also recognised this:

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<sup>40</sup> South West Africa High Court, *Free Press of Namibia v. The Cabinet for the Interim Government of South Africa*, SWA 614 (1987), p. 625.

“The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country.”<sup>41</sup>

### *Step 3: Necessary in a democratic society*

The ICCPR requires that any proposed restriction must be “necessary,” but the ECHR couples this with an additional phrase “in a democratic society, which is found in the UDHR”. This stresses the presumption that the limitation of a right is an option of last resort and must always be proportionate to the aim pursued. “Necessary” is a stronger standard than merely “reasonable” or “desirable,” although the restriction need not be “indispensable.”<sup>42</sup>

The UNHRC has emphasized the importance of the proportionality of restrictions:

“[R]estrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest to be protected...The principle of proportionality has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law.”<sup>43</sup>

In General Comment 34, the UNHRC additionally noted:

“When a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.”<sup>44</sup>

In deciding whether a restriction is “necessary in a democratic society,” the ECtHR considers the public interest in a case. If the information to be restricted relates to a matter of public concern, it would be necessary to demonstrate that it was certain that dissemination would damage the legitimate purpose identified.<sup>45</sup>

The nature of the restriction proposed is also an important consideration. The UNHRC has stated that restrictions on freedom of expression “may not put in jeopardy the right

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<sup>41</sup> United Kingdom House of Lords, *R v. Secretary of State for the Home Department, Ex parte Simms*, 2 AC 115 (2000), p. 126.

<sup>42</sup> ECtHR, *Handyside v. the United Kingdom*, Application No. 5493/72 (1976), par. 48-50; ECtHR, *The Sunday Times v. United Kingdom*. Application No. 6538/74 (1979), par. 62.

<sup>43</sup> UNHRC, *General Comment No. 27 on Article 12*, 55th Session, Supplement No. 40, vol. I (A/55/40 (Vol. I)), annex VI, sect. A.

<sup>44</sup> UNHRC, *General Comment No. 34: ICCPR, Article 19: Freedoms of opinion and expression*, UN Doc. No. CCPR/C/GC/34 (12 September 2011), par. 35.

<sup>45</sup> ECtHR, *The Sunday Times v. United Kingdom*, Application No. 5493/72 (1976), par. 66.

itself.”<sup>46</sup> In a similar vein, the Constitutional Court of Zimbabwe has stated that “[t]o control the manner of exercising a right should not signify its denial or invalidation.”<sup>47</sup>

The IACtHR has stated that “it must be shown that a [legitimate aim] cannot reasonably be achieved through a means less restrictive of a right protected by the Convention.”<sup>48</sup>

The EACJ has also emphasized the proportionality argument:

“A government should not determine what ideas or information should be placed in the market place and information and we dare add, if it restricts that right, the restriction must be proportionate and reasonable.”<sup>49</sup>

The United States Supreme Court has stated that any limitation on freedom of expression must be the least restrictive possible:

“Even though the Government’s purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.”<sup>50</sup>

In assessing the legitimacy of restrictions, the ECtHR allows a “margin of appreciation” to the State. This means that there is a degree of flexibility in interpretation, which is especially applicable if the restriction relates to an issue where there may be considerable differences among European States – particularly on issues such as the protection of morals, where standards differ from country to country. The margin of appreciation will be less when the purpose of the restriction is more objective in nature (such as protecting the authority of the judiciary).<sup>51</sup>

By contrast, the UNHRC explicitly rules out the possibility of such flexibility:

“The Committee reserves to itself an assessment of whether, in a given situation, there may have been circumstances which made a restriction of freedom of expression necessary. In this regard, the Committee recalls that the scope of this freedom is not to be assessed by reference to a “margin of appreciation” and in order for the Committee to carry out this function, a State party, in any given case, must demonstrate in specific fashion the precise nature of the threat to any of the enumerated grounds listed in paragraph 3 that has caused it to restrict freedom of expression.”<sup>52</sup>

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<sup>46</sup> UNHRC, General Comment No. 34: ICCPR, Article 19: Freedoms of opinion and expression, UN Doc. No. CCPR/C/GC/34 (12 September 2011), par. 21.

<sup>47</sup> Zimbabwe Constitutional Court, *Chimakure v. Attorney-General of Zimbabwe*, Application No. CCZ 247/09, Judgment No. CCZ 6/201411 (2014), p. 17.

<sup>48</sup> IACtHR, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85, Series A No. 5, 7 HRLJ 74 (1986), par. 30.

<sup>49</sup> EACJ, *Burundi Journalists’ Union v. The Attorney General of the Republic of Burundi*, Reference No. 1 of 2014 (2015), par. 98.

<sup>50</sup> United States Supreme Court, *Shelton v. Tucker*, 364 US 479 (1960), p. 488.

<sup>51</sup> ECtHR, *Handyside v. United Kingdom*, Application No. 5493/72 (1976), par. 48; ECtHR, *The Sunday Times v. United Kingdom*, Application No. 6538/74 (1979), par. 79-81.

<sup>52</sup> UNHRC, General Comment No. 34: ICCPR, Article 19: Freedoms of opinion and expression, UN Doc. No. CCPR/C/GC/34 (12 September 2011), par. 36.

Also the IACtHR has ruled out the concept by stating the following:

“When a State has ratified an international treaty such as the American Convention, its judges, as part of the State, are also bound by such Convention. This forces them to see that all the effects of the provisions embodied in the Convention are not adversely affected by the enforcement of laws which are contrary to its purpose and that have not had any legal effects since their inception. In other words, the Judiciary must exercise a sort of “conventionality control” between the domestic legal provisions which are applied to specific cases and the American Convention on Human Rights. To perform this task, the Judiciary has to take into account not only the treaty, but also the interpretation thereof made by the Inter-American Court, which is the ultimate interpreter of the American Convention.”<sup>53</sup>

Hence, the concept of awarding states a margin of appreciation is unique for the ECtHR.

**Question for discussion**

How is the limitation of freedom of expression (or other rights) regulated in your national constitution or laws?

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<sup>53</sup> IACtHR, *Almonacid-Arellano et al v. Chile*, Preliminary Objections, Merits, Reparations and Costs (2006), par. 124.

### III. REGULATING THE MEDIA

Should the media be regulated? The first reaction of journalists and free expression defenders is probably to say no. But other professions are regulated – not just anyone can set themselves up as a brain surgeon (or even a lawyer). How will it be determined who gets which broadcasting frequencies? What happens if there is a complaint against the media? And how will it be decided who gets access to the press gallery of a courtroom or parliament?

These questions and arguments – of varying validity – have all been considered by regional or national courts and international human rights bodies. The extent to which the media may or may not be regulated is an important issue to understand because governments that want to restrict press freedom may try to use plausible sounding rationales about “regulation” to preface more frontal attacks.

#### A. *Should journalists be licensed?*

Are journalists like doctors and lawyers, where a professional regulation process (i) determines who may practice, and (ii) protects the public from the incompetent and the dishonest? There are many references to the journalistic “profession,” but for many reasons this is probably a misnomer. The important point is that the media and journalists are instruments whereby the population as a whole exercises its right to freedom of expression. In that sense, they are completely unlike doctors, lawyers, accountants, architects and engineers.

Precisely this question was considered by the IACtHR in 1985. The issue was whether journalists in Costa Rica could be required to become members of a professional association before they could practise.<sup>54</sup> Costa Rica presented three arguments in favour of its licensing regime:

- It was necessary for “public order”;
- It sought to promote higher ethical and professional standards, which would benefit society at large; and
- It would guarantee the independence of journalists in relation to their employers.

The Court rejected each of these claims.

First, it accepted that the development of professional values and principles could contribute to public order in a broad sense. However, freedom of expression did the same:

“Freedom of expression constitutes the primary and basic element of the public order of a democratic society, which is not conceivable without free debate and the possibility that dissenting voices be fully heard ... It is ... in the interest of

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<sup>54</sup> IACtHR, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 (1986), par. 30.

the democratic public order ... that the right of each individual to express himself freely and that of society as a whole to receive information be scrupulously respected.”<sup>55</sup>

By restricting access to journalism, licensing harmed the public order rather than promote it.

Second, the Court distinguished journalism from professions such as medicine and law, because the former constitutes the exercise of a human right – freedom of expression.

“The practice of journalism ... requires a person to engage in activities that define or embrace the freedom of expression which the Convention guarantees. This is not true of the practice of law or medicine, for example.”<sup>56</sup>

Getting rid of less-skilled journalists would ultimately prove counterproductive:

“[G]eneral welfare requires the greatest possible amount of information, and it is the full exercise of the right of expression that benefits this general welfare ... A system that controls the right of expression in the name of a supposed guarantee of the correctness and truthfulness of the information that society receives can be the source of great abuse and, ultimately, violates the right to information that this same society has.”<sup>57</sup>

Finally, on the third argument (strengthening the profession and protecting journalists against their employers), the Court felt that this could be achieved by less intrusive means.<sup>58</sup> The Court concluded unanimously that schemes requiring individual journalists to be “licensed” are a violation of the right to freedom of expression.<sup>59</sup>

Decisions by national courts have echoed this principle.<sup>60</sup> The special mandates of the UN, OAS and the OSCE for protecting freedom of expression endorsed the same position in their 2004 Joint Declaration stating that: “Individual journalists should not be required to be licensed or to register.”<sup>61</sup>

Likewise, in its General Comment 34, the UNHRC stated:

“Journalism is a function shared by a wide range of actors, including professional full-time reporters and analysts, as well as bloggers and others who engage in forms of self-publication in print, on the internet or elsewhere, and general State systems of registration or licensing of journalists are

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<sup>55</sup> *Id.*, par. 69.

<sup>56</sup> *Id.*, par. 72.

<sup>57</sup> *Id.*, par. 77.

<sup>58</sup> *Id.*, par. 78.

<sup>59</sup> *Id.*, par 85.

<sup>60</sup> See e.g.: High Court of Zambia, *Kasoma v. Attorney General*, 95/HP/29/59 (1997).

<sup>61</sup> UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, Joint Declaration of 18 December 2003.

incompatible with [freedom of expression as a vehicle for transparency and accountability].”

*B. But shouldn't journalists have certain minimum qualifications?*

Low professional standards are certainly a problem in many countries (as is the corresponding low esteem in which journalists are sometimes held). But, as with licensing requirements, international standards have ruled out the requirement of minimum professional standards. Qualifications for practising journalism are inconsistent with the right to freedom of expression, because this right encompasses the right to express ideas and information through the mass media, and also for the public to receive it.

The Inter-American Declaration of Principles on Freedom of Expression states that: “[t]he requirement of a university degree for the practice of journalism constitute[s] an unlawful restriction of freedom of expression.”<sup>62</sup>

The three special mandates on freedom of expression at the OAS, UN and OSCE have stated that: “[T]here should be no legal restrictions on who may practise journalism.”<sup>63</sup>

*C. If a journalist commits a grave offence, shouldn't he or she be barred from practising?*

The European Commission on Human Rights addressed precisely this issue early in its existence, in the 1960 case of *De Becker v. Belgium*.<sup>64</sup> De Becker had been a collaborator with Nazi occupiers of Belgium, who narrowly escaped being executed after the Second World War and was instead barred for life from involvement in newspaper publication. Although the Commission did not rule out prohibiting someone from publishing in certain circumstances, it criticized the inflexible application of a lifetime ban in these circumstances.

In the much later case of *Kaperzynski v. Poland*, the ECtHR found that prohibiting a journalist from practising because he had refused to comply with an order to publish a reply was not a “necessary” restriction in a democratic society. It would potentially have the effect of dissuading journalists from discussing matters of public concern.<sup>65</sup> In *Cumpana and Mazare v. Romania*, the Court made a similar finding in a case where a reporter and editor were sanctioned by being deprived of their right to work as journalists.<sup>66</sup>

Banning someone from journalism is similar to imposing a *prior restraint* on speech (see below). This may be permissible in exceptional situations, but under the freedom

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<sup>62</sup> Inter-American Commission on Human Rights, *Inter-American Declaration of Principles on Freedom of Expression*, 108<sup>th</sup> session, 19 October 2000.

<sup>63</sup> UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, Joint Declaration 2004.

<sup>64</sup> European Commission on Human Rights, *De Becker v. Belgium*, Application No. 214/56 (8 January 1960).

<sup>65</sup> ECtHR, *Kaperzynski v. Poland*. Application No.43206/07 (2012).

<sup>66</sup> ECtHR, *Cumpana and Mazare v. Romania*, Application No. 33348/96 (2004).

of expression doctrine established by the ECtHR, there is a very strong presumption against it.

*D. There isn't room for everyone in the press gallery of parliament – who decides who will be allowed in?*

Part of the right to freedom of expression, as exercised by the media, is obviously the right to gather news. But when it comes to reporting certain types of event – parliamentary sessions, court proceedings, conferences, or sporting events – there will be physical limits on the number of journalists who can gain access. In these instances, some sort of accreditation scheme is normal.

Accreditation is however open to abuse, so that it rapidly becomes something close to a licensing regime, with critical journalists excluded. The UNHRC has said that accreditation should only be used as necessary and that the criteria used should be fair and transparent:

“[I]ts operation and application must be shown as necessary and proportionate to the goal in question and not arbitrary ... The relevant criteria for the accreditation scheme should be specific, fair and reasonable, and their application should be transparent.”<sup>67</sup>

The UN, OSCE and OAS special mandates have similarly stated:

“Accreditation schemes for journalists are appropriate only where necessary to provide them with privileged access to certain places and/or events; such schemes should be overseen by an independent body and accreditation decisions should be taken pursuant to a fair and transparent process, based on clear and non-discriminatory criteria published in advance. Accreditation should never be subject to withdrawal based only on the content of an individual journalist's work.”<sup>68</sup>

*E. If licensing of journalists is not acceptable, how about licensing of media bodies?*

The issue of media regulation is a complicated one, and it is not the purpose of this manual to address it thoroughly but we do need to be able to identify when governments are using apparently plausible arguments about regulation to interfere with freedom of expression.

The first point to understand is that different considerations apply to different sections of the media. Historically, the situation of broadcast media has been very different from

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<sup>67</sup> UNHRC, *Gauthier v. Canada*, Communication No. 633/1995, UN Doc. CCPR/C/65/D/633/1995 (7 April 1999), par. 13.6.

<sup>68</sup> UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, *Joint Declaration on regulation of the media, restrictions on journalists and investigating corruption*, 18 April 2003.

that of the print media, for the very simple reason that the frequency spectrum is a finite resource. For example, the maximum number of frequencies on the FM band is about 100. Allocation of frequencies has been the only fair way of ensuring pluralism and free expression in broadcasting – this, in other words, is regulation.

Some other regulatory consequences have flowed from this. In many countries, the fact that broadcasters – including private ones – are using a national resource means that they are obliged to follow strict rules about impartiality in political reporting, especially at the time of elections. More generally, broadcasting licenses, with the aim of ensuring pluralism, often contain certain obligations relating to content. If a broadcaster fails to abide by such requirements it risks losing its licence.

Almost none of these considerations apply to the print or online media. There is no print or online equivalent of the frequency spectrum. In principle, anyone may establish a magazine or newspaper, or set up a website, although there are clearly vast inequalities of resources between potential publishers.

This is why courts in general have been very reluctant to impose any specific licensing requirements on newspaper and magazine publishers – nor indeed financial obligations, such as taxes on materials, that are specific to the publishing industry.

A borderline area is the issue of remedies for irresponsible or inaccurate reporting. While the general approach of free expression advocates is to argue for self-regulation of the media as a way of dealing with professional standards and complaints, international law is not consistent on this point.

The ACHR provides for a right of reply for anyone “injured by inaccurate or offensive statements or ideas” in the media.<sup>69</sup> Other parts of the world are not necessarily averse to the idea, although it is anathema to some since it appears to regulate the content of the media. In certain contexts even the United States, which is generally very resistant, has permitted the right of reply as a necessary interference with freedom of expression. The EACJ has even referred to it as a “maxim of justice.”<sup>70</sup>

#### *F. Attempts to regulate print media*

Courts have looked especially harshly on attempts to impose particular financial burdens on the print media, with United States jurisprudence in particular pointing out the dangers. In *Grosjean v. American Press Co*, the publishers had challenged a law imposing a tax on publications with a circulation of more than 20,000. The Supreme Court felt that the law constrained the press twice over – once as a tax on advertising revenues, and then as an incentive to limit circulation. Considering the constitutional prohibition on laws abridging press freedom, the Court cited a standard legal textbook:

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<sup>69</sup> ACHR, *supra* note 6, Art. 14(1).

<sup>70</sup> EACJ, *Burundi Journalists’ Union v. The Attorney General of the Republic of Burundi*, Reference No. 1 of 2014 (2015).

“The evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens.”<sup>71</sup>

The point was underlined in *Minneapolis Star v. Minneapolis Commissioner of Revenue*. The state of Minnesota had imposed a tax on paper and ink. While there was no problem with generally applicable taxes applying to newspapers, any tax aimed specifically at the press was presumptively unconstitutional:

“[D]ifferential treatment, unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional. Differential taxation of the press, then, places such a burden on the interests protected by the [right to freedom of expression] that we cannot countenance such treatment unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation.”<sup>72</sup>

Although Minnesota claimed that the aim of the tax was to raise revenue, the Court found that this could be achieved by other means that did not interfere with press freedom (such as raising business taxes generally).

Elsewhere, an issue has been how far states may impose registration requirements on the print media. In *Gaweda v. Poland*, a publisher had been refused registration of two publications because the registering authority thought the titles were inappropriate. The ECHR struck this down as not being “prescribed by law”. The Polish courts had inferred a power to refuse registration on the basis of the title, although this was not foreseeable from the text of registration. The ECtHR held:

“To...require of the title of a magazine that it embody truthful information, is ... inappropriate from the standpoint of freedom of the press. A title of a periodical is not a statement as such, since its function essentially is to identify the given periodical on the press market for its actual and prospective readers.”<sup>73</sup>

The UNHRC has repeatedly expressed concern about registration schemes for the press where the authority has the power to refuse registration because this is different from normal business registration for tax or employment purposes:

“The Committee is concerned that the relevant authority under the Printing and Publishing Act has unfettered discretionary power to grant or to refuse registration to a newspaper, in contravention of article 19 of the Covenant.”<sup>74</sup>

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<sup>71</sup> United States Supreme Court, *Grosjean v. American Press Co*, 297 US 233 (1936).

<sup>72</sup> United States Supreme Court, *Minneapolis Star v. Minneapolis Commissioner of Revenue*, 460 US 575 (1983).

<sup>73</sup> ECHR, *Gaweda v. Poland*, Application No. 26229/95 (2002), par. 43.

<sup>74</sup> UNHRC, *Concluding observations of the Human Rights Committee: Lesotho*, , UN Doc. No. CCPR/C/79/Add.106 (1999), par. 23.

Even technical registration schemes carry dangers. The UNHRC expressed extreme scepticism about such a scheme from Belarus when it was imposed on a leaflet with a print run of 200:

“The Committee notes that ... publishers of periodicals ... are required to include certain publication data, including index and registration numbers which, according to the author, can only be obtained from the administrative authorities. In the view of the Committee, by imposing these requirements on a leaflet with a print run as low as 200, the State party has established such obstacles as to restrict the author’s freedom to impart information.”<sup>75</sup>

The African Commission on Human and Peoples’ Rights found that licensing requirements imposed by the Nigerian government violated Article 9 of the African Charter.<sup>76</sup> The case of *Media Rights Agenda and Others v. Nigeria* involved a number of different issues. Among other steps, the military government had required all newspapers to retrospectively register in order to lawfully publish, with the power to refuse registration and hence ban – in other words a licensing system. The Commission considered that high registration fees could be a violation of freedom of expression and likewise the discretion to refuse registration.

In the words of the special freedom of expression mandates from the UN, OSCE, and OAS: “[i]mposing special registration requirements on the print media is unnecessary and may be abused and should be avoided.”<sup>77</sup>

### G. *Regulating broadcasting*

By contrast with the print media, there has long been recognized to be a legitimate public and freedom of expression interest in regulating broadcast media. The reason, as indicated above, is the finite character of the frequency spectrum and the need therefore to allocate its use fairly. It is clearly not in the interest of pluralism and diversity to have the frequency spectrum as a free-for-all, with the largest transmitters crowding out the weak.

The strength of this argument has receded somewhat with the digitalization of broadcasting and hence the greater availability of broadcasting platforms, whether through satellite, cable and, increasingly, the internet. (The internet will be discussed separately in the next chapter.)

However, the fundamental principles behind broadcasting regulation remain. One important rationale is to counter the tendency towards a monopoly (particularly State

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<sup>75</sup> UNHRC, *Laptsevich v. Belarus*, 20 March 2000, Communication No. 780/1997, UN Doc. CCPR/C/68/D/780/1997 (1997), par. 8.1.

<sup>76</sup> African Commission on Human and Peoples’ Rights, *Media Rights Agenda and Others v. Nigeria*, Application Nos. 105/93, 128/94 and 152/96 (1998).

<sup>77</sup> UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, Joint Declaration of 18 December 2003.

monopoly). This was the issue addressed by the ECtHR in *Informationsverein v. Austria*.<sup>78</sup>

Article 10 of the ECHR allows that States may establish regulatory bodies for the media, which constitutes an interference with the right to freedom of expression. However, the aim, legality and necessity of such a regulatory system still has to be established using the three-part test. The issue at stake in the *Informationsverein* case was whether a State monopoly of broadcasting could be justified under the necessity leg of the test:

“Of all the means of ensuring that these values are respected, a monopoly is the one which imposes the greatest restrictions on the freedom of expression, namely the total impossibility of broadcasting otherwise than through a national system and, in some cases, to a very limited extent through a local cable station. The far-reaching character of such restrictions means that they can only be justified where they correspond to a pressing need.”<sup>79</sup>

The Court considered that the stated aim of creating diversity in broadcasting could be achieved by the less restrictive means of allowing private broadcasting. It was sceptical about the stated danger of private monopolies. This could be addressed by the terms of the broadcasting licenses issued.

Subsequently, the UNHRC in its General Comment 34 did express concern about the danger of private monopolies, with the State having an obligation to ensure media pluralism:

“The State should not have monopoly control over the media and should promote plurality of the media. Consequently, States parties should take appropriate action, consistent with the Covenant, to prevent undue media dominance or concentration by privately controlled media groups in monopolistic situations that may be harmful to a diversity of sources and views.”<sup>80</sup>

The Supreme Court of Sri Lanka drew upon the ECtHR judgment in *Informationsverein v. Austria* when it was called upon to consider whether the newly created Sri Lanka Broadcasting Authority was sufficiently independent and impartial. One of the issues was the existence of different regulatory regimes for State and private broadcasters. This would require a strong and persuasive rationale:

“There is no rational explanation why the law should only be benign in operation to those two broadcasters, why the authority should act generously only in relation to those institutions, while looking upon others with ‘an evil eye’ with regard to required standards governing the content of programmes, the manner

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<sup>78</sup> ECHR, *Informationsverein Lentia and others v. Austria*, Application Nos. 13914/88, 15041/89, 15717/89, 15779/89, 17207/90 (1993).

<sup>79</sup> *Id.*, par. 39.

<sup>80</sup> UNHRC, *General Comment No. 34: ICCPR, Article 19: Freedoms of opinion and expression*, UN Doc. No. CCPR/C/GC/34 (12 September 2011), par. 40.

of complying with those standards, and the consequences of failing to comply with those standards. The unjustified discrimination is manifest. There is a clear violation of the principles of equality.”<sup>81</sup>

The Court did not reject the importance of regulation or consider that in itself it violated freedom of expression:

“Having regard to the limited availability of frequencies, and taking account of the fact that only a limited number of persons can be permitted to use the frequencies, it is essential that there should be a grip on the dynamic aspects of broadcasting to prevent monopolistic domination of the field either by the government or by a few, if the competing interests of the various sections of the public are to be adequately served. If the fundamental rights of freedom of thought and expression are to be fostered, there must be an adequate coverage of public issues and an ample play for the free and fair competition of opposing views. The imposition of conditions on licences to ensure that these criteria should be observed do not transgress the right of freedom of speech, but they rather advance it by giving listeners and viewers the opportunity of considering different points of view, of thinking for themselves, and making personal choices.”<sup>82</sup>

The Court also reasoned that the body that allocates licences should be independent of the government:

“The ultimate guarantor that the limited airwaves/frequencies shall be utilised for the benefit of the public is the state. This does not mean that the regulation and control of airwaves/frequencies should be placed in the hands of a government in office for the time being. The airwaves/frequencies, as we have seen, are universally regarded as public property. In this area, a government is a trustee for the public: its right and duty is to provide an independent statutory authority to safeguard the interests of the People in the exercise of their fundamental rights: No more and no less. Otherwise the freedoms of thought and speech, including the right to information will be placed in jeopardy.”<sup>83</sup>

The Court was particularly wary of various provisions allowing the Minister and broadcasting authority to impose conditions by decree. These powers were incompatible with freedom of expression:

“Vague provisions cannot be permitted, for they undermine the basic principles of fair notice and warning: people must be clearly and simply told what they are not supposed to do, so that they may adjust their lives and work. Every situation cannot be anticipated and provided for; but the law must set reasonably clear general guidelines for ministers, officials, law enforcement officials and triers of fact, including judges, to prevent arbitrary action. Without clear guidelines

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<sup>81</sup> Supreme Court of Sri Lanka, *Athukorale and others v. Attorney General of Sri Lanka*, (1997) 2 BHRC 610.

<sup>82</sup> *Id.*, p. 621.

<sup>83</sup> *Id.*, p. 621-622.

prescribed by law, the minister and/or the authority have discretion to act on an irrational selective basis, including a selective basis referable to race, religion, language, caste, gender, or political opinion, and therefore in violation of ... the Constitution. Licensees are exposed to the risk of having their licenses cancelled or suspended or even being prosecuted because they disagree with the minister and/or authority, albeit, for some constitutionally suspect reason: there is a very real potential for the arbitrary suppression of the freedoms of thought and free speech.”<sup>84</sup>

Two such arbitrary decisions were overturned in Caribbean cases decided on appeal by the judicial committee of the Privy Council. In *Benjamin and Others v. Minister of Information and Broadcasting* a radio discussion programme was suspended after a phone-in discussion on a controversial public lottery. The radio station was the only non-religious station in Anguilla and was government-owned.<sup>85</sup>

Benjamin, the host of the suspended programme, won his case in the High Court, but the Court of Appeal ruled that the radio station was not a public place where freedom of expression could be exercised. The Privy Council overruled the contention of the government and appeal court that freedom of expression did not apply:

“[A] government-owned radio station is a suitable and convenient medium for fostering and promoting free expression under the Constitution, subject of course, to reasonable limitations for the rights of others and the interest of the public.....the government was deliberately affording the means for a greater exercise by the people of their [right to freedom of expression].”<sup>86</sup>

The government’s aim in closing down the programme was not legitimate because it was happy to allow discussion of other issues but not the lottery.

In *Observer Publications Ltd v. Matthew*, the appellant had applied to the authorities in Antigua and Barbuda for a broadcasting licence.<sup>87</sup> His application had been postponed indefinitely without consideration – effectively refused. All private broadcasting licenses were held by members of the government and their families. The Privy Council did not rule on this, but noted:

“[T]he homogeneous pattern of the ownership of the authorised broadcasting stations is relevant against any suggestion that the refusal of a licence to the appellant may have been justified...”<sup>88</sup>

The denial of a broadcasting licence was clearly an interference in the right to freedom of expression. There were possible justifications for such an interference, including lack of space on the frequency spectrum, the existence of other stations with a similar

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<sup>84</sup> *Id.*, p. 628.

<sup>85</sup> Judicial Committee of the Privy Council, *Benjamin and Others v. Minister of Information and Broadcasting*, Privy Council Appeal No. 2 of 1999 (2001).

<sup>86</sup> *Id.*

<sup>87</sup> Judicial Committee of the Privy Council, *Observer Publications Ltd v. Matthew*, Privy Council Appeal No. 3 of 2000 (2001).

<sup>88</sup> *Id.*

profile, or the danger that it would broadcast pornography or other unsuitable material. None of these considerations applied in this case. The Privy Council was concerned whether the grounds for refusal had been legitimate:

“[A] policy motivated by a desire to suppress or limit criticism of the Government of the day is never acceptable in a democratic society.”<sup>89</sup>

Clearly the right to freedom of expression had been violated.

In the case of *Granier et al. (Radio Caracas Television) v. Venezuela*, the IACtHR noted that the plurality of the media or information available to the public is an effective guarantee of freedom of expression. There is therefore a duty on the State to protect and guarantee this under Article 1.1 of the Convention through (i) minimising restrictions to information and (ii) through having balanced participation by ensuring that the media is open to all without discrimination.<sup>90</sup>

### **A hypothetical case for you to consider....**

The broadcasting regulatory body receives complaints from members of a community. They are unable to receive the signal from their community station because it is drowned out by the much stronger signal from a commercial station on a neighbouring frequency.

The commercial station is asked to explain itself. It says:

- It is our right to freedom of expression to broadcast our signal clearly.
- In any event, the public is interested in listening to our music and sports programming, not a load of community stuff. (The audience figures confirm that not many people listen to the community station.)

The community broadcasters say:

- We offer diversity to the public.
- We represent a distinct community.
- More people would listen to us if there were no interference with our signal.

How would the rights of the public and broadcasters best be served?

(We forgot to mention – the community broadcasters are racist members of the majority ethnic group. Does this make a difference to your decision?)

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<sup>89</sup> *Id.*

<sup>90</sup> IACtHR, *Granier et al. (Radio Caracas Television) v. Venezuela* Preliminary Objective, Merits, Reparations and Costs, (2015), par. 142.

#### **IV. THE INTERNET – A REGULATORY PUZZLE**

In the 1990s, the advent of the internet as one of the most widely used vehicles for freedom of expression has posed an ongoing series of new issues for the law. Whereas newspapers and magazines would be readily recognizable to those who wrote and published the first publications in the eighteenth century, the internet would be unrecognizable. Indeed the internet of today would be unrecognizable to a time traveller from 20 years ago, let alone further back.

Broadcasting too is not in essence so different from the first days of public broadcasting in the 1930s – although some issues, such as trans-frontier broadcasting, did foreshadow questions that would affect the internet.

Part of the problem is defining what the internet is. If we say that it is a number of communications platforms that use internet transfer protocols, that does not get us very far. In the early 1990s, for the tiny minority of the public who had access to it, the internet meant primarily electronic mail and perhaps, for the very advanced, the newly emerging World Wide Web. But even the latter was probably less widely used than internet platforms that are now all but forgotten, such as Usenet.

Today, email is many times more widely used and the web is employed for a whole variety of purposes scarcely envisaged originally. The most obvious ones for the purposes of a freedom of expression discussion are obviously online newspaper publication and broadcasting. But these are in many ways the least problematic.

In addition, most web users regularly choose which site to use through search engines. Social media websites make everyone a potential journalist or publisher. Then there are the various internet platforms that do not (necessarily) make use of the web, such as downloadable broadcast content, Twitter and so on.

