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Model Training Materials

Overview of Freedom of Expression under International Law

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Introduction¹

These *Model Training Materials: Overview of Freedom of Expression under International Law* are designed as a resource for professional networks of media lawyers, freedom of expression organisations and other groups which are working to build the capacity of lawyers to defend media freedom and freedom of expression. The materials provide a template for an introductory workshop on the basic principles of freedom of expression under international human rights law. They include:

- A Background Reading which can be distributed to participants
- A set of exercises which can be done during a workshop or a training
- Sample discussion questions, again for a workshop or training
- Sample agendas for a 1.5 hour or one-half-day workshop based on these training materials

These *Model Training Materials* have been developed as part of an ongoing project by the Centre for Law and Democracy (CLD) to foster the formation of national media lawyers' networks, supported by UNESCO's Global Media Defence Fund. To learn more about this project and to access additional resources, see <https://www.law-democracy.org/live/projects/media-lawyers-networks/>.

Background Reading

This Background Reading provides an overview of freedom of expression as it is protected in international human rights law, with a particular focus on the *International Covenant on Civil and Political Rights* (ICCPR). It is designed to accompany a training workshop for lawyers on international human rights standards related to freedom of expression and media law. However, it can also be used as a stand-alone resource for those who simply wish to learn more about this area.

The right to freedom of expression is protected in some form in the constitutions of most countries. However, without strong protections for this right, it can become a “paper right” instead of providing effective legal protection for journalists, civil society, political critics and others who might otherwise be targeted for exercising their right to freedom of expression. Given its strong normative framework on freedom of expression, international human rights

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law represents an important reference point for advancing the protection of this right under national law. Furthermore, States which are parties to international treaties which protect freedom of expression have international obligations to respect the rights those treaties guarantee. Understanding freedom of expression standards under international law can therefore aid lawyers who wish to advance protection for the right at the national level.

Protection for Freedom of Expression under International Law

The primary international treaty protecting freedom of expression is the ICCPR, Article 19 of which states:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
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.

The vast majority of countries are parties to the ICCPR.² However, even for those that are not, the right to freedom of expression is also protected by Article 19 of the *Universal Declaration of Human Rights*. Although not a binding treaty, many of its provisions, including Article 19 guaranteeing freedom of expression, are understood to have matured into customary international law, which is binding on all States.

Freedom of expression is also guaranteed in the three main regional human rights treaties, namely the *African Charter on Human and Peoples' Rights* (Article 9), the *American Convention on Human Rights* (Article 13) and the *European Convention on Human Rights* (Article 10). Other treaties, such as the *Convention on the Rights of the Child* and the *Convention on the Rights of Persons with Disabilities*, directly or indirectly protect the right to freedom of expression for

² There were 173 States Parties as of end July 2022. Six other States have signed but not ratified the treaty. The Office of the High Commissioner for Human Rights counts 18 States as having taken no action (neither signed nor ratified the Convention), <https://indicators.ohchr.org/>.

specific groups. This reading material focuses on the ICCPR but the standards it describes apply in essentially the same way under other human rights treaties, unless otherwise noted.

Over time, international standards have evolved to govern specific freedom of expression issues and set guidance for complex freedom of expression questions. Authoritative interpretation of freedom of expression under international human rights law comes from many sources including the following:

- International human rights courts: The African, American and European regional human rights systems all have regional human rights courts which decide on violations of their respective human rights treaties in specific cases.
- Human rights treaty bodies: Human rights treaty bodies are tasked with overseeing implementation of a human rights convention. For example, the Human Rights Committee is the treaty body associated with the ICCPR. Many of these bodies issue interpretive guidance in the form of “General Comments” or “General Recommendations”. The Human Rights Committee’s General Comment No. 34, for example, addresses freedom of expression. Some bodies – including the Human Rights Committee – also consider individual cases of alleged violations of the treaty for States which have accepted their jurisdiction in this regard.
- Other standards: Although non-binding, statements from leading experts, such as the UN Special Rapporteur on freedom of expression or equivalent special mandates in regional human rights systems, are also influential. Resolutions from official bodies such as the UN Human Rights Council or General Assembly also are important as a reflection of consensus among States on human rights standards. Some standards developed by civil society coalitions or non-profit organisations have also been influential and have been referenced by more authoritative entities.

Individual States vary in their approach to incorporating international treaty obligations into domestic law. For a discussion on using international law in domestic contexts, see CLD’s [Guide on Using International Freedom of Expression Norms in Domestic Courts](#).

Key Features of the Right to Freedom of Expression

Freedom of expression includes the right to impart statements, regardless of the subject matter and via any medium, such as online, in print, in speech or otherwise. This includes expression of a wide range of artistic, scientific, political, religious, cultural and other perspectives, including deeply offensive or controversial statements, although harmful speech may be restricted under strict conditions, described further below.

The right to freedom of expression imposes both positive and negative obligations on States. On the one hand, States must refrain from interfering with the exercise of the right (a so-



called negative obligation). However, they should also take positive steps to ensure realisation of freedom of expression. In some cases, this will require them to respond to actions by private actors which undermine freedom of expression. For example, States should take action to protect journalists who face threats from private groups who are angry about their reporting.

In addition to the right to speak, freedom of expression includes the right to access information. Thus, Article 19(2) of the ICCPR includes the right to “seek” and “receive”, as well as to “impart”, information and ideas. In this wider sense, freedom of expression protects the free flow of information and ideas in society. Freely accessible information also requires a diverse, independent media. Media freedom and media diversity are therefore also crucial to the realisation of the right. In the modern era, the ability to access information also typically requires Internet access. These issues are discussed further below.

Since the 1990s, freedom of expression has gradually come to be understood to incorporate a right to access information *held by the government*. The right to access information held by the government, or the “right to information”, is now widely recognised as a core part of freedom of expression. States should accordingly adopt and implement right to information laws (sometimes called access to information laws or freedom of information laws) which create procedures by which individuals can request information from their governments. This issue is not explored in depth here, but information about the qualities of a strong right to information law can be found on the RTI Rating website (rti-rating.org), which ranks all of the national right to information laws around the world.

