



DEFENCE HANDBOOK FOR JOURNALISTS AND BLOGGERS

On freedom of expression and freedom of information
principles in international law

IN PARTNERSHIP WITH

**REPORTERS
WITHOUT BORDERS**
FOR FREEDOM OF INFORMATION

**PAUL
HASTINGS**

 **THOMSON REUTERS
FOUNDATION**

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CONTENTS

03	ACKNOWLEDGEMENTS
09	CONTENTS
11	FOREWORD BY THOMSON REUTERS FOUNDATION
13	FOREWORD BY REPORTERS WITHOUT BORDERS
15	INTRODUCTION
31	SECTION I: SURVEY OF THE INTERNATIONAL SOURCES
121	SECTION II: REPUTATION AND DEFAMATION
165	SECTION III: THE RIGHT TO PRIVACY
195	SECTION IV: PUBLIC ORDER AND MORALITY
217	SECTION V: NATIONAL SECURITY AND STATE SECRETS
241	ENDNOTES

FOREWORD BY THOMSON REUTERS FOUNDATION

Journalists face more threats now than ever before, from harassment and imprisonment to cold-blooded murder. Since the beginning of 2015, 50 journalists have been killed and over 330 journalists and “netizens” have been imprisoned. The terrible Charlie Hebdo attacks in Paris and horrific murders by the Islamic State are what we remember most, but the reality is that the job of a journalist has become increasingly dangerous for a whole set of reasons. Against this rapidly changing landscape, a cross-border debate on the actions and safety of journalists has been re-ignited.

How can we protect journalists worldwide in the face of such danger - not only from individuals, but also from governments who seek to censor the media and prevent the release of vital information to the public? The answer lies in the law. For journalists, freedom of expression and freedom of information are among the most important human rights. These rights are enshrined in international law, meaning that governments can be held to account if they attempt to unduly silence the voice of journalists.

At the Thomson Reuters Foundation, we stand for free, independent journalism, human rights, women’s empowerment, and the rule of law. This publication, the Defence Handbook for Journalists and Bloggers, is for the thousands of journalists around the world who seek to understand how international law can protect them and their work. The Handbook covers important questions faced by international committees and courts, such as the extent to which journalists can criticize public figures; the circumstances in which journalists can release state secrets; and the legality of blasphemy laws.

This Handbook was produced at the request of Reporters Without Borders through TrustLaw, the Foundation’s global pro bono programme that connects NGOs and social enterprises to leading law firms who offer free legal assistance. I am extremely grateful to the 70 lawyers from the law firm, Paul Hastings, who worked tirelessly to research international and regional sources of law that protect freedom of expression and freedom of information.

We believe that this Handbook has the potential to be a useful tool for journalists and the lawyers who seek to defend them in the face of oppression.



Monique Villa
CEO, Thomson Reuters Foundation

FOREWORD BY REPORTERS WITHOUT BORDERS

10 years imprisonment and 1000 lashes. That's the sentence imposed on a Saudi blogger, Raef Badawi, in 2014, for expressing his views on Islam and questioning the Saudi society in his blog. Raef received the first 50 lashes, in public, on January 9, 2015. Syrian journalist Mazen Darwish has been arbitrarily detained by the Syrian regime for more than two years. In China, 60-year-old female journalist, Gao Yu, received a seven year prison sentence for disclosing State secrets. In democracies also, journalists face prosecutions because of the work they perform.

Around the world, at the time of writing in May 2015, 155 journalists and 177 netizens are imprisoned because of their activity. These figures demonstrate that freedom of expression, even though enshrined in all major international human rights instruments, can never be taken for granted, but must, at all times and in all countries, be advocated, promoted, and defended.

"Freedom of information," said Win Tin, a Burmese journalist who spent 19 years as a political prisoner, *"is the freedom that allows us to verify the existence of all other freedoms"*. Freedom of expression is essential for the enjoyment of other human rights and freedoms, and constitutes a fundamental pillar for building a democratic society and strengthening democracy.

In the "new propaganda era" we are entering, where the frontier between information, communication and propaganda becomes blurry, the world needs independent journalists, who engage in the pursuit of the truth, who respect standards of ethics, and whose mission is to give citizens of this world tools to understand what surrounds them. That is to say, in a word, free journalists.

Reporters Without Borders advocates freedom of information, publishes a *World Press Freedom Index* every year, and supports journalists and bloggers around the world by providing instant assistance grants or bulletproof jackets. One of the ways to support journalists is also by providing them with relevant legal information regarding the exercise of freedom of information, to empower them with knowledge on their rights, ensuring they can conduct their work in full understanding of the international standards regulating freedom of expression.

This is the reason for this in-depth legal handbook, which will be extremely useful to all reporters, whether professional or not, wherever they work, whatever the circumstances, and whether they face prosecution or just want to know their rights.

Christophe Deloire

Secretary General, Reporters Without Borders

INTRODUCTION



Freedom of expression is a fundamental right of every human being. It goes beyond professional titles and no distinction in this respect should be drawn between professional and non-professional journalists. Journalism is *“a function shared by a wide range of actors, including professional full-time reporters and analysts, as well as bloggers and others who engage in forms of self-publication in print, on the Internet or elsewhere.”*¹

This Handbook is therefore addressed to professional journalists as well as to bloggers and, more generally, to everybody involved in and committed to sharing information with the public. As stated by the Commissioner for Human Rights of the Council of Europe in his Report of March 1, 2011, *“any person taking part in the journalistic process (including bloggers) where they show attachment to ethical principles”* should be guaranteed the same legal protection as journalists.

The right to freedom of expression is enshrined in all major international human rights instruments, starting with the Universal Declaration of Human Rights. The exercise of this right, and the activity of journalism, whether by professional or non-professional journalists, however sometimes lead to prosecution, judicial harassment, arbitrary detention, or worse. This Handbook is therefore also, and primarily, addressed to lawyers defending those who exercise their right to freedom of expression.

Finally, this Handbook is addressed to all human rights defenders, civil society organizations and NGOs, as a working tool and a reference on the international standards on freedom of expression. The Handbook is intended as a participatory project for all journalists, NGOs and lawyers to contribute to it or comment on it, so that as it is frequently updated, it remains relevant in the future.

This Handbook is in PDF format and is also accessible online for ease of consultation. It is intended to constitute a handy and easy to read compilation of basic rules and ground principles reporters and their legal advisers can rely on, everywhere, offhand. It is a basic map to orient reporters and their legal advisers in the exercise of their job: to express themselves and, ultimately, inform. This Handbook aims at reviewing the international and regional sources journalists as well as bloggers and, in fact, everybody spreading relevant news can rely on to protect their freedom of expression.

The **first section** is dedicated to the **definition of the concept of freedom of expression**. First, international and regional texts are analyzed. Then, an overview of the bodies involved in the process of defining and protecting freedom of expression throughout the world is presented. The following sections focus on specific matters related to the need to balance freedom of expression with other fundamental rights.

Section two is devoted to the risk of incurring **defamation**, and how the issue is regulated in different regions of the world and under different circumstances.

Section three analyses the relationship between freedom of expression and the **right to privacy** both in the texts and in the case law of the relevant international bodies.

Section four deals with the limitation of freedom of expression for reasons of **public order or public morals**. Examples of restrictions grounded on public morals and public order are offered.

Lastly, **section five** focuses on the relationship between freedom of expression and **public security**.

The analysis carried out in this Handbook is deliberately limited to international and regional texts. An exception, however, concerns the United States of America: something is said about their national regime because, on the one hand, they are not party to any regional text² on the topic and, on the other hand, because US courts have deeply investigated freedom of expression, becoming a reference point for other jurisdictions. Apart from this exception, no other national rules are referred to in this Handbook.

EXECUTIVE SUMMARY



SECTION I: SURVEY OF THE INTERNATIONAL SOURCES

Freedom of expression and freedom of information are anchored in international sources of law. The freedom of expression is recognized as a fundamental freedom by the Charter of the United Nations (the “**Charter**”), even if it is not expressly defined in it. The Charter also forms the basis of the Universal Declaration of Human Rights (“**UDHR**”) and of many other international treaties, including the International Covenant on Civil and Political Rights (“**ICCPR**”).

In addition to those international sources, freedom of expression and freedom of information are also granted formal recognition by regional treaties which include similar provisions, and state more precisely the protections offered by the two freedoms.

Although international and regional sources of law are addressed to each human being, most of them only bind the states who have ratified them.

The common aim of these international sources is to protect freedom of expression and information across the world for everyone. The ICCPR states that the right to freedom of expression includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of choice.

In order to ensure the protection of freedom of expression and freedom of information, some political bodies created by the United Nations, UNESCO or other regional systems, issue resolutions, sometimes on very specific matters, such as the protection of journalists in armed conflicts. Furthermore, the Charter has led to the establishment of specific bodies who ensure that the treaties are implemented.

Some of these bodies, such as the Human Rights Council, issue **non-binding recommendations or reports** directed to everyone in order to promote and encourage the respect of these fundamental freedoms for all, and establish cooperation and dialogue with governments.

Others, such as independent experts, Special Rapporteurs and working groups, operate from a thematic perspective (e.g. focusing on the rights of the child, anti-torture, etc.) or a country-specific perspective. In this respect, they act by way of **letter of allegation**, addressing specific cases or general trends that they have been made aware of, directly to a state in order for it to take preventive or investigatory actions to avoid future violation or abuse. Thus, they may receive complaints and advocate for the victims, even if those letters are not binding.

Many bodies also provide **technical assistance** to states to support the implementation of international human rights standards on the ground, by way of reports, statements or even country visits.

Even though most of the material issued by these bodies is non-binding, they still have persuasive power and serve as indicators on a global scale.

Furthermore, **decisions and court rulings** regarding violations of freedom of expression are

delivered by regional courts such as the European Court of Human Rights, the Inter-American Court of Human Rights or the African Court on Human and Peoples' Rights.

The exercise of freedom of expression carries with it special duties and responsibilities and may therefore be subject to certain restrictions. Most of the sources refer to the ICCPR, which provides for a "three-part" test that permits a restriction on freedom of expression as long as:

- it is provided by law which meets standards of clarity and precision;
- it has a legitimate aim by protecting one of the exclusive aims listed in the ICCPR, i.e. rights or reputations of others, national security, public order, public health or morals;
- it is truly necessary and proportionate for the protection of the legitimate aim.

As for the international or regional sources that do not contain express permitted restrictions, they agree on the fact that a fair balance must be found between, on the one hand, human rights and fundamental freedoms of others and, on the other hand, freedom of expression, without weakening the latter.

SECTION II: REPUTATION AND DEFAMATION

Freedom of expression, although considered a fundamental right, can be limited when it conflicts with other rights such as an individual's right to reputation and honor. The individual's right to reputation and honor, which falls within the scope of the right to privacy, is protected by defamation laws.

To ensure that defamation laws comply with the right of freedom of expression, these laws should impose the narrowest restrictions necessary to protect the reputation of individuals. Indeed, restrictions to freedom of expression only apply if they are provided by law, serve an expressly recognised legitimate aim and are necessary and proportionate.

In this regard, international sources, such as the UN Charter, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, provide key guidelines in order to:

- classify defamation only as a civil tort, and repeal criminal defamation laws, considering that imprisonment should never be an appropriate penalty;
- apply financial sanctions which are proportionate to the harm caused and limited by law;
- ensure that there is no misuse of criminal prosecutions (e.g. delay of procedure, independence of the prosecutors, etc).

Regional bodies in various areas of the world, such as Europe, Africa and the Americas apply these international recommendations, with more or less thoroughness.

In the United States, at the federal level, the US Supreme Court, which refers to the US Constitution, protects even the most offensive and controversial speech, limiting restrictions to narrow cases. At the state level, numerous states have decided to enhance freedom of

The fear 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 attack the family life.

expression protection by enacting some form of anti-SLAPP legislation (i.e. Strategic Lawsuit Against Public Participation legislation that typically aims to chill free speech by intimidating critics with the prospect of defending an expensive lawsuit).

In Europe, the European Court of Human Rights (“**ECtHR**”) as well as other political bodies recognise that protection against defamation and libel may limit freedom of expression in accordance with the provisions of the European Convention of Human Rights and the Charter. In this regard, the ECtHR has recently defined several criteria which should be applied by the local courts to strike the balance between the right to freedom of expression and the protection of honor and reputation.

Thus, the regional human rights adjudicating bodies have played a crucial role in establishing a minimum standard of protection of freedom of expression with respect to local defamation laws. However, in practice, many regional or state laws do not totally comply with these principles and are still trying to find the right balance between the two types of rights.

While a kind of consensus has been formed on the need to repeal all criminal defamation laws as inconsistent with freedom of expression, some international and regional human rights courts still consider that an imprisonment penalty can be justified in exceptional circumstances. Thus, in the *Cumpana Mazare v. Romania* case, the ECtHR affirmed that “the Court considers that the imposition of a prison sentence for a press offense will be compatible with journalists’ *freedom of expression as guaranteed by Article 10 of the Convention 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.*”

Starting from the *Kimel v. Argentina* case in 2008, the Inter-American Court’s orientation has changed and judges began to re-evaluate the compatibility of criminal defamation convictions with freedom of expression. Thus, in the *Memoli v. Argentina* judgment, the Court ruled that a criminal defamation conviction did not violate the right to freedom of expression.

Even where defamation is sanctioned as a civil tort, disproportionate damages are frequently awarded. In the *Tristan Donosco v. Panama* case, the Inter-American Court of Human Rights had the opportunity to address the issue of possible negative consequences of disproportionate civil sanctions on the exercise of the right of freedom of expression. According to the Court, *“the fear 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 attack the family life.”* In this regard, in several court rulings, the ECtHR and the Inter-American Court of Human Rights have repeatedly urged states to provide clear criteria and caps for the determination of damages, in order to avoid media self-censorship due to the chilling effect of such penalties on freedom of expression.

Finally, it is generally understood that public figures should tolerate a higher degree of scrutiny and criticism than other people. Thus, in the *Gertz v. Robert Welch* case, the US Supreme Court set forth a different standard for private persons: a private person does not have to show that a defendant acted with actual malice in order to prevail in a defamation suit. However, although recent case rulings are in line with this, laws which ban insults and

suit. However, although recent case rulings are in line with this, laws which ban insults and criticism of the state, of rulers, government bodies or public officials still exist and are constantly questioned by international and regional human rights adjudicating bodies.

SECTION III: THE RIGHT TO PRIVACY

The right to privacy and the freedom of information are both essential human rights expressly stated as such by the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. Under international sources, no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation.

In most of the international sources such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and regional ones such as the European Convention of Human Rights, the American Convention of Human Rights or the Arab Charter on Human Rights, the right to privacy and freedom of information are defined in relation to each other.

Indeed, those rights complement each other: the right to privacy is necessary to protect individuals from interference, attacks or intrusion in their private life, while freedom of information allows individuals to access, ascertain and modify personal data held by government bodies.

Here again, each of these rights may be subject to certain restrictions if such restrictions are necessary to protect the rights and freedoms of other people. The balance between the two rights is of particular importance. Indeed, at a time when mobile phones, Internet and social networks have narrowed the scope of privacy, there is a real risk of a disproportionate public response to protect privacy, which could lead to restrictions on press freedom. Moreover, in order to receive and pursue information from confidential sources, including whistleblowers, journalists must be able to rely on the privacy, security and anonymity of their communications.

In order to ensure a fair balance between those rights, states must implement procedures, practices and legislation regarding the surveillance of communications and the collection of personal data, which include not only what people explicitly decide to share, but also the preferences and habits detected and collected via cookies and bugs.

Guidance to the balancing exercise is also drawn from the European Court of Human Rights (“**ECtHR**”) and Inter-American Court of Human Rights case law setting out guiding principles in their respective jurisdictions.

For instance, when **publishing photographs**, the crucial role of journalists to inform the public must be carefully balanced with the rights of the individuals depicted in the photographs. In order to do so, the ECtHR has identified five criteria in the *Von Hannover v. Germany* case: (i) whether the image contributes to a debate of general interest, (ii) the circumstances in which the photos were taken, (iii) the public role and any prior conduct

of the person concerned, (iv) the context in which the information is disclosed and (v) the content, form and consequences of the publication. In the *HFA v. France* case concerning the publication in a weekly magazine of pictures of Prince Albert of Monaco with his alleged secret child, the ECtHR added a sixth criterion: the gravity of the sanctions imposed. The Inter-American Court follows a similar approach to the ECtHR in relation to photo publishing. An interesting case in this respect is the *Fontevéchia and D'Amico vs Argentina* decision related to the publication of an article reporting the story of a secret son of the Argentinian president.

The ECtHR uses the same criteria regarding the **disclosure of criminal information** about a person.

Furthermore, the same attention must be devoted to **expressing judgements about details of court rulings**. The balancing exercise aims at differentiating between value judgements, considered as simple opinion, and reporting of facts, which may hinder the person concerned and therefore must be reported as objectively as possible.

Finally, it should be noted that the demarcation between the right to privacy and the freedom of information is also problematic regarding **phone interceptions**, which are widely used in criminal investigations. In this regard, the key criteria correspond to the necessity of this publication in a democratic society, i.e. to determine if the reporting is on matters of public concern and contributes to a public debate of great importance without affecting the conduct of the investigation.

An interesting example has been offered by the ECtHR in the *Dupuis* case which concerned the publication of a book of intercepted phone calls of the deputy director of the French President's private office. The authors were condemned. The ECtHR challenged this judgment by focusing on whether there was a pressing social need to avoid disclosure, whether such restriction was proportionate to its aim and justified by relevant and sufficient reasons.

Furthermore, in the *Bartnicki v. Vopper* case, the US Supreme Court ruled that the law punishing dissemination of illegally intercepted phone conversations cannot be used against journalists if they were not responsible for illegally tapping the calls, provided their reporting was a matter of public concern.

SECTION IV: PUBLIC ORDER AND MORALITY

Protection of public order and morality is expressly stated by international and regional sources, such as the Universal Declaration of Human Rights, the European Convention on Human Rights and the American Convention on Human Rights as an acceptable restriction to freedom of expression, as long as the limitation is prescribed by law, proportionate and necessary in a democratic society.

In this regard, international laws only expressly provide for four types of expression which states are required to prohibit:

- (i) child pornography;
- (ii) incitement to genocide;
- (iii) advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence; and
- (iv) incitement to terrorism.

However, as stressed by the UN Special Rapporteur, other restrictions on freedom of expression may also be justified by the very different factual situations states may face.

In this respect, international bodies, such as the Human Rights Committee, and regional bodies, such as the European Court of Human Rights (“**ECtHR**”), have provided guidance relating to the balance between freedom of expression and protection of public order and morality.

As for international bodies, whether regarding protection of public order or protection of morality, they rigorously use the two key guidelines which are the proportionality and the necessity of the restriction to freedom of expression in relation to the objective.

In relation to **public order**, European bodies have stressed the need for protection of freedom of expression against undue restrictions allegedly justified by the need to prevent public disorder. In this regard, states should not use vague terms but adequately and clearly defined terms in order to limit the freedom of expression, for example, in times of crisis or when it concerns the questioning of the judicial authority. In this regard, the ECtHR has observed in the *Skalka v. Poland* case that a distinction had to be drawn between criticism and insult of the Court. According to the Court, an appropriate punishment for insulting the Court would not, in principle, constitute a violation of freedom of expression.

Public order must also be taken into account while dealing with the role of journalists in the fight against terrorism. In fact, they must avoid giving terrorists disproportionate attention but at the same time, should not deprive the public of necessary information. An interesting example is to be found in the ECtHR’s case, *Leroy v. France*.

Public morality is, for its part, a vague and general concept, evolving and changing with ages, cultures and history. The risk is that culturally oriented principles lead to excessive limits being placed on freedom of expression. Nevertheless, the principle of universality of freedom of expression may not be undermined by restrictions justified by reference to local traditions, culture and values. The shift from the alleged protection of public morality to the primacy of freedom of expression was formalized by the Human Rights Committee. In its General Comment 34, it identified the “*prohibition of display of lack of respect for a religion or other belief system*” as being incompatible with the International Covenant on Civil and Political Rights, thus affirming the unlawfulness of blasphemy laws.

SECTION V: NATIONAL SECURITY AND STATE SECRETS PROTECTION

The rights to freedom of expression and freedom of the press can be restricted or limited for reasons of national security. This principle is recognized by international sources, such as the International Covenant on Civil and Political Rights, the UN Human Rights Council and the Special Rapporteurs, and also by regional sources issued in the United States, Europe or Africa.

However, international and regional sources, nearly all guided by the ICCPR, ban blanket restrictions and consider that state interference with freedom of expression is only justified if the action (i) is prescribed by law, (ii) pursues a legitimate aim towards national security, and (iii) is necessary in a democratic society in order to achieve the aim. In the *Stoll v. Switzerland* case, the European Court of Human Rights stated that the criterion for assessing whether interference is necessary in a democratic society must be whether it corresponds to a pressing social need for which the authorities have a limited margin of appreciation.

International and regional bodies have expressed concerns that the censorship of journalists has been facilitated and aggravated by states who abuse the labels of “state of emergency” and “national secret” in order to prevent the disclosure of information which is in the public interest.

In this regard, they have become very demanding as to what can justify a restriction of freedom of the press for **national security issues**. For example, even if there may be some conditions under which freedom of the press would be restricted for purposes of safeguarding national security, the US Supreme Court decided in the *New York Times Co. v. US* case that the national security interest did not justify the type of restriction imposed. More precisely, in this case which concerned the government’s attempt to prevent publication of the Pentagon Papers in the New York Times and Washington Post, the Court noted that governments carry a heavy burden of showing justification for the imposition of a restraint since a system of prior restraints of expression bears a heavy presumption against its constitutional validity. The Court held that the government had failed to meet this burden.

Regional bodies consider that laws relating to a state’s authority to withhold information on national security grounds or punish the disclosure of such information must be drawn narrowly and with precision. In this respect, the “Tshwane principles”, drafted by 22 organizations and academic centers in consultation with more than 500 experts, provide guidance on the drafting of such national laws and their implementation. These principles

underline the fact that the notion of national security should be defined precisely in national law in a manner consistent with the needs of a democratic society.

The **protection of journalists' sources** is also recognized as a key concern. Regional bodies have considered that a journalist may be compelled to reveal a source only in exceptional cases, such as the protection of a human life or the prevention of a major crime.

It should finally be mentioned that international and regional adjudicating bodies have also taken a tough line in favor of the freedom of information regarding the **right of access to state-held information, disclosure of state secrets, cutting off of internet access** or other **terrorism-related regulation**. For instance, the Inter-American Court of Human Rights determined, in the *Palamara-Iribarne v. Chile* case, that the Navy's interference with a retired naval intelligence officer's publication of a book criticizing actions taken by the Chilean Government constituted a violation of the freedom of expression.

SECTION I: SURVEY OF THE INTERNATIONAL SOURCES



1.1. PRIMARY INTERNATIONAL SOURCES

1.1.1. The Charter of the United Nations

The UN Charter³ was signed on 26 June 1945 and came into force on 24 October 1945. The preamble states that the UN was established with the following aims and goals:

- “To save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and
- To reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and
- To establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom,

And for these ends

- To practice tolerance and live together in peace with one another as good neighbours, and
- To unite our strength to maintain international peace and security, and
- To ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and
- To employ international machinery for the promotion of the economic and social advancement of all peoples.”

General Principles

Freedom of expression is not defined in the UN Charter, but it is a “*fundamental freedom*” as referenced in Article 1 of the UN Charter that sets out the purposes of the UN, which are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace

3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and

4. To be a centre for harmonizing the actions of nations in the attainment of these common ends.”

The UN Charter further states that the UN shall promote “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion”⁴. Furthermore, pursuant to the Charter, “all Member States pledge themselves to take joint and separate action in co-operation with the Organisation for the achievement of these purposes”⁵.

The UN Charter is generally considered as the starting point of the development of international human rights law. It also forms the basis for the Universal Declaration of Human Rights, which explicitly includes the right to freedom of opinion and expression⁶.

Restrictions to freedom of expression

In the same way that the UN Charter does not give a detailed description of freedom of expression, it does not explicitly set out any restrictions to that right. However, as a potential reaction to threats to the peace, breaches of the peace, and acts of aggression, the UN Charter states that:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations. (Article 41).

The potential interruption of postal, telegraphic, radio and other means of communication as a reaction to threats to the peace, breaches of the peace, and acts of aggression, would be a measure with a significant impact on the right to freedom of expression which also includes the right to information. As such, the UN Charter includes a potential restriction to freedom of expression.

Scope and Nature of Freedom of Expression

The UN Charter is the constituent treaty of the UN, and is binding on all UN Member States⁷. Every human being can refer to the UN Charter and to the principles of fundamental human rights and the dignity and worth of the human person.

Article 103 of the UN Charter states that obligations of UN Member States to the UN Charter prevail over all other treaty obligations.

Under Article 6 of the UN Charter, a Member of the UN, which has persistently violated the principles contained in the UN Charter, may be expelled from the organization by the General Assembly upon the recommendation of the Security Council.

Under Article 62, *“the Economic and Social Council may make or initiate studies and reports with respect to international economic, social, cultural, educational, health, and related matters and may make recommendations with respect to any such matters to the General Assembly, to the Members of the United Nations, and to the specialized agencies concerned”*⁸.

1.1.2. THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

The UN General Assembly adopted the Universal Declaration of Human Rights (“UDHR”)⁹ on 10 December 1948. It defines the fundamental freedoms and human rights that the Charter¹⁰ was established to foster.

Article 19 of the UDHR is the cornerstone of freedom of expression in international law.

The UDHR, like the UN, is the result of the experience of the Second World War. World leaders decided to complement the UN Charter with a road map to guarantee human rights. The declaration sets down the basic principles at the very heart of the human rights movement. The Preamble states:

“The General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.”

General Principles

According to Article 19 of the UDHR¹¹, everyone has the right to freedom of opinion and expression. Article 19 of the UDHR further states that the right to freedom of opinion and expression includes the freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

The right of freedom of expression is the right of each individual, independent from his or her race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status in society, to tell others about his or her thoughts and ideas in private, in public and via the media. The right of freedom of expression does not only entitle every person to express any kind of information, facts and opinions that can be communicated to others (subject to limitations provided by the law), but also entitles every person to access any kind of information, facts and opinions publicly available. It is not bound to any national boundaries. Therefore, Article 19 of the UDHR also includes the right to seek, receive and impart information and ideas from all parts of the world.

The term “*expression*” has been defined by the UN Human Rights Committee¹² as a broad term and not just confined to political, cultural or artistic expression¹³. It is not limited to information and opinions considered to be useful or correct by the general public or public authorities. On the contrary, the value of freedom of expression in a society has to be measured by its treatment in connection with minorities and in connection with uncommon, disliked or even incorrect opinions, which do not justify censorship. As a consequence, the right of freedom of expression also includes controversial and false expression.

Restrictions to Freedom of Expression

Freedom of expression carries responsibilities and, as a non-absolute and derogable right, it may be limited. Article 29 paragraph 2 of the UDHR states that: “*In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.*”

According to Article 29 paragraph 3 of the UDHR these rights and freedoms cannot be exercised in a way that contradicts the purposes and principles of the UN.

In order to prevent an interpretation of the UDHR that is contrary to its intent to provide for basic human rights principles, Article 30 of the UDHR makes it very clear that nothing in the UDHR shall be interpreted in a way that a state, group or person has a justification to destroy any of the rights and freedoms granted in the UDHR.

Scope and Nature of Freedom of Expression

The UDHR is not a binding treaty¹⁴ but a declaration adopted by the UN General Assembly. Through time and universal acceptance, however, many scholars argue that much of the UDHR has risen to the level of customary international law. In the Proclamation of Teheran, Final Act of the UN International Conference on Human Rights¹⁵, Article 2 states that: “*The Universal Declaration of Human Rights states a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family*” and it “*constitutes an obligation for the members of the international community*”.

The UDHR is the foundation of the legally binding treaties: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

1.1.3. THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

The International Covenant on Civil and Political Rights (“**ICCPR**”)¹⁶ was adopted on 16 December 1966 and entered into force on 23 March 1976¹⁷. While the UDHR sets forth general principles of human rights, the ICCPR is a multilateral binding treaty. It stands alongside the International Covenant on Economic, Social and Cultural Rights (“**ICESCR**”), which deals primarily with economic, social and cultural rights.

General Principles

According to Article 19 paragraph 1 of the ICCPR, everyone shall have the right to hold opinions without interference.

According to Article 19 paragraph 2 of the ICCPR, everyone shall have the right to freedom of expression. This right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his or her choice.

The UN Human Rights Committee, the body of independent experts established by the ICCPR (Article 28) to monitor the implementation of the ICCPR and provide interpretation of its provisions, précised the scope of Article 19 in its General Comment No. 34, stating that:

“Paragraph 2 requires States parties to guarantee the right to freedom of expression, including the right to seek, receive and impart information and ideas of all kinds regardless of frontiers. This right includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others, subject to the provisions in article 19, paragraph 3, and article 20. It includes political discourse, commentary on one’s own and on public affairs, canvassing, discussion of human rights, journalism, cultural and artistic expression, teaching, and religious discourse. It may also include commercial advertising. The scope of paragraph 2 embraces even expression that may be regarded as deeply offensive, although such expression may be restricted in accordance with the provisions of article 19, paragraph 3 and article 20.

*Paragraph 2 protects all forms of expression and the means of their dissemination. Such forms include spoken, written and sign language and such non-verbal expression as images and objects of art. Means of expression include books, newspapers, pamphlets, posters, banners, dress and legal submissions. They include all forms of audio-visual as well as electronic and internet-based modes of expression”.*¹⁸

As noted above¹⁹, the term “*expression*” has been defined by the UN Human Rights Committee, as broad and not confined to political, cultural or artistic expression²⁰. As a consequence, the right of freedom of expression also includes controversial and false expression²¹.

Freedom of expression and the media

Regarding the scope of freedom of expression and the media, the Human Rights Committee also stated that:

“A free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights. It constitutes one of the cornerstones of a democratic society (...) The free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion. The public also has a corresponding right to receive media output.

As a means to protect the rights of media users (...) States parties should take particular care to encourage an independent and diverse media.

States parties should take account of the extent to which developments in information and communication technologies, such as internet and mobile based electronic information dissemination systems, have substantially changed communication practices around the world (...) States parties should take all necessary steps to foster the independence of these new media and to ensure access of individuals thereto.”²²

According to the Human Rights Committee, a free press is not only a condition to ensure freedom of expression, but also a condition to ensure other political rights guaranteed by the Covenant.

According to Article 25 of the ICCPR, every citizen shall have the right and the opportunity to take part in the conduct of public affairs, directly or through freely chosen representatives. The UN Human Rights Committee stated in its General Comment No. 25 dated 12 July 1996²³:

“In order to ensure the full enjoyment of rights protected by article 25, the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.” (Paragraph 25)

The right to express thoughts and ideas in public which is also protected by the right of freedom of expression, is further protected by Article 21 of the ICCPR which entitles everyone to peaceably assemble with others and Article 22, paragraph 1 of the ICCPR which entitles everyone to associate with others.

The right to access information

Freedom of expression does not only consist of the right to express or receive information and ideas, it also implies a right to access information. As indicated by the Human Rights Committee in General Comment No. 34:

“Article 19, paragraph 2 embraces a right of access to information held by public bodies. Such information includes records held by a public body, regardless of the form in which the information is stored, its source and the date of production (...) the right of access to information includes a right whereby the media has access to information on public affairs and the right of the general public to receive media output. (...) every individual should have the right to ascertain in an intelligible form, whether, and if so, what personal data is stored in automatic data files, and for what purposes. Every individual should also be able to ascertain which public authorities or private individuals or bodies control or may control his or her files (...)”²⁴

Restrictions to Freedom of Expression

Freedom of expression is not absolute and can be limited when it conflicts with other rights.

According to Article 19 paragraph 3 of the ICCPR, the exercise of the right to freedom of expression carries with it special duties and responsibilities and may therefore be subject to certain restrictions. Such restrictions have to be provided by law and be necessary for respect of the rights or reputations of others or for the protection of national security or of public order or of public health or morals.

Therefore, each limitation of the right to freedom of expression is only permitted if it passes the three-part test provided by Article 19 paragraph 3 of the ICCPR:

- the limitation is provided by law which meets standards of clarity and precision;
- the limitation has a legitimate aim by protecting one of the exclusive aims listed in Article 19 paragraph 3 of the ICCPR (rights or reputations of others, national security, public order, public health or morals); and
- the limitation is truly necessary for the protection of the legitimate aim.

In its General Comment No. 34²⁵ on States parties’ obligations under Article 19 of the ICCPR, dated 21 July 2011, the UN Human Rights Committee elaborated on the permitted restrictions on freedom of expression, stating in particular that:

Finally, the Committee recalls: “when a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.” (Paragraph 35).

“When a State party imposes restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself. The Committee recalls that the relation between right and restriction and between norm and exception must not be reversed”. The Committee also notes that: “restrictions (to freedom of expression) are not allowed on grounds not specified in paragraph 3, even if such grounds would justify restrictions to other rights protected in the Covenant. Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated”.

More precisely, the Committee recalls that: *“Paragraph 3 may never be invoked as a justification for the muzzling of any advocacy of multi-party democracy, democratic tenets and human rights. Nor, under any circumstance, can an attack on a person, because of the exercise of his or her freedom of opinion or expression, including such forms of attack as arbitrary arrest, torture, threats to life and killing, be compatible with article 19.”²⁶*

General Comment No. 34 also clarifies the scope of the legitimate grounds for restrictions on freedom of expression according to Article 19(3) of the ICCPR:

“The first of the legitimate grounds for restriction listed in paragraph 3 is that of respect for the rights or reputations of others. The term “rights” includes human rights as recognized in the Covenant and more generally in international human rights law (...) the term “others” relates to other persons individually or as members of a community. Thus, it may, for instance, refer to individual members of a community defined by its religious faith or ethnicity.”

“The second legitimate ground is that of protection of national security or of public order (ordre public), or of public health or morals. Extreme care must be taken by States parties to ensure that treason laws and similar provisions relating to national security, whether described as official secrets or sedition laws or otherwise, are crafted and applied in a manner that conforms to the strict requirements of paragraph 3.”²⁷

“On the basis of maintenance of public order (ordre public) it may, for instance, be permissible in certain circumstances to regulate speech-making in a particular public place. Contempt of court proceedings relating to forms of expression may be tested against the public order (ordre public) ground. In order to comply with paragraph 3, such proceedings and the penalty imposed must be shown to be warranted in the exercise of a court’s power to maintain orderly proceedings. Such proceedings should not in any way be used to restrict the legitimate exercise of defence rights.”

“The concept of morals derives from many social, philosophical and religious traditions; consequently, limitations... for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition”. Any such limitations must be understood in the light of universality of human rights and the principle of non-discrimination.”²⁸

“Restrictions must be ‘necessary’ for a legitimate purpose”, “must not be overbroad”, “must conform to the principle of proportionality; (...) be appropriate to achieve their protective function; (...) be the least intrusive instrument amongst those which might achieve their protective function”, and “be proportionate to the interest to be protected”.

Derogatory measures

Further, in a time of public emergency which threatens the life of the nation, the existence of which is officially proclaimed, the States parties may, according to Article 4 of the ICCPR, take measures derogating from their obligations under the ICCPR to the extent strictly required by the exigencies of the situation. Any such measures shall not be inconsistent with other obligations under international law and shall not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. If a State party to the ICCPR avails itself of the right of derogation, it shall immediately inform the other State parties, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and the reasons for derogation.

Scope and Nature of Freedom of Expression

The ICCPR is binding, subject to valid reservations, understandings and declarations.

As of 30 November 2014, 168 States are parties to the ICCPR. At the time of writing, seven State parties²⁹ had signed the ICCPR but had yet to ratify it. A number of State parties to the ICCPR have made reservations and interpretative declarations to their application of the ICCPR³⁰.

All State parties that have ratified the ICCPR have agreed to ensure that the right to freedom of expression can be effectively enforced. The ICCPR does not provide details with respect to a specific mechanism that should be put in place. Each contracting State party is obliged to protect the right to freedom of expression by implementing an enforcement mechanism that fits in their respective legal system. The scope of the ICCPR is therefore also defined by decisions of international and domestic courts.

1.2. POLITICAL SOURCE MATERIAL ISSUED BY UN ORGANS AND UNESCO

1.2.1. United Nations Security Council Resolutions 1946-2014

The UN Security Council (the “Security Council”) is one of the six main organs of the UN established pursuant to the UN Charter. The Security Council has primary responsibility for maintaining international peace and security. Article 25 of the UN Charter³¹ states that UN Member States agree to accept and carry out the decisions of the Security Council. Its resolutions are binding on EU Member States³². The Security Council has issued several resolutions on the protection of freedom of expression and the protection of journalists in conflict zones.

General principles

The Security Council has passed resolutions on freedom of expression, in particular on the protection of journalists in armed conflict. The main Resolution on this topic is Resolution 1738 (2006) on the protection of civilians in armed conflicts³³, which is the first resolution to deal with the protection of journalists in conflicts per se. Resolution 1738 does not create new legal obligations, but reaffirms fundamental rules of international humanitarian law, confirms international customary law and reminds states of their obligations.

Resolution 1738 (2006) recalls that *“journalists, media professionals and associated personnel engaged in dangerous professional missions in areas of armed conflict shall be considered as civilians and shall be respected and protected as such, provided that they take no action adversely affecting their status as civilians”, and demand that “all parties to an armed conflict comply fully with the obligations applicable to them under international law related to the protection of civilians in armed conflict, including journalists, media professionals and associated personnel”.*

Also, where the equipment and installations of journalists, media professionals and associated personnel are used for anything other than military objectives, equipment and installations shall not be the object of attack or of reprisals³⁴.

States and all parties to an armed conflict must *“do their utmost to prevent violations of international humanitarian law against civilians, including journalists, media professionals and associated personnel”* and *“respect the professional independence and rights of journalists, media professionals and associated personnel as civilians.”*

The Resolution recalls that States have the responsibility *“to comply with the relevant obligations under international law to end impunity and to prosecute those responsible for serious violations of international humanitarian law”.*

Finally, the Resolution provides for the UN Secretary General to devote a section of his reports on the protection of civilians in armed conflicts to the protection of journalists.

On May 27, 2015, the Security Council adopted another Resolution on the issue of journalists' safety: Resolution 2222 (2015). This was the first Resolution that the Security Council adopted on this crucial subject since Resolution 1738 in 2006. For the first time, a Security Council resolution referred to the right to freedom of expression as envisaged in Article 19 of the Universal Declaration of Human Rights.

The resolution affirms *“that the work of a free, independent and impartial media constitutes one of the essential foundations of a democratic society, and thereby can contribute to the protection of civilians”.* It calls on states to fulfil their obligations as regards the protection of journalists during armed conflicts and makes it a requirement for UN peacekeeping operations to provide regular reports on the safety of journalists.

The Security Council passed other resolutions on freedom of expression, in particular on the protection of journalists in armed conflict, including Resolution 1265 (1999)³⁵, Resolution 1296 (2000)³⁶, Resolution 1674 (2006)³⁷, Resolution 1894 (2009)³⁸, Resolution 1910 (2010)³⁹,

Resolution 1973 (2011)⁴⁰ and Resolution 1974 (2011)⁴¹.

These resolutions refer to concrete threats and attacks against journalists. As such, the resolutions are mostly directed to a specific State. For instance, Resolution 1973 (2011) condemns violence and intimidation committed by Libyan authorities against journalists, media professionals and associated personnel. Resolution 1974 (2011) welcomes the growth of free media in Afghanistan but contemporarily expresses concerns as to the continued restrictions in this respect.

Scope and Nature of Freedom of Expression

According to the UN Charter, the Security Council has the primary responsibility for the maintenance of international peace and security, either by peaceful means, for example through dispatching a mission, appointing special envoys or undertaking an investigation, or by enforcement measures which may range from economic sanctions to international military action.

Article 25 of the Charter states that *“The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter”*. The Security Council’s resolutions are therefore binding on the Member State concerned.

1.2.2. UNITED NATIONS GENERAL ASSEMBLY RESOLUTIONS

The UN General Assembly (the **“UNGA”**) was established in 1945 under the UN Charter and is the main deliberative, policy-making and representative organ of the United Nations.⁴² At time of writing, the UNGA is comprised of all 193 Members of the UN. Although they are not binding, UNGA resolutions carry a very significant political weight.⁴³

General Principles

In Resolution 59(I) dated 14 December 1946, for Calling of an International Conference on Freedom of Information⁴⁴, freedom of expression is included within the definition of freedom of information. The UNGA stated that *“freedom of information is a fundamental human right and is the touchstone of all the freedoms to which the United Nations is consecrated”* and that it *“implies the right to gather, transmit and publish news anywhere and everywhere without fetters”*. According to the Resolution, *freedom of information is the condition for “an alert and sound world opinion”, which is necessary for “understanding and co-operation among nations.”*

The 2013 General Assembly Resolution on the safety of journalists and the issue of impunity (A/RES/68/163)⁴⁵, adopted on 26 November 2013, is the first General Assembly resolution on the matter.

It acknowledges the important role played by all news providers by stating that *“journalism is continuously evolving to include inputs from media institutions, private individuals and a range of organizations that seek, receive and impart information and ideas of all kinds, online as well as offline”, and by recognizing that “the relevance of freedom of expression and of free media in building inclusive knowledge societies and democracies and in fostering intercultural dialogue, peace and good governance”*.

The resolution underlines that *“impunity for attacks against journalists constitutes one of the main challenges to strengthening the protection of journalists”, and recalls that “journalists, media professionals and associated personnel engaged in dangerous professional missions in areas of armed conflict shall be considered as civilians and shall be respected and protected as such”*.

It *“condemns all attacks and violence against journalists and media workers”, “in both conflict and non- conflict situations”, and it urges member states “to prevent violence against journalists and media workers, to ensure accountability (...), to bring the perpetrators of such crimes to justice and ensure that victims have access to appropriate remedies”*.

The resolution asks Member States to create the security conditions that allow journalists to work in an independent manner without being subjected to pressure, by urging Member States *“to promote a safe and enabling environment for journalists to perform their work independently and without undue interference ”*.

Finally, the resolution proclaimed 2 November as the International Day to End Impunity for Crimes against Journalists.

On 18 December 2014, the General Assembly adopted resolution 69/185⁴⁶, also on the safety of journalists and the issue of impunity, which goes further than resolution 68/163 on several points, namely in the range of abuses against journalists identified, on combating impunity for crimes against journalists and on surveillance of their communications.

Freedom of information requires as an indispensable element the willingness and capacity to employ its privileges without abuse. It requires as a basic discipline the moral obligation to seek the facts without prejudice and to spread knowledge without malicious intent

The new resolution reaffirms that *“the right to freedom of opinion and expression is a human right guaranteed to all, in accordance with Article 19 of the Universal Declaration of Human Rights and of the International Covenant on Civil and Political Rights, and that it constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and development”*.

It acknowledges that journalism is an activity that is evolving and now includes not only professional journalists but also *“private individuals and a range of organizations that seek, receive and impart information and ideas of all kinds, online as well as offline.”*

It stresses *“the particular vulnerability of journalists to becoming targets of unlawful or arbitrary surveillance or interception of communications in violation of their rights to privacy and to freedom of expression.”*

It reaffirms the obligation to protect journalists in both wartime and peacetime and stresses the need to *“create and maintain, in law and in practice, a safe and enabling environment for journalists”* and to conduct *“impartial, speedy, thorough, independent and effective investigations”* into attacks against journalists and other news providers.

The resolution lists all the human rights violations and abuses that constitute a threat to the safety of journalists, not only killing, torture and enforced disappearance but also *“arbitrary arrest and arbitrary detention, expulsion, intimidation, harassment, threats and other forms of violence.”*

Restrictions to Freedom of Expression

Resolution 59(l) does not provide for restrictions to freedom of expression, but it states that *“freedom of information requires as an indispensable element the willingness and capacity to employ its privileges without abuse. It requires as a basic discipline the moral obligation to seek the facts without prejudice and to spread knowledge without malicious intent”*.

It should be noted, that in the conference that followed such resolution, the United Nations Conference on Freedom of Information held at Geneva, Switzerland, from 23 March to 21 April 1948⁴⁷, the question of restrictions to freedom of information was discussed, especially with reference to the right of correction⁴⁸. The outcome of the Conference was however limited, due to the opposition between the East and the West. The Conference is generally considered a failure.

As regards to Resolutions 68/163 and 69/185, they address the issue of safety of journalists and impunity, and therefore do not provide for restrictions to freedom of expression.

Scope and Nature of Freedom of Expression

Aside from budgetary matters, UNGA Resolutions are non-binding on Member States of the UN, and so there are no specific means of redress or remedies⁴⁹. However, UNGA Resolutions may reflect an opinion juris generalis, as the International Court of Justice (ICJ) stated in the *Nicaragua* case⁵⁰, and therefore contribute to the process of law-creation by crystallizing

customary behavior and general principles into law. Article 38 of the ICJ Statutes specifies the source of international law, among which, next to international conventions, are *“international custom, as evidence of general practice accepted as law”* and *“the general principles of law recognized by civilized nations”*. Resolutions and declarations of the UNGA, repeated with sufficient frequency and bearing the characteristics of opinion *juris*, can then establish a general practice recognized as legal custom, and therefore become binding.

1.2.3. UNESCO RESOLUTIONS AND STUDIES

The United Nations Organization for Education, Science and Culture (**“UNESCO”**) was founded on 16 November 1945, with a mandate *“to contribute to peace and security by promoting collaboration among the nations through education, science and culture in order to further universal respect for justice, for the rule of law and for the human rights and fundamental freedoms which are affirmed for the peoples of the world, without distinction of race, sex, language or religion, by the Charter of the United Nations”*⁵¹. At time of writing, UNESCO has 195 Member countries and 9 Associate Member countries.

One of the focuses of UNESCO is the defence and promotion of freedom of expression. Article 1.2(a) of the UNESCO Constitution states that the organization will *“collaborate in the work of advancing the mutual knowledge and understanding of peoples, through all means of mass communication and to that end recommend such international agreements as may be necessary to promote the free flow of ideas by word and image”*.

UNESCO World Press Freedom Day Declaration

UNESCO addresses the importance of freedom of expression and in particular press freedom and the role of media in post-conflict countries each year on May 3 at the World Press Freedom Day. The UNESCO World Press Freedom Day raises awareness regarding the importance of freedom of expression and reminds Member States, professional associations, media outlets, the industry and the UNESCO of their obligation to promote freedom of expression and the right to information enshrined in Article 19 of the UDHR.

Every year, the participants of the UNESCO World Press Freedom Day Conference issue a declaration, which recalls the value of freedom of expression and the right to information as a cornerstone of democratic societies as well as its fundamental role for all other rights and freedoms. The declaration condemns violations of freedom of expression and the right to information.

In the final statement of the 2014 World Press Freedom Day, the Paris Declaration⁵², participants confirm the crucial role press freedom has, not just as a fundamental freedom itself, but also as a tool to enforce other human rights: *“Developing a diversity of media actors, content and languages, relevant and meaningful to all peoples and cultures, is important within the framework of universal human rights; [o]vercoming poverty requires citizens to be empowered through reliable and quality information and inclusive platforms for public voice”*. Moreover, with reference to safety of journalists, the statement stressed that *“The safety of journalists is often a symptom of the strength of the rule of law, and impunity for crimes against journalists constitutes*

a barometer of fragility of a State and evidence of a major obstacle to development”.

The 2014 World Press Freedom Day Declaration states that freedom of expression, press freedom, independent media and the right of access to information should be integrated by the UN in the Sustainable Development Goals. This goes further in the Bali Road Map which aims at emphasising the importance of including a goal on freedom of expression and independent media in the post-2015 Sustainable Development Goals, and of including this recognition in development practice more broadly. Moreover, participants asked UNESCO Member States to *“Condemn the killings of journalists and ensure that such crimes are subject to independent, speedy and effective investigations and prosecutions, and to provide comprehensive and timely responses to the call by the UNESCO Director-General for information about investigations into killings of journalists in line with the decisions of the Organisation’s International Programme for the Development of Communication (IPDC)”.*

The declarations issued at the UNESCO World Press Freedom Day Conference by its participants are not binding and have no scope of application.

UN Plan of Action

The UNESCO International Programme for the Development of Communication⁵³ promoted the adoption of a UN Plan of Action on the Safety of Journalists and the Issue of Impunity (the “Plan of Action”)⁵⁴. The Plan of Action, adopted in 2012, is addressed to all UN agencies for “Working toward the creation of a free and safe environment for journalists and media workers in both conflict and non-conflict situations, with a view to strengthening peace, democracy and development worldwide”. It focuses on strengthening UN mechanisms (including the establishment of an inter-agency mechanism to follow-up and evaluate issues of concern on the issue of the safety of journalists and impunity), boosting co-operation with Member States and with other organisations raising awareness on the issue and fostering safety initiatives.

The UNESCO also publishes, on a regular basis, a Report on the Safety of Journalists and the Danger of Impunity⁵⁵.

1.3. WORKING DOCUMENTS ISSUED BY UN HUMAN RIGHTS BODIES

1.3.1. Charter-based Bodies

1.3.1.1. Human Rights Council

The UN Human Rights Council (the “HRC”)⁵⁶ is an inter-governmental body within the UN responsible for strengthening the promotion and protection of human rights and for addressing situations of human rights violations.

It was established by the UN General Assembly on 15 March 2006 by Resolution 60/251⁵⁷, “in replacement of the Commission on Human Rights, as a subsidiary organ of the General Assembly”, for the purpose of, *inter alia*, “[...] Serv[ing] as a forum for dialogue on thematic issues on all human rights; [...] Mak[ing] recommendations to the General Assembly for the further development of international law in the field of human rights; [...] Promot[ing] the full implementation of human rights obligations undertaken by States[...]; Contribut[ing], through dialogue and cooperation, towards the prevention of human rights violations and respond promptly to human rights emergencies; [...] Work[ing] in close cooperation in the field of human rights with Governments, regional organizations, national human rights institutions and civil society; [...] Making recommendations with regard to the promotion and protection of human rights [...]”.

The HRC has the ability to discuss all human rights issues and subsequently make recommendations. It is made up of 47 UN Member States which are elected by the UNGA. The HRC works closely with the UN Special Procedures. These are independent experts, special rapporteurs, special representatives and working groups that report and advise on human rights with a specific country or thematic focus.

The HRC holds three regular sessions a year, for a total of at least ten weeks. These sessions take place in March, June and September. The HRC can decide to hold special sessions at any time, if so requested by one third of the Member States, to address human rights violations and emergencies.

General Principles

The HRC refers to Article 19 of the ICCPR, and likewise Article 19 of the UDHR, according to which freedom of expression shall “include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice”.

Furthermore, HRC Resolution 7/36 on the mandate of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression⁵⁸, states:

“Recognising that the effective exercise of the right to freedom of opinion and expression, as enshrined in the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights, is essential for the enjoyment of other human rights and freedoms, and constitutes a fundamental pillar for building a democratic society and strengthening democracy, bearing in mind that all human rights are universal, indivisible, interdependent and interrelated.”

Noteworthy in this context is the HRC’s Resolution No. A/HRC/20/L.13, of 5 July 2012⁵⁹, where the Council affirms that *“the same rights that people have offline must also be protected online, in particular freedom of expression, which is applicable regardless of frontiers and through any media of one’s choice”*.

The HRC also recognises *“the global and open nature of the Internet as a driving force in accelerating progress towards development in its various forms”* and calls upon States *“to promote and facilitate access to the Internet and international cooperation aimed at the development of media and information and communications facilities in all countries”*.

Another example of the HRC’s work in this field is to be found in the Resolution 21/12 on safety of journalists adopted by the Human Rights Council on 9 October 2012⁶⁰. In this resolution, the HRC expresses its concern *“that violations of the right to freedom of opinion and expression continue to occur, including increased attacks against and killings of journalists and media workers, and stressing the need to ensure greater protection for all media professionals and for journalistic sources”* and that *“there is a growing threat to the safety of journalists posed by non-State actors, including terrorist groups and criminal organizations.”*

Operative paragraph 8 of the resolution calls upon States to *“promote a safe and enabling environment for journalists to perform their work independently and without undue interference, including by means of (a) legislative measures, (b) awareness-raising in the judiciary, law enforcement officers and military personnel, as well as journalists and civil society, regarding international human rights and humanitarian law obligations and commitments relating to the safety of journalists, (c) the monitoring and reporting of attacks against journalists, (d) publicly condemning attacks, and (e) dedicating necessary resources to investigate and prosecute such attacks.”*

Restrictions to freedom of expression

Article 19 of the ICCPR states that restrictions on freedom of expression shall only be for the protection of national security or of public order, or of public health and morals. Article 20 provides that any propaganda for war or advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Scope and nature of freedom of expression

The HRC makes only recommendations in its resolutions that are not legally binding.

1.3.1.2. SPECIAL PROCEDURES OF THE HRC

The HRC has established Special Procedures to address specific thematic or country-specific situations. According to UN sources, Special Procedures *“are independent human rights experts with mandates to report and advise on human rights from a thematic or country-specific perspective.”*⁶¹ *The Council has affirmed “the obligation of States to cooperate with the Special Procedures, and the integrity and independence of Special Procedures”*⁶², as well as *« the principles of cooperation, transparency and accountability and the role of the system of Special Procedures in enhancing the capacity of the Human Rights Council to address human rights situations”*⁶³.

Special Procedures can be either individuals (called “Special Rapporteur” or “Independent Expert”) or working groups, composed of five members. Special Procedure mandate holders are appointed by the Human Rights Council and serve in their personal capacities. They *“undertake to uphold independence, efficiency, competence and integrity through probity, impartiality, honesty and good faith.”*⁶⁴

Special Procedures undertake fact-finding on-site during country visits, act on individual cases of alleged violations by sending communications to states, conduct thematic studies and convene expert meetings, contribute to the development of international human rights standards, engage in advocacy, raise public awareness, and provide advice for technical cooperation.

Special Procedures also submit reports to the UNGA or to the HRC⁶⁵. Those reports contain recommendations, which are not binding on the Member States, but they rather serve as a hermeneutical tool.

Special Procedures mandate holders receive information on alleged violations of human rights and, after an evaluation of the facts, they may act by communicating directly with the concerned States on specific allegations of human rights violations to advocate for the victims. These communications may take the form of “Urgent appeals” and “Letters of allegations”.

On the dedicated web page, all instructions on how to submit information to the Working Groups are presented⁶⁶.

As it is clearly explained in the Working Group on Business and Human Rights’ brief of March 2014⁶⁷ about their activities, *“such letters, referred to as “Letters of Allegation” and “Urgent Actions” in the UN system, can address specific cases or general trends and they typically ask the recipient State to provide further information and/or take preventative or investigatory action to avoid future violations or abuses. Letters of Allegation do not adjudicate; this means they do not establish guilt and sanctions. They are a complement to the broader UN human rights system. At an initial stage, these letters are sent confidentially to the concerned state to give them reasonable time to respond to such allegations”. In brief, those letters do not have binding legal consequences.*

Three times a year, these communications are summarised and compiled in a public *“Communications Report of the Special Procedures”* for the HRC in March, June and September.