To add to the complications, there are legal issues arising from the fact that the mobile phones most people carry around with them are not just phones, but sophisticated multi-media devices that can not only be used to consume “traditional” media – online newspapers, broadcast podcasts etc – but also to generate a form of media content through photography and writing (e.g. crowd-sourcing and citizen journalism), including by contributing to websites maintained by ‘traditional’ mass media by using comments and taking part in online discussion fora).

This new media landscape confounds all the old categories on which media and freedom of expression law was founded. Who is the journalist, who is the publisher, and indeed who is the audience? Is Twitter the publisher of the tweets posted by its subscribers? Is the company that provides an internet connection the publisher of a user’s messages? And when does publication take place – when a blogger uploads a post or when someone else downloads it? What if Google leads a user to a website that includes hate speech, defamation or violations of privacy? Can the provider of the search engine be liable?

Courts in national, regional and international jurisdictions are tackling these questions. And, while some of these issues are indeed new ones – internet service providers, search engines, etc. – many questions relating to freedom of expression on the internet can be readily answered through the sensible application of pre-existing principles.

*A. Is the internet the same as any other publishing medium?*

Self-evidently it is not. One of the early occasions when a superior court had to address this question was when the Communications Decency Act (“CDA”) came before the Supreme Court of the United States in 1997, after the American Civil Liberties Union challenged its constitutionality under the First Amendment.

The CDA was aimed at protecting minors from harmful material on the internet and criminalized (i) the “knowing” transmission of “obscene or indecent” messages or sending or (ii) displaying any message “[t]hat, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs to anyone under 18.”<sup>91</sup>

The Supreme Court struck down the CDA on free speech grounds, using several arguments of broader application. It disapproved the vagueness of the terminology in the definition of obscenity, which could potentially criminalize discussion of issues such as birth control, homosexuality or the consequences of prison rape. Although the government had a legitimate interest in protecting children from obscene material, it quoted an earlier case to say that the government may not “reduc[e] the adult population... to... only what is fit for children.”<sup>92</sup>

Likewise, the “community standards” criterion is dangerous, since content would be judged by the standards of the community most likely to be offended.

Of particular interest in this context is the Supreme Court’s finding that the internet should not be subject to the same kind of regulation as the broadcast media.<sup>93</sup> One of the main considerations in regulating broadcasting is the scarcity of frequencies and the need to allocate them fairly. By contrast, internet bandwidth is almost unlimited. The Court was distinctly unimpressed by the government’s argument that internet regulation was needed to foster its growth:

“[I]n the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.”<sup>94</sup>

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<sup>91</sup> United States Supreme Court, *Reno v. ACLU*, 521 US 844 (1997).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

## *B. Where is the internet?*

One of the particular issues in applying freedom of expression standards to the internet is a jurisdictional one. This is not entirely unprecedented – it arises in relation to satellite broadcasting, for example – but it reaches a whole new level online.

Historically, an item was both published and read (or heard, or viewed) within the same jurisdiction, or at least that would be the usual assumption, even if it was never universally true. Consider, however, the dangers of assuming that the law in the download location would apply, as a judge did in the Australian state of Victoria, subsequently upheld by the High Court of Australia: “publication takes place where and when the contents [are] comprehended by the reader.”<sup>95</sup> This was in a defamation case relating to content on a US website. It is unlikely, given the more liberal jurisprudence of the US on defamation, that the case would even have come to court there.

The danger, self-evidently, is one of “forum shopping.” If online content were held to be “published” in every location where it is downloaded, then journalists (and others) could be sued in the most restrictive jurisdiction.

A French court decision on the nature of internet “publication” is useful in this regard (even though it dealt not with the matter of international exchange of information, but the date of publication.) The appellant in this case argued that internet publication is on-going every time someone downloads the documents, they are published anew and a new cause of action arises. The Cour de Cassation found, on the contrary, that publication on the internet (as elsewhere) is a discrete event.<sup>96</sup>

Other cases in European national jurisdictions have grappled with the issue of the transnational character of the internet. In a German case, the managing director of the German subsidiary of CompuServe, the US internet company, was initially convicted for publication and distribution of images of violence, child pornography and bestiality found on Usenet newsgroups hosted by the company. In fact, CompuServe Germany had provided subscribers with parental control software.

On appeal, the Court found that the managing director did not have an obligation to continue to request the parent company to remove the material (which might well be unsuccessful anyway). The appeal Court cited domestic law that protects internet service providers (ISPs) from liability for third party content:

“An Internet Service Provider who provides access to material without being able to influence its content should not be responsible for that content.”<sup>97</sup>

However, in a French case involving the US internet provider Yahoo!, the courts did require a foreign website to abide by domestic law. The case involved the online sale of Nazi memorabilia – legal in the United States, but illegal in France. Given that the

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<sup>95</sup> High Court of Australia, *Gutnick v. Dow Jones*, HCA 56 (2002), para 22.

<sup>96</sup> Cour de Cassation, Chambre criminelle, *Arret n°6374* (2001).

<sup>97</sup> Munich Regional Court, *The People v. Felix Somm*, File no. 20 Ns 465 Js 173158/95 (1999).

company was committing no offence in the country in which the site was hosted, the court required Yahoo! to use blocking software to prevent access in France (having first consulted a number of studies that stated that this was a technically feasible option).<sup>98</sup> The company's response was to discontinue the sale of Nazi memorabilia altogether.

Of course, Article 19 of the Universal Declaration of Human Rights (and later the ICCPR) addressed the fundamentals of this more than six decades ago and states that the right to "seek, receive and impart information and ideas through any media and regardless of frontiers." The implications of this for the Internet are clear: the right to freedom of expression protects communication on the internet across borders.

### *C. Is the intermediary a publisher?*

Several of the cases relevant to jurisdictional issues have already raised the question of whether, or how far, an Internet Service Provider is responsible (and hence liable) for the content that it hosts. The Yahoo! case suggested a level of responsibility, whereas the Compuserve case pointed in the opposite direction. The jurisprudence, both comparative and regional, concurs increasingly with the latter view. The ISP does not "publish" any more than the supplier of newsprint or the manufacturer of broadcasting equipment. It simply provides others with the means to publish or to express their views.

In a Dutch case, involving infringement of copyright for example, it was held that liability for the infringement attached to the publisher of the website *not* to the ISP, which simply made available its technical infrastructure to customers. However, an ISP can be required to take reasonable steps to remove content if it is told that there is illegal material on its servers (provided there is no reason to doubt the truth of this).<sup>99</sup>

In the United States, the New York Court of Appeals considered a case where a plaintiff sued an ISP for defamation. The Court recalled its earlier case law in which it had considered that a telephone company could not be considered a publisher because it "in no sense has... participated in preparing the message, exercised any discretion or control over its communication, or in any way assumed responsibility."<sup>100</sup> An ISP is in a similar position to the telephone company in respect of emails.

Even if it could have been seen as the publisher, "[t]he public would not be well served by compelling an ISP to examine and screen millions of email communications, on pain of liability for defamation."<sup>101</sup>

In relation to posts on bulletin boards, the Court considered that the situation was slightly different, in that these could be screened, but were not as a matter of regular practice. Hence the intermediary was not the publisher of messages that were not

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<sup>98</sup> Tribunal de Grande Instance de Paris, *UEJF and Licra v. Yahoo!*, No. 00/05308 (2000).

<sup>99</sup> District Court The Hague, *Scientology v. XS4ALL and others*, *IER* 1999, 47 (1999).

<sup>100</sup> New York Court of Appeals, *Lunney v. Prodigy*, 2 No. 164, 99 NY Int. 0165 (1999).

<sup>101</sup> *Id.*

screened.<sup>102</sup> The United States Supreme Court refused leave to appeal, stating that it agreed with this judgment.<sup>103</sup>

In the United States and the European Union, at least, some of the previous lack of clarity on the issue of intermediary liability has been addressed by legislative acts.

In the United States, Section 230 of the Communications Decency Act sought to clarify the difficulties that had arisen in translating the common law distinction between publishers and distributors (and their obligations in relation to defamatory content) into the online environment. A 1995 case in New York had found an intermediary liable for the defamatory comment of a third party, a poster on an online bulletin board. Section 230 states that no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider. Liability is with the creator of the content.

Importantly, Section 230 does not impose liability on the intermediary (the ISP) to screen content for potentially defamatory or obscene material. The logic of this was explained by the Federal Court of the Fourth Circuit:

“If computer service providers were subject to distributor liability, they would face potential liability each time they receive notice of a potentially defamatory statement — from any party, concerning any message. Each notification would require a careful yet rapid investigation of the circumstances surrounding the posted information, a legal judgment concerning the information's defamatory character, and an on-the-spot editorial decision whether to risk liability by allowing the continued publication of that information. Although this might be feasible for the traditional print publisher, the sheer number of postings on interactive computer services would create an impossible burden in the Internet context.”<sup>104</sup>

The European Union position on intermediary liability was set out in the E-Commerce Directive of 2000.<sup>105</sup> This also provides exemption from liability for intermediaries in three broad areas: the “mere conduit” of content, “caching” of content, and “hosting.” The main difference from the United States law is that this exemption from liability is conditional upon the intermediary acting “expeditiously” to remove content if it has knowledge that the material is illegal. But the E-Commerce directive does *not* require the intermediary to monitor content (which would potentially have undermined the whole purpose of this provision).

The European Court of Justice (the “ECJ”) has interpreted this provision in accordance with fundamental principles of freedom of expression, on the understanding that all the right belongs to citizens, not to the intermediary; an ISP only facilitates the general exercise of the right. The ECJ has also avoided a situation where corporate entities might be required to act as censors.

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<sup>102</sup> *Id.*

<sup>103</sup> United States Supreme Court, *Lunney v. Prodigy* 120 S.Ct. 1832, 146 L. Ed. 2d (2000).

<sup>104</sup> Federal Fourth Circuit Court, *Zeran v. America Online, Inc.*, 129 F. 3d 327 (1997), p. 333.

<sup>105</sup> European Union, *Directive 2000/31/EC*, 8/6/2000.

In the same vein, the Supreme Court of India has interpreted section 79 of the Indian Technology Act on intermediary liability to be read as providing for intermediary liability only where (i) an intermediary has received actual knowledge from a court order or (ii) an intermediary has been notified by the Government that unlawful acts under Article 19 (2) are going to be committed, and has subsequently failed to remove or disable access to such information.<sup>106</sup>

In 2015, the ECtHR elaborated that, notwithstanding the shielding of internet service providers, a media website on which users can take part in discussion fora and leave comments underneath news articles can be held liable for comments that are “clearly unlawful”, and suggested that large news websites should have automated systems to flag up any such comments.<sup>107</sup> However the Court subsequently cautioned against “requiring excessive and impracticable forethought capable of undermining freedom of the right to impart information on the Internet” on the part of intermediaries.<sup>108</sup>

#### *D. Are bloggers journalists?*

On many issues relating to new technologies, practice runs ahead of the law. The mid-2000s onwards have seen an explosion of blogging and “citizen journalism.” Following from the principle that journalists should not be subject to any form of registration requirement, there would seem to be no fundamental distinction between someone who publishes an online article on the website of a traditional newspaper or broadcaster and someone who publishes a blog (certainly there are many bloggers behind bars, persecuted in an identical way to journalists).

In its General Comment 34 on Article 19 of the ICCPR, the UNHRC included bloggers in a broad definition of who should be regarded as a journalist for purposes of freedom of expression:

“Journalism is a function shared by a wide range of actors, including professional full-time reporters and analysts, as well as bloggers and others who engage in forms of self-publication in print, on the internet or elsewhere...”<sup>109</sup>

In noting the “important role played by the Internet in enhancing the public’s access to news and facilitating the dissemination of information”, the ECtHR has stated that “the function of bloggers and popular users of the social media may be also assimilated to that of ‘public watchdogs’ in so far as the protection afforded by Article 10 is concerned”.<sup>110</sup>

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<sup>106</sup> Supreme Court of India, *Shreya Singhal v. Union of India*, Application No. 167/2012 (2015), par. 112-118.

<sup>107</sup> ECtHR (Grand Chamber), *Delfi v. Estonia*, Application No. 64569/09 (2015).

<sup>108</sup> ECtHR, *MTE v Hungary*, Application No. 29947/13 (2016), par 81.

<sup>109</sup> UNHRC, *General Comment No. 34: ICCPR, Article 19: Freedoms of opinion and expression*, UN Doc. No. CCPR/C/GC/34 (12 September 2011), par. 44.

<sup>110</sup> ECtHR (Grand Chamber), *Magyar Helsinki Bizottság v Hungary*, App no. 18030/11 (2016), par 168.

### **Hypothetical case for discussion**

A Twitter user tweets a message claiming that a well-known public figure is known to have been involved in child sexual abuse. The message is replied to by some Twitter users, expressing horror at this information, and is retweeted by some users.

A few days later the author of the original tweet sends a further message, stating that the information tweeted was incorrect and apologizing to the public figure.

The public figure commences defamation proceedings against three sets of respondents:

- Some Twitter users who retweeted the original message;
- Some Twitter users who replied to the original message; and
- Twitter Inc, for publishing the defamatory messages.

How much success would the public figure have with his suits in your own jurisdiction? Or elsewhere?

## V. PROTECTION OF POLITICAL SPEECH AND CRITICISM OF PUBLIC OFFICIALS

Historically, the law has offered great protection to public officials from criticism, whether in the form of “insult” laws, defamation, sedition laws or other means of preventing unruly subjects from criticising their superiors. In a modern age of democracy and human rights, the principle has been reversed, with special emphasis on the importance of protecting the right of political criticism. In the words of the Ugandan Constitutional Court, public figures need “harder skins”.<sup>111</sup>

We saw how the arguments in favour of freedom of expression are not only about the individual right, but also the social and political benefit of openness, free debate and accountability.

The European Court of Human Rights concluded in one of its landmark Article 10 judgments, that “[F]reedom of political debate is at the very core of the concept of a democratic society.”<sup>112</sup> As it elaborated in a more recent judgment:

“The Court emphasises that the promotion of free political debate is a very important feature of a democratic society. It attaches the highest importance to the freedom of expression in the context of political debate and considers that very strong reasons are required to justify restrictions on political speech. Allowing broad restrictions on political speech in individual cases would undoubtedly affect respect for the freedom of expression in general in the State concerned...”<sup>113</sup>

This principle is considered so fundamental that it can be found in the judgments of superior courts at the national level. Spain’s Constitutional Court, for example, underlined the importance of freedom of political expression:

“Article 20 of the Constitution [on freedom of expression] ... guarantees the maintenance of free political communication, without which other rights guaranteed by the Constitution would have no content, the representative institutions would be reduced to empty shells, and the principle of democratic legitimacy ... which is the basis for all our juridical and political order would be completely false.”<sup>114</sup>

“True democracy can only thrive in a free clearing-house of competing ideologies and philosophies - political, economic and social - and in this the press has an important role to play. The day this clearing-house closes down would toll the death knell of democracy.”<sup>115</sup>

<sup>111</sup> Ugandan Constitutional Court, *Andrew Mujuni Mwenda & Anor v. Attorney General*, Consolidated Constitutional Petitions, No. 12 of 2005 and No. 3 of 2006 (2006).

<sup>112</sup> ECtHR, *Lingens v. Austria*, Application No. 9815/82 (1986), par. 42.

<sup>113</sup> ECtHR, *Feldek v. Slovakia*, Application No. 29032/95 (2001), par. 83.

<sup>114</sup> Tribunal Constitucional, Sala Segunda. *Recurso de amparo nº. 211/80. Sentencia* (1981).

<sup>115</sup> Bombay High Court, *Binod Rao v. M R Masani*, 78 Bom. LR 125 (1976).

“Freedom of speech and expression consists primarily not only in the liberty of the citizen to speak and write what he chooses, but in the liberty of the public to hear and read what it needs .... The basic assumption in a democratic polity is that government shall be based on the consent of the governed. The consent of the governed implies not only that consent shall be free but also that it shall be grounded on adequate information and discussion aided by the widest possible dissemination of information from diverse and antagonistic sources [...]. There must be untrammelled publication of news and views and of the opinions of political parties which are critical of the actions of government and expose its weakness. Government must be prevented from assuming the guardianship of the public mind.”<sup>116</sup>

The High Court of Australia has ruled that the Australian Constitution guarantees freedom of political communication, even though it does not include an explicit bill of rights protecting freedom of expression. The guarantee of representative government implicitly protects political speech because of the concept of the accountability of elected representatives:

“Indispensable to that accountability and that responsibility is freedom of communication, at least in relation to public affairs and political discussion [...] Freedom of communication in relation to public affairs and political discussion cannot be confined to communications between elected representatives and candidates for election on the one hand and the electorate on the other. The efficacy of representative government depends also upon free communication on such matters between all persons, groups and other bodies in the community.”<sup>117</sup>

The Nigerian High Court reached a similar conclusion:

“Freedom of speech is, no doubt, the very foundation of every democratic society, for without free discussion, particularly on political issues, no public education or enlightenment, so essential for the proper functioning and execution of the processes of responsible government, is possible.”<sup>118</sup>

There are several implications of the particular protection attached to political speech:

- Political figures must be especially ready to tolerate criticism – rather than the historic situation of having greater protection;

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<sup>116</sup> Supreme Court of Sri Lanka, *M Joseph Perera & Ors v. Attorney-General*, App. Nos. 107-109/86, Judgment of 25 May 1987 (1987).

<sup>117</sup> The High Court of Australia, *Australian Capital Television Pty Ltd v. The Commonwealth; New South Wales v. The Commonwealth (No. 2)* 66 ALJR 695 (1992), p. 703 (per Mason CJ).

<sup>118</sup> High Court of Nigeria, *The State v. The Ivory Trumpet Publishing Co.*, [1984] 5 NCLR 736.

- There needs to be protection of the free speech of politicians when they are conducting their business (as well as protection of those who report what they say); and
- Special rules may be necessary to ensure a fair platform in elections.

#### A. *Criticism of public officials*

Regional human rights courts have increasingly argued that public officials should enjoy *less* protection from criticism than others. As the African Court on Human and Peoples' Rights (the "ACtHPR") observed:

"[F]reedom of expression in a democratic society must be the subject of a lesser degree of interference when it occurs in the context of public debate relating to public figures. Consequently, as stated by the [African] Commission [on Human and Peoples' Rights], 'people who assume highly visible public roles must necessarily face a higher degree of criticism than private citizens; otherwise public debate may be stifled altogether'."<sup>119</sup>

According to the ECHR:

"Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. More generally, freedom of political debate is at the very core of the concept of a democratic society ... . The limits of acceptable criticism are, accordingly, wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed ...[...] and he must consequently display a greater degree of tolerance."<sup>120</sup>

Public officials can often rely on their status to try to curtail freedom of expression. They have almost automatic access to the media to put their point of view. They may use their office to prosecute critics under national security laws. There may be harsher penalties for those who are found to "insult" public officials.

The ECtHR's reasoning from the *Lingens* case in 1986 has been echoed in a number of judgments since:

- Freedom of political debate is a core and indispensable democratic value;
- The limits of criticism of a politician must hence be wider than for a private individual; and
- The politician deliberately puts himself in this position and must hence be more tolerant of criticism.

<sup>119</sup> ACtHPR, *Konaté v. Burkina Faso*, Application No. 004/2013 (2014), par. 155.

<sup>120</sup> ECtHR, *Lingens v. Austria*, Application No. 9815/82 (1986), par. 42.

The Nigerian Federal Court of Appeal has distinguished between an outmoded notion of the “sovereign,” who is protected by sedition laws, and the contemporary politician who is regularly subjected to a process of democratic accountability:

“The whole idea of sedition is the protection of the person of the sovereign [...] The present President is a politician and was elected after canvassing for universal votes of the electorate; so is the present State Governor. They are not wearing constitutional protective cloaks of their predecessors in 1963 Constitution ... There is no ban in the Constitution 1979 against publication of truth except for the provisos and security necessities embodied in those sections.”<sup>121</sup>

“The [politician] inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must display a greater degree of tolerance, especially when he himself makes public statements that are susceptible of criticism.”<sup>122</sup>

The principle that public officials should face a higher threshold in mounting a claim of defamation originates from the United States Supreme Court. In the famous case of *New York Times v. Sullivan*, it concluded:

“The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with “actual malice” -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”<sup>123</sup>

The judgment criticized the notion that defendants in defamation cases should be required to prove the truth of their statements about public officials:

“Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which steer far wider of the unlawful zone. The rule thus dampens the vigour and limits the variety of public debate.”<sup>124</sup>

In a later case, the Supreme Court extended the *Sullivan* rule to apply to all “public figures,” on the basis that public figures have access to the media to counteract false statements.<sup>125</sup>

<sup>121</sup> Federal Court of Appeal of Nigeria, *Chief Arthur Nwankwo v. The State*, 6 NCLR 228 (1983), par. 237.

<sup>122</sup> ECtHR, *Oberschlick v. Austria*, Application No. 11662/85 (1991), par. 59.

<sup>123</sup> United States Supreme Court, *New York Times v. Sullivan*, 376 US 254 (1964), par. 279-80.

<sup>124</sup> *Id.*, par 279.

<sup>125</sup> United States Supreme Court, *Gertz v. Robert Welch Inc*, 418 US 323 (1974).

### Point for discussion

Is it really true that all public figures have “voluntarily exposed themselves” to defamatory falsehoods? If your chosen profession is to be an actor – or even a prominent lawyer – does that mean you are fair game? What are the arguments for and against?

The *Sullivan* reasoning about greater latitude in criticizing public figures has been influential in later judgments in defamation cases, not only in common law jurisdictions such as England, India and South Africa, but also in the Philippines and in Europe. However, the argument in the United States courts about the burden of proof lying with the plaintiff has *not* generally been accepted.

The ECtHR has been influenced by United States free speech jurisprudence, although seldom follows its reasoning fully. Where there is clearly common ground, however, is in the additional latitude given to criticism not only of public officials or politicians, but of the government specifically:

“The limits of permissible criticism are wider with regard to the Government than in relation to a private citizen, or even a politician. In a democratic system the actions or omissions of the Government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion. Furthermore, the dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media.”<sup>126</sup>

Although the ECtHR has not taken this step, the reasonable position is that “the Government” as an entity should have no standing to bring a case for defamation. In *Romanenko v. Russia* the Court said that there might be good reasons for this as a matter of policy, although it did not rule on the point.<sup>127</sup>

In a landmark British case, the House of Lords found that public bodies cannot sue for defamation:

“It is of the highest public importance that a democratically elected governmental body, or indeed any governmental body, should be open to uninhibited public criticism. The threat of a civil action for defamation must inevitably have an inhibiting effect on freedom of speech.... What has been described as “the chilling effect” induced by the threat of civil actions for libel is

<sup>126</sup> ECtHR, *Castells v. Spain*, Application No. 11798/85 (1992), par. 46.

<sup>127</sup> ECtHR, *Romanenko v. Russia*, Application No. 11751/03, (2009), par. 39.

very important. Quite often the facts which would justify a defamatory publication are known to be true, but admissible evidence capable of proving those facts is not available. This may prevent the publication of matters which it is very desirable to make public.”<sup>128</sup>

In this, it followed the reasoning of an earlier South African case:

“The normal means by which the Crown protects itself against attacks upon its management of the country's affairs is political action, not litigation, and it would, I think, be unfortunate if that practice were altered. [...] I have no doubt that it would involve a serious interference with the free expression of opinion hitherto enjoyed in this country if the wealth of the State, derived from the State's subjects, could be used to launch against those subjects actions for defamation because they have, falsely and unfairly it may be, criticised or condemned the management of the country.”<sup>129</sup>

The ECtHR has admitted the possibility of corporate bodies suing for defamation. In *Jerusalem v. Austria*, two associations sued a local government councillor for defamation for describing them as “sects.” However, the Court found that there had been a violation of the councillor's rights under Article 10:

“In the present case the Court observes that the IPM and the VPM were associations active in a field of public concern, namely drug policy. They participated in public discussions on this matter and, as the Government conceded, cooperated with a political party. Since the associations were active in this manner in the public domain, they ought to have shown a higher degree of tolerance to criticism when opponents considered their aims as well as to the means employed in that debate.”<sup>130</sup>

The UNHRC has, for example, called for the abolition of the offence of “defamation of the State”.<sup>131</sup> While the ECtHR entirely ruled out defamation suits by governments, it appears to have limited such suits to situations which threaten public order, implying that governments cannot sue in defamation simply to protect their honour. A number of national courts (e.g. in India, South Africa, the United Kingdom, the United States, and Zimbabwe) have also refused to allow elected and other public authorities to sue for defamation.<sup>132</sup>

In many jurisdictions, by contrast, private corporations are able to sue for defamation. However, there is a trend away from this. Under Australia's Uniform Defamation Laws of 2006 – which consolidated the pre-existing variety of laws across the different federal States – no corporations with 10 or more employees may sue (although their

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<sup>128</sup> United Kingdom House of Lords, *Derbyshire County Council v. Times Newspapers Ltd* [1992] 3 All ER 65 (CA), affirmed [1993] 2 WLR 449.

<sup>129</sup> South African Supreme Court of Appeal, *Die Spoorbond v. South African Railways* [1946] SA 999 (AD).

<sup>130</sup> ECtHR, *Jerusalem v. Austria*, Application No. 26958/95 (2001), par. 39.

<sup>131</sup> UN Commission on Human Rights, *Concluding Observations of the Human Rights Committee : Serbia and Montenegro*, CCPR/CO/81/SEMO (12/08/2004), par. 22.

<sup>132</sup> UN Commission on Human Rights, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, Mr. Abid Hussain, E/CN.4/2000/63 (18 January 2000).

individual officers may do so). In the United Kingdom Defamation Act of 2013, it is now necessary that a corporation demonstrate actual harm caused by a defamatory statement.

**Point for discussion:**

In the famous “McLibel” case, the fast food company McDonald’s sued two British environmental activists for libel, for circulating a pamphlet criticizing the company’s practices in sourcing their meat. The two activists had no legal representation for most of the time – since free legal aid is not available for libel cases – in a case that became the longest such case in British legal history.

McDonalds won, and the activists took their case to the ECtHR. The Court found a violation of Article 10 because of a lack of procedural fairness and an excessive award of damages. There was no “equality of arms” between the parties.<sup>133</sup>

Should corporations be required to develop the same thick skin as politicians and tolerate vigorous criticism in the public interest?

*B. Insult to institutions*

The principle that political speech should be protected is well-established, both at the European level and in many national jurisdictions. It is curious, then, that in many countries, the law offers protection against insult for State offices, institutions or even symbols.

Is the President of France to be understood as a politician (and hence required to be tolerant of greater criticism than an ordinary person)? Or is he national symbol or office (hence meriting greater protection)? The French press law of 1881 provided protection of the presidency as a symbol.

In 2008, French farmer and political activist Hervé Eon waved a small placard as a group including the President, Nicolas Sarkozy, approached. The placard read, “Casse-toi pauv’ con” (“Get lost you sad prick.”) The words had been previously spoken by Sarkozy to a farmer at an agricultural show who had refused to shake his hand.

Eon was charged and convicted under the 1881 law and a suspended fine was imposed. After appealing unsuccessfully through the national courts, the case went to the ECtHR, which found in Eon’s favour:

“The Court considers that criminal penalties for conduct such as that of the applicant in the present case are likely to have a chilling effect on satirical forms

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<sup>133</sup> ECtHR, *Steel and Morris v. United Kingdom*, Application No. 68416/01 (2005).

of expression relating to topical issues. Such forms of expression can themselves play a very important role in open discussion of matters of public concern, an indispensable feature of a democratic society....”<sup>134</sup>

The ECtHR in the *Eon* case did not go quite as far as it had in the earlier French case of *Colombani*. In the latter, the issue was the section of the Press Law criminalizing the insult of a foreign head of State. A journalist on *Le Monde* newspaper had been convicted of insulting the King of Morocco in an article about the drugs trade in that country, which relied upon an official report. The Court stated the following on the offence of insult to foreign leaders:

“[The offence] confer[s] a special legal status on heads of State, shielding them from criticism solely on account of their function or status, irrespective of whether the criticism is warranted. That, in its view, amounts to conferring on foreign heads of State a special privilege that cannot be reconciled with modern practice and political conceptions. Whatever the obvious interest which every State has in maintaining friendly relations based on trust with the leaders of other States, such a privilege exceeds what is necessary for that objective to be attained.”<sup>135</sup>

In a partially dissenting judgment in the *Eon* case, Judge Power-Forde from Ireland argued that a similar reasoning should have been applied. The Court did not draw upon the reasoning in *Colombani* because that case involved press freedom, whereas *Eon* did not. But Judge Power-Forde argued that identical principles applied in relation to the outdated and unwarranted shielding of heads of State from vigorous criticism.<sup>136</sup>

In another case involving the insult of a head of State, the ECtHR was very firm in ruling that a State had violated Article 10. The case of *Otegi Mondragon* was from Spain, where the head of State, the monarch, is not a politician but plays a constitutionally neutral role.<sup>137</sup> In this case, Mondragon, a Basque nationalist politician, had been charged with insulting King Juan Carlos, when he identified him as the head of a State that tortured Basque nationalists and gave immunity to torturers. Although he was acquitted by a Basque court, a higher court convicted him and sentenced him to a year’s imprisonment, also removing his right to stand for election.

The ECtHR, in a strongly worded judgment, echoed its reasoning in an earlier Turkish case (*Pakdemirli*)<sup>138</sup> and found in favour of Otegi Mondragon:

“[T]he fact that the King occupies a neutral position in political debate and acts as an arbitrator and a symbol of State unity should not shield him from all criticism in the exercise of his official duties or – as in the instant case – in his capacity as representative of the State which he symbolises, in particular from

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<sup>134</sup> ECtHR, *Eon v. France*, Application No. 26118/10 (2013), par. 60-61.

<sup>135</sup> ECtHR, *Colombani v. France*, Application No. 51279/99 (2002), par. 66-68.

<sup>136</sup> ECtHR, *Eon v. France*, Application No. 26118/10 (2013), (Judge Power-Forde, partially dissenting opinion).

<sup>137</sup> ECtHR, *Otegi Mondragon v. Spain*, Application No. 2034/07 (2011).

<sup>138</sup> ECtHR, *Pakdemirli v. Turkey*, Application No. 35839/97 (2005).

persons who challenge in a legitimate manner the constitutional structures of the State, including the monarchy [...] the fact that the King is “not liable” under the Spanish Constitution, particularly with regard to criminal law, should not in itself act as a bar to free debate concerning possible institutional or even symbolic responsibility on his part in his position at the helm of the State, subject to respect for his personal reputation.”<sup>139</sup>

### **An hypothetical case for discussion**

A newspaper publishes an article about the record of a senior judge. It is based upon documents from the past, when the country was under dictatorial rule. The documents appeared to show that the judge had prosecuted opposition political prisoners, securing the death penalty in a number of cases.

The judge successfully sues for defamation. He is able to demonstrate that the prosecutor in the newspaper article was not himself, but another lawyer of the same name. He has documentary proof that he was living outside the country at the time.

Is there a violation of the right to freedom of expression?

### *C. The press as public watchdog*

In a judgment more than 20 years ago, the ECtHR took the notion of protection of political speech a step further.