Inter-American Court of Human Rights: *Claude-Reyes v. Chile*³

The Executive Director of an environmental foundation had sent a letter to Chile’s Foreign Investment Committee asking for specific information about a controversial forestry project. The Committee did not provide most of the requested information. The Inter-American Court of Human Rights found that Chile had violated its freedom of expression obligations. It noted that the right to “seek” and “receive” information includes the right to request access to State-held information, and places an obligation on the State to provide that information, unless the information can legitimately be restricted. Individuals who request information can circulate it to society more generally, so granting an individual access to information can realise the right of both the individual and society in general to access information.

³ 19 September 2006, Series C, No. 151, para. 77, https://www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.pdf.

Restrictions on Freedom of Expression: The Three-Part Test

The right to freedom of expression covers all kinds of expression. However, the right is not absolute. States may restrict harmful expression, but only in accordance with a strict test, to ensure that the restrictions do not undermine the right itself.

The language of Article 19(3) of the ICCPR lays out clear requirements for legitimate restrictions on freedom of expression, which are formulated as a “three-part test”. This also closely reflects the approach taken to restrictions on freedom of expression in the American and European human rights systems. Although the *African Charter on Human and Peoples’ Rights* takes a substantially different approach, there is strong precedent for incorporating the three-part test into interpretations of the Charter.⁴

The three-part test is as follows:

- 1) The restriction must be provided by law.
- 2) The restriction must protect a legitimate interest, namely national security, public order, public health, public morals, or the rights or reputations of others.
- 3) The restriction must be necessary to protect that interest.

The first part of the test establishes that restrictions on freedom of expression should not be arbitrary but must instead be based on a proper legal authority. The law granting this authority must be sufficiently precise to allow individuals to regulate their conduct; overly vague legal prohibitions will not pass this part of the test.⁵

The “provided by law” part of the test also requires that laws be of a certain quality. The Inter-American Court of Human Rights, for example, has interpreted the word “law” to mean a law passed by a democratically elected legislature and formulated according to the constitutional procedures of the country.⁶ In other words, laws restricting fundamental rights should be passed by elected legislatures, rather than via regulations or lower-level authorities. While legislatures may delegate some of this authority, authorities tasked with executing a law should not have “unfettered discretion” in restricting freedom of expression.⁷

⁴ See *Lohé Issa Konaté v. Burkina Faso*, 5 December 2014, Application No. 004/2013 (African Court of Human and Peoples’ Rights). The *Declaration of Principles on Freedom of Expression and Access to Information in Africa* also essentially adopts the three-part test. Adopted by the African Commission on Human and Peoples’ Rights, 65th Session, 21 October to 10 November 2019, <https://bit.ly/3yMc7XP>.

⁵ UN Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of opinion and expression*, 12 September 2011, para. 25, [undocs.org/CCPR/C/GC/34](https://www.unhcr.org/refugees/doc/undocs.org/CCPR/C/GC/34).

⁶ *Advisory Opinion OC-6/86, The Word “Laws” in Article 30 of the American Convention on Human Rights*, 9 May 1986, https://www.corteidh.or.cr/docs/opiniones/seriea_06_ing.pdf.

⁷ General Comment No. 34, note 5. Note that some recognition is given to differences in legal traditions, such as certain common law rules, which are not passed by the legislature.

The second part of the test focuses on the permissible grounds for restricting freedom of expression. The list enumerated in Article 19(3) of the ICCPR is a closed list of national security, public order, public health, public morals, or the rights or reputations of others and no other interests are considered to be legitimate.⁸ Some of these grounds (such as “rights of others” and “public order”) are fairly expansive and open to substantially different interpretations. Typically, restrictions fail to meet the first or third parts of the test rather than the second. However, in some cases States attempt to rely on improper grounds for restricting freedom of expression. Economic concerns, for example, or protecting the reputation of the nation are not legitimate aims.

The third part of the test asks whether the restriction is *necessary* to protect the interest identified in the second part of the test. A restriction on freedom of expression cannot merely benefit public health or national security, for example, but must be necessary to respond to a specific threat to public health or national security.

Overly broad restrictions will not pass the necessity part of the test, which requires States to use the least restrictive approach to protect the legitimate interest. States must also show a causal relationship between the exercise of freedom of expression and the harm they allege will occur. Thus, the necessity analysis screens out pretextual or vague claims by governments about dangers claimed to be associated with freedom of expression.

**The Human Rights Committee:
What States Must Demonstrate to Meet the Necessity Requirement**

“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”.⁹

The necessity requirement also implies a *proportionality* analysis. Human rights courts or treaty bodies will consider whether the harm to expression is disproportionate in comparison to the benefits realised by the restriction.¹⁰ This requires the public interest in freedom of expression to be weighed against the interest which is protected by the restriction. In some

⁸ Some regional treaties have slight variations on this list. For example, Article 10 of the European Convention on Human Rights has a specific reference to the authority and impartiality of the judiciary and to prevention of disorder or crime, although of these can be considered to fall under the ICCPR’s public order ground.

⁹ General Comment No. 34, note 5, para. 35.

¹⁰ See, for example, *Morais v. Angola*, 18 April 2005, Communication No. 1128/2002, para. 6.8, undocs.org/CCPR/C/83/D/1128/2002 (Human Rights Committee) (“the requirement of necessity implies an element of proportionality, in the sense that the scope of the restriction imposed on freedom of expression must be proportional to the value which the restriction serves to protect”).

cases, public interest in freedom of expression is particularly high, such as when the expression concerns public officials or matters of great public importance, such as government activities, human rights, elections or corruption.¹¹ In such cases, the importance of freedom of expression is greater so that restrictions are less likely to meet the necessity requirement.

