



Understanding the Right to Freedom of Expression

AN INTERNATIONAL LAW PRIMER FOR JOURNALISTS

This is a joint publication by the International Human Rights Program (IHRP) at the University of Toronto, Faculty of Law and Journalists for Human Rights (JHR).

The IHRP is a multiple-award winning program that enhances the legal protection of existing and emerging international human rights obligations through advocacy, knowledge-exchange, and capacity-building initiatives that provide experiential learning opportunities for students and legal expertise to civil society.

Journalists for Human Rights (JHR) is Canada's leading media development organization. JHR helps journalists build their capacity to report ethically and effectively on human rights and governance issues in their communities.

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List of Acronyms

ACHPR	African Commission on Human and Peoples' Rights
ACHPR SR	African Commission on Human and Peoples' Rights Special Rapporteur on Freedom of Expression and Access to Information
ACHR	American Convention on Human Rights
AU	African Union
COE	Council of Europe
CRC	Convention on the Rights of the Child
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
OAS	Organization of American States
OAS SR	Organization of American States Special Rapporteur for Freedom of Expression
OSCE	Organization for the Security and Cooperation of Europe
OSCE RFM	Organization for the Security and Cooperation of Europe's Representative on the Freedom of the Media
UDHR	Universal Declaration of Human Rights
UN SR	United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression

Introduction

I. Introduction

Freedom of expression is a fundamental human right for every person around the world. All people have the right to hold their own opinions, and the right to seek, receive and share information and ideas.

For journalists, this right is essential to seeking out and sharing the truth. Without this freedom, we cannot interview citizens or request information from public officials. We cannot empower people to share their opinions and ideas publicly. We cannot impart reliable, accurate information to people so they can make informed decisions about their lives. We cannot play a critical role in democracy, development and good governance. And ultimately, we cannot expose human rights abuses.

Not only do journalists need freedom of expression to do their jobs, but journalists also help others exercise their freedom of opinion and expression by providing citizens with important, timely and accurate information upon which to base their ideas and opinions. Media outlets must be able to operate freely, without censorship or unfair restrictions, to allow these rights to be fully exercised.

This primer provides an overview of the right to freedom of expression as protected by international law. It begins by outlining the United Nations-based treaties that protect the freedom of expression at the international level, and then moves on to discuss protection by regional bodies such as the Organization of American States, the Organization for the Security and Cooperation of Europe, and the African Union, as well as the Special Rapporteurs that report to these bodies. The protection of freedom of expression as customary international law will also be discussed.

As with most human rights, there are limitations and restrictions. This primer will also examine what is not protected and how the right can be legitimately restricted.

Finally, this primer will specifically address some of the other issues connected to freedom of expression that journalists encounter on a daily basis: the right to access to information, the right to privacy, and freedom of the press.

Defining Freedom of Expression

II. Defining Freedom of Expression

The right to freedom of expression is broad and covers many freedoms that are essential to the work of journalists around the world. The United States Agency for International Development (USAID) and the International Research and Exchanges Board (IREX) issued a joint report that recognized four fundamental freedoms – all of which rely on the right to freedom of expression – that empower journalists to do their work freely and independently:

1. The freedom of issuing newspapers and publications
2. The independence of broadcast licensing and regulation
3. The prohibition from all forms of censorship
4. Freedom of accessing, obtaining and circulating information¹

The definition of freedom of expression, as recognized by law, has been evolving. When the United Nations General Assembly met the very first time in January 1946, one resolution that it passed recognized freedom of information as a fundamental human right and “the touchstone of all the freedoms to which the United Nations is consecrated.”²

Furthermore, it provided an early definition of freedom of expression:

Freedom of information implies the right to gather, transmit and publish news anywhere and everywhere without fetters. As such it is an essential factor in any serious effort to promote the peace and progress of the world.³

Nearly three years later in December 1948, the General Assembly adopted the Universal Declaration of Human Rights (UDHR). It protects freedom of expression under Article 19:

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.⁴

Since then, several international human rights treaties and reports by the UN Human Rights Committee and Special Rapporteurs have expanded on the definition of this right and how it relates to day-to-day life.

The right to freedom of expression does not exist in isolation. All rights are interrelated, interdependent and indivisible. Freedom of expression is linked with the right to peaceful assembly and association (Article 20 of the UDHR) and freedom of thought, conscience, and religion (Article 18 of the UDHR), in particular.

DISCUSSION

1. How do you seek information? How does this vary depending on the source of the information (e.g. government vs. private citizen vs. business) or the form of the information (e.g. testimony vs. documents)?
2. What is an example in which you have sought information and been denied or restricted? Did you feel the denial or restriction was reasonable and/or justified? If so, why? If not, was there a process to challenge the denial or restriction?
3. How do you impart information?
4. What is an example of how your ability to share information has been restricted or censored? Did you feel the denial or restriction was reasonable and/or justified? If so, why? If not, was there a process to challenge the denial or restriction?

Protecting Freedom of Expression: United Nations Treaties

III. Protecting Freedom of Expression: United Nations Treaties

A number of United Nations treaties protect freedom of expression. Sovereign states – known as “States Parties” in international law – sign international treaties that are then deposited with the United Nations. An international human rights treaty signed by a State Party is an agreement that establishes how that country’s government will act to respect, protect, monitor, and fulfill the human rights and fundamental freedoms outlined in that treaty. However, a signature only means that the State Party agrees in principle and has the intent to be bound by the treaty. In order to be binding, a State Party must also ratify the treaty, the process of which varies from State to State.

Ratification is an internal constitutional process; in Canada, for example, the executive branch of government approves treaties before implementation measures are developed. Canada operates on a “dualist system,” which means that the content of treaties must be incorporated into the country’s domestic law before they are enforceable. In States that operate under a “monist system,” such as South Africa, once treaties are ratified they are immediately enforceable as part of domestic law.

States Parties can also issue “reservations.” Reservations are unilateral statements made by States Parties when becoming a party to a treaty. It is a declaration that the State Party will ratify the treaty on the condition that it excludes or modifies certain provisions in the treaty’s application to their State.

For the purposes of this primer, the following UN-based treaties are applicable only to those countries that have signed and ratified the treaty, and have not registered any reservations to the particular article protecting freedom of expression.⁵

A. International Covenant on Civil and Political Rights

The right to freedom of expression is expressed in Article 19 of the International Covenant on Civil and Political Rights (ICCPR) under the same broad terms as in the UDHR. Article 19 of the ICCPR includes the right not only to express opinions and ideas, but also to receive information.⁶

Article 19 states:

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

The ICCPR has been widely ratified throughout the world, with 168 States Parties. Notably, the following States have not signed the ICCPR: Myanmar (Burma), Malaysia, Oman, Qatar, Saudi Arabia, Singapore, South Sudan, and the United Arab Emirates.⁷

The ICCPR requires States Parties to report to the UN Human Rights Committee on their progress towards realizing the rights contained therein within one year of entry into force, and thereafter whenever the Committee requests it.⁸ Reports are submitted to the Secretary-General of the UN, who then forwards them to the Human Rights Committee. The reports, according to Article 40(2) of the ICCPR, “shall indicate the factors and difficulties, if any, affecting the implementation of the present Covenant.”⁹ States that do not comply with their reporting obligations will be subject to the Committee’s procedure, which allows the Committee to consider the State’s status of implementation of the ICCPR in lieu of a formal report.¹⁰

The ICCPR includes an Optional Protocol, which enables individuals to launch complaints to the UN Human Rights Committee. By signing and ratifying the Optional Protocol, States recognize the jurisdiction and competence of the Human Rights Committee to receive and consider complaints from individuals who claim that the State has violated their rights under the Convention.¹¹ The Second Optional Protocol of the ICCPR is aimed at the abolition of the death penalty; signatories agree to take measures to eliminate the death penalty in their States.¹²

Each of the treaty bodies (for example, the Human Rights Committee for the ICCPR or the Committee on Economic, Social and Cultural Rights for the International Covenant on Economic, Social and Cultural Rights (ICESCR)) publish “general comments” or “general recommendations,” which are an authoritative (though not technically binding) interpretation of the provisions within each respective treaty. General Comment No. 34 is a document adopted by the UN Human Rights Committee in July 2011 that gives States more specific guidance on the proper interpretation of Article 19 of the ICCPR.¹³ By outlining the right to freedom of expression in practice, General Comment No. 34 enhances the protection of this fundamental human right. It provides the authoritative interpretation of freedom of opinion, freedom of expression, freedom of expression and the media, the right of access to information, freedom of expression and political rights, and the specific application of the Article and its restrictions.

