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Model Training Materials

Hate Speech, Defamation and National Security

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Introduction¹

These *Model Training Materials: Hate Speech, Defamation and National Security* 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 a workshop on these three complex restrictions on freedom of expression under international human rights law. They include:

- A Background Reading document 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 addresses three complex and frequently applied areas of restrictions on the right to freedom of expression, namely hate speech, defamation and national security. All three of these areas of restriction are derived from valid and important reasons for limiting freedom of expression, but they are also very often misapplied or abused in a manner which is harmful to the right to freedom of expression. The Background Reading discusses the standards developed under international human rights law on these three areas, with a particular focus on standards under the *International Covenant on Civil and Political Rights* (ICCPR).²

This Background Reading presumes at least an introductory knowledge of freedom of expression principles under international law, in particular the three-part test under the ICCPR for any restriction on freedom of expression. If you are not familiar with this concept, you can learn more about it in CLD's introductory training materials on freedom of

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² UN General Assembly Resolution 2200A (XXI), 16 December 1966, in force 23 March 1976.

expression under international law.³ As a quick review, under international human rights law any restriction on freedom of expression must meet the following requirements:

- 1) Be provided by law.
- 2) Protect a legitimate interest, defined as the rights or reputations of others, national security, public order, public health or public morals.
- 3) Be necessary to protect that interest (which includes a proportionality requirement).

Hate Speech

Under international human rights law, States have an obligation to prohibit hate speech which incites discrimination, hostility or violence. Article 20(2) of the ICCPR states:

Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Other international treaties also require States to prohibit or respond to hate speech. The *Convention on the Elimination of Racial Discrimination* (CERD) requires States to prohibit the dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination and incitement to acts of racial violence.⁴ When hate speech amounts to incitement to genocide, it is an international crime within the jurisdiction of the International Criminal Court, while the Genocide Convention requires States to prohibit “direct and public incitement to commit genocide”.⁵ Other international standards also address hate speech, such as the UN Declaration on the Rights of Indigenous Peoples, which calls on States to address propaganda which promotes or incites racial or ethnic discrimination against indigenous peoples.⁶

Hate speech attacks the equality of its targets, one of the most cherished of human rights. It also inhibits the ability of impacted groups to participate freely in the public sphere, including by freely exercising their right to freedom of expression and to access information. Thus, while hate speech laws are a restriction on freedom of expression, they also support the realisation of the right. When hate speech laws are properly drafted and implemented, the right to freedom of expression and the right to be free from hatred are complementary rather than competing rights.

³ See https://www.law-democracy.org/live/wp-content/uploads/2022/12/Training-Materials-1.FOE_format-1.pdf.

⁴ 21 December 1965, in force 4 January 1969, Article 4.

⁵ *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, in force 12 January 1951, Article III(c); and *Rome Statute of the International Criminal Court*, 18 July 1998, in force 1 July 2002, Article 25(3)(e).

⁶ General Assembly Resolution 61/295, 13 September 2007, Article 8(2)(e), undocs.org/A/RES/61/295.

The obligation to prohibit hate speech does not remove State responsibilities to comply with the ICCPR's Article 19(3) test for any restriction on freedom of expression. One of the grounds enumerated under the three-part test for restricting expression is to protect the rights of others. Everyone has the right to be free from hate speech and discrimination, so responding to hate speech is a proper ground for restricting freedom of expression under the second part of the three-part test. States therefore *can* restrict hate speech under international human rights law, and also *must* do so to the extent required by their obligations under Article 20(2) of the ICCPR and any other relevant international treaties. However, hate speech laws must also be "provided by law" and be necessary and proportionate.

International standards provide guidance to States seeking to adopt hate speech laws and policies which meet both the obligations of Article 19(3) and Article 20(2). As a crucial starting point, Article 20(2) only requires the prohibition of a specific kind of "incitement", namely that which constitutes hate speech. Other types of intolerant speech should be addressed via a multifaceted policy response and awareness/education rather than via criminal proscriptions. Indeed, governments should understand that "legal prohibition alone" cannot eliminate "the human sentiment of hatred".⁷ The following mapping outlines the relatively strict international law rules governing what law and policy responses are appropriate for various kinds of intolerant and discriminatory speech.

- Advocacy of hatred which constitutes incitement: Article 20(2) of the ICCPR requires legal prohibition of a very specific type of speech, namely advocacy of hatred which constitutes incitement to discrimination, hostility or violence.
 - States must prohibit this kind of speech. The normal route for doing this is through criminal offences, although this is subject to strict standards, discussed further below. As with all restrictions on freedom of expression, any sanctions for hate speech must be proportionate and such rules must otherwise comply with the Article 19(3) three-part test.
 - The Genocide Convention requires States to criminalise direct and public incitement to genocide. States should ensure that such laws reflect the elements of the crime of incitement to genocide under international law.
- Intolerant, discriminatory or prejudicial speech which does not constitute hate speech: Other kinds of speech may be insulting or harmful to equality, or even be racist and xenophobic, but do not arise to the level requiring legal prohibition.
 - Criminal sanctions, particularly if the penalty envisages imprisonment, are not the appropriate vehicle for addressing this kind of speech.

⁷ Report of the UN Special Rapporteur on Freedom of Expression, 7 September 2012, para. 32, undocs.org/A/67/357.

- Other sanctions, such as administrative fines or civil remedies, may be appropriate depending on the context and provided all requirements of the three-part test are met. For example, broadcasting or licensing rules may regulate a broader range of racist content than the hate speech covered by Article 20(2) of the ICCPR. Such rules should be applied by independent regulatory bodies in accordance with international human rights standards on broadcast regulation, briefly discussed in CLD’s model training materials on freedom of expression generally.⁸
- States should explore a range of non-punitive measures to combat this kind of hate speech. Examples may include educational efforts, initiatives empowering minorities to exercise their freedom of expression, the creation of equality bodies, promoting pluralism and diversity in the media, training officials on effective strategies for combatting this speech, and creating mechanisms and platforms for conflict resolution.⁹ States may have positive obligations to engage in these kinds of activities. The *Convention on the Elimination of All Forms of Racial Discrimination*, for example, explicitly requires States to undertake “immediate and effective measures, particularly in the fields of teaching, education, culture and information” to combat prejudices leading to racial discrimination.¹⁰

Criminal Prohibitions on Hate Speech

Because criminal hate speech laws impose the most punitive sanctions and therefore present a particularly harsh restriction on freedom of expression, international standards provide detailed guidance on what requirements must be met to ensure that criminal hate speech laws do not violate the Article 19(3) three-part test. For example, laws prohibiting hate speech should align with the elements included in Article 20(2). International bodies have interpreted these standards to mean the following:

- Hatred should be understood as “intense and irrational emotions of opprobrium, enmity and detestation towards the target group”.
- Advocacy includes an intent to promote hatred publicly towards the target group.

⁸ See https://www.law-democracy.org/live/wp-content/uploads/2022/12/Training-Materials-1.FOE_format-1.pdf.

⁹ *Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence*, 11 January 2013, paras. 35-41, undocs.org/A/HRC/22/17/Add.4; and Human Rights Council, Resolution 16/18, 24 March 2011, para. 5, A/HRC/RES/16/18.

¹⁰ Note 4, Article 7.

- Incitement refers to statements which “create an imminent risk” of discrimination, hostility or violence.¹¹

Criminal hate speech laws must therefore have sufficiently specific intent requirements.¹² “Advocacy” implies the presence of hateful intent as an element of the crime, which protects people who are discussing hate speech with the intent to combat it or identify its origins, such as academics and activists. Similarly, a requirement of imminence or a sufficient causal nexus between the speech and the potential harm ensures against an abuse of criminal hate speech laws via overly attenuated connections between controversial speech and the alleged harms flowing from it.

While Article 20(2) only references hate speech on national, racial or religious grounds, many States prohibit hate speech targeting groups based on other identifiers. This is appropriate and may be necessary to protect the rights of other groups, but should use international human rights standards on discrimination as a reference. Protecting only officially recognised ethnic groups, for example, would raise concerns, as would special protections for certain official entities (like “the military” or parliamentarians).

Human Rights Committee, *Rabbae v. Netherlands*

Geert Wilders, a Dutch politician known for his anti-immigration views, has made numerous inflammatory anti-Muslim statements. Based on these statements, he faced criminal charges, including for the crime of “incitement to hatred and discrimination on grounds of religion or race”, but was ultimately acquitted. Mr. Rabbae, a Muslim Member of Parliament, and two other Muslims who experienced harassment and discrimination, brought a complaint to the Human Rights Committee alleging that the acquittal violated their rights under Article 20(2) of the ICCPR.¹³

In its opinion, the Committee affirmed that Article 20(2) protects the right of everyone to be free from hatred and discrimination, but noted that States only have a legal obligation to prohibit specific forms of expression. Article 20(2) is “crafted narrowly” to protect freedom of expression and other rights, and the Committee stressed the importance of the free exchange of views on public and political matters and that freedom of expression

¹¹ This language is derived from Principle 12 of the Camden Principles on Freedom of Expression and Equality, developed by the organisation Article 19 after consultation. Article 19, Camden Principles, 2009, <https://bit.ly/3UokrWW>. It has been cited approvingly in the Rabat Plan of Action, note 9, at note 5; Report of the UN Special Rapporteur on freedom of expression, 9 October 2019, para. 13, undocs.org/A/74/486; and Report of the UN Special Rapporteur on freedom of expression, 7 September 2012, para. 44, undocs.org/A/67/357.

¹² See also Special international mandates on freedom of expression, Joint Statement on Racism and the Media, 27 February 2001, <https://www.osce.org/files/f/documents/f/1/40120.pdf>.

¹³ *Rabbae v. The Netherlands*, 14 July 2016, Communication No. 2124/2011, undocs.org/CCPR/C/117/D/2124/2011.

protects even “deeply offensive” speech. It also affirmed the complementary nature of Articles 19 and 20, and that prohibitions implementing Article 20(2) must align with the three-part test under Article 19.¹⁴

The Committee found that the Netherlands had prohibitions on hate speech under its criminal law and allowed victims to trigger and participate in these proceedings. In this case, Mr. Wilders was prosecuted and the court issued a detailed judgment evaluating his statements. The Committee determined that the Netherlands had taken necessary and proportionate measures to prohibit hate speech and to guarantee an effective remedy to the authors of the complaint. Since Article 20(2) does not impose an obligation on States to ensure that those charged with hate speech “will invariably be convicted by an independent and impartial court of law”, the Committee found there was no violation of Article 20(2) by the Netherlands.¹⁵

The *Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence*, a document arising from a series of expert workshops organised by the Office of the High Commissioner for Human Rights in 2011 and 2012, provides a six-part “threshold test” for when criminal hate speech convictions will be legitimate. In the Rabat Plan, the test is designed as a guide for judges but the test has become influential in other contexts as well. The Declaration on Principles on Freedom of Expression in Africa, for example, provides that States should consider these six factors when deciding whether to adopt criminal sanctions.¹⁶ The six factors in this threshold test are:

- Context: Context, including social and political context, should inform assessments of whether the speech is likely to incite discrimination, hostility or violence, and may be relevant to establishing intent.
- Speaker: The position or status of the speaker, particularly in relation to the audience, should be considered.
- Intent: Specific intent, and not mere negligence or recklessness, is necessary for a conviction for hate speech, given that Article 20(2) refers to advocating or inciting harm, not merely distributing harmful material.
- Content and form: The content and form of the speech should inform the analysis, particularly as to whether incitement is present. Examples of this analysis may

¹⁴ *Ibid.*, para. 10.4.