1.3.2.1.A SPECIAL RAPORTEURS

Special Rapporteurs are independent experts who are not accountable to any particular Government and are mandated to report and advise on human rights from a thematic or country-specific perspective. They are selected through articulated procedures aimed at ensuring, inter alia, experience, impartiality, independence, integrity and objectivity. Independent experts are unpaid (although benefit from logistical support), can only visit countries they are invited to, and follow a Code of Conduct⁶⁸ and a Manual of Operations⁶⁹. They are normally appointed for three years, with possibility of extension for a further three years.

Nature and Scope

Special Rapporteurs provide important guidance and moral influence. They express deep concern about national legal standards as well as the balance between human rights and national security or other restrictions states impose on freedom of expression.

The reports of the Special Rapporteur are directed to the UNGA or the HRC. They are not binding. Given that reports usually highlight specific domestic legislation that contravenes international laws and standards, they can be used as a tool to interpret the right to freedom of opinion and expression enshrined in Articles 19 of the UDHR and the ICCPR.

General principles and restrictions to freedom of expression

Special Procedures make reference, when dealing with freedom of expression, to Article 19 of the ICCPR, and Article 20 which provide that any propaganda for war or advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

1.3.2.1.a.(i) Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression

The Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression's mandate was established in 1993 by the UN Commission on Human Rights (which was replaced by the HRC in 2006).

David Kaye was appointed as Special Rapporteur in August 2014⁷⁰. The Special Rapporteur is mandated by HRC resolution 7/36⁷¹ to:

- a** gather all relevant information relating to violations of the right to freedom of opinion and expression, discrimination against, threats or use of violence, harassment, persecution or intimidation directed at persons seeking to exercise or to promote the exercise of the right to freedom of opinion and expression, including, as a matter of high priority, against journalists or other professionals in the field of information;
- b** seek, receive and respond to credible and reliable information from Governments, non-governmental organisations and any other parties who have knowledge of these cases;
- c** make recommendations and provide suggestions on ways and means to better promote and protect the right to freedom of opinion and expression in all its manifestations; and
- d** contribute to the provision of technical assistance or advisory services by the Office of the United Nations High Commissioner for Human Rights to better promote and protect the right to freedom of opinion and expression.

The reports refer to Articles 19 of the UDHR and the ICCPR and therefore to the meaning of press freedom under those instruments, as referred to above⁷².

He can conduct on-site fact-finding visits and make subsequent recommendations for the improvement of freedom of information.

The Special Rapporteur also submits reports on the promotion and protection of the right to freedom of expression that are directed to the UNGA or to the HRC⁷³. Those reports contain recommendations which are not binding on the Member States.

The Special Rapporteur transmits urgent appeals and allegation letters to states upon receiving prima facie credible and reliable information on the infringement of the right to freedom of opinion and expression. To file a complaint to the Special Rapporteur, the procedure described on his website must be followed⁷⁴.

Here follows a few examples of the Special Rapporteur's reporting activity.

Report of the Special Rapporteur on the implication of States' surveillance of communications on the exercise of the human rights to privacy and to freedom of opinion (17 April 2013)

The report of 17 April 2013⁷⁵ recalls that privacy is unequivocally recognised as a fundamental human right. It is enshrined in Article 12 of the UDHR and Article 17 of the ICCPR. The report puts forward the following definition of privacy:

"[...] the presumption that individuals should have an area of autonomous development, interaction and liberty, a "private sphere" with or without interaction with others, free from State intervention and from excessive unsolicited intervention by other uninvited individuals. The right to privacy is also the ability of individuals to determine who holds information about them and how is that information used."

The right to privacy is often understood as an essential requirement for the realization of the right to freedom of expression. In order for individuals to exercise their right to privacy in communications, they must be able to ensure that these remain private, secure and, if they choose, anonymous. Undue interference with individuals' privacy can both directly and indirectly limit the free development and exchange of ideas⁷⁶.

The framework of Article 17 of the ICCPR enables necessary, legitimate and proportionate restrictions to the right to privacy by means of permissible limitations. However, it does not contain a limitation clause. Therefore, the Special Rapporteur takes the position that this article should also be interpreted as containing elements of a permissible limitations test and should be subject to the same permissible limitations test as the right to freedom of movement, as elucidated in Human Rights Committee's General Comment No. 27⁷⁷. As a consequence, legal frameworks must ensure that communications surveillance measures⁷⁸:

- a** are prescribed by law, meeting a standard of clarity and precision that is sufficient to ensure that individuals have advance notice of and can foresee their application;
- b** are strictly and demonstrably necessary to achieve a legitimate aim; and
- c** adhere to the principle of proportionality, and are not employed when less invasive techniques are available or have not yet been exhausted.

Illegal surveillance by public or private actors should be criminalised.

However, even though restrictions to the right to privacy may be justified, the report highlights that States must change their understandings and regulation of communications surveillance and modify their practices in order to ensure that individuals' human rights are respected and protected. Privacy and freedom of expression are interlinked and States cannot ensure that individuals are able to freely seek and receive information or express themselves without respecting, protecting and promoting their right to privacy. This requires adequate legislation and legal standards to ensure the privacy, security and anonymity of communications⁷⁹.

Therefore, communications surveillance should be regarded as a highly intrusive act that potentially interferes with the rights to freedom of expression and privacy and threatens the foundations of a democratic society. Legislation must stipulate that state surveillance of communications must only occur under the most exceptional circumstances and exclusively under the supervision of an independent judicial authority. Safeguards must be articulated in law. Individuals should have a legal right to be notified that they have been subjected to communications surveillance or that their communications data has been accessed by the state⁸⁰.

Report of the Special Rapporteur on the right to freedom of opinion and expression exercised through the internet (10 August 2011)

The report of 10 August 2011⁸¹ reiterates that the provisions relating to freedom of expression continue to remain relevant and applicable to the Internet. According to the report, Article 19 of the UDHR and Article 19 of the ICCPR were drafted with the foresight to include and accommodate future technological developments through which individuals may exercise this right.

The Special Rapporteur emphasizes that the access to information, the ability to exercise the right to freedom of expression and the participation that the Internet provides to all sectors of society is essential for a truly democratic society. He highlights the essential role of the Internet to facilitate the enjoyment of freedom of expression. Although access to the Internet is not yet recognized as a right in international human rights law, states have an obligation to create an enabling environment for all individuals to exercise their right to freedom of expression. This includes translations of websites into multiple languages, but also training, which can also (next to basic skills training) help individuals to learn about the benefits of accessing information online and of responsibly contributing information.

The report highlights that states are obliged to guarantee a free flow of ideas and information and the right to seek and receive as well as to impart information and ideas over the Internet. Even though there should be as little restriction as possible to the flow of information on the Internet and the general rule should be to maintain openness and the free flow of information over the Internet, there have to be exceptions in connection with the protection of other human rights. Therefore, the types of information or expression that may be restricted under international human rights law shall also apply to online content. Similarly, any restrictions must also comply with international human rights law.

To protect the right to freedom of expression from undue restrictions, the Special Rapporteur has attempted to distinguish the types of expression:

- a** which constitute an offence under international law and which Member States are required to prohibit;
- b** which are not criminally punishable but may justify a civil suit; and
- c** which do not give rise to criminal or civil sanctions, but still raise concerns in terms of tolerance, civility and respect for others.

Only the expressions that can be categorized as expression in accordance with (a) above, which constitute an offence under international law and which the Member States are required to prohibit under their criminal law such as:

- a** child pornography;
- b** direct and public incitement to commit genocide;
- c** advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence⁸²; and
- d** incitement to terrorism,

shall be restricted.

However, the Special Rapporteur reminds all states that any such laws must also comply with the three criteria of restrictions to the right to freedom of expression:

- any restriction must be provided by law, which must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and must be made accessible to the public;
- any restriction must pursue one of the legitimate grounds for restriction set out in Article 19 paragraph 3 of the ICCPR, namely (i) respect of the rights or reputation of others; or (ii) the protection of national security or of public order, or of public health or morals; and
- any restriction must be proven as necessary and proportionate, or the least restrictive means to achieve one of the specified goals listed above.

All other types of expression shall be decriminalised.

Report of the Special Rapporteur on groups in need of attention, limitations to the right to freedom of expression, and protection of journalists (20 April 2010)

The document⁸³ relates to Press Freedom on the following aspects:

- access to means of communication;
- permissible restrictions and limitations on freedom of expression; and
- protection of journalists.

With regard to the first aspect, the Special Rapporteur expresses concerns because of *“concentration of media into large private or public consortia”, which “runs counter to the principle of pluralism and diversity”*.

With regard to the third aspect, the Special Rapporteur expresses deep concern that providers of information have become targets for threats, assaults and even assassinations. The Special Rapporteur calls on a series of countries (those accounting for the greatest number of journalists’ deaths, in descending order) to adopt the measures necessary to guarantee the protection of journalists.

A particular concern expressed “is the fact that a high percentage of the killings for which the motives have been confirmed were connected to investigations into corruption, organized crime and political crime that the journalists in question were conducting at the time”. Further, the authors of such crimes have in large part enjoyed total impunity.

The Special Rapporteur “considers it necessary to remind States of their obligation to ensure that both the national and the international press have access to all the facts and to all conflict zones and to provide members of the press with the protection due [to] them.”⁸⁴

The Special Rapporteur urges states to take steps to prevent violence against journalists and to improve the protection afforded to them. He explicitly recommends drafting and implementing handbooks, guides and protocols on protection to this end.

With regard to the second aspect, the Special Rapporteur lists the criteria under which restrictions on the freedom of expression should be permissible⁸⁵.

- a** the restriction or limitation must not undermine or jeopardise the essence of the right of freedom of expression;
- b** the relationship between the right and the limitation/restriction or between the rule and the exception must not be reversed;
- c** all restrictions must be provided for by pre-existing statutory laws issued by the legislative body of the state;
- d** laws imposing restrictions or limitations must be accessible, concrete, clear and unambiguous, such that they can be understood by everyone and applied to everyone, and they must also be compatible with international human rights law, with the burden of proving this congruence lying with the state;
- e** laws imposing a restriction or limitation must set out the remedy against or mechanisms for challenging the illegal or abusive application of that limitation or restriction, which must include a prompt, comprehensive and efficient judicial review of the validity of the restriction by an independent court or tribunal;
- f** laws imposing restrictions or limitations must not be arbitrary or unreasonable and must not be used as a means of political censorship or of silencing criticism of public officials or public policies;
- g** any restrictions imposed on the exercise of a right must be “necessary”, which means that the limitation or restriction must **(i)** be based on one of the grounds for limitations recognised by the ICCPR; **(ii)** address a pressing public or social need which must be met in order to prevent the violation of a legal right that is protected to an even greater extent; **(iii)** pursue a legitimate aim; **(iv)** be proportionate to that aim and be no more restrictive than is required for the achievement of the desired

purpose. The burden of demonstrating the legitimacy and the necessity of the limitation or restriction shall lie with the state;

- h** certain very specific limitations are legitimate if they are necessary in order for the state to fulfil an obligation to prohibit certain expressions on the grounds that they cause serious injury to the human rights of others;
- i** restrictions already established must be reviewed and their continued relevance analysed periodically;
- j** if the state of emergency is declared in accordance with Article 4 of the ICCPR and general comment No. 29 of the Human Rights Committee and if that emergency threatens the life of the nation, Member States are permitted to temporarily suspend certain rights, including the right to Freedom of Expression. A state of emergency may not under any circumstances be used for the sole aim of restricting Freedom of Expression and preventing criticism of those who hold power;
- k** any restriction or limitation must be consistent with other rights recognised in the ICCPR and in other international human rights instruments, as well as with the fundamental principles of universality, interdependence, equality and non-discrimination as to race, colour, sex, language, religion, political or other belief, national or social origin, property, birth or any other status; and
- l** all restrictions and limitations shall be interpreted in the light and context of the particular right concerned. Wherever doubt exists as to the interpretation or scope of a law imposing limitations or restrictions, the protection of fundamental human rights shall be the prevailing consideration.

Report of the Special Rapporteur to the Human Rights Council on the protection of journalists and media freedom (4 June 2012)

The report⁸⁶ reiterates that freedom of expression and press freedom should be protected in relation to both online and offline press releases in the same manner and with the same scope. The report reiterates existing conditions and exceptions in relation to freedom of expression and press freedom. The report also recommends voluntarily adhering to global standards of professionalism for journalists.

Again, the report recalls the four types of expression or information that states are required to prohibit under international law: child pornography, incitement to genocide, advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, and incitement to terrorism.

If there is any other limitation to the enjoyment of the right to freedom of expression or press freedom (also exercised on the Internet), it must also conform to the criteria listed in Article 19 paragraph 3 of the ICCPR⁸⁷.

Any legislation restricting the right to freedom of expression must be applied by a body which is independent of any political, commercial, or other unwarranted influences in a manner that is neither arbitrary nor discriminatory, and with adequate safeguards against abuse, including the possibility of challenge and remedy against its abusive application.

Report of the Special Rapporteur to the General Assembly on the right to access information (4 September 2013)

The report⁸⁸ highlights the promotion and protection of the right to freedom of expression, pursuant to HRC Resolution 16/4⁸⁹. It focuses on the right to access information and its relationship with the right to truth.

The Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms⁹⁰, in its Article 4, provides for access to information on human rights, stating that everyone has the right, individually and in association with others, (a) to know, seek, obtain, receive and hold information about all human rights and fundamental freedoms, including having access to information as to how these rights and freedoms are given effect in domestic legislative, judicial or administrative systems; and (b) as provided for in human rights and other applicable international instruments, freely to publish, impart or disseminate to others views, information and knowledge on all human rights and fundamental freedoms.

Under no circumstances may journalists, members of the media or members of civil society who have access to and distribute classified information on alleged violation of human rights be subjected to subsequent punishment. Equally, confidential sources and materials relating to the disclosure of classified information must be protected by law.

The overarching notion is that all information in the possession of the state belongs to the public, with limited and qualified exceptions that must be justified by state authorities. Nonetheless, the application of limitations to the right to access information on human rights violations raises a number of specific issues that require greater analysis.

Restrictions must be defined by law that is accessible, concrete, clear and unambiguous, and compatible with the state's international human rights obligations. They must also strictly conform to tests of necessity and proportionality. This applies also where the access to information is restricted due to protection of national security concerns.

The report refers to Section A of Principle 10 of the Tshwane Principles⁹¹ in relation to the disclosure of information on violations of human rights and humanitarian law:

- a** Information may not be withheld on national security grounds in any circumstances that relate to disclosure of information regarding gross violations of human rights or serious violations of international humanitarian law, including crimes under international law, and systematic or widespread violations of the rights to personal liberty and security;
- b** information regarding other violations of human rights or humanitarian law is subject to a high presumption of disclosure, and in any event may not be withheld on national

security grounds in a manner that would prevent accountability for the violations or deprive a victim of access to an effective remedy;

- c** when a State is undergoing a process of transitional justice, the successor government should immediately protect and preserve the integrity of, and release without delay, any records that contain such information that were concealed by a prior government.

Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (7 September 2012)

The report⁹² focuses on hate speech and incitement to hatred. The report recommends to combat hate speech effectively without unduly curtailing the right to freedom of opinion and expression.

It reiterates that hate speech restrictive laws should at the very least conform to the following elements outlined in the 2001 Joint Statement on racism and the media⁹³:

- a** no one should be penalised for statements that are true;
- b** no one should be penalised for the dissemination of hate speech unless it has been shown that they did so with the intention of inciting discrimination, hostility or violence;
- c** the right of journalists to decide how best to communicate information and ideas to the public should be respected, in particular when they are reporting on racism and intolerance;
- d** no one should be subject to prior censorship;
- e** any imposition of sanctions by courts should be in strict conformity with the principle of proportionality.

In order to define the restrictions, the report refers to the following definitions that have been developed by the Office of the High Commissioner for Human Rights (the “OHCHR”)⁹⁴. The below terms shall help to qualify hate speech as such:

- a** “*Hatred*” is a state of mind characterised as intense and irrational emotions of opprobrium, enmity and detestation towards the target group;
- b** “*Advocacy*” is explicit, intentional, public and active support and promotion of hatred towards the target group;
- c** “*Incitement*” refers to statements about national, racial or religious groups that create an imminent risk of discrimination, hostility or violence against persons belonging to those groups;
- d** “*Discrimination*” is understood as any distinction, exclusion or restriction made on the basis of race, colour, descent, national or ethnic origin, nationality, gender, sexual orientation, language, religion, political or other opinion, age, economic position, property, marital status, disability, or any other status that has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise, on an equal footing, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field of public life;
- e** “*Hostility*” is a manifestation of hatred beyond a mere state of mind. As highlighted by an expert at the regional workshops on the prohibition of incitement, this concept has received scant attention in jurisprudence and requires further deliberation;
- f** “*Violence*” is the use of physical force or power against another person, or against a group or community, which either results in, or has a high likelihood of resulting in, injury, death, psychological harm, maldevelopment or deprivation.

The Special Rapporteur considers the following elements to be essential to determine whether an expression amounts to incitement to hatred: real and imminent danger of violence resulting from the expression; intent of the speaker to incite discrimination, hostility or violence; and careful consideration by the judiciary of the context in which hatred was expressed, given that international law prohibits some forms of speech for their consequences, and not for their content as such, because what is deeply offensive in one community may not be so in another.

The Special Rapporteur emphasizes that, for the right to freedom of thought, conscience and religion to be fully realized, robust examination and criticism of religious doctrines and practices – even in a harsh manner – must be allowed. However, the exercise of the right to freedom of expression should not be aimed at the violation of any of the rights and freedoms of others, including the right to equality and non-discrimination.

It is recognized that the right to freedom of expression can indeed be restricted where it presents a serious danger for others and for their enjoyment of human rights. It may therefore be subject to certain restrictions, but only to those stipulated in Article 19 (3) of the ICCPR⁹⁵.

In addition, Article 20 paragraph 2 of the ICCPR explicitly provides that any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence is to be prohibited by law. This formulation contains three key elements⁹⁶:

- a** only advocacy of hatred is covered;
- b** hatred must amount to advocacy which constitutes incitement, rather than incitement alone;
- c** such incitement must lead to one of the listed results, namely discrimination, hostility or violence.

The report adds:

“ As such, advocacy of hatred on the basis of national, racial or religious grounds is not an offence in itself. Such advocacy becomes an offence only when it also constitutes incitement to discrimination, hostility or violence, or when the speaker seeks to provoke reactions on the part of the audience”.

Any restriction imposed must be applied by a body that is independent of political, commercial or other unwarranted influences in a manner that is neither arbitrary nor discriminatory, and with adequate safeguards against abuse, including the right of access to an independent court or tribunal.

1.3.2.1.a.(ii) Special Rapporteur on the situation of human rights defenders

In 2000, the UN Commission on Human Rights established a mandate relating to human rights defenders (as a Special Procedure⁹⁷) to support implementation of the 1998 Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms (commonly known as the “Declaration on human rights defenders⁹⁸”).

The Declaration on human rights defenders reaffirms rights that are instrumental to the defence of human rights, including freedom of opinion and expression.

Article 6 of the Declaration on human rights defenders provides that *“everyone has the right, individually and in association with others:*

- a** To know, seek, obtain, receive and hold information about all human rights and fundamental freedoms, including having access to information as to how those rights and freedoms are given effect in domestic legislative, judicial or administrative systems;*
- b** As provided for in human rights and other applicable international instruments, freely to publish, impart or disseminate to others views, information and knowledge on all human rights and fundamental freedoms;*
- c** To study, discuss, form and hold opinions on the observance, both in law and in practice, of all human rights and fundamental freedoms and, through these and other appropriate means, to draw public attention to those matters.”*

The right to freedom of opinion and expression in the Declaration on human rights defenders encompasses three different elements: (1) the right to hold opinions without interference; (2) the right of access to information; and (3) the right to impart information and ideas of all kinds.

The role of the Special Rapporteur on the situation of human rights defenders was established by the Resolution 61 (2000)⁹⁹ of the UN Commission on Human Rights¹⁰⁰ with a broad mandate, to:

- seek, receive, examine and respond to information on the situation of human rights defenders;
- establish cooperation and conduct dialogue with governments and other interested actors on the promotion and effective implementation of the Declaration;
- recommend effective strategies better to protect human rights defenders and follow up on these recommendations.

In its resolution, the UN Commission on Human Rights urges all governments to cooperate with the Special Rapporteur and to provide all information requested. Governments are also urged to implement and follow up on the Special Rapporteur’s recommendations.

1.3.2.1.a(iii) Joint declarations of Special Rapporteurs

Tenth Anniversary Joint Declaration: Ten key challenges to freedom of expression in the next decade (25 March 2010)

The Declaration¹⁰¹, which is an addendum to a report of the Special Rapporteur on the promotion and protection of the rights to freedom of opinion and expression, deals with freedom of expression and summarises the challenges and concerns identified in this respect as follows:

- mechanisms of government control over the media;
- criminal defamation, i.e. laws making it a crime to defame, insult, slander or libel someone or something;
- violence against journalists;
- limits on the right to information, in particular the application of secrecy laws to journalists;
- discrimination in the enjoyment of the right to freedom of expression;
- commercial pressures, such as growing concentrations of ownership in the media, cost cutting and decreases in investigative journalism;
- support for public service and community broadcasters;
- security and freedom of expression, in particular the conflict between anti-terrorism laws and freedom of expression and freedom of the media;
- freedom of expression on the Internet;
- access to information and communications technologies.

1.3.2. TREATY BODIES

1.3.2.1. Human Rights Committee

As noted above¹⁰², the Human Rights Committee (the “**CCPR**”) is a committee responsible for overseeing the implementation of, and interpreting the meaning of, the ICCPR.

115 of the State Contracting Parties have ratified the first Optional Protocol¹⁰³ (which sets out a mechanism whereby individuals may submit complaints to the CCPR), adopted by the UN General Assembly on 16 December 1966, and entered into force on 23 March 1976.

The CCPR is charged with looking at both the legal and practical realities of the implementation of the ICCPR in particular states, and issuing findings with a view to achieving a positive change.

The four main responsibilities of the CCPR are to:

- 1 receive and examine reports from the State Parties on the steps taken to give effect to the rights provided by the ICCPR;
- 2 provide “General Comments”, designed to assist State Parties to give effect to ICCPR provisions by detailing their substantive and procedural obligations;
- 3 receive and consider individual complaints; and
- 4 consider complaints made by a State Party that another State Party is not abiding by the ICCPR’s obligations.

In particular, General Comments are guidelines issued by a monitoring body to interpret the provisions of its respective human rights treaty. General Comments refer to specific provisions of the ICCPR and are considered to be the major source for the interpretation of the ICCPR.

CCPR General Comment No. 34¹⁰⁴

The CCPR General Comment No. 34¹⁰⁵ (published in July 2011) provides an interpretation of Article 19 of the ICCPR and guidance to State Parties on what freedom of opinion and expression mean in practice. The CCPR states that these two freedoms are “*indispensable conditions for the full development of the person*” and reiterates that the obligation to respect these freedoms is binding “*on every State party as a whole*”, including all branches of the state (executive, legislative and judiciary) at whatever level (national, regional or local).

General Comment No. 34 also addresses the issue of restrictions of the freedoms of opinion and expression and refers to the legitimate grounds for restrictions and the specific conditions laid down in Article 19 paragraph 3 of the ICCPR. The legitimate grounds for restriction listed in the ICCPR are:

- respect for the rights or reputations of others;
- protection of national security or of public order, or of public health or morals;
- provided by the law.

By referring to the restrictions listed in the ICCPR, General Comment No. 34 highlights that “*when a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualised fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat*”.

The General Comment states that State Parties should put in place “*effective measures to protect against attacks aimed at silencing those exercising their right to freedom of expression*”.

Any attacks on individuals because of the exercise of his or her freedom of opinion or expression, should be “*vigorously investigated in a timely fashion and the perpetrators prosecuted*”. The victims shall receive appropriate forms of redress.

Scope and Nature of Freedom of Expression

Redress for violation of a right under the ICCPR will be provided at the national level. General Comment No. 34 declares that State Parties are required to ensure that the rights contained in Article 19 of the ICCPR are given effect in domestic law, and that each State Party must include information in its reports to the CCPR on what remedies are available if those rights are violated.

Article 2 of the ICCPR provides that a State Party must respect and ensure that the rights set out therein are available to all persons within its jurisdiction. The CCPR has interpreted this right to require a forum to be available to hear an allegation of a violation of a right enshrined

in the ICCPR if such a claim is “sufficiently well founded to be arguable under the [ICCPR]”¹⁰⁶. The national courts and administrative authorities usually provide these remedies. However, where remedies at the national level have not been provided and the State is also party to the first Optional Protocol¹⁰⁷, individuals may also make complaints thereunder, to claim that their rights under the ICCPR have been violated. The right to make a complaint extends to all individuals who are directly subject to a state’s authority (for example, a national of a State Party residing abroad who was denied a passport by that state was able to bring a claim to the CCPR).

1.3.2.2. COMMITTEE ON THE RIGHTS OF THE CHILD

The Committee on the Rights of the Child (the “**CRC**”) is the body of 18 independent experts responsible for monitoring the implementation of the Convention on the Rights of the Child (the “**Convention**”) by the State Parties.

The main responsibilities of the CRC are to:

- 1 receive and examine reports from State Parties on the steps taken to give effect to the rights enshrined in the Convention and address its concerns and recommendations to the State Party in the form of “concluding observations”.
- 2 issue “General Comments”, designed to assist State Parties to give effect to the Convention’s provisions by detailing their substantive and procedural obligations;
- 3 hold days of general discussion where particular topics are considered and discussed; and
- 4 promote international co-operation among multilateral agencies, donor countries and developing countries.

Implementation of the two Optional Protocols to the Convention, on involvement of children in armed conflict (OPAC) and on sale of children, child prostitution and child pornography (OPSC), are also monitored by the CRC.

On 19 December 2011, the UN General Assembly approved a third Optional Protocol on a communications procedure (OPIC), which allows individual children to submit complaints regarding specific violations of their rights under the Convention and its first two optional protocols. The Protocol entered into force in April 2014.

General Principles

According to article 13 paragraph 1 of the Convention:

“The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child’s choice.”

Articles 12 to 17 of the Convention impose obligations on State Parties to respect and recognise the freedom of expression of children. These include, *inter alia*:

“States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.” (Article 12 paragraph 1).

“States Parties recognise the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health.”

To this end, States Parties shall:

- (a) *Encourage the mass media to disseminate information and material of social and cultural benefit to the child and in accordance with the spirit of article 29;*
- (b) *Encourage international co-operation in the production, exchange and dissemination of such information and material from a diversity of cultural, national and international sources;*
- (c) *Encourage the production and dissemination of children’s books;*
- (d) *Encourage the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous;*
- (e) *Encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being, bearing in mind the provisions of articles 13 and 18.”* (Article 17).

Restrictions on the freedom of expression

As in Article 19 paragraph 3 of the ICCPR, Article 13 paragraph 1 of the Convention sets out limitations to freedom of expression when it conflicts with other rights.

However, each limitation of freedom of expression is only permitted if it passes the three-part test provided by Article 13 paragraph 3 of the Convention:

- the limitation is provided by law which meets standards of clarity and precision;
- the limitation has a legitimate aim by protecting one of the exclusive aims listed in Article 13 paragraph 3 of the Convention (rights or reputations of others, national security, public order, public health or morals); and
- the limitation is truly necessary for the protection of the legitimate aim.

Scope and Nature of Freedom of Expression

The CRC examines each report submitted by a State Party and addresses its concerns and recommendations to the State Party in the form of “concluding observations”. These concluding observations are not binding on State Parties, but governments are encouraged and expected to implement the recommendations contained therein.

Individual children are allowed to submit complaints regarding specific violations of their rights under the Convention to the CRC.

1.3.2.3. COMMITTEE AGAINST TORTURE

The Committee against Torture¹⁰⁸ was established pursuant to Article 17 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the “**Convention against Torture**” or “**the Convention**”).

The Committee against Torture (“**CAT**”) is a monitoring body of independent experts, whose main function is to ensure that the Convention’s provisions are implemented. The CAT began its work in 1988.

General Principles

There is no definition or description of press freedom and freedom of expression principles in the Convention against Torture.

According to its Article 19¹⁰⁹, State Parties are required to submit regular reports to the CAT on how they implement the rights enshrined in the Convention¹¹⁰. The CAT examines the reports and addresses its concerns and recommendations in the form of “concluding observations”. The CAT is also empowered to investigate allegations of the systematic practice of torture by a state Party¹¹¹, unless the State Party made a reservation to Article 20 of the Convention and does not recognise this competence to the CAT. Under certain circumstances, the Convention against Torture provides individuals with the right to lodge complaints to the CAT if they believe their rights under the Convention have been violated. However, the competence of the CAT to hear individual complaints must have been expressly recognised by that State. The CAT can also consider inter-states complaints.

The CAT also issues general comments to interpret the content of the provisions of the Convention.

1.3.3. Office of the High Commissioner for Human Rights

The Office of the High Commissioner for Human Rights (“**OHCHR**”) is the leading UN agency on human rights. It promotes and protects the human rights that are enshrined in international law. The OHCHR is tasked with promoting international cooperation for human rights and mainstreaming human rights in the UN system. It provides assistance to support the implementation of international human rights standards on the ground including through technical expertise and capacity building.

The OHCHR speaks out against human rights violations. In its annual report, certain sections detail the work the OHCHR has carried out in individual countries, including work on supporting freedom of expression.

The OHCHR closely works with the HRC, and refers to Article 19 of the ICCPR when dealing with freedom of expression.

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

Restrictions to Freedom of Expression

OHCHR refers to Article 19 and 20 of the ICCPR and the three-part test, and relevant comments by the Human Rights Committee, when dealing with freedom of expression.

Scope and Nature of Freedom of Expression

Reports and statements of the OHCHR are not binding.

1.4. PRIMARY REGIONAL SOURCES

1.4.1. Europe

1.4.1.1. The Convention for the Protection of Human Rights and Fundamental Freedoms

The European Convention on Human Rights (“**ECHR**”)¹¹² was open for signature in Rome on 4 November 1950 by the then 12 Member States of the Council of Europe¹¹³ and entered into force on 3 September 1953.

The ECHR is a milestone in the development of human rights in Europe following the Second World War. The ECHR established the European Court of Human Rights (“**ECtHR**”) “to ensure the observance of the engagements undertaken by the [parties to the Convention]”. Its judgments are binding on the states concerned.

General Principles

Article 10 paragraph 1 of the ECHR provides that:

“Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.”

The Council of Europe published in 2004 “A guide to the implementation of Article 10 of the European Convention on Human Rights”¹¹⁴. The guide states that: *“freedom of expression is not only important in its own right, but also it plays a central part in the protection of other rights under the Convention (...) Freedom of expression is a right in itself as well as a component of other rights protected under the Convention, such as freedom of assembly.”*

The guide states further “At the same time, freedom of expression can conflict with other rights protected by the Convention, such as the right to a fair trial, to respect for private life, to freedom of conscience and religion. When such conflict occurs, the Court strikes a balance in order to establish the pre-eminence of one right over the other. The balance of the conflicting interests, one of which is freedom of expression, takes into account the importance of the other.”

Restrictions to Freedom of Expression

Article 10 paragraph 2 of the ECHR states the following restrictions to freedom of expression:

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

Whether it is permissible or not to restrict the right to freedom of expression will be determined by conducting a balancing act and by applying certain criteria developed by the ECtHR. Examples of such balancing act are in the judgments: *Axel Springer v. Germany*¹¹⁵ and *Von Hannover v. Germany (No. 2)*¹¹⁶. Moreover, the Court detailed the positive obligations on Member States to protect journalists and prevent impunity¹¹⁷.

In the *Von Hannover v. Germany (No. 2)* case 118 of 2012, both Article 8 and Article 10 were analysed and defined.

According to the Court, “the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities”, but “it does not merely compel the State to abstain from such interference: in addition to this negative undertaking, there may be positive obligations inherent in effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves” (Paragraph 98).

Effective means of protecting individual privacy against interference by others must be put in place.

On the other hand, “freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to “information” or “ideas” that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb” (Paragraph 101).

The court thus lays down the criteria to balance the right to freedom of expression and the right to respect for private life, and for instance, in the case of reporting criminal information about one individual.

In the *Axel Springer AG v Germany*¹¹⁹ case, the Court reiterated that the right to protection of reputation is a right which is protected by Article 8 as part of the right to respect for private

life. In order for Article 8 to come into play, however, an attack on a person's reputation must attain a certain level of seriousness and in a manner causing prejudice to personal enjoyment of the right to respect for private life.

The Court then established a list of criteria to carry out a balancing exercise when criminal news relating to a person is concerned. Those criteria conform to the court's case law on photo publishing and are as follows:

- Contribution to a debate of general interest;
- How well known is the person concerned and what is the subject of the report;
- Prior conduct of the person concerned;
- Method of obtaining the information and its veracity;
- Content form and consequences of the publication; and
- Severity of the sanction imposed.

Scope and Nature of Freedom of Expression

The Convention is binding, and the obligation to observe freedom of expression pursuant to the ECHR applies to the forty-seven members of the Council of Europe¹²⁰.

The primary responsibility for the protection of the rights guaranteed under the Convention lies with the Contracting States. In practice every Contracting State has now incorporated the Convention rights into its domestic law.

States who ratify the Convention must ensure that the rights and freedoms defined in the Convention are available to everyone within their jurisdiction.

The Convention allows states a degree of discretion in the manner in which they apply some of its provisions. In *Von Hannover*, the ECtHR stated that *"under Article 10 of the Convention, the Contracting States have a certain margin of appreciation in assessing whether and to what extent an interference with the freedom of expression protected by this provision is necessary"*¹²¹. As a consequence, the understanding and level of protection of the freedom of expression can be different in each EU Member State.

Although Article 10 ECHR does not explicitly mention the freedom of the press, the ECtHR has developed extensive case law providing a body of principles and rules granting the press a special status in the enjoyment of the freedoms contained in Article 10 ECHR.

It should also be emphasized that the "expression" protected under Article 10 is not limited to words, written or spoken, but it extends to pictures,¹²² images,¹²³ and actions intended to express an idea or to present information. In some circumstances, dress might also fall under Article 10 ECHR¹²⁴.

Moreover, Article 10 ECHR protects not only the substance of the information and ideas but also the form in which they are expressed¹²⁵. Therefore, printed documents¹²⁶, radio broadcasts¹²⁷, paintings¹²⁸, films¹²⁹ or electronic information systems are also protected under this article.

1.4.1.2. EUROPEAN CHARTER OF FUNDAMENTAL RIGHTS

On 7 December 2000, the Charter of Fundamental Rights of the European Union (the “**Charter**”) was proclaimed at the Nice European Council¹³⁰. The Charter became legally binding when the Treaty of Lisbon came into force on December 1, 2009. The text lists a broad catalogue of fundamental freedoms. The Charter enshrines in one document the fundamental human rights protected in the European Union.

General Principles

Pursuant to Article 11 of the Charter, the peoples of the EU shall enjoy freedom of expression and information. Article 11 states that:

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

2. The freedom and pluralism of the media shall be respected.”

The Charter also contains a provision on the right of access to information. Article 42 states that *“Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium.”*

The EU and its institutions, including the Charter, are primarily concerned with economic integration, and free movement of goods and services. That is why in the community legal order, freedom of expression extends beyond its historical concern for the political dissenter, more important for the ECHR organs, into the wider arena of commercial activity. Therefore the European Court of Justice (“**ECJ**”) deals primarily with freedom of expression for commercial actors.

Restrictions to freedom of expression

The Charter itself does not contain any direct restrictions to freedom of expression.

However, freedom of expression in the Charter is not absolute and can be limited when it conflicts with other rights. Article 52 paragraph 1 stipulates that *“Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.”*

Besides, restrictions to freedom of expression pursuant to the European Convention for the Protection of Human Rights and Fundamental Freedoms (“**ECHR**”) are also applicable according to the Charter.

Article 52 paragraph 3 states: *“In so far as this Charter contains rights which correspond to*

rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention". Therefore freedom of expression in EU law shall be limited in accordance with article 10-2 of the ECHR and interpreted following EctHR decisions. Restrictions permitted by article 10-2 must be "prescribed by law and (...) necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

Therefore when a conflict occurs between the right to freedom of expression and other rights protected by the Charter, the court strikes a balance on a case by case basis to establish the preeminence of one right, taking into account the protection of the other rights at stake. For example, greater weight may be given to the right to privacy of private persons as opposed to public figures.

Scope and Nature of Freedom of Expression

The Charter is directly binding on each EU Member State (although Great Britain and Poland have special arrangements).

According to Article 52 paragraph 1, *"The provisions of the Charter are addressed to the institutions, bodies, offices and agencies of the EU with due regard for the principle of subsidiarity¹³¹ and to the Member States only when they are implementing EU law."*

Vis-à-vis the relevant Member State, the beneficiaries of the right to freedom of expression are individuals and private companies in the respective Member States. The effect of the Charter on the relationship between private individuals and/or corporations is very limited and its details are subject to legal discussion.

To the extent that the Member States have to implement EU law, each of them has a margin of appreciation which needs to be construed and implemented in the spirit of the Charter. As a consequence, the understanding and level of protection of the freedom of expression can be different in each State.

1.4.1.3. THE ORGANIZATION FOR SECURITY AND COOPERATION IN EUROPE

The Organization for Security and Cooperation in Europe ("**OSCE**") has 57 participating States in North America, Europe and Asia, and is the world's largest regional security inter-governmental organization¹³². Its remit includes the areas of arms control, combating terrorism, democratization, human rights, media freedom and development, minority rights, policing, the rule of law and tolerance and non-discrimination.

The Conference on Security and Co-operation in Europe ("**CSCE**") was created in 1975 to serve as a multilateral forum for dialogue and negotiation between East and West. It became

the OSCE by a decision of the Budapest Summit of Heads of State or Government in December 1994.

In 1997, the OSCE established a OSCE Representative on Freedom of the Media (the **“OSCE Representative”**)¹³³.

The OSCE monitors media developments in its Participating States and checks for violations of freedom of expression. It focuses on reviewing legislation regulating media and monitoring cases where journalists are unduly prosecuted or harassed because of their professional activity¹³⁴.

The OSCE Handbooks¹³⁵ are useful guides to provide practical information regarding issues such as freedom in the media or defamation law around the world . The OSCE outlines different decisions, declarations as well as regular reports to the Permanent Council, who convenes weekly in Vienna.

General Principles

The OSCE Safety of Journalists Guidebook (II Edition) (**“the Guidebook”**)¹³⁶, mentions freedom of expression as “the right both to impart, seek and to receive information”. It adds further that *“violence, harassment and intimidation directed against journalists represent an attack on democracy itself. They have the effect of stifling freedom of the media and freedom of expression, depriving people of the ability to make informed decisions about issues that affect their lives.”* The Guidebook observes that *“the safety of the media is a precondition for free media, as journalists cannot write or report freely and independently without safe working conditions”*¹³⁷.

“The task for states of creating safe conditions for free and independent media calls, broadly, for governmental authorities to undertake three sorts of actions [...]:

- 1 *Self-restraint: [...] a framework of laws which ensure a minimum of political interference in \ the media [...], which protects media workers from arbitrary harassment of any kind and which is safeguarded by an independent judiciary [...].*
- 2 *Enacting proactive safeguards for the workings of free and independent media, including laws to protect whistle-blowers and the confidentiality of journalists’ sources; [...].*
- 3 *Observing the principles and standards agreed among OSCE participating States and the legal standards developed in the European Court of Human Rights and international human rights conventions and treaties. The core of this is the conviction that freedom of expression is a precondition for a functioning democracy [...]*¹³⁸.

Restrictions to Freedom of Expression

According to the 2014 Joint Declaration on Universality and the Right to Freedom of Expression¹³⁹, restrictions are permissible only to the extent they fulfill the following requirements:

“States should not impose restrictions on freedom of expression unless they meet the minimum test for such restrictions under international law, including that they meet the standards of legality (provided by law), serve one of the legitimate aims recognized in the International Covenant on Civil and Political Rights (ICCPR), and are necessary and proportionate.” (Article 1 paragraph c).

“Extreme caution should be taken in applying restrictions on freedom of expression to the Internet and other digital technologies, taking into account that such actions in one jurisdiction may affect other jurisdictions.” (Article 1 paragraph h, ii).

Scope and Nature of Freedom of Expression

The reports, handbooks, declarations by representatives and special representatives as well as by other OSCE bodies are mere recommendations and are not legally binding.

1.4.2. AFRICA: AFRICAN CHARTER ON HUMAN AND PEOPLE’S RIGHTS

The African Charter on Human and People’s Rights (the **“African Charter”** or Banjul Charter)¹⁴⁰ was adopted by the Organization of African Unity Assembly on 28 June 1981. The Charter came into force on 21 October 1986. 54 States, almost the entire continent except South Sudan and Morocco (but the Sahrawi Arab Democratic Republic) ratified the African Charter.¹⁴¹ The African Charter establishes a system of supra-national accountability, setting standards for the promotion and protection of human rights and basic freedoms in the African continent.

The African Commission on Human and Peoples’ Rights (the **“ACHPR”**), set up in 1987, interprets and monitors the implementation of the African Charter. The African Court on Human and Peoples’ Rights was established by a Protocol to the African Charter¹⁴², which entered into force on 25 January 2004.

General Principles

Article 9¹⁴³ of the African Charter states that:

“Every individual shall have the right to receive information. Every individual shall have the right to express and disseminate his opinions within the law”. Interpretation of “information” and “the right to express and disseminate his opinions” is provided by the Resolution on the Adoption of the Declaration of principles on Freedom of Expression in Africa, passed at the meeting of the ACHPR in Banjul, Gambia, on 23 October 2002¹⁴⁴.

Moreover, joint declarations issued by the Special Rapporteur on Freedom of Opinion and Expression of the UN and ACHPR are of relevance for the interpretation of the African Charter and offer interesting arguments for journalists to protect their freedom.¹⁴⁵

Restrictions to Freedom of Expression

Note that the right in Article 9 paragraph 2 of the African Charter is explicitly limited to what is “*within the law*”.

Other international or regional sources or courts permit restrictions on freedom of expression that are “*prescribed by the law*”. However it is the restriction that must be “*within the law*”, not the expression itself. This provision of the African Charter is therefore problematic as regards to international human rights law, since expressions could be limited due to national legislations that are themselves not compliant with international human rights law.

Other limitations arise from Chapter II (Duties) of the African Charter, which provides restrictions applying to all rights and freedoms granted to an individual under the African Charter.

Article 27 of the African Charter provides that “*The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest*”.

Such broad and vague concepts and wordings as “*collective security*”, “*morality*” or “*common interest*”, in particular in the absence of further definition, could be instrumentalized to severely limit freedom of expression.

According to Article 28, “*each individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance*”.

Finally, under Article 29 each individual has the duties:

- i** “*not to compromise the security of the state whose national or resident he is*” (point 3);
- ii** “*to preserve and strengthen social and national solidarity, particularly when the latter is threatened*”(point 4);
- iii** “*to preserve and strengthen the national independence and the territorial integrity of his country and to contribute to its defense in accordance with the law*” (point 5), and
- iv** “*to preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral wellbeing of society*” (point 7).

Scope and Nature of Freedom of Expression

All African Union States¹ have signed and ratified the Charter with the exception of South Sudan¹⁴⁶.

Two bodies are entrusted with the promotion of the African Charter: the ACHPR and the African Court. In general terms, the first promotes the implementation of the African Charter while the latter is called to judge on the respect of the African Charter and its judgments are binding on the states who accepted its jurisdiction.¹⁴⁷

1.4.3. The Americas: American Convention on Human Rights (the “Pact of San Jose”)

The American Convention on Human Rights (the “**American Convention**” or “**ACHR**”) was adopted at San Jose, Costa Rica on 22 November 1969 and entered into force on 18 July 1978¹⁴⁸. It followed the American Declaration of the Rights and Duties of Man (“**American Declaration**”), which was signed in April 1948¹⁴⁹, developed many of the concepts contained thereto, and made them legally binding.

This Convention was ratified by 25 of the 35 members of the Organization of American States (“**OAS**”), not including USA and Canada.

The ACHR authority relies very much on the work of two bodies: the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, for those States having accepted its jurisdiction¹⁵⁰.

General Principles

Pursuant to Article 13 paragraph 1 of the ACHR, *“Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one’s choice”*.

The following paragraphs of Article 13 further state that freedom of expression *“shall not be subjected to prior censorship”* and *“may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions ”*

The Declaration of principles of freedom of expression approved by the Inter-American Commission at its 108th regular sessions in October 2000 (the “**Declaration**”)¹⁵¹ offers a detailed interpretation of Article 13 of the ACHR.

In particular, the Declaration of principles of freedom of expression recognizes *“that freedom of the press is essential for the full and effective exercise of freedom of expression”* and it states that the principle of non-discrimination fully applies also to freedom of information: *“All people should be afforded equal opportunities to receive, seek and impart information by any means of communication without any discrimination for reasons of race, color, sex, language, religion, political or other opinions, national or social origin, economic status, birth or any other social condition”*. The Declaration, emphasizing Article 13 paragraph 2 of the ACHR, affirms that *“prior censorship, direct or indirect interference in or pressure exerted upon any expression [...] shall be prohibited by law”*.

Moreover, the office of the Special Rapporteur for Freedom of Expression, established by the IACHR in October 1997¹⁵², released several reports of relevance for the assessment of the meaning of freedom of expression under the ACHR and of its respect in the hemisphere¹⁵³. Lastly, several joint declarations issued together by different regional bodies are of relevance

for the interpretation of 13 ACHR¹⁵⁴, as well as the Chapultepec Declaration adopted by the Hemisphere Conference on Free Speech in Mexico City on 11 March 1994¹⁵⁵.

Restrictions to Freedom of Expression

Article 13 of the American Convention sets out restrictions on the right to freedom of expression. In broad terms these provide that:

- a system of liabilities is put in place by law to the extent necessary to ensure the protection of peoples' reputations and national security, public order, or public health or morals. (Article 13 paragraph 2)¹⁵⁶;
- public entertainments may be subject by law to prior censorship to protect the morality of children and adolescents (Article 13 paragraph 4)¹⁵⁷;
- any propaganda for war and any advocacy of national, racial, or religious hatred that encourage lawless violence are punishable offenses (Article 13 paragraph 5)¹⁵⁸.

Note that "the right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions." (Article 13 paragraph 3).

Moreover, Article 14 of the American Declaration states that "anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply". "Every publisher, and every newspaper, motion picture, radio, and television company shall have a person responsible who is not protected by immunities or special privileges".

Article 27 of the American Declaration states that *"in time of war, public danger, or emergency, a State Party may take measures derogating from its obligations under the Convention (...) to the extent and for the period of time strictly required by the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the grounds of race, color, sex, language, religion, or social origin"*. Any State Party availing itself of this right must immediately inform the other State Parties, through the Secretary General of the Organization of American States, of the provisions it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension.

Finally, pursuant to Article 32 ACHR, *"the rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society"*. Each individual has *"responsibilities to his family, his community, and mankind"*¹⁵⁹.

Scope and Nature of Freedom of Expression

As of 2014, 23 of the 35 OAS's Member States are parties to the American Convention¹⁶⁰. Venezuela and Trinidad and Tobago, originally parties to it, have withdrawn their ratification.

The American Convention is binding on State Parties. As stated above, its provisions are the framework of reference for the work of the Inter American Commission and of the Inter-American Court¹⁶¹.

1.4.4. ASIA: ASEAN DECLARATION

The Association of Southeast Asian Nations (“**ASEAN**”)¹⁶² was established in 1967 to, *inter alia*, “accelerate the economic growth, social progress and cultural development”, to “promote regional peace and stability through abiding respect for justice and the rule of law in the relationship among countries of the region and adherence to the principles of the United Nations Charter” and to “maintain close and beneficial cooperation with existing international and regional organisations with similar aims and purposes, and explore all avenues for even closer cooperation among themselves” in Southeast Asia¹⁶³. The relevant texts are: the ASEAN Declaration of 1967, the ASEAN Charter of 2008 and the ASEAN Human Rights Declaration of 2012.

However, the ASEAN Human Rights system has been criticized, in particular, by civil society groups, international human rights organisations, and the UN High Commissioner for Human Rights.¹⁶⁴ Civil society organisations have noted that “the [ASEAN Human Rights Declaration] fails to include several key basic rights and fundamental freedoms, including the right to freedom of association and the right to be free from enforced disappearance.”¹⁶⁵ Further, the Declaration contains clauses that many fear could be used to undermine human rights, such as “the realization of human rights must be considered in the regional and national context” (Article 7), or that human rights might be limited to preserve “national security” or a narrowly defined “public morality” (Article 8).

The ASEAN Human Rights Declaration adopted in 2012 pursues one of the objectives of the ASEAN Charter, namely purpose No. 7: “to strengthen democracy, enhance good governance and the rule of law, and to promote and protect human rights and fundamental freedoms, with due regard to the rights and responsibilities of the Member States of ASEAN”¹⁶⁶. The Charter also recommends, in Article 14, to establish an ASEAN human rights body, i.e. the Intergovernmental Commission on Human Rights (“**AICHR**”). However, this system does not constitute a regional mechanism of protection for the freedom of expression and information.¹⁶⁷

General Principles

The ASEAN Human Rights Declaration includes Article 23, which states that:

“Every person has the right to freedom of opinion and expression, including the freedom to hold opinions without interference and to seek, receive and impart information, whether orally, in writing or through any other medium of that person’s choice.”

Restrictions to Freedom of Expression

Restrictions to freedom of expression are much wider than the permissible limitations

mentioned under Article 19 of the ICCPR¹⁶⁸. Permitted restrictions (applicable to all human rights, and not only freedom of expression) are very broadly worded. Articles 7 and 8 of the ASEAN Human Rights Declaration state:

“7. All human rights are universal, indivisible, interdependent and interrelated. All human rights and fundamental freedoms in this Declaration must be treated in a fair and equal manner, on the same footing and with the same emphasis. At the same time, the realization of human rights must be considered in the regional and national context bearing in mind different political, economic, legal, social, cultural, historical and religious backgrounds.

8. The human rights and fundamental freedoms of every person shall be exercised with due regard to the human rights and fundamental freedoms of others. The exercise of human rights and fundamental freedoms shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition for the human rights and fundamental freedoms of others, and to meet the just requirements of national security, public order, public health, public safety, public morality, as well as the general welfare of the peoples in a democratic society.”

Criteria for permitted restrictions are therefore the following:

A restriction must:

- be determined by law;
- be for the sole purpose of securing due recognition for the human rights and fundamental freedoms of others;
- be implemented to protect national security, public order, public health, public safety, public morality, as well as the general welfare of the peoples in a democratic society.

“Public safety” and “the general welfare of the peoples in a democratic society” are not protected interests that allow restrictions according to international human rights law. Given the lack of definition and the broad meaning of such notions, restrictions on freedom of expression could be implemented in a manner not consistent with Article 19 of the ICCPR.

Scope and Nature of Freedom of Expression

The ASEAN Human Rights Declaration is a non-binding document.

1.4.5. ARAB CHARTER ON HUMAN RIGHTS

The Arab world has yet to develop an advanced and comprehensive regional system providing a high level of protection for the freedom of expression and information and for human rights in general¹⁶⁹.

The League of the Arab States approved a Charter on Human Rights (the “**Arab Charter**”)¹⁷⁰ in 2004. It entered into force in 2008, and amended the 1994 Arab Charter on Human Rights (which was never ratified).

Even though the adoption of the Arab Charter of Human Rights in 2004 and the establishment of the Arab Committee of Human Rights in 2009 are important steps towards

a comprehensive protection and promotion of human rights in the region, these developments have to be assessed with caution. The Charter is in some parts inconsistent with international human rights standards, a step back for human rights protection, and it is doubtful whether the members of the Committee are sufficiently independent to address human rights issues effectively.

General Principles

Article 32 paragraph 1 of the Arab Charter states that: *“the present Charter guarantees the right to information and to freedom of opinion and expression, as well as the right to seek, receive and impart information and ideas through any medium, regardless of geographical boundaries.”*

Article 21 paragraph 1 also provides that: *“No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, or to unlawful attacks on his honor and reputation.”* Paragraph 2 adds further: *“Everyone has a right to the protection of the law against such interference or attacks”.*

Restrictions to freedom of expression

Article 32 paragraph 2 of the Arab Charter provides that the right to freedom of expression shall be

“exercised in conformity with the fundamental values of society and shall be subject only to such limitations as are required to ensure respect for the rights or reputation of others or the protection of national security, public order and public health or morals”.

Restrictions to freedom of expression under the Arab charter are much wider than the permissible limitations mentioned under Article 19 of the ICCPR¹⁷¹, and contradicts international human rights law.

Scope and Nature of Freedom of Expression

As of November 2013, the Arab Charter has been ratified by Algeria, Bahrain, Iraq, Jordan, Kuwait, Lebanon, Libya, Palestine, Qatar, Saudi Arabia, Syria, the UAE, Sudan and Yemen. It does not provide for an effective enforcement mechanism¹⁷².

Article 45 of the Arab Charter establishes an Arab Human Rights Committee (the **“Arab Committee”**) to supervise the implementation of the Arab Charter on Human Rights by member States, *“on the measures they have taken to give effect to the rights and freedoms recognised in [the] Charter and on the progress made towards the enjoyment thereof”* (Article 48 paragraph 1). The Arab Committee makes recommendations to Member States. Every year

The Council of Europe is an international human rights organization that comprises 47 Member States, including the 28 members of the EU. It was set up in 1949 to promote democracy and protect human rights and the rule of law in Europe.

the Arab Committee shall report to the Council of the League of Arab States on the comments and recommendations issued (Article 48 paragraph 5).

1.4.6. Cairo Declaration on Human Rights in Islam of the Organization of the Islamic Conference

The Cairo Declaration on Human Rights in Islam (the “**Cairo Declaration**”)¹⁷³ is a declaration of the Member States of the Organization of the Islamic Conference (“**OIC**”), adopted in Cairo, Egypt, in 1990. The Cairo Declaration declares its purpose to be a “*general guidance for Member States of the Organisation of the Islamic Conference in the field of human rights*”.

General Principles

Article 22 of the Cairo Declaration states that “*everyone shall have the right to express his opinion freely in such manner as would not be contrary to the principles of the Shari’ah*”. Such right shall include the right “*to advocate what is right and propagate what is good and warn against what is wrong and evil according to the norms of Islamic Shari’ah*”.

Restrictions to Freedom of Expression

All rights regarding freedom of expression (as all rights and freedoms stipulated in the Cairo Declaration) are subject to the principle of the Shari’ah and in no event shall the dignity of the Prophets be violated.