The case concerned an Icelandic writer named Thorgeir Thorgeirson, who had written press articles about the issue of police brutality towards suspects. He was convicted in the national courts on charges of defaming members of the Reykjavik police force. When the case came to the ECtHR, the Icelandic government’s lawyers argued, among other things, that this case was distinct from earlier ECtHR cases (such as *Lingens v. Austria*), because it did not entail *political* speech, which the Court had found to be specially protected.

The Court was not persuaded by this argument and used its judgment to develop a new doctrine, which has been referred to in a number of subsequent cases. It talked of the importance of the role of the media as a “public watchdog” on matters of importance – not only politics, but also other matters of public concern, such as those in Thorgeirson’s articles:

“Whilst the press must not overstep the bounds set, *inter alia*, for “the protection of the reputation of [...] others”, it is nevertheless incumbent on it to impart

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<sup>139</sup> ECtHR, *Otegi Mondragon v. Spain*, Application No. 2034/07 (2011), par. 56.

information and ideas on matters of public interest. Not only does it have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of “public watchdog” [...]”<sup>140</sup>

In another case, almost contemporary with *Thorgeirson*, the Court was required to pronounce on a case involving a press exposé of alleged cruelty in Norwegian seal hunting. The report, in the newspaper *Bladet Tromsø*, relied heavily on a leaked and unpublished official report, written by journalist Odd Lindberg. The paper and its editor were sued for defamation by members of the crew of a sealing vessel whose practices were described in the Lindberg report. The Court concluded in a very similar tone to its *Thorgeirson* judgment:

“Having regard to the various factors limiting the likely harm to the individual seal hunter’s reputation and to the situation as it presented itself to *Bladet Tromsø* at the relevant time, the Court considers that the paper could reasonably rely on the official Lindberg report, without being required to carry out its own research into the accuracy of the facts reported. It sees no reason to doubt that the newspaper acted in good faith in this respect.”<sup>141</sup>

On the publication of allegations regarded as damaging the reputation of some crew members, the Court’s reasoning hinged (as usual in these cases) on whether the limitations on freedom of expression resulting from the defamation cases were “necessary in a democratic society.” In doing so, it took into account the immense public interest involved in the case – albeit not necessarily sympathetic to the editorial line taken by the *Bladet Tromsø*:

“[T]he Court must take account of the overall background against which the statements in question were made. Thus, the contents of the impugned articles cannot be looked at in isolation of the controversy that seal hunting represented at the time in Norway and in Tromsø, the centre of the trade in Norway. It should further be recalled that Article 10 is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population[...].”<sup>142</sup>

[[I]t appears that the thrust of the impugned articles was not primarily to accuse certain individuals of committing offences against the seal hunting regulations or of cruelty to animals.... The impugned articles were part of an ongoing debate of evident concern to the local, national and international public, in which the views of a wide selection of interested actors were reported.<sup>143</sup>

[...]

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<sup>140</sup> ECtHR, *Thorgeir Thorgeirson v. Iceland*, Application No.13778/88 (1992), par. 63.

<sup>141</sup> ECtHR, *Bladet Tromsø and Stensaas v. Norway*, Application No. 21980/93 (1999), par. 72.

<sup>142</sup> *Id.*, par. 62.

<sup>143</sup> *Id.*, par. 63.

On the facts of the present case, the Court cannot find that the crew members' undoubted interest in protecting their reputation was sufficient to outweigh the vital public interest in ensuring an informed public debate over a matter of local and national as well as international interest."<sup>144</sup>

One of the particular points of interest of this case, however, is that a minority of the Court's bench strongly disagreed with the decision. The dissenting judgment concluded that the judgment sent a bad message to the European media, encouraging them to disregard basic ethical principles of the profession.<sup>145</sup>

This notion of "public interest" in *Bladet Tramso* has now become widely used in case law on freedom of expression. The following judgment of the South African Supreme Court of Appeal articulates the concept particularly well:

"[W]e must not forget that it is the right, and indeed a vital function, of the press to make available to the community information and criticism about every aspect of public, political, social and economic activity and thus to contribute to the formation of public opinion. The press and the rest of the media provide the means by which useful, and sometimes vital information about the daily affairs of the nation is conveyed to its citizens—from the highest to the lowest ranks. Conversely, the press often becomes the voice of the people—their means to convey their concerns to their fellow citizens, to officialdom and to government."<sup>146</sup>

The South African Constitutional Court put it thus:

"In a democratic society, then, the mass media play a role of undeniable importance. They bear an obligation to provide citizens both with information and with a platform for the exchange of ideas which is crucial to the development of a democratic culture. As primary agents of the dissemination of information and ideas, they are, inevitably, extremely powerful institutions in a democracy and they have a constitutional duty to act with vigour, courage, integrity and responsibility. The manner in which the media carry out their constitutional mandate will have a significant impact on the development of our democratic society. If the media are scrupulous and reliable in the performance of their constitutional obligations, they will invigorate and strengthen our fledgling democracy. If they vacillate in the performance of their duties, the constitutional goals will be imperiled. The Constitution thus asserts and protects the media in the performance of their obligations to the broader society."<sup>147</sup>

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<sup>144</sup> *Id.*, par. 73.

<sup>145</sup> *Id.* (Judges Palm, Fuhrmann, Baka, joint dissenting opinion).

<sup>146</sup> South African Supreme Court of Appeal, *National Media Ltd and Others v. Bogoshi* [1999] LRC 616.

<sup>147</sup> Constitutional Court of South Africa, *Khumalo and Others v. Holomisa*, (CCT53/01) [2002] ZACC 12; 2002 (5) SA 401; 2002 (8) BCLR 771.

**Point for discussion:**

What is the “public interest”? How does it differ from what interests the public? How would you construct a “public interest” argument in defence of a story on, for example, scandals in the private life of a politician?

*D. Privilege for members of parliament and reporting statements made in parliament*

Almost all legal systems encompass the concept of privilege for statements made in the legislature, and usually in other similar bodies (such as regional parliaments or local government councils). The purpose, clearly, is to protect freedom of political debate.

This privilege extends to reporting of what is said in parliament (or other bodies covered by the same privilege). Hence, as a general principle, not only would a member of parliament not be liable for a defamatory statement made in parliament, but neither would a journalist who reported that statement.

The ECtHR has generally been very firm in upholding the principle of privilege in defamation cases. In one case from the United Kingdom, a member of parliament had made a series of repeated statements that were highly critical of one of his own constituents. The member of parliament gave both the name and address of the constituent, following which she was subject to hate mail, as well as extremely critical media coverage. The Court refused to find that her rights under Article 6(1) – the right to have a civil claim adjudicated by a judge - had been violated, since the protection of parliamentary privilege was “necessary in a democratic society.”<sup>148</sup> The Court also stated the following:

“In light of the above, the Court believes that a rule of parliamentary immunity, which is consistent with and reflects generally recognised rules within signatory States, the Council of Europe and the European Union, cannot in principle be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in Article 6(1)[...].”<sup>149</sup>

In the *Jerusalem* case from Austria, the Court deemed the applicant to have privilege, even though the alleged defamatory statements were made at a meeting of the Vienna Municipal Council and not parliament. This was justified in the following terms:

“In this respect the Court recalls that while freedom of expression is important for everybody, it is especially so for an elected representative of the people. He or she represents the electorate, draws attention to their preoccupations and

<sup>148</sup> ECtHR, *A v. United Kingdom*, Application No. 35373/97 (2002).

<sup>149</sup> *Id.*, par. 83.

defends their interests. Accordingly, interferences with the freedom of expression of an opposition member of parliament, like the applicant, call for the closest scrutiny on the part of the Court [...]"<sup>150</sup>

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<sup>150</sup> ECtHR, *Jerusalem v. Austria*, Application No. 26958/95 (2001), par.36.

## VI. DEFAMATION

### A. *What is defamation?*

The law of defamation dates back to the Roman Empire. The offence of *libellis famosus* was sometimes punishable by death. While the penalties and costs attached to defamation today are not as serious, they can still have a notorious “chilling effect,” with prison sentences or massive compensation awards still an occupational hazard for journalists in many countries.

Defamation continues to fall within the criminal law in a majority of States, although in many instances criminal defamation has fallen into disuse. Defamation as a tort, or civil wrong, continues to be very widespread.

Of course, dealing with defamation or insult through legal process was progress of a sort, in an age when the more usual remedy might have been pistols, swords or fists. In the modern world, however, a further decisive step forward is required: to remove the threat of imprisonment or other debilitating penalties as a punishment for words.

In terms of modern human rights law, defamation can be understood in terms of Article 17 of the ICCPR as the protection against “unlawful attacks” on a person’s “honour and reputation”. Article 11 of the ACHR also protects against “unlawful attacks on his honor or reputation”, although neither the European nor African regional instruments mentions this.

In recent years, the ECtHR has understood the right to a reputation to be encompassed within Article 8 of the ECHR (right to private and family life), although only if the attack on reputation is deemed to be of sufficient gravity.<sup>151</sup> Article 19 of the ICCPR, Article 13 of the ACHR and Article 10 of the ECHR use the identical words “rights and reputations of others” (although not in the same order), as legitimate grounds for limiting the right to freedom of expression.

### B. *Criminal defamation*

Many defamation laws originated as part of the criminal law of the State. This suggests that there is perceived to be a public interest in the State initiating criminal prosecutions against journalists or others – something that goes beyond the right of the individual to protect his or her reputation. It is closely related to the concept of sedition (“seditious libel” in the common law), which penalizes speech and other expression that is critical of government or the State. Yet increasingly, the whole notion of criminal defamation is seen as antiquated and anachronistic.

The UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression is among a number of international and regional bodies that have been arguing that “criminal defamation laws should be repealed in favour of civil

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<sup>151</sup> ECtHR, *Sipos v. Romania*, Application No. 26125/04 (2011).

laws as the latter are able to provide sufficient protection for reputations...”.<sup>152</sup> Further, “[c]riminal defamation laws represent a potentially serious threat to freedom of expression because of the very sanctions that often accompany conviction. It will be recalled that a number of international bodies have condemned the threat of custodial sanctions, both specifically for defamatory statements and more generally for the peaceful expression of views [...]”.<sup>153</sup>

The UNHRC has recommended that:

“States parties should consider the decriminalization of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty. It is impermissible for a State party to indict a person for criminal defamation but then not to proceed to trial expeditiously – such a practice has a chilling effect that may unduly restrict the exercise of freedom of expression of the person concerned and others.”<sup>154</sup>

There are a number of very strict protections that should apply when a criminal defamation law remains on the statute book:

- If defamation is part of the criminal law, the criminal standard of proof – beyond a reasonable doubt – should be fully satisfied.<sup>155</sup>
- Convictions for criminal defamation should only be secured when the allegedly defamatory statements are false, and when the mental element of the crime is satisfied, i.e. when they are made with the knowledge that the statements were false or with reckless disregard as to whether they were true or false.
- Penalties should not include imprisonment, nor should they entail other suspensions of the right to freedom of expression or the right to practice journalism.<sup>156</sup>
- States should not resort to criminal law when a civil law alternative is readily available.<sup>157</sup>

In the case of *Castells v. Spain*, the ECtHR had to consider the issue of the privilege to be accorded to political speech as the applicant was a member of parliament. But it also addressed the matter of criminal defamation, since the Spanish criminal law did not allow Castells to prove the accuracy of his allegedly defamatory statements.<sup>158</sup>

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<sup>152</sup> UN Commission on Human Rights, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, Mr. Abid Hussain, E/CN.4/2000/63 (18 January 2000) par 52.

<sup>153</sup> *Id.*, par. 48.

<sup>154</sup> UHRC, *General Comment No. 34: ICCPR, Article 19: Freedoms of opinion and expression*, UN Doc. No. CCPR/C/GC/34 (12 September 2011), par. 47.

<sup>155</sup> IACtHR, *Kimel v. Argentina*, Merits, Reparations and Costs, Series C No. 177 (2008).

<sup>156</sup> ACtHPR, *Konaté v. Burkina Faso*, Application No. 004/2013 (2014).

<sup>157</sup> See e.g.: ECtHR *Amorim Giestas and Jesus Costa Bordalo v. Portugal*, Application No. 37840/10 (2014), par. 36.

<sup>158</sup> ECtHR, *Castells v. Spain*, Application No. 11798/85 (1992).

The ACtHPR, in *Konaté v. Burkina Faso*, found the State to be in violation of both the African Charter and the ECOWAS Treaty because of the existence of custodial sentences for defamation in its laws in addition to the fact that it was imposed on Konaté. The Court made the same finding in relation to excessive fines and costs imposed upon him.<sup>159</sup>

“Every case of imprisonment of a media professional is an unacceptable hindrance to freedom of expression and entails that, despite the fact that their work is in the public interest, journalists have a sword of Damocles hanging over them. The whole of society suffers the consequences when journalists are gagged by pressure of this kind[...].

The [Parliamentary] Assembly [of the Council of Europe] consequently takes the view that prison sentences for defamation should be abolished without further delay. In particular it exhorts States whose laws still provide for prison sentences – although prison sentences are not actually imposed – to abolish them without delay so as not to give any excuse, however unjustified, to those countries which continue to impose them, thus provoking a corrosion of fundamental freedoms.”<sup>160</sup>

More recently, in *FAJ and others v. The Gambia*, the Court of the Economic Community of West African States (“ECOWAS Court”) considered the detention of a number of journalists, inter alia on charges of criminal defamation. The ECOWAS Court held the criminal laws of the Gambia and the sanctions imposed on the journalists were “disproportionate” and “not necessary in a democratic society”. Further the ECOWAS Court, by reference to the African Charter on Human and People’s Rights, directed that the Gambia’s laws on sedition, criminal libel, defamation and false news publication be “reviewed and decriminalised to be in conformity with the international provisions on freedom of expression in consonance with the Defendants obligation under Article 1 of the Charter”.<sup>161</sup>

The danger with criminal defamation – and one of the many reasons why defamation should be a purely civil matter – is that the involvement of the State in prosecuting alleged defamers shifts the matter very quickly into the punishment of dissent. At the least it gives additional and excessive protection to officials and government.

The United States Supreme Court grappled with this issue in *Garrison v. Louisiana*.<sup>162</sup> Garrison had been convicted of criminal libel after criticizing judges for a backlog in

<sup>159</sup> ACtHPR, *Konaté v. Burkina Faso*, Application No. 004/2013 (2014).

<sup>160</sup> Parliamentary Assembly of the Council of Europe, *Resolution 1577 (2007): Towards decriminalization of defamation*, Institute for Criminal Justice Reform (20 July 2012).

<sup>161</sup> ECOWAS, *Federation of African Journalists and Others v. the Gambia* Application No. ECW/CCJ/APP/36/15 (2018) (accessible at:

<https://www.mediadefence.org/sites/default/files/blog/files/FAJ%20and%20Others%20v%20The%20Gambia%20Judgment.pdf>)

<sup>162</sup> United States Supreme Court, *Garrison v. Louisiana* 379 US 64 (1964).

cases (caused he said by inefficiency, laziness and too many vacations). The Court rejected the idea that a true statement could ever be libellous, whether made with malice or not, and that even a false criticism of a public official could only attract sanction if it was made with “actual malice” – in other words with the knowledge that it was false or with reckless disregard as to its truth.

In concurring opinions, two of the Justices rejected the idea of criminal defamation altogether:

“[U]nder our Constitution, there is absolutely no place in this country for the old, discredited English Star Chamber law of seditious criminal libel.”<sup>163</sup>

The IACtHR has argued that the use of criminal law to protect fundamental rights must be a last resort:

“The broad definition of the crime of defamation might be contrary to the principle of minimum, necessary, appropriate, and last resort or *ultima ratio* intervention of criminal law. In a democratic society punitive power is exercised only to the extent that is strictly necessary in order to protect fundamental legal rights from serious attacks which may impair or endanger them. The opposite would result in the abusive exercise of the punitive power of the State.”

Although it did not rule out criminal defamation, the Court observed that the burden of proof rested with the party that brought the criminal action.<sup>164</sup>

### *C. Civil defamation*

There is broad agreement that some sort of remedy should be available for those who believe that their reputation has been unfairly undermined. This should take the form of a civil suit by the person who claims that their reputation has been damaged.

But even given this consensus, the actual practice of defamation law throws up a number of potential issues.

### *D. Can a true statement be defamatory?*

Put that way, the answer is clear. Of course, when we talk about protecting reputations, we only mean reputations that are deserved. It follows, therefore, that if a statement is actually true, then it cannot be defamatory. (Although, in the common law of criminal seditious libel, truth is not a defence – which so appalled the United States Supreme Court in the *Garrison* case.) This is the position taken by the African Commission on Human and Peoples’ Rights in the Declaration of Principles on Freedom of Expression in Africa:

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<sup>163</sup> *Id.*, p.81 (Mr. Justice Black and Mr. Justice Douglas, concurring opinion).

<sup>164</sup> IACtHR, *Kimel v. Argentina*, Merits, Reparations and Costs, Series C No. 177 (2008).

“No one shall be found liable for true statements, opinions or statements regarding public figures which it was reasonable to make in the circumstances.”<sup>165</sup>

A pro-family, religious politician is engaged in an extra-marital affair. The politician should be unable to sue successfully for defamation. It is true that exposure of the affair would damage his reputation – but the reputation was undeserved.

Hence proving the truth of an allegation should always be an absolute defence to a defamation suit.

The ECtHR, for example, has invariably found that a true statement cannot be legitimately restricted to protect a person’s reputation.<sup>166</sup>

What is reputation?

The concept of “reputation” is unclear, perhaps dangerously so, given that it can be used as the basis for limiting human rights. For example, what does it have to do with public profile or celebrity? Does a public figure have a greater reputation than an ordinary member of the public? Is reputation connected with how many people have heard of you? If the answer is yes, then presumably the damage to reputation will be much greater for such people. This opens up the possibility of abuse of defamation law by public figures.

Perhaps a better approach is to tie the concept of “reputation” to human dignity. Human rights law has as its purpose the protection of dignity – equally for all people, whether they are celebrities or not. This would mean that the ordinary person, whose first appearance in the media occurred when their reputation was attacked, would be as worthy of protection as the public figure whose activities are reported every day.

And is reputation an objective phenomenon?

<sup>165</sup> African Commission on Human and Peoples' Rights, *Declaration of Principles on Freedom of Expression in Africa*, 32nd Session, 17 - 23 October, 2002: Banjul, The Gambia.

<sup>166</sup> ECtHR, *Castells v. Spain*, application 11798/85 (1992), par. 49.

What if a statement is untrue? If it is damaging to a person's reputation, does this automatically mean that it is defamatory?

The past half century has seen a developing trend in which *reasonable publication* is not penalized, even if it is not completely accurate. The term "reasonable publication" encompasses the idea that the author took reasonable steps to ensure the accuracy of the content of the publication, and also that the publication was on a matter of public interest.

The South African Supreme Court of Appeal ruled on the question of whether strict liability in defamation was compatible with the constitutional protection of the right to freedom of expression, and concluded that it was not. In its place, the Court considered an alternative approach of allowing a defence in defamation cases of "reasonable publication:"

"[W]e must adopt this approach by stating that the publication in the press of false defamatory allegations of fact will not be regarded as unlawful if, upon a consideration of all the circumstances of the case, it is found to have been reasonable to publish the particular facts in the particular way and at the particular time."<sup>167</sup>

Various factors should be considered to determine whether any given publication is reasonable:

"In considering the reasonableness of the publication account must obviously be taken of the nature, extent and tone of the allegations. We know, for instance, that greater latitude is usually allowed in respect of political discussion, and that the tone in which a newspaper article is written, or the way in which it is presented, sometimes provides additional, and perhaps unnecessary, sting. What will also figure prominently, is the nature of the information on which the allegations were based and the reliability of their source, as well as the steps taken to verify the information. Ultimately there can be no justification for the publication of untruths, and members of the press should not be left with the impression that they have a licence to lower the standards of care which must be observed before defamatory matter is published in a newspaper ... I have mentioned some of the relevant matters; others, such as the opportunity given to the person concerned to respond, and the need to publish before establishing the truth in a positive manner, also come to mind. The list is not intended to be exhaustive or definitive."<sup>168</sup>

The ECtHR often refers to public interest as a factor to be weighed against restrictions on freedom of expression, when it considers whether a restriction is "necessary in a

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<sup>167</sup> South African Supreme Court of Appeal, *National Media Ltd and Others v. Bogoshi* [1999] LRC 616.

<sup>168</sup> *Id.*, p. 631-632.

democratic society.” It often stresses the importance of the role of the media as a “public watchdog.”<sup>169</sup>

The argument is that media freedom would be hampered – and the public watchdog role undermined – if journalists and editors were always required to verify every published statement to a high standard of legal proof. It is sufficient that good professional practice be exercised, meaning that reasonable efforts were made to verify published statements. Journalists’ honest mistakes should not be penalized in a way that limits media freedom.

*E. The right to protection against attacks on reputation?*

Article 12 of the Universal Declaration of Human Rights provides that:

“No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”<sup>170</sup>

This is echoed in identical words in Article 17 of the ICCPR (and hence is binding law upon States that are party to that treaty).

As we have already seen, there is also a separate reference in Article 19 of the ICCPR to protection of “the rights and reputation” of others as a legitimate grounds for restricting freedom of expression.

The ECHR, as we have seen, also contains a reference to “reputation and rights” as a legitimate grounds for restrictions.

In recent years the ECHR has begun to regard “honour and reputation” as a substantive right contained within Article 8 (as if the wording of that Article were the same as Article 17 of the ICCPR):

“The Court considers that a person’s reputation, even if that person is criticised in the context of a public debate, forms part of his or her personal identity and psychological integrity and therefore also falls within the scope of his or her “private life”. Article 8 therefore applies.”<sup>171</sup>

More recently, the Court has slightly modified this approach. In *A v. Norway*, it acknowledged that Article 8 did not “expressly” provide for a right to reputation. In this case it concluded that:

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<sup>169</sup> See e.g.: ECtHR, *The Sunday Times v. United Kingdom*, Application No. 6538/74 (1979); ECtHR, *Thorgeir Thorgeirson v. Iceland*, Application No.13778/88 (1992).

<sup>170</sup> UDHR, *supra* note 2, Art.12.

<sup>171</sup> ECtHR, *Pfeifer v. Austria*, Application No. 12556/03 (2007), par. 35.

“In order for Article 8 to come into play, the attack on personal honour and reputation must attain a certain level of gravity and in a manner causing prejudice to personal enjoyment of the right to respect for private life.”<sup>172</sup>

In *Karako v. Hungary* the Court underlined this by saying that the defamation must constitute “such a serious interference with his private life as to undermine his personal integrity.”<sup>173</sup>

#### *F. What is the right way to deal with defamation?*

When a person is found to have been defamed, they are entitled to a remedy. The problem – and the reason that defamation law has such notoriety among journalists – is that the remedies imposed are often punitive and disproportionate.

We have already seen that sentences of imprisonment for criminal defamation are regarded as disproportionate due to their impact on freedom of expression. Likewise, heavy fines, whether in criminal or civil cases, are aimed at punishing the defamer rather than redressing the wrong to the defamed.<sup>174</sup>

The ridiculous sums awarded in defamation damages in some jurisdictions have led to the phenomenon of “libel tourism,” whereby plaintiffs shop around to find the most lucrative jurisdiction in which to file their suit.

Whenever possible, redress in defamation cases should be non-pecuniary and aimed directly at remedying the wrong caused by the defamatory statement. Most obviously, this could be through publishing an apology or correction.

Applying a remedy can be considered as part of the “necessity” consideration in the three-part test for limiting freedom of expression. A proportional limitation – which can be justified when defamation has been proved – is one that is the least restrictive to achieve the aim of repairing a damaged reputation.

Monetary awards – the payment of damages – should only be considered, therefore, when other lesser means are insufficient to redress the harm caused. Compensation for harm caused (known as pecuniary damages) should be based on evidence quantifying the harm and demonstrating a causal relationship with the allegedly defamatory statement.

#### *G. Types of defamatory material*

##### *i. Opinions versus. facts*

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<sup>172</sup> ECtHR, *A v. Norway*, Application No. 28070/06 (2009), par. 64.

<sup>173</sup> ECtHR, *Karako v. Hungary*, Application No. 39311/05 (2009), par. 23.

<sup>174</sup> ACtHPR, *Konaté v. Burkina Faso*, Application No. 004/2013 (2014).

Discussion so far has focused on factual statements that may be defamatory. But what about expressions of opinion?

The ECtHR has taken a very robust view of this: no one can be restricted from expressing opinions. An opinion is exactly that; it is the journalist or writer's view, based upon their understanding of the facts. It is something different from the facts themselves.

However, countries with "insult" laws may penalize these expressions of opinion. When a political campaigner called the French President a "sad prick," he was found guilty of insult. The ECtHR found that this verdict had violated his right to freedom of expression.<sup>175</sup>

We discussed how a defence of truth should be absolute in defamation cases. That is to say that if you write that the Minister embezzled his expenses, then you cannot have defamed him if this can be shown to be true.

But what if your allegedly defamatory statement was not a fact that could be proved or disproved, but an opinion?

The ECtHR has a long established doctrine that distinguishes between facts and value judgments:

"[A] careful distinction needs to be made between facts and value-judgements. The existence of facts can be demonstrated, whereas the truth of value-judgements is not susceptible of proof. ... As regards value judgements this requirement [to prove their truth] is impossible of fulfilment and it infringes freedom of opinion itself [...]."<sup>176</sup>

This was elaborated further in the *Thorgeirson* case. Thorgeirson, the Icelandic journalist who wrote about police brutality, had not himself documented such instances, but commented on other accounts of police violence. Even though some of the evidence on which Thorgeirson had based his argument proved to be incorrect, some of it was true. The fact that this was also a matter of considerable public concern meant that the burden of establishing a connection between his value judgment and the underlying facts was light.<sup>177</sup>

So, if you called the Minister "corrupt," would that be defamatory? One avenue open to you is obviously to prove that this is factually true (he fiddled his expenses). But if there are other reports of his embezzlement, you could argue that your opinion that he is corrupt is a value judgment with a factual basis – without yourself having to prove its accuracy.

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<sup>175</sup> ECtHR, *Eon v. France*, Application No. 26118/10 (2013).

<sup>176</sup> ECtHR, *Lingens v. Austria*, Application No. 9815/82 (1986), par. 46.

<sup>177</sup> ECtHR, *Thorgeir Thorgeirson v. Iceland*, Application No. 13778/88 (1992).

The ECHR has spoken on the matter in the case *Cojocaru v. Romania*.<sup>178</sup> The case concerned the journalist Cojocaru who was convicted by the national courts for writing a critical article about the local mayor (R.N.) including statements such as “Twenty years of local dictatorship”, “[R.N.] at the peak of the pyramid of evil” and “in Paşcani, only those who subscribe to [R.N.]’s mafia-like system can still do business”.<sup>179</sup> The ECtHR found that:

“The degree of precision required for establishing the well-foundedness of a criminal charge by a competent court can hardly be compared to that which ought to be observed by a journalist when expressing his opinion on a matter of public concern ...”<sup>180</sup>

The Court was hence “satisfied that the applicant, as a journalist dealing with a matter of general interest, offered sufficient evidence in support of his statements criticising the mayor of Paşcani, whether they were deemed to be of a factual nature or judgment values.”<sup>181</sup>

## ii. Humour

When Hervé Eon designed his insulting placard, the point of its content was not a gratuitous insult to the French President. It was a repetition of the words that Sarkozy himself had used. Since the public generally recognized the words, their repetition was humorous. President Sarkozy clearly did not get the joke, and nor did the French courts. But the ECtHR, on this occasion, did.<sup>182</sup>

It is surprising how often public figures seem to lose their sense of humour. An article in an Austrian newspaper mused in satirical manner on the national angst surrounding their national ski champion, Hermann Maier, who had broken his leg in a traffic accident. The sole exception, according to this article, was his friend and rival Stefan Eberharter, whose reaction was, “[g]reat, now I’ll win something at last. Hopefully the rotten dog will slip over on his crutches and break his other leg too.”<sup>183</sup>

There followed a series of increasingly incredible developments:

- Alone in the whole of Austria, Eberharter did not realize this was a joke.
- He went to a lawyer who did not tell him to go home and get a life.
- The lawyer took the case to court, where Eberharter won a defamation action against the newspaper.
- The Vienna Court of Appeal upheld the conviction.

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<sup>178</sup> ECtHR, *Cojocaru v. Romania*, Application No. 32104/06 (2015).

<sup>179</sup> *Id.*, par. 7.

<sup>180</sup> *Id.*, par. 29.

<sup>181</sup> *Id.*, par. 30.

<sup>182</sup> ECtHR, *Eon v. France*, Application No. 26118/10 (2013).

<sup>183</sup> ECtHR, *Nikowitz v. Austria*, Application No. 5266/03 (2007), par. 6.

The judgment in the ECtHR was one of its shorter ones. Its conclusion can be summarized as “It’s a joke!”:

“The article, as was already evident from its headings and the caption next to Mr Maier’s photograph, was written in an ironic and satirical style and meant as a humorous commentary. Nevertheless, it sought to make a critical contribution to an issue of general interest, namely society’s attitude towards a sports star. The Court is not convinced by the reasoning of the domestic courts and the Government that the average reader would be unable to grasp the text’s satirical character and, in particular, the humorous element of the impugned passage about what Mr Eberharter could have said but did not actually say.”<sup>184</sup>

The Court awarded all claimed damages and costs.

This was neither the first nor the last time that a plaintiff in a defamation action managed to undermine his own reputation.

The ECtHR has maintained a consistent position of allowing greater latitude for humorous and satirical comment. However, the mere fact of an alleged defamatory statement being published in a satirical magazine would not be enough to protect it. In a Romanian case, a politician named *Petrina* applied successfully to the ECtHR, claiming that his Article 8 rights had been violated by the false allegation that he was a former member of the notorious Communist secret police, the *Securitate*. The fact that the publication was in a satirical magazine was irrelevant. The message of the article was “clear and direct, devoid of any ironic or humorous element.”<sup>185</sup>

The protection of satire has also been emphasised by courts elsewhere. For example, the Malaysian Court of Appeal has stated that:

“No reasonable person will read a cartoon with the same concentration, contemplation and seriousness as one would when reading a work of literature. Cartoons exaggerate, satirize and parody life, including political life. [...] The political cartoonist, unlike the serious political pamphleteer, seeks to ridicule persons and institutions with humour to deliver a message. It will be most exceptional if a political cartoon will have the effect of disrupting public order, security or the safety of the nation.”<sup>186</sup>

### iii. Statements of others

How far is a journalist responsible for the (possibly defamatory) things that someone else says? Most journalists spend a large part of their time reporting the words of

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<sup>184</sup> *Id.*, par. 25.

<sup>185</sup> ECtHR, *Petrina v. Romania*, Application No. 78060/01 (2008), par. 44.

<sup>186</sup> Malaysian Court of Appeal, *Zulkiflee Bin SM Anwar Ulhaque v. Arikrishna Apparau (Zunar Case)*, Civil Appeal No. W-01-500-2011 (2014).

others or, in the case of broadcasting, giving others a platform to speak through interviews and discussions.