¹⁵ *Ibid.*, para. 10.7.

¹⁶ African Commission on Human and Peoples’ Rights, Declaration of Principles on Freedom of Expression and Access to Information in Africa, 10 November 2019, Principle 23(2), <https://bit.ly/3UqS2Q7>. As another example, the UN suggests that its field presences use the Rabat Plan’s factors as a guide when developing appropriate responses to hate speech. *United Nations Strategy and Plan of Action on Hate Speech: Detailed Guidance on Implementation for United Nations Field Presences*, September 2020, pg. 17, <https://bit.ly/3zQubBt>.

include how direct and provocative the speech was and whether balanced arguments were provided.

- Extent of the speech act: The extent of the speech act, including factors such as its reach, how it was distributed, the size of audience and whether it was public, is relevant.
- Likelihood, including imminence: A rather direct causation should be present, such that there is a reasonable probability that the speech will actually incite harm (although the harm need not actually occur).¹⁷

European Court of Human Rights: *Jersild v. Denmark*

The six factors identified in the Rabat Plan were not derived out of thin air: they reflect principles established by other human rights authorities and earlier commitments and standards. The European Court of Human Rights, for example, has decided numerous cases which predate the Rabat Plan which rely on analysis which was later reflected in the Plan's six factors. This can be seen in *Jersild v. Denmark*, a 1994 landmark Grand Chamber judgment involving a Danish journalist who interviewed racist youth and included their racist statements in a broadcast. He was convicted and fined under an article of the Danish Penal Code which prohibited racist hate speech.¹⁸

The Court determined that the conviction was “provided by law” and had the legitimate aim of protecting the rights of others. However, it was not “necessary” to protect that aim and therefore violated the journalist’s right to freedom of expression. In making this decision, the Court found several factors to be relevant, many of which can be classified according to those identified in the Rabat Plan:

- Intent: The journalist’s purpose in compiling the programme was not racist, a “key question” for the Court.¹⁹
- Speaker: The Court also considered it important that the journalist did not make racist statements himself but merely disseminated the statements of others.²⁰
- Content and Form: The broadcast was part of a “serious Danish news programme” and the interviewer clearly disassociated himself from the people he had interviewed. The programme also began with a reference to discussions about racism in Denmark and, overall, portrayed the youth’s racism as part of a general anti-social sentiment; while no explicit condemnation of racism was made, the

¹⁷ All summarising language found at the Rabat Plan of Action, note 9, para. 29.

¹⁸ 23 September 1994, Application No. 15890/89, <https://hudoc.echr.coe.int/eng?i=001-57891>.

¹⁹ *Ibid.*, paras. 31 and 36.

²⁰ *Ibid.*, para. 31.

Court did not consider this to be determinative, given the general tone and that editorial choices must be made in a short broadcast.²¹

- Context: The Court also expressed concern over the impact a criminal conviction of a journalist for broadcasting the views of others would have more generally on the ability of the press to fulfil its role in society. Even a limited fine, when imposed on a journalist, could have serious broader implications for media freedom.²²

Variations across the Human Rights Treaties

Hate speech is one area where the various human rights treaties have occasionally taken divergent approaches. In particular, Article 4 of the CERD requires States to prohibit the dissemination of ideas based on racial superiority or hatred, without explicitly requiring incitement, which is built into Article 20(2) of the ICCPR.

However, the CERD specifies that States, when enacting hate speech rules, should have “due regard” to the principles in the *Universal Declaration of Human Rights*,²³ and the Committee on the Elimination of Racial Discrimination has indicated that in interpreting this clause freedom of expression standards should be the “most pertinent reference principle when calibrating the legitimacy of speech restrictions”.²⁴ The Committee has similarly stated that criminal sanctions should only be imposed in serious cases and should be “governed by principles of legality, proportionality and necessity”.²⁵ It has also embraced a modified version of the Rabat Plan’s threshold test, although notably excising the intent and imminence factors in respect to non-incitement offences in the CERD.²⁶ In this respect, “converging interpretations”²⁷ can be seen between the hate speech provisions of the CERD and the ICCPR, although the CERD still call for bans on non-incitement racist speech with lower threshold requirements. To reconcile commitments under the two treaties, we suggest that if States prohibit non-incitement racist speech in line with Article 4 of the CERD, penalties should be administrative rather than criminal, to avoid triggering the higher standard demanded of criminal hate speech laws under the ICCPR.

Some regional variation also exists regarding interpretation of hate speech obligations. So far, the African and American human rights courts have addressed hate speech relatively

²¹ *Ibid.*, para. 34.

²² *Ibid.*, para. 35.

²³ UN General Assembly Resolution 217A (III), 10 December 1948.

²⁴ CERD, note 10, Article 4; and General Comment No. 35, 26 September 2013, para. 19, undocs.org/CERD/C/GC/35.

²⁵ *Ibid.*, para. 12.

²⁶ *Ibid.*, paras 15 and 16.

²⁷ Report of the UN Special Rapporteur on freedom of expression, note 11, para. 15.

infrequently, while the European Court of Human Rights has an extensive jurisprudence on the topic. In this jurisprudence, the European Court has shown a greater willingness to accept restrictions on freedom of expression when combatting hate speech than the standards currently articulated under the other major human rights treaties.²⁸ One source of this more speech-restrictive approach is an “abuse of rights” provision in the *European Convention on Human Rights*.²⁹ The Court has interpreted this provision to exclude from the protection of the right to freedom of expression certain kinds of hate speech which may destroy the “fundamental values” of the Convention, meaning that the three-part test does not apply.³⁰ This is an exceptional approach in international human rights law, which normally protects all speech and then applies the three-part test to restrictions. Lawyers should be mindful of this distinct approach when referring to hate speech cases from the European system.

Public Figures

When hate speech is perpetrated by prominent public figures, it can be particularly harmful and may be more likely to incite hatred, discrimination or violence. Public figures typically have a larger audience than the average person and their words may be more influential. For this reason, the Rabat Plan considers the position and status of the speaker as one factor in its threshold test. The European Court of Human Rights has engaged in similar reasoning. For example, it accepted the legitimacy of a fine imposed on a famous football player who encouraged a crowd to chant a racist slogan, because the player should have been aware of the potential harmful impact of his behaviour given his fame and status as a role-model.³¹

Political leaders and public officials also have special responsibilities to avoid perpetrating hate speech. The obligations contained in the ICCPR extend to all branches of government at all levels, including executive, legislative and judicial, and national, regional and local.³² Politicians and public officials should also avoid racist or discriminatory speech. CERD explicitly affirms this obligation, specifying that States “[s]hall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.”³³

²⁸ For a comparative discussion of this, see Evelyn Aswad and David Kaye, “Convergence & Conflict: Reflection on Global and Regional Human Rights Standards on Hate Speech”, *Northwestern Journal of Human Rights*, 7 July 2022, <https://bit.ly/3zlhLLN>.

²⁹ 4 November 1950, E.T.S. No. 5, in force 3 September 1953, <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>. Article 17 states: “Nothing in this Convention may be interpreted as implying ... any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.”

³⁰ For a summary of the kinds of hate speech excluded from protection, see European Court of Human Rights Press Unit, *Factsheet – Hate Speech*, June 2022, https://www.echr.coe.int/documents/fs_hate_speech_eng.pdf.

³¹ *Šimunić v. Croatia*, 22 January 2019, Application No. 20373/17, para. 45, <https://bit.ly/3EfoZtH>.

³² Human Rights Council, General Comment No. 31, 29 March 2004, para. 4, <https://bit.ly/3FTIPM3>.

³³ CERD, note 4, Article 4(c).

States also have positive obligations to work to combat hate speech and not merely to refrain from perpetrating it. Generally under the ICCPR, States have positive obligations to “adopt legislative, judicial, administrative, educative and other appropriate measures”, including to raise awareness of the ICCPR’s obligations among public officials.³⁴ Political leaders and parties should also take steps to combat hate speech. For example, political parties can adopt codes of conduct or put in place other measures to ensure their officials and candidates do not engage in hate speech.³⁵

States may also bear some responsibility for the actions of non-State actors when State officials make comments which encourage their behaviour. Under human rights law, States are not directly responsible for the acts of private actors but failing to respond to private acts which harm human rights can amount to a violation of treaty obligations. For example, in the context of attacks against journalists, States must take actions to prevent, investigate, prosecute and provide redress for such attacks. In two notable cases, the Inter-American Court of Human Rights found that Venezuela’s failure to investigate properly harassment and attacks on the media, combined with intimidating statements against the media by government officials, amounted to a breach of Venezuela’s human rights obligations.³⁶ While these were not hate speech cases, a similar reasoning could apply where senior officials make discriminatory or hateful statements, either in situations where States fail to bring charges against public officials in contexts where they engage in criminally sanctionable incitement hate speech, or where States fail to take other measures (such as providing training or an internal administrative sanctions system) to address hateful or discriminatory language by public officials.

Public figures and particularly political figures also have their own right to freedom of expression, just like everyone. Political speech is afforded a high level of protection, even when some persons find the speech “unduly critical or even offensive”.³⁷ Statements by public figures which comment on social or political issues of a sensitive nature, without rising to the level of hate speech, should not be restricted on hate speech grounds. When assessing the legitimacy of a hate speech conviction of a public figure, courts should consider the person’s stature, influence and audience reach, in line with the principles of the Rabat Plan’s threshold test. However, whether the speech occurred as part of a political debate may also be a relevant contextual factor. Here are two examples of how the European Court of Human Rights has weighed these considerations.

³⁴ Article 2 of the ICCPR; and General Comment No. 31, note 32, para. 7.

³⁵ International mandates for promoting freedom of expression, 2021 Joint Declaration on Politicians and Public Officials and Freedom of Expression, 20 October 2021, para. 3(1).

³⁶ *Perozo and Others v. Venezuela*, 28 January 2009, Series C, No. 195, <https://bit.ly/3DL6WtX>; and *Ríos v. Venezuela*, 28 January 2009, Series C, No. 194, <https://bit.ly/3FR0eoS> (only available in Spanish).

³⁷ 2021 Joint Declaration on Politicians and Public Officials and Freedom of Expression, note 35, para. 2(a)(i).



European Court of Human Rights

Féret v. Belgium: A Belgian politician was the editor of his party's publications. His party distributed anti-immigrant publications which included xenophobic slogans and advocated discriminatory policies. The Belgian courts, after waiving his parliamentary immunity, convicted him of incitement to discrimination or hatred, and imposed a penalty of community service, a suspended prison sentence and a 10-year ban on serving in Parliament.³⁸

The European Court of Human Rights found that Belgium had not violated the politician's freedom of expression. The conviction was provided by law, met a legitimate aim and was necessary for meeting that aim.³⁹ The Court stressed that free political discourse was of fundamental importance in a democratic society but also noted that being a parliamentarian did not protect the individual from responsibility for disseminating hate speech. In contrast, xenophobic language by candidates during an election could carry a heightened risk of generating harmful reactions by the public.⁴⁰ The Court, examining the leaflets in question, determined that they clearly incited racial hatred and it accepted the reasoning of the Belgian courts in convicting the parliamentarian. The Court also noted the Belgian court's decision not to impose a prison sentence and did not find the penalty to be disproportionate.⁴¹

Erbakan v. Turkey: Turkish courts sentenced a former Prime Minister to one year' imprisonment and a fine on charges of inciting hatred or hostility in a speech. His conviction was based on allegations that the speech made distinctions between non-believers and believers and portrayed other political parties as opposed to Allah.⁴²

The European Court of Human Rights held that the conviction violated Mr. Erbakan's right to freedom of expression. Turkey had not shown that the prosecution had demonstrated that the speech had or would likely have led to any imminent danger or present risk. Imposing criminal sanctions on a well-known politician was not proportionate, particularly given the interests of maintaining free political debate in a democratic society.