Conversely, some measures are always represent invalid restrictions on freedom of expression. For example, in *Njaru v. Cameroon*, the Human Rights Committee considered the case of a journalist who had been subjected to arbitrary arrest, torture and death threats based on his journalistic activity. The Committee found that there was no need to conduct a necessity analysis. No possible exercise of the right to freedom of expression could justify arbitrary arrest, torture or death threats (alternatively, these could never be legitimate responses to the exercise of freedom of expression). As such, the journalist's right to freedom of expression, along with his rights to be from torture and arbitrary detention, had been violated.¹²

The Necessity Test in Practice: Examples from Human Rights Bodies and Courts

Human Rights Committee, *Keun-Tae Kim v. Republic of Korea*:

Mr. Keu-Tae Kim had distributed publications and given a speech calling for North Korean reunification and expressing views which aligned with those of North Korea. He was convicted under provisions of the National Security Law criminalising praise of an anti-State organisation and distributing documents which benefit an anti-State organisation. The Human Rights Committee stated that it was unclear how an undefined 'benefit' to North Korea from the publication of views similar to its own created a risk to national security. Korea had failed to demonstrated the precise threat posed by the publications or speech and had accordingly not met the necessity requirement.¹³

European Court of Human Rights, *Sunday Times v. The United Kingdom*:

Sunday Times was a landmark early freedom of expression case from the European Court of Human Rights.¹⁴ It addressed an injunction to stop the Sunday Times from publishing an article about proposed settlements, subject to court approval, against the manufacturers of thalidomide, a drug given to pregnant women which caused severe birth defects in their children. The injunction was based on contempt of court grounds, due to concerns that the

¹¹ UN Human Rights Council Resolution 12/16, adopted 2 October 2009, para. 5(i), undocs.org/A/HRC/RES/12/16.

¹² 14 May 2007, Communication No. 1353/2005, paras. 6.4 and 7, undocs.org/CCPR/C/89/D/1353/.

¹³ 3 November 1998, Communication No. 574/1994, para. 12.4-12.5, <https://juris.ohchr.org/Search/Details/804>.

¹⁴ 26 April 1979, Application No. 6538/74, <https://hudoc.echr.coe.int/eng/?i=001-57584>.

articles would prejudice the ongoing consideration by the courts of the matter (i.e. the fair administration of justice). The European Court of Human Rights found that the injunction constituted a violation of freedom of expression. The Court was sceptical that the Sunday Times reporting would have a significant impact on settlement proceedings. In contrast, the thalidomide disaster was a matter of “undisputed public concern”, raising crucial questions about the responsibility of pharmaceutical companies. In particular, families of victims had a “vital interest” in learning about the legal proceedings and should only be deprived of such information if it were “absolutely certain” that the information would threaten judicial authority.¹⁵ The Court accordingly found that the public interest in the information outweighed the potential harm to the administration of justice, and that the injunction was therefore neither proportionate nor necessary.

In most cases, the three-part test is the applicable legal standard for assessing whether a restriction on freedom of expression is legitimate. However, when there is an emergency which threatens “the life of the nation”, States can derogate from some of their human rights obligations, including freedom of expression, but only to the extent “strictly required by the exigencies of the situation”.¹⁶ An emergency must be officially proclaimed and strictly time bound. Notice of any derogations must also be registered with the United Nations (or relevant regional body, depending on the treaty).

Example: Derogations during Public Health Emergencies

Just because there is a public emergency does not mean that it is necessary to derogate from the right to freedom of expression. Commenting on the COVID-19 pandemic, the UN Special Rapporteur for freedom of expression noted:

Given the importance of information and freedom of expression to the development of opinion and to the efforts to address the public health crisis, States should also avoid any derogation from their obligations under article 19 of the Covenant. Article 19 (3) already provides sufficient grounds for necessary and proportionate restrictions of article 19 (2) rights, to protect public health.¹⁷

¹⁵ *Ibid.*, para. 66.

¹⁶ Article 4 of the ICCPR and Article 15 of the *European Convention on Human Rights*. The *American Convention on Human Rights* also permits derogation, at Article 27(1), but does not use the “life of the nation” language. Instead, derogations may be imposed in time of “war, public danger, or other emergency” which threatens the “independence or security” of the State Party. The African Charter, notably, does not contain any derogation clause.

¹⁷ Report on disease pandemics and the freedom of opinion and expression, 23 April 2020, para. 17, undocs.org/A/HRC/44/49.

Applying the Three-Part Test: Content Restrictions

A content restriction is any restriction on expression based on the content of that speech. There are in any country a fairly large number of content restrictions. However, some types of content restrictions are fairly ubiquitous and more commonly relied upon to restrict speech. As a result, for these content restrictions more developed international standards have emerged based on the three-part test.

A few examples of common content restrictions are discussed below. Due to the introductory nature of this document, the material presented here is very brief, just to give a sense of some of these restrictions. For a more in-depth discussion of some common types of content restrictions, see Module 2 of the [Training Manual for Judges on International Standards on Freedom of Expression](#), developed by the Centre for Law and Democracy.

Defamation

Defamation laws should aim to protect the reputation of others, a legitimate interest under the three-part test. However, many defamation laws improperly favour reputations over freedom of expression. For example, imprisonment is always a disproportionate sanction for causing reputational harm, so criminal defamation laws are almost always invalid. Defamation laws that provide special protection to heads of State or other public figures are also illegitimate, because these individuals should tolerate a greater degree of criticism rather than benefit from greater protection for their reputations than ordinary people.¹⁸

Reputations should be protected by civil defamation laws, but these should be crafted carefully so that they do not exert a chilling effect on freedom of expression, especially on matters of public concern. For example, defamation laws should only extend to false allegations, so that statements of opinion should not be considered defamatory and proof of the accuracy of a statement should be available as a full defence.¹⁹

National Security

National security is listed as a permissible ground for restricting freedom of expression in Article 19(3) of the ICCPR. However, States frequently abuse this to unduly restrict freedom of expression. For example, in the context of counter-terrorism, prohibitions on acts like praising or encouraging terrorism often insufficiently clear and narrow, and thus fail the “provided by law” part of the three-part test.²⁰ Similarly, State secrets or treason laws are

¹⁸ General Comment No. 34, note 5, para. 47. See also *Lohé Issa Konaté v. Burkina Faso*, note 4.