The ECHR has considered several cases in which national courts have held journalists liable for statements made by others. This is evidence that many national jurisdictions still tend to regard journalists as responsible for reporting the words of others. The ECtHR's reasoning, however, gives greater cause for hope.

Greek broadcaster Nikitas Lionarakis was found liable for defamation and ordered to pay damages to an individual who was insulted by a studio guest interviewed in a live radio broadcast. The ECtHR found several grounds for determining that Lionarakis's Article 10 rights had been violated, giving particular emphasis to the interviewer's lack of liability for the live remarks of an interviewee. It also reiterated a point to be found in a number of its judgments on media cases:

“[R]equiring that journalists distance themselves systematically and formally from the content of a statement that might defame or harm a third party is not reconcilable with the press's role of providing information on current events, opinions and ideas.”<sup>187</sup>

In other words, it should be taken as given that a journalist is not automatically associated with the opinions stated by others, and it is unnecessary for this to be repeated in relation to each reported opinion or fact.<sup>188</sup> Journalists should however be careful not to “adopt” a defamatory statement (i.e., repeating it as their own, or clearly agreeing with it).

#### H. *Defences to defamation suits*

From what has already been said, it is clear that there are a number of possible defences to a suit of defamation:

- *Truth*: Truth should be an absolute defence to a suit of defamation. That is, if something is true it cannot be defamatory.
- *Reasonable publication*: If a publication is *reasonable* then it may be justified even if it is not wholly true. These are some of the elements that might go to define “reasonableness”:
  - The journalist made good faith efforts to prove the truth of the statement and believed it to be true.
  - The defamatory statements were contained in an official report with the journalist not being required to verify the accuracy of all statements in the report.
  - The topic was a matter of public concern and interest.

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<sup>187</sup> ECtHR, *Lionarakis v. Greece*, Application No. 1131/05 (2007).

<sup>188</sup> See also: ECtHR, *Filatenko v. Russia*, Application No. 73219/01 (2007).

- *Opinion*: The statement complained of was not a statement of fact but an expression of opinion. Alternatively, in the case of satire and other humorous expression, it could be argued that a statement was not intended seriously and no reasonable person would understand it as such.
- *Absolute privilege*: If the defamatory statement was reported from parliament or judicial proceedings, it would normally be absolutely privileged. That is, neither the original author of the statement nor the media reporting it could be found to have defamed. This rule may also apply to other legislative bodies and other quasi-judicial institutions (such as human rights investigations).
- *Qualified privilege*: There is a degree of protection for media reporting other types of statements, even if they do not enjoy the privilege accorded to parliament or the courts. This might apply to, for example, public meetings, documents and other material in the public domain.
- *Statements of others*: Journalists cannot be responsible for the statements of others, provided that they have not themselves endorsed them. This would apply, for example, in the case of a live interview broadcast.

*1. Whose burden of proof?*

If I sue you, then I will have to prove my case against you if I want to win. Right?

Well, no. In the case of defamation this general principle is usually wrong. In many (but not all) legal systems, the burden of proof lies not with the claimant – the person who says that they were defamed – but with the defendant. In any other civil action seeking redress for an alleged tort, it would automatically be the responsibility of the person who had been wronged to prove that:

- The defendant had carried out the action (made the defamatory statement in this case).
- That the action was a wrong against the claimant (that it damaged his/her reputation).

However, in defamation cases, this burden is reversed on the second point. If the claimant can demonstrate that the defendant made the statement – usually fairly straightforward – it then becomes a matter for the *defendant* to show that the statement was true, and therefore not defamatory.

The striking exception to this rule is the United States. In the celebrated case of *New York Times v. Sullivan*, discussed above, the United States Supreme Court corrected the anomaly of the burden of proof in libel cases brought by public officials. In a later case this new rule was extended to all public figures.<sup>189</sup>

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<sup>189</sup> United States Supreme Court, *Gertz v. Robert Welch, Inc.* 418 US 323 (1974).

Of course, this new rule does not absolve journalists of the responsibility of reporting accurately – these matters may still be debated in court, after all – but it does allow them to be bolder in pursuing matters of public interest.

On this point, the difference between United States defamation law and elsewhere is striking. While the common law jurisdictions (United Kingdom and the Commonwealth) follow the anomalous tradition of English law, civil law jurisdictions derive their approach from Roman law, which has a slightly different approach, although with similar effect. The Roman law principle is that the burden should lie on the party that can prove the affirmative. This derives from the supposed difficulty of proving a negative. In the case of defamation proceedings, this will mean, of course, that the onus of proving that a statement is true will lie with the defendant.

**Point for Discussion** – what do you think? Should the burden of proof in defamation cases be reversed?

The ECtHR has been completely unpersuaded by arguments to shift the burden of proof. While it has been influenced by other aspects of the evolving United States jurisprudence on defamation – as discussed above – it has explicitly set its face against the new rule from *New York Times v. Sullivan* and subsequent American cases.

In *McVicar*, the Court was asked to adjudicate on the *Sullivan* rule, as part of the claim by a British journalist that he should not have been required to prove the truth of allegations about drug use by a well-known athlete. The Court concluded that:

“[it] considers that the requirement that the applicant prove that the allegations made in the article were substantially true on the balance of probabilities constituted a justified restriction on his freedom of expression under Article 10(2) of the Convention...”<sup>190</sup>

The ECtHR underlined this position in a later case, *Kasabova v. Bulgaria*, applying it even in criminal defamation cases. This is in contrast to the position taken by the IACtHR in *Kimel v. Argentina*, discussed above.<sup>191</sup> Where the two regional courts are united, however, is in holding “it particularly important for the courts to examine the evidence adduced by the defendant very carefully.”<sup>192</sup>

#### J. Remedies/penalties

One reason why defamation suits – whether criminal or civil – are so feared is the impact of the penalties or awards often made against the media in such cases.

<sup>190</sup> ECtHR, *McVicar v. United Kingdom*, Application No. 46311/99 (2002), par. 87.

<sup>191</sup> IACtHR, *Kimel v. Argentina Merits, Reparations and Costs*, Case No. 12.450 (2008).

<sup>192</sup> ECtHR, *Kasabova v. Bulgaria*, Application No. 22385/03 (2011), par. 59.

Reference is often made to the “chilling effect” of heavy penalties or large defamation awards. As that phrase makes clear, the concern is not only for the journalist involved in any particular case, but also the deterrent that defamation law can pose to vigorous, inquiring journalism.

As discussed above, international bodies have focused their concern on criminal defamation and the danger that journalists might be imprisoned for performing their professional obligations and exercising their freedom of expression.

The ECtHR has considered a number of cases involving criminal defamation and although, as noted above, the Court will not rule out criminal defamation in principle, it has commented several times on the penalties imposed, as in this Romanian case:

“The circumstances of the instant case – a classic case of defamation of an individual in the context of a debate on a matter of legitimate public interest – present no justification whatsoever for the imposition of a prison sentence. Such a sanction, by its very nature, will inevitably have a chilling effect, and the fact that the applicants did not serve their prison sentence does not alter that conclusion, seeing that the individual pardons they received are measures subject to the discretionary power of the President of Romania; furthermore, while such an act of clemency dispenses convicted persons from having to serve their sentence, it does not expunge their conviction...”<sup>193</sup>

In this case the Court was also highly critical of an order imposed on the journalists, as part of the sentence for their conviction, prohibiting them from working as journalists for a year:

“[T]he Court reiterates that prior restraints on the activities of journalists call for the most careful scrutiny on its part and are justified only in exceptional circumstances [...] The Court considers that [...] it was particularly severe and could not in any circumstances have been justified by the mere risk of the applicants’ reoffending.”

[...]

The Court considers that by prohibiting the applicants from working as journalists as a preventive measure of general scope, albeit subject to a time-limit, the domestic courts contravened the principle that the press must be able to perform the role of a public watchdog in a democratic society.”<sup>194</sup>

No international human rights court has ever upheld a custodial sentence on a journalist for a ‘regular’ defamation case. The ACtHPR has held that:

“Apart from serious and very exceptional circumstances for example, incitement to international crimes, public incitement to hatred, discrimination or violence or threats against a person or a group of people, because of specific criteria such as race, colour, religion or nationality, the Court is of the view that

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<sup>193</sup> ECtHR, *Cumpana and Mazare v. Romania*, Application No. 33348/96 (2004), par. 116.

<sup>194</sup> *Id.*, par. 118-19.

violations of laws on freedom of speech and the press cannot be sanctioned by custodial sentences.”<sup>195</sup>

In civil defamation cases, the principal cause of the “chilling effect” is large monetary awards against the media in favour of defamation claimants. In a civil suit, the purpose of the award is not to punish the defendant (the defamer), but to compensate the plaintiff, the person who was defamed, for any loss or damage caused by the defamation. It follows that the claimant should be able to prove that there was actual loss or damage as part of their suit. If this cannot be demonstrated, then it is unclear why there should be any monetary award. Usually a defamatory statement could be rectified by a correction or an apology.

The problem often comes in the area of non-pecuniary damages. This refers to monetary awards made to compensate losses that cannot be accurately calculated in monetary terms – such as loss of reputation, anxiety and emotional distress. Courts should take into account not only the damage to reputation, but also the potential impact of large monetary awards on the defendant – and also more broadly on freedom of expression and the media in society.

The ECtHR has been critical of large non-pecuniary monetary awards, even on occasions finding them to be a violation of Article 10. The landmark case was that of *Tolstoy Miloslavsky*, who was author of a defamatory pamphlet confronted with damages of £1.5 million (in 1989) awarded by a British libel jury. The Court found the award grossly disproportionate and that Tolstoy Miloslavsky’s right to freedom of expression had therefore been violated, even though the fact that he had committed libel was not in dispute.<sup>196</sup>

In the case of *Steel and Morris v. the United Kingdom* (the McLibel case), the Court concluded that the size of the award of damages had to take into account the resources available to the defendants. Although the sum awarded by the British court was not very large “by contemporary standards,” it was “very substantial when compared to the modest incomes and resources of the [...] applicants ...”<sup>197</sup>

In the case of *Filipovic v. Serbia*, the Court recalled its conclusions in *Tolstoy Miloslavsky* and *Steel and Morris* that the award should be proportionate to the moral damage suffered, and also to the means available to the defendant. In *Filipovic*, although the defendant had incorrectly accused the plaintiff of “embezzlement,” it was nevertheless a fact that the plaintiff was under investigation for tax offences. Hence the moral damage was not great and the award by the court was equivalent to six months’ salary. The ECtHR found that the award by the court, which was equivalent to six months of the defendant’s salary, was excessive and a violation of Article 10.<sup>198</sup>

The ACtHPR<sup>199</sup> and the IACtHR rarely awards non-pecuniary damages:

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<sup>195</sup> ACtHPR, *Konaté v. Burkina Faso*, Application No. 004/2013 (2014), par. 155.

<sup>196</sup> ECtHR, *Tolstoy Miloslavsky v. United Kingdom*, Application No. 18139/91 (1995).

<sup>197</sup> ECtHR, *Steel and Morris v. United Kingdom*, Application No. 68416/01 (2005), par. 96.

<sup>198</sup> ECtHR, *Filipovic v. Serbia*, Application No. 27935/05 (2007).

<sup>199</sup> ACtHPR, *Mtikila v. Tanzania*, Application No. 011/2011 (2013).

“[T]he issuance of this Judgment, the extent of revoking the domestic decisions in their entirety, and the publication of this Ruling in various media streams, private means as well as those with wide circulation of social and official means, which includes the judiciary, are sufficient and appropriate measures of reparation to remedy the violations inflicted on the victims.”<sup>200</sup>

In the case of *Tristan Donoso*, the IACtHR recognised the chilling effect of damages awards when they are awarded:

“the fear of a civil penalty, considering the claim by the former Attorney General for a very steep civil reparation, may be, in any case, equally or more intimidating and inhibiting for the exercise of freedom of expression than a criminal punishment, since it has the potential to attain the personal and family life of an individual who accuses a public official, with the evident and very negative result of self-censorship both in the affected party and in other potential critics of the actions taken by a public official.”<sup>201</sup>

#### **Hypothetical case for discussion**

A journalist gets hold of an official report from the Ministry of Defence, which is highly critical of the work of the procurement office. The new infantry rifle purchased by the army is substandard – it often gets jammed and will not fire when it is used repeatedly. The report states that the procurement office in the Ministry carried out inadequate checks before agreeing the contract. The journalist’s newspaper publishes a story based on the report.

The head of the procurement office files a suit for defamation. He claims that the newspaper story portrays him as negligent and fails to take account of a series of points that he had made within the Ministry in response to the critical report, which contained factual inaccuracies.

Is the story defamatory of the head of the procurement office? Is the newspaper article a statement of fact or opinion (or does it even matter)? Is there a sufficient factual basis to the statement?

<sup>200</sup> IACtHR, *Fontevicchia & D’Amico v. Argentina*, Case No. 12.524 (2011).

<sup>201</sup> IACtHR, *Tristán Donoso v. Panamá*, Case No. Serie C No.193 (2009)

## VI. PRIVACY

In 1993, the freedom of expression organization ARTICLE 19 published its authoritative *Freedom of Expression Manual*, which collated international and comparative law standards. In a 250-page volume, barely two pages were devoted to the issue of privacy. It is scarcely imaginable that the question could be addressed so briefly today.

The relationship between privacy and freedom of expression has become one of the most important issues of our time, for three particular reasons:

- Technological advances in the past quarter of a century have enabled mass state surveillance to a previously unimagined degree. Where once interception of correspondence would have entailed a steam kettle in the back room of the post office, it is now the work of a few keystrokes on immensely powerful computers.
- The advance of technology also means that both governments and private companies hold much more data on private individuals than ever before.
- The media (and the public's) appetite for disclosures about the private lives of celebrities and other public figures has reached unprecedented proportions. The issue has grown from concern about the activities of paparazzi to a much more systematic scrutiny of the lives of celebrities, including a tolerance in some news organizations of blatantly illegal methods of intrusion.

We might add a fourth ingredient to the mix: many people today reveal private aspects of their life on social media to an extent that previous generations would have found bewildering. In other words, the conceptual boundaries between public and private have changed in the minds of many people.

Yet, just at the moment when interference with privacy becomes much easier (and, for some, more acceptable) the legal protections of privacy have developed rapidly. Today over 100 countries have privacy and data protection laws.<sup>202</sup>

### A. *Privacy in international law*

International human rights treaties offer fairly robust protections against intrusions into privacy. Article 17 of the ICCPR states:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

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<sup>202</sup> David Banisar, *National Comprehensive Data Protection/Privacy Laws and Bills 2014 Map* (2014) Article 19: Global Campaign for Free Expression, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1951416\\_](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1951416_)

Article 8 of the ECHR addresses the right to respect for family and private life:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 11 of the ACHR protects the right to privacy in the identical terms to the ICCPR, but the ACHPR has no mention of the right to privacy.

### *B. Privacy in national law*

Despite the claim that privacy is constitutionally protected in a large majority of countries, the actual experience of national legal systems has been varied. At one end of the spectrum, France, guarantees the right to privacy in Article 9 of its Civil Code. This reflects a media culture that has historically been much less intrusive on the private lives of public figures and even, in the nineteenth century, criminalized the publication of facts about private life.

By contrast, in the United States there is no constitutional protection of privacy, and any residual common law privacy rights will likely always be trumped by the First Amendment and its protection of free speech.

This is not a matter of legal systems. Germany and Italy, both civil law jurisdictions, recognize a privacy right (at least a qualified one). The United Kingdom has imported an explicit privacy protection derived from Article 8 of the ECHR. Previously, protection of privacy under the common law would be in the form of either breach of confidence (if the person could prove ownership of the material disclosed) or trespass. (Although when photographs were published of a well-known actor in hospital recovering from brain surgery, the reporters having tricked their way into his hospital room, the actor found that under the common law as it then stood, he had no recourse for this blatant violation of his privacy.<sup>203</sup>).

The common law in the United States evolved in a slightly different direction. A law review article of 1890, written by Samuel Warren and his friend and colleague Louis Brandeis – later a Supreme Court justice and one of the country's most renowned jurists – proposes a "right to privacy" within the common law. Also taking the starting point as the sanctity of the home, Warren and Brandeis's concern was that the development of intrusive technologies (such as small cameras) and the aggressive approach of the press were posing new threats to privacy. (Remember, this was written in 1890.) The Fourth Amendment to the US Constitution provides protection against arbitrary intrusion by the authorities (although it never uses the word privacy). Warren and Brandeis argued that such protection should be extended:

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<sup>203</sup> Court of Appeal of England and Wales, *Kaye v. Robertson & Anor*, EWCA Civ 21 (1990).

"The common law has always recognized a man's house as his castle, impregnable, often, even to his own officers engaged in the execution of its command. Shall the courts thus close the front entrance to constituted authority, and open wide the back door to idle or prurient curiosity?"<sup>204</sup>

This right is not an unlimited one. Indeed, Brandeis as a Supreme Court justice was famous as a defender of freedom of speech and the First Amendment. This article – justifiably described as the "most influential law review article of all" – argues that "The right to privacy does not prohibit any publication of matter which is of public or general interest."<sup>205</sup> This is precisely the principle that continues to inform US privacy jurisprudence to this day. Justice Brandeis called it "the right to be let alone."<sup>206</sup>

The right to privacy would not cover matters that were revealed legitimately in the course of official proceedings, such as a court case. It would not apply if the individual themselves revealed the information – so, once it is posted on your Facebook page it is no longer private.

Truth would not be a defence to a suit claiming a breach of privacy. Unlike in a defamation case, where truth would be an absolute defence, the right to privacy "implies the right not merely to prevent inaccurate portrayal of private life, but to prevent its being depicted at all".<sup>207</sup>

Finally, according to Warren and Brandeis, "absence of malice" would not be a defence either. This is a point where later US jurisprudence has moved on considerably.

A Supreme Court judgment of the 1970s spelled out four aspects to the right:

"The right not to be put in a "false light" by the publication of true facts;  
The right not to have one's name or likeness appropriated for commercial value;  
The "right of publicity" on the part of a person whose name has a commercial value; and  
The right to avoid the publicizing of "private details."<sup>208</sup>

(The case in question was really about the "right of publicity" rather than the right to privacy. It was brought by a human cannonball who was aggrieved because his act was filmed and broadcast against his will.)<sup>209</sup>

The Supreme Court has also found that the same "actual malice" standard laid down in *Sullivan* for defamation cases would apply to public officials in privacy cases.<sup>210</sup> In

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<sup>204</sup> Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy* (1890) Vol. IV No. 5 Harv. L. R. 193.

<sup>205</sup> *Id.*

<sup>206</sup> United States Supreme Court, *Olmstead v. United States*, 277 U.S. 438 (1928), p. 478.

<sup>207</sup> Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy* (1890) Vol. IV No. 5 Harv. L. R. 193

<sup>208</sup> United States Supreme Court, *Zacchini v. Scripps-Howard Broadcasting Co*, 433 US 562 (1977).

<sup>209</sup> *Id.* p.563.

<sup>210</sup> United States Supreme Court, *Time Inc v. Hill*, 385 US 374 (1967).

other words, public officials and other public figures have a lesser protection of their privacy than others.

There is an undoubted trend towards recognizing the international human right to privacy within national legal systems. The consequence of this is that increasingly national courts will consider privacy not as a potential exceptional *limitation* to the right to freedom of expression but as another equal and substantive right to be balanced against it. Not surprisingly, the jurisprudence of the ECtHR is particularly useful, since the Strasbourg Court has a long history of balancing the substantive Article 8 and Article 10 rights.

### C. *Breaching privacy by covert means*

At first sight, a media organisation would seem to be on the weakest ground when it uses illegal means to violate the privacy of individuals. This was what happened in a series of British cases in which mobile phone accounts were hacked. The hacking scandal initially appeared confined to newspapers in the News International stable, owned by Rupert Murdoch. Indeed, it led to the closure of one of these papers, the *News of the World*. Later it emerged that other companies, such as Mirror Group Newspapers, were also involved.

Most of the targets of phone-hacking were "celebrities," although public concern about the issue was triggered by the revelation that a private investigator employed by one of the newspapers had hacked the voicemail of a disappeared child (later found to have been murdered), deleting messages and giving rise to the hope that she was in fact alive. Several of those involved were prosecuted and convicted under existing criminal law.

Beyond this, however, the phone-hacking cases prompted widespread revulsion about media intrusion into privacy and a judge-led inquiry that proposed a new system of media regulation.

However, in a case before the ECtHR involving the unlawful recording of a telephone conversation, the court reached a rather different conclusion. Radio Twist, a Bratislava station, broadcast a recording of a conversation between the Deputy Prime Minister and Minister of Finance (Mr K) and the State Secretary at the Ministry of Justice (Mr D). The conversation concerned issues surrounding the privatization of an insurance company. The broadcast recording was not made by the radio station but, according to its account, the tape was dropped in its mailbox. Mr D, by then a Constitutional Court judge, filed a suit against Radio Twist for violation of his personal integrity. He won the case both in the District Court and on appeal to the Regional Court.

The Strasbourg Court took a different view. The overriding concern was the public interest in the matters discussed. And, given the subject of the conversation, the privacy claim was not convincing:

"The context and content of the conversation were thus clearly political and the Court is unable to discern any private-life dimension in the impugned events...."

Equally, the Court finds that questions concerning the management and privatisation of State-owned enterprises undoubtedly and by definition represent a matter of general interest."<sup>211</sup>

The ECtHR differed from the domestic courts in the emphasis it placed on the fact that the recording had been obtained illegally. Whereas the domestic courts concluded that broadcasting the illegal recording in and of itself constituted an interference with Mr D's privacy, the ECtHR noted that at no stage had it been suggested that Radio Twist had itself made the recording (and oddly that there had never been any investigation into who was responsible).

"The Court further observes that the applicant company was penalised mainly for the mere fact of having broadcast information which someone else had obtained illegally. The Court is however not convinced that the mere fact that the recording had been obtained by a third person, contrary to law, can deprive the applicant company of the protection of Article 10 of the Convention."<sup>212</sup>

The Court concluded that the broadcast had not interfered with the rights of Mr D in a manner justifying the sanction imposed.

"The interference with its right to impart information therefore neither corresponded to a pressing social need, nor was it proportionate to the legitimate aim pursued. It was thus not 'necessary in a democratic society'."<sup>213</sup>

There were two crucial distinctions with the British phone-hacking cases. First, the media organization had not itself illegally recorded a conversation or message. Secondly, the matter reported was of clear public interest.

In *Haldimann and Ors v. Switzerland*, the Strasbourg Court addressed the issue from the angle of when covert recordings are made by the journalists themselves. The target was an insurance broker. He was not named or otherwise identified, but the recording was broadcast as part of an investigation into the advice brokers give to customers. Importantly, however – and this was a crucial difference from the British phone-hacking cases – the personal privacy of the broker was not at issue. The matter under investigation was one of broad public interest.<sup>214</sup>

#### *D. What are the limits of privacy?*

We have seen that there is an unambiguous right to privacy in international law and also that privacy is protected, at least to some extent, in many national legal systems. It is also apparent that privacy, may be legitimately limited in the public interest. In other words, if the public interest like the right to a reputation so demands, the balance between freedom of expression and privacy will tilt in the direction of the former.

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<sup>211</sup> ECtHR, *Radio Twist v. Slovakia*, Application No. 62202/00 (2006), par. 58.

<sup>212</sup> *Id.*, par. 62.

<sup>213</sup> *Id.*, par. 64.

<sup>214</sup> ECtHR, *Haldimann and Others v. Switzerland*, Application No. 21830/09 (2015).

So what exactly is covered by the right to privacy? At one end of the spectrum, we have seen that a conversation between two public officials on a topic of public interest will not be regarded as private (or at least that the public interest will override the privacy). On the other hand, can we safely assume that revelations about the private life of someone who is not a public figure would breach the right to privacy and would not be protected as a legitimate exercise of freedom of expression?

The answer is yes, usually, but perhaps not always. For example, in the case of *A v. the United Kingdom* (although primarily seen as a case about the right to reputation), a member's exposure of the details of a constituent's family life was deemed to be privileged and hence protected (first in the national courts and then in the Strasbourg Court).<sup>215</sup>

Is your salary private, for example? That may depend on who you are. If you are the head of a large company, then it is not (according to the ECtHR). In *Fressoz and Roire v. France* the Strasbourg Court overruled the conviction of the director and a journalist on a French magazine who had published the salary of the chief executive of a major car manufacturer.<sup>216</sup> The article was based upon photocopies obtained through a breach of professional confidence by a tax official. Although the right to freedom of expression does not release journalists from the obligation to obey the ordinary criminal law, there may be situations where the right of the public to be informed will justify the publication of documents that fall under an obligation of professional secrecy.

The reasoning is similar to that in *Radio Twist*. The difference in this case was the nature of the information revealed. It was not related to government policy, as the tape was in *Radio Twist*. But nor was the material confidential. Information about the executive's salary did not concern his private life. Essentially, Article 10 of the ECHR:

"...leaves it for journalists to decide whether or not it is necessary to reproduce such documents to ensure credibility. It protects journalists' rights to divulge information on issues of general interest provided that they are acting in good faith and on an accurate factual basis and provide "reliable and precise" information in accordance with the ethics of journalism."<sup>217</sup>

What about the publication of photographs? The ECtHR considered a case in which an Austrian newspaper was penalized for breaching the privacy of a politician. It had published a picture of him accompanying an article alleging that some of his earnings had been gained illegally. The national courts had found that although he was a member of parliament he was not well-known to the public. Therefore, the paper was breaching his privacy by publishing a picture of him *in the context of critical allegations*.

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<sup>215</sup> ECtHR, *A. v. the United Kingdom*, Application No. 35373/97 (2002).

<sup>216</sup> ECtHR, *Fressoz and Roire v. France*, Application No. 29183/95 (1999).

<sup>217</sup> *Id.*, par. 54.

Not surprisingly, in view of its previous jurisprudence, the Court found that the newspaper's Article 10 rights had been violated.<sup>218</sup>

In another case involving pictures, the Strasbourg Court reached a different conclusion. Geoffrey Peck claimed a violation of his privacy because he had been included in CCTV footage recorded by the local government authority and broadcast on a crime prevention programme on a commercial television channel. The footage showed Mr Peck carrying a knife – which was actually just after an attempt to slit his own wrists. The broadcast claimed that his detection on CCTV had been a triumph of crime prevention resulting in the apprehension of a "dangerous" individual.<sup>219</sup>

Peck alleged that the masking of his features in the broadcast was inadequate and that his privacy had been breached. Indeed, he was recognised in the broadcast by family and neighbours. The broadcasting regulatory authorities in the UK supported Peck's view, but the British courts disagreed. The ECtHR found that although the interference with his privacy was legal and pursued a legitimate aim (namely, the preservation of public order and prevention of crime) it was disproportionate and was thus an interference with the applicant's Article 8 rights.

Interestingly, the Court had no sympathy with the view that Peck's subsequent use of the media to draw attention to his case undermined his claim that his privacy had been violated. Also, it found a breach of his rights under Article 13 (the right to a remedy) because of the absence of a suitable forum to protect his privacy.

In the *Peck* case, the Court cited one of its own earlier judgments, which addressed the status of Article 8 rights enjoyed by private individuals in public places:

"There are a number of elements relevant to a consideration of whether a person's private life is concerned in measures effected outside a person's home or private premises. Since there are occasions when people knowingly or intentionally involve themselves in activities which are or may be recorded or reported in a public manner, a person's reasonable expectations as to privacy may be a significant, although not necessarily conclusive, factor. A person who walks down the street will, inevitably, be visible to any member of the public who is also present. Monitoring by technological means of the same public scene (for example, a security guard viewing through closed-circuit television) is of a similar character. Private life considerations may arise, however, once any systematic or permanent record comes into existence of such material from the public domain."<sup>220</sup>

It was this final point – the use of the CCTV footage by the media – that constituted the basis for Peck's complaint, *not* that of the camera or the recording (indeed, he acknowledged that the fact that he was caught on camera, leading to an emergency response, may have saved his life).

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<sup>218</sup> ECtHR, *Krone Verlag GmbH & Co. KG v. Austria*, Application No. 35373/97 (2002).

<sup>219</sup> ECtHR, *Peck v. United Kingdom*, Application No. 44647/98 (2003).

<sup>220</sup> *Id.*, par. 58.

What protection does a public figure have from media intrusion into their private life? And how public is a public figure? A celebrated British case involved a footballer called Garry Flitcroft. He was not a very well-known person; an avid football fan would probably have known of him but not an average member of the public. Flitcroft obtained an injunction against newspaper publication of a "kiss and tell" story originating with two women who had had extramarital affairs with him.

Subsequently, the injunction was lifted by the Court of Appeal and the article published. In a commentary on the case, former Appeal Court judge Stephen Sedley noted several points about the reasoning in the case, starting with the assumption that footballers are "role models:"

"Possibly – just possibly – a certain number of boys want to grow up playing football like Garry Flitcroft. Is the revelation in the family's Sunday paper that he has been sleeping with a lap-dancer going to make them switch to, let us say, Wayne Rooney as their preferred role model? Or is it going to suggest to them that the great thing about being a professional footballer, or any other kind of media star, is that you can sleep with just about anyone?"<sup>221</sup>

Sedley also noted that the court made a distinction between the protection of privacy for sexual relations within a marriage and outside. Hence the sexual relationship of Mr and Mrs Flitcroft is off-limits for the media, but his extra-marital affairs are fair game. In neither case is there a demonstrable public interest.

"[The court] does, however, assert that if the interest of the public in a story is understandable, it is legitimate, and that if the press is prevented from publishing such information 'there will be fewer newspapers published, which will not be in the public interest.'"<sup>222</sup>

Sedley notes that such reasoning is "unlikely to survive the recent jurisprudence of the European Court of Human Rights."<sup>223</sup>

Finally, Sedley pointed out that the *Flitcroft* judgment nowhere considered the interests of the Flitcrofts' two young children:

"There is no way that the publication of their father's infidelities in the Sunday papers would not have come to the knowledge of their friends and their friends' parents. What consideration are such children entitled to?"<sup>224</sup>

As Sedley points out, the ECtHR has become increasingly protective of privacy rights. In the case of *MGN vs. United Kingdom*,<sup>225</sup> the model Naomi Campbell (more of a household name than Garry Flitcroft) had sued the *Daily Mirror* over a story entitled:

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<sup>221</sup> Stephen Sedley, *Ashes and Sparks: essays on law and justice* (2011) p. 314.

<sup>222</sup> *Id.*, p. 315.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> ECtHR, *MGN v. United Kingdom*, Application No. 39401/04 (2011).

"Naomi: I am a drug addict." The newspaper detailed Campbell's treatment for narcotics addiction, despite her previous public denials of drug use. The story included pictures of her near the Narcotics Anonymous centre she was attending.

In her case in the British courts, the High Court found in Campbell's favour. This decision was overturned on appeal, before being restored by the House of Lords. The courts awarded nominal damages, but required the newspaper to pay very substantial legal fees on a conditional fee arrangement (in other words, Campbell's legal bill was higher because she won the case).