Genocide Denial

³⁸16 July 2009, Application No. 15615/07, <https://hudoc.echr.coe.int/eng?i=001-93626>, only in French but summarised in English at <https://bit.ly/3WBgDnf>.

³⁹ This was not a case where the Court held that the "abuse of rights" provision in the European Convention was triggered, so it applied the normal three-part test.

⁴⁰ *Ibid.*, para. 77.

⁴¹ *Ibid.*, paras. 78-80.

⁴² 6 July 2006, Application No. 59405/00, <https://hudoc.echr.coe.int/eng?i=001-76232>; only in French but English summary at <https://bit.ly/3E3q9Iz>.

Typically, debate and discussion of historical facts and events is strongly protected under the right to freedom of expression.⁴³ Public discussion of serious human rights violations and atrocity crimes such as genocide is of particular importance, given the high public interest in raising awareness of such events and ensuring they do not recur in the future. For this reason, laws which restrict debate about genocide, crimes against humanity or similar atrocities are likely to raise freedom of expression concerns.

However, in some very limited circumstances, genocide denial may take a form which constitutes hate speech. A conviction under a carefully crafted genocide denial law, particularly one focused on Holocaust denial, may conceivably pass the Article 19(3) test. In *Faurisson v. France*, the Human Rights Committee considered the case of an academic who was fined under a French law which criminalised questioning actions of the Nazi regime which courts had held constituted crimes against humanity. The conviction was based on comments made by the academic which denied the existence of Nazi gas chambers for extermination purposes. The Committee held that this form of Holocaust denial was the “principal vehicle” for anti-Semitism in France and that the conviction was accordingly necessary to protect the rights of the Jewish community to live free from fear of anti-Semitism.⁴⁴

The European Court of Human Rights has also generally accepted that convictions for Holocaust denial are valid.⁴⁵ On the other hand, the European Court’s Grand Chamber has indicated that Holocaust denial may be a special case. In *Perinçek v. Switzerland*, the Court found that a Swiss prosecution of a Turk for denying the Armenian genocide violated his right to freedom of expression. The Grand Chamber’s decision rested on a number of factors but the Court indicated that it treats Holocaust denial cases distinctly as a category. For example, the Grand Chamber acknowledged that statements about traumatic events impacting a group could be sufficiently harmful to the dignity of that group to justify a restriction on freedom of expression. However, it suggested that in such cases a specific showing of that harmfulness would be required (in this case, it found such harm had not been shown). Distinguishing the Holocaust denial cases, the Grand Chamber suggested that

⁴³ Human Rights Committee, General Comment No. 34, 12 September 2011, para. 49. See also *Lehideux and Isorni v. France*, 23 September 1998, Application No. 24662/94 (European Court of Human Rights), and Committee on the Elimination of Racial Discrimination, General Comment No. 35, note 24, para. 14.

⁴⁴ *Faurisson v. France*, 8 November 1996, Communication No. 550/1993, paras. 9.6-9.7, <https://juris.ohchr.org/search/details/654>.

⁴⁵ See, for example, *Garaudy v. France*, 24 June 2003, Application No. 65831/01 and *Honsik v. Austria*, 18 October 1995, Application No. 25062/94, <https://hudoc.echr.coe.int/eng?i=001-2362>. Note that the European Court often treats Holocaust denial speech as being removed from the protection of Article 10 of the European Convention on Human Rights (which protects freedom of expression) by the “abuse of rights” provision in Article 17 of the Convention.



such a showing had not been required because the Court had accepted that Holocaust denial must “invariably” be seen as anti-Semitic.⁴⁶

The African Court of Human Rights has also addressed the question of genocide denial in the context of a Rwandan law prohibiting the minimisation of genocide. In *Ingabire Victoire Umuhoza v. Rwanda*, the Court considered the criminal conviction for genocide denial of a member of the political opposition. In a speech at a Rwandan genocide memorial, she made a comment about the importance of remembering Hutu victims (the Rwandan genocide primarily targeted Tutsis but also moderate Hutus).⁴⁷ The Court noted that given Rwanda’s history, genocide denial laws could be proper but that in this case there was no indication that the politician had actually denied the genocide. It rejected the argument that her remarks should be read, in context, to endorse a theory which implied the genocide was merely ethnic conflict. Criminal sanctions, the Court noted, could not be imposed “merely on the basis of context” when the statements themselves were clear.⁴⁸ Subsequently, the African Commission on Human and Peoples’ Rights made a very similar finding regarding Rwanda’s conviction of two journalists, suggesting that while laws prohibiting genocide denial could in theory be proper, this could not justify convictions of journalists where there was no demonstration of how their articles amounted to genocide denial.⁴⁹

These cases suggest that Holocaust denial may be a special case, or at least that any such law for other genocides would have to be linked to a very specific cultural and social context where genocide denial or denial of similar crimes is used as a means of inciting hatred. Furthermore, any such laws must be crafted very precisely to avoid their application to legitimate historical and scholarly debate, against political critics or even to insulting speech which does not arise to the level of inciting hatred.

Defamation

Most media lawyers will likely have knowledge of defamation law under their own national systems. However, they may not be aware of the well-developed international standards in this area, which can offer important guidance on how to ensure that defamation laws respect freedom of expression while appropriately protecting reputations.

Any legal restrictions on grounds of defamation should aim to protect the reputations of others, a legitimate aim under the second part of the three-part test for restrictions on freedom of expression. However, some defamation laws are not drafted with sufficient precision to

⁴⁶ *Perinçek v. Switzerland*, 15 October 2015 Application No. 27510/08, paras. 252-253, <https://bit.ly/3UbgXaN>.

⁴⁷ 24 November 2017, Application No. 003/2014, paras. 151-154, <https://bit.ly/3zOtqJl>.

⁴⁸ *Ibid.*, paras. 158-159.

⁴⁹ *Uwimana-Nkusi & Saidati Mukakibibi v. Rwanda*, 21 October-10 November 2019, Communication No. 426/12, paras. 207-208, <https://www.achpr.org/sessions/descions?id=293>.

pass the “provided by law” requirement or go beyond what is necessary and proportionate to protect reputations. This section first examines the issue of disproportionate penalties and criminal defamation laws and then discusses a range of issues arising in civil defamation cases. The next part concerns defamation proceedings against public officials and politicians, before ending with a review of laws designed to curtail the abuse of defamation laws via SLAPPs, or strategic litigation against public policy.

Note that in referring to defamation, we refer generally to reputation-based offences, understanding that various legal systems may draw distinctions between offences such as insult, slander, calumny and so on.

Criminal Sanctions and Disproportionate Penalties

Criminal defamation laws, at least when they provide for imprisonment as a penalty, are not proper under international human rights law. Imprisonment as a sanction for defamation is always a disproportionate penalty because of the severity of depriving someone of their liberty and the fact that less intrusive civil remedies provide adequate protection for reputations. Furthermore, the weight of imprisonment as a sanction poses a serious risk of chilling speech beyond that which is harmful and silencing debate on matters of public interest.

International human rights authorities have increasingly recognised this standard, finding that criminal defamation convictions violate the right to freedom of expression. For example, the Human Rights Committee, in its General Comment No. 34, urged States to decriminalise defamation, noting that criminal laws should only apply in “the most serious of cases” and that “imprisonment is never an appropriate penalty.”⁵⁰ Numerous other authoritative statements, such as from the special international mandates on freedom of expression, have also affirmed that imprisonment is a disproportionate penalty and/or called for eliminating criminal defamation entirely.⁵¹

The African Court of Human and Peoples’ Rights has clearly affirmed that imprisonment is a disproportionate sanction for defamation (see the box below). This landmark judgment was

⁵⁰ General Comment No. 34, note 43, para. 47.

⁵¹ See, for example, special international mandates on freedom of expression, 2002 Joint Declaration, <https://bit.ly/3DHYj37>; 2010 Joint Declaration, Tenth Anniversary Joint Declaration: Ten Key Challenges to Freedom of Expression in the Next Decade, <https://bit.ly/3Uf9lmy>; Declaration of Principles on Freedom of Expression and Access to Information in Africa, note 16, Principle 22(4); Parliamentary Assembly of the Council of Europe, Resolution 1577(2007), and Towards Decriminalisation of Defamation, Resolution 1577 (2007), 4 October 2007, para. 17.1, <https://bit.ly/3T5gSUI>; African Commission on Human and Peoples’ Rights, *169 Resolution on Repealing Criminal Defamation Laws in Africa*, ACHPR/Res.169(XLVIII)10, 24 November 2010, <https://bit.ly/3Urm2ve>.

followed by similar language from the ECOWAS Court⁵² and the East African Court of Justice.⁵³ The Inter-American and European human rights courts have not affirmed this standard as clearly. Both have allowed criminal defamation with penalties such as fines⁵⁴ or a suspended prison sentence of a few months.⁵⁵ However, while neither has explicitly held that imprisonment is always disproportionate, both have set strong limits on criminal defamation sentences, stating that their use should be exceptional. Both courts have regularly found that defamation sentences involving imprisonment are disproportionate, particularly when imposed for speech relating to matters of public interest and debate.⁵⁶ The European Court of Human Rights Grand Chamber has also said that imprisonment for press offences should occur “only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in the case of hate speech or incitement to violence”.⁵⁷ Overall, their jurisprudence suggests that criminal defamation should only apply to a narrow category of cases and imprisonment even more rarely, if at all.

Lohé Issa Konaté v. Burkina Faso, African Court of Human and Peoples’ Rights

A journalist and editor of a newspaper published articles in which he accused the State prosecutor of misconduct. In response, the prosecutor filed a complaint against the editor for defamation, public insult and contempt of court. A court imposed a sentence of 12 months’ imprisonment as well as fines and other costs, and ordered the newspaper to be suspended for six months.⁵⁸

The African Court of Human and Peoples’ Rights assessed the provisions of the Information Code and the Penal Code on which the sentence was based. It accepted that the provisions had a legitimate aim – protection of the reputations of others – but found that they failed to satisfy the requirements of necessity and proportionality. Specifically, the prison sentence was a disproportionate penalty and the Court affirmed that “any custodial sentence relating to defamation is inconsistent with the Charter”.⁵⁹ Furthermore,

⁵² *FAJ and Others v. The Gambia*, 13 March 2018, No. ECW/CCJ/APP/36/15, pg. 47, <https://bit.ly/3TgrW13>.

⁵³ *Media Council of Tanzania and Ors. v. Attorney General of Tanzania*, 28 March 2019, No. 2 of 2017, para. 91, <https://bit.ly/3TjyI6A>.

⁵⁴ See, for example, *Lindon, Otchakovsky-Laurens and July v. France*, 22 October 2007, Applications Nos. 21279/02 and 36448/02 (European Court of Human Rights), <https://bit.ly/3NNmHF9>; and *Bédât v. Switzerland*, 29 March 2016, Application No. 56925/08 (European Court of Human Rights), <https://bit.ly/3Udg953>.

⁵⁵ *Memolí v. Argentina*, 22 August 2013, Series C, No. 265 (Inter-American Court of Human Rights), <https://bit.ly/3zLTXXK>.