Although Article 22 of the Cairo Declaration states that information is “*a vital necessity to society*”, information shall not be “*exploited or misused in such a way as may violate sanctities and the dignity of Prophets, undermine moral and ethical values or disintegrate, corrupt or harm society or weaken its faith*”.

This wording limits dangerously freedom of expression and information. Such provisions are inconsistent with international standards on freedom of expression, in particular as stated by article 19 of the ICCPR and its interpretation by the Human Rights Committee in its General comments N°34.

Another explicit limit to freedom of information is incitement to hatred and racial discrimination: “*It is not permitted to arouse nationalistic or doctrinal hatred or to do anything that may be an incitement to any form of racial discrimination*” (Article 22, letter d).

Scope and Nature of Freedom of Expression

57 Member States of the OIC have adopted the Cairo Declaration. Its stipulations are not of legally binding nature.

1.5. DECLARATIONS, RESOLUTIONS, AND DECISIONS ISSUED BY REGIONAL BODIES

1.5.1. Council of Europe

The Council of Europe is an international human rights organization that comprises 47 Member States, including the 28 members of the EU. It was set up in 1949 to promote democracy and protect human rights and the rule of law in Europe. The Council of Europe adopted the European Convention on Human Rights (the “**ECHR**”) ¹⁷⁴ in 1950. The European Court of Human Rights oversees the implementation of the Convention in the Member States ¹⁷⁵.

The Council of Europe consists of the following main bodies: the Committee of Ministers, the Parliamentary Assembly and the European Court of Human Rights.

The Directorate General of Human Rights and Rule of Law ¹⁷⁶ has overall responsibility for the development and implementation of the human rights and rule of law standards of the Council of Europe. Since 1981 the Steering Committee on the Mass Media (now called Steering Committee on media and Information Society, the “**CDMSI**”) ¹⁷⁷, a branch of the Directorate General of Human Rights, has been coordinating the Council of Europe’s media policy. Placed under its supervision, the Committee of Experts on Protection of Journalism and Safety of Journalists (“**MSI – JO**”) ¹⁷⁸ submits draft recommendations to the CDMSI.

1.5.1.1. Committee of Ministers

In 2010, the now called CDMSI made a proposal to the Committee of Ministers “to increase the potential for Council of Europe bodies and institutions to promote, within their respective mandates, respect of Article 10 of the European Convention on Human Rights” ¹⁷⁹.

The Committee of Ministers welcomed such proposal and issued a series of declarations or recommendations to achieve its goal ¹⁸⁰.

On 30 April 2014, the Committee of Ministers adopted a Declaration on the protection of journalism and safety of journalists and other media actors ¹⁸¹.

In the Declaration, the Committee of Ministers alerted “member States to the increasing number of reports of attacks on journalists and other media actors in several parts of Europe, including specific dangers that female journalists face” and for this reason urged “member States to fulfill their positive obligations to protect journalists and other media actors from any form of attack and to end impunity in compliance with the European Convention on Human Rights and in the light of the case law of the European Court of Human Rights” and invited member States “to review at least once every two years the conformity of domestic laws and practices with these obligations on the part of member States”. Moreover, the Committee encouraged member States “to contribute to the concerted international efforts to enhance the protection of journalists and other media actors by ensuring that legal frameworks and law-enforcement practices are fully in accord with international human rights standards. The implementation of the UN Plan of Action on the Safety of Journalists and the Issue of Impunity is an urgent and vital necessity”.

For its part, the Committee “will intensify its standard-setting and co-operation activities for the protection of journalism and the safety of journalists and other media actors [...]” and “will consider further measures to ensure the protection of journalists from threats and acts of violence, as well as measures to eradicate impunity, and the alignment of laws and practices concerning defamation, anti-terrorism and protection of journalists’ sources with the European Convention on Human Rights”. Lastly, it “will address the specific challenges and threats that women journalists are confronted with in the course of their work”.

Regarding other specific issues, the following **Recommendations** are to be mentioned.

1, Recommendation No. R (2000) 7¹⁸² of the Committee of Ministers to Member States on the right of journalists not to disclose their sources of information (adopted by the Committee of Ministers on 8 March 2000)

It recommends to Member States seven principles concerning the right of journalists not to disclose their sources of information, in particular:

- Right of non-disclosure of journalists; “Domestic law and practice in member States should provide for explicit and clear protection of the right of journalists not to disclose information identifying a source [...]”.
- Right of non-disclosure of other persons; “Other persons who, by their professional relations with journalists, acquire knowledge of information identifying a source through the collection, editorial processing or dissemination of this information, should equally be protected [...]”.
- Limits to the right of non-disclosure: “The right of journalists not to disclose information identifying a source must not be subject to other restrictions than those mentioned in Article 10, paragraph 2 of the Convention. [...] The disclosure of information identifying a source should not be deemed necessary unless it can be convincingly established that: i. reasonable alternative measures to the disclosure do not exist or have been exhausted by the persons or public authorities that seek the disclosure, and ii. the legitimate interest in the disclosure clearly outweighs the public interest in the non-disclosure [...]”.
- Conditions concerning disclosures; “The motion or request for initiating any action by competent authorities aimed at the disclosure of information identifying a source should only be introduced by persons or public authorities that have a direct legitimate interest in the disclosure. Journalists should be informed by the competent authorities of their right not to disclose information identifying a source as well as of the limits of this right before a disclosure is requested. Sanctions against journalists for not disclosing information identifying a source should only be imposed by judicial authorities during court proceedings which allow for a hearing of the journalists concerned in accordance with Article 6 of the Convention [...]”

The other three principles establish rights of journalists with reference to (i) the alternative evidence to journalists’ sources that authorities should use in proceedings on grounds of an alleged infringement of the reputation of a person; (ii) the prohibition of journalists’ interception, surveillance or judicial search and seizure in their premises for the purpose of

circumventing their right not to disclose their sources; (iii) protection against self-incrimination.

2, Recommendation CM/Rec (2007) 11183 of the Committee of Ministers to Member States on promoting Freedom of Expression and information in the new information and communications environment (adopted on 26 September 2007)

It recommends that the governments of Member States take all necessary measures to promote the full exercise and enjoyment of human rights and fundamental freedoms in the modern information and communications environment, in particular the right to freedom of expression and information pursuant to Article 10 of the ECHR and the relevant case law of the European Court of Human Rights. The Recommendation provides specific guidelines not only for Member States but also for the private sector under, among others, the following headings:

- Empowering Individual Users: *“Member states, the private sector and civil society are encouraged to develop common standards and strategies to promote transparency and the provision of information, guidance and assistance to the individual users of technologies and services” because “Media education is of particular importance in this context”;*
- Common standards and strategies for reliable information and transparency in the processing of information:
“[...] the private sector and member states are encouraged to develop common standards and strategies regarding [...] the rating and labeling of content and services carrying a risk of harm and carrying no risk of harm especially those in relation to children; the rating, and transparency of filtering mechanisms which are specifically designed for children; the creation of interactive content and its distribution between users (for example peer-to-peer networks and blogs) while respecting the legitimate interests of right-holders to protect their intellectual property rights; and standards for the logging and processing of personal data”;
- Cooperation between stakeholders: *“The private sector should be encouraged to: i. acknowledge and familiarise itself with its evolving ethical roles and responsibilities, and to co-operate in reviewing and, where necessary, adjusting their key actions and decisions which impact on individuals rights and freedoms; ii. develop, where appropriate, new forms of open, transparent and accountable self-regulation”.*

Scope and Nature of Freedom of Expression

Recommendations and declarations of the Committee of Ministers are not legally binding¹⁸⁴.

1.5.1.2. PARLIAMENTARY ASSEMBLY

The Parliamentary Assembly of the Council of Europe (the “**Assembly**”), is composed of 318 members. They come from the national parliaments of the Member States of the Council of Europe. The Assembly is the consultative organ of the Council of Europe¹⁸⁵.

General Principles

Resolutions adopted by the Assembly in the field of media freedom and media protection include, among others:

1, Resolution 1438 (2005)¹⁸⁶ - freedom of the press and the working conditions of journalists in conflict zones - adopted by the Parliamentary Assembly on 28 April 2005

The resolution reaffirms (i) that journalists must in principle be considered civilians under Article 79 of Protocol I to the Geneva Conventions of 1949 and, (ii) that journalists have the status of prisoner of war under Article 4.A.4 of Geneva Convention III once fallen into the power of the enemy. The Assembly calls on Member States to adhere to the following guidelines:

- respect the right to freedom of expression and information;
- refrain from restricting the use of communication equipment, such as fixed and mobile telephones, satellite telephones and radio communication devices;
- instruct their military and police forces to give protection and assistance to journalists;
- facilitate access to the territory of destination by issuing necessary visas and other travel documents to journalists;
- respect the confidentiality of journalists’ sources;
- ensure that journalists can work safely on their territories; and
- investigate all acts of violence or lethal incidents involving journalists which occur on their territories as well as those occurring abroad in which their armed or security forces may have been involved, including those due to friendly fire.

Furthermore, the Assembly calls on Member States “to set up compulsory training programmes for war correspondents embedded in military forces, to be provided prior to departure” (paragraph 10).

“The Assembly stresses that, if, for reasons of their own personal safety, journalists embedded in the military or security forces may only work in certain areas, restrictions on their reporting must be limited to the absolute minimum required to prevent the disclosure of confidential information which might endanger ongoing military operations.”

Journalists’ employers and professional organisations should organise training courses to prepare journalists for the risks of working in conflict areas. The media should declare publicly that no financial payments or political concessions will be made to kidnappers and that political statements made by kidnapped journalists are made under coercion and are hence without any value.

All journalists and their employers are encouraged to adhere to the Charter for the Safety of Journalists Working in War Zones or Dangerous Areas drawn up by the organisation Reporters Without Borders” (paragraph 12-15).

Resolution 1438 (2005) highlights that protection of confidential information may allow restrictions on freedom of expression if such confidential information might endanger ongoing military operations.

2, Resolution 1535 (2007)¹⁸⁷ - threats to the lives and freedom of expression of journalists - adopted by the Parliamentary Assembly on 25 January 2007

This resolution was issued in response to attacks and threats to the lives and freedom of expression of journalists in Europe in 2006 and January 2007. It strongly condemns the murders of journalists.

The resolution highlights that freedom of expression is guaranteed under Article 10 of the ECHR as one of the fundamental requirements of a democratic society. Besides Article 10 in relation to the protection of media freedom throughout Europe, the Assembly believes that additional measures are needed to effectively protect the lives and freedom of expression of journalists in Europe:

“The Assembly calls on national parliaments to:

- *closely monitor the progress of criminal investigations into the murder of journalists and hold the authorities accountable for any failures to investigate or prosecute; and*
- *abolish laws which place disproportionate limits on Freedom of Expression and are liable to be abused to incite extreme nationalism and intolerance.” (Paragraph 10).*

Moreover, *“The Assembly calls on all parliaments concerned to conduct parliamentary investigations into the unresolved murders of journalists as well as attacks and death threats against them and develop as a matter of urgency effective policies for the greater safety of journalists.” (Paragraph 11).*

Finally, *“The Assembly resolves to establish a specific monitoring mechanism for identifying and analysing attacks on the lives and Freedom of Expression of journalists in Europe as well as the progress made by national law enforcement authorities and parliaments in their investigations of these attacks. The Assembly believes that fully representative, independent organizations and unions of journalists are an important form of protection for Freedom of Expression and rejects any concept of state licensing or control over the profession of journalism.” (Paragraph 14).*

3, Recommendation 1789 (2007)¹⁸⁸ – professional education and training for journalists – adopted by the Parliamentary Assembly of the Council of Europe on 16 March 2007

The need for this recommendation arose from the observation of the *“challenges faced by media and journalists in Europe, in particular the transition from totalitarianism to democracy*

throughout Europe, the technological progress of new digital media as well as the growing globalization of information flows and markets” and that “the media in Europe work more and more without national borders: journalists move between states and deal with subjects from abroad or with relevance to an audience abroad, and media products are disseminated across borders” (Paragraph 2). The Assembly is therefore of the opinion that there is a need to adequately train journalists to face the challenges of a globalized and fast changing world: “The professional education and training of their journalists is one of the most valuable assets for media companies in an increasingly competitive media environment. With regard to media content, quality should be promoted and such content should be prepared professionally by well-educated and trained journalists.” (Paragraph 8).

4, Resolution 2035 (2015) - Protection of the safety of journalists and of media freedom in Europe - adopted by the Parliamentary Assembly on 29 January 2015¹⁸⁹

The Assembly condemns in the strongest possible terms the terrorist attack on the French magazine *Charlie Hebdo* in Paris on 7 January 2015, and reiterates the importance of media freedom for democracy.

The Assembly recalls that political criticism and satire must be protected as an essential part of media freedom. Freedom of expression is applicable not only to information or ideas that are favorably received or perceived as inoffensive or with indifference, but also to those that offend, shock or disturb the state or any sector of the population, subject only to the conditions and restrictions provided for in the European Convention on Human Rights.

The Assembly invites:

- national parliaments to hold annual public debates (hearings, committee meetings or plenary sessions), with the participation of associations of journalists and the media, on the state of media freedom in their respective countries;
- the Commissioner for Human Rights to pay particular attention to the situation of media freedom in all conflict zones in Europe, particularly in eastern Ukraine.

In the light of the aforementioned texts, the Parliamentary Assembly formulates a series of recommendations, addressed to the Committee of Ministers to support Member states initiatives for professional training courses of journalists, and addressed to the Assembly itself to engage in establishing training programs and networks within the Council of Europe.

Scope and Nature of Freedom of Expression

Recommendations, resolutions and opinions of the Parliamentary Assembly are not binding, though they are important standard-setting documents and can prove politically influential.

1.5.1.3. THE COMMISSIONER FOR HUMAN RIGHTS

The Office of the European Commissioner for Human Rights was established in 1999 by a Committee of Ministers Resolution¹⁹⁰ to “promote the awareness of and respect for human

rights in 47 Council of Europe member states”.

Their role is primarily a monitoring one: they assist Member States in implementing the Council of Europe’s standards and carry out country visits to analyze the situation *in loco*. They also promote human rights by providing advice on specific matters, issuing reports and organizing awareness-raising activities.

General Principles

At the time of writing, the most recent publication on Freedom of Expression is a 2011 report on Human Rights and a Changing Media Landscape¹⁹¹. The Report deals with: protection of journalists from violence, ethical journalism, access to official documents, media pluralism and human rights, public service media and human rights, social media and human rights.

Scope and Nature of Freedom of Expression

The European Commissioner cannot act upon individual complaints nor has any specific role in the European Court of Human Rights procedure.

1.5.1.4 EUROPEAN COURT OF HUMAN RIGHTS

Set up in 1959, the European Court of Human Rights the (“**ECtHR**” or “**Court**”) is a judicial body established to rule on individual or state applications alleging violations of the rights set out in the ECHR.

General Principles

The ECtHR has developed a body of jurisprudence relating to Article 10 of the ECHR.

A fundamental case for freedom of expression is the decision in *Handyside v United Kingdom* (5493/72)¹⁹² decided by the ECtHR in 1976. It states the essential principle that:

“Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to “information” or “ideas” that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society”. This means, amongst other things, that every “formality”, “condition”, “restriction” or “penalty” imposed in this sphere must be proportionate to the legitimate aim pursued.”

The Court also provides for standards regarding restrictions on freedom of expression. *“Interferences [on freedom of expression] entail a “violation” of Article 10 if they do not fall within one of the exceptions provided for in paragraph 2 (art. 10-2)”. Interferences must “in the first place have been “prescribed by law”, they must be “necessary in a democratic society” and therefore pursue an “aim that is legitimate under Article 10 para. 2” and respond to a “pressing*

social need". Finally, they "must be proportionate to the legitimate aim pursued", which means that "the reasons given by the national authorities to justify the "interference" [must be] relevant and sufficient"

Contracting States have a certain margin to appreciate the necessity and proportionality of these restrictions. However, "the domestic margin of appreciation (...) goes hand in hand with a European supervision. Such supervision concerns both the aim of the measure challenged and its "necessity"; it covers not only the basic legislation but also the decision applying it, even one given by an independent court."

In the case of *Özgür Gündem v Turkey*, the court stated that, "The ECtHR recalls the key importance of freedom of expression as one of the preconditions for a functioning democracy. Genuine, effective exercise of this freedom does not depend merely on the State's duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals [...]"¹⁹³.

The ECtHR has consistently underscored the importance of news media to the functioning of a democratic society. "Press freedom assumes even greater importance in circumstances in which State activities and decisions escape democratic or judicial scrutiny on account of their confidential or secret nature"¹⁹⁴.

Based on its own case law, the ECtHR issued a useful Report on positive obligations on Member States under Article 10 to protect journalists and prevent impunity¹⁹⁵, where it recalled that

"the essential object of many provisions of the Convention is to protect the individual against arbitrary interference by public authorities, there may in addition be positive obligations inherent in an effective respect of the rights concerned. Genuine, effective exercise of certain freedoms does not depend merely on the State's duty not to interfere, but may require positive measures of protection even in the sphere of relations between individuals". "A positive obligation may (...) arise under Article 10. This is because the Court recalls the key importance of freedom of expression as one of the preconditions for a functioning democracy and that states must ensure that private individuals can effectively exercise the right of communication between themselves ». « In deciding whether a positive obligation under Article 10 exists, regard must be had to the kind of expression rights at stake; their capability to contribute to public debates; the nature and scope of restrictions on expression rights; the ability of alternative venues for expression; and the weight of countervailing rights of others or the public (see *Appleby and Others v. the United Kingdom*, §§ 42-43 and 47-49)".

"Moreover, the Court has stressed that States are required to create a favourable environment for participation in public debate by all the persons concerned, enabling them to express their opinions and ideas without fear." (see *Dink v. Turkey*, § 137).

Restrictions to Freedom of Expression

The ECtHR engages in a balancing act between the interests of competing rights. The

approach taken by the ECtHR will depend upon whether the competing rights are qualified or absolute and the circumstances of the individual case¹⁹⁶.

For instance, when it comes to political expression, the ECtHR has stated that its constant approach is to require “very strong reasons for justifying restrictions on political speech, since broad restrictions imposed in individual cases would undoubtedly affect respect for the freedom of expression in general.”¹⁹⁷

Although politicians, public officials and civil servants are entitled to protect their reputations, the limits of acceptable criticism are wider in relation to these individuals than a private individual. Indeed, journalists are permitted “*a degree of exaggeration, or even provocation.*”¹⁹⁸

Offensive language

Unnecessarily offensive language may not be protected, if it amounts to “*wanton denigration*”¹⁹⁹. This principle extends to journalistic practices towards religion. In the case of *Otto-Preminger-Institut v. Austria*, it was held that there had been no breach of Article 10 when authorities banned a film that offended the Catholic religion and the religious feelings of the people of Tyrol. The ECtHR assessed the conflicting interests of the exercise of two fundamental freedoms guaranteed under the ECHR and concluded that the Austrian authorities did not overstep their margin of appreciation²⁰⁰.

In the *Giniewski v. France case*²⁰¹, the Court however followed a different approach. The applicant published an article dealing with the Christian faith, entitled “The obscurity of error”. He was convicted for the offence of publicly defaming a group of persons on the ground of membership of a religion, in this case the Christian community.

The applicant petitioned the ECtHR for relief under Article 10 on the grounds that he had been improperly and disproportionately punished for writing an article that, while it may have shocked some, served to contribute to the public debate.

The ECtHR held that the applicant’s conviction for defamation undoubtedly amounted to an interference in the exercise of his freedom of expression. The ECtHR then discussed whether the interference was proportional to the legitimate aim pursued, and thereby concluded that the interference was not proportionate to the legitimate aim pursued. It further held that the interference could not be considered necessary in a democratic society as no sufficient justification had been offered that the restriction answered a pressing social need. There had therefore been a violation of Article 10 of the Convention.

Furthermore, in the case of *Patrel v. France*²⁰², the ECtHR dealt with an application concerning the conviction for defamation of the author of a book criticizing action taken by an organisation against sects. A French Criminal Court found the applicant and the company’s publishing director guilty of defamation. The ECtHR examined the applicant’s complaints under Article 10. The question was to determine whether the interference in the applicant’s right to freedom of expression was necessary in a democratic society.

The ECtHR found that the disputed statements had reflected a comment on matters of public interest and were to be regarded as value judgments rather than statements of fact. In addition, the ECtHR pointed out that associations laid themselves open to scrutiny when they entered the arena of public debate and that, since they were active in the public domain, they ought to show a higher degree of tolerance to criticism of their aims by opponents and to the means employed in that debate.

As to the sentence imposed on the applicant, the Court found that, while the damages had been nominal, the fine, although relatively modest, when taken together with the cost of publishing a statement in two newspapers and the costs awarded to the association, did not seem justified in view of the circumstances. Accordingly, the Court held that there had been a violation of Article 10 of the ECHR.

The exercise of Article 10 may not be invoked in a manner which is contrary to Article 17 of the ECHR, which prevents an individual from doing something which is aimed at destroying any of the other Convention rights. Following this principle, applications have been rejected, for example, from a journalist convicted of publishing material advocating the reinstatement of national-socialism and racial discrimination²⁰³.

Access to Information and Journalistic Sources

The ECtHR has also recognized the importance of journalists' right of access to information in their exercise of Article 10²⁰⁴. Further, the right of access to information may be considered a civil right pursuant to Article 6 (right to a fair trial), and would therefore be subject to a fair hearing²⁰⁵.

The protection of journalistic sources has been recognized in the jurisprudence of the ECtHR: "Protection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and the professional codes of conduct in a number of Contracting States and is affirmed in several international instruments on journalistic freedoms"²⁰⁶.

Threats against journalists

Article 2 (right to life), Article 3 (prohibition of torture), and Article 13 (right to an effective remedy) may also come into play here. If the state is aware of threats or intimidation perpetrated against journalists, or the news media generally, the state may be under a duty to take protective measures and to carry out an effective investigation into any such allegations²⁰⁷.

In the case of *Dink v Turkey*,²⁰⁸ the ECtHR ruled that authorities had been informed of hostility towards a specific journalist but had not taken appropriate and reasonable efforts to safeguard his life.

Article 3 was found to have been breached in the case of *Tekin v Turkey* which involved a journalist being held blind-folded in a cell, and subject to forcible interrogation²⁰⁹, and in the case of *Najafli v Azerbaijan*, where a journalist was found to have been beaten by the police during a political demonstration.

Interference with Article 10

Where there has been an interference with the exercise of the rights and freedoms guaranteed in Article 10, the necessity for restricting these rights must be convincingly established²¹⁰. The ECtHR has stated that *“the national margin of appreciation is circumscribed by the interest of democratic society in ensuring and maintaining a free press”*²¹¹.

Scope and Nature of Freedom of Expression

Judgments of the court are binding on Member States. Cases can be brought directly by individuals or States that believe their rights have been violated²¹². Since the court was established, almost all applications have been lodged by individuals²¹³.

The court has to look at whether an application is admissible. To be admissible, it must fulfill certain conditions set out in the Convention. For example, applicants must prove that they have *“exhausted all domestic remedies”* (generally speaking this means that the highest court in their country has dismissed their complaint) and the application must relate to a right protected under the Convention.

It has been held that the (negative) obligation not to violate human rights and the (positive) obligation to guarantee all necessary action aimed to give effectiveness to such a protection goes beyond the territory of the state, since it includes those areas in which the state exercises its own authority and control, through state agents or troops deployed abroad²¹⁴.

1.5.2. EUROPEAN UNION

1.5.2.1 European Council

The European Council²¹⁵ was founded in 1974 as an informal forum of discussion between Heads of State or Government. It set up the political agenda of the European Union (*“EU”*)²¹⁶. The 2009 Treaty of Lisbon indicated the European Council as one of the seven institutions of the EU. Today, the European Council gathers the Heads of State or Government of the Member States, together with the European Council’s President and the President of the European Commission. The High Representative of the Union for Foreign Affairs and Security Policy takes part in its meetings as well.

General Principles

The European Council sets the main political guidelines and strategic objectives of the European Union but is not involved in EU legislative process²¹⁷. The resolutions of the European Council do not refer specifically to the freedom of expression, but primarily to economic and financial issues of the EU. However, the European Council stated in several conclusions that the European Community and its Member States shall protect human rights, which include freedom of opinion and expression.

In 1991, at a European Council meeting held in Luxembourg, the European Council adopted a Resolution including a declaration on human rights.

The Resolution²¹⁸ states that respect for human rights, the rule of law and the existence of political institutions which are effective, accountable and enjoy democratic legitimacy are the basis for equitable development. The declaration on human rights attached thereto reaffirms that respecting, promoting and safeguarding human rights is an essential part of international relations and one of the cornerstones of European cooperation as well as of relations between the Community and its Member States and other countries.

Scope and Nature of Freedom of Expression

The European Council does not exercise legislative functions but rather gives advice and sets the political priorities of the EU.

1.5.2.2. European Commission

The European Commission (the “**Commission**”) is the EU’s independent executive body which represents the interests of the EU as a whole. It is made up of 28 Commissioners, one from each EU Member.

The Commission has several responsibilities, including in particular:

- proposing new laws to the European Parliament and the Council of the European Union (right of initiative)²¹⁹;
- enforcing and monitoring the implementation of EU law (together with the Court of Justice of the European Union);
- representing the EU internationally (a competence shared with other EU institutions).

General Principles

In 2007, the Commission published a working paper on Media pluralism in the Member States of the EU²²⁰. It observed that “*Freedom of expression is legally protected in each of the EU Member States. Freedom of information is part of the legal and democratic framework in all Member States; in some cases the impetus for its development stems from the European Convention on Human Rights and fundamental freedoms. These general provisions are completed by freedom of press and freedom of media rules, normally through Constitution articles or Parliamentary Acts.*” Still, “*implementation practices and monitoring may strongly vary from one Member State to another*”.

In February 2014, the Enlargement department published the Guidelines for EU support of media freedom and media integrity in enlargement countries, 2014-2020²²¹. Free press in aspiring countries is one of the elements taken into consideration to assess the conformity with EU principles, “even if there is no EU regulation to align with and implement”²²². For the Commission “*freedom of expression and media is often a precondition for implementation of other rights and freedoms. Deprived of a free media, citizens are denied the right to balanced, factual and reliable information, without exposure to bias and propaganda that in turn is*

*undermining democracy and the effectiveness of institutions*²²³.

The Commission also addressed media pluralism as a matter of competition law: the 2009 Communication from the Commission on the application of state aid rules to public service broadcasting²²⁴ aims at assuring a level playing field for media players in a market until recently dominated by state funded operators. The Digital Agenda directorate established in 2011 an independent High-Level Group on Media Freedom and Pluralism, entrusted with the task to analyze the situation of media freedom in Europe and come up with recommendations for possible actions to take. The Group submitted its report in January 2013²²⁵.

Via its Communication services, the Commission published at the end of 2013 a call for proposals that address violations of media freedom and pluralism. The winning projects should focus on defamation laws versus press freedom, mapping violations of media freedom across the EU, boosting networking and training for journalists and the study for a specific Transnational Support Network for Media Freedom in Italy and Southeast Europe²²⁶.

On 30th June 2014 the Commission decided to implement pilot projects for the creation of a European Center for press and media freedom.

In addition, based on its competence to monitor the implementation of EU laws, the Commission can take action against any EU Member State breaching EU Treaty provisions, regulations or directives. For example, in 2005, it scrutinized Greek restrictions to media ownership²²⁷ and, back in 2000, it pursued infringement proceedings against Germany for a regional law on radio services that closed the market to non-local operators²²⁸. Furthermore, in June 2010, the Commission sent a letter of formal notice to the French authorities asking the Comité Supérieur de l'Audiovisuel to use its powers and ensure that the EU's rules banning programmes containing incitement to hatred were respected. In October 2010, the Commission welcomed the fact that France was now correctly applying the EU's broadcasting rules and decided to close an infringement case²²⁹.

Scope and Nature of Freedom of Expression

Any individual can file a complaint to the Commission alleging that a Member State is not complying with its obligations under EU law. A complaint form and rules on how to proceed are available on the Commission's website²³⁰.

1.5.2.3. EUROPEAN PARLIAMENT

The European Parliament (the "**Parliament**") is the institution of the EU that has the legislative power, together with the Council of the EU. It is composed of directly elected representatives of European citizens and it is renewed every five years²³¹.

General Principles

In its legislative function the Parliament has to conform to the primary sources of EU law, i.e. to the Treaties as well as to the European Charter of Fundamental Rights. On the Parliament website there is a dedicated page to human rights²³² and, according to a survey launched

in 2014 among European citizens to see what they consider should be the priorities of the Parliament, “the protection of human rights” ranked first and “*freedom of speech*” stood second²³³.

Regarding freedom of information in particular, in its legislative functions the Parliament mainly dealt with freedom to receive information, i.e. access to documents of the European Union²³⁴.

The Parliament also issued (together with the Council of the EU) the Audiovisual Media Services Directive in 2010²³⁵ (the “**Directive**”).

In the Directive, issued “*to complete the internal market and facilitate the emergence of a single information area*”, it is stated that “*Audiovisual media services are as much cultural services as they are economic services. Their growing importance for societies, democracy — in particular by ensuring freedom of information, diversity of opinion and media pluralism — education and culture justifies the application of specific rules to these services.*” (Paragraph 5).

The Parliament also has an advocacy role on matters falling within the sphere of activity of the EU, carried out through the adoption of Resolutions²³⁶.

Important resolutions are the Resolution adopted on 21st May 2013²³⁷ on standard settings for Media Freedom across the EU and the Resolution on the Freedom of Press and Media in the world, adopted on 13 June 2013²³⁸. In these Resolutions the Parliament calls for more integrated efforts from the side of the EU to adopt an EU strategy on the matter²³⁹.

Restrictions to Freedom of Expression

In the audiovisual media services Directive, it is specified that “*Measures taken to protect the physical, mental and moral development of minors and human dignity should be carefully balanced with the fundamental right to freedom of expression as laid down in the Charter on Fundamental Rights of the European Union [...]*” (paragraph 60). Moreover, “*Media service providers under the jurisdiction of the Member States should in any case be subject to a ban on the dissemination of child pornography*” (Paragraph 61).

It is further clarified that “*None of the provisions of this Directive that concern the protection of the physical, mental and moral development of minors and human dignity necessarily requires that the measures taken to protect those interests should be implemented through the prior verification of audiovisual media services by public bodies*”. (Paragraph 62).

Specific restrictions tackle the commercial communications promoting tobacco or alcohol.

Some specifications are offered also with reference to the Right of Reply: “*Any natural or legal person, regardless of nationality, whose legitimate interests, in particular reputation and good name, have been damaged by an assertion of incorrect facts in a television programme must have a right of reply or equivalent remedies [...]*” (Article 28).

Scope and Nature of Freedom of Expression

The principles set in regulations passed by the Parliament are directly binding on Member States, while the directives need to be transposed into national legislation.

Parliament resolutions are not binding.

1.5.2.4 COUNCIL OF THE EUROPEAN UNION

The Council of the European Union (the “**Council**”) is one of the two EU institutions entrusted with legislative power. It has a flexible composition according to the topic at stake, involving different ministers of the Member States’ governments.

General Principles

On 12 May 2014, the Council, in its Foreign Affairs Ministers composition, adopted the Guidelines on Freedom of Expression online and offline (the “**Guidelines**”)²⁴⁰. With these guidelines, the EU reaffirms the pivotal role that freedom of opinion and expression plays in a democratic society.

According to the Council, freedom of opinion and freedom of expression “*are essential for the fulfilment and enjoyment of a wide range of other human rights, including freedom of association and assembly, freedom of thought, religion or belief, the right to education, the right to take part in cultural life, the right to vote and all other political rights related to participation in public affairs.*” (Paragraph 2).

The Guidelines state that “*The right to freedom of expression includes freedom to seek and receive information. It is a key component of democratic governance as the promotion of participatory decision-making processes is unattainable without adequate access to information. [...] Ensuring access to information can serve to promote justice and reparation, in particular after periods of grave violations of human rights.*” (Paragraph 14). And, further: “*Freedom of opinion and expression further includes the freedom to express and impart information and ideas of all kinds that can be transmitted to others, in whatever form, and regardless of media. Information or ideas that may be regarded as critical or controversial by the authorities or by a majority of the population, including ideas or views that may “shock, offend or disturb”, are also covered by this. Commentary on one’s own or on public affairs, canvassing, discussion on human rights, journalism, scientific research, expression of ethnic, cultural, linguistic and religious identity and artistic expression, advertising, teaching are all examples of expressions that are covered by the freedom of expression.*” (Paragraph 17).

The Guidelines recall some instruments that can be useful in assessing the meaning and the scope of freedom of information, for example the UN Human Rights Committee’s general comment 34²⁴¹. They also focus on personal data as “*it is recognised that it can be relevant to consider data protection in the context of freedom of expression*” (Paragraph 15).

The Council of the EU has also adopted Conclusions on Media freedom and Pluralism in the digital environment on 26 November 2013²⁴².

In those conclusions, the Council invites the Commission to:

- continue to support projects that aim at enhancing the protection of journalists and media practitioners;
- continue to support the independent monitoring tool for assessing risks to media pluralism in the EU;
- strengthen cooperation between Member States' audiovisual regulatory authorities and promote best practice as regards the transparency of media ownership;
- assess the effectiveness of these measures in order to consider any further steps.

Restrictions to Freedom of Expression

According to paragraph 20 of the Guidelines, any restriction must be provided by law, may only be imposed for the grounds set out in international human rights law, and must conform to the strict tests of necessity and proportionality.

The Guidelines also warn against abusive invocation of public morals for limiting freedom of expression: *"Abusive invocation of public morals, national security or protection of "national values": International human rights law does not permit placing restrictions on the exercise of freedom of expression, solely in order to protect notions such as religions, cultures, schools of thought, ideologies or political doctrines. Some states invoke public morals in an abusive manner and as a means of curtailing the right to freedom of expression."* (Annex I).

The Guidelines also stress, in the operational part, that Member States have the primary obligation to protect and ensure freedom of expression, whilst protecting the right to privacy, in accordance with Article 17 of the ICCPR.

Rights and limitations are valid offline as well as online. The issue of protecting people's privacy is particularly sensitive online, therefore the guidelines provide specific clarifications on this matter in paragraphs 35 and 36.

Scope and Nature of Freedom of Expression

Recommendations from the Council are not legally-binding documents but they nevertheless represent important standard-setting documents. EU guidelines are not legally binding but represent a strong political signal as they are adopted at the ministerial level.

The Guidelines are a practical tool to help EU representations in the field better advance the EU Human Rights Policy.

The Council Working Party on Human Rights²⁴³ is entrusted with supporting the implementation of the said Guidelines.

1.5.2.5 EUROPEAN UNION COURTS

The Court of Justice of the European Union (“**CJEU**”) holds the power to interpret EU law and decide whether upon failure of Member States or EU Institutions comply with their obligations under EU law.

General Principles

Until 2009, the CJEU carried out the protection of freedom of expression within the EU on the basis of a variety of non-EU treaties and on the constitutional traditions of Member States. Following the entry into force of both the Charter of Fundamental Rights of the European Union (the “**Charter**”)²⁴⁴ and the Treaty of Lisbon, there is an explicit statutory basis for this protection.

Article 6 of the Treaty of the European Union (“**TEU**”)²⁴⁵, in its consolidated version of 2012, states:

- 1 The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

- 2 The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union’s competences as defined in the Treaties.
- 3 Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.

ARTICLE 11 OF THE CHARTER STATES:

“1 Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

2 The freedom and pluralism of the media shall be respected.”

Restrictions to Freedom of Expression

The exercise of fundamental freedoms and human rights is not without limitation. In the case of *Wachauf*²⁴⁶, the CJEU stated:

*"[...] the fundamental rights recognized by the Court are not absolute, however, but must be considered in relation to their social function. Consequently, restrictions may be imposed on the exercise of those rights [...] provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of those rights."*²⁴⁷

According to Article 52 paragraph 1 of the Charter, the exercise of fundamental rights may be limited subject to the conditions that, first, the limitations are provided by law and, secondly, the limitations are necessary and proportionate.

In addition to inherent limits on the protection of fundamental freedoms and human rights generally, the balancing act that has to be achieved within EU jurisprudence relating to freedom of expression takes on a distinctive and particular character given the importance afforded to the four freedoms²⁴⁸ within the EU.

Several pre-TEU cases highlight the difficult balancing act that the CJEU undertook when considering questions that require a balancing of fundamental freedoms and human rights with the four freedoms.

The case of *Grogan*²⁴⁹ concerned a dispute between the Irish Society for the Protection of Unborn Children and Grogan and other students distributing information in Ireland on abortion clinics in other EU Member States. The provision of abortion in other Member States was considered to constitute a 'service' within the meaning of EU law.²⁵⁰ The distribution of information was considered to constitute a manifestation of freedom of expression and not a service within EU law. That meant, for the CJEU, that the Irish courts were free to prohibit them²⁵¹.

Scope and Nature of Freedom of Expression

The CJEU ensures that, in the interpretation and application of the Treaties, the law is observed²⁵². The court thus constitutes the judicial authority of the EU and its judgments are directly enforceable.

Any individual directly affected by an act or failure to act of the Union can seek remedies before it. Moreover, when a proceeding before a national court is initiated, any individual taking part in the CJEU proceeding can ask the national judge to send the case to the CJEU for an interpretation of the Treaties or of an act of the Union pertinent to the case. If there are no further remedies against the decision of the national judge, the latter is obliged to refer the case to the CJEU for a preliminary ruling if asked.

1.5.3. The OSCE Representative on Freedom of the Media

In 1997, the OSCE established an OSCE Representative on Freedom of the Media (the “**OSCE Representative**”)²⁵³.

The OSCE Representative is tasked with observing media developments and helping Participating States comply with their commitments to freedom of expression²⁵⁴. The mandate states that the OSCE Representative shall

“assume an early-warning function. He or she [shall] address serious problems caused by, inter alia, obstruction of media activities and unfavorable working conditions for journalists”²⁵⁵. Moreover, “the OSCE Representative on Freedom of the Media [shall] concentrate [...] on rapid response to serious non-compliance with OSCE principles and commitments by participating States in respect of freedom of expression and free media. In the case of an allegation of serious non-compliance therewith, the OSCE Representative on Freedom of the Media will seek direct contacts, in an appropriate manner, with the participating State and with other parties concerned, assess the facts, assist the participating State, and contribute to the resolution of the issue”²⁵⁶.

According to its website, the OSCE Representative’s activities consist of:

“observing media developments as part of an early warning function and helping participating States abide by their commitments to freedom of expression and free media. This includes efforts to ensure the safety of journalists; assist with the development of media pluralism; promote decriminalization of defamation; combat hate speech while preserving freedom of expression; provide expert opinions on media regulation and legislation; promote Internet freedom; and assist with the process of switching from analogue to digital broadcasting.”

General Principles

The Representative serves “as a media watchdog, monitoring the practice of: Harassment, intimidation, incarceration and physical attacks, including murder, of journalists and other members of the press ; Restrictions on media pluralism, especially in broadcasting ; legislative attempts to over-regulate traditional media and the Internet ; denial of access to information held by government agencies ; coercion of journalists to reveal their confidential sources to law enforcement agencies ; Government attempts to label offending or critical views “extremism” or “hate speech” ; administrative obstacles to media operations, including excessive registration, licensing and accreditation requirements”²⁵⁷.

The Representative issues yearly reports to the Permanent Council of the OSCE, and also publishes guidebooks on thematic issues. In these reports, the Representative sets forth or recalls international standards and issue recommendations.

For instance, in its 27 November 2014 Report²⁵⁸, the Representative recalls the principles that

should be observed when participating States attempt to respond to extremist threats:

- Anti-extremism laws should only restrict activities that necessarily and directly imply the use of violence.
- Limits to free expression and free media imposed by anti-extremism laws should respect OSCE commitments and international law, notably article 19 of the International Covenant on Civil and Political Rights.
- Hate speech can be restricted if it directly incites to violence and leads to hate crimes, particularly targeting minorities and other vulnerable groups.

The OSCE Representative also launches joint statements with other organization's Rapporteurs on freedom of expression.

For instance, on September 1, 2014, the OSCE Representative launched a joint statement with the UN Special Rapporteur on Freedom of Opinion and Expression, the OAS Special Rapporteur on Freedom of Expression, and the ACHPR Special Rapporteur on Freedom of Expression and Access to Information, on the issue of protection of journalists covering conflicts²⁵⁹. The statement stresses that *"journalists covering armed conflicts do not lose their status as civilians; they are not participants in the conflicts they cover. As such, they continue to be protected by the applicable guarantees under human rights law and international humanitarian law."* The Rapporteurs *"call for an open and committed dialogue among governments, non-state groups, journalists and other interested parties in order to strengthen protections to promote the safety and respect for those reporting on a conflict, especially to ensure that those responsible for such violence are held accountable."*

Scope and Nature of Freedom of Expression

According to its mandate, *"the OSCE Representative on Freedom of the Media does not exercise a juridical function, nor can his or her involvement in any way prejudge national or international legal proceedings concerning alleged human rights violations"*²⁶⁰. His statements and recommendations are therefore non-binding on OSCE Member States.

1.5.4. INTER-AMERICAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS

The American Convention on Human Rights (the **"American Convention"**) entered into force in 1978, protects mainly civil and political rights, including freedom of expression. The Convention also established the Inter-American Court of Human Rights (the **"Inter-American Court"** or **"Court"**).

The Commission and the Court are two key institutions within the so-called Inter-American system for the protection of human rights.

1.5.4.1 The Inter-American Commission on Human Rights

The Commission is a body of the Organization of American States (the “OAS”), composed of seven independent members and charged with promoting and defending human rights in the Americas. Created in 1959 but only installed in 1979, the Commission has its headquarters in Washington, D.C.

The Inter-American Commission receives individual petitions on alleged violations of human rights, makes non-binding recommendations, publishes human rights reports, and conducts in loco missions to analyze the human rights situation in a given State. It can present a case to the Court and in exceptional cases it can urge a Member State to adopt precautionary measures “to prevent irreparable harm to persons or to the subject matter of the proceedings in connection with a pending petition or case”²⁶¹.

Any individual, group of people, or NGO who are legally recognized in at least one OAS Member State may file a petition against one of the Member States of the OAS²⁶². The Commission “cannot attribute individual liability” but it “can determine the international responsibility of a Member State” and issue recommendations to suspend the harmful act, investigate and punish the persons responsible, repair the damage and/or amend the legislation²⁶³. The Commission can receive petitions against any OAS Member State, insofar as it signed at least a human rights treaty of the Inter-American system (i.e. also against OAS States that did not sign the American Convention²⁶⁴). However, in accordance with Article 45 of the American Convention, the competence of the Inter-American Commission to receive and examine communications in which a State Party alleges that another State Party has committed a violation of a human right is to be expressly recognized by a State Party²⁶⁵.

This Commission²⁶⁶ will process a claim only after the claimant has exhausted all judicial remedies available in the State concerned. The Commission investigates claims and endeavors to help the claimant and the relevant State reach a settlement. If the mediation is unsuccessful, the Commission issues a report containing action points which the State must carry out. If the State does not comply with the report, the Commission may then refer the case to the Court, but only if the State has ratified the American Convention and has previously recognized the contentious jurisdiction of the Court or has accepted jurisdiction expressly for this specific case.

1.5.4.2 Office of the Special Rapporteur for Freedom of Expression

The Office of the Special Rapporteur for Freedom of Expression²⁶⁷ was established in October 1997 by the Inter-American Commission, with the to monitor the compliance of OAS Member States with the American Convention in the area of freedom of expression. Among its principal functions, they advise the Commission on petitions submitted to it; they provide recommendations on the adoption of precautionary measures related to freedom of expression; they carry out on-site visits; and they prepare an Annual Report on the state of freedom of expression in the hemisphere²⁶⁸.

The Special Rapporteur also undertakes more general investigations of human rights issues in the Americas and issues publications on its findings and recommendations.

Examples of the Special Rapporteur's publications include Freedom of Expression and Internet (2013)²⁶⁹, Violence against Journalists and Media Workers: Inter-American Standards and National Practices on Prevention, Protection and Prosecution of Perpetrators (2013)²⁷⁰ and The Inter-American Legal Framework Regarding the Right to Access to Information (Second Edition, 2012)^{271, 272}.

General Principles

The Report of the Office of the Special Rapporteur for freedom of expression²⁷³, published in December 2013, is at the time of writing, the latest available Annual Report of the Special Rapporteur. The report presents an evaluation of freedom of expression in several Member States of the OAS²⁷⁴ and highlights challenges faced by the States in the region.

The publication *"Freedom of Expression and Internet"*, released 31 December 2013²⁷⁵ refers to Article 13 of the American Convention which guarantees the right of all persons to freedom of expression and establishes that this right includes *"freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice"*. According to the document, *"Article 13 fully applies to communications, ideas and information distributed through the internet" which, "like no other means of communication before, has allowed individuals to communicate instantly and at a low cost, and has had a dramatic impact on journalism and the way in which we share information and ideas."*

The Special Rapporteur also issues joint declarations with other rapporteurships for freedom of expression, including the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, the Representative on Freedom of the Media from the OSCE and the Rapporteur for the African Commission on Human and Peoples' Rights.

1.5.4.3. INTER-AMERICAN COURT OF HUMAN RIGHTS

The Inter-American Court of Human Rights ("**Inter-American Court**") was established in 1978 with the entry into force of the American Convention²⁷⁶, with the mandate to apply and interpret the American Convention and other inter-American human rights treaties. The Court began to exercise its contentious jurisdiction in 1986.

The Court may only hear cases where the State involved has ratified the American Convention and accepted the Court's optional jurisdiction²⁷⁷. According to Article 62 of the American Convention: *"A State Party may, upon depositing its instrument of ratification or adherence to this Convention, or at any subsequent time, declare that it recognizes as binding, ipso facto, and not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation or application of this Convention. [...]"* Moreover, according to Article 68, *"the States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties"*.

An individual or a petitioner may not independently bring a case: only State parties and the

Inter-American Commission have the right to submit a case to the Inter-American Court. According to Article 57 of the American Convention, the Inter-American Commission shall appear in all cases before the Court.

In other words, the main procedural differences between the Inter-American Commission and the Inter-American Court are that (i) individuals can bring a case before the Commission but not before the Court (the latter could hear a case brought by an individual to the Commission and then by the Commission to the Court); (ii) the Inter-American Commission can receive petitions against any OAS Member State insofar as it signed at least one OAS act on fundamental rights (American Declaration of the Rights and Duties of Man, Convention and other inter-American human rights treaties) while the Court can only rule on States that signed the Convention. None of them can receive complaints against individuals. Since the Commission established it in 1997, the Office of the Special Rapporteur for Freedom of Expression has advised the Court about the presentation of many cases involving freedom of expression.

Relevant cases²⁷⁸ include the following:

In **Kimel v. Argentina**²⁷⁹, a well-known journalist, writer, and investigative historian published a book describing the findings of his research into the murder of five clergymen, criticizing how the authorities handled the case. On October 28, 1991, the state brought criminal proceedings against him for libel. Upon the conclusion of the criminal proceedings, he was convicted of libel and sentenced to one-year imprisonment and payment of \$ 20,000.00 as damages. The Court found that the state violated the American Convention on Human Rights²⁸⁰ because the journalist's punishment was disproportionate and violated the victim's right to freedom of expression. In its decision, the Inter-American Court ordered the state to, among other things, provide the journalist with reparations and reform its criminal legislation on the protection of honor and reputation, finding that it violated the principle of criminal definition or strict legality.

In **Usón Ramírez v. Venezuela**²⁸¹, a retired military officer was convicted of "slander against the National Armed Forces" after appearing on a television program and expressing critical opinions about the case of a group of soldiers who had been severely injured while in a punishment cell. The Inter-American Court ordered the state to vacate the military justice proceedings against the officer and to modify the criminal law employed in his case.

The **Gomes Lund et. al. v. Brazil**²⁸² case addressed the arbitrary detention, torture and forced disappearance of 70 people as part of operations of the Brazilian army between 1972 and 1975 to eradicate the so-called Araguaia Guerrillas. In its judgment, the Inter-American Court declared that Article 13 of the American Convention protects the right of all individuals to request information held by the State (with the safeguards permitted under the Convention's regime of exceptions).

The **Uzcátegui y Otros v. Venezuela**²⁸³ case concerned the extrajudicial execution by members of the state police of Néstor José Uzcátegui and the persecution of Néstor's brother, Luis Enrique Uzcátegui, in reaction to his search for justice for the death of his brother, and the impunity of the killers.

The Court found that the existence, duration and circumstance of the criminal proceedings *“could have generated a chilling or inhibiting effect on the exercise of freedom of expression, contrary to the State’s obligation to guarantee the free and full exercise of this right in a democratic society.”* Regarding the threats and intimidation, the Court took into account that *“it is possible that freedom of expression may be unlawfully restricted by de facto conditions that directly or indirectly place those who exercise it at risk or in a situation of increased vulnerability”,* and the Court found that every State must *“abstain from acting in a way that contributes to, stimulates, promotes or increases this vulnerability and must adopt, when pertinent, necessary and reasonable measures to prevent violations and protect the rights of those who find themselves in this situation.”*

General Principles

The Inter-American Court applies freedom of expression as defined in Article 13 of the American Convention: *“Freedom of Thought and Expression [...] includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one’s choice.”*

Restrictions to Freedom of Expression

Pursuant to Article 13 paragraphs 2 and 3 of the American Convention, limitations are permitted mainly for the protection of national security, public order, or public health or morals²⁸⁴.

Scope and Nature of Freedom of Expression

Cases can only be brought against State Parties which recognize the Inter-American Court’s contentious jurisdiction and have formally accepted that the Inter-American Court’s decisions are legally binding. This recognition can also be done for a specific case. As of December 2014, 21 nations have accepted the Court’s contentious jurisdiction²⁸⁵. In any event, any OAS Member State may consult the Court regarding the interpretation of the American Convention or request an opinion about their domestic laws. The key difference is that opinions or interpretations produced by the Court for OAS Member States which have not accepted the Court’s jurisdiction are not binding, whereas decisions and orders made against the 21 States which did accept it are.

The Inter-American Court can order remedies and compensation that demand action to be taken not only by a state’s executive but also its legislature and local courts. In a majority of its contentious rulings, the Court will demand that some form of prosecution or judicial action be taken, such as an investigation or a trial, or occasionally, the Court will order that national courts quash a sentence which it had previously delivered.

Usually included in a reparation order by the Court is an obligation on the State to report on its efforts to comply with that order by a certain date. Once a State has submitted its report, the Court gives the Inter-American Commission and the victims an opportunity to respond.

In the last decade, the Inter-American Court has even begun summoning the relevant parties to closed hearings on compliance. The Inter-American Court retains jurisdiction on a matter

until it deems that all of its orders have been fully complied with. This may result in years of monitoring, enquiries and compliance reports: according to the Commission's 2013 Annual Report²⁸⁶, approximately 1 in 5 of the decisions made by the Court since 2002 have been fully complied with so far.

1.5.5. AFRICAN SYSTEM

1.5.5.1. The African Commission on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights²⁸⁷ established the African Commission on Human and Peoples' Rights (the "**African Commission**")²⁸⁸. The African Commission's main tasks are to ensure the protection and promotion of human rights and to oversee and interpret the African Charter. In accordance with Article 62 of the African Charter, State Parties are required to submit a report on the measures taken with a view to giving effect to the rights and freedoms guaranteed by the African Charter every two years.

In addition, individuals or states may bring complaints to the attention of the African Commission²⁸⁹ alleging that a State Party to the Charter has violated one or more of the rights contained therein. The Commission's decisions on these communications are called recommendations and are not in themselves legally binding on the States concerned. They are included in the Commissioner's Annual Activity Reports which are submitted to the OAU Assembly of Heads of State and Government. If they are adopted, they become binding on the States parties and are published.

General principles

In 2002, the African Commission adopted the Declaration of Principles on Freedom of Expression in Africa (the "**Declaration**")²⁹⁰.

The Declaration further reaffirms the fundamental importance of freedom of expression and information as an individual human right, as a cornerstone of democracy and as a means of ensuring respect for all human rights and freedoms.

The African Charter does not provide any insight on what is meant by "*information*" or "*right to express and disseminate his opinions*". The Declaration of Principles on Freedom of Expression in Africa states that:

- 1** *Freedom of expression and information, including the right to seek, receive and impart information and ideas, either orally, in writing or in print, in the form of art, or through any other form of communication, including across frontiers, is a fundamental and inalienable human right and an indispensable component of democracy.*
- 2** Everyone shall have an equal opportunity to exercise the right to freedom of expression and to access information without discrimination."

It also states that freedom of expression imposes an obligation on the authorities to take positive measures to promote diversity, which includes e.g.: *“availability and promotion of a range of information and ideas to the public; pluralistic access to the media and other means of communication, including by vulnerable or marginalized groups, such as women, children and refugees, as well as linguistic and cultural groups; the promotion and protection of African voices, including through media in local languages; and the promotion of the use of local languages in public affairs, including in the courts.”*

Regarding access to information held by public bodies, the Declaration states that:

“Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law”; “The right to information shall be guaranteed by law in accordance with the following principles:

- *everyone has the right to access information held by public bodies;*
- *everyone has the right to access information held by private bodies which is necessary for the exercise or protection of any right;*
- *any refusal to disclose information shall be subject to appeal to an independent body and/or the courts;*
- *public bodies shall be required, even in the absence of a request, actively to publish important information of significant public interest;*
- *no one shall be subject to any sanction for releasing in good faith information on wrong doing, or that which would disclose a serious threat to health, safety or the environment save where the imposition of sanctions serves a legitimate interest and is necessary in a democratic society;*
- *secrecy laws shall be amended as necessary to comply with freedom of information principles.*
- *everyone has the right to access and update or otherwise correct their personal information, whether it is held by public or by private bodies.”*

The Declaration also contains provisions regarding journalists' safety, stating that *“attacks such as the murder, kidnapping, intimidation of and threats to media practitioners and others exercising their right to freedom of expression, as well as the material destruction of communications facilities, undermines independent journalism, freedom of expression and the free flow of information to the public”; “States are under an obligation to take effective measures to prevent such attacks and, when they do occur, to investigate them, to punish perpetrators and to ensure that victims have access to effective remedies. In times of conflict, States shall respect the status of media practitioners as non-combatants”.*

Restrictions on Freedom of Expression

The Declaration also addresses restrictions on freedom of expression:

- 1** *No one shall be subject to arbitrary interference with his or her freedom of expression.*
- 2** *Any restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary and in a democratic society."*

Regarding defamation, the Declaration provides that *"States should ensure that their laws relating to defamation conform to the following standards: no one shall be found liable for true statements, opinions or statements regarding public figures which it was reasonable to make in the circumstances; public figures shall be required to tolerate a greater degree of criticism; and sanctions shall never be so severe as to inhibit the right to freedom of expression, including by others. Privacy laws shall not inhibit the dissemination of information of public interest."*

Scope and Nature of Freedom of Expression

The Declaration is not binding on Member States. It states that *"States Parties to the African Charter on Human and Peoples' Rights should make every effort to give practical effect to these principles."* As regards to the African Commission's decisions (or *"recommendations"*) on communications transmitted on alleged violations of human rights, from States against other States or by individuals and NGOs against one or more States (individual complaints), they are binding on member States if they are adopted by the Assembly of Heads of State and Government. The decision of the Assembly is final.²⁹¹

Relationship with the African Court on Human and People's Rights

The African Commission may submit cases to the Court's jurisdiction. The African Court²⁹² complements and reinforces the functions of the African Commission.