¹⁹ General Comment No. 34, note 5, para. 47.

²⁰ *Ibid.*, para. 46.

often crafted broadly, permitting authorities to apply them to information about human rights, corruption or other matters of high public interest.²¹

Privacy

Privacy is also a protected right under international law²² and freedom of expression may be restricted when its exercise compromises the privacy of others. However, as always, any restriction must be in accordance with the three-part test. This means that the privacy and freedom of expression interests must be balanced against each other in any situation to see which dominates. If there is public interest in accessing private information, courts will normally allow this.²³ For example, private health information should normally be highly protected. However, if health issues prevent a politician from fulfilling his or her duties, the electorate has a heightened interest in this information. Freedom of expression concerns may override the privacy interest in such cases, depending on the overall context.

Hate Speech

International human rights law requires States to prohibit hate speech which constitutes incitement to discrimination, hostility or violence,²⁴ because such hate speech infringes on the rights of others. However, such prohibitions must still meet the three-part test under Article 19(3) of the ICCPR. As such, hate speech laws must be defined narrowly and clearly. Overbroad hate speech laws are a recurrent problem, and can be used to harass political opponents or suppress minority groups. General prohibitions on causing division or inciting social discord, for example, are insufficiently precise to meet international standards. Similarly, criminal hate speech laws need to incorporate a specific intent requirement and require a direct causal connection between the speech and the incitement to pass muster.²⁵

Disinformation

Concerns with disinformation, meaning sharing inaccurate information knowing that it is not correct, and misinformation, meaning unintentionally sharing inaccurate information, especially online, have been used to justify a surge of disinformation laws in recent years. However, preventing false information is not one of the legitimate interests listed in Article

²¹ *Ibid.*, para. 30.

²² Article 17 of the ICCPR.

²³ See, for example, *Fonteccechia and D'Amico v. Argentina*, 29 November 2011, Series C, No. 238, https://www.corteidh.or.cr/docs/casos/articulos/seriec_238_ing.pdf (Inter-American Court of Human Rights); and *Von Hannover v. Germany (no. 2)*, 7 February 2012, Applications No. 40660/08 and 60641/08, <https://hudoc.echr.coe.int/fre?i=001-109029> (European Court of Human Rights) (both discussing the public interest in accessing private information when considering restrictions on statements about private life).

²⁴ Article 20(2) of the ICCPR.

²⁵ Rabat Plan of Action, 11 January 2013, paras. 29(c) and (f), https://previous.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf.

19(3) of the ICCPR.²⁶ Laws prohibiting “disinformation” or “false news” as a blanket category will accordingly fail the three-part test.

At the same time, disinformation may be prohibited to protect the legitimate interests listed in Article 19(3). For example, civil defamation laws, which protect a person’s reputation against false information, can be valid. Similarly, laws prohibiting false information which could compromise elections, such as false information about polling locations, would have the proper aim of protecting people’s right to democratic participation. Of course, any such laws must also meet the provided by law and necessity parts of the test.

Other Types of Content Restrictions

Some other common types of content restrictions include:

- Speech which constitutes incitement to violence may be prohibited. However, such prohibitions should require a clear nexus between the speech and the risk of violence to avoid disproportionately targeting protected speech. Many of the same issues raised by poorly drafted national security or hate speech laws can arise in this context as well, such as when laws contain overly vague references to issues such as “inciting social unrest”.
- Laws which protect the administration of justice can be justified as part of the system of preserving public order, because of the need for orderly court proceedings or to protect the fair trial rights of others.²⁷ However, such laws may fail the three-part test for a range of reasons, such as not respecting the rights of accused persons or providing for disproportionate criminal penalties. Laws prohibiting ‘scandalising the court’ or shielding the judiciary from criticism are particularly problematic, as judges are public figures who should be open to public scrutiny.²⁸
- Blasphemy laws, which protect religions themselves from criticism, are not legitimate as restrictions on freedom of expression. Laws protecting religious sentiment are improper because they protect religion in the abstract rather than the right to practise a religion.²⁹ In practice, blasphemy laws are often used to target religious minorities or suppress legitimate religious dialogue.³⁰ At the same time, it is legitimate to protect members of a religion against hate speech.

²⁶ UN Special Rapporteur on freedom of expression, *Report on disinformation and freedom of opinion and expression*, 13 April 2021, para. 40, undocs.org/A/HRC/47/25.

²⁷ General Comment No. 34, note 5, para. 31; and special international mandates on freedom of expression, 2002 *Joint Declaration*, <https://www.osce.org/fom/39838>.

²⁸ *Ibid.*, 2002 *Joint Declaration*.

²⁹ General Comment No. 34, note 5, para. 48.

³⁰ Rabat Plan of Action, note 25, para. 25.

Media Freedom, Media Diversity and Media Regulation

The right to freedom of expression includes the right to seek and receive information (as well as to impart), which in return requires a diverse and independent media. Media play a particularly important role in realising freedom of expression by enabling public debate about diverse issues within a country and enabling citizens to access information about important events.

International law therefore requires States to guarantee media independence. Interference in the independence of media outlets, such as by harassing or closing them, undermining editorial independence or censoring journalistic content will likely violate the right to freedom of expression of both journalists and the broader public, in their right to seek and receive information. Indirect forms of interference, such as allocating government advertising funds to favoured outlets, are similarly not legitimate.³¹

Media diversity is also crucial. Commercial information markets dominated by a few monopolistic voices will not serve the information needs of citizens. Media spaces dominated by State media or media with government ties also raise diversity concerns. Public media which are subject to government control or interference undermine both media diversity and media independence. However, public service media – State-supported media with strong protections for independent editorial decisions and a public interest mandate – can make a very important positive contribution to diversity.³²

Government regulation of the media should aim to promote both media independence and media diversity. Some regulation is appropriate to prevent media monopolies, but care should be taken to avoid imposing unnecessary regulatory burdens on the media. For example, in the context of print media, licensing regimes are unnecessary and likely to provide opportunities for interfering with media independence. Similarly, journalists should not be required to obtain licences or permits to work. For administrative reasons, print media outlets can be required to register like other businesses, and press passes can be used to give priority access to events with limited capacity. But these should be technical rules and public authorities should not have the discretion to deny registration or make decisions on press passes based on the content of a journalist's work.³³

Examples: Improper Journalist Licensing and Newspaper Registration Rules

³¹ General Comment No. 34, note 5, para. 41.