⁵⁶ See, for example, *Kimel v. Argentina*, 2 May 2008, Series C, No. 177, para. 85 (Inter-American Court of Human Rights), <https://bit.ly/3zObzCd>; *Castells v. Spain*, 23 April 1992, Application No. 11798/85, para. 48 (European Court of Human Rights), <https://bit.ly/3t1XBJd>.

⁵⁷ *Cumpănă and Mazăre v. Romania*, 17 December 2004, Application No. 33348/96, para. 115, <https://bit.ly/3fCwBNa>.

⁵⁸ *Lohé Issa Konaté v. Burkina Faso*, 5 December 2014, Application No. 004/2013, paras. 5-6, <https://bit.ly/3fCy8CU>.

⁵⁹ *Ibid.*, para. 167.

other criminal sanctions (such as fines) should not be disproportionate. In this case, Burkina Faso had not shown that the fines and costs imposed on the journalists, or the six-month suspension of the newspaper, were necessary to protect the prosecutor's reputation.⁶⁰ It had also not shown that the costs "excessively exceed the income" of the editor, particularly in light of the loss of revenue arising from the six-month suspension of the newspaper.⁶¹

While imprisonment is always disproportionate as a penalty, other types of criminal penalties also raise proportionality problems, such as excessive fines, a prohibition on the ability to practice journalism or the loss of civil rights.⁶² Ideally, States should consider entirely decriminalising defamation in favour of civil remedies for reputational harms.⁶³ The very fact that a sanction is criminal in nature makes it a more serious restriction on freedom of expression and hence more likely to be disproportionate. For example, the Inter-American Court of Human Rights found a criminal fine (and suspended prison sentence) to be disproportionate as a penalty for speech criticising the conduct of a judge in *Kimel v. Argentina*. The "criminal proceedings themselves", being listed on a criminal offenders registry, and the stigma of a criminal sentence all contributed to the disproportionality of the sanction, in addition to the weight of the fine itself.⁶⁴ Similarly, while the European Court of Human Rights has accepted criminal fines for defamation offences, it also considers the criminal nature of a fine as a relevant factor when assessing necessity and proportionality.⁶⁵

Unlike criminal defamation, civil defamation poses less of a risk of disproportionate sanctions. However, excessively high damage awards in civil suits may be disproportionate and have a chilling effect on freedom of expression.⁶⁶ States should accordingly consider caps on damages or other steps to prevent disproportionately high damages. The Inter-American Court of Human Rights articulated the problems with steep civil damage awards in a case where a lawyer faced a claim for a "very steep civil reparation" from an Attorney General he had accused of illegal wiretapping:

⁶⁰ *Ibid.*, paras. 165-166 and 169.

⁶¹ *Ibid.*, para. 171.

⁶² 2010 Joint Declaration, Tenth Anniversary Joint Declaration: Ten Key Challenges to Freedom of Expression in the Next Decade, note 51, para. 2(g).

⁶³ General Comment No. 34, note 43, para. 47; special international mandates on freedom of expression, 2000 Joint Declaration, 30 November 2000, <https://bit.ly/3E8shim>.

⁶⁴ *Kimel v. Argentina*, note 56, para. 85. See also *Usón-Ramírez v. Venezuela*, 20 November 2009, Series C, No. 2017, para. 81, <https://bit.ly/3NFJUcg>.

⁶⁵ See, for example, *Tête v. France*, 26 March 2020, Application No. 59636/16, para. 68, <https://bit.ly/3FLnvsd>; and *Affaire Lacroix v. France*, 7 September 2017, Application No. 41519/12, para. 50, <https://bit.ly/3FPDdT3>.

⁶⁶ 2021 Joint Declaration on Politicians and Public Officials and Freedom of Expression, note 35, para. 2(b)(iv)(b); and Declaration of Principles on Freedom of Expression and Access to Information in Africa, note 16, Principle 22(3).

[F]ear of a civil penalty . . . 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.⁶⁷

Civil Defamation

Civil defamation laws and sentences can also violate the right to freedom of expression. However, this involves a more complex proportionality analysis than applies to criminal defamation laws. Various jurisdictions take different approaches towards balancing the interests of parties in civil defamation cases so as to prevent them from unduly restricting freedom of expression. International standards have identified a few key protections, however, which are necessary to prevent civil defamation laws from inappropriately restricting freedom of expression. These are briefly summarised here.

True statements should not be sanctioned by defamation laws.⁶⁸ Accordingly, someone facing defamation charges should always be able to rely on the defence of the truth or, alternatively, the plaintiff can be required to prove falsity. This defence has traditionally been available in both common law and civil law jurisdictions, but not always consistently. International standards call for this defence to be available in all defamation cases.⁶⁹ An alternative approach is for the law to shift the burden of proof to the plaintiff to show the falsity of the claim. Increasingly, international standards call for this approach when the allegedly defamatory statements relate to matters of public concern.⁷⁰ Shifting the burden of proof to the plaintiff in these cases helps to preserve open debate about matters of public interest and acknowledges the power imbalance inherent in many defamation lawsuits involving public figures.

Defamation laws should also not punish opinions, which by their nature are unverifiable.⁷¹ As noted by the European Court of Human Rights, “a careful distinction needs to be made between facts and value-judgments. The existence of facts can be demonstrated, whereas the

⁶⁷ *Tristán Donoso v. Panama*, 27 January 2009, Series C, No. 193, para. 129, <https://bit.ly/3E6CWd9>.

⁶⁸ General Comment No. 34, note 43, para. 47; and Declaration of Principles on Freedom of Expression and Access to Information in Africa, note 16, Principle 21(1)(a).

⁶⁹ See *Rafael Marques de Morais v. Angola*, 18 April 2005, Communication No. 1128/2002, para. 6.8 (Human Rights Committee); *Castells v. Spain*, note 56, para. 48; and *Colombani and Ors v. France*, 25 June 2002, Application No. 51279/99, para. 66 (European Court of Human Rights).

⁷⁰ 2000 Joint Declaration, note 63; and Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mission to Italy from 11 to 18 November 2013, 29 April 2014, para. 23, <https://undocs.org/A/HRC/26/30/Add.3>. See also the discussion of actual malice below.

⁷¹ General Comment No. 34, note 43, para. 47; and 2000 Joint Declaration, note 63.

truth of value-judgments is not susceptible of proof”.⁷² The Inter-American Court of Human Rights has similarly noted that “an opinion cannot be subjected to sanctions”.⁷³

Even if a statement is false, the author should not be strictly liable, at least where the statement is part of a debate about a matter of public interest. Strict liability does not provide sufficient protection for honest mistakes. Even a diligent journalist, for example, will occasionally make inaccurate statements, particularly when reporting on sensitive matters where it is hard to identify trustworthy sources. A defence of “reasonable publication” should therefore be available, which applies when it was reasonable under the circumstances to make such a statement.⁷⁴ Alternatively, similar defences can provide similar protection, such as that the speaker acted in good faith. For journalists, reasonableness can be established by reference to standards of journalistic ethics. An example of how the European Court of Human Rights has approached this issue is provided below.

European Court of Human Rights, *Tromsø and Stensaas v. Norway*

A Norwegian newspaper and its editor were convicted of defamation for an article about seal hunting which included allegations of cruel and illegal hunting methods. The article was partly based on a controversial report by an inspector which subsequent investigations indicated was partly unsubstantiated.

In assessing whether the defamation convictions violated the right to freedom of expression, the European Court’s Grand Chamber noted that it must apply a “most careful scrutiny” to sanctions which may discourage the press from participating in discussions of matters of legitimate public concern.⁷⁵ On the other hand, the press also has special duties and responsibilities, including respecting the reputations of others. Ordinarily, this means that the press should verify factual allegations that are defamatory. But the Court then considered whether there were “special grounds” to dispense with this obligation.⁷⁶ One factor in assessing whether such special grounds exist is whether the newspaper could reasonably rely on the inspector’s report as reliable. The Court held that the newspaper’s reliance on the report was reasonable and that there was “no reason to doubt that the newspaper acted in good faith in this respect”.⁷⁷ Ultimately, the reputational interests at

⁷² *Lingens v. Austria*, 8 July 1986, Application No. 9815/82, para. 46, <https://bit.ly/3TbPGnf> (cited to in subsequent cases such as *Dichand and Ors v. Austria*, 26 February 2002, Application No. 29271/95, para. 42; and *Dalban v. Romania*, 28 September 1999, Application No. 28114/95, para. 49)

⁷³ *Kimel v. Argentina*, note 56, para. 93;. See also *Usón-Ramírez v. Venezuela*, note 64, para. 86.

⁷⁴ See, for example, 2021 Joint Declaration on Politicians and Public Officials and Freedom of Expression, note 35; 2000 Joint Declaration, note 63; and Declaration of Principles on Freedom of Expression and Access to Information in Africa, note 16, Principle 21(1)(a).

⁷⁵ *Bladet Tromsø and Stensaas v. Norway*, 20 May 1999, Application No. 21980/93, para. 64, <https://bit.ly/3U9T3fR>.

⁷⁶ *Ibid.*, paras. 65-66.

⁷⁷ *Ibid.*, para. 72.

stake did not outweigh the “vital public interest in ensuring an informed public debate” and the Court held that the defamation conviction was unnecessary and violated the right to freedom of expression.⁷⁸

Running alongside the “reasonable publication” defence is the principle that people should not be sanctioned for reporting statements made by others, at least where there are grounds to assume that these are reliable.⁷⁹ Journalists, in particular, will not always be in a position to verify such statements but there may still be a high public interest to report on them. In *Herrera Ulloa v. Costa Rica*, the Inter-American Court of Human Rights considered the case of a journalist who was criminally convicted of defamation after reproducing portions of a Belgian news report concerning the conduct of a public official in Costa Rica. In his trial, the judge held him liable because he had not proven the truth of the claims made by the European newspapers. The Inter-American Court found that such a standard of proof was “an excessive limitation” on freedom of expression which has a “deterrent, chilling and inhibiting effect” on the practice of journalism.⁸⁰ An even more speech protective approach is to adopt an “actual malice” standard, described in the following box.

The “Actual Malice” Standard and Variations

The “actual malice” standard was first articulated in the landmark United States Supreme Court case, *New York Times v. Sullivan*.⁸¹ The Court determined that in defamation cases involving public figures an “actual malice” standard should apply. Actual malice was defined to mean that the speaker knew the statement was false or acted with reckless disregard as to its falsity. The plaintiff must demonstrate actual malice, reversing the traditional burden of proof which required the defendant to show the truth of his or her statements.

Because the actual malice standard presents a high initial bar for plaintiffs, it operates as a highly speech protective approach. Recognising this, some other States have also adopted the actual malice standard or a variation of it.⁸² On the other hand, some States have expressly declined to do so, instead relying on a combination of the other standards

⁷⁸ *Ibid.*, para. 73.

⁷⁹ See, for example, *Herrera Ulloa v. Costa Rica*, 2 July 2004, Series C, No. 107, paras. 132-133 (Inter-American Court of Human Rights), <https://bit.ly/3fLJfJL>; and *Thorgeir Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 65 (European Court of Human Rights).

⁸⁰ *Herrera Ulloa v. Costa Rica*, note 79, paras. 132-133.

⁸¹ *New York Times Company v. Sullivan*, 376 U.S. 254 (1964), <https://www.law.cornell.edu/supremecourt/text/376/254>.