1.5.5.2. AFRICAN SPECIAL RAPPORTEUR ON FREEDOM OF EXPRESSION AND ACCESS TO INFORMATION

The Special Rapporteur on Freedom of Expression was established by the African Commission on Human and Peoples' Rights in December 2004, with the mandate to:

- analyze national media legislation, policies and practice within Member States;
- monitor their compliance with freedom of expression standards and advise Member States accordingly;
- undertake investigative missions to Member States where reports of massive violations of the right to freedom of expression are made and make appropriate recommendations to the African Commission;
- undertake country missions and any other promotional activity that would strengthen the full enjoyment of the right to freedom of expression in Africa;
- keep a proper record of violations of the right to freedom of expression and denial of access to information and publish this in her reports submitted to the African Commission; and

- submit reports at each ordinary session of the African Commission on the status of the enjoyment of the right to freedom of expression in Africa.

General Principles

The Special Rapporteur issues recommendations to Member States. For instance, the activity report presented during the 55th Ordinary Session of the African Commission from 28 April to 12 May 2014 states:

“the Special Rapporteur remains alarmed by the series of alleged intimidation, harassment, arbitrary arrest and detention of journalists, media practitioners and human rights defenders in some parts of Africa during the period under review. She calls on concerned Governments to thoroughly investigate the allegations, bring the perpetrators to justice and ensure the safety of journalists, media practitioners and human rights defenders. She also calls on States Parties to carry out comprehensive reforms that guarantee freedom of expression and access to information to the populace, and ensure both legal and practical compliance of national laws with international.”

The following joint declarations issued by the UN Special Rapporteur, along with the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, and the OAS Special Rapporteur on Freedom and Expression are relevant to the interpretation of the African Charter with respect to Freedom of Expression.

All declarations emphasize the fundamental importance of freedom of expression both in its own right and as an essential tool for the defence of all other rights, as a core element of democracy and for advancing development goals.

Joint Declaration on freedom of expression and the Internet dated 1 June 2011

According to the Joint Declaration²⁹³, *“Freedom of expression applies to the Internet, as it does to all means of communication. Restrictions on Freedom of Expression on the Internet are only acceptable if they comply with established international standards, including that they are provided for by law, and that they are necessary to protect an interest which is recognized under international law (the ‘three-part’ test).*

When assessing the proportionality of a restriction on freedom of expression on the Internet, the impact of that restriction on the ability of the Internet to deliver positive freedom of expression outcomes must be weighed against its benefits in terms of protecting other interests” (1, a and b).

Joint Declaration on crimes against freedom of expression dated 25 June 2012

The general principles of the Joint Declaration on crimes against freedom of expression²⁹⁴ are:

- “a State officials should unequivocally condemn attacks committed in reprisal for the exercise of freedom of expression and should refrain from making statements that

are likely to increase the vulnerability of those who are targeted for exercising their right to freedom of expression.

- b** States should reflect in their legal systems and practical arrangements, as outlined below, the fact that crimes against freedom of expression are particularly serious inasmuch as they represent a direct attack on all fundamental rights.
- c** The above implies, in particular, that States should:
 - put in place special measures of protection for individuals who are likely to be targeted for what they say where this is a recurring problem;
 - ensure that crimes against freedom of expression are subject to independent, speedy and effective investigations and prosecutions; and
 - ensure that victims of crimes against freedom of expression have access to appropriate remedies.
- d** In situations of armed conflict, States should respect the standards set out in Article 79 of Protocol I additional to the Geneva Conventions, 1977, which provides that journalists are entitled to the same protections as civilians, provided they take no action adversely affecting their status.”

Tenth anniversary joint declaration: ten key threats to freedom of expression in the next decade dated 3 February 2010

The tenth anniversary Joint Declaration²⁹⁵ highlights the ten key threats to freedom of expression and expresses the specific concerns of the Special Rapporteurs:

(1) Mechanisms of Government Control over the Media, (2) Criminal Defamation, (3) Violence against Journalists, (4) Limits on the Right to Information, (5) Discrimination in the Enjoyment of the Right to Freedom of Expression, (6) Commercial Pressures, (7) Support for Public Service and Community Broadcasters, (8) Security and Freedom of Expression, (9) Freedom of Expression on the Internet (10) Access to Information and Communications Technologies.

1.5.5.3. African Court on Human and Peoples’ Rights

The African Court of Human and Peoples’ Rights (the “**African Court**”)²⁹⁶ was established by Member States of the Organization of African Unity “to enhance the protective mandate of the African Commission on Human and Peoples’ Rights by strengthening the human rights protection system in Africa and ensuring respect for and compliance with the African Charter on Human and Peoples’ Rights, as well as other international human rights instruments, through judicial decisions.”²⁹⁷

The African Court was established by virtue of Article 1 of the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights (the “**Protocol**”), which was adopted on 9 June 1998 and came into force on 25 January 2004²⁹⁸.

Pursuant to the Protocol, the Court shall have jurisdiction:

- a** to deal with all cases and all disputes submitted to it concerning interpretation and application of the Charter, the Protocol and any other relevant human rights instrument ratified by the States concerned;
- b** to render an advisory opinion on any legal matter relating to the Charter or any other relevant human rights instruments, provided that the subject of the opinion is not related to a matter being examined by the Commission;
- c** to promote amicable settlement in cases pending before it in accordance with the provisions of the Charter;
- d** to interpret a judgment rendered by itself; and
- e** to review its own judgment in light of new evidence [..]"
(Rules of Procedure²⁹⁹, rule 26).

Advisory opinions may be requested not only by States that accepted the Court's jurisdiction, but also by any Member State of the African Union, by any organ of the African Union or by an African NGO recognized by the African Union, on any legal matter relating to the Charter or any other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the Commission.(Article 4 of the Protocol).

The African Commission, States Parties to the Protocol and African intergovernmental organizations can bring a case to the Court³⁰⁰. Individuals and NGOs with observer status may institute cases before the African Court only if the state concerned has specifically signed and ratified the African Declaration required by Article 34 of the Protocol³⁰¹: *"The Court shall not receive any petition (...) Involving a State Party which has not made [a] declaration [accepting the competence of the Court]"* Article 5(3) states that *"the Court may entitle relevant Non Governmental Organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with article 34 (6) of this Protocol"*.

The African Court is formally independent of the African Commission. It may request the Commission's opinion with respect to the admissibility of a case brought by an individual or an NGO. The Court may also consider cases or transfer them to the African Commission, where it feels that the matter requires an amicable settlement.

The African Court's judgments are final and without appeal. They are binding on States that accepted its jurisdiction³⁰². In its Annual Report to the African Union, the Court lists States that have not complied with its judgments.

General Principles

On 20-21 March 2014, the African Court heard its first freedom of expression case: Application No. 004/2013 - *Lohé Issa Konaté v. Burkina Faso*³⁰³. The case concerned Lohé Issa Konaté, an editor from Burkina Faso charged with defamation, public insult and insulting a magistrate for articles alleging corruption of the State Prosecutor. He was convicted and sentenced to a year in prison, fined US\$12 000 and his newspaper was shut down for six months. The convictions and sentences were confirmed on appeal, and Konaté then approached the African Court seeking a ruling declaring that his conviction infringed on his right to freedom of expression.

The crux of Mr. Konaté's argument was that the Burkina Faso legislation is inconsistent with the African Charter. Judgment was rendered on December 5 2014, and the court, in a landmark decision, ruled that Burkina Faso violated right to freedom of expression and ordered Burkina Faso to amend its law

Scope and Nature of Freedom of Expression

At the time of writing, 24 States have ratified the Protocol³⁰⁴. Seven States made the declaration entitling individuals and NGOs to file a complaint.

1.5.6. ASEAN Intergovernmental Commission on Human Rights

The original aims of ASEAN, established in 1967, were political and did not specifically focus on human rights, but human rights have been explicitly integrated into the ASEAN framework by means of the ASEAN Charter adopted in 2007³⁰⁵. Article 14 of the Charter provides for the establishment of a human rights body.

The ASEAN Intergovernmental Commission on Human Rights (the "AICHR")³⁰⁶ was inaugurated in October 2009 and in November 2012 the ASEAN Member States³⁰⁷ adopted the ASEAN Human Rights Declaration³⁰⁸.

The AICHR shall be guided, according to its Terms of Reference³⁰⁹, by, *inter alia*, the principles of "adherence to the rule of law, good governance, the principles of democracy and constitutional government; respect for fundamental freedoms, the promotion and protection of social order and justice". It shall also be guided by the principles of "non-interference in the internal affairs of ASEAN Member States" and "respect for the right of every Member State to lead its national existence free from external interference, subversion and coercion".

The terms of reference states that "AICHR is an inter-governmental body and an integral part of the ASEAN organizational structure. It is a consultative body."

The AICHR is composed of representatives of Member States of the ASEAN, and all its decisions shall be taken by consensus. As a consequence, any Member State can use its veto power to block any criticism of its human rights record.

Scope and Nature of Freedom of Expression

The AICHR is a consultative body with no other specific competencies to receive complaints nor binding powers. It cannot hear cases³¹⁰.

The ASEAN Human Rights Declaration, the non-compliance of which with international human rights law has been explained above³¹¹, is a non-binding document.

Each Member State has signed up to the Commonwealth Charter, which sets out the values and aspirations of the Commonwealth (including democracy, human rights and the rule of

law). There are 16 principles of the Commonwealth Charter, including the principle of freedom of expression, which states: “We are committed to peaceful, open dialogue and the free flow of information, including through a free and responsible media, and to enhancing democratic traditions and strengthening democratic processes”. On World Press Freedom Day (3 May) in 2012, the Commonwealth Secretariat reiterated the importance which the Commonwealth places on a free and responsible press in promoting democracy, development and diversity³¹².

1.5.7. ORGANISATION INTERNATIONALE DE LA FRANCOPHONIE (OIF)

The *Organisation Internationale de la francophonie* (“**OIF**”), or International Organisation of Francophonie, was created in 1970 and is an international organization which represents countries in which French is the first or customary language. It comprises 57 Member States³¹³ and 20 observers³¹⁴. The missions of the OIF are four-fold: to promote French language and cultural and linguistic diversity, to promote peace, democracy and human rights, to support education and to expand cooperation for sustainable development.

The OIF adopted on 3 November, 2000, the Bamako Declaration³¹⁵ which sets out concrete aims, measures and commitments to enhance democracy and human rights and sustainable development. It identifies, as one of the conditions for a stable political system, the need to respect freedom of the press and to ensure that different political voices enjoy equal access to public and private media.

Nature and scope

Recommendations and resolutions of the OIF are not binding.

1.5.8. ORGANISATION OF ISLAMIC COOPERATION'S INDEPENDENT PERMANENT RIGHTS COMMISSION

The Organisation of Islamic Cooperation (or “**OIC**”)³¹⁶ is an international organization consisting of 57 Member States. In 2012, a Permanent Human Rights Commission (the “**OIC Permanent Commission**”) was established within the OIC as an advisory body³¹⁷. The first session of the OIC Permanent Commission was held in Jakarta in February 2012.

General Principles

According to its statute, the OIC Permanent Commission shall “*promote the civil, political, social and economic rights enshrined in the Organisation’s covenants and declarations and in universally agreed human rights instruments, in conformity with Islamic values*”. Among these declarations is the Cairo Declaration on Human Rights in Islam³¹⁸ that contains provisions on freedom of expression.

Restrictions to Freedom of Expression

The OIC Commission promotes restrictions on freedom of expression set forth in the Declaration, i.e. mainly the principles of the Shari’ah, in contradiction with international standards.

Scope and Nature of Freedom of Expression

The Commission is an advisory organ for OIC Member States and therefore its advice is of a non-binding nature.

1.5.9 US SUPREME COURT:

The Supreme Court is the highest tribunal in the USA for all cases and controversies arising under the Constitution and the federal laws of the USA. It also covers cases involving conflicts of State law with either the Constitution or the federal laws of the USA. It is an appellate court, and therefore the court of last resort. In certain circumstances, the US Supreme Court has “*original jurisdiction*” in disputes between States or between States and the Federal Government³¹⁹. The Supreme Court is composed of nine Justices.

General Principles

The First Amendment to the US Constitution established the right to freedom of speech and freedom of the press. It states: “*Congress shall make no law [...] abridging the freedom of speech, or of the press; or the right of the people [...] to petition the Government for a redress of grievances.*”

The Supreme Court has since long underlined the importance of the principal of freedom of expression, of the free flow of ideas: “*Under the First Amendment, there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries, but on the competition of other ideas.*”³²⁰. Judge Brandeis already stated in 1927: “*If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.*”³²¹

While the protections afforded to the press under the US Constitution are very broad, they are not absolute. There are certain restrictions; albeit fairly limited. Some examples of such restrictions on the press consist of:

Restrictions on the publication of confidential government information

In ***New York Times Co. v. United States*, 403 U.S. 713 (1971)**, the US Supreme Court permitted the publication of the “*Pentagon Papers*” which was a top secret U.S. Defense Department study of the Vietnam War. See also Section 5.2.1.2 (Decisions of the Supreme Court of the United States).

Restriction on the promotion of unlawful conduct

In ***Schenck v. United States*, 294 U.S. 47 (1919)**, the US Supreme Court permitted the arrest and conviction of individuals that distributed anti-government materials during wartime to U.S. military recruits.

Restrictions on the publication of libelous statements

In *New York Times v. Sullivan*, 376 U.S. 254 (1964), the Justices overturned a judgment of libel against a newspaper for the content in an advertisement that protested the actions of public officials taken in regard to civil rights protests. See also Section 2.2.5 (USA) and 2.3.3 (Public Officials and Public Figures).

Compliance with laws protecting against the defamation of a protected class of citizens

In *Beuharnais v. Illinois*, 343 U.S. 250 (1952), the Court upheld a law that criminalised the publication of racially or religiously discriminatory materials.

Rights of privacy

In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), the US Supreme Court permitted a claim against a television broadcaster for invasion of privacy in connection with the publication of the name of a deceased victim of a rape. See Section 3.2.4.2 (USA and Canada).

Limited rights of commercial speech

In *Metromedia Inc. v. San Diego*, 435 U.S. 490 (1981), the Justices permitted a city ordinance which restricted the placement of public advertisements.

Restrictions on publication of obscenity

In *New York v. Ferber*, 458 U.S. 747 (1982), the US Supreme Court upheld a law that criminalized child pornographic materials.

Limitations on the methods of distribution

In *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984), the US Supreme Court upheld laws prohibiting the posting of signs on public property.

Restricted environments (e.g., schools, prisons, military)

In *Morse v. Frederick*, 551 U.S. 393 (2007), the Court agreed that a school could restrict the flying of a banner by students at a school event which read "Bong Hits 4 Jesus" under the premise that educators were permitted to suppress student speech that was viewed as promoting illegal drug use.

Even when there are permissible restrictions on the press, the jurisprudence of the US Supreme Court generally requires that such restrictions are limited and clear, so they are not overbroad in their effect of restricting the press.

The US Supreme Court has also provided guidance as to the gathering of information by the press, such as:

Decisions of the Supreme Court are binding in the USA. The decisions of the Supreme Court override the decisions of all other courts in the USA, and no state may pass a law which contradicts a decision of the Supreme Court or the Constitution.

- Right to interview prison inmates. In *Pell v. Procunier*, 417 U.S. 817 (1974), the Court upheld laws that restricted the ability of the press to interview prison inmates.
- Obligation to disclose sources. In *Branzburg v. Hayes*, 408 U.S. 665 (1972), the Court upheld the requirement for a reporter to disclose his sources in connection with criminal drug dealing activities.

There is currently no jurisprudence that would extend the protections of freedom of the press to Internet bloggers. However, the freedoms that exist for the press under the US Constitution also broadly apply toward the rights of freedom of speech under the First Amendment, which would clearly include Internet blogging.

Nature and scope

Decisions of the Supreme Court are binding in the USA. The decisions of the Supreme Court override the decisions of all other courts in the USA, and no state may pass a law which contradicts a decision of the Supreme Court or the Constitution.

The First Amendment protection extends to all publications made in the USA, including publications written by non-US citizens. Although not binding in any other country, the decisions of the Supreme Court are studied with interest throughout the world, particularly in other democratic States.

SECTION II: REPUTATION AND DEFAMATION



2.1 PRIMARY INTERNATIONAL SOURCES

2.1.1 UN Charter

Under the United Nations Charter (“**UN Charter**”)³²⁵, freedom of information is a “fundamental freedom”, of which the promotion and encouragement through international co-operation is one of the objectives of the United Nations (“**UN**”). The Preamble to the UN Charter specifically reaffirms faith “[...] *in fundamental human rights, in the dignity and worth of the human person [...]*” as one of the core resolutions of the “people of the United Nations”.

2.1.2 Universal Declaration of Human Rights

The key importance of human dignity is recognized in the Universal Declaration of Human Rights (“**UDHR**”)³²⁶, both in the Preamble: “*Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world*”; and under Article 12: “*No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks*”³²⁷.

The right to reputation is also bolstered by the provisions of Article 8 of the UDHR (setting out the right to an effective remedy in case of violation) and of Article 29 paragraph 2 of the UDHR (affirming the possibility of protection through restriction of the rights of others).

2.1.3 International Covenant on Civil and Political Rights

The right to freedom of information and the right to reputation are recognized in Article 19 and Article 17 respectively of the International Covenant on Civil and Political Rights (“**ICCPR**”)³²⁸. The tension between the two is apparent in the wording of Article 19, whereby the right to freedom of information may be subject to limitations (including “[...] *to respect the rights and reputation of others*”) provided that such limitations pass the three-part test set out in Article 19 paragraph 3³²⁹. It is worth recalling that, in the interpretation given by the UN Human Rights Committee, the right to freedom of expression also includes controversial and false expression.

On the specific issue of how to ensure that defamation laws comply with Article 19 paragraph 3 of the ICCPR, the UN Human Rights Committee has set out key guidelines in its General Comment No. 34 on Article 19 dated 12 September 2011.³³⁰

- State Parties should consider the decriminalization of defamation; in any case, the application of the criminal law should be limited to the most serious cases and imprisonment is never an appropriate penalty³³¹;
- once a person has been indicted for criminal defamation, State Parties should ensure that trial is commenced expeditiously, as otherwise there may be a chilling effect unduly restricting the freedom of expression of that person and others;
- all defamation laws, and in particular criminal defamation laws, should include the defence of truth and should not be applied to those forms of expression which are not, of their

nature, subject to verification;

- State Parties should not penalize or otherwise render unlawful untrue statements which have been published in error but without malice, especially with regard to comments about public figures;
- in any event, a public interest in the subject matter of the criticism should be recognized as a defence; and
- State Parties should avoid excessively punitive measures and penalties and should place reasonable limits on the requirement for a defendant to reimburse the expenses of the successful party.

On the other hand, in its General Comment No.16 on Article 17 dated 28 September 1988³³², the UN Human Rights Committee has reiterated that Article 17 affords protection to personal honor and reputation against unlawful attacks, whether they come from state authorities or from natural or legal persons, and that states are under an obligation to provide adequate legislation to that end. The term “unlawful” means that no interference or attack can take place except in cases envisaged by the law, which itself must comply with the provisions, aims and objectives of the ICCPR. Provision must be made for everyone to be able to protect himself in an effective manner against any unlawful attack and to have an effective remedy against those responsible.

2.1.4 United Nations General Assembly

Paragraph 1 of Resolution No. 59 (I) of the UN General Assembly dated 14 December 1946³³³ stresses that “*freedom of information requires as an indispensable element the willingness and capacity to employ its privileges without abuse*” and that “[...] *It requires as a basic discipline the moral obligation to seek the facts without prejudice and to spread knowledge without malicious intent*”.

In addition, Article 2 of the Draft Convention on Freedom of Information adopted at the UN Conference on Freedom of Information held in Geneva in March/April 1948, states that freedom of information carries duties and responsibilities and “[...] *may therefore be subject to necessary penalties, liabilities and restrictions clearly defined by law, but only with regard to: [...] (g) Expressions about other persons, natural or legal, which defame their reputations or are otherwise injurious to them without benefiting the public*”.

2.1.5 UN Special Rapporteur on Freedom of Opinion and Expression

The issue of defamation is often considered in the work of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression.³³⁴ Examples include:

Report of the UN Special Rapporteur on access to information, criminal libel and defamation, the police and the criminal justice system, and new technologies, dated 18 January 2000³³⁵

In this report, the following recommendations were made to the states:

- criminal defamation laws should be repealed in favour of civil laws as the latter are able to provide sufficient protection for reputations;
- sanctions for defamation should not be so large as to exert a chilling effect on freedom of opinion and expression and the right to seek, receive and impart information; penal sanctions, in particular imprisonment, should never be applied and awards of damages should be strictly proportionate to the actual harm caused;
- government bodies and public authorities should not be able to bring defamation suits; the only purpose of defamation, libel, slander and insult laws must be to protect reputations and not to prevent criticism of governments or even to maintain public order, for which specific incitement laws already exist;
- defamation laws should reflect the importance of open debate about matters of public interest and the principle that public figures are required to tolerate a greater degree of criticism than private citizens;
- to require truth in the context of publications relating to matters of public interest is excessive; it should be sufficient if reasonable efforts have been made to ascertain the truth (i.e. a defence of non-malicious or reasonable publication should be available);
- with regard to opinions, only patently unreasonable views may qualify as defamatory; defendants should never be required to prove the truth of opinions or value statements; the onus of proof of all elements should be on those claiming to have been defamed, rather than on the defendant;
- in defamation and libel actions, a range of remedies should be available in addition to damage awards, including apology and/or correction.

Tenth Joint Declaration by the four special international mandates for protecting freedom of expression: Ten key challenges to freedom of expression in the next decade, adopted on 25 March 2010 ³³⁶

This Joint Declaration specifically lists criminal defamation among such key challenges. While reiterating a general concern about all criminal defamation laws, the declaration identifies certain features of defamation laws which, when present, are particularly problematic under international human rights law:

- the failure to require the plaintiff to prove key elements of the offence such as falsity or malice;
- the penalization of true statements, accurate reporting of the statements of official bodies, or statements of opinion;
- the protection of the reputation of public bodies, of state symbols or flags, or the state itself;
- the failure to require public officials and public figures to tolerate a greater degree of criticism than ordinary citizens;
- the protection of beliefs, schools of thought, ideologies, religions, religious symbols or ideas;

- the use of the notion of group defamation to penalize speech beyond the narrow scope of incitement to hatred; and
- unduly harsh sanctions such as imprisonment, suspended sentences, loss of civil rights, including the right to practice journalism, and excessive fines.

In addition, when addressing the challenges relating to freedom of expression on the internet, the Joint Declaration expresses concern about jurisdictional rules which allow cases, particularly defamation cases, to be pursued anywhere, leading to a lowest common denominator approach.

Report of the UN Special Rapporteur on key trends and challenges to the right of all individuals to seek, receive and impart information and ideas of all kinds through the Internet, dated 16 May 2011 ³³⁷

In this report, the UN Special Rapporteur recognized that *“due to the unique characteristics of the Internet, regulations or restrictions which may be deemed legitimate and proportionate for traditional media are often not so with regard to the Internet. For example, in cases of defamation of individuals’ reputation, given the ability of the individual concerned to exercise his/her right of reply instantly to restore the harm caused, the types of sanctions that are applied to offline defamation may be unnecessary or disproportionate”* (paragraph 27).

With regard to the role of intermediaries, the UN Special Rapporteur emphasized that generally *“censorship measures should not be delegated to private entities, and intermediaries should not be held liable for refusing to take action that infringes individuals’ human rights”* and therefore for what is posted by others on their media. *“Any requests submitted to intermediaries to prevent access to certain content, should be done through an order issued by a court or a competent body which is independent of any political, commercial or other unwarranted influences”* (paragraph 75).

4, Report of the UN Special Rapporteur on the protection of journalists and media freedom, dated 4 June 2012 ³³⁸

This report emphasized the need to create *“an environment where independent, free and pluralistic media can flourish and journalists are not at risk of imprisonment”* (paragraph 78). Whilst acknowledging that *“defamation laws protect an individual’s reputation from false and malicious attacks and therefore constitute valid grounds for restricting freedom of expression”* under Article 19 of the ICCPR, the report highlighted the risk that defamation laws be abused and has reiterated the recommendation that defamation be classified only as a civil tort as criminal defamation laws *“are inherently harsh”, “have a disproportionate chilling effect on freedom of expression”* and inevitably become *“a mechanism of political censorship”*. In addition, where defamation is classified (only) as a civil tort, the financial sanctions imposed should be proportionate to the harm caused and limited by law. Finally, the report noted that *“public officials, including heads of state and public figures, must tolerate a higher degree of scrutiny than ordinary individuals because of their public functions, and should not be granted a higher level of protection against defamatory statements in the media”* (paragraph 88).

5, Joint Declaration on universality and the right to freedom of expression, adopted by the Special Rapporteurs on 6 May 2014 ³³⁹

This Joint Declaration, adopted by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHRP Special Rapporteur on Freedom of Expression and Access to Information, focuses on the principle of universality of freedom of expression. It emphasizes that *“restrictions on freedom of expression should never represent an imposition by certain groups of their traditions, culture and values on others”*. The Joint Declaration further identifies certain core principles of freedom of expression in respect of which states should be deemed to have no discretion, regardless of local traditions, cultures of values, as follows:

- “the protection of political speech, broadly defined, given the centrality of such speech to democracy and respect for all human rights, which also implies that public figures should accept a greater degree of scrutiny by society” (letter e)
- the illegality under international law of the following restrictions on freedom of expression:
 - *“laws which protect religions against criticism or prohibit the expression of dissenting religious beliefs;*
 - *laws which prohibit debate about issues of concern or interest to minorities and other groups, which have suffered from historical discrimination, or prohibit speech which is an element of the identity or personal dignity of these individuals and/or groups;*
 - *laws which provide for special protection against criticism for officials, institutions, historical figures, or national or religious symbols” (letter f).*

The UN Special Rapporteur has reiterated the recommendation to states to decriminalize defamation in press releases and end-of-mission statements. This includes the press release issued in respect of the conviction of the Colombian journalist Luis Agustin Gonzalez for an editorial relating to the candidacy of a local politician (4 April 2012)³⁴⁰ and the end-of-mission statement issued after the first official visit to Italy (18 November 2013)³⁴¹, where the UN Special Rapporteur stressed that the criminalization of defamation remained a significant issue in the country, notwithstanding the positive step taken of removing the prison sentence for defamation.

2.1.6 UNESCO

UNESCO developed a set of Media Development Indicators (“**MDIs**”) aimed at enabling the assessment of media landscapes at a national level. The MDIs were developed through a broad international consultation launched by the IPDC Intergovernmental Council at its 25th session in 2006.

According to the UNESCO website, *“the Media Development Indicators define a framework within which the media can best contribute to, and benefit from, good governance and democratic development. The MDIs look at all aspects of the media environment and are structured around the five following categories:*

- A system of regulation conducive to freedom of expression, pluralism and diversity of the media;
- Plurality and diversity of media, a level economic playing field and transparency of ownership;
- Media as a platform for democratic discourse;
- Professional capacity building and supporting institutions that underpin freedom of expression, pluralism and diversity;
- Infrastructural capacity is sufficient to support independent and pluralistic media.

Taken as a whole, they provide an aspirational picture of the media ecology to be constructed in order to ensure freedom of expression, pluralism and diversity of the media.

By indicator, one should understand a quantitative or qualitative factor or variable, measured over time, that provides a simple and reliable basis for assessing achievements, change or performance in a country’s media landscape. For each indicator, the MDI framework suggests various means of verification as well as potential data sources.”

Defamation is addressed in Issue C of category 1 of the MDIs, where it is noted that defamation laws should impose *“the narrowest restrictions necessary to protect the reputation of individuals”*, that civil defamation laws are sufficient to adequately protect reputations and therefore criminal defamation laws should be recalled, and guidelines are set out on how a country’s defamation laws should be assessed.³⁴²

2.2 MAIN REGIONAL SOURCES

2.2.1 Europe

In the European area, as already pointed out in Section I, freedom of expression is declared and protected, at a supranational level, as a fundamental human right by both the Council of Europe and the European Union (“**EU**”), in particular under the European Convention for the Protection of Human Rights (“**ECHR**”) and the Charter of Fundamental Rights of the European Union (“**European Charter**”), respectively³⁴³.

In these above contexts, freedom of expression is not absolute and the protection of honor

and reputation of a person as well as the protection against defamation and libel may limit freedom of expression in accordance with the provisions of the ECHR and the European Charter, the principles of which are interpreted and applied from time to time by the European Court of Human Rights (“**ECtHR**”) and the Court of Justice of the European Union (“**CJEU**”).

Defamation and libel laws exist in European countries to protect individuals’ reputation from unfair and untrue attacks. They protect people from being discredited in the estimation of others. On the other hand, the individual’s desire to maintain a good reputation must be balanced against the right of others to criticize and, more generally, against the right to freedom of expression.

Defamation and libel laws allow the award of compensation if a person’s reputation has been damaged as a result of defamatory statements. Defamation laws vary across Europe and the EU, and in a number of Member States criminal sanctions are still in place, jeopardizing freedom of expression³⁴⁴.

Before dealing with the limitations to freedom of expression under both the ECHR and the European Charter, in order to better understand the scope of the balance between the right to freedom of expression and the protection of honor, reputation and against defamation and libel (as applied in first instance by each court in its respective sphere of action), it should be considered that: (i) the ECHR is binding upon the countries who have ratified it with respect to any activities and in each sector of the relevant country, while (ii) the European Charter is binding only with reference to the subject matters pertaining to the EU³⁴⁵.

2.2.1.1 COUNCIL OF EUROPE: EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS

The scope of the principles declared in the ECHR (including freedom of expression and its limitations) are outlined and interpreted by the ECtHR. The ECtHR has played a pivotal role in establishing a minimum standard of protection of freedom of expression with respect to local defamation laws, which in several circumstances have been declared not to be in line with the principles and rights protected under the ECHR.

The protection of the individuals’ honor and reputation is affirmed under Article 10 paragraph 2 of the ECHR, which provides: *“The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”*

European Court of Human Rights

The ECtHR has read into Article 8 of the ECHR on the right to respect for private and family life the importance of respect for a person’s honor and reputation³⁴⁶. The Court has also

clarified that, when balancing between the right to respect for private life and the right to freedom of expression, the outcome should not, in theory, vary according to whether the case has been lodged with the Court under Article 8 of the ECHR by the person who had been the subject to the attacks to his or her private life, or under Article 10 by the person who had disseminated the relevant information. As a matter of principle, these rights (to private life and to freedom of expression) deserve equal respect³⁴⁷. The Court has also clarified that only attacks to honor and reputation which can cause damage to the offended person can fall within the protection of Article 8.

As pointed out in several judgments of the ECtHR, the decision of the Court on the balance to be reached between fundamental rights protected under the ECHR is based on two fundamental principles: (i) the so-called consensus standard (i.e. prevailing legislation trends of the Member States within the Council of Europe) and (ii) the concept of a margin of appreciation (i.e. if a common trend is not recognized among the Member States, each state has a degree of discretion in choosing its own policies).

The margin of appreciation allowed by the ECtHR to Member States in cases relating to the balance to be struck between the right to freedom of expression and, *inter alia*, the protection of honor and reputation, has shifted and has become wider as a consequence of two judgments, with similar contents, *Von Hannover v. Germany*, 7 February 2012 and *Axel Springer v. Germany*, 7 February 2012, in which the ECtHR established that the following criteria should be applied by the local courts to strike the balance between the right to freedom of expression and the right to private life (which includes the protection to honor and reputation):

- contribution to a debate of general interest;
- how well known is the person concerned and what is the subject of the report;
- prior conduct of the person concerned;
- content, form and consequences of the publication;
- circumstances in which the photos/information were taken³⁴⁸.

The ECtHR has, in several cases, reaffirmed a number of principles that stem from paragraphs 1 and 2 of Article 10 of the ECHR. These principles have also been applied to defamation cases to strike the balance between the right to freedom of expression and the individual's right to reputation and honor.

Any limitation on freedom of expression under Article 10 (including limitations for the purpose of protecting the reputation or rights of others) must be: (i) prescribed by law and (ii) necessary in a democratic society. The ECtHR has therefore developed certain principles as regards these two requirements.

(i) Limitation prescribed by law

The ECtHR has, in several circumstances, affirmed that the term "prescribed by law" includes common law.

In *Sunday Times v. United Kingdom*³⁴⁹, it stated: "The Court observes that the word "law" in the expression "prescribed by law" covers not only statute but also unwritten law. Accordingly,

*the Court does not attach importance here to the fact that contempt of court is a creature of the common law and not of legislation. It would clearly be contrary to the intention of the drafters of the Convention to hold that a restriction imposed by virtue of the common law is not “prescribed by law” on the sole ground that it is not enunciated in legislation: this would deprive a common-law State which is Party to the Convention of the protection of Article 10 [paragraph 2] and strike at the very roots of that State’s legal system”³⁵⁰. Furthermore, in the recent case *DELFI v. Estonia*³⁵¹, the ECtHR also affirmed that a restriction to freedom of expression can also be imposed if it is done through the interpretation and application of a law made by competent courts on the grounds that “the applicant company must at least have been familiar with the legislation and case-law, and could also have sought legal advice” and that “the applicant company was in a position to assess the risks related to its activities and that it must have been able to foresee, to a reasonable degree, the consequences which these could entail”.*

(ii) Limitation must be necessary in a democratic society

The ECtHR has established two principles in this respect: (i) that the limitation is justified by reference to a pressing social need in a democratic society and (ii) that the restriction shall be proportionate to its aim.

The case law of the ECtHR relating to the need of a pressing social need and to the principle of proportionality is extensive and, with specific respect to defamation, the *Cumpana Mazare v. Romania* case³⁵² clearly applied such principles. The Romanian local court sentenced two journalists to three months’ imprisonment for insult and seven months’ imprisonment for defamation and ordered them both to serve seven months’ immediate imprisonment. As well as this main penalty, the court imposed the secondary penalty of disqualification from exercising all civil rights. It also prohibited the applicants from working as journalists for one year after serving their prison sentences.

The ECtHR examined the relevant circumstances and, with respect to the test of “*necessary in a democratic society*”, after recalling many of the principles commonly applied by the ECtHR in finding a balance between rights equally protected by the ECHR, established that “*having regard to the margin of appreciation left to the Contracting States in such matters, the Court finds in the circumstances of the case that the domestic authorities were entitled to consider it necessary to restrict the exercise of the applicants’ right to freedom of expression and that the applicants’ conviction for insult and defamation accordingly met a “pressing social need”*³⁵³.

On the other hand, with respect to the determination of whether the interference was proportionate to the legitimate aim pursued, in view of the sanctions imposed, the ECtHR established that “*although the national authorities’ interference with the applicants’ right to freedom of expression may have been justified by the concern to restore the balance between the various competing interests at stake, the criminal sanction and the accompanying prohibitions imposed on them by the national courts were manifestly disproportionate in their nature and severity to the legitimate aim pursued by the applicants’ conviction for insult and defamation. The Court concludes that the domestic courts in the instant case went beyond what would have amounted to a “necessary” restriction on the applicants’ freedom of expression. There has therefore been a violation of Article 10 of the [ECHR]*³⁵⁴”.

In relation to the proportionality of the sanctions imposed by local courts, the ECtHR also recalled one of its fundamental principles, observing: *“the Court considers that the imposition of a prison sentence for a press offence will be compatible with journalists’ freedom of expression as guaranteed by Article 10 of the [ECHR] 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 (see, mutatis mutandis, Feridun Yazar v. Turkey, no. 42713/98, § 27, 23 September 2004, and Sürek and Özdemir v. Turkey [GC], nos. 23927/94 and 24277/94, § 63, 8 July 1999)³⁵⁵”*. Thus, the ECtHR considers that imposition of a prison sentence for a press offence would be legitimate only in very exceptional circumstances. Similar principles have been reaffirmed in the case *Belpietro v. Italy*³⁵⁶, of 24 September 2013.

With respect to freedom of expression of journalists, given the public function they perform, the ECtHR has strictly interpreted restrictions to freedom of expression based on the protection of the reputation or rights of others, and has affirmed that a careful distinction needs to be made between facts and value judgments. The existence of facts can be demonstrated, whereas the truth of value judgments is not capable of proof.³⁵⁷ Value judgments cannot qualify as defamatory if based on undisputed facts.

Furthermore, the ECtHR has ruled that each court of Member States shall allow the persons charged with defamation to give evidence before the ECtHR of the truth of the assertions made by them.

Steering Committee on Media and Information Society

The Steering Committee on Media and Information Society (the **“CDMSI”**)³⁵⁸ has carried out a study of the alignment of laws and practices concerning defamation with the relevant caselaw of the ECtHR on freedom of expression, with particular regard to the principle of proportionality (the **“CDMSI Study”**)³⁵⁹. The Study *“investigate[d], among other things, the case law of the [ECtHR] on freedom of expression in the context of defamation cases and review[ed] the Council of Europe’s and other international standards on defamation. It contain[ed] information on the legal provisions on defamation in various Council of Europe’s Member States. It also attempt[ed] to identify trends in the development of rules on defamation, both in national legal systems and in international law”* (page 5).

The conclusions of the CDMSI Study summarizes certain principles stated by the ECtHR as follows:

“In its case-law regarding the right to freedom of expression in general and defamation in particular, the [ECtHR] bases its view on the notion of democracy. While it does not give a precise definition of the notion of democracy, the [ECtHR] mentions constituent aspects of it -pluralism, tolerance and broadmindedness- without which there could be no “democratic society”. It is clear from the [ECtHR]’s case-law that achieving a democratic society hinges above all on the existence of open public debate. Accordingly, it is equally clear that States’ margin for manoeuvre for restricting the right to freedom of expression and information on matters of public interest, including political issues, is very limited. [...] [T]he [ECtHR] has consistently applied the notion of a high tolerance threshold for criticism where politicians, members of the government and heads of state are concerned.

The [ECtHR] has not proscribed criminal provisions on defamation but it has unequivocally criticised the use of criminal sanctions in response to acts considered to be defamatory. The [ECtHR]'s stance is grounded in the importance it attaches to citizens in general and journalists in particular not being dissuaded from voicing their opinions on issues of public interest for fear of criminal or other sanctions.[...] According to the [ECtHR], civil sanctions, when so severe as to be punitive in nature or coming at the end of a procedure that fails to respect the procedural guarantees of Article 6 of the [ECHR], also constitute major obstacles to the exercise of the right to freedom of expression." (Pages 19-20).

Committee of Ministers

As specified in the Declaration of the Committee of Ministers of the Council of Europe on the Desirability of International Standards dealing with Forum Shopping, in respect of Defamation, "Libel Tourism", to Ensure Freedom of Expression dated 4 July 2012³⁶⁰: *"In defamation cases, a fine balance must be struck between guaranteeing the fundamental right to freedom of expression and protecting a person's honour and reputation. The proportionality of this balance is judged differently in different Member States within the Council of Europe. This has led to a substantial variation in the stringency of defamation law or case law, for example different degrees of attributed damages and procedural costs, different statute of limitation or the reversal of the burden of proof in some jurisdictions"*³⁶¹

The Declaration recalls the importance of freedom of expression and summarizes the principles affirmed by the ECtHR with respect to the limitations to such rights. It also focuses on the fact that Member States still balance between freedom of expression and the protection of honor and reputation in different ways, and that special jurisdiction rules in tort and criminal cases have given rise to the phenomenon known as "libel tourism". Point 5 of the Declaration defines libel tourism as a *"form of "forum shopping" when a complainant files a complaint with the court thought most likely to provide a favourable judgment (including in default cases) and where it is easy to sue. In some cases a jurisdiction is chosen by a complainant because the legal fees of the applicant are contingent on the outcome ("no win, no fee") and/or because the mere cost of the procedure could have a dissuasive effect on the defendant. The risk of forum shopping in cases of defamation has been exacerbated as a consequence of increased globalisation and the persistent accessibility of content and archives on the Internet"*.

Under the Declaration, the Committee of Ministers summarizes the main risks associated with libel tourism as follows:

- libel tourism undermines freedom of expression as well as other rights protected by the ECHR, such as Article 6 (right to a fair trial) and Article 8 (right to respect for private and family life);
- the improper use of defamation laws affects all those who wish to avail themselves of freedom of expression, especially journalists, other media professionals and academics, and may have an intimidatory effect on journalists (the "chilling effect");
- it can have a detrimental effect on pluralism and diversity of the media;

- given the differences between jurisdictions it is often impossible to predict where a defamation/libel claim will be filed. This is especially true for web-based publications.
- Media interests, by contrast, need predictability, and libel tourism create a situation of legal uncertainty to the detriment of media actors.

The Committee of Ministers then affirms measures to prevent libel tourism, which “*should be part of the reform of the legislation on libel/defamation in Member States to protect freedom of expression and information within a system that strikes a balance between competing human rights*”. It also alerts the Member States on the fact that libel tourism constitutes a serious threat to freedom of expression and information and acknowledges that it is necessary to provide legal protection against awards of damages which are disproportionate to the defamation/injury and to align national laws with the case law of the ECtHR.

The Committee of Ministers adopted another declaration, the Declaration on Freedom of Political Debate in the Media, on 12 February 2004 at the 872nd meeting of the Ministers’ Deputies³⁶². The Committee of Ministers stated it was “*conscious that some domestic legal systems still grant legal privileges to political figures or public officials against the dissemination of information and opinions about them in the media which is not compatible with the right to freedom of expression and information as guaranteed by Article 10 of the [ECHR]*”.

With specific regard to the protection of honor and reputation and other rights of politicians, principle VI of the Declaration provides: “*Political figures should not enjoy greater protection of their reputation and other rights than other individuals, and thus more severe sanctions should not be pronounced under domestic law against the media where the latter criticize political figures. This principle also applies to public officials; derogations should only be permissible where they are strictly necessary to enable public officials to exercise their functions in a proper manner.*”

Parliamentary Assembly of the Council of Europe

The Parliamentary Assembly passed several resolutions of interest for the topic.

Resolution 428 (1970) containing a declaration on mass communication media and Human Rights³⁶³

In the context of this resolution, the Parliamentary Assembly recognized that the protection of honor and reputation falls also within the scope of the protection of the right to privacy, stating that “*The right to privacy consists essentially in the right to live one’s own life with a minimum of interference. It concerns private, family and home life, physical and moral integrity, honour and reputation, avoidance of being placed in a false light, non-revelation of irrelevant and embarrassing facts, unauthorised publication of private photographs, protection against misuse of private communications, protection from disclosure of information given or received by the individual confidentially. Those who, by their own actions, have encouraged indiscreet revelations, about which they complain later on, cannot avail themselves of the right to privacy.*”

**Resolution 1577 calls on the
Member States to abolish,
without delay, prison sentences
for defamation.**

Resolution 1577(2007)³⁶⁴ and Recommendation 1814 (2007)³⁶⁵ both entitled “Towards Decriminalisation of Defamation”

Resolution 1577 calls on the Member States to abolish, without delay, prison sentences for defamation. This principle is in line with the established case law of the ECtHR which, in several circumstances, has affirmed that imprisonment, as criminal sanction for defamation, is not proportionate to the legitimate aim pursued by the relevant defamation law (see, among others, *Cumpana Mazare v. Romania*³⁶⁶).

The Assembly also recalled and reaffirmed other principles which have been applied by the ECtHR in defamation cases. In particular, the Assembly stated that “*anti-defamation laws pursue the legitimate aim of protecting the reputation and rights of others*” but also urged the Member States “*to apply these laws with the utmost restraint since they can seriously infringe freedom of expression*”. The Assembly then insisted on the need of procedural safeguards to enable the persons charged with defamation “*to substantiate their statements in order to absolve themselves of possible criminal responsibility*” (paragraph 6).

The Assembly further noted the importance of information of public interest, stating that even if it proves to be inaccurate, “*it should not be punishable provided that it was disclosed without knowledge of its inaccuracy, without intention to cause harm, and its truthfulness was checked with proper diligence*” (paragraph 7).

In addition, the Assembly deplored the fact that in a number of Member States the criminal sanctions imposed on persons in cases of defamation are misused and can create a media self-censorship and stated that such aberrant use of anti-defamation laws is unacceptable. Acknowledging the fact that imprisonment for defamation is still applicable in certain Member States, the Assembly stated that “*every case of imprisonment of a media professional is an unacceptable hindrance to freedom of expression and entails that, despite the fact that their work is in the public interest, journalists have a sword of Damocles hanging over them*” (paragraph 12).

In light of all the above, the Assembly (i) took the view that prison sentences for defamation should be abolished without further delay even if prison sentences are not actually imposed (so as not to give any excuse to those countries which continue to impose them) and also (ii) condemned abusive recourse to unreasonably large awards for damages and interest in defamation cases, pointing out that disproportionate compensation awards may also contravene Article 10 of the ECHR.

The Assembly accordingly called on the Member States to, *inter alia*: “(i) abolish prison sentences for defamation without delay; (ii) guarantee that there is no misuse of criminal prosecutions for defamation and safeguard the independence of prosecutors in these cases; (iii) define the concept of defamation more precisely in their legislation so as to avoid an arbitrary application of the law and to ensure that civil law provides effective protection of the dignity of persons affected by defamation; (iv) make only incitement to violence, hate speech and promotion of negationism punishable by imprisonment; (v) remove from their defamation legislation any increased protection for public figures, in accordance with the Court’s case law; (vi) ensure that under their legislation persons pursued for defamation have appropriate means of

defending themselves, in particular means based on establishing the truth of their assertions and on the general interest; (vii) set reasonable and proportionate maxima for awards for damages and interest in defamation cases so that the viability of a defendant media organ is not placed at risk; (viii) provide appropriate legal guarantees against awards for damages and interest that are disproportionate to the actual injury [..].” (paragraph 17)

Under Recommendation 1814 (2007) the Parliamentary Assembly called on the Committee of Ministers “to urge all Member States to review their defamation laws and, where necessary, make amendments in order to bring them into line with the case law of the [ECtHR], with a view to removing any risk of abuse or unjustified prosecutions” and to instruct the competent intergovernmental committee, the Steering Committee on the Media and New Communication Services, to prepare in the light of the Court’s case law “a draft recommendation to Member States laying down detailed rules on defamation with a view to eradicating abusive recourse to criminal proceedings”.

European Commissioner for Human Rights

The Council of Europe Commissioner for Human Rights issued a Discussion paper on Ethical Journalism in November 2011.³⁶⁷ The paper has been published as an attempt to contribute to debate and reflection on media freedoms in Europe.

The document focused on the relevance of an effective self-regulation to be developed by the media community to be based on an agreed code of ethics. Its aim was to set out a framework for fresh discussions of the ethical challenges that create tension between human rights and journalism.

The Discussion paper analyzed different angles of the relationship between journalism and human rights and specifically dealt with defamation law under section III³⁶⁸. It recognized that defamation laws “are often used to protect public figures from criticism even though human rights law requires people in public life to tolerate more scrutiny than ordinary people” and recalled some principles (also recognized by the ECtHR and OCSE) with particular respect to the decriminalization of defamation, namely that damages awarded under civil law should not be disproportionate to the offence to avoid the so-called “chilling effect”. It also mentioned the fact that in Europe there are individuals “leaving their own countries to seek jurisdictions where their libel claims are more likely to succeed – so-called libel tourism”.

Regional Conference on Defamation and Freedom of Expression 17-18 October 2002³⁶⁹

This Conference brought together public officials, judges and media professionals from South-East European countries. It was organised by the Council of Europe in Strasbourg on 17-18 October 2002 under the framework of the Stability Pact for South-Eastern Europe.

The participants to the Conference noted that defamation laws were failing to give sufficient weight to the right to freedom of expression and recommended, *inter alia* that:

- “defamation and insult should be decriminalised”;

- *“if public authorities nevertheless decide to maintain criminal sanctions, there should be no imprisonment for defamation, a moratorium should immediately be applied where such sentences have already been handed down by national courts and financial penalties should be proportionate. Similarly, in the case of civil proceedings, compensation should be proportionate, in order not to have a chilling effect on freedom of expression and information”*
“there should be a defence of truth. There should also be a defence of fair comment where
- *journalists have acted reasonably and in good faith”;*
“the burden of proof should in principle rest with the plaintiff in cases of defamation. Where
- *the burden of proof is placed on the defendant, the latter should be able to be exonerated from his/her responsibility if he/she is able to provide reasonable evidence that he/she had acted reasonably and in good faith”;*
“there should be no special protection in both substantive and procedural laws or in practice
- *for public officials (including Heads of State), in accordance with the jurisprudence of the [ECtHR]”*

2.2.1.2 EUROPEAN UNION: CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

As described in Section I, the protection of the right to freedom of expression is granted by Article 11 of the Charter of Fundamental Rights of the EU (the **“European Charter”**). As already pointed out in paragraph 2.2.1 of this Section II, the scope of the European Charter is confined to matters at Member States’ level which fall within the implementation of EU law.

The scope of the protection of the right to freedom of expression under the European Charter, set out in Article 52, is in essence, the same as the scope of Article 10 of the ECHR. The European Charter further specifies that the EU is not prevented from providing a more extensive protection than under the ECHR.

Contrary to the provisions of Article 10 paragraph 2 of the ECHR, the European Charter, under Article 11, does not envisage any specific limitations to the right to freedom of expression. Any limitation must fall within the scope of the general provision of Article 52 of the European Charter, which provides that:

“1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

2. Rights recognised by this Charter which are based on the Community Treaties or the Treaty on European Union shall be exercised under the conditions and within the limits defined by those Treaties.”

Under this provision, the right to freedom of expression can be limited in order to, inter alia, “protect the rights and freedoms of others”. In the EU context, honor and reputation are recognized as fundamental rights under a number of considerations. This can be inferred

from the provisions of Article 6 paragraph 3 of the Treaty on European Union³⁷⁰ under which “Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law”.

Indeed, honor and reputation clearly result from the constitutional traditions of the Member States and are also expressly protected under the European Charter. In this specific respect, such rights are generally recognized to fall under the provisions of article 1, where the European Charter expressly recognizes and protects human dignity³⁷¹ (to the extent that this term is interpreted to include all personal rights) and of Article 7 of the European Charter which protects private and family life³⁷². In this second case, the protection of honor and reputation under Article 7 of the European Charter derives from the application of the interpretative rule set out in Article 52 paragraph 3 of the European Charter which provides that, if the European Charter contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down by such Convention. Based on all the above grounds, reputation and honor shall be recognized as fundamental rights under the European Charter and, in accordance with the provisions of Article 52 paragraph 1, in case of conflict between such rights and freedom of expression, the local court is required to strike a balance between them.

Any limitation to the right to freedom of expression must be for the protection of the rights of others (including honor and reputation) and must in every case: (i) be provided for by law (ii) respect the essence of those rights and freedoms, and (iii) be subject to the principle of proportionality.

The CJEU strikes the balance between freedom of expression and honor and reputation taking into account the constitutional traditions of the Member States. The principle of proportionality to the legitimate aim pursued is currently applied by the CJEU in the same way as the ECtHR. There is no relevant case law of the CJEU specifically dealing with the balance of the right to freedom of expression and the protection of honor and reputation yet. The CJEU has issued judgments only in relation to the balance between freedom of expression and the protection of personal data and copyright, in particular last May 13, 2014³⁷³.

2.2.2 ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE (OSCE)

In paragraph 26 of the Charter for European Security adopted in Istanbul in November 1999, the Member States of OSCE³⁷⁴ stated that: “We reaffirm the importance of independent media and the free flow of information as well as the public’s access to information. We commit ourselves to take all necessary steps to ensure the basic conditions for free and independent media and unimpeded trans-border and intra-State flow of information, which we consider to be an essential component of any democratic, free and open society.”

The OSCE Parliamentary Assembly has often addressed the issue of the balance between freedom of information and the protection of reputation. In particular, it has repeatedly called on Member States to repeal laws which provide for criminal sanctions for defamation of public

officials, or which criminalize the defamation of the state, of government bodies or of public officers as such³⁷⁵. The OSCE Representative on Freedom of the Media routinely assesses the domestic defamation laws of Member States and makes recommendations, mostly on the basis and in furtherance of the principles developed in the case law of the ECtHR.

2.2.3 AFRICA

2.2.3.1. The African Charter on Human and Peoples' Rights

Article 9 of the African Charter on Human and Peoples' Rights ("**African Charter**")³⁷⁶ expressly protects freedom of expression by providing that "Every individual shall have the right to receive information [...]" and "*shall have the right to express and disseminate his opinions within the law*". However, no reference is made within the African Charter to, *inter alia*, the protection of the right to reputation, nor to the concept of defamation, although Article 27 of the African Charter provides that the rights and freedoms of each individual (including freedom of expression) should be exercised "with due regard to the rights of others, collective security, morality and common interest".

The African Charter has been criticized by many interpreters due to the omission of some important human rights and the vagueness in the definition of certain rights protected. With specific regard to freedom of expression, this was recognized in November 2000, when the African Commission on Human and Peoples' Rights ("**ACHPR**")³⁷⁷ and Article 19 (an NGO campaigning for the right to freedom of expression) adopted a joint statement noting the importance of freedom of expression and the limited protection given to it by Article 9 of the African Charter.

Thereafter, in the Declaration of Principles on Freedom of Expression in Africa adopted in October 2002³⁷⁸, the ACHPR expressly stated that:

"Any restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary in a democratic society" (Principle II)³⁷⁹.

"States should ensure that their laws relating to defamation conform to the following standards:

- no one shall be found liable for true statements, opinions or statements regarding public figures which it was reasonable to make in the circumstances;
- public figures shall be required to tolerate a greater degree of criticism; and
- sanctions shall never be so severe as to inhibit the right to freedom of expression, including by others" (Principle XII).

In line with the position taken by the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression³⁸⁰, the Special Rapporteur on Freedom of Expression in Africa³⁸¹ has repeatedly called in his reports for State Parties to ensure that criminal defamation and insult laws are either repealed or amended so as to bring them in line with international and regional standards.