B. International Covenant on Economic, Social and Cultural Rights

The International Covenant on Economic, Social and Cultural Rights (ICESCR) recognizes the right to freedom of expression under Article 15(3): “The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.” The ICESCR has been signed and ratified by 163 States parties.

Under the ICESCR, States are required to submit reports in two parts: the first is a common core document that contains general information about the reporting State and related frameworks for the implementation and promotion of human rights; the second is a treaty-specific document that contains specific information on the implementation of Articles 1 to 15 of the ICESCR.¹⁴ States parties submit reports within one year of the Covenant’s entry into force, in accordance with a program established in consultation between the Economic and Social Council and the State party.¹⁵ Further reporting schedules are also negotiated during this consultation process.

The ICESCR also has an Optional Protocol, which like the first Optional Protocol of the ICCPR, establishes a complaint mechanism whereby the Committee on Economic, Social and Cultural Rights is able to receive and consider individual complaints.¹⁶

C. International Convention on the Elimination of All Forms of Racial Discrimination

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) expresses the right to freedom of expression under Article 5(d)(vii) and (viii) as the rights to freedom of thought, conscience and religion and the freedom of opinion and expression, respectively.¹⁷

Article 5 states:

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights,

...

(d) Other civil rights, in particular:

...

(vii) The right to freedom of thought, conscience and religion;

(viii) The right to freedom of opinion and expression;¹⁸

The ICERD has been ratified by 177 States.¹⁹ States Parties are required to report on the legislative, judicial, administrative and other measures that they have adopted to meet the standards of the ICERD within one year of its entry into force, and every two years thereafter and whenever the Committee on the Elimination of Racial Discrimination requests it.²⁰

D. Convention on the Rights of the Child

The Convention on the Rights of the Child (CRC) protects the freedom of expression of children under Article 12 and Article 13.²¹

Article 12 states:

1. 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.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Article 13 states:

1. 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.

2. The exercise of this right may 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; or
 - (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

The CRC is the most widely ratified human rights treaty in the world with 194 States Parties. Sudan is not a State party, and the United States has signed but not ratified the treaty.²² States Parties are required to report to the Committee on the Rights of the Child within two years of the Convention's entry into force and every five years thereafter. Reports are to include the measures that the States have taken to implement and give effect to the treaty and "the progress made on the enjoyment of those rights"²³ afforded by the treaty.

The CRC has two Optional Protocols. The first Optional Protocol provides additional protections to children involved in armed conflict – States that have signed and ratified this protocol have committed to ensure that children under the age of 18 are not involved in the armed forces and do not play a direct role in hostilities.²⁴ The Second Optional Protocol is a prohibition on the sale of children, child prostitution, and child pornography.²⁵

E. International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families

The International Convention on the Protection of All Migrant Workers and Members of their Families (ICMW) protects the freedom of expression under Article 13.²⁶

Article 13 states:

1. Migrant workers and members of their families shall have the right to hold opinions without interference.
2. Migrant workers and members of their families 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 their choice.
3. The exercise of the right provided for in paragraph 2 of the present 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 reputation of others;
 - (b) For the protection of the national security of the States concerned or of public order (*ordre public*) or of public health or morals;
 - (c) For the purpose of preventing any propaganda for war;
 - (d) For the purpose of preventing any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

III. PROTECTING FREEDOM OF EXPRESSION: UNITED NATIONS TREATIES

The ICMW has been ratified by only 47 states.²⁷ States Parties are required to report to the Committee on Migrant Workers within one year of the ICMW's entry into force, and every five years thereafter or whenever the Committee requests it. Reports describe the legislative, judicial, administrative and other measures taken to bring effect to the ICMW domestically.²⁸

DISCUSSION

So far, this primer has established how the right to freedom of expression is protected in five international human rights treaties. Now check online to see whether your country has signed, ratified or made any reservations to these treaties (see the **Appendix** of this primer to find out how to do this):

Your Country:

Treaty	Date Signed	Date Ratified	Reservations
International Covenant on Civil and Political Rights			
International Covenant on Economic, Social and Political Rights			
International Convention on the Elimination of All Forms of Racial Discrimination			
Convention on the Rights of the Child			
International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families			

Protecting Freedom of Expression: Regional Treaties

IV. Protecting Freedom of Expression: Regional Treaties

Regional intergovernmental organizations, including the Organization of American States (OAS), Council of Europe (COE), African Union (AU), and Arab League each have Charters that generally share the principles and fundamental human rights protections championed in the UDHR and the UN Charter, including the right to freedom of expression. Each of these organizations have reporting bodies and/or judicial/quasi-judicial mechanisms that consider human rights issues more specifically.

A. The American Convention on Human Rights

The American Convention on Human Rights (ACHR) is the multilateral human rights treaty of the OAS. Article 13 defines the right to freedom of thought and expression, and includes the freedom to seek, receive, and impart information of all kinds, regardless of frontiers, through any medium. Subsections 2 through 5 outline the permissible limits to this right.²⁹

Article 13 of the American Convention on Human Rights states:

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.
2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
 - (a) respect for the rights or reputations of others; or
 - (b) the protection of national security, public order, or public health or morals.
3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.
4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.
5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.

Considering the principles of Article 13, the Inter-American Commission on Human Rights (IACHR) issued the Declaration of Principles on Freedom of Expression in 2000. This Declaration further details the components and limitations of this right, such as privacy laws, confidentiality of journalistic sources, and ownership and control of media sources.³⁰

Of the 34 States that make up the Americas, 25 have ratified the ACHR.³¹ The United States signed but never ratified the Convention, and Canada has neither signed nor ratified the Convention.

States Parties report annually to the Inter-American Economic and Social Council and the Inter-American Council for Education, Science and Culture, and are required to simultaneously submit copies of these reports to the IACHR.³² The IACHR assess the promotion of human rights that States Parties have agreed to honour by signing and ratifying the American Convention. The IACHR then submits an annual report to the General Assembly of the OAS³³, representing all member countries.³⁴ As requested by the Commission, States Parties must submit information regarding the domestic implementation of the rights held within the ACHR.³⁵

As Article 61 states, only States Parties and the IACHR can submit a case to the Inter-American Court of Human Rights (IACtHR)³⁶. However, “any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party.”³⁷ The Commission may then recommend petitions to the IACtHR, pursuant to Article 41 of the ACHR. Admission of petitions must meet the requirements of Article 46, which states that (a) all domestic legal remedies must first be exhausted, (b) that the petition or communication is brought within six months of the date the aggrieved party received notification of the final judgment on the alleged violation, (c) that the subject matter is not pending in another international proceeding, and (d) that the petition contains the relevant personal information of the person(s) or legal representative lodging the petition.³⁸

The decisions of the IACtHR are binding. By signing and ratifying the ACHR, States Parties agree to comply with the judgments issued by the Court.³⁹

B. European Convention on Human Rights

The Council of Europe (COE) oversees the European Convention on Human Rights (ECHR). This Convention recognizes the right to freedom of expression under Article 10.⁴⁰ This includes the right to hold opinions, and to receive and impart ideas and information without interference regardless of frontiers, as well as the duties and restrictions that may also be imposed on the right.

Article 10 of the European Convention on Human Rights 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. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the 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.

IV. PROTECTING FREEDOM OF EXPRESSION: REGIONAL TREATIES

The ECHR has been signed and ratified by the 47 member states of the COE.⁴¹ The Commissioner for Human Rights, under the COE, conducts visits to each member state to assess the status of human rights protections after which a report may be published.⁴²

The ECHR establishes the European Court of Human Rights (ECtHR), which in turn oversees the observance of provisions of the ECHR by High Contracting Parties (parties to the ECHR that have both signed and ratified it), alongside the COE.⁴³

Any High Contracting Party can refer any allegation of breach of the ECHR provisions and protocols by any other High Contracting Party to the ECtHR.⁴⁴ The ECtHR may also receive applications from any person or group of persons, or non-governmental organizations that claim to be victim of a violation of any of the rights outlined in the ECHR by one of the High Contracting Parties.⁴⁵ However, the ECtHR will only consider cases when all domestic remedies have been exhausted and if the issue is brought to the Court within six months of the issuance of a final decision by domestic courts.⁴⁶ The ECtHR will not consider cases if they are brought anonymously or if another international body is already investigating the matter.⁴⁷

The decisions of the ECtHR are binding, and by signing and ratifying the ECHR, the High Contracting Parties commit to abiding by these judgments.⁴⁸

C. African Charter on Human and Peoples Rights

The African Charter on Human and Peoples Rights (ACHPR; also known as the “Banjul Charter”) adopted in 1981 and entered into force in 1986, articulates the right to freedom of expression under Article 9. The article simply states that “(1) Every individual shall have the right to receive information; (2) Every individual shall have the right to express and disseminate his opinions within the law.”⁴⁹