Mirror Group Newspapers took the case to Strasbourg, arguing a violation of Article 10 both on the substantive grounds of the privacy decision and because of the "chilling effect" of the large award of costs. The ECtHR upheld the House of Lords decision on the substantive issue. Although the article itself was in the public interest, the publication of secretly taken photographs was an intrusion into Campbell's privacy. However, the Court did find a breach of Article 10 in the size of the costs award.

The case of *Rusuunen v. Finland* also concerned the balance between the right to privacy and the right to freedom of expression. A Finnish woman had written a book about her nine-month long relationship with the then prime minister of Finland. The book contained details of their intimate life and more general information about the prime minister. The ECtHR agreed with the Finnish courts that while parts of the book were in the public interest, the parts concerning the intimate life of the prime minister interfered with his right to privacy. Furthermore, the modest fine the Finnish courts imposed was found to be a proportionate sanction. The interference with the right to freedom of expression was thus justified.<sup>226</sup>

In the area of privacy, to an even greater extent than other media law issues, the ECtHR has generated the greatest amount of case law (not least because one other regional system, the African, has no such protection of privacy). The IACtHR has drawn on Strasbourg jurisprudence in this area, as it often does, but has offered a particularly robust defence of the right of journalists to intrude on the privacy of public figures in certain instances when this is in the public interest.

In *Fontevicchia and Anor v. Argentina*, the applicants had published an article about a personal relationship of former President Carlos Menem, including the financial arrangements between him and the mother of his illegitimate child. The Court found that while the state should take action to protect privacy, including against media intrusion, it must also take into account:

"a) the different threshold of protection for public officials, especially those who are popularly elected, for public figures and individuals; and b) the public interest in the actions taken."<sup>227</sup>

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<sup>226</sup> ECtHR, *Rusuunen v. Finland*, Application No. 73579/10 (2014), par. 37-54.

<sup>227</sup> Inter-American Commission of Human Rights, *Fontevicchia & D'Amico v. Argentina*, Case No. 12.524 (2011), par. 59.

The Court saw a clear public interest in the disclosure of these facts:

"This information relates to the integrity of political leaders, and without the need to determine the possible use of public funds for personal purposes, the existence of large sums and costly gifts on behalf of the President of the Nation, as well as the possible existence of negotiations or interference in a judicial investigation, are issues that involve a legitimate social interest."<sup>228</sup>

#### *E. Privacy and medical confidentiality*

The Naomi Campbell case skirts round the edge of an issue where the definition of privacy is at first sight very clear: information about medical conditions. While the confidentiality of medical records would generally be regarded as a completely valid application of the right to privacy, in the Campbell case the fact of her drug dependency was regarded as a matter of public interest.

In a case involving medical records, however, the Strasbourg Court found a legitimate public interest in their exposure. *Le Grand Secret* was a book co-written by the personal physician to President Francois Mitterrand of France and published a few days after the President's death. It detailed the progress of the cancer that Mitterrand was diagnosed to have shortly after he became President in 1981. The French courts had issued a temporary injunction against the circulation of the book, which was then made permanent some months later.

The Court made a distinction between the temporary injunction and the permanent ban on publication.<sup>229</sup> The former did not constitute an interference with Article 10, since it was imposed within days of Mitterrand's death out of respect for his family. By the time of the second decision, nine months later, the Court determined that two factors had changed. One, following the reasoning in earlier cases, such as *Spycatcher*,<sup>230</sup> was that the content of the book was already public knowledge and so medical confidentiality could no longer be maintained. Secondly, the passage of time meant that the hurt to the family was lessened.<sup>231</sup>

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<sup>228</sup> *Id.*, par. 62.

<sup>229</sup> ECtHR, *Éditions Plon v. France*, Application No. 58148/00 (2004).

<sup>230</sup> ECtHR, *Observer and Guardian v. the United Kingdom*, Application No. 13585/88 (1991).

<sup>231</sup> Note, however, that the judgment related to the right of the publisher to circulate the book, not the author's breach of medical confidentiality, for which he received a criminal conviction that was not appealed.

### **Hypothetical case for discussion**

A newspaper publishes a list of women who are alleged to have had abortions. The information comes from medical records leaked to the paper by a staff member in a clinic who is opposed to abortion on religious grounds.

A number of the women whose names are published sue the newspaper for violating their right to privacy. What should the court decide?

One of those who sues is a well-known actress. Should the court reach any different decision in her case?

Another of the women is a prominent politician who is well-known for her anti-abortion views. What should be the court's decision in her case?

## VIII. NATIONAL SECURITY

"National security" is one of the most common justifications offered by states for limiting freedom of expression by journalists and media organs. When we discussed limitations on freedom of expression, we saw that national security is a legitimate aim justifying restrictions on freedom of expression in the ICCPR, the ECHR, and the American Convention on Human Rights. The ACHPR does not contain this explicit limitation, although the right to freedom of expression in Article 9 is to be exercised "within the law." The individual also has a general duty, in Article 29(3) of the African Charter, "Not to compromise the security of the State whose national or resident he is."<sup>232</sup>

So how do we assess the legitimacy of a limitation on freedom of expression on grounds of national security – applying the three part test that has already been introduced?

First, though we will consider situations where the right to freedom of expression is suspended, wholly or in part. This is most often justified because of a grave security threat. The process whereby such a suspension – or *derogation* – takes place is different from the three-part test, although some elements of the reasoning may be familiar.

### A. *The derogation process under international and regional human rights treaties*

Some of the key human rights instruments allow a temporary derogation from certain human rights obligations in situations of national emergency. Such a measure is to be found in Article 4 of the ICCPR, Article 15 of the ECHR and Article 27 of the ACHR. The first of these, for example, provides:

"In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin."<sup>233</sup>

Article 4 then proceeds to list a number of articles of the ICCPR that may not be derogated from, even in times of public emergency. These include the rights not to be enslaved or tortured, and the right to freedom of opinion. It does not, however, include Article 19, the right to freedom of expression.

Article 4 concludes by setting out the procedure by which a state of emergency should be notified to other parties to the ICCPR, namely through notification to the Secretary-General of the United Nations.

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<sup>232</sup> ACHPR, *supra* note 7, Art. 29 (3).

<sup>233</sup> ICCPR, *supra* note 3, Art. 4.

The UNHRC has devoted two of its General Comments to explaining in greater detail the meaning of Article 4 and the procedure and scope of derogation. The more recent of these, General Comment 29 of 2001, can be taken as an authoritative statement on the matter. There are a number of key points to note, which can be applied equally to the other human rights treaties that provide for derogation:

- The state of emergency must be publicly proclaimed according to the law. This is an essential requirement in maintaining the principle of legality and respect for the rule of law. The proclamation should be in conformity with domestic legal requirements and should be accompanied by notification to other States Parties (via the Secretary General). The notification should also state what provisions of the ICCPR have been derogated from and why this was necessary.<sup>234</sup>
- The situation leading to derogation must be "a public emergency which threatens the life of the nation."<sup>235</sup> In some of its concluding observations on reports by States Parties, the UNHRC has been highly critical of derogations that have taken place in situations that appear to fall short of the Article 4 requirements. In General Comment 29, the Committee points out that the threshold of threatening "the life of the nation" is a high one.<sup>236</sup> (It should be noted, though, that the ECtHR has tended to tolerate a lower threshold for the declaration of a state of emergency.)<sup>237</sup>
- The Committee emphasises the importance of the principle that derogations should only be "to the extent strictly required by the exigencies of the situation." This consideration is similar to the necessity/proportionality test applied for limitations of human rights. Even in instances when derogation may be warranted, there should only be derogation from those rights that are strictly required and only to the extent necessary:

"[T]he mere fact that a permissible derogation from a specific provision may, of itself, be justified by the exigencies of the situation does not obviate the requirement that specific measures taken pursuant to the derogation must also be shown to be required by the exigencies of the situation. In practice, this will ensure that no provision of the Covenant, however validly derogated from will be entirely inapplicable to the behaviour of a State party."<sup>238</sup>

The final point suggests that the right to freedom of expression may not be completely suspended, even in emergency situations.

The most common circumstance in which the life of a nation may be under threat is one of armed conflict, in which the state's obligations under international humanitarian law are also engaged.

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<sup>234</sup> UNHRC, *General Comment No. 29: Article 4: States of Emergency*, UN Doc. No. CCPR/C/21/Rev.1/Add.11 (31 August 2001), par. 2.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*, par 3.

<sup>237</sup> ECtHR, *A and Others v. United Kingdom*, Application no. 3455/05 (2009), par. 179.

<sup>238</sup> UNHRC, *General Comment No. 29: Article 4: States of Emergency*, UN Doc. No. CCPR/C/21/Rev.1/Add.11 (31 August 2001), par. 3.

The implication of this is that in circumstances where a state has lawfully derogated from its obligations under Article 19 of the ICCPR (or the corresponding articles of the ECHR and ACHR), there remains an obligation on the state to justify the measures taken as being required by the exigencies of the situation. Hence it will be required to offer a rationale for any specific measures taken to limit freedom of expression or media freedom.

### *B. Limiting media freedom on grounds of national security*

National security is one of the permissible grounds for limitation of the right to freedom of expression under Article 19(3)(b) of the ICCPR, as well as under Article 10(2) of the ECHR and Article 13(2)(b) of the ACHR. The African Charter has distinct wording, mentioning "security" twice, in Article 27(2) requiring rights to be exercised with regard to "collective security" and in Article 29(3), which sets out a duty not "to compromise the security of the State."

The ECHR explicitly lists national security with territorial integrity. Hence, the exercise of the right to freedom of expression may be limited on grounds of national security, provided that this is explicitly provided by law and that the restriction is necessary in a democratic society – i.e. it is required in order to prevent actual damage to national security and that the restriction is proportionate.

In practice, national security is one of the most problematic areas of interference with media freedom. One difficulty is the tendency on the part of many governments to assume that it is legitimate to curb *all* public discussion of national security issues. Yet, according to international standards, expressions may only be lawfully restricted if it *threatens actual damage* to national security. There may be many instances where reporting of national security issues – for example, exposure of corruption or indiscipline within security institutions – may actually help to promote national security. Unfortunately, governments seldom tend to understand the issue that way.

In 1995, a group of international experts drew up the Johannesburg Principles on Freedom of Expression and National Security.<sup>239</sup> Although not binding law, these principles are frequently cited (notably by the UN Special Rapporteur on Freedom of Opinion and Expression) as a progressive summary of standards in this area. The Johannesburg Principles address the circumstances in which the right to freedom of expression might legitimately be limited on national security grounds, at the same time as underlining the importance of the media, and freedom of expression and information, in ensuring accountability in the realm of national security.

### *C. The scope of national security*

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<sup>239</sup> Article 19: Global Campaign for Free Expression, *The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Freedom of Expression and Access to Information* ("Johannesburg Principles"), UN Doc. No. E/CN.4/1996/39 (November 1996).

"Freedom of expression" and "national security" are very often seen as principles or interests that are inevitably opposed to each other. Governments often invoke national security as a rationale for violating freedom of expression, particularly media freedom. Yet national security remains a genuine public good – and without it, media freedom would be scarcely possible. On the other hand, governments are seldom inclined to recognize that media freedom may actually be a means to ensure better national security by exposing abuses in the security sector. Examples might include the Pentagon Papers case in the United States,<sup>240</sup> Wikileaks exposure of abuses by US troops in Iraq and Afghanistan as well as Edward Snowden's revelations of mass electronic surveillance. These are instances where media revelations of abuse in the national security sector may lead to reforms and ultimately, greater security.

### **Pentagon Papers**

"[P]aramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell. ... Far from deserving condemnation for their courageous reporting, the New York Times, the Washington Post, and other newspapers should be commended [for] revealing the workings of government that led to the Vietnam War."<sup>241</sup>

The abuse of national security as a rationale for attacking human rights was one of the factors leading to the development of an alternative paradigm – that of "human security." While this may be preferable in some respects – emphasizing the whole sum of factors that affect enjoyment of security in the security, including human rights – it is not a great deal of help in addressing laws that seek to limit the media on national security grounds. It is, however, worth asking what is meant by "national security" and various related concepts (such as "state security," "internal security," "public security," and "public safety").

The 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."<sup>242</sup> Subsequent articles indicate 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."<sup>243</sup>

The UN Special Rapporteur on Freedom of Expression has repeatedly limited the scope of a national security limitation in similar terms. For example:

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<sup>240</sup> United States Supreme Court, *New York Times Co. v. United States*, 403 U.S. 713 (1971).

<sup>241</sup> *Id.*, p. 717 (Black, J. concurring opinion).

<sup>242</sup> United Nations Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc. No. E/CN.4/1985/4, Annex (1985), Principle 29.

<sup>243</sup> *Id.*, Principle 30.

"For the purpose of protecting national security, the right to freedom of expression and information can be restricted only in the most serious cases of a direct political or military threat to the entire nation."<sup>244</sup>

In a similar vein, the Johannesburg Principles define a national security interest as being

"to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government."<sup>245</sup>

(Note that the Johannesburg Principles prefer the word "country" to "nation," on the grounds that the latter is often invoked to defend the interests of a majority ideology or ethnic group.)

Like the Siracusa Principles, the Johannesburg Principles also offer a non-exhaustive list of invalid reasons for invoking a national security interest to restrict freedom of expression, for example:

"to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest."<sup>246</sup>

#### *D. Terrorism*

In the past decade or so – since the attacks in the United States on 11 September 2001 – much of the focus of security legislation has been on countering terrorism. In part this reflects a genuine change in understanding the nature of the threat to national security – seen also in the notion that terrorism or terrorist organizations are the object of a "war." More generally, it serves as a rhetorical device whereby dissent – including critical media coverage – may be characterized as giving succour to terrorists.

The UN Security Council has required member states to take a number of steps to combat terrorism. One measure of particular relevance to the media is contained in Resolution 1624 of 2005, which was the first international instrument to address the issue of incitement to terrorism. The preamble to Resolution 1624 condemns "incitement to terrorist acts" and repudiates "attempts at the justification or glorification (*apologie*) of terrorist acts that may incite further terrorist acts."<sup>247</sup>

The operative section of Resolution 1624:

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<sup>244</sup> UN Special Rapporteur on Freedom of Expression, *Report of the Special Rapporteur on the nature and scope of the right to freedom of opinion and expression, and restrictions and limitations to the right to freedom of expression*, UN Doc. No. E/CN.4/1995/32 (1995).

<sup>245</sup> *Johannesburg Principles*, *supra* note 221, Principle 2(a).

<sup>246</sup> *Id.*, Principle 2(b).

<sup>247</sup> UN Security Council, *Resolution 1624 of 2005*, UN Doc. No. S/RES/1624 (14 September 2005).

1. *Calls upon* all States to adopt such measures as may be necessary and appropriate and in accordance with their obligations under international law to:
  - (a) Prohibit by law incitement to commit a terrorist act or acts;
  - (b) Prevent such conduct;
  - (c) Deny safe haven to any persons with respect to whom there is credible and relevant information giving serious reasons for considering that they have been guilty of such conduct;

This may at first sight be seen as overly restrictive of media expression. However, in the event that Resolution 1624 is used as a rationale for censoring media, a number of points should be borne in mind:

- Resolution 1624, unlike other counter-terrorism resolutions of the Security Council, is not binding on member states. It is not issued under the Council's powers in Chapter VII of the UN Charter (preserving peace and security).
- Although the preamble mentions "glorification" or apology for terrorism, this is explicitly when such glorification may have the effect of inciting terrorist acts.
- The preamble also makes explicit reference to the guarantee of the right to freedom of expression in Article 19 of the ICCPR and the limited circumstances and conditions under which this right may be restricted. In other words, Resolution 1624 confers no additional basis for curbing free expression, beyond the criteria and process already set out in international law.

One serious problem with legal restrictions on glorification (or even incitement) of terrorism is the lack of any commonly accepted definition of terrorism in international law. Early counter-terrorism treaties focused on criminalization of particular acts, such as hijacking aircraft, without using the term terrorism. Later treaties, such as the International Convention for the Suppression of Financing of Terrorism,<sup>248</sup> do offer a definition, although this has no binding character beyond the treaty itself.

Many states, as well as entities such as the European Union, additionally define terrorism with reference to certain organizations "listed" as terrorist. This may hold particular dangers for the media in reporting the opinions and activities of such organizations.

The United Nations Special Rapporteur on protecting human rights while countering terrorism has offered a definition of terrorism, based upon best practices worldwide, which focuses on the act of terror rather than the perpetrator:<sup>249</sup>

"Terrorism means an action or attempted action where:

1. The action:

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<sup>248</sup> Art. 2(1), International Convention for the Suppression of Financing of Terrorism (9 December 1999).

<sup>249</sup> UN Special Rapporteur on the promotion and protection of human rights while countering terrorism, *Statement by the Special Rapporteur on the promotion and protection of human rights while countering terrorism at the International Seminar Terrorism and human rights standards*, 15 November 2011: Santiago de Chile, Chile.

- (a) Constituted the intentional taking of hostages; or
- (b) Is intended to cause death or serious bodily injury to one or more members of the general population or segments of it; or
- (c) Involved lethal or serious physical violence against one or more members of the general population or segments of it; and

2. The action is done or attempted with the intention of:

- (a) Provoking a state of terror in the general public or a segment of it; or
- (b) Compelling a Government or international organization to do or abstain from doing something; and<sup>[L]  
[SEP]</sup>

3. The action corresponds to:

- (a) The definition of a serious offence in national law, enacted for the purpose of complying with international conventions and protocols relating to terrorism or with resolutions of the Security Council relating to terrorism; or
- (b) All elements of a serious crime defined by national law."<sup>250</sup>

Some defenders of freedom of expression might argue that there is no purpose served by defining a crime of terrorism at all. "One man's terrorist," as the saying goes, "is another man's freedom fighter." But it is precisely because labels of terrorism are so prone to political partisanship that a clear legal definition is required.

The advantage of the Special Rapporteur's definition is that it clearly sets out both the subjective and objective elements of the crime: the coercive political objective and the serious crime. This excludes the possibility of labelling political opinions alone as terrorist.

Where does this leave the crimes of incitement and glorification?

We will look at the notion of incitement in greater depth when we consider "hate speech." "Incitement" exists as a crime in many legal systems. It is known as an *inchoate* crime – meaning an incomplete action. It must be related to an existing recognized crime – in other words, it is only a crime to incite someone to commit an action that is itself a crime. It must contain both the intention (*mens rea*) to incite someone to commit a crime *and* the actual possibility that someone will commit the crime as a consequence of the incitement.

This is similar to the standard contained in the Johannesburg Principles regarding the circumstances in which expression may be regarded as a threat to national security:

"Expression may be punished as a threat to national security only if a government can demonstrate that:

- (a) the expression is intended to incite imminent violence;
- (b) it is likely to incite such violence;

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<sup>250</sup> *Id.*

(c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence."<sup>251</sup>

#### *E. Prescribed by law*

If national security is to be used to limit freedom of expression, the restriction must not only address a legitimate national security interest but must also be prescribed by law. The exact meaning of this has been at issue in several national security related cases.

In *Ekin Association v. France*, involving the banning of a Basque nationalist publication, the authorities' decision had been based on a law allowing the prohibition of the publication, distribution or sale of texts of "foreign origin." The book in question was published in France, but four out of its five chapters had been written by Spanish citizens. The ECtHR was "inclined to think that the restriction complained of by the applicant association did not fulfil the requirement of foreseeability."<sup>252</sup> (It also pointed out that the law appeared to be in direct conflict with paragraph 1 of Article 10 of the ECHR, which allows freedom of expression "regardless of frontiers.")<sup>253</sup>

Similar questions about foreseeability and the lack of precision in laws has arisen in cases relating to "false news."

In *Chavunduka and Choto v. Minister of Home Affairs & Attorney General*, the Zimbabwe Supreme Court considered the case of two journalists who had been charged with publishing false news on the strength of an article reporting that an attempted military coup had taken place. (The two journalists were also tortured while in custody.)<sup>254</sup>

The Court found that false news was protected by the constitutional guarantee of freedom of expression: "Plainly embraced and underscoring the essential nature of freedom of expression are statements, opinions and beliefs regarded by the majority as false."<sup>255</sup>

The offence of publishing false news in the Zimbabwean criminal code was vague and over-inclusive. It included statements that "might be likely" to cause "fear, alarm or despondency" – without any requirement to demonstrate that they actually did so. In any event, as the Court pointed out:

"[A]lmost anything that is newsworthy is likely to cause, to some degree at least, in a section of the public or a single person, one or other of these subjective emotions."<sup>256</sup>

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<sup>251</sup> *Johannesburg Principles*, *supra* note 221, Principle 6.

<sup>252</sup> ECtHR, *Ekin Association v. France*, Application No. 39288/98 (2001), par. 46.

<sup>253</sup> *Id.*

<sup>254</sup> Supreme Court of Zimbabwe, *Chavunduka & Choto v. Minister of Home Affairs & Attorney General*, Judgment No. S.C. 36/2000, Civil Application No. 156/99 (2000).

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

The word "false" was vague, since it included any statement that was inaccurate, as well as a deliberate lie. The law did not require it to be proved that the defendant knew the statement was false. (The Court then went on to find the provision unconstitutional on necessity grounds as well.)

#### F. Necessary in a democratic society

Most cases involving national security restrictions tend to be decided on the necessity leg of the three-part test.

One area where restrictions may fall down is if they are overbroad. This was the issue in the UNHRC case of *Mukong v. Cameroon*. Albert Mukong was a journalist and author who had spoken publicly, criticizing the president and Government.<sup>257</sup> He was arrested twice under a law that criminalized statements "intoxicat[ing] national or international public opinion."

The government justified the arrests to the Committee on national security grounds. The Committee disagreed. Laws of this breadth that "muzzled advocacy of multi-party democracy, democratic tenets and human rights" could not be necessary.<sup>258</sup>

The African Commission on Human and Peoples' Rights has taken similar positions. In *Constitutional Rights Project and Civil Liberties Organisation v. Nigeria*, opponents of the annulment of the 1993 presidential elections, including journalists, had been arrested and publications were seized and banned.<sup>259</sup> The Commission said that no situation could justify such a wholesale interference with freedom of expression.

Various bodies have found that the burden is on the government to show that a restriction on freedom of expression was necessary. In *Jong-Kyu v. Republic of Korea*, the UNHRC found against the state for failing to explain the specific threat to national security behind Jong-Kyu's statement in support of striking workers.<sup>260</sup> It made a similar argument in the case of *Vladimir Petrovich Laptsevich v. Belarus*.<sup>261</sup>

Courts have also insisted that there must be a close nexus between the restricted expression and an actual damage to national security or public order. Rather as in incitement to hatred – discussed later in this manual – courts will tend to look closely at the exact words used and the context of publication. What is the likely impact of the publication on the audience?

This approach can be seen very clearly in the many national security cases from Turkey before the ECtHR. *Okçuoğlu* participated in a round table discussion.<sup>262</sup> His

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<sup>257</sup> UNHRC, *Womah Mukong v. Cameroon*, Communication No. 458/1991, UN Doc. No. CCPR/C/51/D/458/1991 (1994).

<sup>258</sup> *Id.*, par. 9.7.

<sup>259</sup> African Commission on Human and Peoples' Rights, *Constitutional Rights Project and Civil Liberties Organisation v. Nigeria*, Communication No. 102/93 (1998).

<sup>260</sup> UNHRC, *Jong-Kyu Sohn v. Republic of Korea*, Communication No. 518/1992, UN Doc. No. CCPR/C/54/D/518/1992 (1995).

<sup>261</sup> UNHRC, *Vladimir Petrovich Laptsevich v. Belarus*, Communication No. 780/1997, UN Doc. No. CCPR/C/68/D/780/1997 (2000).

<sup>262</sup> ECtHR, *Okçuoğlu v. Turkey*, Application No. 24246/94 (1999).

comments were later published in an article entitled "The past and present of the Kurdish problem." He was imprisoned for these comments and later required to pay a fine, under a law protecting national security and preventing public disorder.

To determine if the restrictions were necessary, the Court looked at the words used and the context. It noted the "sensitivity of the security situation in south-east Turkey" and the government's fear that the comments would "exacerbate the serious disturbances." Yet the negative terms of some of the comments did "not amount to incitement to engage in violence, armed resistance, or an uprising" because the comments were published in a "periodical whose circulation was low, thereby significantly reducing their potential impact on 'national security', 'public order', or 'territorial integrity'."<sup>263</sup>

The Court reached a similar conclusion in the case of *Gerger v. Turkey*, decided on the same day. The Applicant in this case had written the commemoration address read out at a memorial service for two people executed by the government. What the Court found "essential to take into consideration" was that the address was read only to "a group of people attending a commemorative ceremony, which considerably restricted its potential impact on 'national security', public 'order' or 'territorial integrity'."<sup>264</sup>

On the other hand, in a third Turkish case, *Zana*, a mayor had expressed support for the Kurdistan Workers Party (PKK), engaged in armed struggle against the Turkish authorities.<sup>265</sup> Incidents of terrorism had increased in response to the mayor's comments.

"[T]he support given to the PKK ... by the former mayor of Diyarbakir, the most important city in south-east Turkey, in an interview published in a major national daily newspaper, had to be regarded as likely to exacerbate an already explosive situation in that region."<sup>266</sup>

In some cases the necessity of restrictions has been denied because material said to damage national security has already been published elsewhere. The most famous example of this was the "Spycatcher" cases before the ECtHR, *The Observer and Guardian v. the United Kingdom*<sup>267</sup> and *The Sunday Times v. the United Kingdom*.<sup>268</sup> The government succeeded in gaining injunctions against the newspapers in question to prevent publication of passages from unauthorized memoirs of a former member of the security service. The injunctions remained in place even after the book had been published in the United States, which made the material widely available in the United Kingdom too. The ECtHR held that there was a violation of Article 10, since there could be no necessity to prohibit the circulation of material that was already widely available. Of course, this consideration is likely to be even more frequent in the days of internet publication.

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<sup>263</sup> *Id.*

<sup>264</sup> ECtHR, *Gerger v. Turkey*, Application No. 24919/94 (1999), par. 50.

<sup>265</sup> ECtHR, *Zana v. Turkey*, Application No. 18954/91 (1997).

<sup>266</sup> *Id.*, par. 60.

<sup>267</sup> ECtHR, *Observer and Guardian v. the United Kingdom*, Application No. 13585/88 (1991).

<sup>268</sup> ECtHR, *The Sunday Times v. United Kingdom* (No. 2), Application No. 13166/87 (1991).

### G. Prior restraint in national security cases

We have noted that there is a general presumption against prior restraint. But surely national security interests are precisely the type of issue where it may be necessary to step in and prevent publication. There is little point – as in *Spycatcher* – in stepping in to stop publication of material that is already in the public domain. (Though the other lesson from *Spycatcher*, of course, was that the publication did no harm anyway.)

This was precisely the question that the United States Supreme Court confronted in *New York Times Co. v. United States* – better known as the "Pentagon Papers" case. The government sought prior restraint on publication of a large stash of documents – 47 volumes of them – labelled "top secret" and leaked from the Department of Defense.

The documents detailed the decision-making leading to its involvement in the Vietnam war and the government sought to prevent publication because of alleged damage to national security and relations with other countries.

In a brief judgment rejecting the request for prior restraint, the Court drew on earlier judgments to note that prior restraint can only be allowed in extreme circumstances:

"Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity" ... The Government "thus carries a heavy burden of showing justification for the imposition of such a restraint."<sup>269</sup>

Individual opinions by the judges elaborated on this reasoning. Justice Hugo Black argued:

"To find that the President has "inherent power" to halt the publication of news ... would wipe out the First Amendment and destroy the fundamental liberty and security of the very people the Government hopes to make "secure." ... The word "security" is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment. The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security ... ." <sup>270</sup>

This reasoning was echoed more recently by the Israeli Supreme Court:

"A democracy must sometimes fight with one arm tied behind her back. Even so, democracy has the upper hand. The rule of law and individual liberties constitute an important aspect of her security stance. At the end of the day, they strengthen her spirit, and this strength allows her to overcome her difficulties."<sup>271</sup>

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<sup>269</sup> United States Supreme Court, *New York Times Co. v. United States* ("Pentagon Papers" case), 403 US 713 (1971).

<sup>270</sup> *Id.*

<sup>271</sup> Supreme Court of Israel, *Beit Sourik Village Council v. The Government of Israel*, HCJ 2056/04 (2004).

While less categorical than Justice Black's reasoning, the ECtHR has also consistently warned of the danger of prior restraint, including in national security cases. Note, for example, its reasoning in the Spycatcher case:

"The dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court. This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest."<sup>272</sup>

Some of the same issues arose in the case of *Vereniging Weekblad Bluf! v. Netherlands*.<sup>273</sup> The magazine in question had got hold of an internal report by the internal security service (BVD). It showed the extent of the BVD's monitoring of the Communist Party and the anti-nuclear movement. The special issue of the magazine containing details of the report was seized. However, the offset plates were not and the magazine simply reprinted its issue. Later a court order was obtained banning the issue from circulation.

The Strasbourg Court in this case found, as with Spycatcher, that the court order withdrawing the magazine from circulation was not a necessary interference with Article 10, since the information in the issue was already publicly known. (The Court also questioned whether the contents were genuinely secret.) However, it rejected the argument from the magazine that Article 10 would in all instances prevent a state from seizing and withdrawing material from circulation. National authorities have to be able to take steps to prevent disclosure of secrets when this is truly necessary for national security.

### **Hypothetical case for discussion**

Your client is a magazine that has published an article about the standard issue infantry rifle of your country's army. Using first-hand (anonymous) testimony from serving soldiers, as well as interviews with experts, the article demonstrates that the rifle has serious shortcomings. It easily becomes overheated and jams, placing the lives of its users in danger in situations of combat.

The editor of the magazine and the author of the article are charged under the country's secrets laws and accused of endangering national security. What lines of argument would you use in their defence?

<sup>272</sup> ECtHR, *Observer and Guardian v. the United Kingdom*, Application No. 13585/88 (1991), par. 60.

<sup>273</sup> ECtHR, *Vereniging Weekblad Bluf! v. the Netherlands*, Application No. 16616/90 (1995).

## IX. MEDIA FREEDOM AND JUDICIAL PROCEEDINGS

### Discussion point

Why are the media an important part of the right to a fair trial?

The right to a fair trial and the right to freedom of expression often seem to be in conflict. In different jurisdictions around the world there have been many cases – some of which will be cited here – in which media freedoms have been limited in order to facilitate the impartial administration of justice.

The ECHR even makes "maintaining the authority and impartiality of the judiciary" a legitimate ground for limiting the right to freedom of expression under Article 10.

Yet, this may not be the best starting point. The right to a fair trial – or to a fair hearing on any matter, such as violation of rights – is a central and fundamental human right. It is guaranteed in Article 14 of the ICCPR, as well as the regional human rights treaties and national constitutions. A *fair* hearing is understood to mean a *public* hearing, encompassed in the old adage that justice must not only be done, but "be seen to be done".

In the modern age, a public hearing does not only mean that the doors of the courtroom are open to the family and friends of the participants. Media reporting is generally understood to be crucial part of making a trial public.