⁸² Kyu Ho Youm describes this in Argentina, Bosnia-Herzegovina, Hungary, India, the Philippines, and Taiwan, for example. Kyu Ho Youm, “The ‘Actual Malice’ of *New York Times Co. v. Sullivan*: A Free Speech Touchstone in a Global Century”, 19 *Communication Law and Policy* 185 (2014).

discussed in this section to strike an appropriate balance between freedom of expression and reputational rights.⁸³

The Inter-American Declaration of Principles on Freedom of Expression, adopted by the Inter-American Commission of Human Rights, calls for a variation of the actual malice standard in cases involving public officials, public persons or private persons who voluntarily become involved in matters of public interest:

[I]n these cases, it must be proven that in disseminating the news, the social communicator had the specific intent to inflict harm, was fully aware that false news was disseminated, or acted with gross negligence in efforts to determine the truth or falsity of such news.⁸⁴

The Human Rights Committee also notes that “a public interest in the subject matter of the criticism should be recognized as a defence.”⁸⁵ Where speech concerns matters of legitimate public interest, defamation liability is more likely to disproportionately burden freedom of expression because it will not only silence the speaker but also risk more broadly chilling discussion of and access to information about matters of public importance.

Finally, new issues arise regarding defamation rules in the digital era. As with any type of content restrictions, general standards on freedom of expression also apply to defamation online.⁸⁶ Special “cyber libel” laws, for example, are not appropriate because States should not create new content restrictions or standards merely because speech occurs online. Some special issues around defamation online do arise, however. For example:

- A recommended better practice is the “single publication rule”, which counts the first publication of content online for purposes of the statute of limitations and only allows one action for damages.⁸⁷ In the Internet era, a multiple publication rule can essentially subject media or other publishers to endless liability.

⁸³ *Ibid.*

⁸⁴ Adopted 19 October 2000, Principle 10, <https://www.cidh.oas.org/declaration.htm>.

⁸⁵ General Comment No. 34, note 43, para. 47. See also UN Special Rapporteur on freedom of expression, *Reinforcing media freedom and the safety of journalists in the digital age*, 20 April 2022, para. 113, undocs.org/A/HRC/50/29; and *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, 6 September 2016, para 34, undocs.org/A/71/373

⁸⁶ For a very introductory discussion, see CLD, *Model Training Materials: Overview of Freedom of Expression under International Law*, October 2022, https://www.law-democracy.org/live/wp-content/uploads/2022/12/Training-Materials-1.FOE_format-1.pdf.

⁸⁷ Special international mandates on freedom of expression, 2011 Joint Declaration on Freedom of Expression and the Internet, para. 4(c), <https://bit.ly/3DJaNaB>; and Agnes Callamard, *Global Trends in Freedom of Expression Jurisprudence in 2014*, 10-11 March 2015, <https://bit.ly/3UfubDi>.

- The digital era has significantly exacerbated the problem of “forum shopping” or “libel tourism”, where those bringing defamation cases abusively choose jurisdictions which are most favourable to their claims. This can have a chilling effect on freedom of expression by creating a “lowest common denominator” approach.⁸⁸ States should consider introducing changes to their domestic jurisdictional rules to mitigate such practices by providing that parties can only sue in jurisdictions where they have suffered substantial harm.⁸⁹

Public Officials and Politicians

Some countries have or have historically had special laws protecting the head of State or other public officials from insult or defamation. So-called “lèse majesté” laws prohibit criticism of the monarch, while *desacato* laws offer special protection to the head of State, politicians and public officials.

These kinds of special protections for public figures breach international law standards governing speech about matters of public interest. As stated by the Human Rights Committee, “in circumstances of public debate concerning public figures in the political domain and public institutions, the value placed by the Covenant upon uninhibited expression is particularly high.”⁹⁰ Public figures should not be specially shielded as compared to the average person because their actions are especially likely to impact society more broadly.

Accordingly, laws which impose penalties on those who insult public officials are not valid. Imposing heavier sanctions for defamation of such individuals similarly breaches the right to freedom of expression.⁹¹ This principle is strongly established in the jurisprudence of regional human rights courts. The European Court of Human Rights has repeatedly held invalid defamation convictions based on special protections for public officials or leaders

⁸⁸ Special international mandates on freedom of expression, 2020 Joint Declaration on Freedom of Expression and Elections in the Digital Age, para 9(d), <https://bit.ly/3NFVhRu>. See also UN Special Rapporteur on freedom of expression, *Reinforcing media freedom and the safety of journalists in the digital age*, note 85, para. 113.

⁸⁹ 2011 Joint Declaration on Freedom of Expression and the Internet, note 87, para. 4(a); and Committee of Ministers of the Council of Europe, Declaration on the Desirability of International Standards dealing with Forum Shopping in respect of Defamation (“Libel Tourism”), 20 July 2012, para. 9 (citing to the 2011 Joint Declaration).

⁹⁰ General Comment No. 34, note 43, para. 38.

⁹¹ General Comment No. 34, note 43, para. 38; 2021 Joint Declaration on Politicians and Public Officials and Freedom of Expression, note 35, para. 2(b)(iii); Inter-American Declaration of Principles on Freedom of Expression, note 84, Principle 11; and Committee of Ministers of the Council of Europe, Declaration on freedom of political debate in the media, 12 February 2004, para. VI, <https://bit.ly/3fGBJju>.

such as the monarch,⁹² the head of State⁹³ and foreign heads of State.⁹⁴ The Inter-American Court of Human Rights has similarly held that special protections for public officials or politicians are invalid,⁹⁵ while the African Court on Human and Peoples' Rights has affirmed that laws regarding the reputation of public figures should not provide "more severe sanctions" than those relating to an ordinary individual.⁹⁶ Instead of offering special protection to public officials, courts deciding defamation cases should consider the importance of allowing public debate about the actions of public officials.

Human rights courts have also frequently held that harsh defamation sanctions are unnecessary or disproportionate, especially when the speech concerns matters of public interest and the target of the speech is a public official. These courts have also extended this approach to other public figures who have subjected themselves to public scrutiny or where the matter under debate is of high public interest. The Inter-American Court, for example, refers to a,

different threshold of protection ... in the case of public officials, individuals who exercise functions of a public nature, and politicians, a different threshold of protection should be applied, which is not based on the nature of the subject, but on the characteristic of public interest inherent in the activities or acts of a specific individual. Those individuals who have an influence on matters of public interest have laid themselves open voluntarily to a more intense public scrutiny and, consequently, in this domain, they are subject to a higher risk of being criticized, because their activities go beyond the private sphere and belong to the realm of public debate.⁹⁷

Finally, it should be stressed that criminal defamation laws protecting public officials or politicians against defamation are particularly inappropriate. For example, the Inter-American Court of Human Rights, as noted previously, has not definitively ruled out criminal defamation, but it has nonetheless made it clear in two recent cases that criminal defamation is always improper as a means to protect the reputations of public officials in the context of a debate about a matter of public interest.⁹⁸

Strategic Litigation against Public Participation (SLAPPs)

⁹² *Otegi Mondragon v. Spain*, 15 March 2011, Application No. 2034/07, <https://bit.ly/3E95Cm1>.

⁹³ *Artun and Güvener v. Turkey*, Application No. 75510/01, 26 June 2007, <https://bit.ly/3TgMwyl>.

⁹⁴ *Colombani and Ors v. France*, note 69.

⁹⁵ See, for example, *Tristán Donoso v. Panama*, 27 January 2009, Series C, No. 193 (Inter-American Court of Human Rights), <https://bit.ly/3UqE5By>; and *Kimel v. Argentina*, note 56.

⁹⁶ *Lohé Issa Konaté v. Burkina Faso*, note 58, paras. 155-156.

⁹⁷ *Ricardo Canese v. Paraguay*, 31 August 2004, Series C, No. 111, para. 103, <https://bit.ly/3E5N1Hb>.

⁹⁸ *Urrutia v. Ecuador*, 24 November 2021, Series C, No. 446, paras. 117-120, 127, <https://bit.ly/3FU4Z0L>; *Álvarez Ramos v. Venezuela*, 30 August 2019, Series C, No. 380, paras. 121-123, 129, <https://bit.ly/3DExpt3>.

SLAPPs, or strategic litigation against public participation, are harassing or retaliatory lawsuits brought with an intent to silence speech on matters of public interest. Typically lacking legal merit, they instead seek to burden the opposing party with the costs and hassle of litigation. Journalists, non-profit organisations or individuals who lack the resources to fight such suits may simply settle the case or stop reporting on the issue, a form of self-censorship. For example, journalists may avoid reporting on misconduct by corporations with a reputation for SLAPPs.

Anti-SLAPP laws are designed to limit abuse of the legal system to silence freedom of expression mainly by providing a route to rapid resolution of the case. Defamation laws are particularly prone to SLAPP abuse but SLAPPs can also be based on other causes of action, so anti-SLAPP laws are typically not specific to defamation cases. They may include features such as:

- An option for an early dismissal of the case. This can be available at the request of the defendant or, in some jurisdictions, the court itself may be empowered to dismiss SLAPPs.
- The possibility of awarding court costs to the defendant, including attorney's fees, particularly in jurisdictions where the losing party does not normally bear them
- Penalties designed to discourage SLAPPs, such as the possibility of punitive damages upon dismissal of a SLAPP
- Other measures, such as providing legal aid or special funds to support those subject to SLAPPs

Increasingly, international human rights law standards suggest that States have a positive obligation to enact anti-SLAPP rules or similar measures. In their 2021 Joint Declaration, the various special mandates for freedom of expression called on States to:

Ensure that courts have the power, either at the request of the defendant or on their own motion, to dismiss, in a summary fashion at an early stage of the proceedings, defamation lawsuits involving statements on matters of public interest that do not have a realistic chance of success.⁹⁹

The UN Special Rapporteurs on freedom of expression and freedom of assembly and association have at other times also voiced support for anti-SLAPP laws or associated measures, such as providing legal support to those targeted by SLAPPs.¹⁰⁰ Furthermore, in

⁹⁹ 2021 Joint Declaration on Politicians and Public Officials and Freedom of Expression, note 35.

¹⁰⁰ UN Special Rapporteur on freedom of expression, *Reinforcing media freedom and the safety of journalists in the digital age*, note 85, para. 113; UN Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, *Info Note, SLAPPs and FoAA Rights*, 2017, <https://bit.ly/3Tbgu74>; and UN Working Group on Business and Human Rights, *Guidance on National Action Plans on Business and Human Rights*, December 2014, p. 37.

its 2021 decision in *Palacio Urrutia v. Ecuador*, the Inter-American Court of Human rights stated:

[T]he Court considers that the recurrence of public officials resorting to judicial channels to file lawsuits for crimes of slander or insult, not with the objective of obtaining a rectification but to silence the criticisms made regarding their actions in the public sphere, constitutes a threat to freedom of expression. This type of process, known as "SLAPP" (strategic lawsuit against public participation), constitutes an abusive use of judicial mechanisms that must be regulated and controlled by the States, with the aim of allowing effective exercise of freedom of expression.¹⁰¹

In 2022, the European Court of Human Rights also explicitly referenced SLAPPs when reviewing the applicable law relevant to a case involving an abusive lawsuit brought by a State entity.¹⁰² Earlier cases, although not using the term, have struck down SLAPP-like lawsuits. For example, in *Steel and Morris v. United Kingdom*, the Court considered a lawsuit brought by McDonalds against two activists who distributed anti-Macdonalds flyers. It found that the heavy fine levelled on the activists, in conjunction with the inequality in power between the activists and the corporation and the fact that legal aid had not been provided to the activists, constituted a violation of the right to fair trial and to freedom of expression.¹⁰³

Despite increased interest in anti-SLAPP laws, relatively few jurisdictions have adopted them. Various states and provinces in the United States, Canada and Australia all have anti-SLAPP laws but otherwise such laws are largely lacking globally, although the situation is set to change in Europe, where the European Commission has developed a recommendation and draft directive on SLAPPs.¹⁰⁴ Overall, according to the UN Special Rapporteur, globally, "much more needs to be done by States" to address abuse of the judicial system to harass journalists.¹⁰⁵ Greater discussion is also needed regarding the best strategy for combatting SLAPPs in different contexts.