**For the effective protection of honor
and reputation, every publisher,
and every newspaper, motion
picture, radio, and television
company, shall have a person
responsible who is not protected by
immunities or special privileges**

Following suggestions and appeals made by the Special Rapporteur, in November 2010, the ACHPR adopted a resolution specifically concerning the repeal of criminal defamation laws in Africa³⁸². In this prominent document the ACHPR, noting *“that criminal defamation laws constitute a serious interference with freedom of expression and impede on the role of the media as a watchdog, preventing journalists and media practitioners to practice their profession without fear and in good faith”*, expressly called on states ratifying the African Charter *“to repeal criminal defamation laws or insult laws which impede freedom of speech, and to adhere to the provisions of freedom of expression, articulated in the African Charter, the Declaration, and other regional and international instruments”*³⁸³. This was the same year in which the Special Rapporteur issued, together with the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, the *Tenth Anniversary Joint Declaration: Ten Key Challenges to Freedom of Expression in the Next Decade*³⁸⁴.

2.2.4 AMERICAS

2.2.4.1. American Convention on Human Rights

The 1969 American Convention on Human Rights (**“American Convention”**)³⁸⁵ protects the right to freedom of thought and expression. Restrictions can be imposed only for limited circumstances such as reputation of individuals, national security and public order.

The American Convention makes clear and direct reference to the protection of the right to reputation. In particular, Article 13 provides that the exercise of the right to freedom of thought and expression *“shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure: the respect for the rights or reputations of others; or the protection of national security, public order, or public health or morals”*.

In addition, Article 14 of the American Convention expressly provides that anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication should have a right to reply and that such reply should in no case remit other legal liabilities which have been incurred by the offender. Further, Article 14 paragraph 3 states that: *“for the effective protection of honor and reputation, every publisher, and every newspaper, motion picture, radio, and television company, shall have a person responsible who is not protected by immunities or special privileges”*.

In the Declaration of Principles of Freedom of Expression adopted by the Inter-American Commission on Human Rights (**Inter-American Commission**) in October 2000³⁸⁶, the Inter-American Commission declared that *“the protection of a person’s reputation should only be guaranteed through civil sanctions in those cases in which the person offended is a public official, a public person or a private person who has voluntarily become involved in matters of public interest. In addition, in 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”* (principle 10).

In this regard, the Inter-American Commission also added that *“public officials are subject to greater scrutiny by society. Laws that penalize offensive expressions directed at public officials, generally known as “desacato laws,” restrict freedom of expression and the right to information”* (principle 11).

Within the scope of his mandate, the OAS Special Rapporteur on Freedom of Expression³⁸⁷ has drafted a formal document containing interpretations of the principles set forth in the Declaration³⁸⁸.

With specific reference to principle 10, the OAS Special Rapporteur affirmed that *“This principle essentially refers to the need to revise laws created to protect people’s reputations (commonly known as libel and slander laws). The kind of political debate encouraged by freedom of expression and information inevitably will generate some speech critical of, or even offensive to, those who hold public posts or are intimately involved in public policymaking. Rather than protecting people’s reputations, libel or slander laws are often used to attack, or rather to stifle, speech considered critical of public administration. The Inter-American Commission has stated that the criminalization of speech directed toward public officials or private individuals voluntarily engaged in matters of public interest is a disproportionate punishment compared to the important role that freedom of expression and information plays in a democratic system”*.

As a consequence, in the OAS Special Rapporteur’s opinion, each state should fulfil *“its obligation to protect the rights of others by establishing statutory protection against intentional attacks on honor and reputation through civil procedures, and by enacting legislation to ensure the right to rectification or reply. In this way, the State safeguards the private life of all individuals, without exercising its coercive power abusively to repress the individual freedom to form and express an opinion. [...] This principle also establishes the standard of “actual malice” as a legal doctrine used to protect the honor of public officials or public figures. In practice, this standard means that only civil sanctions are applied in cases where false information has been produced with “actual malice”, in other words, produced with the express intention to cause harm, with full knowledge that the information was false or with manifest negligence in the determination of the truth or falsity of the information. The burden of proof is on those who believe they have been affected by the false or inaccurate information to demonstrate that the author of the news item acted with malice.[...] there should be no liability when the information giving rise to a lawsuit is a value judgment rather than a factual assertion”*.

In his annual report for 2013³⁸⁹, the OAS Special Rapporteur recalled principle 10 of the Declaration and the consequent need to revise laws limiting freedom of expression, recommending that the Member States:

“Promote the modification of laws on criminal defamation with the objective of eliminating the use of criminal proceedings to protect honor and reputation when information is disseminated about issues of public interest, about public officials, or about candidates for public office. Protecting the privacy or the honor and reputation of public officials or persons who have voluntarily become involved in issues of public interest, should be guaranteed only through civil law;

Promote the inclusion of inter-American standards in civil legislation so that civil proceedings against individuals who have made statements about public officials or about matters of public interest apply the standard of actual malice, in accordance with principle 10 of the Declaration of Principles, and are proportionate and reasonable³⁹⁰.

Finally, in November 2013³⁹¹ the Special Rapporteur gave a detailed status report on the process of repealing criminal defamation laws in the American Region, highlighting that:

- Mexico had repealed the federal laws that permitted individuals to be tried for criminal defamation, and a number of the states of the Mexican federation have done the same;
- the National Assembly of Panama had also decriminalized defamation in relation to criticism or opinions regarding official acts or omissions of high-ranking public servants;
- in April 2009, the Supreme Court of Brazil declared its Press Law incompatible with the Brazilian Constitution since it had imposed severe prison and pecuniary penalties on journalists for the crime of defamation;
- in June 2009, Uruguay eliminated from the Criminal Code the sanctions for the dissemination of information or opinions about public officials and matters of public interest, with the exception of those cases where the person allegedly affected could demonstrate the existence of “actual malice”;
- in November 2009, Argentina reformed its Criminal Code doing away with prison terms for the crime of defamation, and decriminalizing speech about matters of public interest;
- in December 2009, the Supreme Court of Costa Rica invalidated a provision of its Press Law that established a prison penalty for crimes against honor;
- in December 2011, El Salvador approved a reform that substituted prison sentences with fines for crimes against honor and established greater protection for expressions regarding public figures or matters of public interest;
- in July 2012, Grenada passed a law amending the 2012 Criminal Code, which repealed the offenses of negligent and intentional defamation;
- in September 2012, Bolivia declared unconstitutional the Article of its Criminal Code which provided for an aggravated prison sentence for the commission of criminal defamation against a public servant; and in November 2013, Jamaica adopted the 2013 Defamation Act which decriminalized defamation matters.

2.2.4.2. USA

2.2.4.2.1. Protection of Freedom of Expression at the Federal level

Despite not being part of any regional convention on the protection of Freedom of Expression, the United States (“**U.S.**”) protects and safeguards this fundamental right through the First Amendment to the U.S. Constitution, which provides that “*Congress shall make no law [...] abridging the freedom of speech, or of the press*”. The First Amendment protects even the most offensive and controversial speech from governmental suppression and allows

restriction to the right to express opinions only in certain limited circumstances.

Indeed there are only a few categories of expression that may be restricted under the U.S. Constitution, including incitement to imminent violence, true threats and, with specific reference to protection of reputation, defamatory speech.

A leading decision that marked the evolution of U.S. courts approach to defamation vis-à-vis public officials was *New York Times Co. v. Sullivan*³⁹². In that judgment, the U.S. Supreme Court relied upon the First Amendment to reverse previous judgments issued by courts of Alabama which had held that proof of malice could be used to defeat a defendant's claim to privilege, and malice could be presumed in defamatory words. The Supreme Court substituted a standard of "actual malice" which is not presumed. The plaintiff bears the burden of proof. The Supreme Court found that the law the earlier judgments had applied was "*constitutionally deficient for [its] failure to provide the safeguards of freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a public official against critics of his official conduct*". The Supreme Court added that "*libel can claim no talismanic immunity from constitutional limitations,*" but must "*be measured by standards that satisfy the First Amendment.*"

The reasoning behind such an assessment was that "[the making of] erroneous statement[s] is inevitable in free debate" and that punishing critics of public officials for any factual errors would chill speech about matters of public interest.

The Supreme Court set out a rule for defamation cases that still dominates modern-day U.S. defamation law, stating that "*the constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves [by convincing clarity or clear and convincing evidence] that the statement was made with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not*".

Since this decision, U.S. federal defamation law has become explicitly limited by the First Amendment and not as plaintiff-friendly in comparison with other common law countries' standards.

The principle set out in *New York Times Co. v. Sullivan* was later extended to cover "*public figures*"³⁹³ in addition to public officials, then also to so-called "*limited-purpose public figures*" (i.e. an individual who gets involved in a particular public dispute and thereby becomes a public figure for a limited range of issues)³⁹⁴. For the private concerns of private individuals, though, the standard for proving defamation remains lower³⁹⁵. In such cases, defamation can be established if the statements were false and damaged the person's reputation, without the need to show actual malice, but merely that the defendant was negligent.

Later judgments of the U.S. Supreme Court have further narrowed the scope of defamation, by forbidding libel claims for statements which are so ridiculous as to be patently false. In the case *Hustler Magazine v. Falwell*³⁹⁶, the Supreme Court ruled that an allegation believed by nobody cannot bring any liability to its author.

With reference to defamation on the internet, it is also worth mentioning section 230 of the Communication Decency Act of 1996. This provision (“No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider”) protects online intermediaries that host or republish speech against, inter alia, defamation claims, if someone using their online service publishes defamatory statements.

2.2.4.2.2. Protection of Freedom of Expression at the State level

The need to protect and safeguard freedom of expression is also understood by U.S. state courts dealing with civil complaints - often brought by corporations, real estate developers, or government officials and entities - in which the alleged injury is actually the result of petitioning or free speech activities protected by the First Amendment to the U.S. Constitution.

Such complaints, which are technically defined as “Strategic Lawsuit Against Public Participation” (“**SLAPP**”) are typically claims for defamation, intentional infliction of emotional distress, invasion of privacy, or tortious interference with contract, which are filed against a party who has criticized or spoken out against the plaintiff in some public context. A paradigm case is a real estate developer filing a defamation or tortious interference suit against a citizen who had spoken out publicly against a proposed development project.

SLAPPs typically aim at chilling free speech by intimidating critics with the prospect of defending an expensive lawsuit. Defending against a SLAPP requires substantial money, time and legal resources and thus diverts the defendant’s attention away from the public issue. Equally important, however, a SLAPP also embodies a message to others: “you, too, can be sued if you speak up”.

Even though most SLAPPs would likely fail if litigated fully, the SLAPP-filer does not usually intend to do so. Indeed, as previously mentioned, the point of a SLAPP is to intimidate and silence the target through the threat of an expensive lawsuit. In fact, although the First Amendment to the U.S. Constitution protects freedom of speech, the U.S. legal system generally gives the benefit of the doubt to a party bringing a lawsuit until the fact-finding stage, and a winning defendant is not usually entitled to recover his or her attorneys’ fees to cover the expense of legal defense. This means that, even if the claim ultimately fails, the process of defending against a SLAPP through the legal system can be daunting and expensive.

While there is no federal anti-SLAPP law, numerous states - considering the effect these suits can have on citizens petitioning the government for redress of grievances - have enacted some form of anti-SLAPP legislation.³⁹⁷

California, in particular, has adopted a unique variant of anti-SLAPP legislation (§ 425.16 of the California Code of Civil Procedure enacted in 1992 and modified in 2009) intended to frustrate SLAPPs by providing a quick and inexpensive defense. In order for California’s anti-SLAPP statute to be applied, a defendant needs to show that the plaintiff is suing for an “act in furtherance of his/her right of petition or free speech under the United States in connection with

a public issue". If the defendant can make a prima facie case that the suit arises from speech or action covered by the statute, the plaintiff then bears the burden of showing a probability of prevailing on the underlying claim. Thus, where the underlying claim is for defamation, the plaintiff would have to demonstrate early in the proceedings - before discovery - the probability that it could satisfy each element of the claim, including falsity and the appropriate standard of fault.

In addition, this statute allows the defendant to file a special motion to dismiss a complaint filed against him/her. In this case, if a court rules in favour of the defendant, it will dismiss the plaintiff's case early in the litigation and award attorneys' fees and court costs to the defendant. By contrast, if the court finds that such special motion is frivolous or is solely intended to cause unnecessary delay, the court will award costs and reasonable attorney's fees to the plaintiff prevailing on the motion.

Finally, California and seven other states (Delaware, Hawaii, Minnesota, Nevada, New York, Rhode Island, and Utah) also allow so-called "SLAPP back suits," which provide that defendants who have been hit with a SLAPP can file a counterclaim against the plaintiff to recover compensatory and punitive damages for abuse of the legal process. While these suits do not help the defendant avoid the time and expense of litigation, they can evidently act as a deterrent to those considering filing what might be a SLAPP.

2.2.5. ARAB COUNTRIES

2.2.5.1. Arab Convention on Human Rights

The 2004 Arab Convention on Human Rights³⁹⁸ contains a clear and direct reference to the protection of reputation as balance to the right to freedom of expression. Indeed, Article 21 expressly provides that *"no one shall be subjected to [...] unlawful attack on his honor or his reputation. Everyone has the right to protection of the law against such [...] attack"*. Article 32 further affirms that *"the present Charter guarantees the right to information and to freedom of opinion and expression [...] Such rights and freedoms shall be exercised in conformity with the fundamental values of society and shall be subject only to such limitations as are required to ensure respect for the rights or reputation of others or the protection of national security, public order and public health or morals"*.

The Arab Human Rights Committee, which is the treaty body established after the entry into force of the Arab Convention on Human Rights, began examining state reports in 2012. The concluding remarks of the Committee are now published on its website in Arabic only. It has therefore not been possible to obtain any further insight on the position of the organs of the Arab League generally or of the Arab Human Rights Committee specifically on the issue of the balance between freedom of expression and information and the protection of reputation.

According to an online article by Matt Duffy³⁹⁹, a professor of journalism and international media law at the Georgia State University and member of the Center for International Media Education, the following points should be made: (i) in all Arab countries, defamation is a criminal matter, which can be sanctioned with detention; (ii) most Arab countries have

laws that prohibit insults of rulers; (iii) in some Arab countries, the defence of truth is not recognized; and (iv) many Arab countries have laws which sanction the spreading of false news, thereby mandating truth in reporting. The state has thus a monopoly on truth and any contrary reporting may be criminalized. Such legislation is not in accordance with the Universal Declaration of Human Rights and with the International Covenant on Civil and Political Rights.

2.2.5.2. CAIRO DECLARATION OF HUMAN RIGHTS IN ISLAM

The 1990 Cairo Declaration of Human Rights in Islam⁴⁰⁰ provides minimal guidance on the balance to be struck between freedom of expression and the protection of reputation.

As mentioned in Section I, paragraph 1.4.8, Article 22 of the Cairo Declaration recognizes the right for everyone “to express his opinion freely in such manner as would not be contrary to the principles of Shari’ah”. The protection of individuals’ reputation is not mentioned as a counterweight to freedom of expression, but any use of information which violates the sanctity and the dignity of the Prophets is expressly prohibited by Article 22.

The central role given to the Shari’ah by the Cairo Declaration (Article 24 expressly says that “*all the rights and freedoms stipulated in this Declaration are subject to the Islamic Shari’ah*”) is considered by the interpreters as the major limitation of this document, since it is not a lawful restriction provided by the International Covenant. Furthermore it renders the content and the interpretation of the Declaration substantially (i) ambiguous - as it does not specify what constitutes Shari’ah and, given the diversity of opinions on the subject across time and schools of Islamic law, it is impossible to know what rights are protected – and (ii) too restrictive, since Shari’ah represents an extensive moral and legal code, and limiting rights such as freedom of information to a Shari’ah compatible framework of values would essentially render such rights meaningless.

2.2.6. ASIA

The Southeast Asian countries’ Human Rights Declaration (the “**ASEAN Human Rights Declaration**”) is the only regional document pertaining to protection of human rights which has been adopted by Asian Countries.

With specific reference to protection of reputation as a recognized limit to freedom of expression, Article 21 of the ASEAN Human Rights Declaration affirms that “*Every person has the right to be free from arbitrary interference with his or her privacy, family, home or correspondence including personal data, or from attacks upon that person’s honor and reputation. Every person has the right to the protection of the law against such interference or attacks*”.

As is the case regarding the Arab Charter on Human Rights, the ASEAN Human Rights Declaration has also been criticized by regional human rights organizations, which have

claimed it contains provisions that distort universal standards on human rights protection. The UN High Commissioner on Human Rights has joined 62 local, regional, and international civil society groups in calling on ASEAN to suspend the signing of the declaration⁴⁰¹ and, in November 2012, the U.S. Department of State also declared that “*we are deeply concerned that many of the ASEAN Declaration’s principles and articles could weaken and erode universal human rights and fundamental freedoms as contained in the Universal Declaration of Human Rights*”⁴⁰². An ASEAN representative⁴⁰³ has firmly contested international criticism on the ASEAN Human Rights Declaration, defining it as an unnecessarily negative view of affirming that the Declaration is clearly an advance from the previous situation.

2.3. BALANCING THE TWO RIGHTS: PRACTICAL EXAMPLES

2.3.1 Criminal Defamation

While at some level a consensus has been formed on the need to repeal all criminal defamation laws as inconsistent with freedom of expression⁴⁰⁴, the international and regional human rights adjudicating bodies have not yet reached the conclusion of proscribing criminal defamation tout court.

We summarize below the most recent decisions on this matter taken by the main regional human rights courts.

European Court of Human Rights

As briefly outlined in paragraph 2.2.1.1 of this Section II, the ECtHR has in several circumstances criticized the application of criminal sanctions in defamation cases (particularly prison sentences), but has not outlawed such sanctions per se, stating that they can be justified only in exceptional circumstances.

In Cumpăna Mazare v. Romania, 17 December 2004⁴⁰⁵, the ECtHR affirmed that “the Court considers that the imposition of a prison sentence for a press offence will be compatible with journalists’ freedom of expression as guaranteed by Article 10 of the Convention 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.”

The same principle has been reaffirmed in the case of *Belpietro v. Italy*, 24 September 2013⁴⁰⁶. At the time in question, Mr Belpietro was the editor of the newspaper *Il Giornale*. He was convicted, in accordance with the provisions of the Italian Criminal Code, for defamation because, in his capacity as editor, he did not ensure that an article criticizing two Italian public prosecutors was based on sufficient factual basis. Belpietro was sentenced to prison and to pay civil damages. After reiterating the general principles distilled from its case law on the issue, including the balance that has to be struck between the prosecutors’ right to their reputation based on Article 8 of the ECHR and the newspaper editor’s right to freedom of expression based on Article 10, the ECtHR expressed the opinion that the Italian authorities did not breach Article 10 in finding Belpietro liable for publishing the defamatory article.

Although the ECtHR recognized that the article concerned an issue of importance to society

that the public had the right to be informed about, it emphasized that some of the allegations against the persons involved were very serious and without sufficient objective basis. Furthermore, the ECtHR referred to the obligation of an editor of a newspaper to control what is published, in order also to prevent the publication of defamatory articles. This duty does not disappear when it concerns an article written by a Member of Parliament as otherwise, this would amount to an absolute freedom of the press to publish any statement about Members of Parliament in the exercise of their parliamentary mandate, regardless of its defamatory or insulting character. The ECtHR also referred to the fact that the author of the article had already been convicted in the past for defamation of public officials and to the fact that the newspaper had given a prominent place to the author's article in the newspaper.

However, the ECtHR considered the sanction of imprisonment and the high award of damages as disproportionate to the aim pursued and, therefore, came to the conclusion that solely for that reason the interference by the Italian authorities amounted to a breach of Article 10 of the ECHR. The ECtHR especially focused on the fact that a sentence of imprisonment (even if suspended) can have a significant chilling effect and that the conviction was essentially due to the failure of exercising sufficient control before publishing a defamatory article. Therefore there were no exceptional circumstances justifying such a severe sanction.

Similar to the decision in the Belpietro case is the decision in the case, *Ricci v. Italy*, 8 October 2013⁴⁰⁷, concerning the conviction and sentencing of the presenter/producer of a satirical television programme for disclosing confidential images that had been recorded for the internal use of a public television station (the RAI). The ECtHR took the view that, taking into account the applicant's failure to observe the ethics of journalism in particular, his conviction did not itself entail a violation of his right to freedom of expression. However, the nature and severity of the penalty imposed on him, in particular the suspended prison sentence, constituted a disproportionate interference with the legitimate aims of the protection of the reputation of others and the prohibition on disclosing information received in confidence.

The ECtHR took the view that Mr Ricci wished to impart information or ideas and that his conviction and sentence had constituted an interference with his right to freedom of expression. However, that interference was prescribed by law and had the legitimate aims of protecting the reputation of others – namely that of the person appearing in the video – and of preventing the disclosure of information received in confidence. As to the necessity of the interference in a democratic society, the ECtHR rejected the argument of the District Court of Milan and the Court of Cassation that the protection of communications based on a computer or data-transmission system precluded in principle any possibility of balancing against the exercise of freedom of expression. Even where such information was broadcast, there were a number of separate aspects to be examined, namely the interests at stake, the review by the domestic courts, the applicant's conduct and the proportionality of the sanction.

As regards the interests at stake, the ECtHR was prepared to accept Mr Ricci's argument that the broadcast footage concerned a subject of general interest, namely the denunciation of the "real nature" of television in modern society. However, the Court pointed out that Mr Ricci was seeking above all to stigmatize and ridicule individual conduct. If he had intended to start a discussion on a subject of paramount interest for society, such as the role of television,

other means were available to him without involving any breach of the confidentiality of communications.

As regards Mr Ricci's conduct, he could not have been unaware, as a media professional, that the impugned recording had been made on a channel reserved for the internal use of the RAI, or that, consequently, the fact of broadcasting it would breach the confidentiality of that TV station's communications. Accordingly, Mr Ricci had not acted in accordance with the ethics of journalism. In view of the foregoing, his conviction had thus not constituted, in itself, a violation of Article 10. However, when it came to the proportionality of the interference, the ECtHR observed that the nature and severity of the sanctions imposed also had to be taken into consideration. In the present case, in addition to compensation for damage, Mr Ricci had been sentenced to four months and five days in prison. Even though it had been a suspended sentence and the Court of Cassation had found the offence to be time-barred, the fact that a prison sentence had been handed down must have had a significant chilling effect. In addition, the case in question, which concerned the broadcasting of a video whose content was not likely to cause significant damage, was not marked by any exceptional circumstance justifying recourse to such a harsh sanction. Consequently, on account of the nature and quantum of the sentence imposed on Mr Ricci, the interference with his right to freedom of expression had not been proportionate to the legitimate aims pursued. The ECtHR found that there had therefore been a violation of Article 10⁴⁰⁸.

Inter-American Court of Human Rights

For years, the Inter-American Court of Human Rights ("IACHR") had consistently maintained the view that Member States' criminal defamation laws are a direct violation of freedom of expression, protected by Article 13 of the American Convention on Human Rights.

However, starting from the *Kimel v. Argentina*⁴⁰⁹ case in 2008, court watchers have begun to see a change in the Court's orientation on the matter, with some judges beginning to re-evaluate the compatibility of criminal defamation convictions with freedom of expression. The most recent example is the IACHR's judgment in *Memoli v. Argentina*⁴¹⁰ issued in 2013 where a bare majority of the Court ruled that a criminal defamation conviction did not violate the right to freedom of expression.

In Ricardo *Canese v. Paraguay*⁴¹¹, in 2004, a case concerning a candidate for the presidential election in Paraguay who called another presidential candidate, during an electoral debate, a "front man" for the Paraguayan Building Companies Consortium, the candidate was sentenced for slander. The Court noted that punitive measures for the issuing of certain statements constituted an indirect infringement of freedom of expression according to Article 13 of the American Convention on Human Rights. The Court found the criminal proceedings, the prison sentence against Mr. Canese as well as the prohibition of leaving the country to be an indirect means of violating his freedom of expression and, therefore, a violation of Article 13 of the American Convention.

The Court also highlighted the importance of freedom of expression during election campaigns and in matters of public interest, noting that "*everyone must be allowed to question*

and investigate the competence and suitability of the candidates, and also to disagree with and compare proposals, ideas and opinions, so that the electorate may form its opinion in order to vote”.

In *Kimel v. Argentina*, the IACHR considered the case of Mr Eduardo Kimel, a journalist, writer, and investigative historian, who had been convicted for the way he criticized in his book the handling of a murder case by the responsible authorities. He was sentenced for libel to one year imprisonment and payment of USD20,000.00 as damages.

The Inter-American Court, slightly modifying its original orientation on the matter of criminal defamation laws, affirmed that *“the Court does not deem any criminal sanction regarding the right to inform or give one’s opinion to be contrary to the provisions of the Convention; however, this possibility should be carefully analyzed, pondering the extreme seriousness of the conduct of the individual who expressed the opinion, his actual malice, the characteristics of the unfair damage caused, and other information which shows the absolute necessity to resort to criminal proceedings as an exception”*. Yet the IACHR concluded that, considering the specific facts related to the case, the *“violation of Mr Kimel’s right to freedom of thought and expression has been overtly disproportionate as excessive in relation to the alleged impairment of the right to have one’s honor respected”*. The IACHR ordered the state to pay compensation and to set aside the criminal sentence and all the effects deriving therefrom. Moreover, it asked Argentina to bring within a reasonable time its domestic legislation into compliance with the provisions of the American Convention.

In *Tristán Donoso v. Panama*⁴¹², the applicant was a lawyer whose privileged conversation with a client was taped by an unknown party and then released by Panama’s Attorney General. In a press conference, Tristán Donoso accused the state of taping the telephone conversation. Having been exposed at the press conference, the Attorney General brought criminal charges against the applicant for slander and libel, for which Mr Donoso was criminally convicted and ordered to pay damages. The Inter-American Court concluded that the Member State violated the lawyer’s right to freedom of expression, since the criminal punishment imposed upon Mr Donoso was *“evidently unnecessary, considering the alleged violation of the right to honor in the instant case, for which reason it results in a violation of the right to freedom of thought and of expression enshrined in Article 13 of the American Convention, as related to Article 1(1) of such treaty, to the detriment of Mr Donoso”*.

In *Usón Ramírez v. Venezuela*,⁴¹³ the Court considered the conviction of Usón, a retired military officer, for the crime of “slander against the National Armed Forces” due to his participation in a television program where he expressed critical opinions regarding the reaction of the military institution in the case of a group of soldiers who had been severely injured while in a military establishment. The Court reiterated the general principle expressed in *Kimel v. Argentina* (i.e. that criminal defamation laws may be a legitimate restriction of freedom of expression in certain exceptional circumstances) but found that the criminal law used to convict Usón did not comply with the principle of legality because it was ambiguous. In addition, having affirmed that “both rationality and proportionality shall guide the behaviour of the State when exercising its punitive power, thus avoiding the leniency which is characteristic of impunity such as abuse of discretion regarding the determination of

criminal penalties”, the Court then concluded the application of the criminal law in the case was not appropriate, necessary or proportionate. The Court ordered Venezuela to annul the military justice proceeding against the applicant (among other orders) and to modify, within a reasonable time, the criminal provision employed in his case.

In *Uzcátegui et al. v. Venezuela*,⁴¹⁴ the Court considered the situation of Luís Uzcátegui, who had released statements to the press accusing two police commanders from the Venezuelan State of Falcón of executing his brother and others. In reaction to these statements, one of the police commanders filed a criminal complaint with the Falcón State Criminal Court Circuit against Uzcátegui for aggravated defamation (which is criminalized under the Venezuelan Criminal Code) and local courts agreed to hear the case. Five years later, on 9 April 2008, the case was dismissed.

The IACHR found that Mr Uzcátegui’s public statements could and should “be understood as part of a broader public debate on the possible implication of the State security forces in cases involving grave human rights violations”. Taking into account the relevance of such assertions, the Court found that the existence of the criminal proceeding, its duration in time (6 years), and the circumstance of the high rank of the person filing the complaint “could have generated a chilling or inhibiting effect on the exercise of freedom of expression, contrary to the State’s obligation to guarantee the free and full exercise of this right in a democratic society”.

Finally, in *Memoli v. Argentina*, the Court considered the sentence of one year and five months prison handed down to Carlos and Pablo Mémoli - father and son and publishers of the newspaper La Libertad in San Andrés de Giles, a town in the Buenos Aires province - after they printed a series of stories and aired opinions denouncing alleged wrongdoing in the sale of space in the local cemetery by a mutual assistance organization. A court acquitted the three people accused by the Mémolis. After the acquittal, these people pursued a libel case against the Mémolis.

The Mémolis brought the case before the Inter-American Court, complaining that they had suffered an attack on their freedom of expression. In settling the conflict between freedom of expression and the right to reputation, a bare majority of the Court’s judges (four of seven) affirmed for the first time that “Journalists are not exempted from responsibility in the exercise of their freedom of expression”. “This Court believes that journalists have the obligation to check in a reasonable manner, if not thoroughly, the facts that ground their opinions”. “It is appropriate to demand balance and diligence in the cross-checking of sources and the search of information. This implies the right of the public not to receive a manipulated version of the facts”. “Freedom of expression does not grant journalists an unlimited protection; even in matters of public interest journalists must carry out their duties with responsibility”. On this basis, the Court upheld the criminal conviction against the Memolis.

The new position assumed by the Inter-American Court in the case *Memoli v. Argentina* has been heavily criticized by human right groups.⁴¹⁵

2.3.2 Disproportionate damages awards

Even where defamation is sanctioned as a civil tort, states have been repeatedly urged to provide clear criteria and caps for the determination of damages, given that excessive damages awards can per se have a chilling effect on freedom of information.

The following guidelines can be derived from the case law of the main regional human rights courts.

European Court of Human Rights

As already outlined in paragraph 2.2.1.1 of this Section II, there is an established case law of the ECtHR recognizing that self-censorship can arise not only from the imposition of criminal sanctions, but also from the issue of disproportionate or excessive damages awards.

The above has been affirmed in the decision on the case, *Tolstoy Miloslavsky v. the United Kingdom*, 13 July 1995⁴¹⁶. In that case, the Court affirmed that, although the relevant legal rules concerning damages for libel were formulated with sufficient precision rendering the award “prescribed by law” as required by the ECHR, “the Court takes note of the fact that the applicant himself and his counsel accepted that if the jury were to find libel, it would have to make a very substantial award of damages [...]. While this is an important element to be borne in mind it does not mean that the jury was free to make any award it saw fit since, under the Convention, an award of damages for defamation must bear a reasonable relationship of proportionality to the injury to reputation suffered.” And furthermore “The sum awarded was three times the size of the highest libel award previously made in England [...] and no comparable award has been made since. An award of the present size must be particularly open to question where the substantive national law applicable at the time fails itself to provide a requirement of proportionality. In this regard it should be noted that, at the material time, the national law allowed a great latitude to the jury. [...]. The Court cannot but endorse the above observations by the Court of Appeal to the effect that the scope of judicial control, at the trial and on appeal, at the time of the applicant’s case did not offer adequate and effective safeguards against a disproportionately large award. Accordingly, having regard to the size of the award in the applicant’s case in conjunction with the lack of adequate and effective safeguards at the relevant time against a disproportionately large award, the Court finds that there has been a violation of the applicant’s rights under Article 10 of the Convention.”

Inter-American Court of Human Rights

Although all the judgments on defamation issued by the Inter-American Court relate to criminal defamation proceedings, in *Tristán Donoso v. Panama* the local court, alongside the criminal conviction, also ordered the applicant to pay damages⁴¹⁷. The Court had the opportunity to address the issue of the possible negative consequences of disproportionate civil sanctions on the exercise of the right to freedom of expression. In this regard, the Court affirmed that “the fear 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”. (Paragraph 129).

It is generally understood that public figures should tolerate a higher degree of scrutiny and criticism than other people.

2.3.3 Public Officials and Public Figures

It is generally understood that public figures should tolerate a higher degree of scrutiny and criticism than other people. The analysis below considers the most recent case law of the main regional human rights courts as well as the case law of the U.S. Supreme Court.

European Court of Human Rights

The ECtHR has affirmed this principle in several judgements. *Lingens v. Austria*, 8 July 1986⁴¹⁸ is one of the leading cases. Mr Lingens was a journalist, convicted and required to pay a fine for having defamed an Austrian politician in a newspaper article. In its decision, the Court:

- Recalled that freedom of expression, as guaranteed in Article 10 paragraph 1 of the ECHR, is one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to Article 10 paragraph 2, it is applicable not only to "information" or "ideas" that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb.
- Described the concept of a "democratic society" as demonstrating or accommodating pluralism, tolerance and broadmindedness;
- Recalled the limitations to freedom of expression applicable also to the press but affirmed that it is nevertheless incumbent on it to impart information and ideas on political issues just as on those in other areas of public interest. Not only does the press have the task of imparting such information and ideas, the public also has a right to receive them.
- Affirmed that "*freedom of political debate is at the very core of the concept of a democratic society, which prevails throughout the Convention*". "*The limits of acceptable critics are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance*". Article 10 paragraph 2 certainly authorizes protection of the reputation of others – that is to say, all individuals and this protection extends to politicians too, even when they are not acting in their private capacity; "but in such cases the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues".
- Finally, in the Court's view, a careful distinction needs to be made between facts and value judgments. The existence of facts can be demonstrated, whereas the truth of value judgments is not amenable to proof. To this end, the Court noted that the facts on which Mr. Lingens founded his value judgement were undisputed, as was also his good faith.

The ECtHR has also reiterated some of the principles affirmed in *Lingens v. Austria* in the *Oberschlick v. Austria No.1* case of 23 May 1991⁴¹⁹. In that case, the applicant was convicted for having reproduced in a periodical the text of a criminal information which he and other persons had laid against Mr Grabher-Meyer. During an election campaign, this politician had made certain public statements, reported in a television programme, concerning foreigners' family allowances, and proposed that such persons should receive less favourable treatment than Austrians. The applicant had expressed the opinion that

this proposal corresponded to the philosophy and aims of National Socialism as stated in the NSDAP Manifesto of 1920. The Court, after having recalled the principles affirmed in the *Lingens v. Austria* case, stated, *inter alia*, that:

- it agreed with the Commission that the insertion of the text of the said information in the journal “contributed to a public debate on a political question of general importance. In particular, the issue of different treatment of nationals and foreigners in the social field has given rise to considerable discussion not only in Austria but also in other Member States of the Council of Europe”. The defendant’s criticisms, as the Commission pointed out, “sought to draw the public’s attention in a provocative manner to a proposal made by a politician which was likely to shock many people. A politician who expresses himself in such terms exposes himself to a strong reaction on the part of journalists and the public”;
- the Court regarded the information given in the mentioned article “only as a value judgment, expressing the opinion of the authors as to the proposal made by this politician, which was clearly presented as derived solely from a comparison of this proposal with texts from the National Socialist Party Manifesto”. It followed that the defendants “had published a true statement of facts followed by a value judgment in respect of those facts. The Austrian courts held, however, that [the defendants] had to prove the truth of his allegations”. But it is not possible to prove value judgments; such a requirement represents an infringement of freedom of opinion.

In *Riolo v. Italia*, 17 July 2008⁴²⁰ the Court also reaffirmed, *inter alia*, that a politician may be subject to more in depth scrutiny by the public than a private individual. In that case, the applicant was an Italian researcher in political science at the University of Palermo. He had been convicted for defamation following the publication of an article entitled “*Mafia and law. Palermo: the province versus itself in the Falcone trial. The strange case of Mr Musotto and Mr Hyde*”. The article was published in November 1994 in the newspaper *Narcomafie*. In this article, the applicant criticized the conduct of Mr Musotto, a lawyer at the Palermo Bar and President of the Province of Palermo, whose conduct was described as supposedly ambiguous. Mr Musotto was representing one of the accused in the criminal proceedings concerning the murder of Giovanni Falcone - a judge engaged in the fight against the Mafia - while the question whether the Province of Palermo should join the proceedings as a civil party was under discussion. In April 1995, Mr Musotto brought a civil action for damages against the applicant, alleging defamation. In May of that year, the article was re-published in *Narcomafie* and in the national daily newspaper *Il Manifesto*. The applicant was finally convicted for defamation.

The ECtHR, based on the above grounds and on other principles which are established under its case law, concluded that the applicant’s article could not be said to constitute a gratuitous personal attack on Mr Musotto. Furthermore, with regard to the ironic expressions used by the applicant, the Court reiterated that journalistic freedom also covered possible recourse to a degree of provocation. Moreover, the expressions used by the applicant had not amounted to insults and could not be said to be gratuitously offensive, but had been connected to the situation being reported on by the applicant. The Court also observed that the truth of the main factual information contained in the article had not been disputed.

Inter-American Court of Human Rights

With reference to the difficult balance between protection of freedom of expression and defence of public figures' and public officials' reputation, the Inter-American Court has repeatedly noted that criminal statutes on *desacato*, libel and slander, which provide special protection for the honor and reputation of public officials, are incompatible with the right to freedom of expression provided for under Article 13 of the American Convention. Indeed, in a democratic society public officials, rather than receiving such special protection, should be exposed to a greater level of scrutiny so as to facilitate a wider public debate and democratic oversight of their actions.

The leading example of the Inter-American Court's position on the matter at issue is the Court's decision in *Herrera-Ulloa v. Costa Rica*⁴²¹. That case concerned a journalist who had published several articles reporting information from various European newspapers on allegedly illegal conduct by a Costa Rican diplomat, who then sued Mr. Herrera-Ulloa for slander. The state court fined the journalist 300,000 colons (around US \$1,000) and ordered that his name be entered into the Registry of Criminal Offenders. The conviction was grounded on the fact that the journalist had failed to prove the truth of the reported assertions contained in the European press. The Inter-American Court found that the conviction was an unreasonable violation of the right to freedom of expression and ordered the annulment of criminal proceedings against the journalist as well as the removal of his name from the Registry of Criminal Offenders. The Court also ordered Costa Rica to reform its national legal system, and to pay Mr. Herrera-Ulloa US \$20,000 in reparations.

In particular, the Court based its decision on the principle (internationally recognized and also set forth under principle 10 of the Declaration of Principles of Freedom of Expression adopted by the Inter-American Commission⁴²²) that public officials and others who "*enter the sphere of public discourse*" must tolerate a greater "*margin of openness to a broad debate on matters of public interest*", this being essential to the proper functioning of democracy. The Court further noted that "*the special protection enjoyed by political speech does not flow from the status of the individuals involved, but from the public interest in the discussion of their activities and performance*". The Court thus found that Herrera had largely reported on allegations published by the European media. Requiring him to prove those third-party allegations, in a case where there was a clear public interest in exposing corruption, had amounted to an impermissible restriction on his freedom of expression.

U.S. Supreme Court

As mentioned above⁴²³, until the second half of the 20th century, the right to reputation weighed in the U.S. more heavily in the legal balance than the right to freedom of speech or expression, with the U.S. Supreme Court usually confirming convictions for defamation issued by U.S. Courts in libel cases. Indeed, defamation was considered in the U.S. as not covered by constitutional principles in general or the First Amendment in particular, with the U.S. Supreme Court comparing libel to obscenity and fighting words and stating that "*there are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words - those which by their very*

*utterance inflict injury or tend to incite an immediate breach of the peace*⁴²⁴.

Starting from 1964, however, the U.S. Supreme Court's approach to libel cases evolved through the issuance of a number of innovative decisions which led – by recognizing a constitutional dimension for defamation – to the current U.S. approach to defamation, which is now much less plaintiff-friendly than in Europe and in Commonwealth countries. As mentioned, the first landmark decision was issued in 1964 in *New York Times Co. v. Sullivan*⁴²⁵.

In 1960, the New York Times published an article by the Committee to Defend Martin Luther King, detailing – with undeniable factual errors – abuses suffered by Southern black students at the hands of the police. Although not mentioned by name in the article, the city commissioner managing the police department, L.B. Sullivan, sued the New York Times. The trial judge and the appellate courts upheld Sullivan's claim, relying on the principle that falsity and malice should be presumed.

The U.S. Supreme Court reversed the earlier judgments. It ruled that public officials could prove defamation only if they could demonstrate actual malice, that is, that the speaker or author acted with knowledge that the defamatory statement was false or "*with reckless disregard of whether it was false or not*".

A few years later, in *Curtis Publishing Co. v. Butts*⁴²⁶ the U.S. Supreme Court extended the actual malice rule to public figures, that is, to persons who are not public officials, but who are involved in issues in which the public has a justified and important interest.

The U.S. Supreme Court further clarified the limits of the "actual malice" standard and the difference between public and private figures in libel cases in *Gertz v. Robert Welch*⁴²⁷. In that case, a Chicago magazine had alleged that there was a communist conspiracy to discredit local police and that the trial concerning a Chicago police officer who killed a man was part of that plan, as the murdered was a communist affiliate. The victim's family sued the publisher for defamation and the District Court decided that the standard set out in *New York Times v. Sullivan* should also apply.

The case eventually went to the U.S. Supreme Court. The Court drew a distinction between public figures and private persons for the applicability of the *New York Times v. Sullivan* doctrine. The Court noted two differences: (1) public officials and public figures have greater access to the media in order to counter defamatory statements; and (2) public officials and public figures to a certain extent seek out public acclaim and assume the risk of greater public scrutiny.

For these reasons, the U.S. Supreme Court laid down a different standard for private persons: a private person does not have to show that a defendant acted with "actual malice" in order to prevail in a defamation suit. A private plaintiff usually must show simply that the defendant was negligent or at fault. However, private defamation plaintiffs still cannot recover punitive damages unless they can show evidence of "actual malice".

The U.S. Supreme Court also determined, as a general principle, that certain persons could

be classified as “*limited-purpose public figures*” with respect to a certain controversy. The Court noted that sometimes an individual “*injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues*”. These limited-purpose public figures, as plaintiffs in defamation cases, are also subject to the “actual-malice” standard. When considering the plaintiff’s status, the US Supreme Court determined that he was a private person, not a limited-purpose public figure, because he had taken no part in the criminal prosecution of the officer, nor had he made any press statement. As a consequence, the plaintiff, as a private person, was not subject to the “actual malice” rule and, in order to prevail against the publisher, he only needed to prove that the latter acted with negligence or was at fault.

2.3.4 DEFAMATION OF THE STATE OR GOVERNMENT BODIES, OR OF THE JUDICIARY

Laws which ban insults and criticism of the state, of rulers, government bodies or public officials per se pose a great threat to freedom of expression and are increasingly criticized in the international human rights arena.

European Court of Human Rights

This principle has been affirmed by the ECtHR in *Castells v. Spain*, 23 April 1992⁴²⁸. In 1979, a Spanish weekly magazine had published an article entitled “*Insultante Impunidad*” (Outrageous Impunity) by Mr Castells, a senator supporting independence for the Basque Country. Mr Castells was prosecuted for allegedly insulting the Government. In his defence, Mr Castells emphasized the crucial importance of freedom of expression for an elected representative, as the spokesman for the opinions and anxieties of his electorate. In addition, that freedom required extra guarantees when the discussion related to a matter of public interest (as in that very case, the contested article being part of a wide debate on the climate of insecurity which had prevailed in the Basque Country since 1977).

The ECtHR recalled the main principles of its case law stating that “*the freedom of expression, enshrined in paragraph 1 of Article 10 (art. 10-1), constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress. Subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society”*” and also that “*the pre-eminent role of the press in a State governed by the rule of law must not be forgotten. Although it must not overstep various bounds set, inter alia, for the prevention of disorder and the protection of the reputation of others, it is nevertheless incumbent on it to impart information and ideas on political questions and on other matters of public interest*”.

With respect to the limits admissible in relation to criticism of a Government, the Court also stated that: “*The limits of permissible criticism are wider with regard to the Government than in relation to a private citizen, or even a politician. In a democratic system the actions or omissions of the Government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion. Furthermore, the dominant position which*

the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media.” It then considered that such interference in the exercise of the applicant’s freedom of expression was not necessary in a democratic society.

In *Thorgeirson v. Iceland*, 25 June 1992⁴²⁹, Mr Thorgeirson had been fined for publishing two articles concerning police brutalities in a newspaper. After recalling the importance of freedom of expression and press freedom specifically, the Court observed there was no basis in its case law for distinguishing between political discussion and discussion of other matters of public concern in the manner suggested by the Government.

The applicant had essentially reported what was being said by others about police brutality. He had been convicted by the Reykjavik Criminal Court of an offence under Article 108 of the Icelandic Penal Code partly because of failure to justify what the local court had considered to be his own allegations. In so far as the applicant was required to establish the truth of his statements, he was, in the ECtHR’s opinion, faced with an unreasonable, if not impossible task.

In Brunet Lecomte and *Lyon Mag’ v. France*, 6 May 2010⁴³⁰ the applicants were fined for publishing allegations insinuating that a Muslim Professor had taken part in terrorist activities. In 2003, the Court of Appeal of Lyon had found that there had been public defamation of an individual. It ordered the first applicant to pay damages to the professor and found the publishing company civilly liable.

The ECtHR observed that the offending passages and insinuations should have been examined in their context, namely the publication of a series of articles resulting from a three-week investigation into local Islamist networks. Moreover, the professor, as a lecturer and without being compared to a public figure, had exposed himself to press criticism by the publicity that he had given to some of his ideas or beliefs, and could therefore have expected a close examination of his statements. In addition, the article was mainly based on information cited from the French intelligence service. The offending remarks were not therefore devoid of factual basis.

Furthermore, in the light of the quantity and seriousness of the sources consulted, the investigation carried out and the moderation and prudence shown in the article, the applicants had been acting in good faith and so the offending remarks, published by a well-informed press medium, had not exceeded the admissible limits of criticism in such matters. The ECtHR noted that the offending articles, published shortly after the 11 September 2001 attacks, had contributed to a political debate of immediate interest, resituating it in the local context. Therefore, the applicants’ interest in imparting and the public’s interest in receiving information about a subject in the general interest, and its repercussions for the Lyons area as a whole, should prevail over the professor’s right to the protection of his reputation.

In July and *SARL Libération v. France*, 14 February 2008⁴³¹, the applicants were the French daily newspaper Libération and its publication director Serge July, who had been convicted of defamation after publishing an article concerning a criminal investigation into the death, in

suspicious circumstances, of a French judge while he was on assignment abroad. The article reported comments made during a press conference. The aim of the conference had been to make public an official request by the widow of the deceased for an inquiry into the actions of the judges in charge of the criminal investigation. The investigation was criticized on that occasion. The investigating judges in question brought defamation proceedings against the applicants, alleging that four passages in the article were defamatory.

The ECtHR observed that the article in question had been a report on a press conference concerning a case already in the public domain. Moreover, the article had rightly used the conditional tense and quotation marks in several places in order to avoid any confusion in readers' minds between the statements made by the speakers and the newspaper's analysis. The speakers' names had also been given each time for the benefit of the reader, with the result that it could not be argued that some passages could be attributed to the journalist and hence to the applicants.

Furthermore, considering that the limits of acceptable criticism were wider with regard to civil servants acting in an official capacity, the applicants had not even had recourse to a degree of exaggeration or provocation, although that was permitted in the exercise of journalistic freedom.

In *Eon v. France*, 14 March 2013⁴³² a political activist had been convicted for insulting the French President by waving a satirical placard. During a visit by the President of France in 2008, the applicant waved a small placard reading "*Casse toi pov'con*" ("Get lost, you sad prick") as the President's party was about to pass by, an allusion to a much publicised phrase uttered by the President himself that had given rise to extensive comments and media coverage, widely circulated on the Internet and used as a slogan at demonstrations.

The ECtHR observed that, although the phrase "*Casse toi pov'con*" was, in literal terms, offensive to the President, it should be examined within the overall context of the case, particularly with regard to the status of the person to whom it was addressed, the applicant's own position, its form and the context of repetition of a previous statement.

The ECtHR thus emphasized the importance of free discussion of matters of public interest. The Court considered that Eon's repetition of a phrase uttered earlier by the President had not targeted the latter's private life or honor; nor had it simply amounted to a gratuitous personal attack against him. Instead, the Court took the view that Eon's criticisms had been political in nature.

There was therefore little scope under Article 10 for restrictions on freedom of expression in the political sphere. The Court reiterated that politicians inevitably and knowingly laid themselves open to close public scrutiny of their words and deeds and consequently had to

display a greater degree of tolerance towards criticism directed at them. Furthermore, by repeating a phrase that had been used by the President himself and had attracted extensive media coverage and widespread public comment, Eon had chosen to adopt a satirical approach.

Since satire was a form of expression and comment that naturally aimed to provoke and agitate, any interference with the right to such expression had to be examined with particular care.

The ECtHR considered that criminal penalties for an expression and conduct such as that displayed by Eon were likely to have a chilling effect on satirical contributions to discussion of matters of public interest, such discussion being fundamental to a democratic society. The criminal penalty imposed on Eon, although modest, had thus been disproportionate to the aim pursued and unnecessary in a democratic society. The ECtHR therefore found a violation of Article 10 of the ECHR.

Inter-American Court of Human Rights

The Inter-American Court has specifically addressed the issue of national laws condemning defamatory speeches against government bodies and institutions *per se*, in the already mentioned case *Uson Ramirez v. Venezuela*⁴³³. As discussed above, Mr. Usón Ramírez was tried and convicted for the crime of slander after appearing on a television program and expressing critical opinions regarding the military institution's reaction in the case of a group of soldiers who had been severely injured while in a punishment cell. Such conviction was actually based on the application by the Venezuelan court of a criminal statute set out in Article 505 of the Organic Code of Military Justice which provided that "*whoever slanders, offends, or disparages the National Armed Forces or any of its units shall be subject to three to eight years in prison*" (and in fact Mr Usón Ramirez was convicted to deprivation of liberty for five years and six months).

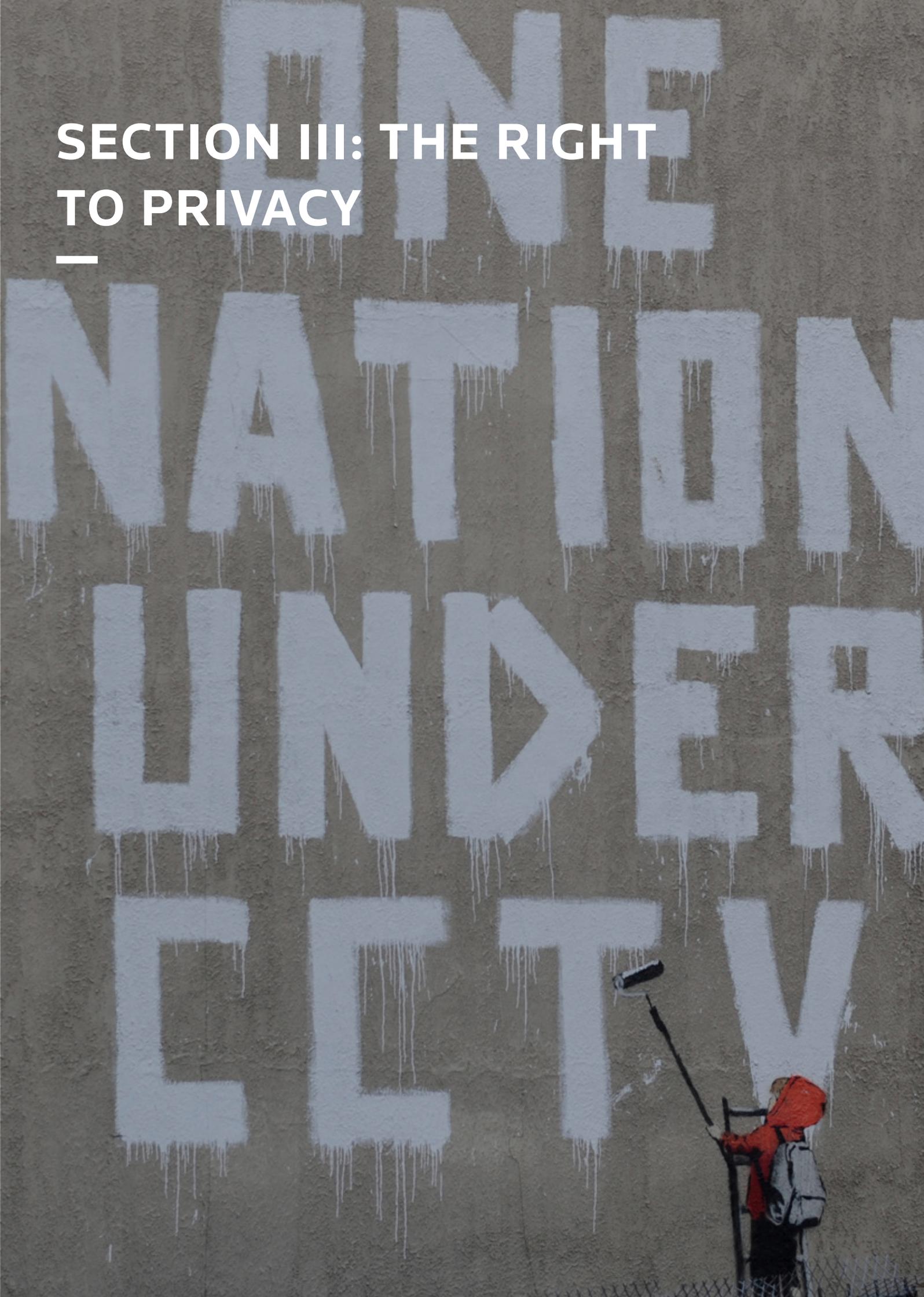
While the Inter-American Commission advised that defending the reputation of the Armed Forces was not a valid purpose to restrict the right to freedom of expression, "*since any further liabilities under the Convention allow for the protection of the honor and reputation of a civil servant or any other person, but it is not allowed to protect the honor and reputation of legal entities, subjects which are not protected under the American Convention*", the Court held that judging whether the Armed Forces were entitled to a right to reputation would fall outside its mandate and that in any case restrictions to the right of freedom of expression are allowed whenever they serve a legitimate purpose. Also, following the case law of the ECtHR, which had upheld restrictions to freedom of expression to protect the reputation of companies, the Court held that: "*the Tribunal considers that the purpose in this case is legitimate since it tries to protect a right that the Venezuelan domestic legislation recognizes to the Armed Forces and, in general, such right is set forth in the American Convention regarding natural persons.*" However, the Court concluded that the formulation of Article 505 of the Organic Code of Military Justice was too vague and therefore incompatible with Article 13 of the Convention and that the imposition of liabilities on Mr. Usón Ramírez for the crime of slander against the Armed Forces was disproportionate and violated his right to freedom of expression, set out in the Articles 9 and 13 paragraphs 1 and 2 of the American Convention.

African Commission on Human and People's Rights / African Court of Human and Peoples' Rights

In the recent case of *Konaté vs. Burkina Faso*⁴³⁴, Mr. Konaté, Chief Editor of the Newspaper L'Ouragan, was sued before the Burkina Faso Courts for defamation, public insult and insult to a magistrate, due to two articles published in his newspaper in August 2012 about possible corruption involving a Public Prosecutor. The Court convicted Mr Konaté to a 12-month imprisonment and payment of a fine equaling around 18 times the annual salary in Burkina Faso. The newspaper was also shut down for a six-month period.