In 2002, the 32nd session of the ACHPR outlined the Declaration of Principles of Freedom of Expression, which reaffirms and elaborates on the rights described in Article 9. It contains sections on the interference with the right to freedom of expression, the promotion of diversity within freedom of expression, freedom of information, the stance of private and public broadcasting, regulatory bodies, and print media, and various protections for media professionals, reputations, and journalistic sources.⁵⁰

Fifty-three States have signed and ratified the ACHPR; South Sudan has not yet signed or ratified the ACHPR.⁵¹ States Parties submit reports every two years from the date the ACHPR came into force. Reports describe the legislative and other measures States have implemented to institute the rights and freedoms of the ACHPR.⁵²

The Protocol on the Statute of the African Court of Justice and Human Rights merges the African Court on Human and Peoples’ Rights and the Court of Justice of the African Union into one: the African Court of Justice and Human Rights.⁵³ States that have signed and ratified the Protocol, the ACHPR, the African Committee of Experts on the Rights and Welfare of the Child, African Intergovernmental Organizations accredited to the AU or its organs, African National Human Rights Institutions, and individuals or relevant NGOs accredited to the AU or its organs may submit cases on any violation of a right guaranteed in the ACHPR to the African Court.⁵⁴ Cases alleging the violation of a human right

protected by the ACHPR are submitted by written application to the Registrar, who then gives notice to all of the parties concerned and the Chairperson of the ACHPR.⁵⁵ According to Article 46 of the Protocol, all decisions of the African Court are binding on all parties.⁵⁶

D. Arab Charter of Human Rights

The Arab Charter of Human Rights was adopted by the Arab League, a regional organization of Arab countries in the Middle East and North Africa, in 2004, and came into force in 2008. It reaffirms the principles of the UDHR, ICCPR, and the Cairo Declaration on the Human Rights of Islam. Article 32 guarantees the right to freedom of expression, stating:

1. 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.
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.⁵⁷

Special Rapporteurs on Freedom of Expression

V. Special Rapporteurs on Freedom of Expression

In addition to the treaty-based mechanisms discussed above, there are various Special Rapporteurs and similar functionaries who investigate and report on issues related to freedom of expression.

The United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression (UN SR) is an independent expert appointed by the UN Human Rights Council to investigate and report on freedom of expression.

The UN SR's mandate is to gather all relevant information on violations of the right to freedom of expression wherever it occurs; to seek and respond to information from governments and non-governmental organizations who are knowledgeable about these violations; and to make recommendations and provide suggestions for how to better protect freedom of expression in general and where violations occur in particular.

The UN SR also works in an advisory capacity to the Office of the United Nations High Commissioner for Human Rights.⁵⁸ The UN SR is additionally responsible for drawing the attention of the Human Rights Council and the United Nations High Commissioner for Human Rights to cases where the violation of the right to freedom of expression is of serious concern.⁵⁹

The OAS has a Special Rapporteur on Freedom of Expression (OAS SR) who reports to the Inter-American Commission on Human Rights (IACHR). The OAS SR's mandate involves conducting visits to OAS Member States; preparing specific and thematic reports on freedom of expression within those States; promoting the exercise of freedom of expression through educational activities, and promotion of the adoption of judicial, administrative, legislative and other measures; and preparing an annual report on freedom of expression in the Americas, which is submitted to the IACHR.⁶⁰

However, the OAS SR's most important function is to advise the IACHR in evaluating individual petitions alleging violations or potential violations of the right, as well as those that may reveal general or systemic issues that affect the right.⁶¹

The African Commission on Human and Peoples' Rights (ACHPR) has a Special Rapporteur on Freedom of Expression and Access to Information (ACHPR SR). The ACHPR SR performs similar functions to the other Special Rapporteurs, and reports to the ACHPR. The ACHPR SR's mandate includes analysis and monitoring of national legislation and compliance with freedom of expression standards within Member States; investigating reports of systemic violations of this right and making recommendations to the ACHPR; conducting public interventions where violations have been brought to his or her attention, for example, by issuing statements, press releases, and sending appeals to Member States; promoting the right to freedom of expression through country missions and other activities; and submitting reports to the ACHPR on violations of the right and on the status of the enjoyment of the right across Africa.⁶²

The Organization for the Security and Cooperation of Europe (OSCE) is a separate entity. It is an intergovernmental organization that is concerned with, among other things, the promotion and protection of human rights. The OSCE is comprised of 57 participating States from Europe, North America and Asia, and partner organizations such as the UN, the European Union, the Council of Europe (COE) and the North Atlantic Treaty Organization. The OSCE follows the Charter of the UN, and also maintains a special office for the OSCE Representative on Freedom of the Media (OSCE RFM).

The OSCE RFM acts as a watchdog for non-compliance of the principles of the OSCE with regard to free media and freedom of expression.⁶³ Additionally, the OSCE RFM supports and encourages States to stand by their freedom of expression and free media commitments, including the protection of journalists, balancing restrictions on freedom of expression, and the development of media pluralism.⁶⁴ The OSCE RFM concentrates on responding to serious violations of OSCE principles regarding freedom of expression by participating States, with one of their tasks being to assist in the resolution of these issues.⁶⁵ However, it is important to note that the OSCE RFM does not exercise a judicial function.⁶⁶

In Paris 2014, the UN SR, the OSCE RFM, the OAS SR and the ACHPR SR alongside the non-governmental organizations, Article 19, the Global Campaign for Free Expression, and the Centre for Law and Democracy, reaffirmed their commitment to universality and the freedom of expression articulated in past joint declarations. They reaffirm the values and principles of Article 19 of the ICCPR, and encourage the strengthening of support and obligations to media to maximize pluralism and encourage the exercise of the rights to free expression and access to information.

Protecting Freedom of Expression: Customary Law

VI. Protecting Freedom of Expression: Customary Law

Customary international law, or international custom, is a source of international law based on widespread and consistent practice by states, and the belief that such practice is required by law (this is known as *opinio juris sive necessitatis*).⁶⁷ More obvious examples of customary norms include prohibitions against genocide, slavery and torture. These examples rise to the level of what is known as *jus cogens*, or peremptory norms, which apply to all States. *Jus cogens* norms cannot be “opted out of”; they are a special form of customary international law. States can “opt out” of customary laws that do not rise to the level of just cogens by openly and consistently objecting to the application of the practice, for example, by enacting treaties or conflicting domestic legislation.

Customary law does not have to be written out in a treaty or some other form; it is binding on all States regardless of whether or not they specifically engage in that particular practice or officially recognize it.

The rights enshrined in the United Nations Declaration on Human Rights (UDHR) are generally considered customary international law.⁶⁸ As such, the right to freedom of expression is an international customary law. Whether or not a State has signed and ratified the treaties that protect freedom of expression, they will still be bound by legal custom unless they have explicitly and consistently objected to it.

The scope of freedom of expression as customary law may vary from how the right is understood in a treaty, such as the ICCPR. Since the practice must be widespread for it to be custom, only some aspects of freedom of expression might be considered customary law.⁶⁹ For example, the principle that journalists should not be arbitrarily detained for conducting their work may be protected by custom, but that journalists should not have to be licensed may not be.

Scope: What is Protected by the Right to Freedom of Expression?

VII. Scope: What is Protected by the Right to Freedom of Expression?

The right to freedom of expression is both individual and collective, and imposes both positive and negative obligations on States. The importance of freedom of expression should not be understated. As noted in the foundational case from the European Court of Human Rights (ECtHR), *Lingens v Austria*: “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-fulfillment.”⁷⁰

However, this right is not absolute and can be subject to legitimate restrictions and limitations. It is supported by and can come into conflict with the other rights that are protected by the International Covenant on Civil and Political Rights (ICCPR) or other treaties and conventions, including the right to a fair trial, the right to freedom of conscience and religion, and the right to privacy.⁷¹ When these interests come into conflict, they need to be weighed and balanced in light of the surrounding context.⁷²

In general, as expressed in Article 19 of the Universal Declaration of Human Rights (UDHR) and repeated in the human rights treaties that guarantee freedom of expression, the right is protective of three interrelated elements: (a) the right to hold opinions without interference, (b) the right to seek and receive information, and (c) the right to impart information and ideas of all kinds through any media and regardless of frontiers.