Anti-SLAPP laws must be crafted with care to ensure that they will accomplish their intended goal, avoid inappropriately infringing on fair trial rights and avoid empowering new forms of malicious conduct. Difficult questions arise around how to define public interest speech and the grounds on which the court will grant an early dismissal. Furthermore, depending on the context, anti-SLAPP laws of the type described above may not be the most effective

¹⁰¹ *Urrutia v. Ecuador*, note 98, para. 95.

¹⁰² *OOO Memo v. Russia*, 15 March 2022, Application No. 2840/10, para. 23, <https://bit.ly/3t2UFfh>.

¹⁰³ *Steel and Morris v. United Kingdom*, 15 May 2005, Application No. 6846/01, <https://bit.ly/3UdXCpc>.

¹⁰⁴ Proposal for a Directive of the European Parliament and of the Council on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings ("Strategic lawsuits against public participation"), COM/2022/177 final, 27 April 2022, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0177>.

¹⁰⁵ UN Special Rapporteur on freedom of expression, *Reinforcing media freedom and the safety of journalists in the digital age*, note 85, para. 69.

strategy to combat abuse of defamation laws. Decriminalising defamation, for example, may be a more urgent priority where journalist and activists frequently face criminal defamation charges. Notwithstanding these considerations, anti-SLAPP measures may represent an important protective innovation against abusive defamation lawsuits in many countries.

Anti-SLAPP Laws

California (United States): California, where anti-SLAPP protections have been in place since 1992, has one of the more comprehensive anti-SLAPP laws. It includes the following features:

- The defendant can make a special motion to strike a case when facing a lawsuit based on an exercise of the right to petition or freedom of expression in relation to a public issue. If the lawsuit is based on speech on a public issue, the court strikes the case unless the plaintiff can show a probability that he or she will prevail on the merits of the case.¹⁰⁶
- The proceedings by which the parties gather evidence from each other, known as “discovery” in the United States, where they are often an expensive process, are stayed while the court considers the motion, unless the court specially orders discovery.¹⁰⁷
- If the defendant is successful in the special motion, the court will require the plaintiff to cover attorney’s fees and costs (normally in the U.S. each party bears their own costs in such cases). Conversely, if the plaintiff shows that the defendant’s special motion to strike was frivolous or solely intended to cause delay, the plaintiff can recover fees and costs from the defendant.¹⁰⁸
- Parties can immediately appeal the court’s decision on the motion to strike.¹⁰⁹
- The law was subsequently amended to address concerns over its abuse. A public interest exemption now effectively prevents the procedure from being applied when non-profit plaintiffs bring public interest litigation. A commercial speech exemption limits the use of the anti-SLAPP law by corporate defendants facing class action lawsuits relating to false advertising.¹¹⁰
- Unlike some anti-SLAPP laws, there is no possibility for the court to award punitive damages. However, California does set out special procedural rules to facilitate a “SLAPP-back” countersuit, or a malicious prosecution suit brought by the target of SLAPP against the party who originally brought the SLAPP.¹¹¹

¹⁰⁶ California Code of Civil Procedure, section 425.16(b),(e), <https://bit.ly/3Tf4a5E>.

¹⁰⁷ *Ibid.*, section 425.16(g).

¹⁰⁸ *Ibid.*, section 425.16(c).

¹⁰⁹ *Ibid.*, section 425.16(i).

¹¹⁰ *Ibid.*, section 425.17; for a discussion of the exemptions (narrowed by the California Supreme Court) see Julio Sharp-Wasserman, “New York’s Anti-SLAPP Law is Only a Slap on the Wrist”, *NYSBA Journal*, 2019, <https://bit.ly/3UcrRNo>.

¹¹¹ *Ibid.*, section 425.18.

The Philippines: The Philippines has some limited anti-SLAPP protections in the environmental context. Notably, these procedures were not created by the legislature but rather by the Supreme Court in 2010 in their Rules of Procedure for Environmental Cases, following multistakeholder discussions.¹¹²

The Rules establish a SLAPP defence when legal actions are filed to “harass, vex, exert undue pressure or stifle any legal recourse” related to environmental laws and rights. If the defendant in a civil suit claims a lawsuit is a SLAPP, this triggers a summary hearing where the defendant must prove by substantial evidence that his or her acts were legitimately for the protection of the environment, while the plaintiff must show by a preponderance of the evidence that the action is a valid claim rather than a SLAPP. Based on the hearing, the court can decide to dismiss the action with prejudice (meaning it cannot be subsequently refiled). The defendant can also file a counterclaim for damages, attorney’s fees and costs.¹¹³ The SLAPP defence is also available in criminal cases, triggering a summary hearing with the same burdens of proof as with civil suits although, for criminal cases, the judge dismisses the case if the accused shows that it was filed with intent to harass, vex, exert undue pressure or stifle legal recourse.¹¹⁴

National Security

Restrictions ostensibly based on national security, which is one of the legitimate grounds for restricting freedom of expression under international law, are a common area of abuse. It is legitimate for States to protect national security. For example, sharing sensitive security information about a State’s ability to protect itself, such as from physical or cyberattack, can pose a genuine risk to people’s lives. On the other hand, it is often very difficult to challenge national security restrictions on freedom of expression in court or otherwise. Furthermore, such restrictions are often used in a manner that is clearly rights abusive, such as to prevent criticism of the military or security establishment, or to suppress legitimate dissent (particularly from minorities in separatist or conflict areas) which does not pose any real threat of violence.

This section outlines general standards which guide restrictions on freedom of expression based on national security grounds, followed by a more in-depth discussion of restrictions based on anti-terrorism and the issue of State secrets. In addition to official human rights sources, it refers to two highly influential sets of soft-law standards, the *Johannesburg*

¹¹² Rationale to the Rules of Procedure for Environmental Cases, April 2010, pp. 96-97, <https://bit.ly/3UdEdVp>.

¹¹³ Supreme Court of the Philippines, Rules of Procedure for Environmental Cases, A.M. No. 09-6-8-SC, 13 April 2010, Rule 6, <https://bit.ly/3zSjP4e>.

¹¹⁴ *Ibid.*, Rule 19.

Principles on National Security, Freedom of Expression and Access to Information,¹¹⁵ and the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*.¹¹⁶

General Principles

The Human Rights Committee has indicated that “extreme care” must be taken with laws relating to national security such as treason laws, official secrets laws, sedition laws and other similar provisions.¹¹⁷ The concept of national security is “vulnerable to manipulation by the State as a means of justifying actions that target vulnerable groups” and is often used to justify unnecessary secrecy.¹¹⁸

The concept of “national security” has no standard precise definition under international law. However, threats to national security must be sufficiently grave to justify restricting freedom of expression. The UN Special Rapporteur on freedom of expression has said that such restrictions should only apply to the “most serious cases of a direct political or military threat to the entire nation.”¹¹⁹ The Siracusa Principles suggest the following approach:

National security may be invoked to justify measures limiting certain rights only when they are taken to protect the existence of the nation or its territorial integrity or political independence against force or threat of force. . . National security cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order.¹²⁰

Similarly, the Johannesburg Principles indicate that only speech which amounts to incitement to violence should be sanctioned as a threat to national security:

[E]xpression 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; and
- (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.¹²¹

¹¹⁵ The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, 1 October 1995, Principle 6, <https://bit.ly/2MdOgrH>.

¹¹⁶ Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, 28 September 1984, <https://bit.ly/2LNkNGD>.

¹¹⁷ General Comment No. 34, note 43, para. 30.

¹¹⁸ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 17 April 2013, para. 60, undocs.org/A/HRC/23/40.

¹¹⁹ Report of the Special Rapporteur, 14 December 1994, undocs.org/E/CN.4/1995/32, para. 48.

¹²⁰ Siracusa Principles, note 116, paras. 29-30, <https://bit.ly/2LNkNGD>.

¹²¹ The Johannesburg Principles, note 115, Principle 6.

As this shows, the connection between speech and an alleged harm to national security cannot be abstract; there must be a sufficient nexus between the two. The Human Rights Committee also specifies that there must be a “direct and immediate connection” between the expression and the alleged national security threat,¹²² while the African Commission on Human and Peoples’ Rights has referred to the “close causal link” between a risk of harm to national security and the expression in question.¹²³ The actual likelihood that the harm will occur is also relevant to determining whether a sufficiently close connection exists between the speech and the harm.

The risk of violence can be assessed by considering the context and nature of the speech in question. The European Court of Human Rights looks to the words used as well as the context in which they were made, including relevant social and political factors, to determine the extent to which speech risks inciting to violence.¹²⁴ For example, in one case involving a Turkish lawyer who was imprisoned for spreading separatist propaganda, the Grand Chamber acknowledged the insecure security situation in the Kurdish region. However, while the comments in question had been hostile, they did not incite to violence, in particular because they were distributed in a periodical with low circulation, “significantly” reducing their potential impact on national security.¹²⁵

Human Rights Committee, *Kim v. Republic of Korea*

South Korea convicted a pamphleteer under a provision of its National Security Law which criminalised praising an anti-State organisation or distributing documents which benefit an anti-State organisation. The pamphlets in question called for reunification with North Korea and criticised South Korean policy on North Korea.

The Committee indicated that the burden is on the State to demonstrate the precise alleged national security threat. In this case, it found that South Korea had failed to do so. The Committee did not accept that an undefined benefit to North Korea could be sufficient a ground for restricting freedom of expression, noting South Korea had not identified a clear risk to national security. It also noted that there was no indication that any of the courts had evaluated the nature or extent of the alleged risk to national security, or considered whether the pamphlets “had any additional effect” on the readers which would pose a sufficient security threat to render a restriction on freedom of expression necessary.¹²⁶

¹²² General Comment No. 34, note 43, para. 35.

¹²³ Declaration of Principles on Freedom of Expression and Access to Information in Africa, note 16, Principle 22(5).

¹²⁴ *Sürek v. Turkey (no. 3)*, 8 July 1999, Application No. 24735/94, para. 40, <https://bit.ly/3UJwcHC>; and *Sürek and Özdemir v. Turkey*, 8 July 1999, Application Nos. 23927 and 24277/94, para. 61, <https://bit.ly/3fTvicW>.

¹²⁵ *Okçuoğlu v. Turkey*, 8 July 1999, Application No. 24246/94, para. 48, <https://bit.ly/3fYmnqu>.

¹²⁶ 20 November 1998, Communication No. 574/1994, para. 12.4, <https://juris.ohchr.org/Search/Details/804>.