Mr Konaté has taken his case to the African Court, alleging that his conviction violates his right to freedom of expression as protected under Article 9 of the African Charter. In his pleading, Mr Konaté has stressed the fact that the decision of the African Court in this specific case would not only concern his personal situation, but would have also an impact on journalists, human rights defenders, political activists and all others within the African continent who exercise their right to freedom of expression to create a more democratic and free society. The hearing took place on 20-21 March 2014. Judgment was taken on 5 December 2014⁴³⁵; the Court considered that the law was an unjustified restriction to freedom of expression. It therefore held that the conviction of Mr Konaté and the sanctions imposed on him were invalid.

SECTION III: THE RIGHT TO PRIVACY



3.1. PRIMARY INTERNATIONAL SOURCES

3.1.1. Universal Declaration of Human Rights

The rights to privacy and freedom of expression are both essential human rights in modern society. Both rights are explicitly stated in the Universal Declaration of Human Rights (the “UDHR”)⁴³⁶. Adopted by the United Nations General Assembly on 10 December 1948, the Declaration establishes a code of conduct to help promote basic human rights on the international, national, and individual level.

The right to privacy is outlined in Article 12 of the UDHR. Article 12 states that *“no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation”*. Article 12 also states that *“everyone has the right to the protection of the law against such interference or attacks”*. By including this Article in the UDHR, the United Nations acknowledges the right to privacy as an essential right for human freedom, justice and peace.

Freedom of expression is outlined in Article 19 of the UDHR. Article 19 states simply that *“everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers”*. As the Article declares that everyone has the right to freedom of opinion and expression, freedom of the press may be considered as a subset of the right to freedom of expression and opinion.

3.1.2 International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights⁴³⁷ (“ICCPR”) uses the terms *“privacy”* and *“freedom of expression”* in outlining the rights to privacy and freedom of expression. The Covenant was adopted by the United Nations General Assembly to promote civil and political freedom of all peoples while protecting certain inalienable rights, including the right to privacy and freedom of expression.

Article 19 paragraph 2 of the ICCPR states that *“everyone has the right to freedom of expression”*. The Article further states that *“this right includes freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice”*.

The ICCPR states that rights may be subject to certain restrictions if they are necessary to protect the rights and freedoms of others.⁴³⁸ The ICCPR prescribes that the exercise of the freedom to seek, receive and impart information under Article 19 paragraph 2 of the ICCPR carries with it special duties and responsibilities. It may therefore be subject to certain restrictions provided by the law necessary for respect of the rights of others, among which is the right to privacy.⁴³⁹

Article 17 of the ICCPR states that *“no one shall be subjected to arbitrary or unlawful interference⁴⁴⁰ with his privacy, family⁴⁴¹, home⁴⁴² or correspondence⁴⁴³, or to unlawful attacks on*

his honour and reputation". Article 17 also states that "everyone has the right to the protection of the law against such interference or attacks."

In 1988, the CCPR⁴⁴⁴ adopted General Comment No. 16⁴⁴⁵: "Article 17 (Right to Privacy); The right to respect of privacy, family, home and correspondence, and protection of honour and reputation" (the "**General Comment**").

According to the Human Rights Committee, "Article 17 provides for the right of every person to be protected against arbitrary or unlawful interference with his privacy, family, home or correspondence as well as against unlawful attacks on his honor and reputation. In the view of the Committee this right is required to be guaranteed against all such interferences and attacks whether they emanate from State authorities or from natural or legal persons. The obligations imposed by this article require the State to adopt legislative and other measures to give effect to the prohibition against such interferences and attacks as well as to the protection of this right."⁴⁴⁶

Furthermore, according to the Committee, compliance with article 17 of the Covenant requires that the integrity and confidentiality of correspondence should be guaranteed de jure and de facto. Thus, "correspondence should be delivered to the addressee without interception and without being opened or otherwise read." The ICCPR stated that in principle "surveillance, whether electronic or otherwise, interceptions of telephonic, telegraphic and other forms of communication, wire-tapping and recording of conversations should be prohibited."

"Searches of a person's home should be restricted to a search for necessary evidence and should not be allowed to amount to harassment. So far as personal and body search is concerned, effective measures should ensure that such searches are carried out in a manner consistent with the dignity of the person who is being searched."⁴⁴⁷

In order for interferences to be permitted, the CCPR explained that "even with regard to interferences that conform to the Covenant, relevant [national] legislation must specify in detail the precise circumstances in which such interferences may be permitted."

Such interference should correspond to the special circumstances as allowed by the relevant legislation. A decision to make use of such authorized interference must be made only by the authority designated under the law, and on a case-by-case basis.

Furthermore, a three-part-test should be applied when there is any interference in private life, to ascertain whether it conforms to the ICCPR. This test is set out in Article 19(3) of the ICCPR: any interference must be provided by law, must follow a legitimate aim and must be proportionate and necessary to that aim.

The CCPR further considered that "in order to have the most effective protection of his private life, every individual should have the right to ascertain in an intelligible form, whether, and if so, what personal data is stored in automatic data files, and for what purposes."⁴⁴⁸ "Every individual

should also be able to ascertain which public authorities or private individuals or bodies control or may control their files”.

Private individuals or bodies may include media and if so, use of personal data by the media should be restricted because, as the CCPR stated, *“if such files contain incorrect personal data or have been collected or processed contrary to the provisions of the law, every individual should have the right to request rectification or elimination” (Paragraph 10).*

An application of these principles can be found in the Communication Van Hulst v. Netherlands⁴⁴⁹, which raised the question of whether an investigation into an individual’s criminal conduct could be launched on the basis of information gained from an intercepted conversation between that individual and his lawyer, in circumstances where the lawyer’s phone had been tapped for unrelated reasons. According to the Human Rights Committee, it must be considered whether the interference with the author’s phone conversations was arbitrary or reasonable in the circumstances of the case. Furthermore, the Committee recalled its jurisprudence according to which the requirement of reasonableness implied that any interference with privacy must be proportionate to the end sought, and must be necessary in the circumstances of any given case⁴⁵⁰.

While acknowledging the importance of protecting the confidentiality of communication, in particular communication between a lawyer and his client, the Committee also considered the need for States parties to take effective measures for the prevention and investigation of criminal offences⁴⁵¹.

The Committee first recalled that *“the relevant legislation authorizing interference with phone communications must specify in detail the precise circumstances in which such interference may be permitted and that the decision to allow such interference can only be taken by the authority designated by law, on a case-by-case basis”*. In this regard, the Committee noted that the procedural and substantive requirements for the interception of telephone calls are clearly defined in the Dutch Code of Criminal Procedure requiring interceptions to be based on a written authorization by the investigating judge⁴⁵².

In the case, the Committee considered that the interception and recording of the author’s telephone calls did not disproportionately affect the right of Mr Van Hulst to communicate with his lawyer in conditions ensuring full respect for the confidentiality of the communications between them. The District Court distinguished between tapped conversations in which the author’s lawyer participated as his lawyer (which were removed from the evidence), and other conversations, which were admitted as evidence⁴⁵³.

Furthermore, the Committee noted that the records of the tapped conversations were kept intact in their entirety, separately from the case file, for possible inspection by the defence.

According to the Committee, as the right to privacy implies that every individual should have the right to request rectification or elimination of incorrect personal data in files controlled by public authorities, it considered that the separate storage of the recordings of the author’s tapped conversations with his lawyer cannot be regarded as unreasonable for purposes of

Article 17 of the ICCPR⁴⁵⁴.

In light of the foregoing, the Committee concluded that the interference with the author's privacy in regard to his telephone conversations was proportionate and necessary to achieve the legitimate purpose of combating crime, and reasonable in the particular circumstances of the case. According to the Committee, there was accordingly no violation of Article 17 of the ICCPR⁴⁵⁵.

3.1.3. UNITED NATIONS GENERAL ASSEMBLY

On 18 December 2013, the 68th Session of the United Nations General Assembly adopted a resolution entitled "The right to privacy in the digital age" (the "**Resolution 68/167**")⁴⁵⁶. While echoing Article 12 of the UDHR and Article 17 of the ICCPR, Resolution 68/167 sought to protect the right to privacy in the context of rapid technological advancement, which has increased the threat of "unlawful or arbitrary surveillance and/or interception of communications, as well as unlawful or arbitrary collection of personal data". The Resolution also aimed to protect the rights of those who expose violations of human rights. Furthermore, following this Resolution, the UN High Commissioner for Human Rights published her Report on the right to privacy in the digital age⁴⁵⁷.

Resolution 68/167 posits that violations of individual privacy and freedom of expression are inconsistent with the principle of democracy itself. It stresses the importance of full respect for the freedom to seek, receive and impart information, including the fundamental importance of access to information and democratic participation. The Resolution also recognizes that the exercise of the right to privacy enables the realization of the right to freedom of expression and to hold opinions without interference. That is, protection of individual privacy may facilitate or enhance freedom of expression.

Resolution 68/167 affirms that "the same rights that people have offline must also be protected online, including the right to privacy".

Resolution 68/167 also requires states "to respect and protect the right to privacy, including in the context of digital communication" and "to put an end to violations of those rights [...] by ensuring that relevant national legislation complies with their obligations under international human rights law". In addition, it requires states to "review their procedures, practices and legislation regarding the surveillance of communications, their interception and collection of personal data, including mass surveillance, interception and collection, with a view to upholding the right to privacy by ensuring the full and effective implementation of all their obligations under international human rights law".

3.1.4 HUMAN RIGHTS COUNCIL RESOLUTIONS

In its resolution on the promotion, protection and enjoyment of human rights on the Internet⁴⁵⁸, dated 16 July 2012, the Human Rights Council observed that the right to privacy is particularly fundamental in the digital age, noting that "the same rights that people have

offline must also be protected online, in particular freedom of expression, which is applicable regardless of frontiers and through any media of one's choice".

During the 26th session of the HRC in 2014, the Council adopted another resolution on the issue of the promotion, protection and enjoyment of human rights on the Internet⁴⁵⁹. This Resolution recognizes that *"for the Internet to remain global, open and interoperable, it is imperative that States address security concerns in accordance with their international human rights obligations, in particular with regard to freedom of expression, freedom of association and privacy", and called upon States to "address security concerns on the Internet in accordance with their international human rights obligations to ensure protection of freedom of expression, freedom of association, privacy and other human rights online"*.

During the 28th session of the HRC in March 2015, in a resolution on the right to privacy in the digital age⁴⁶⁰, the HRC created the mandate of a Special Rapporteur on the right to privacy. This resolution, which reaffirms that *"the same rights that people have offline must also be protected online, including the right to privacy", gives the Special Rapporteur a mandate to "gather relevant information (...) in relation to the right to privacy and to make recommendations to ensure its promotion and protection, including in connection with the challenges arising from new technologies"; to "seek, receive and respond to information (from all) relevant stakeholders or parties"; to "identify possible obstacles to the promotion and protection of the right to privacy, to identify, exchange and promote principles and best practices (...) and to submit proposals and recommendations to the Human Rights Council in that regard, including with a view to particular challenges arising in the digital age"; to "raise awareness concerning the importance of promoting and protecting the right to privacy, including with a view to particular challenges arising in the digital age, as well as concerning the importance of providing individuals whose right to privacy has been violated with access to effective remedy" to "report on alleged violations, wherever they may occur, of the right to privacy" and to submit an annual report to the HRC.*

3.1.5 UN SPECIAL RAPPORTEURS ON FREEDOM OF OPINION AND EXPRESSION

On 17 April 2013, the UN Special Rapporteur on freedom of opinion and expression issued a report to analyze *"the implications of States' surveillance of communications for the exercise of the human rights to privacy and to freedom of opinion and expression"*⁴⁶¹.

The report notes that *"innovations in technology have increased the possibilities for communication and protections of free expression and opinion, enabling anonymity, rapid information-sharing and cross-cultural dialogues. Technological changes have concurrently increased opportunities for State surveillance and interventions into individuals' private communications." It adds further "national laws regulating what would constitute the necessary, legitimate and proportional State involvement in communications surveillance are often inadequate or non-existent. Inadequate national legal frameworks create a fertile ground for arbitrary and unlawful infringements of the right to privacy in communications and, consequently, also threaten the protection of the right to freedom of opinion and expression."*

The report makes clear that security excesses linked to online surveillance are widespread. The use of technology that enables spying on citizens is not limited to authoritarian states, the Rapporteur notes. He cites laws on terrorism, national security and organized crime, which authorize cyber-surveillance. These may be used to “*target vulnerable groups,*” including journalists. The report says: “*Journalists are also particularly vulnerable to becoming targets of communications surveillance because of their reliance on online communication*”.

In addition, the Special Rapporteur notes that journalists are especially exposed to the negative effects of surveillance, which may involve “*violation of...human rights*” (Paragraph 51).

The Rapporteur notes that the use of personal data affects personal privacy. For journalists and their sources, surveillance of their communications can have catastrophic consequences.

Relevant laws currently in place are in many cases out of date or inadequate and must be adapted to keep up the pace with technological change, the report concludes (Paragraph 50). The report recommends penalizing unauthorized surveillance and establishing judicial control of the practice (Paragraph 54), especially as it involves collecting and storing personal data.

The report recommends that governments raise public awareness of the uses of communications technology and of the extent of surveillance mechanisms and legal authority.

3.1.6. UNESCO

In 2012, UNESCO published a Global Survey on Internet privacy and freedom of expression.⁴⁶²

The survey acknowledges that “*it has proven difficult to forge consensus on the specific content of this right*”, although “*it is clear that it has at its essential core some notion of the right to be free of external intrusion.*”

The survey further highlights that “*the content of the right has a subjective element, inasmuch as one may, by treating something as public in nature, effectively render it so, or perhaps cede parts of one’s privacy. Thus, one’s sexual orientation is private, but one might change this by making it public repeatedly through advocacy. In this regard, it may be contrasted with other personal rights, such as to reputation or to freedom of expression, which have much clearer and more objective boundaries.*”

It finally underlines that “*An important issue for Internet privacy in general is (...) the extent to which data protection principles find protection as part of the established human right to privacy.*” “*The core concept behind data protection is that individuals have a right to control the collection and use of data through which they may be identified (personal data). Like privacy, data protection is subject to certain constraints.*”

Personal data on the Internet may include not only data people intentionally decide to share, but also data concerning browsing preferences and habits detected and collected, via tools such as cookies and bugs.

The European Convention on Human Rights (“ECHR”) affirms the right to respect for one’s private and family life (Article 8) as well as the right to freedom of expression (Article 10)

The survey then provides a compressive overview of the global legal and regulatory environment for protection of privacy.

3.2. MAIN REGIONAL SOURCES

3.2.1. Europe

3.2.1.1. Council of Europe: European Convention for the protection of Human Rights

The European Convention on Human Rights (“**ECHR**”)⁴⁶³ affirms the right to respect for one’s private and family life (Article 8) as well as the right to freedom of expression (Article 10).

The right to privacy is affirmed in Article 8 paragraph 1 as part of a wider right to respect for private and family life, home and correspondence. As the Parliamentary Assembly has observed⁴⁶⁴, privacy is “*the right to live one’s own life with a minimum of interference*”.

Article 8 paragraph 2 of the ECHR prohibits any interference with this wider right by public authorities except when the interference is “*in accordance with the law*” and is “*necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*” The reference to the rights and freedoms of others is an important point of reference in terms of the relationship between Articles 8 and 10.

Article 10 of the ECHR is similarly divided into two parts. Paragraph 1 affirms the general freedom to hold, receive and impart information, while Paragraph 2 sets out the conditions and limits to that general freedom. The prescribed limits are not exactly the same as those listed under Article 8 paragraph 2 in relation to privacy. Among the specific limits to the freedom of expression are measures imposed for preserving “*territorial integrity*”, “*preventing the disclosure of information received in confidence*”, “*maintaining the authority and impartiality of the judiciary*” and, “*protection of the reputation or rights of others*”.

It is clear from the prescribed exceptions in Article 8 paragraph 2 and Article 10 paragraph 2 that the rights to privacy and to freedom of expression may limit one another.

Also of relevance, Article 15 of the ECHR provides that the rights set out in the ECHR may be derogated from in times of emergency, while Article 16 permits restrictions on the political activities of aliens, in derogation of Articles 10, 11 and 14.

The European Court of Human Rights (“**ECtHR**”) case law offers some useful explanations of the meaning and scope of Articles 8 and 10. For example, in the *Von Hannover v. Germany* (No. 2) case⁴⁶⁵ of 2012, both Article 8 and Article 10 were analysed and defined.

According to the Court, “*the essential object of Article 8 is to protect the individual against*

arbitrary interference by the public authorities”, but “it does not merely compel the State to abstain from such interference: in addition to this negative undertaking, there may be positive obligations inherent in effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves” (Paragraph 98).

Effective means of protecting individual privacy against interference by others must be put in place.

On the other hand, *“freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to “information” or “ideas” that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb” (Paragraph 101).*

The court then lays down the criteria to balance the right to freedom of expression and the right to respect for private life (see below, section 3.3.1.)

The ECtHR has issued several other detailed judgments under Article 10 relating to freedom of expression and the media. A useful collection of such case law is provided by the European Audiovisual Observatory in its 2013 publication *Freedom of Expression, the Media and Journalists: Case-law of the European Court of Human Rights*⁴⁶⁶.

3.2.1.2. EUROPEAN UNION: CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

The EU Member States are also subject to the provisions of the EU Charter of Fundamental Rights (“the **Charter**”)⁴⁶⁷. The Charter contains a provision affirming that *“everyone has the right to respect for his or her private and family life, home and communications” (Article 7)*, and a provision affirming the freedom of expression and information (Article 11), which *“shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers” while “the freedom and pluralism of the media shall be respected”*.

The Charter also includes a provision affirming that *“everyone has the right to the protection of personal data concerning him or her” (Article 8)*. Personal data is not expressly defined, but Article 8 further states that *“such [personal] data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified” (Paragraph 2).*

The Charter, contrary to other sources such as the ICCPR or the ECHR, does not expressly list the protection of personal privacy as one of the exceptions that could justify restrictions on freedom of expression. Instead, the Charter contains a general limitation provision which applies to all the rights protected in the Charter.

Article 52 states that *“any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.”*

The EU Charter also warns that nothing in its provisions should be intended as restricting the fundamental rights recognized by EU law or by international agreements to which the Union or all the Member States are part of (Article 53).

3.2.2 ORGANIZATION FOR SECURITY AND CO-OPERATION (OSCE)

On 4 May 2015, the OSCE Representative on Freedom of the Media issued a joint declaration on “Freedom of Expression and Responses to Conflict Situations” together with Special Rapporteurs on free expression from the United Nations (UN), the Organization of American States (OAS) and the African Commission on Human and People’s Rights⁴⁶⁸.

The Special Rapporteurs stated, inter alia, that *“surveillance represents an invasion of privacy and a restriction on freedom of expression. In accordance with the three-part test for restrictions on freedom of expression and, in particular, the necessity part of that test, surveillance should be conducted only on a limited and targeted basis and in a manner which represents an appropriate balance between law enforcement and security needs, on the one hand, and the rights to freedom of expression and privacy, on the other. Untargeted or ‘mass’ surveillance was inherently disproportionate and was a violation of the rights to privacy”*⁴⁶⁹.

It states further that *“requirements to retain or practices of retaining personal data on an indiscriminate basis for law enforcement or security purposes are not legitimate”. “personal data should be retained for law enforcement or security purposes only on a limited and targeted basis and in a manner which represents an appropriate balance between law enforcement and security needs and the rights to freedom of expression and privacy.”*

The Special Rapporteurs finally state: *“encryption and anonymity online enable the free exercise of the rights to freedom of opinion and expression and, as such, may not be prohibited or obstructed and may only be subject to restriction in strict compliance with the three-part test under human rights law.”*

3.2.3. AFRICA

3.2.3.1. The African Charter on Human and Peoples’ Rights

The African Charter on Human and Peoples’ Rights (“**African Charter**”)⁴⁷⁰ sets out the basic human rights principles for the 53 ratifying state parties⁴⁷¹. Article 9 of the African Charter affirms that *“every individual shall have the right to receive information”, and that “every individual shall have the right to express and disseminate his opinions within the law”*. Interestingly, there is no corresponding article affirming a right to privacy or reputation.

The African Charter was signed back in 1981 at the initiative of the African Union. It generally follows the ECHR and the Inter-American Democratic Charter in its terminology, but some differences can be highlighted. For example, as far as privacy and its relationship with freedom of expression is concerned, it should be noted that the right to privacy is not mentioned as a standalone right nor does it represent a limitation to freedom of information.

The right to express and disseminate opinions is subject to the limit that this is to be done “within the law”. Article 27 of the African Charter contains a general limitation provision, stating that *“the rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest”*.

Egypt has imposed specific limits on the application of Article 9 of the African Charter within its borders: *“As far as the Arab Republic of Egypt is concerned, the provision of the first paragraph of article 9 should be [confined] to such information as could be obtained within the limits of the Egyptian laws and regulations”*⁴⁷².

The African Charter is a legally binding instrument.

There are two bodies that are supposed to supervise the implementation of, and compliance with, the African Charter by Member States: the Commission on Human and Peoples’ Rights, and the African Court. While the Commission’s role of promoting Human Rights and controlling respect of the African Charter has been recognized by all the signing parties (its existence being envisioned in the African Charter articles) the African Court has been established via an additional protocol, signed by only 27 parties⁴⁷³. That said, the African Court’s powers are much stronger than those of the African Commission, its decisions being binding upon the Member States concerned.

The African Commission on Human and Peoples’ Rights offered an interpretation of Article 9 that takes into account the need to balance freedom of expression with other fundamental rights, as the right to privacy: *“there seems to be an international consensus among states on the content of the right to freedom of expression. This consensus similarly extends to the need to restrict the right to freedom of expression to protect the rights or reputation of others, for national security, public order, health or morals. Freedom of expression is not therefore an absolute right, it may be restricted for the reasons mentioned above but such restrictions should be necessary and have to be clearly provided by law. The Commission made it clear in its ‘Declaration of Principles on Freedom of Expression in Africa’ that ‘any restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary in a democratic society”* (Paragraph 187 of the African Commission’s decision in *Kenneth Good v. Botswana*⁴⁷⁴).

3.2.4. AMERICAS

3.2.4.1. American Convention on Human Rights

The American Convention on Human Rights (“**American Convention**”)⁴⁷⁵ prescribes both the right to privacy (Article 11) and the freedom of thought and expression (Article 13). Interestingly, it also includes a provision (Article 14) called *“right of reply”*, which recognises

the right of those subject to “inaccurate or offensive” publications to corrections of incorrect or offensive statements “for the effective protection of honor and reputation”.

A comparison of the wording of Articles 11 and 13 is instructive. The right to privacy is defined in very broad terms, leaving little room for limitation of the right (which must not be “arbitrary” or “abusive” and the attack “unlawful”).

Article 11. Right to Privacy

1. Everyone has the right to have his honor respected and his dignity recognized.
2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.
3. Everyone has the right to the protection of the law against such interference or attacks.

Whereas Article 13 sets out a very detailed description of what comprises freedom of thought and expression and how the freedom may be limited⁴⁷⁶.

As in other international provisions, permissible limits on the right of privacy are left to be elaborated upon at a national level: there can be lawful attacks on honour or reputation as well as non-arbitrary and non-abusive interference with private life.

The Inter-American Commission approved a Declaration of principles on freedom of expression in 2000⁴⁷⁷. The Declaration expressly sets out the limits to personal privacy by reference to the importance of freedom of expression and information: “Privacy laws should not inhibit or restrict investigation and dissemination of information of public interest. The protection of a person’s reputation should only be guaranteed through civil sanctions in those cases in which the person offended is a public official, a public person or a private person who has voluntarily become involved in matters of public interest. In addition, in 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” (Paragraph 10).

3.2.4.2. USA

Despite being part of the universal treaties on human rights, the USA and Canada are not party to any regional human rights convention. However, their national legislation is very detailed with reference to both the right to privacy and freedom of expression.

3.2.4.2.1 Protection of Freedom of Expression at Federal level

Freedom of speech in the US is protected by the First Amendment to the US Constitution⁴⁷⁸, which states : “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

Despite the First Amendment’s strong language, freedom of speech in the US is not absolute.

The US Supreme Court has recognized several limits to the freedom, including of the protection of personal privacy. The US Supreme Court introduced the concept of a right to privacy in the form of protection from governmental intrusion.⁴⁷⁹ Since then, the US Supreme Court has considered the conflict between the constitutional freedom of press and privacy rights in several landmark cases.

In *Time, Inc. v. Hill*,⁴⁸⁰ the Court considered a claim by a family's members who had been taken hostage in their own house by three escaped convicts. Years after the events, LIFE Magazine published a story about a Broadway musical based on a novel, which was itself loosely based on the family's experience. However, the article exaggerated the similarities between the musical and the family's experience. One of the members of the family suffered a mental breakdown and sued Time Inc., LIFE's publisher, for breach of New York State privacy law, in particular the principle of false light. In reviewing New York's privacy laws, the Supreme Court expounded more generally on the relationship between the First Amendment principles of free speech and privacy laws. A 5-4 majority of the Court found for Time Inc., holding that a retrial was required because state laws could not provide legal redress to individuals "to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or reckless disregard of the truth". In short, the claimants had to prove LIFE Magazine had intentionally or recklessly published falsehoods about them.

In *Cox Broadcasting Corp. v. Cohn*⁴⁸¹, the US Supreme Court considered whether a Georgia statute which prohibited the release of a rape victim's name, despite the particular name in this case being contained in official court records, was unconstitutional. The US Supreme Court, ruled 8-1 in favor of Cox Broadcasting, holding that Georgia's statute violated the First Amendment:

"By placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served. Public records, by their very nature, are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media. The freedom of the press to publish that information appears to us to be of critical importance to our type of government, in which the citizenry is the final judge of the proper conduct of public business. In preserving that form of government, the First and Fourteenth Amendments command nothing less than that the States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection" (Page 420 U. S. 496).

In *Florida Star v. B. J. F.*, the state law under challenge prohibited the publication of a rape victim's name. The newspaper that published it, though, obtained such name from the

publicly available police report made by the Sheriff for the county where the name had been erroneously included. The Court observed:

"[...] where the government itself provides information to the media, it is most appropriate to assume that the government had, but failed to utilize, far more limited means of guarding against dissemination than the extreme step of punishing truthful speech. That assumption is richly borne out in this case. B.J.F.'s identity would never have come to light were it not for the erroneous, if inadvertent, inclusion by the Department of her full name in an incident report made available in a pressroom open to the public. Florida's policy against disclosure of rape victims' identities [...] was undercut by the Department's failure to abide by this policy. Where, as here, the government has failed to police itself in disseminating information, it is clear under Cox Broadcasting, Oklahoma Publishing, and Landmark Communications that the imposition of damages against the press for its subsequent publication can hardly be said to be a narrowly tailored means of safeguarding anonymity. [...] Once the government has placed such information in the public domain, "reliance must rest upon the judgment of those who decide what to publish or broadcast," Cox Broadcasting, 420 U.S. at 420 U. S. 496, and hopes for restitution must rest upon the willingness of the government to compensate victims for their loss of privacy and to protect them from the other consequences of its mishandling of the information which these victims provided in confidence." (Page 491 U. S. 539).

In this case, the US Supreme Court restricted its decisions to the specific facts of the cases and refused to adopt any general principle.

3.2.4.2.2 PROTECTION OF FREEDOM OF EXPRESSION AT STATE LEVEL

The US states' case law tradition offers some protection for privacy of personal information, as a potential limitation to the freedom of expression and of publication.

It is thus illegal to reveal private facts about someone if the average person would find it objectionable to have that information made public, provided that the subject of the information is not a public figure and there is no legitimate public interest in making the information known.

An interesting recent example can be found in the *Velon v. Di Modolo International LLC* case of the Supreme Court of New York⁴⁸².

The plaintiff was a model and an actress, who alleged in her complaint that she attended a casting call in the office of AM Public Relations in New York City in the summer 2011. Her pictures were taken a few weeks later for what she thought at the time was a test shoot. She discovered later that her photograph had been used in a national advertising campaign. Plaintiff then sued the company that used her picture to advertise its products, and the department stores that used the picture, for violation of her right of privacy and publicity.

According to the Court, the unauthorized commercial use of an individual's likeness is protected by the "right to publicity". The Court went on, stating that New York did not

recognize a right of privacy at common law, but one of its statutes, Civil Rights Law §§ 50 and 51, recognized a right to publicity. The latter provides a cause of action for injunctive relief and damages if “[a] person, firm or corporation...uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian.”

Based on the Civil Rights Law, on May 16, 2014, the New York Supreme Court ruled that plaintiff’s claim could proceed to trial.

3.2.5. ARAB COUNTRIES

There are two relevant texts applicable to countries in the Middle East and North Africa⁴⁸³: the Arab Charter on Human Rights⁴⁸⁴ and the Cairo Declaration on Human Rights in Islam⁴⁸⁵.

3.2.5.1. ARAB CHARTER ON HUMAN RIGHTS

The Arab Charter sets a number of basic principles which Member States must respect. Among these principles, Article 21 establishes the right to privacy, while Article 32 affirms the freedom of expression.

The right to privacy is defined as the right not to be arbitrary or unlawfully subjected to “interference with [his] privacy, family, home or correspondence, or to unlawful attacks on [his] honor and reputation”. Article 21 further specifies that such a right includes a right to be protected by law “against such interference or attacks”. Member States therefore have an obligation both to prohibit intrusions into private life and to guarantee a means of action against such intrusions.

The right to freedom of expression is defined as the “freedom to seek, receive and impart information by all means, regardless of frontiers”. Article 32 specifies that this right must be “exercised in the framework of society’s fundamental principles”, which speaks to the strong ethical and moral identity of many signing countries. The Arab Charter explicitly affirms that “the respect of the rights or reputation of others” is a permissible limit to the freedom of expression, together with the protection of national security or of public order, health or morals.

The wording of the document leaves some open questions. For example, an infringement to an individual’s right to privacy must not be “arbitrary or unlawful”, effectively allowing states to define the scope of the right by reference to their local laws (for example, by authorizing through legislation what might otherwise be an infringement of personal privacy). Similarly, freedom of information is subject to the respect of the “framework of society’s fundamental principles”, the meaning of which is also unclear.

Article 3 of the Arab Charter affirms that “each State Party to the present Charter undertakes to ensure to all individuals within its territory and subject to its jurisdiction the right to enjoy all the rights and freedoms recognized herein”, while Article 45 states that “there shall be established, pursuant to the present Charter, an Arab Human Rights Committee”, whose role is to issue

recommendations and assess States parties' reports. The result is no special body is in charge of overseeing enforcement of the Arab Charter with binding powers to impose its respect upon the Member States.

3.2.5.2. CAIRO DECLARATION ON HUMAN RIGHTS IN ISLAM

The Cairo Declaration on Human Rights in Islam⁴⁸⁶ is the human rights text of reference for those countries which are members of the Organization of the Islamic Conference⁴⁸⁷. The Declaration also refers to the right to privacy (in Article 18(b)) and freedom of expression (in Article 22).

The Declaration sets out the basic human right principles that must be followed by the signing parties by reference to Shari'ah law. Fundamental rights are described as an integral part of the Islamic religion, which gives them force. They must be respected as binding divine commandments⁴⁸⁸.

Article 18(b) of the Declaration affirms that *"everyone shall have the right to privacy in the conduct of his private affairs, in his home, among his family, with regard to his property and his relationships. It is not permitted to spy on him, to place him under surveillance or to besmirch his good name. The State shall protect him from arbitrary interference."* Privacy covers matters of physical and emotional areas: home and good name, property and relationships. As seen in other texts referred to above, this right entails an explicit duty for the state to protect people from any arbitrary interference. The formula chosen is broadly similar to that applied in the other regional texts studied in this Handbook.

The same cannot be said with respect to freedom of information. While Article 22 establishes the right to express one's opinions *"freely in such manner as would not be contrary to the principles of the Shari'ah"*, and the right *"to advocate what is right, propagate what is good and warn against what is wrong and evil according to the norms of Islamic Shari'ah"* and affirms that *"information is a vital necessity to society"*. It adds that information *"may not be exploited or misused in such a way as may violate sanctities and the dignity of Prophets, undermine moral and ethical values or disintegrate, corrupt or harm society or weaken its faith."*

The Cairo Declaration is a non-binding instrument and it does not provide for any supranational body to monitor or enforce compliance. Any hermeneutical activity can be carried out by each party referring to Shari'ah principles (Article 25). In 2011 OIC Member States created the Independent Permanent Human Rights Commission⁴⁸⁹, consisting of 18 experts appointed to monitor and advise member States on human rights issues in case of discrepancy between them.

3.2.6. ASIA

While continental Asia has not signed any regional human rights text comparable to those adopted in other regions such as the African Charter on Human and Peoples' Rights or the

American Convention on Human Rights, the South-East Asian countries recently signed a declaration providing for basic human rights: the ASEAN Human Rights Declaration⁴⁹⁰.

3.2.6.1. ASEAN HUMAN RIGHTS DECLARATION

The rights to privacy and to freedom of information are established under Articles 21 and 23 of the ASEAN Human Rights Declaration. Article 21 states: *“Every person has the right to be free from arbitrary interference with his or her privacy, family, home or correspondence including personal data, or to attacks upon that person’s honour and reputation. Every person has the right to the protection of the law against such interference or attacks.”*

Of note, ASEAN countries give effect to the right of privacy in two ways: signing states commit to not only prevent the interference with citizens’ private lives but must also offer appropriate means of redress to those whose privacy has been infringed.

Article 23, affirming freedom of expression, does not expressly state that the right can be limited for the purpose of protecting individual privacy. Nevertheless, all rights and freedoms set out in the ASEAN Human Rights Declaration are *“interdependent and interrelated”* and *“must be treated in a fair and equal manner, on the same footing and with the same emphasis.”* (Paragraph 7).

The ASEAN Intergovernmental Commission is not mandated to monitor signatory States’ compliance with the rights enumerated in the Declaration, nor do its decisions have binding powers⁴⁹¹.

3.3. BALANCING THE TWO RIGHTS: PRACTICAL EXAMPLES

3.3.1. Publishing Photos

Photographs are undoubtedly part of the news, sometimes even the news itself. However, their crucial role in informing the public must be carefully considered alongside the rights of those individuals depicted in them and their rights to privacy and reputation. In carrying out this balancing exercise, several elements must be taken into account: whether the subject is a public figure, the significance of what is depicted, the extent of the public interest in knowing about what is depicted, and so on.

Guidance to the balancing exercise can again be drawn from regional, ECtHR and Inter-American Court of Human Rights (“IACHR”) case law setting out guiding principles in their respective jurisdictions.

European Court of Human Rights case law

The Von Hannover v. Germany (No. 2) case⁴⁹² concerned the unauthorized publication of photos depicting private moments of the Monegasque royal family. In its judgment, the Grand Chamber of the ECtHR stressed that whether a case is framed as an infringement of the right

to privacy or the right to freedom of expression, the analysis should be the same: “[T]he Court considers that the outcome of the application should not, in theory, vary according to whether it has been lodged with the Court under Article 8 of the Convention by the person who was the subject of the article, or under Article 10 by the publisher. Indeed, as a matter of principle these rights deserve equal respect.” (Paragraph 106).

As there is no hierarchy between the two principles, the case law offers a series of criteria to carry out a balancing exercise. As far as images are concerned, relevant criteria include:

1. Whether the image contributes to a debate of general interest;
2. How well known the subject of the image is (ie. whether he or she is a “public figure”);
3. Any prior conduct of the person concerned;
4. The content, form and consequences of the publication;
5. The circumstances in which the photos were taken.

This five step analysis needs further specifications as regards the concepts of “general interest” and the concept of “public figure”

According to ECtHR case law, general interest is not only confined to political issues or crimes, but it extends to facts involving performing artists or other renowned people as long as the facts reported are “capable of contributing to a debate in a democratic society”. The activity of reporting those facts pertains to the “public watchdog” role of the journalists and should be kept separate from reporting facts and details of one person’s private life with the sole aim of satisfying public curiosity (see paragraph 110 of Von Hannover).

Public figures are those “persons holding public office and/or using public resources and, more broadly speaking, all those who play a role in public life, whether in politics, the economy, the arts, the social sphere, sport or in any other domain”(Paragraph 71).

A politician, for example, is aware of and agrees to be exposed to a degree of interest in his or her actions by the public generally and journalists in particular. He or she must therefore tolerate that exposure to a certain extent. Such extent has been effectively described by the Parliamentary Assembly of the Council of Europe in its Resolution 1003 (1993) “on ethics of journalism”⁴⁹³: “Persons holding office in public life are entitled to protection for their privacy except in those cases where their private life may have an effect on their public life.” (Paragraph 23).

In the *Couderc and Hachette Filipacchi v. France case*⁴⁹⁴, the ECtHR considered the publication in a weekly magazine of pictures of Prince Albert of Monaco with his alleged “secret” child. The pictures were taken by the mother of the child, with the consent of the Prince. The mother submitted the photos to the magazine for their publication. In this case the Court followed the 5-step analysis illustrated above and added a sixth criterion: the gravity of the sanctions imposed.

Considering whether the image contributed to a debate of general interest, the ECtHR had to resolve the difference of opinion between the French court (which did not consider the

point fulfilled) and the German one (which did). The ECtHR differentiated between the news of a Prince having a secret descendant, which it considered a topic of real public interest, and the additional information published about the Prince's reaction to the pregnancy and his behaviour with the child, which it considered were elements of a purely private nature (see Paragraph 59). However, the presence of elements of public interest, together with the observation that the photos were taken with the consent of the Prince and disclosed by a person involved in the matter (the mother) persuaded the ECtHR the conviction of the applicants amounted to a violation of Article 10 ECHR.

Inter-American Court of Human Rights case law

The Inter-American Court takes a similar approach to the ECtHR in relation to photo publishing.

A leading case is *Fontev ecchia and D'Amico v Argentina*⁴⁹⁵, concerning the publication of an article (accompanied by pictures) by a magazine reporting the story of a secret son of the Argentinian President. This case concerned the alleged violation of the right to freedom of expression of the director and the editor of the magazine that published the article. The alleged violation consisted in the civil sentence imposed on them by Argentinian Tribunals as further liability for the publication of two articles in November 1995 in the magazine.

The Inter-American Court wondered whether Argentinian society had the right to know about that story. The Inter-American Court posited that if the question were of interest to Argentinian society, they would have the right to know about it, and therefore journalists would have the right to publish it. The balancing exercise is therefore actually performed at the first step of the logical chain: right to know versus right to privacy, instead of right to tell versus right to privacy (see Paragraph 16 and following). Privacy issues will be relevant as regards the question of whether the public has a right to know.

Thus, the protection of privacy was determined by balancing the right of the public to know and the right of a former President to privacy. In this case, the Court recalled that the President's right to privacy had to be recognized. However, although images and personal photos fell within the scope of protection of private life, the images supported the credibility of the written accounts. Consequently, the images' contribution to the debate was of general interest for the public⁴⁹⁶.

The Court considered that *"the publications involved matters of public interest, which were in the public domain and involving the alleged victim who, by way of his own conduct, had not contributed to protect the information that he later contests. Thus, there was not an arbitrary interference with the right to private life of Mr. Menem"*⁴⁹⁷

The liability imposed on the publishers violated their right to freedom of thought and expression under Article 13 of the American Convention.

The effect of the Court's judgment is that the more prominent a public figure is, the weaker his or her claim to privacy in respect of information can be. That said, a public figure does not

completely forego his or her right to privacy. A careful contextual analysis is always required.

By way of summary, a court considering a claim in respect of a photograph would consider the following:

1. Is the information already in the public domain? (If so, the likely infringement of any right to privacy would be minimal);
2. What was the context in which the information is disclosed?;
3. Does the information have public relevance? For example (i) Does it relate to the functions of the person concerned, or (ii) Suggest non-compliance with a legal obligation, or (iii) Could it affect public trust in the official, or (iv) Does it refer to the competence and capabilities of an official to perform his duties? (See paragraph 17).

Also the Inter-American Court, as the ECtHR did, attempted a definition of public interest: *"the Court has repeatedly upheld the protection of freedom of expression regarding opinions and statements on matters of which society has a legitimate interest to be informed, in order to be aware of anything that bears on the performance of the State or impacts on general interests or rights, or of anything having significant consequences."* (Paragraph 121). Moreover, when it comes to public officials a *"different honor protection standard is justified by the fact that public officials voluntarily expose themselves to control by society, which results in a greater risk of having their honor affected and also the possibility –given their status – of having greater social influence and easy access to the media to provide explanations or to account for any events in which they take part"* (Paragraph 122).

US Supreme Court

There is no case law of the US Supreme Court directly related to the publication of photos. The right to privacy is primarily governed by the states, rather than at the federal level. While there are certainly restrictions on the publication of photographs, such as when they have been obtained by intrusion into a private area or when they place their subject in a false light, these torts are governed by state law. As such, they fall outside the scope of this section.

The Supreme Court could have a role to play if a state attempted to restrict the publication of photographs in such a way that was found to violate the First Amendment. However, the Court has not yet had occasion to decide the boundaries of state-given privacy rights with respect to the First Amendment in the context of published photographs.

3.3.2. REPORTING CRIMINAL INFORMATION ABOUT ONE PERSON

The disclosure of information about criminal proceeding is potentially problematic because it could affect the accused's right to privacy and confidentiality in his or her information, or reputation, as well as his right to a fair trial (if information is published in the public arena which could influence members of the jury or others involved in the court process).

An analysis of the case law is crucial to understand the way to weight the rights at stake in these situations.

European Court of Human Rights case law

The *Axel Springer AG v Germany*⁴⁹⁸ case illustrates how the ECtHR deals with reporting criminal information about an individual.

On 23 September 2004, a German television actor was arrested at a festival for possession of cocaine. The applicant company, a newspaper publisher, subsequently published a front-page story detailing the actor's arrest and later, on 7 July 2005, an article covering the actor's trial and conviction for unlawful possession. Both articles were accompanied by photographs of the actor and made various references to his TV character.

The actor lodged a request, asking for an injunction on publication, which was granted by a German court. The applicant company claimed the injunction violated its right to freedom of expression.

The ECtHR reiterated that the right to protection of reputation is protected by Article 8 as part of the right to respect for private life. In order for Article 8 to come into play, however, *"an attack on a person's reputation must attain a certain level of seriousness and in a manner causing prejudice to personal enjoyment of the right to respect for private life"*⁴⁹⁹.

The Court considered that there were insufficient grounds to establish that the interference complained of was necessary in a democratic society. Despite the margin of appreciation enjoyed by the Contracting States, the Court stated that there was no reasonable relationship of proportionality between, on the one hand, the restrictions imposed by the national courts on the applicant company's right to freedom of expression and, on the other hand, the legitimate aim pursued.

In this case, the Court based its analysis taking into consideration the Recommendation of the Committee of Ministers on the provision of information through the media in relation to criminal proceedings⁵⁰⁰. This Recommendation affirmed that, *"The public must be able to receive information about the activities of judicial authorities and police services through the media. Therefore, journalists must be able to freely report and comment on the functioning of the criminal justice system, subject only to the limitations provided for under the following principles."* Nevertheless, *"opinions and information relating to on-going criminal proceedings should only be communicated or disseminated through the media where this does not prejudice the presumption of innocence of the suspect or accused."* Moreover *"particular protection should be given to parties who are minors or other vulnerable persons, as well as to victims, to witnesses and to the families of suspects, accused and convicted."*

Again, as there is no hierarchy between the two principles, the Court established a list of criteria to carry out a balancing exercise when criminal news relating to a person is concerned. Those criteria conform to the Court's case law on photo publishing and are as follows:

1. Contribution to a debate of general interest;

2. How well known is the person concerned and what is the subject of the report;
3. Prior conduct of the person concerned;
4. Method of obtaining the information and its veracity;
5. Content form and consequences of the publication;
6. Severity of the sanction imposed.

US Supreme Court case law

There are no Supreme Court decisions addressing publication of criminal information regarding an individual.

Were the Court to take up such a case, it would likely distinguish between public and non-public information about an individual's criminal history. Publication of information available in public court records is protected by the U.S. Constitution. As to publication of non-public criminal information, it is less clear what protections, if any, the Court would extend.

In a somewhat related context, the Court has held that criminal "rap sheets" (records) are protected from disclosure under the federal Freedom of Information Act. In *U.S. Dept. of Justice v. Reporters Comm. for Freedom of the Press*, the Court held that such disclosure would constitute an "unwarranted invasion of personal privacy," therefore meriting exemption from disclosure under the Freedom of Information Act⁵⁰¹.

The Supreme Court explained that FOIA's purpose of enabling citizens to monitor the workings of their government would not be furthered by requiring the disclosure of information on private individuals compiled and maintained by government agencies. It must be noted, however, that this case dealt only with whether a government agency could withhold law enforcement records from disclosure under federal law, and not with the question of potential liability for publishing such information - however obtained.

3.3.3. PUBLICATION OF DETAILS OF COURT JUDGMENTS

The right to privacy is generally expressed to include the right to one's reputation or good name. This right can be infringed by the media publishing the details of court judgments. A balance between the right and the media's right to publish must therefore be struck.

European Court of Human Rights case law

The ECtHR has tried to establish a rational basis for adjudicating where the balance between the two rights falls, and in doing so, has made a differentiation between value judgments and the reporting of facts. While value judgments are generally accepted as representing a simple opinion, conclusions presented as facts may hinder the person concerned and therefore must be reported as objectively as possible. As simple as this criterion may seem, it actually entails a difficult assessment in its practical application. An example is offered by the Court's judgment in *Pfeifer v Austria*⁵⁰².

That case concerned the publication of an article in which a journalist claimed that a person

who had written a critical pamphlet about another person who later committed suicide was responsible for the death. The main issue discussed was what constituted an acceptable degree and manner of criticism, and if value judgments could be sanctioned for hindering another's reputation in circumstances where there was no factual basis for making the judgment.

As for what constitutes a value judgment, the Court doubted that merely stating there was a causal link between an action (writing a critical article) and an accident (somebody's suicide) could be considered a value judgment: the assertion of a causal link between two facts *"is not a matter of speculation, but is a fact susceptible of proof"* (Paragraph 47).

Although a statement may amount to a value judgment, it does not necessarily mean that it cannot be an actionable infringement of another's reputation. Indeed, value judgments must also have a "sufficient factual basis".

This principle is also affirmed in the Resolution 1003 (1993) of the Parliamentary Assembly of the Council of Europe⁵⁰³: *"Expression of opinions may entail thoughts or comments on general ideas or remarks on news relating to actual events. Although opinions are necessarily subjective and therefore cannot and should not be made subject to the criterion of truthfulness, we must ensure that opinions are expressed honestly and ethically. Opinions taking the form of comments on events or actions relating to individuals or institutions should not attempt to deny or conceal the reality of the facts or data."* (Paragraphs 5 and 6).

Inter-American Commission on Human Rights case law

The Inter-American Commission has a more straightforward approach to the matter. In a document entitled "Background and Interpretation of the Declaration of Principles on Freedom of Expression"⁵⁰⁴, the IACHR stated that *"there should be no liability when the information giving rise to a lawsuit is a value judgment rather than a factual assertion. A prerequisite for establishing liability is the ability to demonstrate that the information was false or to prove that the respondent knowingly published a statement that was false or very likely false. If the information is a value judgment, it is impossible to prove its truth or falsity, since it represents a totally subjective opinion that cannot be proved"* (Paragraph 47). In fact, *"since value judgments cannot be proven, it may be impossible to demonstrate the veracity of such declarations. Thus, a rule that compels someone who criticizes public officials to guarantee the veracity of the assertions has a chilling effect on criticism of government conduct"* (Paragraph 48).

US Supreme Court case law

The First Amendment protects accurate publication of public court records. In *Cox Broadcasting v. Cohn*, the Supreme Court held that the First and Fourteenth Amendments protect the truthful publication of information contained in publicly available official court records⁵⁰⁵. In doing so, the Court found unconstitutional a state law that criminalized the publication of the names of victims of rape. The Court acknowledged that individuals have state-protected privacy rights, but explained that there is a longstanding privilege that

protects the press when reporting truthfully on the events of judicial proceedings. Indeed, the Court recognized that this privilege is critical to the proper functioning of government, since *“the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice.”*⁵⁰⁶

Where the states have seen fit to make certain information publicly available in court records, they are deemed to have determined that its public knowledge is in the public interest, and therefore they may not punish a reporter for later publishing such information accurately. The Court suggested that in cases where states wish to prioritize protecting privacy rights above the public’s right to be informed of government administration, they should avoid public documentation of private information. However, *“once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it.”*⁵⁰⁷

African Commission for Human and Peoples’ Rights

In 2010, the African Commission decided a case concerning the freedom to express opinions on public figures. In its decision 313/05 *Kenneth Good v. Botswana*⁵⁰⁸ the Commission analyzed the case of a professor who had made critical statements against the Botswana Government in a press article and, as a result, had been expelled from the country.

In this case, the Commission reiterated how freedom of expression was understood and recalled its close relationship with the right to reputation of others. It affirmed the case law of other international bodies and also its Declaration of Principles of freedom of expression in Africa⁵⁰⁹ which states that *“public figures shall be required to tolerate a greater degree of criticism”*.

3.3.4. PHONE INTERCEPTION

Phone conversations can clearly engage the private sphere of one’s life. They can reveal a lot about a person’s intentions and opinions, often expressed in a particularly candid way, which is why they are so widely used in criminal investigations.

European Court of Human Rights case law

The case law of the ECtHR offers a detailed approach to this delicate issue. This subsection focuses on two cases: *Craxi v. Italy* (No. 2)⁵¹⁰ and *Dupuis and Others v. France*⁵¹¹.

These two cases concern the publication of telephone conversations intercepted by judges. They must be analyzed in connection with each other as they are complementary.

Interestingly, while the *Craxi* case concerns a violation of an individual’s right to privacy, the *Dupuis* case analyzes the issue of the publication of interceptions from an Article 10 point of view, the case having been brought before the Court for alleged violation of an individual’s freedom of expression.

The *Craxi* case concerned the publication of intercepted telephone conversations between

Craxi and his wife with their lawyer, a political supporter and the wife of another politician. The content of the conversations was of strictly private nature: it had no connection with the criminal charges brought against Craxi (and in relation to which the interceptions were ordered).

In the *Dupuis* case, the two appellants were journalists who had written a book called *Les Oreilles du Président* (“*The President’s Ears*”).

The book detailed allegations that the President’s office had wiretapped the telephone lines of certain lawyers and journalists (about 2,000 persons were wiretapped).

The allegations were already in the public domain, and “G.M.”, a deputy director in the President’s office, had been placed under formal investigation. G.M. brought a criminal complaint against the two journalists, alleging they handled documents (in particular transcripts of wiretaps and lists of targets) in breach of professional confidence, knowingly deriving advantage from the breach and handling stolen property. The journalists denied they obtained their information illegally but refused to reveal their sources. They pointed out that much of the information was already being passed around by journalists and was in the public domain. But they were convicted before the French criminal courts.

The ECtHR held the convictions clearly infringed the journalists’ rights to freedom of expression. While their convictions were clearly “prescribed by law” (the French criminal code) and the relevant criminal laws pursued a “legitimate aim” (protecting an accused’s right to be presumed innocent), the convictions were not “necessary” in a democratic society as they were disproportionate. More precisely, the Court emphasized:

- *Les Oreilles du Président* contributed to a debate of significant public interest (Paragraphs 40 and 41);
- Article 10 leaves little flexibility for states to infringe on political speech (Paragraph 41);
- Provided the media do not “*overstep the bounds imposed in the interests of the proper administration of justice*”, they have an important role to play in reporting on court proceedings:

“the media have the right to inform the public in view of the public’s right to receive information”, and “media reporting on criminal proceedings in order to inform the public and ensure public scrutiny of the functioning of the criminal justice system” is of high importance. In addition, “the public must be able to receive information about the activities of judicial authorities and police services through the media” and journalists “must therefore be able to report freely on the functioning of the criminal justice system”.

The journalists must have been aware the information came from the judicial file and was therefore likely to be subject to obligations of confidentiality. This needed to be balanced against the importance of the Article 10 right (Paragraph 43).

Here, the aim of “protecting the secrecy of the judicial investigation” was weakened by the fact that at the time the book was published, it was already public knowledge that G.M. had been placed under investigation. Indeed, he had been convicted and sentenced. G.M. had also commented in public on the case at length. The Government therefore could not show there was any risk to G.M.’s presumption of innocence from the publication.

Finally, journalists’ important roles as ‘watchdogs’ needed to be factored in: *“it is necessary to take the greatest care in assessing the need, in a democratic society, to punish journalists for using information obtained through a breach of the secrecy of an investigation or a breach of professional confidence when those journalists are contributing to a public debate of such importance and are thereby playing their role as ‘watchdogs’ of democracy. Article 10 protects the right of journalists to divulge information on issues of public interest provided that they are acting in good faith and on an accurate factual basis and provide ‘reliable and precise’ information in accordance with the ethics of journalism”* (at Paragraph 46).

In the *Craxi* case, the Court considered an appeal by Mr Craxi, a former Prime Minister of Italy, that the reporting by journalists of intercepted telephone calls, some parts of which had been read out at a public hearing of charges against Mr Craxi for corruption, was a breach of Article 8 of the Convention.

The Court held that *“public figures are entitled to the enjoyment of the guarantees set out in Article 8 of the Convention on the same basis as every other person. In particular, the public interest in receiving information only covers facts which are connected with the criminal charges brought against the accused. This must be borne in mind by journalists when reporting on pending criminal proceedings, and the press should abstain from publishing information which is likely to prejudice, whether intentionally or not, the right to respect for the private life and correspondence of the accused persons”* (Paragraph 65).

It follows from the above that with regard to interceptions, while in principle journalists enjoy great freedom to publish them when they concern a criminal proceeding of major interest for the public, this does not allow them to publish intercepted communications that, despite being recorded in the same conditions and pertaining to the same judicial file, are of no relevance in the proceeding.

US Supreme Court case law

The leading US authority on the lawfulness of publishing intercepted communications is *Bartnicki v. Vopper*⁵¹². In that case, the US Supreme Court ruled that a federal law criminalizing the dissemination of illegally intercepted phone conversations cannot be used against journalists if they were not responsible for illegally tapping the call, provided their reporting is on matters of public concern. In other words, the US Supreme Court held that *“a stranger’s illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern”*.

3.4. SANCTIONING THE VIOLATION OF RIGHT OF PRIVACY

Lastly, it is important to review the evolution of the regulation and case law in Europe as well as in Latin America regarding sanctions on journalists for breaches of personal privacy rights. The trend has been generally to avoid imposing criminal sanctions on journalists for interference with a person's right to privacy.

3.4.1. EUROPE

Resolution 1165 (1998) of the Council of Europe Parliamentary Assembly⁵¹³

In reaffirming the equal value of the right to privacy and the freedom of expression, the Council of Europe Parliamentary Assembly set a list of rules that Member States should include in their statute law to guarantee effective protection of the right to privacy. From reading the list, it is clear that emphasis is put on the civil nature of the sanctions against journalists: individuals should have the opportunity of taking an action under civil law to claim possible damages for invasion of privacy; economic penalties should be envisaged for publishing groups which systematically invade people's privacy; a civil action (private lawsuit) by the victim should be allowed against a photographer or a person directly involved, where paparazzi have trespassed or used "visual or auditory enhancement devices" to capture recordings that they otherwise could not have captured without trespassing (see paragraph 14).