A. The Right to Hold Opinions Without Interference

As explained in the UN Human Rights Committee’s General Comment No. 34 on Freedom of Expression, the right to hold opinions without interference includes the right to change an opinion whenever and for whatever reason.⁷³ This includes all forms of opinion: political, scientific, historic, moral or religious. No exceptions or restrictions are allowed, and the criminalization of holding an opinion is always fundamentally incompatible with Article 19, paragraph 1. Harassment, intimidation or stigmatization of an individual, or the arrest, detention, trial or imprisonment of an individual for their opinion(s) are all incompatible with paragraph 1.⁷⁴

Despite the broad interpretation in General Comment No. 34, the right to hold opinions has been subject to limitations insofar as the *expression* of that opinion infringes on one of the legitimate grounds for restriction. For example, in *Faurisson v France*, the expression of an opinion was found to encourage the strengthening of anti-Semitic or racist feelings; limitations were therefore found to be necessary to protect the rights and reputations of others.⁷⁵

CASE LAW: FAURISSON v. FRANCE (1996)

Robert Faurisson was an academic in France who denied the existence of gas chambers for extermination purposes at Nazi concentration camps during the Second World War. In 1990, France passed the Gayssot Act, which made it an offense to deny the existence of certain crimes against humanity. Following the passing of this Act, Faurisson was interviewed by a French monthly magazine where he criticized the Act as being contrary to freedom of expression, and reiterated his views about the Holocaust. The Human Rights Committee of the ICCPR noted that it was not their prerogative to assess the validity of the laws enacted by France, but to consider whether the restrictions placed on freedom of expression are provided by law, and necessary and legitimate in scope.⁷⁶ The Committee found that while Faurisson had a right to hold and express his own opinions, expression in this case violated the rights and reputations of others. The “restriction served the respect of the Jewish community to live free from fear of an atmosphere of anti-Semitism.”⁷⁷

DISCUSSION QUESTIONS

1. What is an example of an opinion that you have published or broadcast that you do not personally agree with?
2. When, if ever, do you restrict the publication or broadcast of a person’s opinion?
3. Why do you think international law allows for restrictions of expression on certain opinions?

B. The Right to Seek and Receive Information

The right to seek and receive is part of the public’s right of access to information. It includes access to communications of every form that are capable of transmission to others, subject to the provisions in the ICCPR’s Article 19(3) and Article 20, which prohibits propaganda for war and the advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.⁷⁸

VII. SCOPE: WHAT IS PROTECTED BY THE RIGHT TO FREEDOM OF EXPRESSION?

C. The Right to Impart Information and Ideas of All Kinds through Any Media and Regardless of Frontiers

As outlined in General Comment No. 34, the types of information and ideas that can be imparted are extensive. These include but are not limited to: political discourse, commentary on one's own affairs and on public affairs, canvassing, discussion of human rights, journalism, cultural and artistic expression, teaching, religious discourse, and in some cases may include commercial advertising.⁷⁹

Forms of dissemination include all forms and modes of audio-visual, electronic and internet-based expression, as well as spoken, written and sign language and non-verbal expression such as images and objects of art. Written forms of expression include but are not limited to: books, newspapers, pamphlets, banners, dress and legal submissions.⁸⁰

Finally, as articulated within this right, all people are free to impart information and ideas of all kinds through any media, regardless of frontiers. This means that the right applies regardless of State boundaries and borders.

There is an individual right to freedom of expression as well as a collective right. Individuals are free to hold opinions, share information and ideas, and seek out and receive information. Within this is also a collective right to access of information that is of public interest. States therefore have an obligation to both promote, by creating a legal and social environment in which the exercise of this right is possible, and protect, by preventing the interference with the exercise of freedom of expression and access to information.⁸¹ The State may also have an obligation to restrict or limit freedom of expression.

Accepted Restrictions on Freedom of Expression

VIII. Accepted Restrictions on Freedom of Expression

A. Restrictions Outlined in ICCPR Article 19(3)

The right to freedom of expression is universally recognized as a limited right, as it carries with it a number of duties and responsibilities. Each of the UN-based treaties that outline the right to freedom of expression in the context of their subject matters also outline restrictions on freedom of expression. Article 19(3) of the International Covenant on Civil and Political Rights (ICCPR) states:

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 the respect of the **rights or reputation of others**; (b) for the protection of **national security** or **public order** (*ordre public*), or of **public health or morals**.⁸²
[emphasis added]

This restriction is also expressed in the Convention on the Rights of the Child (CRC) under Article 13(2). Article 13 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICMW) recognizes these restrictions as well as restrictions for “the purpose of preventing any propaganda for war”⁸³ and “for the purpose of preventing any advocacy or national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.”⁸⁴

In his 2011 UN Special Rapporteur Report on the promotion and protection of the right to freedom of opinion and expression,⁸⁵ Frank La Rue distinguishes between three levels of harmful expression. These are “(a) expression that constitutes an offence under international law and can be prosecuted criminally; (b) expression that is not criminally punishable but may justify a restriction and a civil suit; and (c) expression that does not give rise to criminal or civil sanctions, but still raises concerns in terms of tolerance, civility and respect for others.”⁸⁶

The forms of expression that fall into the first category include those that States are required to prohibit at the domestic level: child pornography; direct and public incitement to commit genocide; the advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence; and incitement to terrorism.⁸⁷ Category B expressions may include such things as defamation, libel and slander. Category C expressions are those that may raise concern, but are not criminally or civilly punishable, according to international standards.

B. The Three-Part Test for Restricting Freedom of Expression

Article 19(3) of the ICCPR outlines a cumulative three-part test that must be passed for the legitimate and legal restriction of the right to the freedom of expression. The test dictates that any restriction must:

1. be provided by law;
2. pursue one of the legitimate grounds for restriction: respect of the rights or reputation of others; protection of national security or public order, or public health or morals; and
3. be “necessary” to achieve one of the goals listed in (2).

Fundamentally, any restriction or limitation must not undermine or jeopardize the right to freedom of expression itself.⁸⁸ Additionally, restrictions must be consistent with other rights found in the ICCPR and the fundamental principles found in the UDHR.⁸⁹ Therefore, “the relationship between the right and the limitation/restriction or between the rule and the exception must not be reversed.”⁹⁰

I. PROVIDED BY LAW

Provided by law means that the restriction is outlined in the State’s domestic legislation. The UN Special Rapporteur (UN SR) has detailed a number of criteria that such laws must fulfill.⁹¹ First, any legislation that restricts this right must be applied by an independent body, free of any political, commercial or other unwarranted influences, and is one that is also able to provide safeguards against abuse, in addition to space for challenges and remedies “against its abusive application.”⁹²

These laws must be accessible, precisely worded and unambiguous; meaning they are understood by all and apply equally to everyone.⁹³ They must also be compatible with international human rights law; they cannot be arbitrary or unreasonable, nor can they be used as a method for political censorship.⁹⁴ Finally, the laws must clearly “set out the remedy against or mechanisms for challenging the illegal or abusive application of that limitation or restriction,” including judicial review by an independent court or tribunal.⁹⁵

For example, in *Altuğ Taner Akçam v Turkey*, the European Court of Human Rights (ECtHR) found that there was a violation of Article 10 as the domestic legislation prohibiting expression, Article 301 of the Turkish Criminal Code, was too broad and vague, meaning an individual could not foresee what the consequences of an action might entail.⁹⁶

CASE LAW: ALTUĞ TANER AKÇAM v. TURKEY (2011)

Article 301 of the Turkish Criminal Code, before being amended in 2008, made it a crime, punishable by imprisonment for up to 3 years, to “denigrate Turkishness.” The applicant, a history professor who researches and publishes extensively on the Armenian Genocide of 1915, wrote an editorial in a Turkish-Armenian newspaper criticizing the prosecution of that newspaper’s editor, who was accused of violating Article 301. For his article and his opinions on the Armenian Genocide, the applicant complained that he had been the subject of an investigation and threatened with prosecution under Article 301 for expressing his opinion, and as such his right to freedom of expression had been violated. The European Court of Human Rights (ECtHR) considered whether the interference with the right to freedom of expression was prescribed by law; the law must be written with enough precision that a reasonable person would be able to foresee the consequences of a particular action. They found that the wording in Article 301, even after it had been amended, was not written in a way that allowed individuals to regulate their conduct or foresee the consequences of their actions. Thus, the Court found a violation of the right to freedom of expression under Article 10 of the European Convention.

II. PURSUE A LEGITIMATE GROUND FOR RESTRICTION

Respect for the Rights or Reputations of Others Such restrictions or limitations include expression that States are required to prohibit, such as the advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. It also encompasses expression that is not punishable criminally, but may justify restriction through civil suit – primarily, defamation.⁹⁷

However, it is important to note that the UN SR cautions against the criminalization of defamation: “criminalization can be counter-effective and the threat of harsh sanctions exert a significant chilling effect on the right to freedom of expression.”⁹⁸ The “chilling effect” refers to a situation where the exercise of a right is discouraged; in this case, where criminal penalties of the exercise of free expression may lead to self-censorship and the ultimate non-performance of this right.