In some jurisdictions this is understood to include live broadcasts of trials. The defence team of the American footballer O.J. Simpson, charged with the murder of his wife, succeeded in having the trial proceedings televised live, resulting in a world audience for the real-life courtroom drama.

In the trial of another celebrity defendant – South African athlete Oscar Pistorius – the defence objected to the broadcast, although parts of it were indeed televised, excluding Pistorius's own testimony.

However, most jurisdictions do not go that far.

Why is publicity good for the administration of justice? The United States Supreme Court answered the question this way:

"A responsible press has always been regarded as the handmaiden of effective judicial administration, particularly in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the

miscarriage of justice by subjecting the police, prosecutors, and judicial process to extensive public scrutiny and criticism."<sup>274</sup>

(Interestingly, however, the court in this case found in favour of the plaintiff, who claimed that he had received an unfair trial because of excessive media attention. It was pointed out that "Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice.")<sup>275</sup>

Hence the correct way to approach any potential limitations on freedom of expression in respect of the administration of justice is no different from that employed for other potential limitations, whether based upon the ECHR ground (the authority and impartiality of the judiciary) or the broader "rights of others," including the right to a fair trial. The presumption is that the right to freedom of expression will prevail unless it is necessary to limit it for the purpose of ensuring the right to a fair hearing. This will be determined, as ever, by the three-part test: legitimate aim, prescribed by law, and necessary in a democratic society.

Many jurisdictions have arrived at some version of the above position. In Canada for example:

"Even before the Charter [of Rights and Freedoms], access to exhibits that were used to make a judicial determination, even ones introduced in the course of pre-trial proceedings and not at trial, was a well-recognised aspect of the open court principle..."<sup>276</sup>

"[C]urtailment of public accessibility can only be justified where there is present the need to protect social values of superordinate importance. One of these is the protection of the innocent."<sup>277</sup>

Courts in New Zealand take a similar approach, emphasizing the role of openness in public confidence in the judicial system:

"The courts must be careful in cases such as the present lest, by denying access to their records, they give the impression they are seeking to prevent public scrutiny of their processes and what has happened in a particular case. Any public perception that the courts were adopting a defensive attitude by limiting or preventing access to court records would tend to undermine confidence in the judicial system. There will of course be cases when a sufficient reason for withholding information is made out. If that is so, the public will or should understand why access has been denied. But unless the case for denial is clear, individual interests must give way to the public interest in

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<sup>274</sup> United States Supreme Court, *Sheppard v. Maxwell*, 384 US 333 (1966), par. 350.

<sup>275</sup> *Id.*

<sup>276</sup> Ontario Court of Appeal, *R v. Canadian Broadcasting Corporation* ONCA 726 (2010), par. 28 (in Canada, there is no relevant provision in the Charter of Rights and Freedoms).

<sup>277</sup> Supreme Court of Canada, *Attorney General of Nova Scotia v. MacIntyre*, 1 SCR 175 (1982) par. 187.

maintaining confidence in the administration of justice through the principle of openness."<sup>278</sup>

United States federal courts have interpreted the common law to mean that there is a presumption of access to court documents (including those gathered in the investigation and not necessarily presented in evidence):

"The presumption of access is based on the need for federal courts, although independent – indeed, particularly because they are independent – to have a measure of accountability and for the public to have confidence in the administration of justice."<sup>279</sup>

The problem, however, is that there may be a very large amount of material and much of it inaccurate. So the weight given to the presumption of access will be determined in light of such considerations.

In the South African case about the media's request to film the proceedings concerning the athlete Oscar Pistorius, who was on trial for murdering his girlfriend Reeve Steenkamp, the judge looked at the competing interests at stake and found that:

"...I have further considered the extensive interest that the pending criminal trial has evoked in the local and international communities as well as in media circles. My view is that it is in the public interest that, within allowable limits, the goings on during the trial be covered as I have come to decide to ensure that a greater number of persons in the community who have an interest in the matter but who are unable to attend these proceedings due to geographical constraints to name just one, are able to follow the proceedings wherever they may be. Moreover, in a country like ours where democracy is still somewhat young and the perceptions that continue to persist in the larger section of South African society, particularly those who are poor and who have found it difficult to access the justice system, that they should have a first-hand account of the proceedings involving a local and international icon. I have taken judicial notice of the fact that part of the perception that I allude to is the fact that the justice system is still perceived as treating the rich and famous with kid gloves whilst being harsh on the poor and vulnerable. Enabling a larger South African society to follow first-hand the criminal proceedings which involve a celebrity, so to speak, will go a long way into dispelling these negative and unfounded perceptions about the justice system, and will inform and educate society regarding the conduct of criminal proceedings."<sup>280</sup>

Also in South Africa the Constitutional Court has stated:

"From the right to open justice flows the media's right to gain access to, observe and report on, the administration of justice and the right to have access to

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<sup>278</sup> Supreme Court of New Zealand, *Rogers v. Television New Zealand Limited*, NZSC 91 (2007), par. 74.

<sup>279</sup> United States Court of Appeals, Second Circuit, *U.S. v. Amodio*, 71 F. 3d 1044 (1995).

<sup>280</sup> High Court of South Africa, Gauteng division, Pretoria, *Multichoice (Pty) Ltd and others v. The National Prosecuting Authority and another*, Case No. 10193/2014 (2014), par. 27.

papers and written arguments which are an integral part of court proceedings subject to such limitations as may be warranted on a case-by-case basis in order to ensure a fair trial."<sup>281</sup>

However, the judge in this Constitutional Court case stated that although "the default position" was "one of openness," a balancing exercise was required to ensure that the interests of justice were served.<sup>282</sup> For the reality is that there is some tension between freedom of expression and the fair administration of justice. In the following sections, we will look at four areas where this tension is likely to be evident:

- Reporting current criminal investigations;
- Reporting court proceedings;
- Criticism of judges (and other lawyers); and
- Protection of journalists' sources.

#### A. *Reporting current criminal investigations*

There is an obvious potential danger in reporting on investigations that are current and continuing. Aside from the risk that media comment and revelations may prejudice future court proceedings – which we will return to below – there may be a risk that reporting will interfere with the investigation. Media coverage may tip off those being investigated, or it may reveal the techniques that the police are using.

Yet courts have become increasingly reluctant to apply blanket restrictions to reporting of investigations. In a Canadian case, the government applied for an order to conceal the fact that search warrants had been issued in an investigation and the information that provided the basis for these warrants, on the basis that public disclosure could identify a confidential informant. The Supreme Court ultimately dismissed the government's appeal:

"Under certain conditions, public access to confidential or sensitive information related to court proceedings will endanger and not protect the integrity of our system of justice. ... Public access will be barred only when the appropriate court ... concludes that disclosure would subvert the ends of justice or unduly impair its proper administration."<sup>283</sup>

In other words, there was a presumption of openness that would only be restricted if there were evidence that the investigation would be harmed.

The ECtHR reached a similar conclusion in the case of *Weber v. Switzerland*. Franz Weber, a journalist and ecologist, had held a press conference criticizing (and thereby revealing) details of a continuing investigation. The Swiss law prohibited making public

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<sup>281</sup> Constitutional Court of South Africa, *Independent Newspapers v. Minister for Intelligence Services* [2008] ZACC 6, par. 41.

<sup>282</sup> *Id.*, par. 43.

<sup>283</sup> Supreme Court of Canada, *Toronto Star Newspapers Ltd. v. Ontario*, 2 S.C.R. 188 (2005), par. 3-4.

"any documents or information about a judicial investigation" until the investigation had been completed.<sup>284</sup>

The Strasbourg Court found that because the proceedings under investigation had already been made public, there was no interest in maintaining their confidentiality. Hence it was not "necessary in a democratic society" to impose a penalty on Weber. In addition, the statements could not be seen as an attempt to pressure the investigating judge and therefore prejudicial to the proper conduct of the investigation, because the investigation was already practically complete.<sup>285</sup>

The other issue that arises in reporting continuing investigations – often a more common one – is the selective release of information by the investigating authority. In principle the authorities should not be leaking details of the investigation to favoured journalists without making the information available to all.

The Committee of Ministers of the Council of Europe developed a recommendation on this point:

"When journalists have lawfully obtained information in the context of on-going criminal proceedings from judicial authorities or police services, those authorities and services should make available such information, without discrimination, to all journalists who make or have made the same request....

When judicial authorities and police services themselves have decided to provide information to the media in the context of on-going criminal proceedings, such information should be provided on a non-discriminatory basis and, wherever possible, through press releases, press conferences by authorised officers or similar authorised means..."<sup>286</sup>

### *B. Reporting court proceedings*

Article 14(1) of the ICCPR guarantees every person the right to "a fair and public hearing" of a criminal charge "or of his rights and obligations in a suit at law." A public hearing must clearly be understood to mean one where the media are present and may report on the proceedings.

**Point for discussion – why are public trials a good thing?**

Fundamentally, the argument in favour of public trials is that opening the proceedings to scrutiny will guarantee fairness. Hence "a fair and public hearing" is a phrase that cannot be taken apart – the fairness is dependent (in part) on the publicity.

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<sup>284</sup> ECtHR, *Weber v. Switzerland*, Application No. 11034/84 (1990), par. 20.

<sup>285</sup> *Id.*

<sup>286</sup> Council of Europe Committee of Ministers, *Recommendation Rec (2003) 13 on the provision of information through the media in relation to criminal proceedings*, 10 July 2003.

The media (and their audience) may often be interested in the coverage of trials because they see it as good=valued, cheap entertainment (see the O.J. Simpson trial, already discussed). But there is a more serious purpose. Informing and educating the public about the workings of the justice system is intended to make that system operate more fairly and efficiently. The general public interest in open trials is the reason why international courts have resisted the notion that trials could be closed if the parties agree. It is not a matter to be solved privately by the parties to a suit and courts may only exclude the public if to do so "would not run counter to any public interest."<sup>287</sup>

The UNHRC has observed that making trials public is "a duty upon the State that is not dependent on any request, by the interested party, that the hearing be held in public."<sup>288</sup> This means that the courts must make publicly available information about the location and time of hearings and make adequate provision to accommodate the public (including the media).

Nevertheless, Article 14 (1) of the ICCPR does provide:

"The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children."<sup>289</sup>

Hence the court does retain some discretion in deciding whether to restrict public access. The UNHRC has said that the grounds for excluding the public listed in Article 14(1) constitute an exhaustive list – there may be no other grounds for not allowing the public access to a trial. This applies equally to media access.<sup>290</sup> The burden of proof for showing that the public should be excluded lies with the State.<sup>291</sup>

There are, of course, intermediate steps that can be taken to fulfil the same interests, such as excluding the public for limited parts of a trial or imposing restrictions so that the media do not report certain names or facts.

### C. "Trial by media"

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<sup>287</sup> ECtHR, *Håkansson and Sturesson v. Sweden*, Application No. 11855/85 (1990), par. 66.

<sup>288</sup> UNHRC, *Van Meurs v. The Netherlands*, Communication No. 215/1986, UN Doc. CCPR/C/39/D/215/1986 (1990), paras. 6.1-6.2.

<sup>289</sup> ICCPR, *supra* note 3, Art. 14 (1).

<sup>290</sup> UNHRC, *General Comment No. 13: Article 14: Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law*, UN Doc. No. HRI/GEN/1/Rev.6 at 135 (1983), par. 6.

<sup>291</sup> UNHRC, *Miguel Angel Estrella v. Uruguay*, Communication No. 74/1980, UN Doc. Supp. No. 40 (A/38/40) (1980), par. 10.

One of the greatest concerns about media coverage of court proceedings is the danger of "trial by media" – in other words, that biased or ill-informed coverage will affect the outcome of a court case.

This concern is particularly acute in criminal cases where an essential element of a fair trial is the "presumption of innocence" – the principle that no one is to be regarded as guilty of a crime until the prosecution has proved its case.

This places a considerable ethical burden on journalists to report accurately and responsibly. It also places a burden on the courts to ensure that media coverage does not prejudice the fairness of proceedings. Ultimately, of course, the courts may feel it necessary to intervene to restrain irresponsible reporting.

However, this does not mean that all reporting and media comment is prohibited beyond a stenographic reproduction of what happens in court. As the ECtHR has observed:

"Whilst the courts are the forum for the determination of a person's guilt or innocence on a criminal charge, this does not mean that there can be no prior or contemporaneous discussion of the subject matter of criminal trials elsewhere, be it in specialised journals, in the general press or amongst the public at large.

Provided that it does not overstep the bounds imposed in the interests of the proper administration of justice, reporting, including comment, on court proceedings contributes to their publicity and is thus perfectly consonant with the requirement ... that hearings be public. Not only do the media have the task of imparting such information and ideas: the public also has a right to receive them (references omitted)."<sup>292</sup>

The ECtHR also recognizes that the possibility of the media influencing a court decision will vary depending on whether that decision is made by a jury (or lay judges) or professional judges. In the former situation, it may be more legitimate to require neutrality in the reporting of a case.<sup>293</sup>

If the case concerns a matter of particular public interest – for example if the defendant is a politician as in *Worm v. Austria* – the public have a particular right to receive different views on the matter:

"Such persons inevitably and knowingly lay themselves open to close scrutiny by both journalists and the public at large. Accordingly, the limits of acceptable comment are wider as regards a politician as such than as regards a private individual (references omitted)."<sup>294</sup>

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<sup>292</sup> ECtHR, *Worm v. Austria*, Application No. 22714/93 (1997), par. 50.

<sup>293</sup> *Id.*, par. 54; ECtHR, *Tourancheau and July v. France*, Application No. 53886/00 (2005), par. 75.

<sup>294</sup> ECtHR, *Worm v. Austria*, Application No. 22714/93 (1997), par. 50.

In other words, the general principle about greater scrutiny of the actions of politicians applies in legal cases, just as it does in relation to privacy. But politicians are still entitled to a fair trial and media are not entitled to make "statements which are likely to prejudice, whether intentionally or not, the chances of a person receiving a fair trial."<sup>295</sup>

The public interest applies more broadly than just to politicians. One of the first such cases considered by the ECtHR was that of *The Sunday Times v. the United Kingdom*.<sup>296</sup> In that case, the newspaper was challenging a court injunction restraining it from commenting on the responsibility of the company liable for the drug Thalidomide, which had caused birth deformations because there were continuing settlement negotiations.

The Strasbourg Court applied its three-part test and explicitly ruled out the state's contention that it was "balancing" the right to freedom of expression and the right to a fair trial:

"The Court is faced not with a choice between two conflicting principles but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted."<sup>297</sup>

In this case, the Court concluded that reporting was clearly in the public interest:

"In the present case, the families of numerous victims of the tragedy, who were unaware of the legal difficulties involved, had a vital interest in knowing all the underlying facts and the various possible solutions. They could be deprived of this information, which was crucially important for them, only if it appeared that its diffusion would have presented a threat to the 'authority of the judiciary' ...."<sup>298</sup>

The Court did not argue that it was invariably wrong to ban coverage, merely that the public interest was strong in this particular case. It also sounded an early warning against "trial by media":

"...it cannot be excluded that the public's becoming accustomed to the regular spectacle of pseudo-trials in the news media might in the long run have nefarious consequences for the acceptance of the courts as the proper forum for the settlement of legal disputes."<sup>299</sup>

Nevertheless, courts have been generally disinclined to interfere with media reporting. In a United States case, the Supreme Court refused to uphold a ban on reporting confessions said to have been made by a defendant in a murder case. It reasoned that that protection such a ban might offer would not justify prior censorship. Word of the

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<sup>295</sup> *Id.*

<sup>296</sup> ECtHR, *The Sunday Times v. United Kingdom*, Application No. 6538/74 (1979).

<sup>297</sup> *Id.*, par. 65.

<sup>298</sup> *Id.*, par. 66.

<sup>299</sup> *Id.*, par. 63.

confessions would probably spread anyway – and who is to say what influence this would have on jurors.<sup>300</sup> The point holds even more strongly in the age of the Internet.

**Question for discussion**

Does the balance of how far the media may comment on a court case vary depending on whether the case is to be decided by members of the public (a jury) or a trained legal professional (a judge)?

*D. Protection of privacy of participants*

There are a number of other grounds on which courts may limit reporting of proceedings. Most obviously – and uncontroversially – courts may limit the naming of children or the victims of certain types of crime (notably those of a sexual nature).

However, although the media will generally accept the validity of such restrictions and comply with them, there may nevertheless be exceptional cases.

One such arose in New Zealand, where a court ordered the suppression of the name of a witness in a trial, as well as the substance of the evidence, on the basis that the evidence was hearsay. There was considerable media speculation on the nature and content of the suppressed evidence.

The Court of Appeal took as its starting point that "in the absence of compelling reasons to the contrary, criminal justice is to be public justice."<sup>301</sup> However, when the privacy of the victims of crime was concerned, as in this case, they can be protected

"against the public disclosure of private facts where the facts disclosed are highly offensive and objectionable to a reasonable person of ordinary sensibilities."<sup>302</sup>

In this instance, however, the right to freedom of expression overrode privacy considerations:

"[T]he criminal justice system itself requires that some highly offensive facts, once private, do become public."<sup>303</sup>

The original court order had become counter-productive in that it had promoted speculation on the content of what had been suppressed:

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<sup>300</sup> United States Supreme Court, *Nebraska Press Ass'n. v. Stuart*, 427 US 539 (1976), p. 565-67.

<sup>301</sup> New Zealand Court of Appeal, *Television New Zealand Ltd v. R*, LRC 391 (1997).

<sup>302</sup> *Id.*

<sup>303</sup> *Id.*

"The suppression might itself "promote distrust and discontent". That speculation is not in the interests of the administration of justice and is itself a reason supporting the revoking of the prohibition order."<sup>304</sup>

So, although the Court of Appeal concluded that the ban was mistaken, this was only because it had potentially discredited the justice process, not because freedom of expression took precedence.

In a United States case, the Supreme Court ruled that a newspaper's First Amendment rights had been violated after it had been required to pay damages for revealing the name of a rape victim. However, similarly the Supreme Court found that it was not a violation of freedom of expression for the authorities to protect the anonymity of victims of sexual crimes. What had happened in this case was that the authorities had inadvertently released the name and there was no fault attached to the newspaper for publishing it.<sup>305</sup>

What about the privacy of an accused person? Bear in mind that a person who is accused of a crime is still regarded as innocent. Bear in mind also the danger of prejudicing a fair trial. However, in a case regarding an alleged breach of a defendant's privacy, the ECtHR ruled for the newspaper that had been fined by a domestic court for publishing a photograph of the accused.

B was a right-wing extremist, publicly known before his prosecution for a series of letter-bombings. *News* magazine published several photographs of B, under the headline "The Mad World of Perpetrators" – which seemed to imply B's guilt. The magazine was fined.

The Strasbourg Court found that there were reasons justifying the publication of the photographs. The case was a matter of major public interest, while B was already a public figure before the bombings case. Only one of the published pictures, of B's wedding, arguably disclosed details of his private life.<sup>306</sup>

In the case of *Lewis v. Wilson & Horton Ltd*, the New Zealand Court of Appeal overturned a judicial order granting anonymity to a drug smuggler. Lewis, a wealthy and prominent citizen, had imported illegal narcotics on board his yacht. He pleaded guilty and was discharged without conviction after making a large donation to charity. The judge prohibited publication of his identity. A newspaper applied for judicial review of the decision, which was then quashed, before arriving in the Court of Appeal.

The Court observed that although the law allowed a wide discretionary power to grant anonymity, this power should be exercised with care:

"What has to be stressed is that the prima facie presumption as to reporting is always in favour of openness."<sup>307</sup>

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<sup>304</sup> *Id.*

<sup>305</sup> United States Supreme Court, *Florida Star v. B.J.F.* 491 US 524 (1989).

<sup>306</sup> ECtHR, *News Verlags GmbH & CoKG v. Austria*, , Application No. 31457/96 (2000).

<sup>307</sup> New Zealand Court of Appeal, *Lewis v. Wilson & Horton Ltd*, 2 LRC 205 (2001).

The court will consider the personal damage to the person involved, including any impact on the prospects for reconciliation. However, "adverse personal and financial consequences" are to be expected, therefore:

"some damage out of the ordinary and disproportionate to the public interest in open justice in the particular case is required to displace the presumption in favour of reporting."<sup>308</sup>

The Court found in favour of the newspaper:

"in the absence of identified harm from the publicity which clearly extends beyond what is normal in such cases, the presumption of public entitlement to the information prevails. Any other approach risks creating a privilege for those who are prominent which is not available to others in the community and imposing censorship on information according to the court's perception of its value."<sup>309</sup>

It is important to underline that restrictions on reporting, when justified, are *exceptions* to the fundamental principle of openness in court proceedings. The South African Supreme Court of Appeal has ruled:

"[C]ourt records are, by default, public documents that are open to public scrutiny at all times. While there may be situations justifying a departure from that default position – the interests of children, State security or even commercial confidentiality – any departure is an exception and must be justified."<sup>310</sup>

#### *E. Criticism of judges (and other lawyers)*

How far is it allowed to criticize the judge?

The narrow interpretation of protecting the dignity of the court has often been understood to mean that it is contempt of court to criticize the judge. But is it? And does it make a difference whether the criticism is broad and generic or related to a particular case?

In one Australian case, a newspaper attacked the integrity and independence of the Australian Industrial Relations Commission, describing its members as "corrupt labour judges." The newspaper's publisher was charged with "bring[ing] a member of the Commission or the Commission into disrepute."<sup>311</sup>

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<sup>308</sup> *Id.*

<sup>309</sup> *Id.*

<sup>310</sup> South African Supreme Court of Appeal, *Ponnan JA in City of Cape Town v. South African National Roads Authority Limited & others*, (20786/14), ZASCA 58 (2015).

<sup>311</sup> High Court of Australia, *Nationwide News Pty Ltd v. Wills*, 177 CLR 1 (1992).

The Federal Court of Australia found that truthful and fair criticism of a court or judge is not contempt, even if it impairs public confidence:

"[I]t is no contempt of court to criticize court decisions when the criticism is fair and not distorted by malice and the basis of the criticism is accurately stated. To the contrary, a public comment fairly made on judicial conduct that is truly disreputable (in the sense that it would impair the confidence of the public in the competence or integrity of the court) is for the public benefit. It is not necessary, even if it be possible, to chart the limits of contempt scandalizing the court. It is sufficient to say that the revelation of truth - at all events when its revelation is for the public benefit - and the making of a fair criticism based on fact do not amount to a contempt of court though the truth revealed or the criticism made is such as to deprive the court or judge of public confidence."<sup>312</sup>

A Kenyan example involves criticism of a judge in a particular case – albeit not by the media but a lawyer outside court. Pheroze Nowrojee, an advocate, wrote to the registrar of the High Court protesting at the delay of the judge in deciding a motion in an important case amounting, he argued, to a refusal to adjudicate. The Attorney-General applied to the High Court for an order against Nowrojee for contempt.

The Court found in the respondent's favour. The judge should only be protected against "scurrilous abuse," whereas there was substance to the concern expressed in Nowrojee's letter:

"Such abuse must be distinguished from healthy comment and criticism, and the court must scrupulously balance the need to maintain its authority with the right to freedom of speech. The offence must be proved beyond reasonable doubt and it is a jurisdiction to be exercised only in the clearest cases of necessity in the interests of the administration of justice and the protection of the public from the result of undermining the authority of the court."<sup>313</sup>

In the Nowrojee case, the Court rejected the initial application against the respondent on the common law offence of "scandalizing the court," although this continues to be used in many common law jurisdictions. In the Indian case of *EMS Namboodiripad v. TN Nambiar*,<sup>314</sup> the Chief Minister of Kerala made a general statement accusing judges of class bias, unconnected to any specific case. The Supreme Court of India upheld his conviction on the basis that "the likely effects of his words must be seen and they have clearly the effect of lowering the prestige of Judges and Courts in the eyes of the people."<sup>315</sup> The Indian Supreme Court reached a similar conclusion in the case of *Sanjiv Datta*, who filed an affidavit critical of the court in a broadcasting case: "there is a danger of the erosion of the deference to and confidence in the judicial system...and an invitation to anarchy."<sup>316</sup>

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<sup>312</sup> *Id.*, par. 5.

<sup>313</sup> High Court of Kenya, *Republic v. Nowrojee*, Application No. 461 of 1990 (1990), par. 6.

<sup>314</sup> Supreme Court of India, *EMS Namboodiripad v. TN Nambiar*, AIR 1970 SC (1970).

<sup>315</sup> *Id.*, p. 2024.

<sup>316</sup> Supreme Court of India, *Sanjiv Datta and Ors. v. Unknown*, 19953 S.C.R. 450 (1996), par. 460.

However, the South African Constitutional Court has evaluated the offence of scandalizing the court against the provisions of that country's Bill of Rights. In *State v. Mamabolo*,<sup>317</sup> the Court concluded that there was a very narrow scope for a conviction for scandalizing the court, weighed against the Constitutional values of accountability and openness: "scandalising the court is not concerned with the self-esteem, or even the reputations, of judges as individuals...Ultimately the test is whether the offending context, viewed contextually, really was likely to damage the administration of justice."<sup>318</sup>

In an important decision on a case from Mauritius, the Privy Council quashed the conviction and sentence of a newspaper editor who had criticized the Chief Justice. In doing so it narrowed the scope of the offence of scandalizing the court. If judges were unfairly criticized "they have to shrug their shoulders and get on with it." Although the Privy Council said that there was a strong case for abolishing the offence, that was a matter for the Mauritian legislature. However, it would no longer be necessary for the journalist to demonstrate that he or she had acted in good faith. Rather, the prosecution will be required to prove beyond a reasonable doubt the bad faith behind the publication.<sup>319</sup>

As might be expected, the United States offers particularly strong protections of freedom of expression in criticism of judges. The Supreme Court has enunciated a "clear and present danger" test (echoed in recent Canadian jurisprudence), which requires that "substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished."<sup>320</sup>

In *Pennekamp et al. v. Florida*, the Court considered a series of articles criticizing Florida judges. Although the articles contained factual errors and "did not objectively state the attitude of the judges," they did not constitute a clear and present danger to the administration of justice. The State of Florida had hence not been justified in finding the journalists in contempt of court.<sup>321</sup>

The ECtHR has dealt with several cases, not entirely consistently, and with generally less liberal conclusions as regards freedom of expression.

In its first such case, *Barfod v. Denmark*, the Strasbourg Court considered the application of a journalist convicted of defamation for questioning the ability of two lay judges to reach an impartial decision in a case against their employer, the local government. The Court found no violation of freedom of expression, concluding that the article:

"...was not a criticism of the reasoning in the judgment...but rather...defamatory accusations against the lay judges personally, which was

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<sup>317</sup> Constitutional Court of South Africa, *State v. Mamabolo*, 10 BHRC 493 (2001).

<sup>318</sup> *Id.*, par. 45.

<sup>319</sup> Privy Council of Mauritius, *Dhooharika v. The Director of Public Prosecutions*, No. 0058 of 2012 (2014).

<sup>320</sup> United States Supreme Court, *Bridges v. California*, 314 US 252 (1941).

<sup>321</sup> United States Supreme Court, *Pennekamp et al. Florida*, 328 US 331 (1946).

likely to lower them in public esteem and was put forward without any supporting evidence."<sup>322</sup>

In *Prager and Oberschlick v. Austria*, the Court reached a similar decision in relation to an article of general criticism against judges of the Vienna Regional Criminal Court, some of whom were described as "arrogant" and "bullying." The ECtHR again declined to find a violation of Article 10, because of "the excessive breadth of the accusations, which, in the absence of a sufficient factual basis, appeared unnecessarily prejudicial."<sup>323</sup>

In *De Haes and Gijssels v. Belgium*, by contrast, the Court found in favour of the applicants, who had been convicted of contempt of court, following a series of articles criticizing a court decision in a children's custody case. It tried to differentiate this case from *Prager and Oberschlick*:

"Looked at against the background of the case, the accusations in question amount to an opinion, whose truth, by definition, is not susceptible of proof. Such an opinion may, however, be excessive, in particular in the absence of any factual basis, but it was not so in this instance; in that respect the present case differs from the *Prager and Oberschlick* case...."<sup>324</sup>

De Haes and Gijssels were "proportionate" in their criticisms and had offered to demonstrate the truth of their allegations. Even while finding in their favour, though, the Court underlined the priority in protecting public confidence in the judicial system:

"The courts — the guarantors of justice, whose role is fundamental in a State based on the rule of law — must enjoy public confidence. They must accordingly be protected from destructive attacks that are unfounded..."<sup>325</sup>

The Grand Chamber case *Morice v. France* concerned a lawyer who in the French newspaper *Le Monde* had criticised two investigative judges. The Court emphasised that:

"The key question in the statements concerned the functioning of a judicial investigation, which was a matter of public interest, thus leaving little room for restrictions on freedom of expression. In addition, a lawyer should be able to draw the public's attention to potential shortcomings in the justice system; the judiciary may benefit from constructive criticism".<sup>326</sup>

The Court further noted that:

"[...] while it may prove necessary to protect the judiciary against gravely damaging attacks that are essentially unfounded, bearing in mind that judges are prevented from reacting by their duty of discretion [...], this cannot have the

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<sup>322</sup> ECtHR, *Barfod v. Denmark*, Application No. 11508/05 (1989), par. 34-35.

<sup>323</sup> ECtHR, *Oberschlick v. Austria*, Application No. 11662/85 (1991), par. 37.

<sup>324</sup> ECtHR, *De Haes and Gijssels v. Belgium*, Application No. 19983/92 (1997), par. 47.

<sup>325</sup> *Id.*, par. 37.

<sup>326</sup> ECtHR (Grand Chamber), *Morice v. France*, Application No. 29369/10 (2015), par. 167.

effect of prohibiting individuals from expressing their views, through value judgments with a sufficient factual basis, on matters of public interest related to the functioning of the justice system, or of banning any criticism of the latter."<sup>327</sup>

Only a few months after the Grand Chamber ruling in *Morice v. France*, a new chamber ruling of the Court in the somewhat similar case *Perruzzi v. Italy* held that the criminal sanction imposed on a lawyer who had criticised the judiciary was compatible with Article 10 of the Convention.<sup>328</sup>

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<sup>327</sup> *Id.*, par. 168.

<sup>328</sup> ECtHR, *Perruzzi v. Italy*, Application No. 39294/09 (2015).

## X. PROTECTION OF SOURCES

The protection of confidential sources is usually regarded as a fundamental principle of journalistic ethics, and is increasingly protected in law as well.

In most instances good journalistic practice will rest on the open identification of sources, preferably as many as possible. This is part of the transparency that allows audience or readers to judge the quality of the information that the journalist presents.

For some stories, however – often the most important ones – the risk to the source may be too great for his or her identity to be safely revealed. The risk may be from criminals, the state or others. It may be a risk to life, liberty or livelihood.

Journalists have long understood that they sometimes depend on these confidential sources. They need to be able to *guarantee* anonymity against legal threats – otherwise future sources will not come forward. This is why legal protection is so important.

The landmark international case on this issue is *Goodwin v. the United Kingdom* from the ECtHR. The journalist had been fined for contempt by a British court for refusing to reveal the sources who had leaked information about a company's financial position.