ECtHR case law

In *Ruusunen v Finland*⁵¹⁴, the ECtHR ruled on the publication of an autobiography by the lover of the Finnish Prime Minister. The Court deemed that the criminal sanction imposed on the author was proportionate to the breach of the Prime Minister's privacy. The sanction, however, was only an economic one and, according to domestic law, no entry of the conviction was made on the applicant's criminal record.

3.4.2. AMERICA

Declaration of Principles on Freedom of Expression

According to the Declaration of Principles on Freedom of Expression, drafted by the Special Rapporteur for Freedom of Expression in America and approved by the Inter-American Commission on Human Rights in 2000⁵¹⁵, "privacy laws should not inhibit or restrict investigation and dissemination of information of public interest. The protection of a person's reputation should only be guaranteed through civil sanctions in those cases in which the person offended is a public official, a public person or a private person who has voluntarily become involved in matters of public interest. In addition, in 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" (Principle No. 10).

In a document on the interpretation of the Principles⁵¹⁶, it is specified that

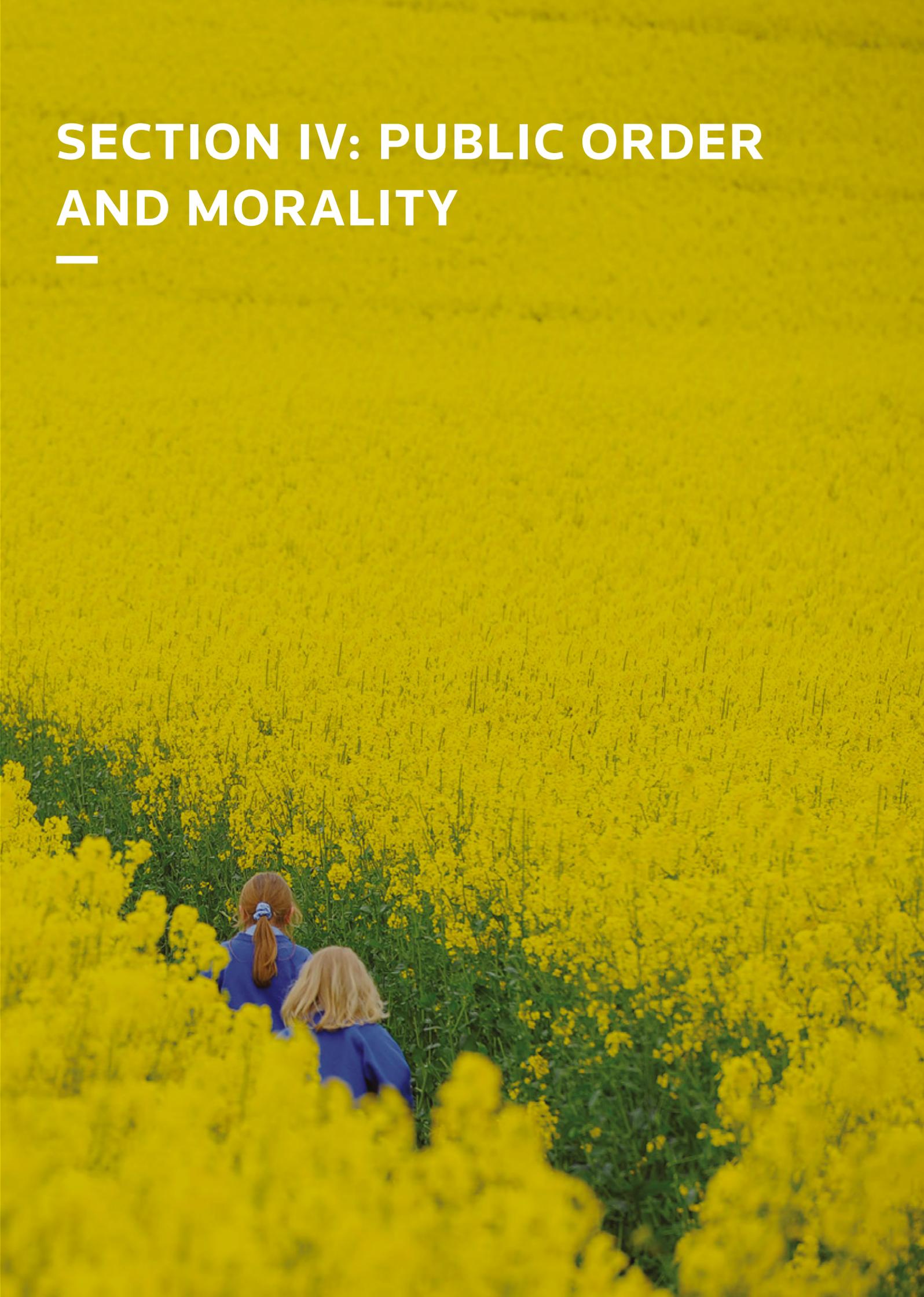
“the criminalization of speech directed toward public officials or private individuals voluntarily engaged in matters of public interest is a disproportionate punishment compared to the important role that freedom of expression and information plays in a democratic system” (Paragraph 43).

3.4.3. AFRICA

Resolution on Repealing Criminal Defamation Laws in Africa

In 2010, the African Commission on Human Rights and Peoples’ Rights adopted the Resolution on Repealing Criminal Defamation laws in Africa⁵¹⁷, which affirmed that *“criminal defamation laws constitute a serious interference with freedom of expression and impedes on the role of the media as a watchdog, preventing journalists and media practitioners to practice their profession without fear and in good faith”*. The Resolution called on *“States Parties to repeal criminal defamation laws or insult laws which impede freedom of speech.”*

SECTION IV: PUBLIC ORDER AND MORALITY



4.1. PRIMARY INTERNATIONAL SOURCES

4.1.1. Universal Declaration of Human Rights

The grounds of public order and morality are recognized as permissible limits on fundamental rights under the Universal Declaration of Human Rights (“**UDHR**”)⁵¹⁸. Article 29 of the UDHR provides generally that: *“In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society”*. The Article narrows the justification, however, to the “just requirements” of morality and public order which apply in a “democratic society”. In other words, Article 29 does not authorise countries to invoke the concepts of “morality” and “public order” loosely in justifying a law, policy or practice. The grounds are contextualised within the concept of justice in a democratic society.

4.1.2. International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights⁵¹⁹ (the “**ICCPR**”) echoes Article 29 of the UDHR. Article 19 paragraph 3 prescribes specific limits on freedom of expression, stating: *“The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals”*.

Again, the limits to freedom of expression have limits themselves. According to the three-part test⁵²⁰, restrictions must be “*provided by law*”, must respond to “*a legitimate aim*” and must be justified as being “*necessary*”⁵²¹. In other words, “*when a State party imposes restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself*”⁵²².

In General Comment No. 34, the Human Rights Committee (the “**CCPR**”) recalled that: “*No person may be subject to the impairment of any rights under the Covenant on the basis of his or her actual, perceived or supposed opinions. All forms of opinion are protected, including opinions of a political, scientific, historic, moral or religious nature.*”

The Committee further explained the concept of “morals” in the following terms: “*the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations... for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition. Any such limitations must be understood in the light of universality of human rights and the principle of non-discrimination*”.

Discussing the scope of the “public morals” limitation is difficult. Although public order identifies with a state’s organization and authority, public morality refers to a vague and general concept, evolving and changing with time, cultures and history⁵²³. Both concepts give a large margin of appreciation to authorities.

The CCPR has been called to rule upon a few cases concerning limitations on freedom of expression for reasons of protection of public order.

Linguistic minorities

In *Ballantyne v. Canada*, the CCPR considered a Quebec provincial law which prohibited the advertising of commercial activities in languages other than French. The purpose of the law was to protect French culture in the province. A merchant having mainly English speaking customers had complained that the law infringed his right to freedom of expression. The Federal Government of Canada and the province of Quebec argued in its defence that *“the historical background and the fact that the evolution of linguistic relations in Canada constitute[d] a political compromise d[id] not justify the conclusion that the requirement to carry out external commercial advertising in a certain way amounts to a violation of article 19”; the restriction was, in the Government’s view, “a means of preserving its specific linguistic character and give French speakers a feeling of linguistic security”⁵²⁴.*

The CCPR held the law was an unjustified limit on freedom of expression, observing: *“the Committee have [no] reason to believe that public order would be jeopardized by commercial advertising outdoors in a language other than French. [...] It is not necessary, in order to protect the vulnerable position in Canada of the francophone group, to prohibit commercial advertising in English. This protection may be achieved in other ways that do not preclude the freedom of expression, in a language of their choice, of those engaged in such fields as trade. For example, the law could have required that advertising be in both French and English. A state may choose one or more official languages, but it may not exclude, outside the spheres of public life, the freedom to express oneself in a language of one’s choice.”⁵²⁵*

As this case shows, despite the protection of minorities being a purpose which, in principle, could justify certain restrictions on freedom of expression, any limitations must still be subject to the necessity test. Limits will not be justified where they are not strictly necessary to achieve the Government’s objective.

Electoral silence

In *Jong-Cheol v. Korea*, the CCPR considered the compatibility of a Korean law which imposed “electoral silence” over the 23 days leading up to the Korean elections⁵²⁶. A journalist had reported on polls in the days leading up to the election and was convicted of a criminal offence and fined.

The CCPR upheld the law as a justified limit on the freedom of expression. In particular, it acknowledged the purpose of the law, *“not[ing] the underlying reasoning for such a restriction [wa]s based on the wish to provide the electorate with a limited period of reflection, during which they are insulated from considerations extraneous to the issues under contest in the elections, and that similar restrictions can be found in many jurisdictions”⁵²⁷.*

The CCPR has dealt with the “protection of public morals” limitation most often in the context of defamation of religion and blasphemous libel.

Defamation of religions

In its General Comment 34⁵²⁸, the CCPR recognized that *“prohibitions of displays of lack of respect for a religion or other belief system” would be unlawful except in narrow circumstances. It observed that “such prohibitions must ... comply with the strict requirements of article 19, paragraph 3, as well as such articles as 2, 5, 17, 18 and 26. Thus, for instance, it would be impermissible for any such laws to discriminate in favor of or against one or certain religions or belief systems, or their adherents over another, or religious believers over non-believers. Nor would it be permissible for such prohibitions to be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith.”*⁵²⁹

In practice, when harsh, offensive statements about religions or about believers are punished or prohibited, the lawfulness of statements is analyzed in terms of harm to individual reputation rather than as something inconsistent with public morality. An interesting case in this respect is *Ross v. Canada*⁵³⁰. That case concerned a Canadian teacher who published in his spare time books and pamphlets and made public statements reflecting controversial views which were discriminatory towards Jews. He was at some point transferred to non-teaching functions to ensure that pupils were not exposed to his comments. He appealed the school’s decision, claiming it was against his freedom of expression, arguing in particular that his behaviour in class was unobjectionable. The CCPR analyzed possible justifications; rather than trying to identify a threat to public morality in Mr Ross’ statements that could be perceived as offensive by a religious community, the Committee preferred to make it a matter of reputation: *“the rights or reputations of others for the protection of which restrictions may be permitted under article 19, may relate to other persons or to a community as a whole”*. The Committee concluded that *“the restrictions imposed on [Mr. Ross] were for the purpose of protecting the “rights or reputations” of persons of Jewish faith, including the right to have an education in the public school system free from bias, prejudice and intolerance”*⁵³¹.

Defamation of religions has been a very controversial topic for United Nations (“UN”) Member States for years. Called for condemnation by the Organization of Islamic Cooperation (“OIC”) States, it has been the object of annual UN non-binding resolutions since 1999. At the basis of those resolutions has been the observation that *“defamation of religions is among the causes of social disharmony and leads to violations of the human rights of their adherents”*⁵³². Those resolutions were criticized by civil society organizations⁵³³ and started becoming more and more unpopular among Member States as they risked prompting the enactment of anti-blasphemy laws, incompatible with the principle of freedom of expression.

The skepticism surrounding the use of the word “defamation” with reference to religions led to a compromise between the United Nations Human Rights Council (“HRC”) Member States, which allowed a change of perspective in 2011⁵³⁴; it turned towards protection against “intolerance” instead of “defamation” and towards “believers” rather than “religions”. In its Resolution 16/18 adopted in 2011, entitled *“Combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence and violence against persons based on religion or belief”*⁵³⁵, the HRC condemned *“any advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence, whether it involves the use of print, audio-visual or electronic media or any other means”*.

Therefore, international law does provide protection to believers against incitement to hatred against them as individuals, in accordance with Article 20(2) of the ICCPR. However, Article 20 is not a basis to protect religions as such.

Homosexual propaganda

The CCPR has also ruled that state restrictions of “homosexual propaganda” in Russia are infringements on free expression which cannot be justified on the basis of “public morality”.

In *Irina Fedotova v. Russian Federation*, the CCPR had to deal with a provision of a Regional Russian Law prohibiting the “propaganda of homosexuality (sexual act between men or lesbianism) among minors”⁵³⁶. Under this provision, an activist for LGBT rights was convicted for having displayed posters that declared “Homosexuality is normal” and “I am proud of my homosexuality” near a secondary school building. In its reasoning, the CCPR underlined that any restriction of the freedom of expression for protection of morals “must be understood in the light of universality of human rights and the principle of non-discrimination”⁵³⁷. In this case the CCPR observed that similar rules were not in place regarding heterosexual “propaganda”.

The CCPR also held the Russian Federation had not shown the limitation, applicable to “propaganda” of homosexuality among minors, was based on reasonable and objective criteria. It therefore concluded the provision was in breach of Article 19 paragraph 2 of the ICCPR.

4.1.3 UN SPECIAL RAPORTEURS

The general words of the public morality limitation create a risk that states will invoke cultural norms to justify excessive limits being placed on freedom of expression. In the Joint Declaration on Universality and the Right to Freedom of Expression dated 6 May 2014, the UN Special Rapporteur on Freedom of Opinion and Expression, together with the OSCE Representative on Freedom of the Media, the Organization of American States (“OAS”) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples’ Rights (“ACHPR”) Special Rapporteur on Freedom of Expression and Access to Information, addressed this issue. The Joint Declaration stressed that frequent attempts to justify violations of freedom of expression, often for purely political ends, are made by reference to culturally specific, traditional or community values, moral or religious beliefs, or claimed threats to national security or public order. It also provided recommendations for Member States and other actors. In particular, the Joint Declaration stressed that:

***“States have some limited flexibility under international law in deciding whether or not, and if so how, to restrict freedom of expression to protect legitimate aims while respecting the standards set out above, including to reflect their own traditions, culture and values.*”**

“International law also recognises that different approaches towards restrictions on freedom of expression may be justified by the very different factual situations States may face. Neither of these variations in any way undermines the principle of universality of freedom of expression and

restrictions on freedom of expression should never represent an imposition by certain groups of their traditions, culture and values on others.

"[...] Certain types of legal restrictions on freedom of expression can never be justified by reference to local traditions, culture and values. Where they exist, such restrictions should be repealed and anyone who has been sanctioned under them should be fully absolved and be afforded adequate redress for the violation of their human rights. These include:

- *Laws which protect religions against criticism or prohibit the expression of dissenting religious beliefs.*
- *Laws which prohibit debate about issues of concern or interest to minorities and other groups which have suffered from historical discrimination or prohibit speech which is an element of the identity or personal dignity of these individuals and/or groups.*
- *Laws which provide for special protection against criticism for officials, institutions, historical figures, or national or religious symbols."*⁵³⁸

It is important also to note that *"there are four types of expression which states are required to prohibit under international law: child pornography; incitement to genocide; advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence; and incitement to terrorism"*⁵³⁹.

In any event, states must always comply with the three-part test set in Article 19 of the ICCPR.

4.1.4 UNESCO

In the Media Development Indicators ("**MDI**")⁵⁴⁰, UNESCO has emphasized that the ability to justify infringements of freedom of expression on the grounds of morality and public order poses a risk to freedom of expression, noting:

"Laws are especially inimical to free speech when they are extensive or ill-defined e.g. banning publications which might damage public order, morality or security, or harm relations with a foreign country. Excessive punishments such as heavy fines or the closure or threatened closure of media organisations risk encouraging a climate of self-censorship. By contrast, an effective system of media self-regulation (see Section 3.C Media self-regulation) makes state intrusion unnecessary."

4.2. MAIN REGIONAL SOURCES

4.2.1. Europe

4.2.1.1. Council of Europe: European Convention for the protection of Human Rights

Article 10 paragraph 2 of the European Convention on Human Rights ("**ECHR**")⁵⁴¹ states that freedom of expression may be subject to certain limits, namely *"the prevention of disorder or crime, for the protection of health or morals [...] or for maintaining the authority and impartiality*

of the judiciary". These restrictions, similar to those contained in Article 19 of the ICCPR, must be "prescribed by law" and "necessary in a democratic society". The expression "prescribed by law" not only "requires that the impugned measure should have a legal basis in domestic law, but also refers to the quality of the law in question, which should be accessible to the person concerned and foreseeable as to its effects"⁵⁴². The adjective "necessary", instead, implies "the existence of a 'pressing social need'. The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a 'restriction' is reconcilable with freedom of expression as protected by Article 10"⁵⁴³.

No definition of public order has been provided by the European Court of Human Rights ("ECtHR") case law⁵⁴⁴. The Court considers the issue on a case by case basis.

The Committee of Ministers and the Court have dealt with the issue of public order and public morality in the following circumstances:

Times of crisis

Protection of public order as a reason to limit freedom of expression is asserted particularly when crisis situations threaten the stability and organization of a community.

In the *Guidelines on protecting freedom of expression and information in times of crisis* adopted by the Committee of Ministers of the Council of Europe on 26 September 2007⁵⁴⁵, the Committee of Ministers stressed the need for protection of the freedom of expression against undue restrictions allegedly justified by the need to prevent public disorder: "the Member States should not use vague terms when imposing restrictions of freedom of expression and information in times of crisis. Incitement to violence and public disorder should be adequately and clearly defined"⁵⁴⁶. In fact "Member States should always bear in mind that free access to information can help to effectively resolve the crisis and expose abuses that may occur"⁵⁴⁷.

To uphold the authority of the judiciary

The judiciary has a major role in guaranteeing stability and order in a country. Threats which affect public confidence in the judiciary and its impartiality are therefore threats to public order as such. That is explicitly acknowledged in the ECtHR, where the maintenance of the authority and impartiality of the judiciary is expressly prescribed as a permissible limit to the freedom of expression. That is why the ECtHR gives to the states a large margin of appreciation in the protection of the judiciary. Nonetheless, the ECtHR states that the judiciary is not immune from criticism and scrutiny.

Fight against terrorism

The Committee of Ministers of the Council of Europe has observed that, in the context of the fight against terrorism⁵⁴⁸, journalists have dual roles: on the one hand, they should "bear in mind their particular responsibilities (...) not to contribute to the aims of terrorists", i.e. "not to

in democratic societies people must be allowed to express their opinions and views no matter how offensive and shocking they might be. According to the case law of the Court in Strasbourg, extreme and threatening forms of hate speech might exceptionally require an ex-post response by public authorities

offer a platform to terrorists by giving them disproportionate attention”⁵⁴⁹; on the other hand, they should “refrain from any self-censorship, the effect of which would be to deprive the public of information necessary for the formation of its opinion”⁵⁵⁰.

This approach places reliance on journalists to manage these obligations in the course of their work. It emphasizes self-discipline (taking “self-regulatory measures [to] effectively respond to ethical issues raised by media reporting on terrorism”⁵⁵¹).

The Parliamentary Assembly stressed in its Report on Media and Terrorism that “article 15 of the European Convention on Human Rights [Derogation in time of emergency] cannot be invoked in cases of terrorism in order to restrict freedom of expression and information beyond the existing limitations of Article 10, paragraph 2 of the Convention, because terrorist action can neither be regarded as war in a legal sense, nor can it threaten the life of a democratic nation.”⁵⁵².

4.2.1.2. EUROPEAN UNION: CHARTER OF FUNDAMENTAL RIGHTS

No explicit reference is made in the Charter of Fundamental Rights of the European Union⁵⁵³ to restrictions of freedom of expression for reasons of public order or public morals. It is important to note, however, that the ECHR and the case law of the ECtHR are recognized points of reference for the protection of fundamental rights in the European Union.

4.2.2 ORGANIZATION FOR SECURITY AND CO-OPERATION (OSCE)

The OSCE Representative on Freedom of the Media published on 6 May 2014 a study entitled “Important Freedom of Expression and Information Cases and Relevant Legal Trends”⁵⁵⁴.

The Representative expressed her view on a French *Conseil d’Etat*’s decision confirming the ban on the shows of a comedian who had several times been convicted for incitement to racial hatred for public order reasons.

According to the Representative, “in democratic societies people must be allowed to express their opinions and views no matter how offensive and shocking they might be. According to the case law of the Court in Strasbourg, extreme and threatening forms of hate speech might exceptionally require an ex-post response by public authorities. However, prior restraint and preventive prohibitions (as it was the case this time) should be always considered a disproportionate restriction. The notion of public order (even in its widest possible meaning) cannot be accepted as a legitimate basis for such an intrusion on individual freedom in a democratic society”⁵⁵⁵.

4.2.3 AFRICA

4.2.3.1. The African Charter of Human and Peoples' Rights

As noted in Section 1.4.2⁵⁵⁶, the African Charter on Human and Peoples' Rights protects freedom of expression through Article 10⁵⁵⁷. That Article does not prescribe permissible limitations. However, Article 27 of the Charter contains a general limitations provision, affirming: *"the rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest"*.

In its Resolution on the Adoption of the Declaration of Principles on Freedom of Expression in Africa⁵⁵⁸, the ACHPR noted that *"freedom of expression should not be restricted on public order or national security grounds unless there is a real risk of harm to a legitimate interest and there is a close causal link between the risk of harm and the expression"*⁵⁵⁹.

4.2.4. AMERICAS

4.2.4.1 American Convention on Human Rights

Article 13 of American Convention on Human Rights⁵⁶⁰ ("**American Convention**") carefully defines the scope of permissible limitations on freedom of expression. Paragraph (2)(b) provides that limits (which must be established by law and necessary) may be for the purpose of *"the protection of ... public order, or public health or morals"*. Paragraph (5) also criminalizes *"any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin"*.

Regarding the "necessity" requirement, the Inter-American Court has pointed out that *'the necessity' and, therefore, the legality of the restrictions on freedom of expression based on Article 13(2) of the American Convention will depend on whether they are designed to fulfill an overriding public interest. Among the options available to achieve such purpose, that which is less restrictive of the protected right should be chosen. Given this standard, it is not sufficient to prove, for example, that the law serves a useful or suitable purpose. To be compatible with the Convention, the restrictions must be justified on the basis of collective purposes that, given their importance, clearly override the social need for the full enjoyment of the right protected by Article 13 of the Convention, and must not restrict, beyond what is strictly necessary, the right enshrined therein. In other words, the restriction must be proportionate to the underlying interest and in direct furtherance of such legitimate purpose, interfering as little as possible with the effective exercise of the right to freedom of thought and expression"*⁵⁶¹.

The Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights at the OAS has also made declarations on this matter. In a joint statement with the UN Special Rapporteur on Freedom of Opinion and Expression and the OSCE Representative on Freedom of the Media, the Special Rapporteur recognized that expression that incites or promotes *"racial hatred, discrimination, violence and intolerance"* is harmful, and that crimes against humanity are often accompanied or preceded by these forms

of expression. The Joint Statement noted that laws governing hate speech, given their interference with freedom of expression, should be *“provided by law, serve a legitimate aim as set out in international law and be necessary to achieve that aim.”* It further noted that hate speech, in accordance with international and regional law, should, at a minimum, conform to the following guidelines:

- no one should be penalized for statements which are true;
- no one should be penalized for the dissemination of hate speech unless it has been shown that he or she did so with the intention of inciting discrimination, hostility or violence;
- the right of journalists to decide how best to communicate information and ideas to the public should be respected, particularly when they are reporting on racism and intolerance;
- no one should be subject to prior censorship; and
- any imposition of sanctions by courts should be in strict conformity with the principle of proportionality.

4.2.4.2 US

4.2.4.2.1 Protection of Freedom of Expression at the Federal Level

The First Amendment to the **U.S.** Constitution states: *“Congress shall make no law [...] abridging the freedom of speech, or of the press; or the right of the people [...] to petition the Government for a redress of grievances.”* The First Amendment is broad in scope; it generally protects even offensive and controversial speech from governmental suppression and allows restriction on the right to express opinions only in certain limited circumstances.

The Supreme Court has recognized that *“the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.”*⁵⁶²

The Court has further explained: *“Our decisions . . . cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment. Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law.”*⁵⁶³

The types of permissible restrictions on expression include those that could undercut public order and morality, such as language that is *“lewd”* and *“obscene,”* as well as *“fighting”* words—*“those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”*⁵⁶⁴

In the landmark case *Brandenburg v. Ohio*, the Supreme Court limited states' ability to restrict advocacy of violence, and held that *"the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."*⁵⁶⁵

Two years later in the 1971 case *Cohen v. California*, the Supreme Court further illustrated the limited nature of unprotected "fighting words," and states' potential roles as "guardians of public morality."

There, after wearing a jacket to court that said "Fuck the Draft," the appellant was convicted of violating a state statute that prohibited "maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person . . . by . . . offensive conduct . . ." ⁵⁶⁶

The Supreme Court first noted that the appellant could not be punished for the underlying content of the message his jacket conveyed: *"At least so long as there is no showing of an intent to incite disobedience to or disruption of the draft, [appellant] could not, consistently with the First and Fourteenth Amendments, be punished for asserting the evident position on the inutility or immorality of the draft his jacket reflected."*⁵⁶⁷

The Court then explained the scope of states' abilities to restrict "fighting words" under the First Amendment: *"States are free to ban the simple use, without a demonstration of additional justifying circumstances, of so-called 'fighting words,' those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction."*⁵⁶⁸

Under this standard, the Court held that the appellant had not engaged in unprotected "fighting" language:

"No individual actually or likely to be present could reasonably have regarded the words on appellant's jacket as a direct personal insult."⁵⁶⁹
Moreover, even "acting as [a] guardian of public morality," the state could not simply remove the "scurrilous epithet" on appellant's jacket from public discourse.⁵⁷⁰

4.2.4.2.2 PROTECTION OF FREEDOM OF EXPRESSION AT THE STATE LEVEL

State courts have similarly emphasized the limited nature of the government's ability to restrict expression that allegedly threatens public order and/or morality. For example, in the 2008 case *State v. Johnson*, the Supreme Court of Oregon evaluated a state statute that punished "harassment," defined as *"[p]ublicly insulting such other person by abusive words or gestures in a manner intended and likely to provoke a violent response"*.⁵⁷¹

The Court found that Oregon's statute was overbroad: "[I]t is patent that the statute also extends to various species of expression that may not be punished Taunts intended and likely to produce a violent response are not limited to playgrounds and gang disputes. They extend to political, social, and economic confrontations that range from union picket lines to the protagonists on a host of divisive issues, and thus include a wide range of protected speech. Moreover, courts have long recognized that even speech that is intended and likely to produce violence may not be criminalized unless the violence is imminent[.]"⁵⁷²

4.2.5 ARAB COUNTRIES

4.2.5.1. Arab Charter on Human Rights

Article 32(1) of the Arab Charter on Human Rights guarantees freedom of expression and the right to seek, receive and impart information. Article 32(2) of the Charter prescribes that these freedoms may be limited, including on the ground of "the protection of national security or of public order, health or morals."⁵⁷³

4.2.5.2. Cairo Declaration on Human Rights in Islam

The Cairo Declaration on Human Rights in Islam⁵⁷⁴ is based on the Shari'ah principles and every Article of the Declaration must be read in accordance with it⁵⁷⁵. This aligns with the general recognition that freedom of expression can be limited in accordance with public morals.

Article 22 of the Declaration protects freedom to express opinions "in such manner as would not be contrary to the principles of the Shari'ah"; prohibits the use of information "in such a way as may violate sanctities and the dignity of Prophets, undermine moral and ethical values or disintegrate, corrupt or harm society or weaken its faith"; and prohibits the "excit[ing of] nationalistic or doctrinal hatred or [the] do[ing of] anything that may be an incitement to any form or racial discrimination."

4.2.6 Asia

The ASEAN Human Rights Declaration ("the **Declaration**") signed in 2012 recognizes the possibility to limit freedom of expression for public order reasons.

According to the general principles of the Declaration, "the human rights and fundamental freedoms of every person shall be exercised with due regard to the human rights and fundamental freedoms of others. The exercise of human rights and fundamental freedoms shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition for the human rights and fundamental freedoms of others, and to meet the just requirements of national security, public order, public health, public safety, public morality, as well as the general welfare of the peoples in a democratic society"⁵⁷⁶.

4.3 BALANCING THE TWO RIGHTS: PRACTICAL EXAMPLES

4.3.1 Authority of the Judiciary

European Court of Human Rights

In 1997, in the *Worm v. Austria* case⁵⁷⁷, a journalist had published an article on the trial of a former Austrian Vice Chancellor and Finance Minister, which criticized both the accused and the Court. Subsequently, the applicant was charged for having exercised prohibited influence on criminal proceedings, and an Austrian Court of Appeal concluded that the article was objectively capable of influencing the outcome of the proceedings. The journalist was therefore found guilty and fined. The applicant complained under Article 10 of the ECHR that his conviction violated his right to freedom of expression. After noting that the interference was prescribed by law, and that it responded to the legitimate aim of the maintenance of the authority and impartiality of the judiciary, the Court considered the interference to be relevant to that aim, because the incriminated article was objectively capable of influencing the outcome of the proceedings. The Court examined if the restriction was sufficient.

The ECtHR observed that *“Provided that it does not overstep the bounds imposed in the interests of the proper administration of justice, reporting, including comment, on court proceedings contributes to their publicity and is thus perfectly consonant with the requirement under Article 6 § 1 of the Convention that hearings be public. Not only do the media have the task of imparting such information and ideas: the public also has a right to receive them. This is all the more so where a public figure is involved, such as, in the present case, a former member of the Government. Such persons inevitably and knowingly lay themselves open to close scrutiny by both journalists and the public at large. Accordingly, the limits of acceptable comment are wider as regards a politician as such than as regards a private individual.”*

The Court noted however that *“public figures are entitled to the enjoyment of the guarantees of a fair trial set out in Article 6, which in criminal proceedings include the right to an impartial tribunal, on the same basis as every other person. This must be borne in mind by journalists when commenting on pending criminal proceedings since the limits of permissible comment may not extend to statements which are likely to prejudice, whether intentionally or not, the chances of a person receiving a fair trial or to undermine the confidence of the public in the role of the courts in the administration of criminal justice.”*

The Court considered that the article *“had deliberately attempted to lead the reader to conclude that [the former Vice Chancellor] was guilty of the charges against him and had predicted his conviction”, and recalled its words in its judgment in the Sunday Times (no. 1) case: “it cannot be excluded that the public’s becoming accustomed to the regular spectacle of pseudo-trials in the news media might in the long run have nefarious consequences for the acceptance of the courts as the proper forum for the determination of a person’s guilt or innocence on a criminal charge.”*

Therefore the Court concluded that the interference with the applicant's right to freedom of expression resulting from his conviction was also "sufficient" for the purposes of Article 10 § 2, and found that "the national courts were entitled to consider that the applicant's conviction and sentence were "necessary in a democratic society" for maintaining both the authority and the impartiality of the judiciary within the meaning of Article 10 § 2 of the Convention". Consequently, there has been no violation of Article 10 of the Convention."

In *Skatka v. Poland*⁵⁷⁸, the ECtHR observed that "the work of the courts, which are the guarantors of justice and which have a fundamental role in a state governed by the rule of law, needs to enjoy public confidence. It should therefore be protected against unfounded attacks [...] The courts, as with all other public institutions, are not immune from criticism and scrutiny. [...] A clear distinction must, however, be made between criticism and insult. If the sole intent of any form of expression is to insult a court, or members of that court, an appropriate punishment would not, in principle, constitute a violation of Article 10 § 2 of the Convention".

Moreover, in *De Haes and Gijssels v. Belgium*, the ECtHR considered another appeal after journalists had been sanctioned for making critical comments about a Judge. The Judge had ruled in favor of a father whom the general public considered to have committed incest. The Court noted that "the duty of discretion laid upon magistrates prevented them from reacting and defending themselves as, for example, politicians did."⁵⁷⁹ The fact that judges and magistrates are not required to respond to criticism in this way makes it more likely they will suffer harm from undue attacks made against them.

According to the Court, "although Mr De Haes and Mr Gijssels' comments were without doubt severely critical, they nevertheless appear proportionate to the stir and indignation caused by the matters alleged in their articles. As to the journalists' polemical and even aggressive tone, which the Court should not be taken to approve, it must be remembered that Article 10 protects not only the substance of the ideas and information expressed but also the form in which they are conveyed⁵⁸⁰."

The Court therefore considered that,

"regard being had to the seriousness of the circumstances of the case and of the issues at stake, the necessity of the interference with the exercise of the applicants' freedom of expression has not been shown, except as regards the allusion to the past history of the father of one of the judges in question⁵⁸¹".

The Court concluded Article 10 ECHR was violated.

Inter-American Court of Human Rights

The Inter-American Court⁵⁸² has upheld the right of journalists to critique actions of the judiciary.⁵⁸³ The *Kimel v. Argentina* case⁵⁸⁴ concerned the conviction of a journalist who wrote

wrote a book criticizing the conduct of a criminal judge investigating a murder. The judge in turn initiated criminal proceedings against the journalist for defamation. The Argentinian court noted that even if not defamatory, the language could injure the judge's honor and amount to "*false imputation of a publicly actionable crime.*" The court then sentenced the journalist to one year imprisonment and a substantial fine (paragraphs 2, 44-45).

Although the Inter-American Court acknowledged that the American Convention provided for citizens a general right to have their honor and reputations protected, (paragraphs 55, 71), the Court found that the journalist's sentence violated his right to free expression, and that this violation was "*overtly disproportionate.*"

In reaching this conclusion, the Court noted that the substantial penalty imposed upon the journalist constituted a "*serious impairment to the right to freedom of thought and expression.*" The Court also emphasized the need for the judge to reduce his expectation that his honor must be protected, explaining that "*opinions regarding a person's qualification to hold office or the actions of public officials in the performance of their duties are afforded greater protection, so that debate in a democratic system is encouraged*" (Paragraphs 85-86).

U.S. Supreme Court

The Supreme Court has long recognized the general First Amendment protection afforded to speech criticizing the judiciary. The critical importance of expression regarding the actions of the judiciary was first articulated in the 1941 case, *Bridges v. California*, where the Court found that neither the articulated concern of "*disrespect for the judiciary*" nor the "*disorderly and unfair administration of justice*" supported restricting certain out-of-court publications that criticized administration of a pending case.

In reaching this conclusion, the Court applied the "clear and present" danger standard to its analysis – i.e., whether or not "*the words used [were] used in such circumstances and [were] of such a nature as to create a clear and present danger that they [would] bring about the substantive evils.*"⁵⁸⁶

Rejecting the first articulated concern, the Court explained: "*The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion [...] And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.*"⁵⁸⁷

The Court then rejected the second articulated concern, finding that the contested communications (editorial publications and a telegram) did not present a degree of likelihood sufficient to justify punishment.⁵⁸⁸

This "*clear and present danger*" standard was later applied by the Court in the related 1946 and 1947 cases of *Pennekamp v. Florida*⁵⁸⁹ and *Craig v. Harney*⁵⁹⁰, both of which again rejected attempts to restrict certain media critiques of the judiciary.

In *Pennekamp*, the Court reversed an order holding an editor and his corporate publisher in

criminal contempt due to printed pieces criticizing the administration of criminal justice in pending cases. In reaching this conclusion, the Court emphasized that it could not say that the editorials presented *“a clear and present danger to the fair administration of justice.”*⁵⁹²

Similarly, in **Craig** the Court rejected a finding that journalists were guilty for criminal contempt for publishing articles critical of how a local judge handled a case. That said, the Court emphasized that this inquiry is fact-dependent: *“The nature of the case may, of course, be relevant in determining whether the clear and present danger test is satisfied.”*⁵⁹³ The Court succinctly summarized this *“clear and present danger”* standard for judicial critiques in the seminal 1964 case *New York Times Co. v. Sullivan*⁵⁹⁴: *“Injury to official reputation affords no more warrant for repressing speech that would otherwise be free than does factual error. Where judicial officers are involved, this Court has held that concern for the dignity and reputation of the courts does not justify the punishment as criminal contempt of criticism of the judge or his decision This is true even though the utterance contains ‘half-truths’ and ‘misinformation’ Such repression can be justified, if at all, only by a clear and present danger of the obstruction of justice.”*⁵⁹⁵

4.3.2. Fight against Terrorism

European Court of Human Rights

An interesting case concerning terrorism, in particular alleged incitement to terrorism, was decided by the ECtHR in 2008⁵⁹⁶. In 2002, a French cartoonist was convicted by a French court for incitement to terrorism because of a drawing, published on 13 September 2011, representing the attack on the World Trade Centre with a caption that parodied a famous slogan: *“We have all dreamt of it... Hamas did it”* (the original slogan was *“Sony did it”*).

The ECtHR, while acknowledging that what happened on 11 September 2001 was a matter of public interest, found that *“viewed as a whole with the accompanying text, the cartoon was not just a criticism of American imperialism, it was also a glorification of the destruction of America with violence”*⁵⁹⁷ (Paragraph 43). In the Court’s view, the caption sounded like an approval of mass violence and, in the light of its language as well as its timing, it showed disrespect for the dignity of the victims. *“The Court concludes as a consequence that the sanctions issued against the applicant are justified by “relevant and sufficient” elements”* (Paragraph 46).⁵⁹⁹

U.S. Supreme Court

In the 2010 case *Holder v. Humanitarian Law Project*⁶⁰⁰, the Supreme Court addressed the relationship between the First Amendment and the fight against terrorism. The Court examined a federal *“material support statute”*, which prohibited, inter alia, legal training and political advocacy to designated terrorist groups, and held that it did not violate the First Amendment rights of groups wishing to provide humanitarian training on how to resolve disputes peaceably.

Noting that Congress had drawn the *“material support statute”* narrowly, the Court held that the First Amendment did not protect speech that amounted to *“training”* or *“expert advice”*⁶⁰¹

However, the Court ruled quite narrowly that the particular speech at issue in that case was not protected by the First Amendment, and expressly disclaimed that any future applications of the “material support statute” or other terrorism-related regulation to speech would survive constitutional scrutiny.⁶⁰²

4.3.3 INCITEMENT TO HATRED

European Court of Human Rights

The ECtHR dealt with incitement to hatred in the *Féret*⁶⁰³ case. The case concerned a Belgian politician of *Front National*, convicted for the content of some party leaflets distributed during election campaigns and inciting others to racism, hatred and discrimination. Féret applied to the ECtHR, claiming an excessive restriction of his right to freedom of expression. The ECtHR observed that the language used by the applicant was clearly an incitement to racial hatred and discrimination, which cannot be hidden by reference to the electoral process (Paragraph 78).

The Court also held that, despite the fact that in principle, political debate deserves a high degree of protection, this cannot mean incitement to racial discrimination and humiliation may go unsanctioned.

U.S. Supreme Court

In the *Virginia v. Black* case, three defendants were convicted in two separate cases of violating a Virginia statute against cross burning. Cross burning in the U.S is associated with the racist organization Klu Klux Klan. The Court found that Virginia’s statute is unconstitutional, because a general prohibition of cross burning ignores “*all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate*”. However, cross burning done with intent to intimidate can be limited because such expression has a “*long and pernicious history as a signal of impending violence*.” Considering cross burning as prima facie evidence of intent to intimidate blurs the distinction between proscribable “*threats of intimidation*” and the Ku Klux Klan’s protected “*messages of shared ideology*.” Cross burning can be a criminal offence if the intent to intimidate is proven.

4.3.4 GUARANTEEING TERRITORIAL INTEGRITY

European Court of Human Rights

In 2004⁶⁰⁴ the ECtHR was called on to review a Turkish ruling on the basis of which the president of a foundation defending the rights of Kurdish women in Turkey was convicted and sentenced to two years of prison. The applicant was convicted because he distributed a pamphlet on the conditions of Kurdish women in Turkey that, according to the Turkish court, was in fact a pamphlet of separatist propaganda.

The ECtHR, despite acknowledging that the protection of territorial integrity per se is a valid restriction of freedom of expression, did not find that the particular restriction in the case was necessary in a democratic society.

The ECtHR reached a similar outcome in the case of the editor and the owner of a magazine in Turkey who had both been convicted for “disseminating propaganda against the indivisible unity of the State.” The applicants published an article blaming the Turkish Minister of Justice for the poor conditions of the State’s prisons and for the death of two prisoners who carried out a hunger strike to raise awareness on the situation⁶⁰⁵. The ECtHR affirmed that such a restriction to freedom of information was not proportionate to the aim pursued.

4.3.5 SEXUALLY EXPLICIT CONTENT

European Court of Human Rights

In its 2010 decision in *Akdas v Turkey*, the ECtHR dealt with the case of a Turkish publisher, Akdaş, who in 1999 published the Turkish translation of the erotic novel “*Les onze mille verges*” by the French writer Guillaume Apollinaire⁶⁰⁶. The novel contained very explicit sexual content, including vampirism and paedophilia. On that basis, Akdas was condemned under the criminal code for spreading an immoral book that could have bad effects on the population.

The ECtHR found that such interference with Akdas’ freedom of expression was not necessary in a democratic society. The Court recalled the Müller case⁶⁰⁷, where it stated that “*it is not possible to find in the legal and social orders of the Contracting States a uniform European conception of morals. The view taken of the requirements of morals varies from time to time and from place to place, especially in our era, characterised as it is by a far-reaching evolution of opinions on the subject*” (paragraph 35).

It also acknowledged that states were in general better placed than an international judge to expound upon the exact content of these requirements and upon what constitutes a necessary restriction or sanction.

Still, the ECtHR noted that each case must be considered on a case by case basis. Here, a book of a world-renowned author published a century ago and translated in many languages and which represented an element of European heritage, could not be withheld from Turkish speakers on the ground of protection of public morals (Paragraphs 28-30).

U.S. Supreme Court

In the US, obscenity is not protected by the First Amendment right to freedom of speech, and may therefore be regulated or banned by states. The standard for what is considered obscene has been evolving.

In 1973, the Supreme Court in *Miller v. California* established the three-tiered Miller test to

determine what was obscene (and thus not protected) versus what was merely erotic and thus protected by the First Amendment. While the Court reiterated that *“obscene material is unprotected by the First Amendment”*, to qualify as unprotected *“obscene material, a trier of fact must consider: “(a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.”*

The Government may regulate sexually explicit but non-obscene expression in an appropriately narrow way.

In the *Erznoznik v. City of Jacksonville* case of 1975⁶⁰⁸, the U.S. Supreme Court considered a city ordinance prohibiting the showing of films containing nudity by a drive-in theatre, and ruled that that this ordinance was unconstitutional, because:

“The ordinance by discriminating among movies solely on the basis of content has the effect of deterring drive-in theaters from showing movies containing any nudity, however innocent or even educational, and such censorship of the content of otherwise protected speech cannot be justified on the basis of the limited privacy interest of persons on the public streets, who if offended by viewing the movies can readily avert their eyes.

“Nor can the ordinance be justified as an exercise of the city’s police power for the protection of children against viewing the films. Even assuming that such is its purpose, the restriction is broader than permissible since it is not directed against sexually explicit nudity or otherwise limited.

(...) Moreover, its deterrent effect on legitimate expression in the form of movies is both real and substantial.”

The Court’s view of how narrow regulation must be is determined by its view of the strength of the government’s interest in regulation on the one hand, and by its view of the importance of the expression itself on the other hand. It follows from the case law of the Court that sexually explicit expression does not receive the same degree of protection afforded to purely political speech.

4.3.6 MANDATORY MEMBERSHIP IN A PROFESSIONAL ASSOCIATION

Inter-American Court of Human Rights

In 1985, the Inter-American Court delivered an opinion on the compliance of a rule requiring journalists to be members of a professional association, with freedom of expression⁶⁰⁹.

The Court found the provision in breach of Article 13 of the American Convention, refusing to see it as a permissible restriction of freedom of expression justified by reasons of public order:

“reasons of public order that may be valid to justify compulsory licensing of other professions cannot be invoked in the case of journalism because they would have the effect of permanently depriving those who are not members of the rights that Article 13 of the Convention grants to each individual. Hence it would violate the basic principles of a democratic public order on which the Convention itself is based”.

In its opinion, the Court acknowledged *“the difficulty inherent in the attempt of defining with precision”* the meaning of ‘public order’, recognizing that it *“can be used as much to affirm the rights of the individual against the exercise of governmental power as to justify the imposition of limitations on the exercise of those rights in the name of collective interests”*. The Court emphasized that *“public order [...] may under no circumstances be invoked as a means of denying a right guaranteed by the Convention or to impair or deprive it of its true content”*.

U.S. Supreme Court

The Supreme Court has not directly addressed whether journalists can potentially be required to join professional associations or maintain other qualifications in order to publish (e.g., licenses).

However, the Court has emphasized multiple times that the public and media have equal rights under the First Amendment, suggesting that U.S. courts would refuse to impose these requirements on anyone as a precondition to publication.

As the Court explained in the 2010 case *Citizens United v. FEC*⁶¹⁰, *distinguishing between the press and other speakers is difficult, if not impossible: “With the advent of the Internet and the decline of print and broadcast media (...) the line between the media and others who wish to comment on political and social issues becomes far more blurred.”*⁶¹¹

Based on these “blurred” lines, it would be impossible to limit free speech rights to members of a professional media organization, or those who maintain other similar professional qualifications.⁶¹²

SECTION V: NATIONAL SECURITY AND STATE SECRETS



5.1. PRIMARY INTERNATIONAL SOURCES

5.1.1. International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (“**ICCPR**”)⁶¹³ affirms that civil and political freedoms can only be achieved if conditions are created whereby everyone may enjoy civil and political rights. Article 19 of the ICCPR states that *“Everyone shall have the right to freedom of expression [...]”. It also states that enjoyment of the right may be subject to restrictions, namely those that are provided by law and are necessary for “respect of the rights or reputations of others”, for reasons of “public health or morals, or for the protection of national security or of public order”.*

Subject to these three conditions (the “**three-part-test**”), freedom of expression can therefore be limited for reasons of protection of national security.

Additionally, Article 4 of the ICCPR provides conditions under which freedom of expression can be restricted in a state of emergency. If a state declares a state of emergency it must establish the following:

- (1) circumstances which “threaten the life of the nation”;
- (2) the state of emergency must be officially proclaimed in line with applicable legal procedures;
- (3) the limitation on liberties shall be used only to the extent strictly necessary in the circumstances and shall not be applied in a discriminatory way; and
- (4) the state shall inform other states of this restriction, the reason for the restriction, and its duration.

In its General Comment No. 34, the Human Rights Committee (“**CCPR**”) states that restrictions to the freedom of expression *“must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated.”* Additionally, these restrictions *“must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.”*⁶¹⁴

For example, *“treason laws and similar provisions relating to national security, whether described as official secrets or sedition laws or otherwise” must be drafted and applied in a manner that conforms to these strict requirements and cannot be invoked “to suppress or withhold from the public information of legitimate public interest that does not harm national security”.*

Journalists, researchers, environmental activists, human rights defenders, and others, should not be prosecuted for disseminating such information. Likewise, counter-terrorism measures should be compatible with this guidance.

The media plays an important role in informing the public about acts of terrorism and its capacity to operate should not be unduly restricted. In other words, it is not sufficient to

impose blanket restrictions on freedom of expression based on vague or unarticulated claims of threats to national security.

5.1.2. UNITED NATIONS HUMAN RIGHTS COUNCIL RESOLUTIONS

The UN Human Rights Council (“HRC”) has also recognized that the rights to freedom of expression and freedom of the press can be restricted or limited for reasons of national security.

HRC resolutions express concern, however, that, in practice, national legislation related to security, public order, or counter-terrorism issues and the practices of security or intelligence services are being used to unjustifiably restrict press freedoms.

HRC resolutions 21/12 and 12/16 have noted that states must provide a *“safe and enabling environment for journalists to perform their work independently and without undue interference” from military, law enforcement and security personnel⁶¹⁵ and that national governments must ensure that the invocation of national security “is not used unjustifiably or arbitrarily to restrict the right to freedom of opinion and expression”.*

Further, the Council has expressed concern that the censorship or abuse of journalists has been facilitated and aggravated by abusing “states of emergency”⁶¹⁶. This sentiment echoes the restrictions based on necessity set out by the ICCPR.

5.1.3. SPECIAL RAPORTEURS

In 1996, the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Expression published a report heralding the Johannesburg Principles on National Security, Freedom of Expression and Access to Information⁶¹⁷.

These Principles, adopted by a group of experts in international law, national security, and human rights, provide useful guidance for protecting the right to freedom of opinion, expression and information. They have been endorsed in several Special Rapporteur reports⁶¹⁸.

The Johannesburg Principles recognize a limited scope for restrictions on freedom of expression and freedom of information, and stress the necessity for legal protection of these freedoms by the enactment of laws drawn narrowly and with precision. This is in order to avoid unjustified restrictions on the exercise of these freedoms by Governments under the pretext of national security.

In particular, the Johannesburg Principles⁶¹⁹ state that:

- *“Any restriction on expression or information must be prescribed by law”⁶²⁰;*
- *“Any restriction on expression or information that a Government seeks to justify on the grounds of national security must have the genuine purpose and demonstrable effect of protecting a legitimate national security interest”⁶²¹;*
- *“A Government attempting to restrict expression or information must demonstrate that the expression or information at issue poses a serious threat to a legitimate national security interest; the restriction imposed is the least restrictive means possible of protecting that interest; and the restriction is compatible with democratic principles”⁶²².*

Additionally, the Johannesburg Principles address concerns related to determining what constitutes a legitimate national security interest, restrictions placed on freedom of expression during declared states of emergency, and limitations on expression that pose a threat to national security.

A state may impose restrictions on these freedoms *“only to the extent strictly required by the exigencies of the situation and only when and for so long as they are not inconsistent with the Government’s other obligations under international law.”*

The Johannesburg Principles also highlight other important limitations on the use of national security grounds as a means for restricting the freedom of expression:

- *“Expression may not be prevented or punished merely because it transmits information issued by or about an organization that a Government has declared threatens national security or a related interest”⁶²³.*
- *“A state may not categorically deny access to all information related to national security, but must designate in law only those specific and narrow categories of information that it is necessary to withhold in order to protect a legitimate national security interest”⁶²⁴.*
- *“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”⁶²⁵.*
- *“Protection of national security may not be used as a reason to compel a journalist to reveal a confidential source”⁶²⁶.*

Several Joint Declarations⁶²⁷ by the UN Special Rapporteur on Freedom of Opinion and Expression, the Organisation for Security and Co-Operation in Europe (OSCE) Representative on Freedom of the Media and the Organization of American States (OAS) Special Rapporteur on freedom of expression have also recognized the limited scope of national security limitations on the freedom of expression and freedom of information.

One Joint Declaration issued on 6 December 2004⁶²⁸ declared that, *“Certain information may legitimately be secret on grounds of national security or protection of other overriding interests. However, secrecy laws should define national security precisely and indicate clearly the criteria which should be used in determining whether or not information can be declared secret, so as*

to prevent abuse of the label 'secret' for purposes of preventing disclosure of information which is in the public interest. Secrecy laws should set out clearly which officials are entitled to classify documents as secret and should also set overall limits on the length of time documents may remain secret. Such laws should be subject to public debate."

In 2010, the Special Rapporteurs released the "Tenth Anniversary Joint Declaration: Ten Key Challenges to Freedom of Expression in the Next Decade". The Tenth Anniversary Joint Declaration included "Security and Freedom of Expression" as a key challenge.

Specifically, *"the notion of national security has historically been abused to impose unduly broad limitations on freedom of expression, and this has become a particular problem in the aftermath of the attacks of September 2001, and renewed efforts to combat terrorism"*⁶²⁹.

The Declaration highlighted specific concerns with respect to vague and overbroad definitions of terms such as "security" and "terrorism", the abuse of vague terms to limit speech, pressures on the media to not report on issues of terrorism and the expanded use of surveillance (and chilling effect on journalists).

A 2011 Joint Declaration on Freedom of Expression and the Internet⁶³⁰ declared that *"cutting off access to the Internet, or parts of the Internet, for whole populations or segments of the public (shutting down the Internet) can never be justified, including on public order or national security grounds. The same applies to slow-downs imposed on the Internet or parts of the Internet."*

In further recognition of these principles, the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Expression issued a report in 2013 addressing the tensions between national security concerns and the freedom of expression⁶³¹.

The report discussed concerns about national security and criminal activity and the appropriateness of responding with exceptional use of communications surveillance technologies. Because national laws regulating the use of surveillance are often inadequate or nonexistent, there is a risk of arbitrary and unlawful infringement of the right to privacy in communications and, similarly, to the freedoms of expression and opinion.

States are increasingly drawing on communications data to support law enforcement or national security investigations. The report observes that *"[j]ournalists are also particularly vulnerable to becoming targets of communications surveillance because of their reliance on online communication. In order to receive and pursue information from confidential sources, including whistleblowers, journalists must be able to rely on the privacy, security and anonymity of their communications"* (Paragraph 52).

As it is widely applied and ill-defined, the concept of national security is *"vulnerable to manipulation by the state as a means of justifying actions that target vulnerable groups such as human rights defenders, journalists, or activists"* (Paragraph 60).

In September 2013, following Edward Snowden's revelations on mass surveillance operated by the United States **National Security Agency** ("**NSA**"), the Special Rapporteurs on Freedom

of Expression and on Human Rights and Counter-terrorism observed in a joint declaration that *“it is clear that the revelations on the extensive mass surveillance initiatives implemented by some Governments needs to be widely debated,”* and that *“the intimidation of journalists and newspapers questioning alleged abuses by intelligence bodies is certainly not a contribution to the open debate that needs to take place”*⁶³².

On 4 May 2015, the Special Rapporteurs on freedom of expression of the UN, the OSCE, the OAS and the ACHPR issued a joint declaration on freedom of expression and responses to conflict situations⁶³³. Addressing the issue of systematic or targeted attacks on freedom of expression, the Special Rapporteurs stated:

“all criminal restrictions on content – including those relating to hate speech, national security, public order and terrorism/extremism – should conform strictly to international standards, including by not providing special protection to officials and by not employing vague or unduly broad terms”.

5.1.4 UNESCO

Echoing the principles set forth by the ICCPR, UNESCO published its book *Freedom of Expression, Access to Information and Empowerment of People*⁶³⁴ in connection with the 2008 World Press Freedom Day.