Certain classes of information cannot, by their very nature, constitute national security threats. For example, national security laws should not be used against journalists, researchers, activists and others who disseminate information on matters of public concern or be applied to commercial, banking or scientific information.¹²⁷ Peaceful political speech should also be protected. As noted by the European Court for Human Rights: “[P]olitical ideas which challenge the existing order and whose realisation is advocated by peaceful means must be afforded a proper opportunity of expression”.¹²⁸ The Human Rights Committee has similarly said that national security concerns cannot be met by “by attempting to muzzle advocacy of multi-party democracy, democratic tenets and human rights”.¹²⁹

Finally, it is generally not appropriate to impose restrictions on freedom of expression by civilians in any kind of specialised military or security tribunal, which frequently raise fair trial and due process concerns. Military courts should not try civilians except in limited and exceptional circumstances, such as where the class of individual and offence cannot be handled by normal civilian courts.¹³⁰ Speech-related crimes rarely if ever meet these criteria. Similarly, intelligence or security agencies should not operate outside the scope of judicial oversight or enjoy blanket exceptions from obtaining judicial authorisation in relation to matters impacting freedom of expression.¹³¹ All restrictions on freedom of expression “must be subject to independent judicial oversight”.¹³²

Terrorism Laws and Freedom of Expression

States have obligations under international law to take measures to combat terrorism.¹³³ For example, the UN Security Council has called on States to prohibit incitement to terrorism, although notably not under their authority to impose binding obligations on UN Member States.¹³⁴ Unfortunately, although any such anti-terrorism measures should be exercised in full compliance with human rights law, as affirmed by numerous anti-terrorism UN Security

¹²⁷ General Comment No. 34, note 43, para. 30.

¹²⁸ *Eğitim ve Bilim Emekçileri Sendikası v. Turkey*, 25 September 2012, Application No. 20641/05, para. 70, <https://bit.ly/3UjT54O>.

¹²⁹ *Mukong v. Cameroon*, 10 August 1994, Communication No. 458/1991, para. 9.7, undocs.org/CCPR/C/51/D/458/1991. See also the Johannesburg Principles, note 115, Principle 7.

¹³⁰ Human Rights Committee, General Comment No. 32, 23 August 2007, para. 22, undocs.org/CCPR/C/GC/32. See also Jared Genser, *The UN Working Group on Arbitrary Detention* (Cambridge University Press, New York, 2020), p. 363, <https://bit.ly/3DV1qVn>.

¹³¹ Report of the Special Rapporteur on freedom of expression, note 118, para. 59.

¹³² Special international mandates on freedom of expression, 2016 Joint Declaration on Freedom of Expression and Countering Violent Extremism, para. 1(e), <https://bit.ly/3WLRz0f>.

¹³³ UN Security Council Resolution 1373, 28 September 2001, [undocs.org/S/RES/1373\(2001\)](https://undocs.org/S/RES/1373(2001)).

¹³⁴ UN Security Council Resolution 1624, 14 September 2005, para. 1, <https://bit.ly/3FWWB0o>.

Council Resolutions,¹³⁵ some States have used terrorism threats to justify human rights abuses, including improper restrictions on freedom of expression.

States should only criminalise incitement to terrorism and not insufficiently precise concepts such as “glorifying” or “justifying” terrorism.¹³⁶ These terms are too vague to meet the “provided by law” requirement. Criminalising support or involvement in terrorism is also insufficiently precise and subject to broad interpretations.¹³⁷ Laws which criminalise “extremism” or “radicalisation” are also likely to restrict freedom of expression unduly because the idea of extremism is “context dependent” and can easily be manipulated.¹³⁸

Instead, prohibitions on incitement to terrorism should be defined precisely to focus on incitement to specific terrorist acts. The definition of terrorism has been a source of contention in international law and an agreed definition has not yet been reached. For the purposes of restrictions on freedom of expression, however, a key consideration is that terrorist offences should be linked to violent crimes and not to other concepts which could cover peaceful protest or expression of dissent. Furthermore, terrorism is more than an ordinary act of violence which should have as its purpose provoking terror or intimidation in a civilian population or compelling a government action.¹³⁹ The special international mandates on freedom of expression have indicated that the definition of terrorism in this context “should be restricted to violent crimes that are designed to advance an ideological, religious, political or organised criminal cause and to influence public authorities by inflicting terror on the public.”¹⁴⁰

Other elements of the crime of incitement to terrorism should be clearly and narrowly defined. As with other incitement crimes, the crime should have a specific intent requirement and there should be a sufficiently clear nexus between the speech and the terrorist act, including an actual risk that the terrorist act will occur. The UN Special Rapporteur on counter-terrorism and human rights has said that three conditions should be satisfied:

¹³⁵ See, for example, UN Security Council Resolution 1624, preamble (referencing Article 19 of the ICCPR); Resolution 1535, 26 March 2004, preamble, [undocs.org/S/RES/1535\(2004\)](https://undocs.org/S/RES/1535(2004)); and Resolution 2395(2017), 21 December 2017, preamble and para. 21, [undocs.org/S/RES/2395\(2017\)](https://undocs.org/S/RES/2395(2017)).

¹³⁶ Special international mandates on freedom of expression, 2015 Joint Declaration on Freedom of Expression and Responses to Conflict Situations, para. 3(b), <https://bit.ly/3DXlwyB>.

¹³⁷ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, 16 August 2006, para. 32, undocs.org/A/61/267.

¹³⁸ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, 1 March 2019, para. 35, undocs.org/A/HRC/40/52; see also 2016 Joint Declaration on Freedom of Expression and Countering Violent Extremism, note 132, para. 2(c).

¹³⁹ UN Security Council Resolution 1566, 8 October 2004, [undocs.org/S/RES/1566\(2004\)](https://undocs.org/S/RES/1566(2004)).

¹⁴⁰ Special international mandates on freedom of expression, 2008 Joint Declaration on Defamation of Religions, and Anti-Terrorism and Anti-Extremism Legislation, <https://bit.ly/3TpOAMZ>.

[F]irst, that there is the intent to incite the commission of a terrorist offence; second, that this intent is not solely that of one or several individuals but that of the association, group or political party as a collective entity; and third, that there exists an actual risk that such an act will be committed.¹⁴¹

States should take great care to avoid applying anti-terrorism laws to ordinary crimes.¹⁴² Anti-terrorism laws typically involve steep criminal penalties and may have added stigma due to being branded a terrorist. Relying on anti-terrorism laws to respond to violence associated with social unrest or discontent, such as violence that occurs at protests, will often constitute a disproportionate sanction and have an undue chilling effect on the rights to freedom of expression and freedom of assembly.

Inter-American Court of Human Rights, *Norín Catrimán v. Chile*¹⁴³

Mapuche indigenous activists in Chile were engaged in social protests related to their claims to traditional lands and the presence of investment projects on those lands. Controversy over the projects led to increased social unrest and conflicts in the region and there were a number of incidents where equipment or property of forestry companies was set on fire. Chile increasingly brought criminal charges against Mapuche leaders and activists involved in the protests, and prosecuted several for the crimes of terrorist arson and the threat of terrorist arson.¹⁴⁴ These persons challenged these convictions before the Inter-American Court of Human Rights.

In addition to fair trial and due process violations, the Court found a violation of the right to freedom of expression. This finding was partly because Chile had imposed a penalty on three of the leaders which banned them from managing a “social communication medium” for 15 years. However, the Court also specifically noted that the application of the Counter-Terrorism Act was disproportionate. By applying terrorism charges, Chile could generate an “intimidating and inhibiting effect on the exercise of freedom of expression, derived from the specific effects of the undue application of the Counter-terrorism Act to members of the Mapuche indigenous people.”¹⁴⁵ Such charges could create a “reasonable fear” in

¹⁴¹ Report of the Special Rapporteur on human rights and countering terrorism, note 137, para. 28. See also Report of the Special Rapporteur on human rights and countering terrorism, note 138, para. 37 (“the threshold for these inchoate crimes requires the reasonable probability that the expression in question would succeed in inciting a terrorist act, thus establishing a degree of causal link or actual risk of the proscribed result occurring”).

¹⁴² Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, 28 December 2005, para. 47, undocs.org/E/CN.4/2006/98.

¹⁴³ 29 May 2014, Series C, No. 279, paras. 79-81, <https://bit.ly/3A0rPA2>.

¹⁴⁴ *Ibid.*, para. 106.

¹⁴⁵ *Ibid.*, para. 376.

other community members involved in social protests regarding their territorial lands, chilling their exercise of freedom of expression.¹⁴⁶

State Secrets

The right to freedom of expression includes not only a right to express opinions but also a right to access information. Under international human rights law, this right encompasses a specific right to access information held by the government.¹⁴⁷ States should adopt right to information laws to ensure public access to information.¹⁴⁸

If a government refuses to make information available to the public, it must therefore have justified reasons for doing so. National security may require certain information to be kept secret. However, States should identify a specific harm before deciding not to disclose information. This harm should also be weighed against the public interest value in disclosing the information; should the latter outweigh the harm to national security, States should disclose the information.¹⁴⁹ For information which reveals corruption, human rights abuses, environmental harm, government misconduct or similarly serious concerns, this public interest override should normally apply.¹⁵⁰ Secrecy laws should accordingly be reformed to reflect these principles.

Unfortunately, many States still have outdated secrecy laws, including severe sanctions for sharing information deemed to be secret, even where that information should be disclosed to the public. To avoid overapplication of such laws in a manner which limits public access to information, the Johannesburg Principles call for the following approach to be used:

No person may be punished on national security grounds for disclosure of information if (1) the disclosure does not actually harm and is not likely to harm a legitimate national security interest, or (2) the public interest in knowing the information outweighs the harm from disclosure.¹⁵¹

¹⁴⁶ *Ibid.*

¹⁴⁷ General Comment No. 34, note 43, para. 19; and *Marcel Claude Reyes v. Chile*, 19 September 2006, Series C, No. 151, <https://bit.ly/3FZlrgb>.

¹⁴⁸ For a comprehensive list of indicators on what constitutes a strong right to information law, derived from international standards and better practices, see <https://www.rti-rating.org/country-data/by-indicator/>.

¹⁴⁹ Special international mandates on freedom of expression, 2004 Joint Declaration, <https://bit.ly/3DOgQLc>; Declaration of Principles on Freedom of Expression and Access to Information in Africa, note 16, Principles 21(2) and 33; and Recommendation Rec(2002)2 of the Committee of Ministers to the Member States on Access to Official Documents, para. IV(2), <https://rm.coe.int/16804c6fcc>.

¹⁵⁰ UN Special Rapporteur on freedom of expression, Report on protection of sources and whistleblowers, 8 September 2015, para. 10, undocs.org/A/70/361.

¹⁵¹ Johannesburg Principles, note 115, Principle 15.

Individuals who do not work for the government, such as journalists or civil society activists who receive leaked confidential information, should not be penalised for sharing government information with the public. They are not responsible for managing this information and should not be held responsible for the failure of the government to protect it. Furthermore, such sanctions may have a chilling effect on journalistic work and public interest advocacy. As articulated by the special international mandates on freedom of expression in a Joint Declaration:

Public authorities and their staff bear sole responsibility for protecting the confidentiality of legitimately secret information under their control. Other individuals, including journalists and civil society representatives, should never be subject to liability for publishing or further disseminating this information, regardless of whether or not it has been leaked to them, unless they committed fraud or another crime to obtain the information¹⁵²

Public officials and government officials, on the other hand, can be sanctioned for inappropriately sharing confidential information although such sanctions should not apply where the public interest in the information outweighs the harm caused by disclosure.¹⁵³ To achieve this, States should provide proper protection to whistleblowers, who serve an important function in ensuring the public can access critical information about misconduct, corruption and human rights abuses.¹⁵⁴

In the landmark case of *Guja v. Moldova*, a Grand Chamber of the European Court of Human Rights found Moldova had failed to respect its freedom of expression obligations after a whistleblower who exposed wrongdoing in the public prosecutor's office was dismissed from his job in that office. The Court noted that the public interest in accessing information about prosecutorial misconduct outweighed the government interests in non-disclosure.¹⁵⁵ The Court found that such a restriction on freedom of expression was unnecessary after considering factors including that the employee had acted in good faith and not for personal advantage, had no effective alternative options for reporting the misconduct and faced a heavy sanction.¹⁵⁶

In general, prior censorship poses high risks to freedom of expression and carries a heavy presumption of invalidity under international law. The American Convention on Human Rights disallows any form of prior censorship except in very limited circumstances.¹⁵⁷ The

¹⁵² 2004 Joint Declaration, note 149.