The Court found in favour of the journalist. The company had a legitimate interest in trying to identify a "disloyal" employee, but this was outweighed by the need for a free press in a democratic society:

"Protection of journalistic sources is one of the basic conditions for press freedom.... Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest."<sup>329</sup>

It is important to understand that the public interest here is served by protecting the source from disclosure; it is not a particular right enjoyed by journalists. Hence the protection of sources may be invoked by communicators beyond the traditional journalistic profession. The Inter-American Commission on Human Rights has said:

Every social communicator has the right to keep his/her source of information, notes, personal and professional archives confidential.<sup>330</sup>

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<sup>329</sup> ECtHR, *Goodwin v. the United Kingdom*, Application No. 17488/90 (1996), par. 39.

<sup>330</sup> Inter-American Commission on Human Rights, *Inter-American Declaration of Principles on Freedom of Expression*, 108<sup>th</sup> session, 19 October 2000.

The Committee of Ministers of the Council of Europe has taken a similar position.

The EACJ ruling on the compliance of the Burundian press law with human rights standards, echoed the language of the ECtHR in *Goodwin*. The Burundian law requires journalists to reveal their sources in matters relating to "state security, public order, defence secrets and the moral and physical integrity of one or more persons." In relation to these matters, the Court held that the solution lay in "enacting other laws to deal with the issue and not by forcing journalists to disclose their confidential sources. There are in any event other less restrictive ways of dealing with these issues."<sup>331</sup>

The Declaration of Principles on Freedom of Expression in Africa states:

"Media practitioners shall not be required to reveal confidential sources of information or to disclose other material held for journalistic purposes except in accordance with the following principles:

- the identity of the source is necessary for the investigation or prosecution of a serious crime, or the defence of a person accused of a criminal offence;
- the information or similar information leading to the same result cannot be obtained elsewhere;
- the public interest in disclosure outweighs the harm to freedom of expression; and
- disclosure has been ordered by a court, after a full hearing."<sup>332</sup>

Of course, as the African Declaration makes clear, the right to maintain the confidentiality of sources (like the right to freedom of expression itself) is not an absolute one. The decision on whether to require disclosure should be made according to the same three-part test.

The Committee of Ministers of the Council of Europe issued a recommendation on the protection of sources that argues that protection of sources should only be overridden in the interests of protecting life, preventing major crime, or in defence of someone charged with a major crime.<sup>333</sup>

Of course, there is another type of case where the issue of protection of sources may arise, namely those where the journalist is on trial (or has been sued, for example for defamation). Revelation of sources may favour the journalist, but journalistic ethics would demand a refusal to disclose. (The Council of Europe recommendations are not alone in maintaining that courts should never order the revelation of confidential sources in a defamation case.)

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<sup>331</sup> EACJ, *Burundi Journalists' Union v. The Attorney General of the Republic of Burundi*, Ref. No. 1 of 2014 (2015).

<sup>332</sup> Declaration of Principles on Freedom of Expression in Africa, *supra* note 156.

<sup>333</sup> Council of Europe, *Recommendation No. R (2000) 7 of the Committee of Ministers to Member States on the right of journalists not to disclose their sources of information*, 8 March 2000.

Zimbabwean journalist Geoffrey Nyarota found himself in just such a situation. The editor of the *Bulawayo Chronicle*, Nyarota had exposed corrupt acquisition and sale of vehicles from the Willowvale car plant by government ministers and senior ruling party figures (inevitably dubbed "Willowgate"). One such minister, Nathan Shamuyarira, sued Nyarota for defamation. His counsel demanded that the editor reveal the identities of the sources who leaked details of the Willowgate scandal. Nyarota refused and later recalled in his memoirs:

"If they were not identified in court, the non-disclosure would in no way prejudice Shamuyarira as the plaintiff. Such failure to disclose would, however, effectively prejudice me, the defendant, because my refusal to identify the sources supporting my evidence would increase the burden on me to satisfactorily prove the truth of the allegations against the minister."<sup>334</sup>

In the event, the court did not require Nyarota to reveal his sources, using the reasoning already set out. Nyarota lost his case.

In a case from Singapore on a related question, the Court of Appeal used a "balancing of interests" approach to determine whether a journalist, James Dorsey, should be required to reveal his sources. Dorsey had written a blog entry, using information from a leaked report by PriceWaterhouseCoopers ("PWC"), relating to corruption in football. World Sports Group ("WSG") regarded the allegations as defamatory and sought to make Dorsey disclose his source – an application that was upheld by the lower court.

Note that in this case WSG did not actually sue Dorsey for defamation, which it was certainly able to, nor did it sue PWC whose report it was, but was trying to identify the whistleblower who had leaked the report.

The Court of Appeal noted that Singapore did not have a "newspaper rule" protecting Dorsey against being required to disclose his sources. In balancing the competing interests, however, it found in favour of the public interest of protecting the whistleblower:

"Whistleblowing and the reporting of corrupt activities by credible parties... should not be unnecessarily deterred by the courts, as such activities, given their surreptitious nature, are usually very difficult to detect. In fact, it should be reiterated that there is a compelling public interest consideration ever present in Singapore to encourage whistle blowing against corruption..."<sup>335</sup>

A related question is whether there may in some circumstances be a privilege for journalists in not being compelled to testify. This was the issue confronted by the International Criminal Tribunal for the Former Yugoslavia in the case against *Brdjanin* and *Talic*. The trial court issued a *subpoena* against Jonathan Randal, formerly a war correspondent with the *Washington Post*, who had interviewed Brdjanin during the

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<sup>334</sup> Geoffrey Nyarota, *Against the Grain: Memoirs of a Zimbabwean Newsmen*, (Zebra 2006), p. 196.

<sup>335</sup> Singapore Court of Appeal, *Dorsey v. World Sport Group Pte Ltd*, Civil Appeal No. 167 of 2012/M (2014), par. 75.

course of the war. Randal appealed to the Appeals Chamber of the Tribunal to set aside the *subpeona*.

Randal's argument, which the Appeals Chamber broadly accepted, was that war correspondents play a vital public role in documenting and publicizing events, such as the atrocities of which the defendants were accused. It would become much more difficult for them to play this role if it was known that they could be required to testify.

The Appeals Chamber offered a two-part test to determine whether journalists should be compelled to testify in these circumstances. First, did the journalist have evidence that was of direct value in determining a core issue in the case? Second, was there no alternative means of obtaining this evidence? In this case, given that the published article of the interview with Brdjanin was available, the two-part test was not satisfied.<sup>336</sup>

More recently, this issue was considered by the Canadian Supreme Court which upheld a decision of the lower courts compelling a Vice Media journalist to hand over material relating to communications with his source. In upholding the lower courts decision, the Supreme Court found that the established *Lessard* framework in essence remained a suitable model when considering applications for production orders relating to the media, and provides adequate protection to the media. The framework which seeks to balance the state's interest in the investigation and prosecution of a crime and the media's right to privacy in gathering and disseminating the news, sets out factors for judges to consider when determining whether to issue a search warrant to the media. The Canadian Supreme Court held that a four-part test, based on the *Lessard* framework, should be applied: 1. The authorising judge must consider whether to exercise his or her discretion to require notice to the media; 2. All statutory preconditions must be met; 3. The authorising judge must balance the state's interest in the investigation and prosecution of crimes and the media's right to privacy in gathering and disseminating the news; and 4. If the authorising judge decided to exercise his or her discretion to issue the order, he or she should consider imposing conditions to ensure that the media will not be unduly impeded in the publishing and dissemination of the news.

A. *What if the "journalist" is a blogger or a "citizen journalist"?*

The question of whether James Dorsey was entitled to invoke a journalist's right to protect sources arose in the Singapore case above. He was a blogger rather than a traditional journalist.

While clearly not everyone can enjoy this "right to protect confidential sources" in all circumstances, the application is in fact rather more widely enjoyed. The purpose of the principle, clearly, is to allow a whistle-blower to communicate evidence of wrongdoing to the public, as noted by the Singapore court. This is done through an intermediary – usually a journalist – whose name is publicly attached to the exposure.

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<sup>336</sup> International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Radoslav Brdjanin & Momir Talic*, Case No.: IT-99-36-AR73.9, Decision on Interlocutory Appeal (2002).

But if someone else exposed the story – a blogger, say, as in Dorsey's case – the principle would still apply.

Some international bodies avoid the term journalists altogether in this connection. The Declaration of Principles on Freedom of Expression adopted by the Inter-American Commission on Human Rights states:

"Every social communicator has the right to keep his/her source of information, notes, personal and professional archives confidential."<sup>337</sup>

The Recommendation adopted by the Council of Europe's Committee of Ministers provides, in similar terms:

The term "journalist" means any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication.

*B. Are there exceptions to the right to protect sources?*

The protection of sources – like the right to freedom of expression of which it is part – is not absolute. There will be occasions when courts are entitled to require journalists (or "social communicators") to reveal their sources.

What might these occasions be?

The Council of Europe Declaration already cited, along with the Declaration of Principles on Freedom of Expression in Africa, set out the possible circumstances:

- Only if there is an overriding requirement in the public interest. The Council of Europe Recommendation states that this could be the case only if disclosure was necessary to protect human life, to prevent major crime or for the defence of a person accused of having committed a major crime.
- The interest in disclosure should always be balanced against the harm to freedom of expression.
- Disclosure should only be ordered at the request of an individual or body with a direct, legitimate interest, who has demonstrably exhausted all reasonable alternative measures.
- The power to order disclosure of a source's identity should be exercised exclusively by courts of law.
- Courts should never order disclosure of a source's identity in the context of a defamation case.
- The extent of a disclosure should be limited as far as possible, for example just being provided to the persons seeking disclosure instead of general public.

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<sup>337</sup> Inter-American Commission on Human Rights, *The Inter-American Declaration of Principles on Freedom of Expression*, 108 session, 2-20 October 2000: Washington D.C., The United States.

- Any sanctions against a journalist who refuses to disclose the identity of a source should only be applied by an impartial court after a fair trial, and should be subject to appeal to a higher court.

It is not necessarily true that the more important the case, the more likely it is that sources should be disclosed. As the Norwegian Supreme Court has pointed out, the greater the interest to order the disclosure of sources, the greater also the need to protect them in many instances:

"In some cases ... the more important the interest violated, the more important it will be to protect the sources. ... It must be assumed that a broad protection of sources will lead to more revelations of hidden matters than if the protection is limited or not given at all."<sup>338</sup>

*C. What if the authorities don't bother going to court – but just raid the journalist's premises?*

The ECtHR has dealt with this situation and was highly critical of an attempt by the state (Luxembourg) to bypass the requirement that a court determine whether a journalist is required to reveal a confidential source:

"The Court considers that, even if unproductive, a search conducted with a view to uncover a journalist's source is a more drastic measure than an order to divulge the source's identity. This is because investigators who raid a journalist's workplace unannounced and armed with search warrants have very wide investigative powers, as, by definition, they have access to all the documentation held by the journalist. The Court ... thus considers that the searches of the first applicant's home and workplace undermined the protection of sources to an even greater extent than the measures in issue in *Goodwin*."<sup>339</sup>

The danger posed is clearly broader than to the journalist affected (and the source). The possibility that the police may turn up with a search warrant is likely to have a "chilling effect" on investigative journalism. For this reason, courts in some countries have demanded higher standards for the issuing of search warrants where these affect journalism and freedom of expression.

Hence the United States Supreme Court, for example, made this observation in a case where police conducted a raid to seize books:

"The authority to the police officers under the warrants issued in this case, broadly to seize "obscene . . . publications," poses problems not raised by the warrants to seize "gambling implements" and "all intoxicating liquors" ... the use of these warrants implicates questions whether the procedures leading to

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<sup>338</sup> Supreme Court of Norway, the "*Edderkopp*" case (*HR-1992-10-A - Rt-1992-39*), LNR 10/1992, JNR 34/1991, (1992), p. 39.

<sup>339</sup> ECtHR, *Roemens Schmit v. Luxembourg*, Application No. 51772/99 (2003), par. 57.

their issuance and surrounding their execution were adequate to avoid suppression of constitutionally protected publications."<sup>340</sup>

A British court expressed similar disquiet about a case where the journalist raided had been investigating possible wrongdoing by public authorities:

"Legal proceedings directed towards the seizure of the working papers of an individual journalist, or the premises of the newspaper or television programme publishing his or her reports, or the threat of such proceedings, tend to inhibit discussion. When a genuine investigation into possible corrupt or reprehensible activities by a public authority is being investigated by the media, compelling evidence is normally needed to demonstrate that the public interest would be served by such proceedings. Otherwise, to the public disadvantage, legitimate inquiry and discussion, and 'the safety valve of effective investigative journalism' ... would be discouraged, perhaps stifled (reference omitted)."<sup>341</sup>

The French Criminal Procedure Code provides:

"Searches of the premises of a press or broadcasting company may be conducted only by a judge or a State prosecutor, who must ensure that the investigations do not endanger the free exercise of the profession of journalism and do not obstruct or cause an unjustified delay to the distribution of information."<sup>342</sup>

These additional procedural protections are required because raids on journalistic premises are almost automatically an interference with freedom of expression and are hence subject to the three-part test – a decision for a judge, not a police officer.

In the case of *Sanoma v. The Netherlands*, the Grand Chamber of the ECtHR overruled a decision by the Third Section of the Court in a case where police arrested a newspaper editor who refused to hand over photographs and threatened to close down the newspaper.<sup>343</sup> The Court found that the quality of the relevant national law was deficient as there was no procedure in place to allow an independent assessment of whether a criminal investigation overrode the public interest in the protection of journalistic sources. One of the deficiencies in the national law was the lack of an independent judge or other decision-making body to review an order for disclosure, prior to the disclosure of the material in which the sources were identified. The Court stated that, whilst it accepted that elaborate reasons may not always be given for urgent requests, at the very least an independent review should be carried out prior to the access and use of the obtained material.<sup>344</sup> The state entity should also consider whether a less intrusive measure can suffice, if an overriding public interest is

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<sup>340</sup> United States Supreme Court, *Marcus v. Search Warrant*, 367 US 717 (1961), par. 730-31.

<sup>341</sup> Divisional Court of England and Wales, *Rv. Central Criminal Court, ex parte the Guardian, the Observer and Martin Bright*, 2 All ER 244, 262 (2001).

<sup>342</sup> French Criminal Procedure Code, Article 56-2. See also e.g.: Sections 97-98 of the German Criminal Procedure Code, Article 18.01(e) of the Texas Code of Criminal Procedure.

<sup>343</sup> ECtHR (Grand Chamber), *Sanoma Uitgevers B.V. v. the Netherlands*, Application No. 38224/03 (2010).

<sup>344</sup> *Id.*, par. 91.

established by the authorities seeking disclosure.<sup>345</sup> Relevant and non-relevant information should also be separated at the earliest available opportunity, and any judge or other person responsible for the independent review should have appropriate legal authority.<sup>346</sup>

Similarly, in the case of *Telegraaf v. the Netherlands*, the Court stated that in order for a national law to be of sufficient quality, it had to have safeguards appropriate to the nature of the powers used to discover journalistic sources (in this case, surveillance). In that case, it was also found that the lack of a prior review by an independent body with the power to prevent or terminate the interference meant that the law was deficient and there was, therefore, a violation of Article 10.<sup>347</sup>

The purpose of this chapter is to summarise the Court's approach to the protection of journalistic sources. In doing so, the principles and guidelines which have emerged from relevant case law related to the freedom of expression have been assessed. The chapter explains the law protecting journalists from having to disclose their sources rather than the law related to the protection of the sources themselves (whistleblowers), although there is some overlap between the two.

However, it may be relevant to have a brief look at the standards for whistleblower protection set out by the ECtHR. The leading case of *Guja v. Moldova* concerned the head of the press department of the Moldovan public prosecutor's office who was dismissed when he informed a newspaper about a letter from the Deputy Speaker of Parliament in which the Deputy Speaker implicitly suggested that the investigation against four police officers should be stopped. The ECtHR found a violation of Article 10 of the Convention and formulated six factors for when a whistleblower may be protected. First, dissemination of the information should only be considered when internal reporting is "clearly impracticable".<sup>348</sup> Second, the interest, which the public may have in particular information, can sometimes be so strong as to override even a legally imposed duty of confidence.<sup>349</sup> Third, the information disclosed must be accurate and reliable.<sup>350</sup> Fourth, the Court must look at whether the damage suffered by the public authority as a consequence of the disclosure in question outweighs the interest of the public in having the information revealed.<sup>351</sup> Fifth, the person revealing the information should act in good faith. Hence "an act motivated by a personal grievance or a personal antagonism or the expectation of personal advantage, including pecuniary gain, would not justify a particularly strong level of protection".<sup>352</sup> Lastly, the Court must look at the penalty imposed in order to measure whether the interference was proportionate.<sup>353</sup> The factors are part of the overall balancing of

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<sup>345</sup> *Id.*, par. 92.

<sup>346</sup> *Id.*, par. 91.

<sup>347</sup> ECtHR, *Telegraaf Media Nederland Landelijke Media B.V. and others v. the Netherlands*, Application No. 39315/06 (2013).

<sup>348</sup> ECtHR, *Guja v. Moldova*, Application No 14277/04 (2008), par. 73.

<sup>349</sup> *Id.*, par. 74.

<sup>350</sup> *Id.*, par. 75.

<sup>351</sup> *Id.*, par. 76.

<sup>352</sup> *Id.*, par. 77.

<sup>353</sup> *Id.*, par. 78.

interests that the Court must make. This has been reaffirmed in a number of cases concerning whistleblower protection.<sup>354</sup>

#### *D. Source protection in the context of mass surveillance*

Technological developments have placed “significant strain” on the legal frameworks that have enabled journalists to protect the confidentiality of their sources.<sup>355</sup> Regimes allowing bulk surveillance and the retention of communications or “metadata” have provided States the capacity to conduct sophisticated and invasive surveillance of citizens – enabling the routine collection of information that might easily identify a source.

The ECtHR considered the implications of the United Kingdom’s regime of bulk surveillance and metadata acquisition in *Big Brother Watch v UK*.<sup>356</sup> In doing so, it recognised the intrusive nature of modern surveillance, noting that a single piece of communications data may reveal the identity of a source and in bulk, and when subjected to modern data-mining technology, such data may reveal an enormous range of (journalistically privileged) information.<sup>357</sup>

The Court went on to find that surveillance regime violated Article 10 of the Convention, in part, on the basis to a failure to protect journalistic source confidentiality. While the regime afforded enhanced protections to journalists where the data was sought for the specific purpose of identifying a source, it did *not* provide enhanced protection to intrusions on other forms of journalistic communications. Furthermore, there were no special provisions restricting access for the purpose of combating “serious crime”.<sup>358</sup>

#### **Hypothetical case for discussion**

You are a judge. The police have applied to you for an order to seize unbroadcast television footage of recent civil disturbances. There are a number of criminal cases arising out of the disturbances and the police believe that there may be evidence in the footage that can be used to build their cases.

The television company argues that surrendering the footage will compromise its future ability to cover public events, especially where violence takes place or is threatened. What is your decision?

<sup>354</sup> See: ECtHR, *Frankowicz v. Poland*, Application No. 53025/99 (2008); see also: ECtHR, *Maschenko v. Ukraine*, Application No. 4063/04 (2009); see also: ECtHR, *Kudeshkina v. Russia*, Application No. 29492/05 (2009); see also: ECtHR, *Pasko v. Russia*, Application No. 69519/01 (2009); see also: ECtHR, *Sosinowska v. Poland*, Application No. 10247/09 (2011); see also: ECtHR, *Heinisch v. Germany*, Application No. 28274/08 (2011); see also: ECtHR, *Bucur and Toma v. Romania*, Application No. 40238/02 (2013).

<sup>355</sup> Julie Posetti, “Protecting journalism sources in the digital age”, UNESCO, 2017, 5.

<sup>356</sup> ECtHR, *Big Brother Watch and others v United Kingdom*, Application 58170/13 and others (2018).

<sup>357</sup> *Id.*, par 356.

<sup>358</sup> *Id.*, par 499.

## XI. HATE SPEECH AND INCITEMENT

The issue of "hate speech" and incitement is one that creates an enormous amount of disagreement among defenders of freedom of expression. Free speech advocates usually having little difficulty uniting against infringement of press freedom in the name of national security, say, or the reputation of politicians, yet there is much less unanimity in defence of expressions of hatred.

This is because, in principle, speech that expresses or incites hatred is not only potentially subject to limitation under Article 19(c) of the ICCPR, but it also conflicts directly with an explicit obligation in Article 20 of the ICCPR to prohibit incitement to hatred:

- "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."<sup>359</sup>

The balance between freedom of expression and protection against incitement is understood very differently in different jurisdictions. On the one hand, the United States, given the near absolute character of the First Amendment to its constitution protecting free speech and press freedom, has permitted hate speech and will only draw a line when there is a "clear and present danger" of hateful expression resulting in violence. By contrast, the ECtHR has applied its usual reasoning in determining the legitimacy, lawfulness and necessity of any given restriction on freedom of expression, with differing outcomes. National jurisdictions have taken a wide range of approaches, with none as permissive as the United States. Even within Europe, which is more restrictive on this issue than the US, there is a considerable divergence between countries like France and Germany, with extensive legal prohibitions on hate speech, and the United Kingdom, which is more permissive.

- Incitement, or a similar offence, exists in many legal systems. It is an inchoate crime – that is to say, it is not necessary that the action being incited actually has to occur. The question, therefore, is what test should apply to determine that speech is in fact incitement.
- Should specific past events be off limits for discussion because of their sensitive or offensive character (for example the Nazi Holocaust of European Jews)?
- How far can the general protection of political speech be understood to protect hateful speech?
- To what extent can the media be held liable for reporting hateful sentiments expressed by others?

In addition to Article 20 of the ICCPR, which can be properly interpreted as being consistent with the requirements of Article 19(3), another international instrument requires the prohibition of hate speech. The Convention on the Elimination of Racial Discrimination, in Article 4, requires that States Parties:

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<sup>359</sup> ICCPR, *supra* note 3, Art. 20.

"(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;

(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination."<sup>360</sup>

The jurisprudence of the Committee on the Elimination of Racial Discrimination has been extremely problematic in its inconsistency with the UNHRC – charged with interpreting ICCPR Articles 19 and 20 – and with most regional and national case-law.

The Committee on the Elimination of Racial Discrimination (CERD) itself recognizes the inherent tension between freedom of expression and prohibition of speech that incites to discrimination, referring to the need for Article 4 to be interpreted in line with the principles contained in the Universal Declaration of Human Rights. However, the CERD committee has sometimes been inclined to disregard this tension, as for example in the recent case of *TBB v. Germany*, where the Committee found against Germany for its failure to prosecute an individual for offensive and derogatory statements about Turkish people made in the course of a magazine interview.<sup>361</sup> The refusal to prosecute was made on freedom of expression grounds. A dissenting opinion by Committee member Carlos Manuel Vazquez offers cogent reasons for deferring to the national prosecutors' reading of the situation, with a much more nuanced appreciation of the tension between freedom of expression and combating hate speech.<sup>362</sup>

In *Ross v. Canada*, the UNHRC observed that:

"restrictions on expression which may fall within the scope of Article 20 must also be permissible under Article 19, paragraph 3, which lays down requirements for determining whether restrictions on expression are permissible."<sup>363</sup>

This implies that the same three-part test – legitimate aim, prescribed by law, necessary in a democratic society – that is required for applying a restriction under Article 19(3) applies equally to the restrictions required by Article 20. Importantly, this

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<sup>360</sup> Art. 4, United Nations General Assembly, *Convention on the Elimination of All Forms of Racial Discrimination*, GA Resolution 2106 (XX), (21 December 1965).

<sup>361</sup> Committee on the Elimination of Racial Discrimination, *TBB v. Germany*, *Communication No. 48/2010*, CERD/C/82/D/48/2010 (2013).

<sup>362</sup> *Id.*

<sup>363</sup> UNHRC, *Ross v. Canada*, *Communication No. 736/1997* (2000), par. 10.6.

contrasts with the way in which Article 4 of the CERD has usually been understood and applied.

The UNHRC has decided a number of cases involving hate speech, generally in favour of restrictions on freedom of expression, but offering a clearer line of reasoning to be emulated.

In *Ross v. Canada*, mentioned above, the UNHRC made clear how freedom of expression may be limited for the "rights and reputations of others." In this instance, Ross was a school teacher responsible for anti-semitic statements and publications, who had been removed from his teaching position. The Committee remarked that others had the "right to have an education in the public school system free from bias, prejudice and intolerance".<sup>364</sup>

In *Faurisson v. France*, the Committee made clear that the interests to be protected by restricting freedom of expression were those of the community as a whole. Faurisson was a professor of literature convicted of violating the Gayssot Act, which makes it a crime to contest the facts of the Holocaust. He had expressed doubts in his publications about "the existence of gas chambers for extermination purposes."<sup>365</sup>

The Committee analysed whether the restrictions "were applied for the purposes provided for by the Covenant." These included not only "the interests of other persons [but also of] those of the community as a whole". In particular, such interests included the interest "of the Jewish community to live free from fear of an atmosphere of anti-semitism".<sup>366</sup>

A. Was "hate speech" intended to incite?

One important strand in the case law on hate speech has been the requirement that the speaker (or author) *intended* to incite hatred. Perhaps the key case in this regard is *Jersild v. Denmark* before the ECtHR. Jersild was a television journalist who made a documentary featuring interviews with members of a racist, neo-Nazi gang. He was prosecuted and convicted for propagating racist views – indeed the case was included in Denmark's report to the CERD as an example of its commitment to suppress racist speech.<sup>367</sup>

When Jersild took his case to the ECtHR in Strasbourg, however, the Court took a different view. The journalist's *intent*, clearly, was to make a serious social inquiry exposing the views of the racist gangs, not to promote their views. There was a clear public interest in the media playing such a role:

"Taken as a whole, the feature could not objectively have appeared to have as its purpose the propagation of racist views and ideas. On the contrary, it clearly sought - by means of an interview - to expose, analyse and explain this

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<sup>364</sup> *Id.*, par. 6.11.

<sup>365</sup> UNHRC, *Robert Faurisson v. France*, Communication No. 550/1993, U.N. Doc.CCPR/C/58/D/550/1993 (1996).

<sup>366</sup> *Id.*, par. 9.6.

<sup>367</sup> ECtHR, *Jersild v. Denmark*, Application No. 15890/89 (1994).

particular group of youths, limited and frustrated by their social situation, with criminal records and violent attitudes, thus dealing with specific aspects of a matter that already then was of great public concern..."<sup>368</sup>

In its consideration of the case, the ECtHR made an observation, often repeated subsequently, about the courts having no role in determining how journalists go about their work:

"...the methods of objective and balanced reporting may vary considerably, depending among other things on the media in question. It is not for this Court, nor for the national courts for that matter, to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists."<sup>369</sup>

Hence:

"The punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so."<sup>370</sup>

The ECtHR has similarly dealt with the issue of intent in some of its Turkish cases. In *Gokceli*, the Court invoked the "attitude" behind a writer's articles on the Kurdish situation as evidence that "the tenor of the article could not be said to be an incitement to the use of violence..."<sup>371</sup>

In *Gunduz*, where the issue was the broadcast of a television programme about Islam and *sharia* law, the Court said that "the simple fact of defending shari'a, without calling for violence for its establishment, cannot not be said to be 'hate speech'."<sup>372</sup>

By contrast, in *Surek*, in which the Court did find the publication to be "hate speech and glorification of violence", there was found to be a "clear intention to stigmatise the other side to the conflict", that constituted "an appeal to bloody revenge".

Some national courts have followed a similar approach. In *R. v. Keegstra*, the Supreme Court of Canada had to determine the consistency of a section of the Criminal Code prohibiting "wilful promotion of hatred" on racial or ethnic grounds with the freedom of expression provisions of the Canadian Charter of Rights and Freedoms. Although the Court upheld the section of the Criminal Code, it did so by focusing on the word "wilful" and underlining the importance of subjective intent. "Wilfully" meant, according to the Court, that the "accused subjectively desires the promotion of hatred or foresees such a consequence as certain or substantially certain to result ...". The Court went on to note that "this stringent standard of *mens rea* is an invaluable means of limiting the

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<sup>368</sup> *Id.*, par. 33-35.

<sup>369</sup> *Id.*, par. 31.

<sup>370</sup> *Id.*, par. 35.

<sup>371</sup> ECtHR, *Gokceli v. Turkey*, Application Nos. 27215/95 and 36194/97 (2003), par. 22 (translation from French).

<sup>372</sup> ECtHR, *Gunduz v. Turkey*, Application No. 35071/97 (2003), par. 51.

incursion of s. 319(2) into the realm of acceptable (though perhaps offensive and controversial) expression".<sup>373</sup>

The special rapporteurs on freedom of expression for the United Nations, OSCE and the OAS have also taken the view that there is an intent requirement if hate speech is to be used as a ground to limit freedom of expression:

"In accordance with international and regional law, hate speech laws should, at a minimum, conform to the following:

[N]o one should be penalised for the dissemination of hate speech unless it has been shown that they did so with the intention of inciting discrimination, hostility or violence."<sup>374</sup>

*B. Must violence or hatred actually result?*

Incitement is what is known as an *inchoate* offence. That means that there is no requirement that hatred (or violence or discrimination) actually results from it. However, there must be the possibility of demonstrating a plausible nexus between the offending words and some undesirable consequence. Courts in different jurisdictions have differed on what exactly this nexus should be.

The United States (perhaps not surprisingly) has the strictest test. Its standard – usually known as "clear and present danger" – derives from the Supreme Court decision in *Brandenburg v. Ohio*. Brandenburg was a leader of the racist Ku Klux Klan. He and his confederates held a rally to which they invited representatives of the press. They displayed weapons, burned crosses and made racist comments. They were convicted under a law banning "advocat[ing] ... the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform".<sup>375</sup>

In its decision, the Supreme Court concluded that a restriction on advocacy of the use of force not only required the intent to incite but also a finding that it "is likely to incite or produce such action."<sup>376</sup>

Few other jurisdictions (with the partial exception of Israel) have such a stringent standard. Nevertheless, many do require that there is some demonstrable connection between the hateful expression and the undesirable outcome. This was the view of the UNHRC in the *Ross* case already discussed. The reason why the suspension of the anti-semitic teacher was not a violation of freedom of expression was that his statements were partly to blame for a "poisoned school environment" experienced by Jewish children.<sup>377</sup>

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<sup>373</sup> Supreme Court of Canada, *R v. Keegstra*, 3 S.C.R. 697 (1990).

<sup>374</sup> The UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, *Joint Statement on Racism and the Media* (27 February 2001). p. 2.

<sup>375</sup> United States Supreme Court, *Brandenburg v. Ohio*, 395 US 444 (1969).

<sup>376</sup> *Id.*

<sup>377</sup> UNHRC, *Ross v. Canada, Communication No. 736/1997* (2000), par. 10.6.

### C. *The danger of vagueness*

As we have seen, the obligation to prohibit racist discrimination and violence is strongly rooted in international human rights law. It can be defined according to the intent behind it and the real possibility that it will cause violent or discriminatory consequences. The danger, clearly, is that vague prohibitions are used to penalize expression that has neither the intent nor the realistic possibility of inciting hatred. Many of the Turkish cases heard by the Strasbourg Court fall into this category.