³² *Ibid.*, paras. 16 and 40; and International Mandates for Promoting Freedom of Expression, 2007 Joint Declaration on Diversity in Broadcasting, <https://www.osce.org/fom/29825>.

³³ International Mandates for Promoting Freedom of Expression, 2003 Joint Declaration, <https://www.osce.org/fom/28235>.

Inter-American Court of Human Rights, *Advisory Opinion on Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*

In an advisory opinion requested by Costa Rica, the Inter-American Court of Human Rights determined that laws imposing compulsory licensing of journalists were not legitimate because they prevent those who were unlicensed from fully exercising their right to freedom of expression, including via the use of the news media:

The practice of professional journalism cannot be differentiated from freedom of expression. On the contrary, both are obviously intertwined, for the professional journalist is not, nor can he be, anything but someone who has decided to exercise freedom of expression in a continuous, regular and paid manner.³⁴

African Commission on Human and Peoples' Rights, *Media Rights Agenda and Others v. Nigeria*

After Nigeria's military government annulled elections in 1993, it cancelled existing newspaper registrations. By decree, it created a new Newspapers Registration Board, which could refuse registration simply by "having regard to the public interest", giving it broad discretion. No appeal procedure was available.³⁵ Anyone who published an unregistered newspaper could face a criminal prosecution. Registration required a fee and a pre-registration fee also had to be paid as a deposit in case of any penalties.³⁶

The African Commission held that this registration scheme violated the right to receive information. The core reason for this was the "total discretion and finality of the decision" of the registration board, which "invites censorship" and endangers the right of the public to receive information.³⁷ The Commission also warned against "excessively high" registration fees, although it indicated that the fees in this case, while high, were not so excessive as to represent a clear violation of freedom of expression.³⁸

Broadcast licensing, on the other hand, is permissible. Traditional broadcasting relies on a finite frequency spectrum and licensing regimes are typically necessary to allocate access to those wavelengths fairly, to prevent technical interference and to ensure a diverse range of

³⁴ 13 November 1985, Series A, No. 5, para. 74, https://www.corteidh.or.cr/docs/opiniones/seriea_05_ing.pdf.

³⁵ 31 October 1998, Communication Nos. 105/93, 128/94, 130/94 and 152/96 (1998), para. 5, http://hrlibrary.umn.edu/africa/comcases/105-93_128-94_130-94_152-96.html.

³⁶ *Ibid.*, para. 6.

³⁷ *Ibid.*, para 57.

³⁸ *Ibid.*, para. 56.

voices have access to the spectrum. However, such licensing should always be done according to open, clear, transparent and non-discriminatory licensing conditions, and be overseen by an independent licensing authority.³⁹

Any form of media regulation must be careful to respect the principle of media independence. For this reason, media regulatory bodies such as broadcasting authorities must be independent. Boards of such bodies should be appointed in a manner which insulates them from political interference, and the regulatory authority should not be housed within a government office. For print media and journalists, self-regulatory systems (such as via a media professional body) are preferable, because they are less likely to compromise media independence.

Examples: Broadcast Licensing and Freedom of Expression

Human Rights Committee, *Yashar Agazade and Rasul Jafarov v. Azerbaijan*

Azerbaijan's National Television and Radio Council had not held regular open tenders for allocating radio broadcasting licences, and instead had allocated licences to government-affiliated media entities.⁴⁰ Azerbaijan argued that their licence allocation system was necessary to ensure pluralism and prevent disorder in telecommunications. The Committee questioned how such practices could accomplish that goal, stressing that licensing conditions should be objective, clear and transparent. It found Azerbaijan had violated the right to freedom of expression of Mr. Agazade and Mr. Jafarov, who had unsuccessfully tried to obtain a licence.⁴¹

Inter-American Court of Human Rights, *Case of the Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala*

Guatemala's radio licensing system awarded licences to the highest bidder, without a dedicated category for community radio. Unable to compete, some indigenous communities operated radio stations without a licence. Guatemala regularly raided unlicensed stations and charged radio workers with theft for their use of the radio spectrum (on the grounds that it was a State resource).⁴²

The Court, considering the case of two indigenous communities, found that the radio broadcasting framework violated their right to freedom of expression. It effectively denied them access to the media to express their opinions and disseminate information relevant

³⁹ General Comment No. 34, note 5, para. 39.

⁴⁰ 16 March 2017, Communication No. 2205/2012, para 7.2, <https://juris.ohchr.org/Search/Details/2235>.

⁴¹ *Ibid.*, paras. 7.4-7.6.

⁴² 6 October 2021, Series C, No. 44, para. 57, https://www.corteidh.or.cr/docs/casos/articulos/seriec_440_ing.pdf.

to their communities.⁴³ The raids and criminal prosecutions were also unnecessary and disproportionate.⁴⁴ Among other reparations, the Court ordered Guatemala to revise its regulatory framework to recognise community radio and to ensure indigenous communities had access to the radio spectrum.⁴⁵

Freedom of Expression in the Digital Era

In the digital era, the speed of communication and the amount of information available have dramatically transformed communications and access to information. Despite these changes, the fundamental principles of freedom of expression remain the same. The ability of governments to regulate speech is still subject to the same standards contained in the international treaties. The basic rule is: online speech is protected according to the same principles as offline speech.⁴⁶

Accordingly, new rules which specially penalise online speech are viewed with great suspicion. For example, laws should not impose higher penalties merely because speech occurs online. Laws should also avoid creating duplicate crimes for the same time of harmful speech online and offline: a single, clearly worded legal provision avoids confusion and duplicate standards. In a few specialised areas, content restrictions may need to be updated. For example, some uniquely online phenomenon, like sending spam emails, may require new legal rules. Outside of these special cases, however, States should not create special Internet content restrictions.