¹⁵³ Johannesburg Principles, note 115, Principle 16.

¹⁵⁴ UN Special Rapporteur on freedom of expression, note 150.

¹⁵⁵ 12 February 2008, Application No. 14277/04, para. 91, <https://hudoc.echr.coe.int/eng?i=001-85016>.

¹⁵⁶ *Ibid.*, para. 97.

¹⁵⁷ American Convention on Human Rights, 22 November 1969, in force 18 July 1978, Article 13(2). See also Johannesburg Principles, note 115, Principle 23.

European Court of Human Rights has said that prior restraints call for the “most careful scrutiny”¹⁵⁸ and must be governed by a legal framework with “tight control over the scope of bans and effective judicial review to prevent any abuse of power.”¹⁵⁹ Furthermore, once information has been public, any additional censorship cannot be justified, as evidenced in the *Observer and Guardian* case, an important case on prior censorship in the national security context. This also applies to prior restraint in the form of court injunctions against publication.

European Court of Human Rights, *Observer and Guardian v. The United Kingdom*

The European Court of Human Rights considered a case where a former member of the intelligence services sought to publish his memoirs. The government sought an injunction to prevent newspapers in the United Kingdom from running serialised excerpts from the memoirs.

The Court found that the United Kingdom court injunctions during an initial time period were acceptable, finding it “improbable” that all the contents of the book related to public interest concerns which outweighed the national security interests and noting that the United Kingdom court had weighed the national security concerns against the potential public interest in the information when making its decisions.¹⁶⁰ Furthermore, the injunctions did not impose a “blanket prohibition” and were limited in nature.¹⁶¹

However, subsequent injunctions issued after the book had been published in the United States violated the right to freedom of expression. At that stage, the reasons for the injunction could no longer be to maintain the secrecy of the information, as confidentiality had already been lost. Rather, the purpose of ongoing injunctions was to preserve the reputation of and the public’s confidence in the intelligence services, and to deter others from similarly sharing secret information. These objectives could not justify such a restriction on freedom of expression or on the ability of newspapers to share information on a matter of legitimate public interest.¹⁶²

Further Reading and Useful Sources

Freedom of Expression under International Law Generally

¹⁵⁸ *Observer and Guardian v. the United Kingdom*, 26 November 1991, Application No. 13585/88, para. 60, <https://bit.ly/3UDJKoI>.

¹⁵⁹ *Ekin Association v. France*, 17 July 2001, Application No. 39288/98, para. 58, <https://bit.ly/3hi1u2>.

¹⁶⁰ *Observer and Guardian v. the United Kingdom*, note 158, paras. 61-63.

¹⁶¹ *Ibid.*, para. 64.

¹⁶² *Ibid.*, paras. 69-70.

Model Training Materials: Overview of Freedom of Expression under International Law, CLD, October 2022, <https://bit.ly/3Ekm6re>

These Model Training Materials introduce freedom of expression standards under international law. They provide important background to this set of training materials, particularly for lawyers who are new to international human rights law.

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>. This General Comment elaborates on the right to freedom of expression in Article 19 of the ICCPR.

Training Manual for Judges on International Standards on Freedom of Opinion and Expression, CLD, UNESCO, IMS and Judicial Institute of Jordan, 2021, <https://bit.ly/3fSpJvo>

Briefing Note Series: Freedom of Expression, CLD and IMS, 2014, <https://bit.ly/3DRddEd>

Hate Speech

- Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, 2013, undocs.org/A/HRC/22/17/Add.4
- Article 19, Camden Principles on Freedom of Expression and Equality, 2009, <https://bit.ly/3NTA6M7>
- European Court of Human Rights, Fact Sheet – Hate Speech, 2022, <https://bit.ly/3fMMh0B>
- UN Special Rapporteur on Freedom of Expression, Report on online hate speech, 2019, undocs.org/A/74/486
- UN Special Rapporteur on Freedom of Expression, Report on hate speech and incitement to hatred, 2012, undocs.org/A/67/357

Defamation

- Article 19, Defining Defamation: Principles on Freedom of Expression and Protection of Reputation, 2000, <https://bit.ly/3fPTLzJ>
- European Court of Human Rights, Factsheet – Protection of Reputation, June 2022, <https://bit.ly/3fSqm8e>

National Security

- Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, 1984, <https://bit.ly/2LNkNGD>
- The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, 1995, <https://bit.ly/2MdOgrH>



Exercises

Exercise 1: Hate Speech

Break into small groups. Each group should consider the following excerpts from hate speech laws in light of the international law standards discussed in the workshop. Does the provision align with international standards? Is additional information needed to determine this? What reforms could improve the provision?¹⁶³

- Denmark, Criminal Code, Article 266(b):
 - (1) Any person who, publicly or with the intention of wider dissemination, makes a statement or imparts other information by which a group of people are threatened, insulted or degraded on account of their race, colour, national or ethnic origin, religion, or sexual inclination shall be liable to a fine or to imprisonment for any term not exceeding two years.
 - (2) In determining the punishment it shall be considered a particularly aggravating circumstance if the conduct is of a propagandistic nature.
- Romania, Criminal Code:
 - Article 369: Incitement to hatred or discrimination Inciting the public, by any means, hatred or discrimination against a class of persons shall be punished with imprisonment of six months to three years or a fine.
 - Article 77: h) an offence for reasons of race, nationality, ethnicity, language, religion, gender, sexual orientation, opinion or political affiliation, wealth, social origin, age, disability, noncontagious disease or HIV / AIDS or other circumstances.
- Turkey, Criminal Code: Article 216: Provoking people to be rancorous and hostile
 - (1) Any person who openly provokes a group of people belonging to a different social class, religion, race, sect, or coming from another origin, to be rancorous or hostile against another group, is punished with imprisonment of one year to three years in case such act causes risk from the aspect of public safety.
 - (2) Any person who openly humiliates another person just because he belongs to a different social class, religion, race, sect, or comes from another origin, is punished with imprisonment of six months to one year.
- Uruguay, Criminal Code: Article 149bis: Incitement to hatred, contempt or violence towards certain people: Anyone who publicly, or by any means suitable for its public diffusion, incites hatred, contempt, or any form of moral or physical violence against one or more people because of the colour of their skin, race, religion, national

¹⁶³ All provisions and translations are taken from Natalie Alkiviadou, Jacob Mchangama and Raghav Mendiratta, Global Handbook on Hate Speech Laws, The Future of Free Speech, 2020, <https://bit.ly/3fSPNgc>.

or ethnic origin, sexual orientation or sexual identity, will be punished with three to eighteen months' imprisonment.

Exercise 2: Defamation

Break into small groups. If possible, ensure each group has a lawyer with some experience with defamation law.

Each group should discuss the current situation of defamation law in the country and, specifically, consider the following questions:

- Who primarily brings defamation cases in your country? Are these generally legitimate claims for reputational damage?
- Do SLAPPs exist in your country? If so, what are some egregious examples you have seen of defamation law being used as a weapon to silence freedom of expression?
- How do the current defamation rules undermine the ability of journalists to report freely on issues of public interest?

Based on the discussion, each group should identify 2-3 areas where legal reform is most needed and discuss the most appropriate strategy for advocating for that legal reform. The group should then discuss which of the identified legal reforms are most achievable and possible actions towards accomplishing those reforms. They should briefly present their ideas to the plenary group.

Exercise 3: National Security

Break into small groups. Each group will be assigned one of the following topics:

- Incitement to violence
- Incitement to terrorism or praise of terrorism
- Sharing state secrets

Each group should review the international standards relevant to restrictions on freedom of expression related to their topic. Then, they should select 2-3 examples where someone's speech has been restricted on that ground. If they cannot think of examples from their own country context or their own experiences, they can also invent a hypothetical example. The group should apply the international standards to that example and prepare a short presentation explaining why or why not the restriction was justified.

Each group will then briefly present their examples to the group along with an explanation of the relevant international standards.



Discussion Questions

Hate Speech

- What types of non-criminal measures to address hate speech might States adopt? Would any of these raise problems under the three-part test for restrictions on freedom of expression?
- When politicians engage in hate speech, it has especially serious consequences, and may be more likely to incite violence. On the other hand, political speech must be specially protected and anti-hate speech laws should not be weaponised against political opponents. How can these concerns be reconciled?
- This training did not focus specifically on online speech, but online hate speech is a serious problem in the modern era. Keeping in mind the relevant international law standards, what solutions to online hate speech might you recommend?

Defamation

- Consider the rules on civil defamation in your country. Do they provide for sufficient defences? How are burdens of proof allocated? Overall, do they appropriately balance protection of reputational interests with the right to freedom of expression?
- Consider your own experiences representing clients in defamation cases or the major defamation cases in your country. Have they referred to international standards or international law obligations? Do you believe courts in your country are open to considering arguments based on international law?
- What do you think of the “reasonable publication” defence? Would it be applied in a way that protected freedom of expression by courts in your country? Does it need to be more specific to serve in that role?
- Would the provisions of anti-SLAPP rules described above be effective at combatting SLAPPs in your country? Would other measures be more impactful?

National Security

- What kinds of national security concerns can legitimately justify restrictions on freedom of expression? What are and are not valid national security threats?
- What factors should courts consider when deciding if speech incites to violence? How can they assess the likelihood that violence will result and the strength of the causal link between the speech and the risk of harm?
- Does your country have laws which criminalise extremism or glorification of terrorism? What are some alternatives to this?
- It is reasonable to expect the authorities in your country – information officers, information commissioners, courts – to apply the “public interest override” (i.e. the standard that when the public interest in disclosing information outweighs the potential harm the information should be disclosed)? What measures might be necessary to ensure that public interest information gets disclosed?

Sample Agendas

Hate Speech, Defamation and National Security Restriction on Freedom of Expression under International Law

Date
Location

This workshop explores three of the more commonly applied restrictions on freedom of expression. Hate speech, defamation and national security are all legitimate goals for restricting freedom of expression. However, if they are not crafted and applied carefully, they can have a serious negative impact on freedom of expression.

This workshop explores international human rights law standards governing each of these three issues, with a focus on standards under the *International Covenant on Civil and Political Rights*. It aims to empower legal professionals to use these standards in the course of their advocacy, litigation and law reform work 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 – 9:40	Hate Speech <ul style="list-style-type: none">• Presentation• Discussion and Questions
9:40 – 10:10	Defamation <ul style="list-style-type: none">• Presentation• Discussion and Questions
10:10 – 10:30	National Security <ul style="list-style-type: none">• Presentation• Discussion and Questions

Sample Agenda 2 – Longer Half-Day Workshop Incorporating Exercises

Agenda

9:00 – 9:15	Introductions, Agenda and Purposes of the Workshop
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Review of Restrictions under International Law and the Three-Part Test

9:15 – 9:40	Hate Speech
9:40 – 9:50	Discussion
9:50 – 10:20	<i>Exercise 1: Hate Speech</i>
10:20 – 10:50	Defamation
10:50 – 11:20	<i>Exercise 2: Defamation</i>
11:20 – 11:30	Discussion
11:30 – 11:45	Break
11:45 – 12:10	National Security
12:00 – 12:40	<i>Exercise 3: National Security</i>
12:40 – 13:00	Final Group Discussion and Closing