Protection of National Security or Public Order The restriction or limitation of freedom of expression in the interest of national security or public order is legitimate, however, it is also the legitimate aim perhaps most vulnerable to abuse. Where courts are left to determine what constitutes a threat to national security, they have generally afforded a large degree of deference to the State.⁹⁹

One case where this is apparent was in *The Observer and Guardian v the United Kingdom*.¹⁰⁰ A former member of the British Security Service wrote about his experiences while working there, and the British Government sought injunctions on the book’s publication in Australia on the grounds of national security,¹⁰¹ despite the fact that it has already been published in the UK and a number of other countries. The European Court of Human Rights (ECtHR) found that, in order for a restriction on freedom of expression to be justified, it must be shown that it was necessary in that a “pressing social need” for the limitation exists, and that the restriction was “proportionate to the legitimate aims

pursued.”¹⁰² The Court did not address whether or not the injunction served the goal of protecting national security, stating that any damage that could come from the book’s publication was already done since the book had already been released elsewhere.¹⁰³

In *Shin v Republic of Korea*, an artist was arrested after creating a painting that depicted controversial political imagery.¹⁰⁴ The UN Human Rights Committee found that the artist’s right to free expression had been violated because the State failed to justify how a restriction based on “national security” was necessary in these particular circumstances.¹⁰⁵

A further complicating issue in this area is that restrictions on the ability to access information as a matter of national security may occur through processes that are deemed “classified” or are otherwise non-transparent.¹⁰⁶ There is often a necessary balancing of the public’s right to information on the one hand, and the State’s need to guard information in the interest of national security and public order on the other. NGOs such as Amnesty International¹⁰⁷ have expressed specific concern about the abuse of national concern as a legitimate ground for the limitation or restriction of freedom of expression and information in this respect.

A case which is particularly illustrative is *Leander v Sweden*, in which a Swedish national had been dismissed from his government job on national security grounds and was not given access to the reasons for his dismissal.¹⁰⁸ Despite there being no direct evidence that this individual presented a threat, the ECtHR held that the restriction of information was justified and necessary to protect Sweden’s national security. A decade later it was reported that the individual had been fired for his political beliefs and the Court had been misled by the Swedish authorities.¹⁰⁹

The Global Principles on National Security and the Right to Freedom of Information, better known as the Tshwane Principles, were finalized in 2013 as a joint agreement by the UN SR, UN Special Rapporteur on Counter-Terrorism and Human Rights, African Commission on Human and Peoples’ Rights Special Rapporteur on Freedom of Expression and Access to Information (ACHPR SR), Organization of American States Special Rapporteur for Freedom of Expression (OAS SR), and Organization for the Security and Cooperation of Europe’s Special Representative on the Freedom of the Media (OSCE RFM).

Following the Johannesburg Principles on National Security, Freedom of Expression and Access to Information,¹¹⁰ the Tshwane Principles guide States in balancing restrictions to the right to freedom of expression under the ground of national security with the public’s right to freedom of information.

Principle 3 outlines the requirements to restrict the right to information on the grounds of national security. Similar to the three-step test for restrictions in general, the limitation or restriction must be:

1. prescribed by law
2. necessary to a democratic society, in that that risk of harm from disclosure must outweigh the general public interest in disclosure; as well, the restriction must be proportional in that it is the least restrictive means to protect against the harm; and
3. protects a legitimate national security interest

Second, the law must provide safeguards against the abuse of this ground, including measures for challenges to the restriction by an independent body and be amenable to full review by the courts.¹¹¹

III. NECESSARY AND PROPORTIONATE

The restriction or limitation put on the right to freedom of expression must be necessary and proportionate to achieving one of the goals outlined as a legitimate ground for restriction.¹¹² This means that the restriction must be no more than absolutely required to achieve that aim, and proportional to that goal.

Necessary, here, means that there are no other options to achieve the stated goal apart from restricting or limiting freedom of expression. Within “necessary” is the fact that the restriction or limitation is based on one of the grounds outlined in Article 19(3) of the ICCPR, and should “address a pressing public or social need” that has to be met “in order to prevent the violation of a legal right that is protected to an even greater extent.”¹¹³

General Comment No. 34 reaffirms the significance of necessity and proportionality. When a State petitions a legitimate ground to restrict or limit freedom of expression, they must specifically demonstrate the “precise nature of the threat”¹¹⁴ to these grounds, as well as “the necessity and the proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.”¹¹⁵

In determining whether a restriction on the right to freedom of expression is necessary, the ECtHR interprets this part of the restriction test under Article 10 of the European Convention on Human Rights (ECHR) strictly: any restriction “must be narrowly interpreted and the necessity for any restrictions must be convincingly established.”¹¹⁶

First, there is assessment of whether or not there is a “pressing” or “substantial need” for the restriction or limitation. Second, there is a rational-connection test, whereby the restriction of the right must be rationally connected to protecting the interest at stake. As the Inter-American Court of Human Rights (IACtHR) notes, “If there are various options to [protect the legitimate interest], that which least restricts the right protected must be selected.”¹¹⁷ Additionally, the restriction should be as narrowly defined as possible as not to include expression or information that is not within the scope of the interest. Third, there is a proportionality test, where the benefit of protecting the interest must outweigh the harm caused by restricting freedom of expression or information, otherwise such a restriction would not justifiably be in the public interest.¹¹⁸

For instance, *Gauthier v Canada* provides an example of a situation in which the restriction imposed failed the proportionality test. In this case, failing to issue Mr. Gauthier a full membership to the Parliamentary Press Gallery was not found to be necessary or proportionate to the alleged goal of maintaining the effective operation of Parliament and public order, and as such the Court found that Gauthier’s right to freedom of expression had been infringed.¹¹⁹

CASE LAW: GAUTHIER v. CANADA (1999)

In *Gauthier v Canada*, a newspaper publisher named Robert Gauthier applied for a full membership in the Parliamentary Press Gallery. The private organization that grants membership repeatedly rejected him. Thus, Gauthier was denied the same access as other journalists to Parliament buildings and was prohibited from taking notes. As a journalist, he complained that this violated his right to access and report information. The State argued that their accreditation system was necessary to maintain public order and safety in Parliament. The Human Rights Committee agreed that an accreditation system could be justified, but found that this system was arbitrary, and since it was run by a private organization, lacked transparency. The Human Rights Committee concluded that it was not necessary or proportionate to the State objective of public order and safety. As such, Mr. Gauthier's right to freedom of expression had been unduly restricted.

In *Sunday Times v the United Kingdom*, the publication of an article about the distillers of thalidomide while legal actions against the distillers were on-going was at issue. It was found that interfering with the publication of the article did not correspond to a sufficiently pressing social need that outweighed the public interest in freedom of expression in this case.¹²⁰

CASE LAW: SUNDAY TIMES v. THE UNITED KINGDOM (1979)

In this case, the European Court of Human Rights (ECtHR) had to weigh whether a court injunction against a newspaper was a necessary and proportionate restriction of freedom of expression. An injunction is an order that prohibits a person from acting in a particular manner. The Sunday Times was publishing an article about the marketing of an anti-morning sickness drug, Thalidomide, which was taken by a number of pregnant women who later gave birth to deformed children. The State obtained a court injunction blocking the article from publication on the grounds that the matter was before the court. It argued that restricting freedom of expression was warranted to maintain the authority and impartiality of the justice system, and as such, was a pressing social need. The Court concluded that the facts of the case did not support that argument, and the court injunction was not necessary or proportionate.