This publication discusses the restrictions on freedom of information that have emerged in response to concerns with protecting national security. Whenever media is censored, UNESCO observed, *“the right to information is violated.”* This principle reflects a broad theme among international organisations: that prior censorship on purported national security grounds is rarely, if ever, a justifiable infringement on the freedom of expression.

UNESCO further noted that *“observers and activists across the world have highlighted the negative impact of security and counter-terrorism measures on civil liberties, the media and political expression, suggesting an overall setback as far as the protection of freedom of expression is concerned”* (page 48).

Furthermore, the International Program on the Development of Communications (IPDC), which is, according to its website, a *“multilateral forum in the UN system designed to mobilize the international community to discuss and promote media development in developing countries”* set up under the auspices of UNESCO⁶³⁵, has developed a set of Media Development Indicators⁶³⁶ *“aimed at enabling the assessment of media landscapes at national level”*.

The MDIs *“define a framework within which the media can best contribute to, and benefit from, good governance and democratic development”*. According to the MDIs, constitutional guarantees may be eroded by exceptions and derogations from international treaty obligations or by contradictory laws covering, for example, state secrecy or criminal defamation.

The “war on terror” has seen the introduction of laws and regulations relating to national security which infringe the right to freedom of expression and erode the assumption of information access.

5.1.5. TSHWANE PRINCIPLES: GLOBAL PRINCIPLES ESTABLISHED BY CIVIL SOCIETY AND EXPERTS

The Global Principles on National Security and the Right to Information⁶³⁷, based on international and national law, standards and good practices, and the writings of experts, place a framework around the state’s ability to withhold information on national security grounds and punish the disclosure of such information.

These principles, published in June 2013, were drafted by twenty-two organisations and academic centres in consultation with more than 500 experts.

The aim of the document is to provide guidance on law drafting and implementation.

“National security” is not defined in these Principles. However, Principle 2 includes a recommendation that “national security” should be defined precisely in national law, in a manner consistent with the needs of a democratic society.

According to Principle 2,

“given that national security is one of the weightiest public grounds for restricting information, when public authorities assert other public grounds for restricting access—including international relations, public order, public health and safety, law enforcement, future provision of free and open advice, effective policy formulation, and economic interests of the state—they must at least meet the standards for imposing restrictions on the right of access to information set forth in these Principles as relevant.”

The Tshwane Principles develop in detail these standards for imposing restrictions on the right of access to information.

Principle 3 states that: *“No restriction on the right to information on national security grounds may be imposed unless the government can demonstrate that: (1) the restriction (a) is prescribed by law and (b) is necessary in a democratic society (c) to protect a legitimate national security interest; and (2) the law provides for adequate safeguards against abuse, including prompt, full, accessible, and effective scrutiny of the validity of the restriction by an independent oversight authority and full review by the courts.”*

Each of these criteria is then developed further.

In 2000, the Committee of Ministers published a Recommendation noting the importance of protecting a journalist's right to non-disclosure. However, the Committee observed that this right is not without limitation and that a journalist may be compelled to reveal a source in exceptional cases where a vital personal or public interest is at stake.

5.2. PRIMARY REGIONAL SOURCES

5.2.1. Europe

5.2.1.1. Council of Europe

The Council of Europe's Committee of Ministers⁶³⁸ has published recommendations discussing the relationship between freedom of expression and concerns related to national security.

In 2000, the Committee of Ministers published a Recommendation noting the importance of protecting a journalist's right to non-disclosure. However, the Committee observed that this right is not without limitation and that a journalist may be compelled to reveal a source in exceptional cases where a vital personal or public interest is at stake.

One example highlighted by the Committee is a case where a disclosure is necessary to protect a human life or to prevent a major crime from occurring.

According to the recommendation, major crimes include murder, manslaughter, severe bodily injury, crimes against national security, or serious organized crime. The prevention of such crimes can "*possibly justify the disclosure of a journalist's source*"⁶³⁹. The Committee focuses only on the "prevention" of such crimes and not the repression and prosecution.

In 2007, the Council of Europe Parliamentary Assembly issued Resolution 1551 regarding fair trial issues in criminal cases concerning espionage or divulging state secrets.

The Resolution specifically noted "*the importance of freedom of expression and of information in a democratic society, in which it must be possible to freely expose corruption, human rights violations, environmental destruction and other abuses of authority.*"

Additionally, the Assembly stated that legislation on official secrecy in many Member States is vague and overly broad and could be construed to cover a wide range of legitimate activities of journalists, scientists, lawyers or other human rights defenders⁶⁴⁰.

Furthermore, in 2005, the Directorate General of Human Rights and Rule of Law⁶⁴¹ issued a Recommendation to the Committee of Ministers regarding the media and terrorism expressing that terrorism should not be used as a pretext for restricting fundamental rights and requesting the Committee to ask states to abstain from unduly restricting the dissemination of information about terrorism⁶⁴².

In 2008, the Directorate General urged states to regularly review any legislation restricting freedom of the press and to take measures to remedy laws that limit these freedoms. Specifically, the Directorate General observed that "*penal laws against incitement to hatred or for the protection of public order or national security must respect the right to freedom of expression*"⁶⁴³.

The decisions of the ECtHR reflect these views.

In *Stoll v. Switzerland*, the Court stated that state interference with freedom of expression is only justified if the action is (i) prescribed by law, (ii) pursues a legitimate aim towards national security, and (iii) is necessary in a democratic society in order to achieve them.

The criterion for assessing whether interference is necessary in a democratic society must be whether it corresponds to a pressing social need for which the authorities have only a limited margin of appreciation.

In most cases, the Court has found that interferences with the press are not justified⁶⁴⁴.

5.2.1.2. EUROPEAN UNION

No explicit reference is made in the Charter of Fundamental Rights of the European Union⁶⁴⁵ to restrictions of freedom of expression for reasons of national security.

It is important to note, however, that the ECHR and the case law of the ECtHR are recognized points of reference for the protection of fundamental rights in the European Union.

In 2013, the European Parliament issued a Resolution on the freedom of press and media in the world⁶⁴⁶. The Resolution recognized that governments have the primary responsibility for guaranteeing and protecting freedom of the press and media.

According to the Resolution, *“a balance between national security issues and freedom of information must be struck in order to avoid abuses and guarantee the independence of the press and media”*.

The European Parliament pointed out that governments have acted under the guise of national security and anti-terrorism legislation as a means of hampering the freedoms of the press and media.

The European Parliament’s Resolutions are, however, non-binding upon Member States. They provide guidelines for coordination of national legislations or administrative practices.

5.2.2 ORGANIZATION FOR SECURITY AND COOPERATION IN EUROPE

The Organization for Security and Cooperation in Europe (“OSCE”)’s Regular Reports to the Permanent Council periodically document issues that have been raised to participating states by the Representative on Freedom of the Media.

In the 29 March 2012 Regular Report to the Permanent Council, OSCE addressed governments’ efforts to regulate the Internet.

The Representative observed that many states limit access to and free use of the Internet through laws and regulations, justifying these restrictions on grounds of: protection of public safety, morals, national security and protection of others' lawful rights.

The OSCE went on to state that “[b]y pitting free speech concerns and security issues against each other we run the risk that both will be conquered. We may find ourselves with no security and no rights. Consequently, all measures that aim to increase security must be accompanied by meaningful counterweights that protect human rights. In short, we must have effective and transparent mechanisms for civilian oversight of new security measures”⁶⁴⁷.

For instance, with respect to national security, on 11 March 2014, the Representative made a public statement about the Ukrainian National Television and Radio Broadcasting Council's demands that cable operators in Ukraine stop transmitting Russian television channels, stating that “banning programming without a legal basis is a form of censorship and national security concerns should not be used at the expense of media freedom”⁶⁴⁸.

As mentioned before, the OSCE Representative on Freedom of the Media made a Joint Declaration along with the UN Special Rapporteur on Freedom of Opinion and Expression and the OAS Special Rapporteur on Freedom of Expression⁶⁴⁹.

5.2.3. THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS

The African Commission on Human and Peoples' Rights (“**African Commission**”)⁶⁵⁰ is a quasi-judicial body tasked with promoting and protecting human rights and collective peoples' rights, interpreting the African Charter on Human and Peoples' Rights (“**African Charter**”) and other African Union legal instruments such as the African Charter on Democracy, Elections and Governance, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa and the African Charter on the Rights and Welfare of the Child. The African Commission aims at considering individual complaints of violations of the Charter.

Freedom of the press is a fundamental right under Article 9 of the African Charter (right to freedom of information and free expression), which provides that every individual has the right to receive information and to express and disseminate opinions within the law. Article 27 of the African Charter states that all rights and freedoms under the Charter “shall be exercised with due regard to the rights of others, collective security, morality, and common interest.”

The African Commission has also adopted the Declaration of Principles on Freedom of Expression in Africa (“**Declaration**”), which reaffirms and expands on Article 9 of the African Charter. The Declaration states that the right to a free press “should not be restricted for national security grounds unless there is a real risk of harm to a legitimate interest and there is a close causal link between the risk of harm and the expression”⁶⁵¹.

The African Commission has interpreted Articles 9 related to free expression and 27 of the African Charter and the Declaration to allow legitimate national security reasons to justify

limiting freedom of the press. According to Article 27 of the African Charter, the rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.

Pursuant to the Declaration of Principles on Freedom of Expression in Africa, African Commission on Human and Peoples' Rights, the restriction must (i) be provided by law, (ii) not run afoul of the African Charter, and (iii) serve a legitimate interest and be necessary in a democratic society in order to be an allowable limitation on freedom of the press⁶⁵².

Furthermore, according to the African Commission, when judging the reason for a restriction on the press, a higher level of scrutiny is required for political speech and an even higher level when directed towards the government or government officials.

The African Commission has found domestic laws or government actions have run afoul of Article 9 of the African Charter in the following circumstances:

- (i) requiring journalists to register with a state agency⁶⁵³;
- (ii) allowing for expulsion of journalist for critiquing the government;
- (iii) arresting journalists with no statement for the arrest;
- (iv) closing down newspapers⁶⁵⁴; and
- (v) only allowing state-run newspapers.

The African Commission has indicated that substantiated or credible claims regarding concerns of national security or public order may be a defence to impingement of freedom of the press or expression.⁶⁵⁵

The Commission is generally wary of such claims.

Moreover, the Commission has clarified that *"unlike other human rights instruments, and as emphasized in communication 74/92, the African Charter does not allow States Parties to derogate from it in times of war or other emergency [...] And [States Parties] actions must be judged according to Charter norms, regardless of any turmoil within the state at the time"*⁶⁵⁶.

It added that political turmoil is insufficient grounds for violation of human rights or freedom of expression⁶⁵⁷.

In addition, the African Commission stated its categorical view that military tribunals are not appropriate places to try cases over civilians or offenses falling within the jurisdiction of regular courts,⁶⁵⁸ and has stated that in order for a state to claim, as a defence, that its activities were pursuant to a law validly enacted at the time of the alleged offence, the state must show that the law falls within the scope of the African Charter⁶⁵⁹.

Finally, the African Commission has rejected attempts to impose burdensome accreditation requirements based on claims of security or public order, on the basis that such a showing had not been made and finding that while accurate reporting is the journalistic goal, there will be unforeseeable circumstances when a journalist will publish information contravening

reputations, interests, national security, or public order, and that *“in such circumstances, it is sufficient if journalists have made a reasonable effort to be accurate and have not acted in bad faith [...]. To adopt legislation [like the burdensome accreditation law rejected] aimed at or under the pretext of protecting public order, health or morals, is tantamount to imposing conditions for prior censorship”*⁶⁶⁰.

5.2.1. THE AMERICAS

5.2.1.1. Inter-American System of Human Rights

Article 13 of the Organization of American States (OAS) Convention on Human Rights (the American Convention) states⁶⁶¹ that *“everyone has the right to freedom of thought and expression”*. This Article recognizes that this right should not be subject to prior censorship but that it can be subject to subsequent imposition of liability in order to ensure respect for the rights or reputations of others or for the protection of national security, public order, or public health or morals.

Additionally, Article 27 of the Convention recognizes a state’s ability to suspend certain guarantees in times of war, public danger or other emergencies so long as the measures taken are only *“for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin”*.

Furthermore, the Inter-American Commission on Human Rights (the **“Inter-American Commission”**)⁶⁶² observed in its Report on Terrorism and Human Rights (October 2002) that *“limitations on freedom of expression or access to information related to fighting terrorism may be justified as measures that are necessary to protect the public order or national security”, but “States considering suspending any aspect of this right [to freedom of expression] should always bear in mind the importance of freedom of expression for the functioning of democracy and guaranteeing other fundamental rights”*⁶⁶³.

The freedom may be limited when the state has legally declared a state of emergency.

But whether that limitation is compatible with Article 13 of the American Convention will depend on whether a state of emergency has been legally declared and whether the measures limiting freedom of expression satisfy the strict test required under Article 13 paragraph 2 of the American Convention.

That test requires that freedom of expression be limited only by post-publication sanction and not by prior restraint or censorship. The sanction must be in accordance with law and applicable only to the extent necessary to ensure a) respect for the rights or reputations of others; or b) the protection of national security, public order, or public health or morals.

Further, with regard to the right of access to information, the Declaration of Principles on Freedom of Expression, drafted by the OAS Office of the Special Rapporteur for Freedom

of Expression, and adopted by the Inter-American Commission on Human Rights in October 2000, notes that states have an obligation to guarantee the full exercise of the right of access to information⁶⁶⁴. Limitations should only be allowed in exceptional situations and must be previously established by law in case of a real and imminent danger that threatens national security in democratic societies.

The Inter-American Commission⁶⁶⁵ has also encouraged states to limit punishments for the dissemination of information. In particular, the Commission has suggested that only the person responsible for maintaining a state secret should be subject to liability for the disclosure of a purported state secret. This provides some protection to journalists who receive disclosed secrets.

In December 2004, the Inter-American Commission Special Rapporteur published a joint declaration with the UN Special Rapporteur on Freedom of Opinion and Expression and the OSCE Representative on Freedom of the Media. The joint declaration stated that *"journalists and civil society representatives should never be subject to liability for publishing or further disseminating [...] information, regardless of whether or not it has been leaked to them, unless they committed fraud or another crime to obtain the information"*⁶⁶⁶.

The joint declaration went on to recommend that criminal laws that do not restrict liability for the dissemination of state secrets to those who are officially entitled to handle those secrets, should be repealed or amended.

5.2.4.2. USA: PROTECTION OF FREEDOM OF EXPRESSION AT THE FEDERAL LEVEL

In the United States, freedom of the press is strongly protected from both types of infringement: prior restraint and punishment subsequent to publication. The Supreme Court decisions illustrate the contours of the freedom of the press and the conditions under which freedom of the press would be restricted for purposes of safeguarding national security⁶⁶⁷

5.2.5. ARAB COUNTRIES

5.2.5.1. Arab Charter on Human Rights

Article 32 (1) of the Charter⁶⁶⁸ *"guarantees the right to information and to freedom of opinion and expression, as well as the right to seek, receive and impart information and ideas through any medium, regardless of geographical boundaries."*

However, pursuant to Article 32(2), *"such rights and freedoms shall be exercised in conformity with the fundamental values of society and shall be subject only to such limitations as are required to ensure respect for the rights or reputation of others or the protection of national security, public order and public health or morals"*.

5.2.6. ASIA

The South-East Asian countries signed a joined declaration providing for basic human rights: the ASEAN Human Rights Declaration ("the **Declaration**").⁶⁶⁹

Article 23 of the Declaration states that, *"every person has the right to freedom of opinion and expression, including freedom to hold opinions without interference and to seek, receive and impart information, whether orally, in writing or through any other medium of that person's choice."*

Pursuant to the general principles of the Declaration, *"the human rights and fundamental freedoms of every person shall be exercised with due regard to the human rights and fundamental freedoms of others. The exercise of human rights and fundamental freedoms shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition for the human rights and fundamental freedoms of others, and to meet the just requirements of national security, public order, public health, public safety, public morality, as well as the general welfare of the peoples in a democratic society"*⁶⁷⁰.

5.3 BALANCING THE RIGHTS: PRACTICAL EXAMPLES

5.3.1 Right of access to state-held information

European Court of Human Rights

In the case *Sirbu and Other v. Moldova* of 15 June 2004⁶⁷¹, the ECtHR made a sharp distinction between a right to receive information without interference from independent media on the one hand, and a right of access to state-held documents on the other.

According to a Moldovan governmental decision, which was classified as secret since it concerned the Ministry of Defence, the Ministry of National Security and the Ministry of Internal Affairs, the applicants were allowed to benefit from an increased monthly allowance. This decision was not published in the Official Gazette (*Monitorul Oficial*) and accordingly the applicants did not know about it and did not receive the due payment. The applicants complained that the secrecy imposed on this government decision breached their right to be informed.

The Court noted that it recognized in cases concerning restrictions on freedom of the press a right for the public to receive information as a corollary of the specific function of journalists, which is to impart information and ideas on matters of public interest. However, in this case, the Court stated that the applicants complained of a failure of the state to make public a governmental decision concerning the military, the intelligence service and the Ministry of Internal Affairs.

In this case, the Court considered that there had been no restriction on press freedom since *"the applicants complained of a failure of the State to make public a Governmental decision concerning the military, the intelligence service and the Ministry of internal affairs"*⁶⁷².

The Court therefore concluded that *“freedom to receive information cannot be construed as imposing on a State positive obligations to disclose to the public any secret documents or information concerning its military, intelligence service or police”*⁶⁷³.

Inter-American Court of Human Rights

The Inter-American Court⁶⁷⁴ has held that the right to freedom of information includes the right of access to state-held information⁶⁷⁵.

In *Claude-Reyes et al v. Chile*⁶⁷⁶, the Court addressed a state’s refusal to provide individuals with information requested from the Foreign Investment Committee regarding a deforestation project. The Court determined that Article 13 of the American Convention protects the rights of individuals to request access to state-held information and that there is a positive obligation on the state to provide access to such information or to provide a justification for why access is prohibited (at Paragraph 77).

Any restriction must (1) not be at the discretion of public authorities, and should be enacted *“for reasons of general interest”*; (2) respond to a purpose allowed by the American Convention – e.g., it must be necessary to ensure *“respect for the rights or reputations of others”* or *“the protection of national security, public order, or public health and morals”*; and (3) must be *“necessary in a democratic society; consequently, [it] must be intended to satisfy a compelling public interest”* (at Paragraphs 89-91).

Further, in *Gomes Lund et al. v. Brazil*⁶⁷⁷, a case involving the forced disappearance of Brazilian citizens by the Brazilian military dictatorship in the 1970’s, the Inter-American Court established that *“[.] in cases of violations of human rights, state authorities cannot resort to mechanisms such as official secret or confidentiality of the information, or reasons of public interest or national security, to refuse to supply the information required by the judicial or administrative authorities in charge of the ongoing investigation or pending procedures”* (at paragraph 202).

Moreover, *“the decision to qualify the information as secretive or to refuse to hand it over cannot stem solely from a [s]tate organ whose members are charged with committing the wrongful acts. In the same sense, the final decision on the existence of the requested documentation cannot be left to its discretion”* (at Paragraph 202).

US Supreme Court

Unlike the Inter-American Court, the Supreme Court has not offered broad guidance regarding access to “state-held information.” Instead, this issue is generally governed by federal statutes such as the Freedom of Information Act⁶⁷⁸ and the Government in the Sunshine Act,⁶⁷⁹ as well as their state counterparts⁶⁸⁰.

Although the Supreme Court has not focused on the nature and extent of access to state-held information, it has repeatedly emphasized that the press is not entitled to any special privileges in this regard: *“It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the*

*public generally*⁶⁸¹.

The Supreme Court has relied on this premise in a variety of cases denying media access to inmates or prisons.

For example, in the 1974 case *Pell v. Procunier*, the Court rejected a claim by journalists that a state regulation prohibiting interviews with certain inmates violated the First Amendment⁶⁸².

The Court noted that the regulation did not deny media access to sources of information available to the public. In fact, prior to the regulation the media actually had more access than the public and inmates⁶⁸³.

Because the Constitution does not “*impose[] upon government the affirmative duty to make available to journalists sources of information not available to members of the public generally,*” the regulation did not violate the First Amendment⁶⁸⁴.

The Court reiterated this point and reached similar conclusions in the cases *Saxbe v. Washington Post Co.*⁶⁸⁵ and *Houchins v. KQED, Inc.*⁶⁸⁶

In *Saxbe*, the Court upheld a policy prohibiting media interviews with inmates at certain federal prisons, ruling that the limitation did not “place the press in any less advantageous position than the public generally” because both the press and the public had the same access to prisoners: they could visit any inmate if they were a lawyer, clergyman, relative, or friend of that individual⁶⁸⁷.

Four years later in *Houchins*, the Court again considered media access to prison, and restated that the press has no special right to information not available to the general public⁶⁸⁸. Citing *Pell*, the Court also emphasized that “[t]here is no constitutional right to have access to particular government information” and confirmed it had never “intimated a First Amendment guarantee of a right of access to all sources of information within government control”⁶⁸⁹.

The Court has also explored the media’s right to access and report on various stages of criminal proceedings.

In the 1979 *Gannett Co. v. DePasquale*⁶⁹⁰ case, while ruling that there was no independent constitutional entitlement to attend a pretrial suppression hearing, the Court referenced in dictum a possible right under the First and Fourteenth Amendments to attend criminal trials⁶⁹¹.

The Court confirmed this right the next year in *Richmond Newspapers, Inc. v. Virginia*⁶⁹². There, the Court considered the unopposed request of a criminal defendant to close his trial to both the press and the public generally⁶⁹³.

In ruling against this request, the Court acknowledged that the Constitution did not directly protect against exclusion of the public from criminal trials⁶⁹⁴. However, the Court reasoned that arbitrarily excluding individuals from observing and reporting on trials would contravene

the freedom of speech and the press provided for in the First and Fourteenth Amendments⁶⁹⁵.

Still, the Court emphasized that the right to attend criminal trials was qualified, explaining that its holding did not “mean that the First Amendment rights of the public and representatives of the press are absolute”⁶⁹⁶. Despite the general ability of the press and public to attend proceedings, a trial judge “in the interest of the fair administration of justice, [may] impose reasonable limitations on access to a trial”⁶⁹⁷.

The Supreme Court subsequently extended its holding in *Richmond Newspapers, Inc.* to a variety of other types of judicial proceedings.

For example, in the 1982 case *Globe Newspaper Co. v. Superior Court*, the Court held unconstitutional a Massachusetts state statute requiring judges

“at trials for specified sexual offenses involving a victim under the age of 18, to exclude the press and general public from the courtroom during the testimony of that victim”⁶⁹⁸

The Court reiterated that “[a]lthough the right of access to criminal trials is of constitutional stature, it is not absolute”⁶⁹⁹. Still, “the circumstances under which the press and public can be barred from a criminal trial are limited; the State’s justification in denying access must be a weighty one”⁷⁰⁰.

The Court rejected the state’s proffered reasons for the statute in question (protection of minors and the encouragement of minor victims of sex crimes to come forward), reasoning that they did not support a blanket exclusion from these hearings⁷⁰¹.

Similarly, four years later the Court applied its reasoning in *Richmond Newspapers, Inc.* to a defendant’s request to exclude press from a preliminary hearing in a murder trial⁷⁰².

In *Press-Enterprise Co. v. Superior Court*, the Court ruled that the right of access applied to preliminary proceedings as conducted in California.⁷⁰³ The Court based its holding on two different conclusions: (1) the tradition of accessibility to those types of preliminary hearings; and (2) public access to the hearings played “a significant positive role” in the process, which the Court called “the final and most important step in the criminal proceeding”⁷⁰⁴. Any restriction on access to these hearings would have to be “essential to preserve higher values and . . . narrowly tailored to serve that interest”⁷⁰⁵.

Finally, the Court invoked *Press-Enterprise Co.* in the 1993 case *El Vocero de Puerto Rico v. Puerto Rico*⁷⁰⁶, reversing the lower court’s opinion that open probable cause hearings would “prejudice defendants’ ability to obtain fair trials because of Puerto Rico’s small size and dense population”⁷⁰⁷.

The Court ruled that these hearings were “sufficiently like a trial” to generally require public access, and any concern regarding prejudice would have to be addressed on a case-by-case basis⁷⁰⁸.

5.3.2. SAFEGUARD OF NATIONAL SECURITY

European Court of Human Rights

The case of *Sürek v. Turkey* (No. 2) of 8 July 1999⁷⁰⁹ concerned the applicant's conviction for having published a news report containing accusations of violence against the population on the part of two officials involved in the combat against terrorism. It had been argued that because this report disclosed the officials' identities, it had endangered their lives by exposing them to terrorist attack.

In this case, the Court considered that, in view of the gravity of the accusations, it was legitimate and in the public interest to know not only the nature of the officials' conduct but also their identities, even though Turkish law did not directly recognize any public interest legal defences.

Furthermore, the information in the news report had already been published in articles by other newspapers (which had not been prosecuted) and was therefore a matter of common knowledge. Moreover, the conviction in question was liable to deter the press from contributing to an open debate on questions of public interest⁷¹⁰.

Finally, the Court stated that the conviction and sentence were capable of discouraging the contribution of the press to open discussion on matters of public concern⁷¹¹.

The Court therefore did not find that the objective of the government in protecting the officers in question against terrorist attack was sufficient to justify the restrictions placed on the applicant's right to freedom of expression under Article 10 of the Convention. In the absence of a fair balance between the interests in protecting the freedom of the press and those in protecting the identity of the public officials in question, the interference complained of was disproportionate to the legitimate aims pursued. There had therefore been a breach of Article 10 of the Convention⁷¹².

In the case of *Hadjianastassiou v. Greece* of 16 December 1992⁷¹³, the applicant was a Greek air force officer who had been convicted of publishing an article containing technical information on a missile, after having written a report, which had been classified secret, on a different missile.

The Court considered that the disclosure of the state's interest in a given weapon and of the corresponding technical information, which could provide data on the state of progress in its production, are liable to considerably damage national security⁷¹⁴. The Court also pointed to the specific 'duties' and 'responsibilities' of members of the armed forces, and the applicant's obligation of discretion in relation to anything concerning the performance of his duties⁷¹⁵. The Court therefore concluded that the Greek military courts could not be said to have overstepped the limits of the margin of appreciation which is to be left to the domestic authorities in matters of national security. No violation of Article 10 was established⁷¹⁶.

Inter-American Court of Human Rights

The Court has addressed the issue of whether a government can censor an individual on the grounds of protecting national security.

In *Palamara-Iribarne v. Chile*⁷¹⁷, the Court determined that the Navy's interference with a retired naval intelligence officer's publication of a book criticizing actions taken by the Chilean Government constituted prior censorship of material that was collected from publicly available sources and thus the Navy's censorship was in violation of Article 13 paragraph 2 of the American Convention.

The Court noted that statements concerning public officials and other individuals who perform public services should be afforded greater protection and that there should be more tolerance and openness to criticism of these individuals in order to encourage transparency in state activities and to promote accountability of public officials. The naval officer was originally charged, and later acquitted, of violating national security laws by publishing state secrets.

US Supreme Court

There are two Supreme Court decisions that suggest that there may be some conditions under which freedom of the press would be restricted for purposes of safeguarding national security, though in neither case did the Court find that the national security interest justified the type of restriction imposed.

First, in 1931 in *Near v. Minnesota*, the Supreme Court struck down a law that prohibited the publication of any "*malicious, scandalous and defamatory newspaper, magazine or other periodical*"⁷¹⁸.

In that case, the law punished mere publication of "*malicious*" material, even if true, on the theory that it served the public welfare by avoiding stirring up public scandals. The court noted that the chief purpose of the constitutional guarantee of freedom of the press was to prevent "*previous restraints upon publication*"⁷¹⁹.

According to the Court, protection from prior restraint is "not absolutely unlimited," but any restrictions on the freedom of the press are extremely limited⁷²⁰.

Indeed, the "*exceptional nature*" of the restrictions signifies that this freedom has meant "*principally, although not exclusively, immunity from previous restraints or censorship*"⁷²¹. "*Exceptional cases in which some restriction on freedom of the press might be recognized include (1) obscenity, (2) incitements to acts of violence and the overthrow of government by force, and (3) statements made during war times that are such a hindrance to [the nation's war] efforts that their utterance will not be endured [during the period of war] and that no Court could regard them as protected by any constitutional right*"⁷²². According to the Court, this last category could justify a restriction on the "*publication of the sailing dates of transports or the number and location of troops*"⁷²³.

Forty years later, the Supreme Court decided *New York Times Co. v. United States*, which dealt

with the government's attempt to prevent publication of the classified information on the Vietnam war (the "*Pentagon Papers*") in the *New York Times* and *Washington Post*⁷²⁴. In a short *per curiam* opinion, the Court noted that governments carry a "heavy burden of showing justification for the imposition of [a prior] restraint" since "[a]ny system of prior restraints of expression [...] bear[s] a heavy presumption against its constitutional validity"⁷²⁵.

Without providing any detail, the Court held summarily that the government had failed to meet this burden. Justice Black concurred, writing that any willingness to "hold that the publication of news may sometimes be enjoined [...] would make a shambles of the First Amendment"⁷²⁶. Justice Douglas also concurred, stating that the plain language of the First Amendment leaves "no room for governmental restraint on the press," and that in *Near v Minnesota* the Court repudiated any expansive view that government may enjoin publication in the name of national security⁷²⁷.

In Justice Brennan's concurrence, he clarified that *Schenk's* exception⁷²⁸ to the First Amendment bar on prior restraint is limited to times when the United States is "at war"⁷²⁹. He added that particularly in the areas of national defence and international affairs, "the only effective restraint upon executive policy and power [...] may lie in an enlightened citizenry" informed with the benefit of a free press⁷³⁰.

Justice White's concurrence reaffirmed that the protection against prior restraint is "extraordinary," though he admitted that there could be some circumstances that would justify restraining the press from publishing information on "government plans or operations"⁷³¹.

Justice Marshall's concurrence indicated that he believed there may be some circumstances that would warrant enjoining the publication of material

***"damaging to 'national security,' though he declined to do so at the invitation of the Executive alone, when Congress had passed no law authorizing any prior restraint in the name of national security"*⁷³².**

The heavy burden against prior restraint has been affirmed in the years following *Near and New York Times Co.*

In *CBS, Inc. v. Davis*, the Court held that "[e]ven where questions of allegedly urgent national security [citing *New York Times Co.*] [the Court has] imposed this most extraordinary remedy [of prior restraint] only where the evil that would result from the reportage is both great and certain and cannot be mitigated by less intrusive measures"⁷³³.

More recently, the Court has shown its willingness to defer to Congress and the Executive assessment of the facts when "sensitive" national security and foreign relations interests are at stake, but has refused to defer to the Government's interpretation of the First Amendment even when those interests are implicated.

In the case *Holder v. Humanitarian Law Project*⁷³⁴, the Court held that the federal "material

support statute”, which prohibited, inter alia, legal training and political advocacy to designated terrorist groups, did not violate the First Amendment rights of groups wishing to provide humanitarian training on how to resolve disputes peaceably.

Noting that Congress had drawn the “*material support statute*” narrowly, the Court held that the First Amendment did not protect speech that amounted to “*training*” or “*expert advice*”⁷³⁵. However, the Court ruled quite narrowly that the particular speech at issue in that case was not protected by the First Amendment, and expressly disclaimed that any future applications of the “*material support statute*” or other terrorism-related regulation of speech would survive constitutional scrutiny⁷³⁶.

ENDNOTES

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¹ Human Rights Committee General Comment No. 34, CCPR/C/GC/34, para. 43. Available at: <http://www1.umn.edu/humanrts/gencomm/hrcom34.html>.

² With the exception of the American Declaration of the Rights and Duties of Man of 1948.

³ <http://www.un.org/en/documents/charter/>.

SECTION I: SURVEY OF THE INTERNATIONAL SOURCES

⁴ UN Charter, Chapter IX, Article 55c.

⁵ UN Charter, Chapter IX, Article 56.

⁶ See Section 1.1.2 below.

⁷ UN Member States bound by the charter and date of admission to the United Nations: <http://www.un.org/en/members/index.shtml>.

⁸ Article 62 of the UN Charter.

⁹ <http://www.un.org/en/documents/udhr/>.

¹⁰ See Section 1.1.1 above.

¹¹ <http://www.un.org/fr/documents/udhr/>.

¹² <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx>.

¹³ See Para. 11 of GC N°34, Article 19, available at: <http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>

¹⁴ www.un.org/rights/dpi1774e.htm.

¹⁵ <http://www.refworld.org/docid/3ae6b36f1b.html>.

¹⁶ <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>.

¹⁷ List of States parties to the ICCPR: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en.

¹⁸ Human Rights Committee, General comment n°34, <http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>, paragraph 11 and 12

¹⁹ See Section 1.1.2.

²⁰ See footnote 11

²¹ See footnote 11

²² Human Rights Committee, General comment n°34, <http://www2.ohchr.org/english/bodies/hrc/docs/>

any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters". Furthermore, pursuant to Article 11 of the UN Charter, "the General Assembly may consider the general principles of co-operation in the maintenance of international peace and security, including the principles governing disarmament and the regulation of armaments, and may make recommendations with regard to such principles to the Members or to the Security Council or both".

Article 14 of the UN Charter states that "subject to the provisions of Article 12, the General Assembly may recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth from the Purposes and Principles of the United Nations".

⁴³ Black's Law Dictionary. The UNGA also publishes decisions, which often concern procedural matters, for example, elections, appointments, time and place of future sessions.

⁴⁴ <http://www.refworld.org/docid/3b00f0975f.html>.

⁴⁵ http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/68/163

⁴⁶ http://www.un.org/fr/documents/view_doc.asp?symbol=A/RES/69/185&TYPE=&referer=http://www.un.org/fr/ga/69/resolutions.shtml&Lang=E

⁴⁷ http://www.ivir.nl/news/UN_Conference_on_Freedom_of_Information_1948_Final_Act.pdf.

⁴⁸ [http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/277\(III\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/277(III)).

⁴⁹ <http://www.unfoundation.org/what-we-do/issues/united-nations/the-general-assembly.html>.

⁵⁰ Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment of 27 June 1986 [1986]. ICJ Reports 14, para. 188

⁵¹ http://portal.unesco.org/en/ev.php-URL_ID=15244&URL_DO=DO_TOPIC&URL_SECTION=201.html.

⁵² Available at: http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CI/CI/images/WPFD/2014/wpfd_2014_statement_final.pdf.

⁵³ <http://www.unesco.org/new/en/communication-and-information/intergovernmental-programmes/ipdc/special-initiatives/safety-of-journalists/>.

⁵⁴ http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CI/CI/pdf/official_documents/UN_plan_on_Safety_Journalists_EN.pdf.

⁵⁵ <http://www.unesco.org/new/en/communication-and-information/freedom-of-expression/safety-of-journalists/unescos-director-general-report/>.

⁵⁶ <http://www.ohchr.org/EN/HRBodies/HRC/Pages/AboutCouncil.aspx>.

- ⁵⁷ http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/60/251.
- ⁵⁸ http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_7_36.pdf.
- ⁵⁹ See: <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session20/Pages/ResDecStat.aspx>
- ⁶⁰ Resolution A/HRC/RES/21/12, available at http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/a_hrc_res_21_12.pdf
- ⁶¹ <http://www.ohchr.org/EN/HRBodies/SP/Pages/Introduction.aspx>
- ⁶² *ibid*
- ⁶³ *ibid*
- ⁶⁴ *ibid*
- ⁶⁵ A number of reports were issued by the Special Rapporteur and these can be found at <http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/Annual.aspx>.
- ⁶⁶ <http://www.ohchr.org/EN/HRBodies/SP/Pages/Communications.aspx>.
- ⁶⁷ http://www.ohchr.org/Documents/Issues/Business/WGBrief_Communications_with_States_and_non-State_actors_12.03.2014.pdf.
- ⁶⁸ http://www.ohchr.org/Documents/HRBodies/Sp/CodeofConduct_EN.pdf.
- ⁶⁹ http://www.ohchr.org/documents/hrbodies/sp/manual_operations2008.pdf.
- ⁷⁰ <http://www.ohchr.org/EN/ISSUES/FREEDOMOPINION/Pages/OpinionIndex.aspx>.
- ⁷¹ See http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_7_36.pdf
- ⁷² See Sections 1.1.2. and 1.1.3.
- ⁷³ A number of reports were issued by the Special Rapporteur and these can be found at <http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/Annual.aspx>.
- ⁷⁴ See <http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/Complaints.aspx>. And, more in detail.
- ⁷⁵ <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G13/133/03/PDF/G1313303.pdf?OpenElement>, examined by the Assembly the 3rd June 2013.
- ⁷⁶ Para. 24 of the report, *op.cit.* fn 67
- ⁷⁷ Para 28 and 29 of the report, fn 67. Available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolNo=CCPR%2fC%2f21%2fRev.1%2fAdd.9&Lang=en
- ⁷⁸ Para. 83 *op cit.*

- ⁷⁹ Para. 78-79, op.cit.
- ⁸⁰ Para. 81 – 82, op.cit
- ⁸¹ <http://www.ohchr.org/Documents/Issues/Opinion/A.66.290.pdf>.
- ⁸² Restrictions must be formulated in a way that makes clear that its sole purpose is to protect individuals from hostility, discrimination or violence, rather than to protect belief systems, religions or institutions as such from criticism.
- ⁸³ <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.23.pdf>.
- ⁸⁴ Para. 100 of the report
- ⁸⁵ Section C of the report, page 12 and following
- ⁸⁶ <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G12/137/87/PDF/G1213787.pdf?OpenElement>.
- ⁸⁷ See above, 1.1.3 and the three-part test for permitted restrictions to freedom of expression, page 38
- ⁸⁸ <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N13/464/76/PDF/N1346476.pdf?OpenElement>.
- ⁸⁹ <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/G11/124/99/PDF/G1112499.pdf?OpenElement>.
- ⁹⁰ The Tshwane Principles on National Security and the Right to Information address the question of how to ensure public access to government information without jeopardizing legitimate efforts to protect people from national security threats. These Principles are based on international and national law and practices. They were developed in order to provide guidance to those engaged in drafting, revising, or implementing relevant laws or policies. Based on more than two years of consultation around the world with government actors, the security sector and civil society, they set out in unprecedented detail guidelines on the appropriate limits of secrecy, the role of whistleblowers, and other issues.
- ⁹¹ <http://www.opensocietyfoundations.org/sites/default/files/global-principles-national-security-10232013.pdf> (last access: 26/09/2014).
- ⁹² <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N12/501/25/PDF/N1250125.pdf?OpenElement>.
- ⁹³ Available from www.osce.org/fom/40120.
- ⁹⁴ See Section 1.3.3.1 below.
- ⁹⁵ See above, 1.1.3, and the three-part test for permitted restrictions to freedom of expression, page 38

- ⁹⁶ Paragraph 43 of the report
- ⁹⁷ See Section 1.3.1.3. below.
- ⁹⁸ The Declaration is not binding. Still, it represents a strong commitment as it was adopted by consensus. Moreover, many of its principles are affirmed also in international instruments that are legally binding. The Declaration is available at: <http://www.ohchr.org/Documents/Issues/Defenders/Declaration/declaration.pdf>.
- ⁹⁹ http://ap.ohchr.org/documents/alldocs.aspx?doc_id=4760.
- ¹⁰⁰ Now replaced by the UN Human Rights Council, see Section 1.3.1.1.
- ¹⁰¹ http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.23.Add.2_en.pdf.
- ¹⁰² See Section 1.1.3 above.
- ¹⁰³ https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en#2.
- ¹⁰⁴ See Section 1.1.3 above.
- ¹⁰⁵ <http://www2.ohchr.org/english/bodies/hrc/docs/GC34.pdf>.
- ¹⁰⁶ See for example: UN Doc CCPR/C/85/D/1036/2001 (31 October 2005)
- ¹⁰⁷ List of parties to the Optional Protocol: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en.
- ¹⁰⁸ <http://www.ohchr.org/EN/HRBodies/CAT/Pages/CATIndex.aspx>.
- ¹⁰⁹ <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>.
- ¹¹⁰ The first report must be submitted within one year after the entry into force of the Convention for the State concerned; then every four years supplementary reports shall be submitted on subsequent developments. The Committee can ask for further reports or additional information.
- ¹¹¹ List of the States Parties: http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?Treaty=CAT&Lang=en.
- ¹¹² Text of the ECHR: <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>. List of State Parties: <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=&DF=&CL=ENG>.
- ¹¹³ <http://hub.coe.int/>
- ¹¹⁴ Monica Macovei; Council of Europe, A guide to the implementation of Article 10 of the European Convention on Human Rights, Human rights handbooks, No. 2 – Available at : <http://www.echr.coe.int/LibraryDocs/DG2/HRHAND/DG2-EN-HRHAND-02%282004%29.pdf>

- ¹¹⁵ <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109034>. For a detailed analysis of this judgment, see further, Section III.
- ¹¹⁶ <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109029>. For a detailed analysis of this judgment, see further, Section III.
- ¹¹⁷ http://www.echr.coe.int/Documents/Research_report_article_10_ENG.pdf.
- ¹¹⁸ This case corresponds to the second case out of three bearing the name “Von Hannover v. Germany” which have been dealt with by the ECtHR; The first decision was issued on 24 September 2004, the third decision on 18 September 2013. The second “Von Hannover v. Germany” decision was taken in February 2012; available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109029>.
- ¹¹⁹ [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109034#{%22itemid%22:\[%22001-109034%22\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109034#{%22itemid%22:[%22001-109034%22]})
- ¹²⁰ For a full list of State parties: <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=8&CL=ENG>.
- ¹²¹ See the judgment Von Hannover v. Germany (No. 2), quoted above, paragraph 104.
- ¹²² Müller and Others v. Switzerland, 1988
- ¹²³ Chorherr v. Austria, 1993.
- ¹²⁴ Stevens v. the United Kingdom, 1986.
- ¹²⁵ Oberschlick v. Austria, 1991; Thoma v. Luxembourg, 2001; Dichand and Others v. Austria, 2002; Nikula v. Finland, 2002.
- ¹²⁶ Handyside v. the United Kingdom, 1976..Müller and Others v. Switzerland, 1988
- ¹²⁷ Groppera Radio AG and Others v. Switzerland, 1990
- ¹²⁸ Müller and Others v. Switzerland, 1988
- ¹²⁹ Otto-Preminger Institut v. Austria, 1994.
- ¹³⁰ Document 2000 C364/1, available at : http://www.europarl.europa.eu/charter/pdf/text_en.pdf.
- ¹³¹ The principle of subsidiarity aims at determining the level of intervention that is most relevant in the areas of competences shared between the EU and the Member States. This may concern action at European, national or local levels. In all cases, the EU may only intervene if it is able to act more effectively than Member States.
- ¹³² <http://www.osce.org/>
- ¹³³ <http://www.osce.org/pc/40131?download=true>. See Section 1.5.3.
- ¹³⁴ <http://www.osce.org/what/media-freedom>.

- ¹³⁵ Among others: Safety of Journalists Guidebook (II Edition): <http://www.osce.org/fom/118052?download=true>; Media Self Regulation Guidebook: <http://www.osce.org/fom/31497>; Online media Self regulation Handbook: <http://www.osce.org/fom/99560>; Commitments on Freedom of the Media, Freedom of Expression, Free Flow of Information: <http://www.osce.org/fom/99565>; Joint declarations of the representatives of intergovernmental bodies to protect free media and expression: <http://www.osce.org/fom/99558>.
- ¹³⁶ See the Guidebook, at page 7. Available at: <http://www.osce.org/fom/118052?download=true>.
- ¹³⁷ Ibidem, page 8.
- ¹³⁸ Ibidem, page 15, 16.
- ¹³⁹ <http://www.osce.org/fom/118298?download=true>.
- ¹⁴⁰ <http://www.achpr.org/instruments/achpr/>.
- ¹⁴¹ List of States parties: <http://www.achpr.org/instruments/achpr/ratification/>
- ¹⁴² <http://www.african-court.org/en/images/documents/Court/Court%20Establishment/africancourt-humanrights.pdf>.
- ¹⁴³ Note that Egypt has entered the following reservation with respect to Article 9, “as far as the Arab Republic of Egypt is concerned, the provision of the first paragraph of article 9 should be [confined] to such information as could be obtained within the limits of the Egyptian laws and regulations”
- ¹⁴⁴ The declaration is further discussed under Section 1.5.7. The text is available at <http://www.achpr.org/sessions/32nd/resolutions/62>.
- ¹⁴⁵ See section 1.3.2.1.a. Those documents are further discussed under Section 1.5.7.
- ¹⁴⁶ List: http://au.int/en/member_states/countryprofiles.
- ¹⁴⁷ For further details on the two bodies see Section 1.5.7 below.
- ¹⁴⁸ http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm.
- ¹⁴⁹ <http://www.cidh.oas.org/Basicos/English/Basic2.american%20Declaration.htm>.
- ¹⁵⁰ <http://www.cidh.oas.org/basicos/english/Basic4.Amer.Conv.Ratif.htm>.
- ¹⁵¹ <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=26&IID=1>.
- ¹⁵² http://www.oas.org/en/iachr/expression/docs/brochures/rapporteur_brochure_web_julio_13.pdf.
- ¹⁵³ See, for example, the Report on Freedom of Expression and the Internet, http://www.oas.org/en/iachr/expression/docs/reports/2014_04_08_Internet_ENG%20WEB.pdf or the Report on Violence against Journalists and media workers, http://www.oas.org/en/iachr/expression/docs/reports/2014_04_22_Violence_WEB.pdf.

¹⁵⁴ See Section 1.4.2 above.

¹⁵⁵ <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=60>.

¹⁵⁶ **Article 13 paragraph 2 reads:** “The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure: a. respect for the rights or reputations of others; or b. the protection of national security, public order, or public health or morals.”

¹⁵⁷ **Article 13 paragraph 4 reads:** “Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.”

¹⁵⁸ **Article 13 paragraph 5 reads:** “Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.”

¹⁵⁹ **Article 32 reads:** “**Relationship between Duties and Rights** - 1. Every person has responsibilities to his family, his community, and mankind.
2. The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society.

¹⁶⁰ List of States Parties http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm.

¹⁶¹ For detailed information on those bodies see Section 1.5.6.

¹⁶² <http://www.asean.org/news/asean-statement-communiques/item/asean-human-rights-declaration>.

¹⁶³ See <http://www.asean.org/asean/about-asean/overview>. For a detailed analysis of ASEAN and its Human Rights declaration, see paragraph 1.5.8.

¹⁶⁴ UN High Commissioner for Human Rights. “UN official welcomes ASEAN commitment to human rights, but concerned over declaration wording” <http://www.un.org/apps/news/story.asp?NewsID=43536#.VWRnOEjt5Th>

¹⁶⁵ Human Rights Watch, <http://www.hrw.org/news/2012/11/19/civil-society-denounces-adoption-flawed-asean-human-rights-declaration>

¹⁶⁶ The ASEAN Charter, article 1.7

¹⁶⁷ See Section 1.5.8. below.

¹⁶⁸ See 1.1.3.

¹⁶⁹ See FIDH’s report: “The Arab League and human rights: challenges ahead”, Regional Seminar held in Cairo on 16-17 February 2013, available at https://www.fidh.org/IMG/pdf/rapport_lea_uk-lddouble.pdf.

¹⁷⁰ http://www.acihl.org/res/Arab_Charter_on_Human_Rights_2004.pdf.

¹⁷¹ See 1.1.3.

¹⁷² <http://www.icnl.org/research/library/files/Transnational/arabcharter2004en.pdf>.

¹⁷³ <http://www.oic-oci.org/english/article/human.htm>.

¹⁷⁴ http://www.echr.coe.int/documents/convention_eng.pdf.

¹⁷⁵ See further, Section 1.5.2.3.

¹⁷⁶ <http://www.coe.int/en/web/human-rights-rule-of-law/home>.

¹⁷⁷ http://www.coe.int/t/dghl/standardsetting/media/cdmsi/default_EN.asp.

¹⁷⁸ http://www.coe.int/t/dghl/standardsetting/media/MSI-JO/default_en.asp.

¹⁷⁹ Committee of Ministers related Declaration: <https://wcd.coe.in>

¹⁸⁰ Here follows a list of Committee of Ministers Declarations and Recommendations adopted in the media field since 1 January 2010: Declaration of the Committee of Ministers on enhanced participation of member States in Internet governance matters – Governmental Advisory Committee (GAC) of the Internet Corporation for Assigned Names and Numbers (ICANN), adopted on 26 May 2010; Declaration of the Committee of Ministers on the Digital Agenda for Europe, adopted 29 September 2010; Declaration of the Committee of Ministers on network neutrality, adopted on 29 September 2010; Declaration of the Committee of Ministers on the management of the Internet protocol address resources in the public interest, adopted on 29 September 2010; Recommendation CM/Rec(2011)8 of the Committee of Ministers to member States on the protection and promotion of the universality, integrity and openness of the Internet, adopted on 21 September 2011; Recommendation CM/Rec(2011)7 of the Committee of Ministers to member States on a new notion of media, adopted on 21 September 2011; Declaration by the Committee of Ministers on the protection of freedom of expression and information and freedom of assembly and association with regard to Internet domain names and name strings, adopted on 21 September 2011; Declaration by the Committee of Ministers on Internet governance principles, adopted on 21 September 2011; Declaration of the Committee of Ministers on the protection of freedom of expression and freedom of assembly and association with regard to privately operated Internet platforms and online service providers, adopted on 7 December 2011; Declaration of the Committee of Ministers on Public Service Media Governance, adopted on 15 February 2012; Recommendation of the Committee of Ministers to member States on public service media governance, adopted on 15 February 2012; Recommendation CM/Rec(2012)3 of the Committee of Ministers to member States on the protection of human rights with regard to search engines, adopted on 4 April 2012; Recommendation CM/Rec(2012)4 of the Committee of Ministers to member States on the protection of human rights with regard to social networking services, adopted on 4 April 2012; Declaration of the Committee of Ministers on the Desirability of International Standards dealing with Forum Shopping in respect of Defamation, “Libel Tourism”, to ensure Freedom of Expression, adopted on 4 July 2012.

- 181 Link to the declaration: <https://wcd.coe.int/ViewDoc.jsp?id=2188999&Site=CM&BackColorInternet=C-3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383-%20FR>.
- 182 [http://www.coe.int/t/dghl/standardsetting/media/Doc/CM/Rec\(2000\)007&ExpMem_en.asp#TopOfPage](http://www.coe.int/t/dghl/standardsetting/media/Doc/CM/Rec(2000)007&ExpMem_en.asp#TopOfPage).
- 183 Link to document: [https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Rec\(2007\)11&Language=lanEnglish&Ver=original&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75](https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Rec(2007)11&Language=lanEnglish&Ver=original&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75).
- 184 http://www.coe.int/t/cm/aboutcm_en.asp.
- 185 A precise list of the Assembly's competences is available at <http://website-pace.net/web/apce/powers>. See in particular: Resolution 1920 (2013) - The state of media freedom in Europe, Resolution 1877 (2012) and Recommendation 1998 (2012) The protection of freedom of expression and information on the Internet and online media, Recommendation 1950 (2011) The protection of journalists' sources, available at <http://www.coe.int/en/web/media-freedom/parliamentary-assembly-resources>
- 186 <http://www.assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta05/ERES1438.htm>.
- 187 <http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta07/ERES1535.htm>.
- 188 <http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta07/EREC1789.htm>.
- 189 <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=21544&lang=en>
- 190 <https://wcd.coe.int/ViewDoc.jsp?id=458513&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75>.
- 191 <http://www.coe.int/t/commissioner/source/prems/MediaLandscape2011.pdf>.
- 192 [http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-62057#{%22languageiso-code%22:\[%22ENG%22\],\[%22appno%22:\[%225493/72%22\],\[%22documentcollectionid%22:\[%22CHAMBER%22\],\[%22itemid%22:\[%22001-57499%22\]](http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-62057#{%22languageiso-code%22:[%22ENG%22],[%22appno%22:[%225493/72%22],[%22documentcollectionid%22:[%22CHAMBER%22],[%22itemid%22:[%22001-57499%22])}
- 193 Özgür Gündem v Turkey, No. 24144/93, 2000, paras. 43 and 46. Available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58508>.
- 194 Stoll v Switzerland, No 69698/01 2007 at paragraph 110. Available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-83870>.
- 195 http://www.echr.coe.int/Documents/Research_report_article_10_ENG.pdf.
- 196 See, for example, regarding the balancing act between the competing interests of Article 10 and article 8 of the Convention: <http://www.farrer.co.uk/Global/Briefings/10.%20Media%20Group%20Briefing/Privacy%20v%20the%20right%20to%20freedom%20of%20expression%20Clarification%20from%20the%20ECHR.pdf>.
- 197 Fatullayev v Azerbaijan, No. 40984/07 2010 at paragraph 117. Available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-98401>.

- 550 Ibid.
- 551 Ibid.
- 552 Parliamentary Assembly, report on media and Terrorism, 20 May 2005. Available at: <http://assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileID=10914&Language=en>
- 553 <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT>.
- 554 Dunja Mijatović, OSCE Perspective: Important Freedom of Expression and Information Cases and Relevant Legal Trends, 6 May 2014, available at http://globalfreespeech.columbia.edu/files/gfei/Dunja%20Mijatovic_OSCE%20Perspective%20-%20Important%20FOE%20and%20FOI%20Cases%20and%20Relevant%20Legal%20Trends_O.pdf
- 555 Ibid, see part related to France
- 556 See Section 1.4.2
- 557 <http://www.achpr.org/instruments/achpr/#a9>.
- 558 <http://www.achpr.org/sessions/32nd/resolutions/62/>.
- 559 Ibidem, para. XIII.
- 560 http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm.
- 561 IACHR, case Ricardo Canese v. Paraguay, 31 August 2004, paragraph 96. Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_111_esp.pdf.
- 562 Chaplinsky v. New Hampshire, 315 U.S. 568, 571-572 (1942). Available at: <https://supreme.justia.com/cases/federal/us/315/568/case.html>.
- 563 U.S. v. Stevens, 559 U.S. 460, 472 (2010). <https://supreme.justia.com/cases/federal/us/559/08-769/opinion.html>.
- 564 Chaplinsky, 315 U.S. at 571-572. Available at:
- 565 Brandenburg v. Ohio, 395 U.S. 444, 447 (1969). Available at: <https://supreme.justia.com/cases/federal/us/395/444/case.html>.
- 566 Cohen v. California, 403 U.S. 15 (1971). Available at: <https://supreme.justia.com/cases/federal/us/403/15/case.html>.
- 567 Ibidem, at 18.
- 568 Ibidem, at 20.
- 569 Ibidem, at 20.
- 570 Ibidem, at 23-24.
- 571 State v. Johnson, 345 Ore. 190 (2008). Available at: <https://www.courtlistener.com/opinion/835256/state-v-johnson/>.