Complex questions arise around the roles and responsibilities of Internet intermediaries. Intermediaries include a range of private actors that host the speech of others online, Internet service providers which provide access to the Internet, search engines and social media companies.

A key question relates to intermediary liability, or the extent to which intermediaries should be held responsible for unlawful harmful speech on their platforms. In general, intermediaries which provide merely technical services, such as Internet service providers, should be immune from any intermediary liability. Other types of intermediaries should also

⁴³ *Ibid.*, para. 156.

⁴⁴ *Ibid.*, paras. 170-172.

⁴⁵ *Ibid.*, paras. 196, 200.

⁴⁶ Human Rights Council, Resolution 47/16, para. 1, undocs.org/A/HRC/RES/47/16.

generally be shielded from liability.⁴⁷ Otherwise, private companies are likely to be overly zealous in restricting speech in order to protect themselves from liability, thereby inhibiting free expression. Any liability schemes should not impose direct liability but only penalise a failure to act once properly notified about illegal content. Even this, however, may create risks. Accordingly, international standards are that intermediaries should never be required to monitor content proactively and should only be compelled to remove content upon receiving an order to do so from a court or other authoritative body.⁴⁸

Global concern about the presence of harmful speech on large social media platforms has increasingly led to calls for regulating such platforms. While the dominance of a few large companies raises legitimate concerns, great care should be taken in compelling content removal by social media companies. Noting concerns over harmful speech on platforms, the UN Special Rapporteur has noted:

[T]he appeal of regulation is understandable. However, such rules involve risks to freedom of expression, putting significant pressure on companies such that they may remove lawful content in a broad effort to avoid liability. They also involve the delegation of regulatory functions to private actors that lack basic tools of accountability.... Complex questions of fact and law should generally be adjudicated by public institutions, not private actors whose current processes may be inconsistent with due process standards and whose motives are principally economic.⁴⁹

While international standards call for careful review of any rules mandating content removal, they have increasingly embraced calls for regulating major tech companies in other areas. Specifically, they have called for greater transparency and procedural fairness and to protect human rights in the use of artificial intelligence.⁵⁰ Regulation in these areas can also raise

⁴⁷ Special international mandates on freedom of expression, *2011 Joint Declaration on Freedom of Expression and the Internet*, para. 2, <http://www.law-democracy.org/wp-content/uploads/2010/07/11.06.Joint-Declaration.Internet.pdf>.

⁴⁸ *Ibid.*, para. 2(b). The Declaration of Principles on Freedom of Expression and Access to Information in Africa takes a strict approach: “States shall not require the removal of online content by internet intermediaries unless such requests are: a. clear and unambiguous; b. imposed by an independent and impartial judicial authority, subject to sub-principle 5; c. subject to due process safeguards; d. justifiable and compatible with international human rights law and standards; and e. implemented through a transparent process that allows a right of appeal.” Note 4, Principle 39.

⁴⁹ Report of the UN Special Rapporteur on freedom of expression, 6 April 2018, para. 17, undocs.org/A/HRC/38/35.

⁵⁰ For example, the civil-society led Santa Clara Principles, which are cautious of government regulation generally, suggest: “Governments and other state actors should consider how they can encourage appropriate and meaningful transparency by companies...including through regulatory and non-regulatory measures.” <https://santaclaraprinciples.org/>. See also Declaration of Principles on Freedom of Expression and Access to Information in Africa, note 4, Principle 39(6).

complex challenges but generally poses less of a risk to freedom of expression than content removal requirements. Further, transparency is crucial to understanding platform decisions which restrict access to information online in ways that relatively hidden, such as decisions to deprioritise certain content.

Complexities in Regulating Harmful Online Speech: An Example from Germany

Germany's Network Enforcement Act – "NetzDG" by the German acronym – requires large social media companies (those with more than 2 million users) to meet certain reporting and transparency obligations. More controversially, the law also requires companies to put in place a system to block or remove clearly illegal content within 24 hours after they receive a complaint about it. Illegal content, for NetzDG purposes, refers to content under specified provisions of the German criminal code, for example relating to hate speech, national security and public order.⁵¹

Many advocates have criticised the law for the short timeframe required for takedown, the lack of judicial oversight and the law's potential to incentivise platforms to over-police content. The UN Human Rights Committee also expressed concern, stating:

Whilst appreciating the commitment of the State party to addressing online hate speech and abuse, the Committee is concerned by the broad powers introduced by the Network Enforcement Act in 2017 to remove content deemed illegal or abusive. It also notes with concern that responsibility for the removal of such content is assigned to social media companies and not subject to judicial oversight, thereby limiting access to redress in cases where the nature of content is disputed. The Committee is concerned that these provisions and their application could have a chilling effect on online expression (art.19).⁵²

NetzDG has sometimes been cited by other States when enacting laws regulating online speech, including in far more repressive ways.⁵³

⁵¹ An English version of the law is available here, but this translation does not include 2021 amendments: <https://bit.ly/3PAIEZ0>. Note that litigation is ongoing in relation to NetzDG and a German court has held that some provisions violate European Union law. Library of Congress, "Germany: Administrative Court of Cologne Grants Google and Facebook Interim Relief", 2022, <https://bit.ly/3OkpaWa>.

⁵² Human Rights Committee, Concluding Observations on the seventh periodic report of Germany, 30 November 2021, para. 46, undocs.org/CCPR/C/DEU/CO/7.

⁵³ Jacob Mchangama and Joelle Fiss, *The Digital Berlin Wall: How Germany (Accidentally) Created a Prototype for Global Online Censorship* (2019, Copenhagen, Justitia), p. 8, <https://bit.ly/3AZuxHe>.