C. States of Emergency under ICCPR Article 4

In states of emergency, “States are permitted to temporarily suspend certain rights, including the right to freedom of expression.”¹²¹ However, the suspensions must be in accordance with Article 4 of the ICCPR,¹²² and General Comment No. 29 of the Human Rights Committee, which outlines the interpretation of Article 4. Article 4(1) states:

In times of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.¹²³

As General Comment No. 29 notes, for a State party to implement a policy incompatible with the ICCPR, they must demonstrate that the state of emergency constitutes (1) a threat to the life of the nation and (2) that derogation is a proportionate response to the threat.¹²⁴ While there are some provisions that States are prohibited from acting contrary to (such as article 6, the right to life; article 7, prohibition of torture or cruel, inhumane, and degrading punishment, or of medical experimentation without consent; or article 18, freedom of thought, conscience and religion, amongst others), the right to freedom of expression is not one of these provisions.¹²⁵ However, the state of emergency is invalid if it is declared for the purpose of restricting the right to freedom of expression and by extension preventing criticism of those in power.¹²⁶

In the case of violations of human rights or humanitarian law, the Inter-American Court of Human Rights (IACtHR) has stated that States cannot use the protection of national security or public order as grounds to refuse providing the judicial or other authorities information required as part of an ongoing investigation or proceeding.¹²⁷ The UN SR has generally accepted these principles.¹²⁸

Impermissible Restrictions on Freedom of Expression

IX. Impermissible Restrictions on Freedom of Expression

There is some expression that should never be subject to restriction of any kind. As stipulated in UN Human Rights Council resolution 12/16,¹²⁹ these include: discussion of government policies and political debate; reporting on human rights, government activities and corruption; engaging in election campaigns, peaceful demonstrations or political activities, including for peace or democracy; and the expression of opinion and dissent, religion or belief, including by persons belonging to minorities or vulnerable groups.¹³⁰

Notably, in their Joint Declaration on Universality and the Right to Freedom of Expression, the Special Rapporteurs on Freedom of Expression of the UN, Organization of American States (OAS), African Commission on Human and Peoples' Rights (ACHPR), and the Organization for the Security and Cooperation of Europe's Representative on the Freedom of the Media (OSCE RFM) stated that certain legal restrictions cannot be justified in reference to local tradition, cultures, or values; stating that such restrictions constitute human rights violations.¹³¹ These include laws (a) protecting religions against criticism or that prohibit the expression of dissenting religious beliefs, (b) prohibiting debate about issues concerning minorities or other groups and, (c) laws that give special protection against criticism for officials, institutions, historical figures, or national or religious symbols.¹³²

The Right to Access Information

X. The Right to Access Information

The freedom of and access to information is recognized as a fundamental human right and, as described in the first session of the United Nations General Assembly, “the touchstone of all the freedoms to which the United Nations is consecrated.”¹³³ The UN Special Rapporteur (UN SR) has defined the right to the access of information as “both the general right of the public to have access to information of public interest from a variety of sources and the right of the media to access information, in addition to the right of individuals to request and receive information of public interest and information concerning themselves that may affect their individuals rights.”¹³⁴

Therefore, the right to freedom of expression is two-fold. There is the right to express and disseminate information, and the converse right to receive that information. The right to access information, according to the Inter-American Commission on Human Rights (IACHR), “is a fundamental requirement for guaranteeing transparency and good public administration of the government and other State authorities.”¹³⁵ The right to access information works to ensure transparency in governments, as well as create a barrier to abuse, corruption and authoritarianism.¹³⁶ Additionally, it is important to the functioning of democratic systems, as citizens need access to information to properly exercise their political rights.¹³⁷ The UN SR has similarly acknowledged the fundamental importance of this right to the enjoyment of civil and political rights and democratic governance.¹³⁸

The right of access to information includes a number of elements. The right encompasses all records held by a public body, regardless of their form, storage, or date of production, as well as records held by any other entity so long as they are carrying out a public function.¹³⁹ The media has a right to access information on public affairs and, conversely, the public has the right to access information from the media.¹⁴⁰ Individuals also have the right to know what personal data is stored in automatic data files and for what purposes, as well as which public authorities or private individuals or bodies control these files.¹⁴¹ The UN Human Rights Committee also suggests that States make every effort to ensure that the public has access to information of public interest, any fees required for the supply of information should not be so high as to be an impediment to access, and finally, that any refusal to provide access or a failure to respond to requests for access is explained and reasons provided.¹⁴²

Like the right to freedom of expression as a whole, the right to access information is not absolute. Limitations or restrictions on the right must comply with the same three-part test previously described for limitations of the right to freedom of expression.

The right to access information is considered in the case of *Gauthier v Canada*.¹⁴³ In that case, the UN Human Rights Committee found that, even where information is denied pursuant to a legitimate policy aim (in this case, the effective operation of Parliament), the scheme for denial of information must be specific, fair and reasonable, transparent in its application,¹⁴⁴ and cannot result in arbitrary denial of information.

A. The “Right to Truth”

Following the transition of Eastern European and Latin American governments from authoritarian to democratic regimes in the 1980s and 1990s, the “right to truth” has been considered as distinct from the right to access information and from freedom of expression more generally. The “right to truth” is a positive obligation imposed on knowledge-bearers. The “right to truth” is not contained in any legally binding human rights treaty or convention but has been acknowledged in Human Rights Council Resolution 12/12¹⁴⁵ and under Principle 4 of Economic and Social Council’s Commission on Human Rights report on the principles for the Protection and Promotion of Human Rights through Action to Combat Impunity.¹⁴⁶

The right to truth was borne out of concerns relating to access of information regarding serious human rights violations. For example, the development of truth commissions following the transition of some Latin American States to democracy, exemplifies the development of the recognition that the right to *know* about human rights abuses and what has occurred is of public importance. The public interest in the disclosure of information relating to the systematic violation of human rights and humanitarian law and “the obligation of states to take proactive measures to ensure the preservation and dissemination of such information”¹⁴⁷ make up the right to truth.

The “right to truth” is discussed in this context in the case of *Lucio Parada Cea, et al v El Salvador*.¹⁴⁸ The Inter-American Court of Human Rights (IACtHR) describes the “right to truth” as “a collective right which allows a society to gain access to information essential to the development of democratic systems, and also an individual right for the relatives of the victims, allowing for a form of reparation.”¹⁴⁹ They continue:

The right to the truth is also related to Article 25 of the Convention which establishes the right to have a simple and prompt remedy for the protection of the rights enshrined in it. The presence of artificial or legal impediments... to accessing and obtaining important information regarding the facts and circumstances surrounding the violation of a fundamental right, constitutes an open violation to the right established in the provision referred to, and hampers the establishment of domestic remedies which allow for judicial protection of the fundamental rights established in the Convention, the Constitution, and the laws.¹⁵⁰

The “right to truth” is not explicitly written in any specific provision in the American Convention on Human Rights (ACHR), or in the ICCPR; but as is apparent here, it exists as a result of the other fundamental rights found within the human rights statutes and treaties. The Court found that society as a whole has the right to be duly informed of human rights violations, and under the specific circumstances of this case, the State was found to have violated Article 5 (right to security and personal integrity), 8 (the right to a fair trial), 25 (right to judicial protection), 7(5) (the right to liberty and security), and Article 4 (right to life).¹⁵¹

As stated by the UN SR report investigating the right of access to information, limitations on the State’s obligation to this collective right can only be invoked under very specific circumstances.¹⁵²

CASE LAW: LUCIO PARADA CEA, ET AL v. EL SALVADOR (1998)

In the midst of the Salvadorian Civil War (1980–1991), six farm workers were arrested by the Salvadorian Army during a military operation in a rural area in the Department of San Salvador. A complaint was brought to the Inter-American Commission on Human Rights claiming that these farmers were tortured while in detention, and two of them died as a result. The petitioners asked the IACHR to declare that the State was responsible for the deaths of two of the farmers, contrary to Articles 4 (right to life) and 5 (right to humane treatment) of the American Convention, and by implementing a law that would leave the crimes committed by State agents unpunished, were in violation of Articles 8 (right to a fair trial) and 25 (right to judicial protection). The Court found that not only did the State have an obligation to properly investigate these crimes, which it failed to do, but that the State also has an obligation to the relatives of the victims and to society as a whole to honour the collective “right to know the truth.” All persons and society have the right “of knowing the full, complete, and public truth on incidents which have occurred, their specific circumstances, and who participated in them, [these] are part of the right to reparation for violations to human rights.”¹⁵³ The Court found that the Salvadorian State had injured the right to know the truth for the victims, their families, and society.