The Constitutional Court of South Africa reflected at length and constructively on precisely this issue. In *The Islamic Unity Convention v. The Independent Broadcasting Authority et al*, it was required to rule upon the constitutionality of clause 2(a) of the Code of Conduct for Broadcasting Services, which prohibited the broadcast of "any material which is ... likely to prejudice ... relations between sections of the population". There is no constitutional protection for propaganda for war, incitement of imminent violence, and the advocacy of hatred. However, the Court noted that material that might prejudice relations between sections of the population might not necessarily fall into these categories.

Whereas the constitutional definition was "carefully circumscribed, no such tailoring is evident in" the language of clause 2(a). The latter, by contrast, was "so widely-phrased and so far-reaching that it would be difficult to know beforehand what is really prohibited or permitted". Hence the Court found clause 2(a) inconsistent with the constitutional right to freedom of expression.<sup>378</sup>

#### A. *Advocacy of genocide and Holocaust denial: a special case?*

Within the debate on hate speech and incitement, the issue of advocacy of genocide and Holocaust denial occupies a particular place – although the phenomena are certainly not identical.

The 1948 Genocide Convention lists among its punishable acts "direct and public incitement to commit genocide."<sup>379</sup> This followed the trial at the Nuremberg Tribunal of Julius Streicher, editor of the pro-Nazi newspaper *Der Stürmer*, who was convicted of crimes against humanity and hanged for his incitement of genocide, having called for the extermination of the Jews. The tribunal linked Streicher's propaganda to the actual genocide of Jews. Another Nazi publicist, Hans Fritzsche, was acquitted on the basis that, although there was evidence of his anti-semitism, the link between his work and the genocide was less direct.

In the 1994 Rwanda genocide, the media again played a role in generating propaganda against the victims. This role led to the first prosecutions at the International Criminal Tribunal for Rwanda (ICTR) for "direct and public incitement to commit genocide." This was defined as an inchoate offence, meaning that it was not

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<sup>378</sup> Constitutional Court of South Africa, *Islamic Unity Convention v. Independent Broadcasting Authority*, (4) SA 294 (CC); (5) BCLR 433 (CC) (2002).

<sup>379</sup> United Nations General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, Resolution 260 (III) (9 December 1948), Art. 3.

necessary that the genocide actually occurred, but required the intent on the part of the accused that it should do so. "Direct" was defined in a broad sense, not necessarily meaning explicit, but with the implication that listeners were being called on to take some specific action. When specific action was not called for, this was defined as "hate propaganda."

There were several cases brought against journalists at the ICTR, notably *Nahimana et al*, often known as the Media Trial.<sup>380</sup> Two of the three journalists in the latter case were the founders of a radio station that broadcast anti-Tutsi propaganda before the genocide. Once it had started, the station actually broadcast the names and licence plate numbers of intended victims.

The Tribunal found: "The actual language used in the media has often been cited as an indicator of intent." However, it is not necessary to show "any specific causation ... linking the expression at issue with the demonstration of a direct effect."<sup>381</sup>

The Rome Statute establishing the ICC also establishes the crime of incitement to genocide – although not incitement to any of the other crimes (such as crimes against humanity, war crimes etc.) covered by the treaty.

The genocide of the Jews in Nazi-occupied Europe was such a formative event in the creation of the European human rights system that Holocaust denial – claiming that the genocide did not occur – is an offence in several countries and is treated in a particular fashion within the ECtHR jurisprudence.

The usual approach of the Court has been to use the Article 17 "abuse clause" to deny Holocaust deniers the protection of Article 10. Article 17 prohibits the abuse of rights in the Convention to deny the rights of others. The Court ruled the application of Roger Garaudy inadmissible on Article 17 grounds:

"Denying crimes against humanity is one of the most serious forms of racial defamation of Jews and of incitement to hatred of them."<sup>382</sup>

Garaudy had written a book entitled *The Founding Myths of Modern Israel*, denying the Holocaust and hence falling foul of French law.

However, it is noteworthy that the Strasbourg Court has only used this approach in the specific instance of Holocaust denial and not other historical revisionism, even when closely related. Hence in the case of *Léhideux and Isorni v. France* it found a violation of Article 10. The two authors had written in defence of the pro-German French wartime leader Marshal Pétain and had been convicted of defending war crimes and collaboration. The Court observed:

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<sup>380</sup> International Criminal Tribunal for Rwanda, *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze*, Case No. ICTR-99-52-T (2003).

<sup>381</sup> *Id.*, par. 86-90.

<sup>382</sup> ECtHR, *Garaudy v. France*, Application No. 65831/01 (2003).

"...the lapse of time makes it inappropriate to deal with such remarks, forty years on, with the same severity as ten or twenty years previously."<sup>383</sup>

### B. Religious defamation

Many states have laws prohibiting defamation of religions, while in the common law there exists the crime of blasphemous libel.

Because of the doctrine of the "margin of appreciation," the ECtHR has been very reluctant to find against states in matters of blasphemy and defamation of religions. Because this falls within the area of "public morals," the Court often declines to interfere in decisions made at the national level:

"The absence of a uniform European conception of the requirements of the protection of the rights of others in relation to attacks on their religious convictions broadens the Contracting States' margin of appreciation when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or religion..."<sup>384</sup>

As mentioned above the ECtHR applies a doctrine of the "margin of appreciation." This refers to the flexibility available to states in applying the European Convention on Human Rights. The margin in cases involving political speech, for example, will be very small because this is regarded as being a common value of great importance. The margin will be considerably greater for cases involving "public morals" because this is an area of greater cultural difference between European countries.

In more recent cases, however, the Court has been reluctant to find that religions have been defamed. In *Giniewski v. France*, in which a writer published an article critically examining Roman Catholic doctrine and linking it to anti-semitism and the Holocaust, the Court found that a verdict of defaming religion was a violation of Article 10. While it invoked the margin of appreciation doctrine, the Court still underlined the importance of a liberal application of Article 10 on matters of general public concern (of which the Holocaust is undoubtedly one):

"By considering the detrimental effects of a particular doctrine, the article in question contributed to a discussion of the various possible reasons behind the extermination of the Jews in Europe, a question of indisputable public interest in a democratic society. In such matters, restrictions on freedom of expression are to be strictly construed. Although the issue raised in the present case concerns a doctrine upheld by the Catholic Church, and hence a religious

<sup>383</sup> ECtHR, *Léhideux and Isorni v. France*, Application No. 55/1997/839/1045 (1998), par. 55.

<sup>384</sup> ECtHR, *Giniewski v. France*, Application No. 64016/00 (2006), par. 44.

matter, an analysis of the article in question shows that it does not contain attacks on religious beliefs as such, but a view which the applicant wishes to express as a journalist and historian. In that connection, the Court considers it essential in a democratic society that a debate on the causes of acts of particular gravity amounting to crimes against humanity should be able to take place freely...<sup>385</sup>

In a case from Slovakia, a writer published an article criticizing the head of the Roman Catholic church for calling for the banning of a film poster and later the film itself, on moral grounds. He was convicted of the offence of "defamation of nation, race and belief," on the basis that criticizing the head of the church was tantamount to defaming the religion itself. The ECtHR rejected this reasoning and found a violation of Article 10:

"The applicant's strongly worded pejorative opinion related exclusively to the person of a high representative of the Catholic Church in Slovakia. Contrary to the domestic courts' findings, the Court is not persuaded that by his statements the applicant discredited and disparaged a sector of the population on account of their Catholic faith.

[...] The fact that some members of the Catholic Church could have been offended by the applicant's criticism of the Archbishop and by his statement that he did not understand why decent Catholics did not leave that Church since it was headed by Archbishop J. Sokol cannot affect the position. The Court accepts the applicant's argument that the article neither unduly interfered with the right of believers to express and exercise their religion, nor did it denigrate the content of their religious faith....<sup>386</sup>

These recent cases contrast with the earlier decisions of the ECtHR. In one Austrian case, the Court declined to find that the seizure of a film deemed to offend Roman Catholics was a violation of Article 10. In exercising the right to freedom of expression, people had an

"obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights and which do not contribute to any form of public debate capable of furthering progress in human affairs. This being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent improper attacks on objects of religious veneration, provided always that any 'formality', 'conditions', 'restriction'; or 'penalty' imposed be proportionate to the legitimate aim pursued."<sup>387</sup>

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<sup>385</sup> *Id.*, par. 51.

<sup>386</sup> ECtHR, *Klein v. Slovakia*, Application No. 72208/01 (2006), par. 51-52.

<sup>387</sup> ECtHR, *Otto-Preminger-Institut vs. Austria*, Application No. 13470/87 (1994), par. 49.

The Court reached a similar conclusion in a British case involving a short film with erotic content that was banned on the grounds that it would be guilty of the criminal offence of blasphemous libel.<sup>388</sup>

The gradual move away from blasphemy laws and the protection of religion may derive in part from the sense that the protection offered was uneven and unfair. In *R v. Chief Metropolitan Stipendiary Magistrate, ex parte Choudhury*, a District Court in London ruled on the refusal of a magistrate to issue a summons for blasphemy against the author Salman Rushdie, at the request of a Muslim organization. The court made a clear finding that the common law of blasphemy only protected the Christian church – actually, not all Christians, but those who constitute the state religion in England and Wales.

Furthermore, the absence of a law protecting religions other than Christianity was not a breach of the United Kingdom's obligations under the European Convention for the Protection of Human Rights and Individual Freedoms because the protection of freedom of religion in article 9 of that convention did not require a domestic law to provide a right to bring criminal proceedings of blasphemy and such proceedings would be contrary to the author's right of freedom of expression under article 10 of the convention.<sup>389</sup>

In 2008, the offence of blasphemy was abolished.

The final word on this issue is with the UNHRC:

"Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant. Such prohibitions must also comply with the strict requirements of article 19, paragraph 3, as well as such articles as 2, 5, 17, 18 and 26. Thus, for instance, it would be impermissible for any such laws to discriminate in favour of or against one or certain religions or belief systems, or their adherents over another, or religious believers over non-believers. Nor would it be permissible for such prohibitions to be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith."<sup>390</sup>

### **Hypothetical case for discussion**

Your country has a law prohibiting denial of the 1915 Armenian genocide. A magazine publishes an article by a historian arguing that the killings in 1915 did not constitute genocide – and discussion of genocide is actually used to stir anti-Turkish

<sup>388</sup> ECtHR, *Wingrove v. the United Kingdom*, Application No. 17419/90 (1996).

<sup>389</sup> Divisional Court of Queen's Bench, *R. v. Chief Metropolitan Stipendiary Magistrate, ex parte Choudhury*, 1 All ER 313 (1991).

<sup>390</sup> UNHRC, *General Comment No. 34: ICCPR, Article 19: Freedoms of opinion and expression*, UN Doc. No. CCPR/C/GC/34 (12 September 2011), par 48.

hatred. The author and the magazine's editor are convicted under the genocide denial law.

They take their case to the regional human rights court. What arguments could be used by each side and what, in your opinion, should the court decide?

## XII. PHYSICAL SAFETY OF JOURNALISTS

So far we have focused on potential restrictions on media freedom through legal measures taken by governments and others. Yet the most dangerous attacks on the media are physical ones. Each year dozens of journalists are killed as they carry out their professional activities. Many more suffer threats to make them back away from stories that offend vested interests.

Human rights law is not silent on the issue of journalist safety. Essentially it says two things:

- The state has a responsibility to provide protection to media professionals;
- The state has a responsibility to initiate an independent investigation into any attack on media professionals and to prosecute those responsible, as appropriate.

These obligations are not specific to attacks on or threats against journalists, but there is an added duty on states with regards to violence and threats against the media in that the right to freedom of expression requires states to ensure an 'enabling environment' for its enjoyment. The obligation is not merely to *respect* rights – that is, not to violate them directly – but also to ensure that they are protected against abuses by third parties.

Article 2 (3) of the ICCPR provides the right for a remedy for violation of any of the rights contained in the treaty (which would cover assault, threats, killing, torture or disappearance of journalists). This has three elements:<sup>391</sup>

- a. The right to an effective remedy, irrespective of who violated the right;
- b. This right shall be determined by a competent judicial, legislative or administrative authority, in accordance with the legal system of the state;
- c. The remedy shall be enforced by the competent authorities.

There are similar provisions in the regional human rights instruments: Article 13 of the ECHR, Article 26(1) Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights and Article 25 American Convention on Human Rights.

Although Article 2 (2) of the ICCPR recognizes that there are different ways in which international law may be "domesticated" into national legal systems, the UNHRC has underlined the application in all cases of the principle enunciated in Article 27 of the Vienna Convention on the Law of Treaties, namely that a state "may not invoke the provisions of its internal law as justification for its failure to perform a treaty."<sup>392</sup> This means, among other things, that there is a general obligation on all branches of the

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<sup>391</sup> ICCPR, *supra* note 3, Art. 2 (3).

<sup>392</sup> UNHRC, *General Comment No. 31 [80]: ICCPR, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 2187th meeting, Geneva, Switzerland (26 May 2004), par. 4.

state (including the judiciary and legislature, not just the executive, which normally represents the state on the international stage) to respect and protect rights and, in this instance, to provide an effective remedy.

One important element of an effective remedy is understood to be prompt and independent investigation of an alleged violation:

“Administrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies.”<sup>393</sup>

The UNHRC notes that failure to investigate alleged violations "could in and of itself give rise to a separate breach of the Covenant."<sup>394</sup>

When investigations reveal violations of some Covenant rights, those responsible should be brought to justice and, again, the UNHRC notes that failure to do so could itself be a breach of the ICCPR.

"These obligations arise notably in respect of those violations recognized as criminal under either domestic or international law, such as torture and similar cruel, inhuman and degrading treatment (article 7), summary and arbitrary killing (article 6) and enforced disappearance (articles 7 and 9 and, frequently, 6). Indeed, the problem of impunity for these violations, a matter of sustained concern by the Committee, may well be an important contributing element in the recurrence of the violations."<sup>395</sup>

In its case law, the Committee has reached a similar conclusion – that in cases involving arbitrary detention, enforced disappearance, torture and extrajudicial executions Article 2(3) must entail a criminal investigation that brings those responsible to justice.<sup>396</sup>

The same reasoning has been applied in the jurisprudence of regional human rights courts. The ECtHR has a particularly well-developed case law on Article 2 (the right to life), sometimes read in conjunction with Article 13 (the right to a remedy). It has found that states should take appropriate steps to safeguard the lives of those within their jurisdictions. This would include criminal law provisions, backed up by an effective law enforcement machinery.<sup>397</sup> The absence of direct state responsibility for a death does not preclude state responsibility under Article 2.<sup>398</sup>

Not all unlawful killings will engage a state's Article 2 obligations:

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<sup>393</sup> *Id.*, par. 15.

<sup>394</sup> *Id.*, par. 15.

<sup>395</sup> *Id.*, par. 18.

<sup>396</sup> See e.g.: UNHRC, *Bautista de Arellana v. Colombia*, Communication No. 563/1993, U.N. Doc. CCPR/C/55/D/563/1993 (1995) (Views of 11 October 1994).

<sup>397</sup> See: ECtHR, *L.C.B. v. the United Kingdom*, Application No. 23413/94 (1998); see also: ECtHR, *Osman v. the United Kingdom*, Application No. 23452/94 (1998).

<sup>398</sup> ECtHR, *Angelova and Iliev v. Bulgaria*, Application No. 55523/00 (2007), par. 93.

"[W]here there is an allegation that the authorities have violated their positive obligation to protect the right to life (...), it must be established to the [Court's] satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk."<sup>399</sup>

Article 2 also implies an obligation to conduct an investigation into any death that may be in breach of the Convention. The importance of an investigation, as the Court reasoned in the landmark case of *McCann v. the United Kingdom*, is that a prohibition on arbitrary killing by the state would be ineffective without an independent means of determining whether any given killing was arbitrary.<sup>400</sup> Beyond that, of course, an investigation is about the state exercising its obligation to protect those within its jurisdiction from violence by other parties. In *Ergi v. Turkey* the Court stated that the obligation to investigate "is not confined to cases where it has been established that the killing was caused by an agent of the State."<sup>401</sup> In various judgments the Court has established the essential characteristics of such an investigation: independence, promptness, adequate powers to establish the facts, and accessibility to the public and relatives of the victims.

The ECtHR's jurisprudence on Article 2 is the most developed case law of a human rights body on this issue. It would be reasonable to draw upon this reasoning elsewhere (that is, outside Europe) and in relation to other issues than the right to life, such as torture or serious bodily injury. The ECtHR itself has applied similar standards in relation to investigation of torture and disappearances.

These requirements apply to everyone, but they assume particular importance in the case of journalists and other media workers because the issue at stake is not merely the individual rights of those concerned but the freedom of the media in general (and hence the right to information of the population).

The African Commission on Human and Peoples' Rights' Declaration of Principles on Freedom of Expression states:

1. Attacks such as the murder, kidnapping, intimidation of and threats to media practitioners and others exercising their right to freedom of expression, as well as the material destruction of communications facilities, undermines independent journalism, freedom of expression and the free flow of information to the public.
2. States are under an obligation to take effective measures to prevent such attacks [...]<sup>402</sup>

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<sup>399</sup> ECtHR, *Osman v. the United Kingdom*, Application No. 23452/94 (1998), par. 116.

<sup>400</sup> ECtHR, *McCann and Ors v. the United Kingdom*, Application No. 18984/91 (1994).

<sup>401</sup> ECtHR, *Ergi v. Turkey*, Application No. 23818/94 (1998).

<sup>402</sup> Declaration of Principles on Freedom of Expression in Africa, *supra* note 156.

The special mechanisms monitoring respect for freedom of expression have made several statements on the issue. Most recently, in 2012, the special rapporteurs on freedom of expression from the UN, the OSCE, the African Commission on Human and Peoples' Rights and the Organization of American States declared that states should:

- put in place special measures of protection for individuals who are likely to be targeted for what they say where this is a recurring problem;
- ensure that crimes against freedom of expression are subject to independent, speedy and effective investigations and prosecutions; and
- ensure that victims of crimes against freedom of expression have access to appropriate remedies.<sup>403</sup>

The rapporteurs suggested the creation of specific crimes for physical attacks on journalists because of their impact on freedom of expression (or at least applying the harshest available penalties). They recommended the creation of special protection programmes against violent attack. And they elaborated the investigation requirements: independence, speed and effectiveness, with each spelt out in some detail.

When it comes to the question of the specific obligations of states in relation to serious crimes where journalists are the victims – "crimes against freedom of expression," as the rapporteurs call them – the regional human rights courts have relevant case law.

In the case of *Ozgur Gundem v. Turkey* in the ECtHR, the newspaper in question had been the target of numerous attacks by "unknown perpetrators" that were not disputed by the government. These included seven killings of journalists and others associated with the paper and a number of attacks on others, such as vendors and distributors. In addition, there were alleged to be a number of attacks that were disputed by the government. The newspaper had drawn these incidents to the attention of the authorities, but for the most part there were neither investigations nor the requested protection. (There were, however, police raids on Ozgur Gundem's offices and prosecutions of its staff.)<sup>404</sup>

On the general obligations that the state has to protect the media against unlawful attack, the Court noted:

"The Court recalls the key importance of freedom of expression as one of the preconditions for a functioning democracy. Genuine, effective exercise of this freedom does not depend merely on the State's duty not to interfere, but may require positive measures of protection..."<sup>405</sup>

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<sup>403</sup> The United Nations Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights Special Rapporteur on Freedom of Expression and Access to Information, *Joint declaration on crimes against freedom of expression* (25 June 2012).

<sup>404</sup> ECtHR, *Ozgur Gundem v. Turkey*, Application No. 23144/93 (2000).

<sup>405</sup> *Id.*, par. 43.

The Court found that the failure to protect the newspaper against attack constituted a breach of its Article 10 (freedom of expression) obligations on the part of Turkey:

"the authorities were aware that Özgür Gündem, and persons associated with it, had been subject to a series of violent acts and that the applicants feared that they were being targeted deliberately in efforts to prevent the publication and distribution of the newspaper. However, the vast majority of the petitions and requests for protection submitted by the newspaper or its staff remained unanswered. The Government have only been able to identify one protective measure concerning the distribution of the newspaper which was taken while the newspaper was still in existence...."

The Court has noted the Government's submissions concerning its strongly held conviction that Özgür Gündem and its staff supported the PKK [an armed anti-government group] and acted as its propaganda tool. This does not, even if true, provide a justification for failing to take steps effectively to investigate and, where necessary, provide protection against unlawful acts involving violence."<sup>406</sup>

In a highly celebrated case, concerning the assassinated journalist Firat (Hrant) Dink the Court found against Turkey. Hrant Dink was a Turkish journalist of Armenian origin who wrote a series of articles about the consequences of the 1915 genocide of Armenians and the importance of acknowledging (and naming) what had happened. Dink was prosecuted for denigrating "Turkishness," convicted and, at the time of his murder in 2007, the case was still in the upper reaches of the judicial system. It emerged that intelligence on the plot to kill Dink had been gathered, but not acted upon, by the police.<sup>407</sup>

The ECtHR found that Dink's rights had been violated on several counts. First, the failure to take action to prevent Dink's assassination was a violation of Article 2 "in its substantive aspect." Second, the failure to carry out an effective investigation into the murder was a violation of Article 2 "in its procedural limb."

The Court also found a violation of Article 10 (freedom of expression), not only because of the prosecution of Dink for his journalism, but also because of its failure to protect him against physical attack:

"[The Court] considers that, in these circumstances, the failure of the police in their duty to protect the life of Firat Dink against attack by members of an ultranationalist group ... added to the guilty verdict handed down by criminal courts in the absence of any pressing social need ... also led to a breach of its positive obligations on the part of the Government in relation to the freedom of expression of the applicant."<sup>408</sup>

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<sup>406</sup> *Id.*, par. 44.

<sup>407</sup> ECtHR, *Dink v. Turkey*, Application Nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09 (2010).

<sup>408</sup> *Id.*, par. 138 (unofficial translation). The original reads: "Elle estime que, dans ces circonstances, le manquement des forces de l'ordre à leur devoir de protéger la vie de Firat Dink contre l'attaque des membres d'un groupe ultranationaliste ... ajouté au verdict de culpabilité prononcé par les juridictions

Finally, the failure of effective investigation also engaged Article 13 – the right to an effective remedy – which the Court found to have been violated.

In a recent case, Uzeyir Jafarov, a journalist from Azerbaijan, had written a number of articles criticizing the police and security policies before being a victim of a serious physical attack by unknown assailants. He later identified one of the attackers as a police officer and informed the investigating police of this. The investigation was subsequently dropped.

The Court found a violation of Article 3 (the right not to be tortured or otherwise ill-treated) "in its procedural limb" because of the manifest inadequacy of the investigation. It also concluded, however, that it could not determine whether Jafarov had actually been ill-treated by state officials – precisely because of the failure of the investigation. Disappointingly, the Court declined to rule on whether there had been a violation of Article 10, as it had in *Özgür Gündem*, because "the applicant's allegations in this respect arise out of the same facts as those already examined under Article 3 of the Convention", and "that being so, it is not necessary to examine the complaint again under Article 10 of the Convention."<sup>409</sup>

The IACtHR has specified criteria for the conduct of investigations. Quoting jurisprudence from the ECtHR, it has held that the investigation must be concluded within a reasonable time; three factors are crucial for deciding what is 'reasonable': a) the complexity of the matter; b) the judicial activity of the interested party; and c) the behaviour of the judicial authorities.<sup>410</sup> State authorities must take the initiative: the investigation "must ... be assumed by the State as its own legal duty, not as a step taken by private interests which depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government."<sup>411</sup>

Importantly, the IACtHR has stressed the impact on society as a whole of the failure to conduct a proper investigation into the murder of a journalist:

"A State's refusal to conduct a full investigation of the murder of a journalist is particularly serious because of its impact on society. And that is the case here, because the impunity of any of the parties responsible for an act of aggression against a reporter – the most serious of which is assuredly deprivation of the right to life – or against any person engaged in the activity of public expression of information or ideas, constitutes an incentive for all violators of human rights. At the same time, the murder of a journalist has a "chilling effect" most notably

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pénales en l'absence de tout besoin social impérieux ... a aussi entraîné, de la part du Gouvernement, un manquement à ses obligations positives au regard de la liberté d'expression de ce requérant."

<sup>409</sup> ECtHR, *Uzeyir Jafarov v. Azerbaijan*, Application No. 54204/08, (2015).

<sup>410</sup> IACtHR, *Genie Lacayo v. Nicaragua*, Series C No. 30 (1997), par. 77. See also: ECtHR, *König v. Germany*, Application No. 6232/73 (1978), par. 99.

<sup>411</sup> IACtHR, *Velásquez Rodríguez v. Honduras*, Series C No. 4 (1988), par. 177.

on other journalists, but also on ordinary citizens as it instils the fear of denouncing any and all kinds of offences, abuses or illegal acts."<sup>412</sup>

In another case from the IACtHR concerning a violent attack on the journalist Luis Gonzalo Vélez the Court stated that:

"The State must conduct, effectively and with a reasonable time, the criminal investigation into the attempted deprivation of liberty of Luis Gonzalo Vélez Restrepo that took place on October 6, 1997, in a way that leads to the clarification of the facts, the determination of the corresponding criminal responsibilities, and the effective application of the sanctions and consequences established by law, in accordance with paragraph 285 of this Judgment."<sup>413</sup>

The ACtHPR used similar language in its finding against Burkina Faso in the case of the assassinated journalist Norbert Zongo.<sup>414</sup> Burkina Faso "failed to act with due diligence in seeking, trying and judging the assassins of Norbert Zongo and his companions" [and as a result violated] "the rights of the Applicants to be heard by competent national courts." This "failure ... in the investigation and prosecution of the murderers of Norbert Zongo, caused fear and worry in media circles."

In a case from the ECOWAS Court of Justice concerning the killing of the Gambian journalist, Deyda Hydara, the Court found that the Gambian state had failed to conduct an effective investigation of the killing.<sup>415</sup> The Court noted that "there are no hard and fast rules as to what constitute proper, effective or diligent investigations". The Court, however, made clear from an objective standpoint it should be possible to state whether such investigations had taken place. In the present case, the Court found it a particularly aggravating factor that two eyewitnesses had found it necessary to flee the country. Furthermore, seven journalists were prosecuted for sedition when they spoke out against the failure to investigate the killing.

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<sup>412</sup> IACtHR, *Miranda v. Mexico*, Case 11.739, Report N° 5/99, OEA/Ser.L/V/II.95 Doc. 7 rev., p. 755 (1998), par. 52.

<sup>413</sup> IACtHR, *Vélez Restrepo and Family v. Columbia* (2012), p. 90.

<sup>414</sup> ACtHPR, *Claimants of Late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Liboudo and the Burkinabe Movement on Human and Peoples' Rights v. Burkina Faso*, Application No. 013/2011 (2014).

<sup>415</sup> ECOWAS Community Court of Justice, *Deyda Hydara Jr. and Others v. The Gambia*, Case No. ECW/CCJ/APP/30/11 (2014).

### **XIII. HOW CAN INTERNATIONAL HUMAN RIGHTS LAW BE APPLIED IN NATIONAL COURTS?**

Much of the discussion in this manual focuses on the standards for protecting freedom of expression set out in international and regional human rights law. But how can these standards be applied at the national level? Will a civil or criminal court simply ignore any argument based upon these standards?

Regional human rights standards may be particularly influential, with effectively universal ratification of the relevant treaties in Europe, Africa and Latin America. The influence of regional jurisprudence has been particularly strong in Europe and Latin America, where human rights courts offer detailed findings on states' obligations to protect freedom of expression.

Globally, the key treaty protecting freedom of expression is the ICCPR. Like the regional treaties, this creates a binding obligation on the state to comply with the obligations it creates.

The body that monitors states' compliance with the ICCPR is the UNHRC, a group of independent experts that gives interpretative guidance on how the Covenant is to be implemented. It also periodically reviews each state party's progress in implementing its ICCPR obligations. And, if the state has also ratified the first Optional Protocol to the ICCPR, it may consider individual complaints from individuals who allege that their rights have been violated, provided that they have first exhausted all domestic remedies.

The ICCPR requires:

"Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant."<sup>416</sup>

However, the exact way in which international law obligations are implemented domestically is a matter of great variation.

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<sup>416</sup> ICCPR, *supra* note 3, Art. 2 (2).

Theoretically, states are said to fall into one of two categories: *monist* and *dualist*.

*Monist states* are those where international law is automatically part of the domestic legal framework. This means that it is possible to invoke the state's treaty obligations in domestic litigation (such as a defamation trial).

*Dualist states* are those where international treaty obligations only become domestic law once they have been enacted by the legislature. Until this has happened, courts could not be expected to comply with these obligations in a domestic case.

States with common law systems are invariably dualist. States with civil law systems are more likely to be monist, but many are not (for example the Scandinavian states). All the previously dualist post-Communist states of Central and Eastern Europe are now monist.

That is the theory. The practice is more complicated.

In monist states, although ratified treaties are automatically a part of domestic law, their exact status varies. Do they stand above the constitution? On a par with it? Above national statutes? Or on a par with them? The answer varies from country to country.

In dualist states, some parts of international law may be automatically applicable. In states such as the United Kingdom and the United States, customary international law may be directly invoked, provided that it is not in conflict with national statute law. The United States constitution also says that "all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the land."<sup>417</sup> In practice, however, the Supreme Court has found many treaties (including those on human rights) to be "non self-executing," which means that they must first be incorporated by Congress.<sup>418</sup> However, even where treaties have not been incorporated in dualist states, courts are likely to consider them as interpretive guidance in deciding cases.

It is very difficult, therefore, to give general guidance on how far domestic courts will admit arguments based upon international legal standards. It will be for practitioners in each country to understand this.

There is, however, a common problem that potentially cuts across different legal systems: judges may simply be unaware of states' treaty obligations, or the contents of the treaty, or how the treaty should be interpreted and applied. It is unlikely to be a

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<sup>417</sup> *United States Constitution* (21 June 1788), art. VI.

<sup>418</sup> United States Supreme Court, *Foster & Elam v. Neilson*, 27 U.S. 2 Pet. 253 (1829)

good strategy in litigation to tell judges that they should apply treaty law. A better approach in most instances would be to invoke international law *as a means of interpreting national law*.

After all, most national constitutions protect freedom of expression. The limitations on freedom of expression permitted in national law often echo closely the terms of the limitations allowed in international and regional standards. This provides a good starting point for using international and comparative case-law to interpret national standards.

*A. What about case law from other jurisdictions?*

In this manual we refer sometimes to landmark cases from national courts. Of course, the decision of a national court in one country does not bind the court of another, even when they have similar laws and legal systems and even when, as in the common law countries, they operate according to a doctrine of precedent.

The importance of consulting cases from other countries is simply to learn what are the most advanced decisions and most persuasive reasoning in freedom of expression cases. If these arguments are introduced into cases in national courts, this must be done in a careful and diplomatic fashion, so as not to antagonize judges. It is important, however, that judges hearing freedom of expression cases be educated in the case law of other countries.