Another key freedom of expression issue in the digital era is access to the Internet. Universal Internet access is increasingly being recognised as indispensable to the exercise of freedom of expression, given that most communication and information access now occurs online. States should accordingly make adequate efforts to promote access to the Internet and address inequalities in this regard.⁵⁴ States should also ensure against discriminatory treatment of Internet data and traffic, such as Internet service providers prioritising certain content for commercial benefit.⁵⁵ This principle, known as “net neutrality”, aims to preserve the Internet as a free and open forum where all information and communications are treated equally.

Given the importance of access to the Internet to freedom of expression, State interferences with it raise grave concerns. Blanket Internet shutdowns, where a government orders service providers to stop providing access to the Internet to all or a part of the population, are never justified. Such actions are always disproportionate under the three-part test because of their wide-ranging impact on communications of all types.⁵⁶ More targeted interferences with Internet access will only very rarely be proportionate and justified.⁵⁷ Measures to block clearly illegal content, such as copyright infringements or explicit sexual images of children, can be legitimate if they are carefully tailored to target only harmful illegal content, in accordance with the three-part test.⁵⁸ For example, blocking social media sites which are widely used for public discourse on the grounds that they are used to share illegal content would not be valid, because it would not be necessary and proportionate.

**Community Court of Justice of the Economic Community of West African States:
Decisions on Internet Freedom**

In *Amnesty International Togo and Ors v. Togo*, the ECOWAS Court found that Togo’s Internet shutdown in response to protests in the country had no basis in any law. Because it was not provided for by law, the shutdown violated the right to freedom of expression as protected by the *African Charter on Human and Peoples’ Rights*.⁵⁹ Just recently, in July 2022, the same Court determined that Nigeria’s suspension of Twitter violated the rights to

⁵⁴ Human Rights Council Resolution 47/16, note 46.

⁵⁵ See 2011 Joint Declaration, note 47, para. 5(a); and Human Rights Council, Resolution 47/16, note 46, para. 12.

⁵⁶ See Report of the Office of the High Commissioner for Human Rights (OHCHR) on Internet Shutdowns, 13 May 2022, para. 13, undocs.org/A/HRC/50/55; and Report of the UN Special Rapporteur on freedom of expression, 30 March 2017, para. 14-15, undocs.org/A/HRC/35/22.

⁵⁷ Report of the OHCHR on Internet Shutdowns, note 56, para. 13.

⁵⁸ 2011 Joint Declaration, note 47, para. 3(a); and Council of Europe Committee of Ministers, Declaration on freedom of communication on the Internet, adopted 28 May 2003, para. 3, <https://rm.coe.int/16805dfbd5>.

⁵⁹ 25 June 2020, Judgment NO. ECW/CCJ/JUD/09/20, para. 45, https://www.accessnow.org/cms/assets/uploads/2020/07/ECOWAS_Togo_Judgement_2020.pdf.

freedom of expression and access to information. Nigeria had suspended Twitter after it flagged a tweet by Nigeria's President for violating its rules.⁶⁰

Further Reading and Useful Sources

UN Human Rights Committee, General Comment No. 34: This General Comment elaborates on the right to freedom of expression under Article 19 of the ICCPR. UN Human Rights Committee, *General Comment No. 34, Article 19: Freedoms of opinion and expression*, 12 September 2011, CCPR/G/GC/34, <http://undocs.org/ccpr/c/gc/34>.

Joint Declarations of the Special Rapporteurs on Freedom of Expression: The special rapporteurs at the UN, OSCE, OAS and African Commission release annual Joint Declarations articulating key standards on a wide range of specific freedom of expression themes and are available at: <https://www.osce.org/fom/66176>.

Colombia's Global Freedom of Expression project has a compilation of major cases from the Inter-American and African human rights systems, and from the Grand Chamber of the European Court of Human Rights, available at: <https://globalfreedomofexpression.columbia.edu/a-special-collection-of-the-case-law-of-freedom-of-expression/>.

⁶⁰ The decision was not available at the time of writing, but an announcement of the decision may be found at ECOWAS, "ECOWAS Court Orders Nigeria to Guarantee Not to Repeat Unlawful Ban on Twitter", 16 July 2022, <https://bit.ly/3PgwXpf>.

Exercises

Exercise 1: Applying the Three-Part Test

Break into small groups. Each group will consider one of the following scenarios (the moderator should allocate scenarios to groups). For each scenario, imagine that the case has been appealed to the UN Human Rights Committee claiming a violation of the right to freedom of expression as protected by Article 19 of the ICCPR. Imagine that you are members of the Committee and have to decide whether freedom of expression has been violated according to the three-part test. You should be prepared to present the reasons for your decision to the rest of the participants.

Case 1: An investigative journalist is looking into procurement processes for the military's acquisition of new weapons. A government source contacts the journalist and leaks confidential documents which suggest corrupt dealings related to the procurement of these weapons.

The journalist publishes a story including information from the leaked documents. The government brings criminal charges against the journalist for violating the Law on State Secrets, which prohibits publishing classified information which was disclosed illegally. They also bring treason charges against the journalist, because the crime of treason includes "providing information in order to assist the armed forces of an enemy of the State".

Case 2: National News 1 has a licence from the national broadcasting authority, which also enforces a code of conduct for broadcasters. Violating the code of conduct can result in the broadcaster losing its licence.

National News 1 was broadcasting live from a protest in the capital city. The protesters consisted largely of supporters of the political opposition. While a reporter was on air, a protester ran into her, knocking her over. She blurted out a few curse words and then got up and continued reporting. Later in the broadcast, she interviewed a protester who used racial slurs to describe supporters of the majority party.

The broadcasting authority issued a notice to National News 1 that it had violated an obscenity provision and a hate speech provision in the code of conduct. As a result, it revoked the licence of National News 1. National News 1 claims that this was done in retaliation for their coverage of the protests, which were politically embarrassing for the government. The broadcasting authority says it was simply enforcing the broadcasting rules.

Case 3: A rural social movement has been active in documenting human rights violations related to land disputes in their region. They are tracking a particularly contentious dispute related to land acquired by a foreign company for investment purposes. Local residents claim they own the land under a communal arrangement and have been protesting regularly at the site.