Freedom of Expression on the Internet

XI. Freedom of Expression on the Internet

Freedom of expression on the internet is subject to the same liberties and restrictions as freedom of expression through any other medium.¹⁵⁴ However, on the internet there are additional considerations to take into account, including the relative ease of access of information and its ability to be used as a positive tool to promote pluralism, transparency, and citizen participation.¹⁵⁵ On the other hand, the internet is capable of being monitored and individuals can be identified and targeted online¹⁵⁶. Reporters Without Borders reported in 2010 that approximately 100 cyber-dissidents, bloggers and internet users were imprisoned for expressing their opinions online.¹⁵⁷

The UN recognizes the value of a free internet and its positive attributes as a tool for the exercise of freedom of expression.¹⁵⁸ In general, international human rights law on freedom of expression is equally applicable to the internet, and any restrictions or limitations are subject to the three-part test.¹⁵⁹ The UN SR notes that, as a general rule, “there should be as little restriction as possible to the flow of information on the internet, except under a few, very exceptional and limited circumstances prescribed by international law for the protection of other human rights.”¹⁶⁰

General Comment No. 34 adds that the same test should be applied in the case of restrictions to the operation of websites and any other information disseminating-systems, including supporting systems like internet service providers and search engines.¹⁶¹ Any restrictions should be content-specific; like the right to freedom of expression more generally, restrictions cannot be overbroad. Additionally, a website or supporting system cannot be restricted on the basis that it has published or disseminated material that is critical of the government.¹⁶²

The Inter-American Commission on Human Rights (IACHR) has established a number of principles regarding free expression that are consistent with the open nature of the internet: access, pluralism, non-discrimination, privacy, and net neutrality.¹⁶³ Accordingly, in the Joint Declaration on Freedom of Expression and the Internet it states, “forcing the blocking or suspension of entire websites, platforms, channels, IP addresses, domain name extensions, ports, network protocols, or any other kind of application, as well as measures intended to eliminate links, information and websites from the servers on which they are stored, all constitute restrictions that are prohibited and exceptionally admissible only strictly pursuant to the terms of Article 13 of the American Convention.”¹⁶⁴

Despite this and the international standards protecting free expression online, UNESCO reports that the number of countries blocking or regulating internet access and content through such means, as well as States involved in internet surveillance, has increased in recent years.¹⁶⁵

The Right to Privacy

XII. The Right to Privacy

The right to privacy sets a certain limitation on the right to freedom of expression. It is protected under Article 12 of the Universal Declaration of Human Rights (UDHR), which states: “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”¹⁶⁶ This right is repeated in Article 17 of the International Covenant on Civil and Political Rights (ICCPR), Article 8 of the European Convention on Human Rights (ECHR), and Article 11 of the American Convention on Human Rights (ACHR). Like Article 19(3) of the ICCPR, ECHR Article 8(2) sets out exceptions to the rule of no interference with privacy. Article 8(2) states:

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic 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.¹⁶⁷

The right to privacy, by its nature, must be balanced with the right to free expression and a contextual approach must be taken when considering whether or not the right to privacy has been breached. The European Court of Human Rights (ECtHR) has generally ruled that the State has a positive obligation to provide protection for individual’s privacy and reputation.¹⁶⁸ The ECHR considers the public stature of the individual, generally arguing that public figures, in particular politicians, may be subject to a greater degree of criticism before their right to privacy is interfered with.¹⁶⁹

Lingens v Austria is the definitive case involving the balancing of the right to freedom of expression and the right to privacy where a public figure is concerned.¹⁷⁰ The Court writes, “Freedom of the press ... affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual.”¹⁷¹ They continue that the protection of reputation does extend to politicians, even when they are acting in a public capacity, but unlike private individuals, protections are weighed in relation to the public interest in the open discussion of political issues.¹⁷² As such, it was held that there was a breach of the applicant’s right to freedom of expression under Article 10 of the ECHR.¹⁷³

CASE LAW: LINGENS v. AUSTRIA (1986)

Lingens was a journalist and editor of an Austrian magazine, *Profil*. He published two articles about the participation of Austrians in atrocities committed during the Second World War. These articles were published shortly after Austrian general elections took place, and accused one of the politicians, Peters, of participation in the atrocities, and criticized the then-retiring Chancellor for protecting Peters. Lingens was convicted of defamation, and he argued at the European Court of Human Rights that this charge infringed his freedom of expression. The Chancellor argued that such an infringement was necessary to protect his reputation. The Court found that the protection of a public figure's privacy is narrower than that of private individuals, particularly where that information is relevant to the public's right to receive information regarding political issues. The Court concluded that the charge of defamation was unnecessary in a democratic society and violated Lingens' right to freedom of expression.

Pfeifer v Austria provides an alternative example of the right to privacy where the state had a positive obligation to protect an individual's right.¹⁷⁴ Pfeifer published a commentary critical of an individual's article, who later brought defamation proceedings against Pfeifer, who was acquitted. However, years later when this individual committed suicide, the editor of a magazine claimed that Pfeifer was morally responsible for the individual's suicide. Pfeifer brought a case of defamation against the editor and won. Pfeifer brought a subsequent defamation proceeding when the editor again repeated his accusation against Pfeifer in a request for financial support from readers, alleging a conspiracy against his magazine. Pfeifer lost in the Regional Courts.¹⁷⁵ Pfeifer argued that the Austrian courts had failed to protect his right to privacy under Article 8 of the ECHR. The Court reviewed the decisions of the Regional Courts and did not find a causal link based in fact that Pfeifer's commentary had caused the death of the individual, and as such, they disagreed that the protection of freedom of expression outweighed the right of Pfeifer to safeguard his reputation.¹⁷⁶

In *Marques v Angola*, a journalist was arrested at gunpoint and charged with the crimes of defamation and slander for criticizing the Angolan president in newspaper articles and on the radio.¹⁷⁷ The UN Human Rights Committee wrote that, "the requirement of necessity implies an element of proportionality, in the sense that the scope of the restriction imposed on freedom of expression must be proportional to the value which the restriction serves to protect."¹⁷⁸ They found that the severity of the sanctions imposed on the journalist were not a proportionate measure to protect the public order and honour the reputation of the President, keeping in mind the higher threshold allowed for criticizing public figures.

XII. THE RIGHT TO PRIVACY

In *Verlagsgruppe News GmbH v Austria (No 2)*,¹⁷⁹ the European Court of Human Rights (ECtHR) found a valid public interest in the private information of a public figure. In this case, a news article was published about the investigation of alleged tax evasion committed by a well-known company director, as well as an attempted murder against him. His picture appeared alongside the article and he sought an injunction to restrict the publication of his picture in connection with these crimes. The applicant argued that this infringed his freedom of expression. The Court found that publishing a photograph alongside an article containing information that was in the public's interest was permissible, and restriction on the applicant's freedom of expression was not necessary in a democratic society.

The degree of interference with privacy must be taken into consideration when engaging in the balancing exercise. How the information was obtained, why it was obtained, and what was obtained is considered.¹⁸⁰ For example, in *Radio Twist A.S. v Slovakia*,¹⁸¹ confidential information contained in a telephone call between politicians was illegally obtained and broadcast over the radio. The Court found that, despite how the recording was obtained, the journalists did not act in bad faith, the recording did not contain any untrue or distorted information, and the content was clearly political and was not an intrusion of the politician's personal privacy.¹⁸² They found that the broadcasting company had not interfered with the politician's reputation and rights in a way that justified the limitation to free expression – it was not “necessary in a democratic society.”¹⁸³

Finally, it must be considered whether or not a journalist obtaining the information has breached the law or professional ethics. Article 10 of the ECHR does not protect media workers who cross the ethical boundaries of their profession, nor does it protect those in blatant violation of the law.¹⁸⁴

Principles 10 and 11 of the Inter-American Commission on Human Rights (IACHR)'s Declaration of Principles on Freedom of Expression set out boundaries for privacy laws in the Americas. Like the findings of the ECtHR, Principle 11 notes that “public officials are subject to greater scrutiny by society” and as such, penalizing criticisms or negative expressions of such individuals would restrict freedom of expression and information.¹⁸⁵ Principle 10 states that privacy laws “should not inhibit or restrict investigation and dissemination of information of public interest.”¹⁸⁶ Protections of individual reputations should only be guaranteed through civil sanctions, and in the case of matters of public interest, it must be demonstrated that the person disseminating the information intended to inflict harm, was aware that the information was false, or acted with gross negligence in determining the veracity of the information.¹⁸⁷

Freedom of the Press

XIII. Freedom of the Press

The press plays a crucial role in the right to freedom of expression; it is the task of the media to impart information and ideas and be a source of information for those who seek it. The fundamental role of the media has been recognized in several international cases, notably in *Thorgeison v Iceland*, where the European Court of Human Rights (ECtHR) stated,

Whilst the press must not overstep the bounds set, [among other things], for “the protection of the reputation of ... others”, it is nevertheless incumbent on it to impart information and ideas on matters of public interest. Not only does it have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of “public watchdog.”¹⁸⁸

In order for the press and media to properly perform their functions, USAID has suggested that they need to exist in a “legal enabling environment.”¹⁸⁹ Such an environment maintains free press values and a commitment to the rule of law such that there is freedom in the issuing of newspapers and publications, independence of broadcast licensing and regulation, the prohibition on pre-publication censorship, and the freedom of accessing, obtaining, and circulating information.¹⁹⁰