Police have issued an order prohibiting filming or taking photos within a specific geographic area surrounding the disputed area. They say this is necessary to maintain public order following several violent incidents. The social movement challenges the order in court but is unsuccessful, with the court finding that the restriction is justified on public order grounds.

The movement also displays “know your rights” information posters at the site and distributes fliers. These contain information about what protesters should do if they are arrested and also states that they have a right to protest and gather. It also calls for acts of civil disobedience to protect the rights of the community and the environment. Police take down the posters and confiscate the fliers, saying they are also leading to disorder and inciting violence at the site. They say they will arrest anyone who continues to post or distribute these documents and charge him or her with incitement.

Case 4: A popular online newspaper is one of the most vocal critics of government policy but also has a reputation for sensationalism, with frequent reporting on celebrity gossip and public scandals. It published a series of articles detailing an extramarital affair by a Member of Parliament, including expensive spending habits surrounding the affair, some of which raise questions about the illicit use of funds. The Member of Parliament accused the online paper of violating his rights to privacy and obtained a court injunction to stop the paper from disseminating any further articles about his private life.

Meanwhile, the ministry in charge of telecommunications reportedly issued an order to Internet providers in the country asking them to block access to the website on the grounds that it was repeatedly revealing private information. Following action by Internet providers, users are no longer able to access the website of the online newspaper.

Exercise 2: Broadcasting Regulation

Break into small groups and discuss the following scenario. Imagine you are lawyers advising the government on a new broadcasting law it is drafting. The government has asked



for your advice about how the draft law will impact freedom of expression in light of international standards. The core features of the draft law are:

- It creates a Broadcasting Authority and states that the Authority will operate independently and without interference.
- The Authority will be led by a Council of six people, of whom four will be appointed by the President (who is the head of State) and two will be appointed by the head (speaker) of the legislature chosen from among nominees proposed by an association of broadcasters.
- Members of the Council serve two-year terms, renewable twice. They can be removed by the President for reasons of incapacity or unsatisfactory performance.
- Funding for the Authority is allocated from the budget of the Ministry of Information and out of any licensing fees and fines collected.
- The Broadcasting Authority is tasked with drafting a code of conduct for broadcasters and is empowered to impose fines or cancel licences for violations of the code. Both the code of conduct and the rules on penalties will be drafted by the Authority, although it must first consult with relevant stakeholders.
- The Authority must award licenses through open tenders based on the financial competitiveness and quality of the bid. There are two classes of licences: an open commercial class and a public broadcasting class reserved for the State-affiliated broadcaster.

What advice would you give regarding the features outlined above? Are there other key components the law is missing which should be incorporated? How would you ensure that the principles of media independence and media diversity are protected in the legislation?

Exercise 3: Strategies for Stronger Freedom of Expression Laws

Break into small groups. Based on the reading material and the contents of the workshop, consider the media laws of your own country. Brainstorm a few key aspects of the media law framework in your country which you believe are not aligned with international standards. These could include existing laws which are problematic or an area where appropriate legal regulation is currently lacking.

Then discuss one of the laws or provisions you have identified (or absence of such a law) and brainstorm around what strategies you would use to secure a change in the law to better protect freedom of expression. Which strategies are likely to be successful and which not? In pursuing those strategies, would you reference international human rights standards or would that be counter-productive? If you are part of a network of media lawyers, what roles do you see for your network in engaging in these strategies?



Discussion Questions

- Why does freedom of expression protect the right to seek and receive information as well as the right to speak? What are the implications of protecting the former? What responsibilities does this aspect of the right impose on States?
- Do you understand the main components of the three-part test? Could you explain it to someone else?
- How does the three-part test compare to approaches taken by courts on freedom of expression issues under your domestic constitution?
- Can you think of examples from your country of landmark freedom of expression cases which have either protected or undermined this right? Is there a tradition of courts finding laws invalid for violating expression as guaranteed by the constitution in your country?
- Consider the types of content restrictions discussed here. Can you think of other types of content restrictions? For example, are there other content restrictions in your domestic law? Would these other content restrictions pass the three-part test?
- How can media regulation promote media diversity and media independence? In your country's context, have you seen examples of media regulation which has improved protection for freedom of expression? Or has media regulation mostly been a threat to media freedom?
- Do you understand the freedom of expression concerns that result from imposing liability on online intermediaries? Do you agree with the standards articulated in this area? How do you think States can respond to harmful speech on social media platforms while still respecting for freedom of expression?



Sample Agendas

Overview of Freedom of Expression under International Law

Date

Location

This workshop provides an overview of basic principles governing freedom of expression under international human rights law, specifically under the *International Covenant on Civil and Political Rights*. It aims to give participants, with a focus on legal professionals, an understanding of international law standards in this area and better equip them to use these standards in the course of litigation, advocacy and law reform efforts at the national level.

Sample Agenda 1 – Shorter Workshop Without Exercises

Agenda

9:00 – 9:10	Introductions, Agenda and Purposes of the Workshop
9:10 – 9:35	Scope of the Right and Restrictions on the Right; Introduction to Content Restrictions
9:35 – 9:50	Discussion and Questions
9:50 – 10:15	Media Freedom, Media Diversity and Media Regulation; Freedom of Expression in the Digital Age
10:15 – 10:30	Discussion and Questions

Sample Agenda 2 – Longer Half-Day Workshop Incorporating Exercises

Agenda

9:00 – 9:10	Introductions, Agenda and Purposes of the Workshop
9:10 – 9:35	Scope of the Right and Restrictions on the Right; Introduction to Content Restrictions
9:35 – 9:50	Discussion and Questions



9:50 – 10:20	<i>Exercise 1: Applying the Three-Part Test</i>
10:20 – 10:45	Media Freedom, Media Diversity and Media Regulation
10:45 – 11:15	<i>Exercise 2: Broadcasting Regulation</i>
11:15 – 11:30	Break
11:30 – 12:00	Freedom of Expression in the Digital Age
12:00 – 12:30	<i>Exercise 3: Strategies for Stronger Freedom of Expression Laws</i>
12:30 – 13:00	Final Group Discussion and Closing