Fundamental to freedom of expression is the provision of information such that citizens can engage in society, develop their own informed opinions, and participate actively within the democratic system. Media workers (including journalists, support staff and citizen journalists) provide an integral service to this end, and as such the UN SR has stated that governments and state institutions are responsible for the protection of media workers in general.¹⁹¹ Recognizing the right to impart as well as to receive information, General Comment No. 34 encourages independent and diverse media, representative of members of ethnic and linguistic minorities, as well as encouraging States to foster this independence particularly in relation to new forms of media and ensure its access by individuals.¹⁹² Free communication of information and ideas is particularly important in relation to public affairs and political issues, which is elaborated on in General Comment No. 25.¹⁹³

The Organization for the Security and Cooperation of Europe (OSCE), Organization of American States (OAS) and African Commission on Human and Peoples’ Rights (ACHPR) have also reiterated the importance of press freedom to the public interest, and the consequential positive obligation placed on governments and state institutions to protect press freedom. In their most recent joint declaration on the right to freedom of expression, along with the UN Special Rapporteur (UN SR), they highlight four recommendations for States to ensure and safeguard free expression for all citizens:

1. The strengthening of obligations on public broadcasters to address the needs and share information pertinent to all individuals and groups within a society;
2. The creation of an enabling legal framework for community media;
3. Providing support, financially or regulatory, for media outlets and content, to best serve the community at large; and
4. To put into place a regulatory framework that promotes access, diversity of voice, and ease with which to disseminate and receive information.¹⁹⁴

These recommendations are echoes of those made in 1991 under the Windhoek Declaration, developed by the UN and UNESCO. This declaration reiterates the absolute importance of media freedom and the legal and political environment that is necessary to ensure that freedom.¹⁹⁵ UNESCO summarizes that media freedom exists where six main criteria have been achieved by States, and function in practice not just on paper: (1) a legal and statutory environment that guarantees free expression, (2) the ratification of international treaties on free expression, (3) the decriminalization of defamation, (4) active freedom of information laws, (5) unrestricted access to media platforms and the internet, and (6) the protection of journalist's sources.¹⁹⁶

Media independence and media pluralism are two other components of media freedom that have found significant import in freedom of expression.¹⁹⁷ Media independence refers to ability of media outlets and journalists to work independently from government and other external interests.¹⁹⁸ Media workers should be able to work independently of these interests, enabling them to fulfill their role as “watchdogs,” and work within a self-regulating system with autonomous regulatory bodies and public service broadcasting guided by its own professional standards and codes of ethics.¹⁹⁹ Media pluralism, in the same vein, concerns the sharing of ownership and control of media outlets and outputs, a broad scope of coverage, and importantly, the variety and accessibility of different types of media, sources, and viewpoints, representative of the diversity of communities and audiences that media workers provide service to.²⁰⁰

A. Licensing: Media and Media Professionals

Licensing or registration schemes are generally considered contrary to the international right to freedom of expression because they can present an obstacle to the dissemination of information and ideas. The 2003 Joint Declaration by the UN SR, the Organization for the Security and Cooperation of Europe's Representative on the Freedom of the Media (OSCE RFM), and the Organization of American States Special Rapporteur for Freedom of Expression (OAS SR) states,

Imposing special registration requirements on the print media is unnecessary and may be abused and should be avoided. Registration systems which allow for discretion to refuse registration, which impose substantive conditions on the print media or which are overseen by bodies which are not independent of government are particularly problematical.²⁰¹

Registration schemes are different from licensing schemes in that they, in theory, only require media workers and outlets to register, which makes it easier to know where to direct complaints should they arise. Licensing schemes, on the other hand, present a barrier for media workers, and as the NGO Article 19 argues, should be subject to the same three-part test as any other limitation or restriction on freedom of expression to be legally justified and legitimate.²⁰² International courts have showed a general tendency to be wary of licensing and registration schemes.²⁰³

*Mavlonov and Sa'di v Uzbekistan*²⁰⁴ is illustrative of this. Mavlonov was the editor of a newspaper that was published primarily in the Tajik language and the only non-governmental Tajik-language publication in the Samarkland region of Uzbekistan. The newspaper was subject to a registration law, which it adhered to, registering the newspaper under the names of its two founders. When one of the founders opted out at a later date, the newspaper was required to re-register and in the meantime the Press Department cancelled the newspaper's license and ordered all printing shops to stop printing it.²⁰⁵ The newspaper was denied its re-registration and Mavlonov challenged the Press Department's decision, arguing that this was a denial of his freedom of expression and a violation of his right to enjoy his own culture (Article 27 of the ICCPR).²⁰⁶ The Committee found that the registration scheme in this case was a violation of the

XIII. FREEDOM OF THE PRESS

author's rights under Article 19, as Mavlonov was prevented from imparting information, and a violation of Article 27, since the use of a minority language press was essentially important to the Tajik minority community in Uzbekistan.²⁰⁷

In *Gawęda v Poland*, a registration system required the applicant, who wanted to register two periodicals for publication, to change the titles of the periodicals as they found one would be misleading to readers and the other was harmful to international relations.²⁰⁸ The applicant refused to change the titles, arguing that this constituted an interference of his rights under Article 10 of the European Convention on Human Rights (ECHR). The issue brought to the European Court of Human Rights (ECtHR) was whether or not the interference was prescribed by law: it was found that the Polish law was too imprecise to enable the applicant to regulate his conduct and was therefore not 'prescribed by law' and a violation of Article 10 was found.²⁰⁹

The licensing of journalists as well as the requirement for them to join professional organizations is, likewise, generally regarded as an unjustifiable impediment to the freedom of expression.²¹⁰ The 2003 Joint Declaration on Freedom of Expression by the UN, OAS and OSCE states: "journalists should not be required to be licensed or to register. There should be no legal restrictions on who may practise journalism."²¹¹ Furthermore, "Accreditation schemes for journalists are appropriate only where necessary to provide them with privileged access to certain places and/or events; such schemes should be overseen by an independent body and accreditation decisions should be taken pursuant to a fair and transparent process, based on clear and non discriminatory criteria published in advance. Accreditation should never be subject to withdrawal based only on the content of an individual journalist's work."²¹²

Unlike professions such as medicine or law where licensing is important to professional standards and accountability, the work of media workers is a fundamental human right that is protected by international and domestic law, and the right to impart information is not limited to licensed professionals, but the right of every individual. In its advisory opinion to the Government of Costa Rica, the Inter-American Court of Human Rights (IACtHR) states, "because it is linked with freedom of expression, which is an inherent right of each individual, journalism cannot be equated to a profession that is merely granting a service to the public through the application of some knowledge or training acquired in a university or through those who are enrolled in a certain professional "colegio"."²¹³

Overall, there has been a worldwide trend towards opposing licensing schemes for media workers, which is in line with international standards. UNESCO reports that this trend exists in print media as well, though the practice of licensing print media still continues in some parts of Africa, the Arab region, and Central and Eastern Europe.²¹⁴

B. Journalists: Threats, Protections, Obligations

There are a number of threats that journalists face, and these are not limited to the risks encountered by journalists working in conflict areas and war zones. The threats that media workers can face include physical threats, such as physical violence, kidnapping, and murder – these are not necessarily sanctioned by government bodies, but may also be carried out by certain groups and organizations that wish to silence a report. Threats can constitute non-physical actions as well, such as mental or moral harassment or intimidation.

The UN SR reports that in 2011, 179 journalists had been imprisoned for their work on- and offline, the highest total number since 1996.²¹⁵ The Committee to Protect Journalists reports that this number rose to 211 in 2013.²¹⁶ Reporters Without Borders reported that 71 journalists had been killed conducting their work in 2013 alone,²¹⁷ which is indicative of the overall pattern they reported in 2010, stating that more than 800 journalists had been killed since 1995 with

over 90% of these crimes going unpunished.²¹⁸ These threats raise the question of whether or not States have the responsibility to grant media workers special protection and create an environment that works to prevent the risks and threats that media workers face.

Threats and attacks on journalists are not merely limited to physical consequences, but violate their individual rights to freedom of expression, as well as, by extension, the same right of citizens as their ability to seek and receive information is undermined. The UN SR states, “without respect for freedom of expression, in particular freedom of the press, an informed, active and engaged citizenry is impossible. An attack against a journalist is therefore an attack against the principles of transparency and accountability, as well as the right to hold opinions and to participate in public debates, which are essential for democracy.”²¹⁹

I. DUTY TO PROTECT AND PREVENT

UNESCO describes an environment of media worker safety as the absence of: killings and physical assaults against media workers; impunity in crimes against media professionals; incarceration and arbitrary arrest of media workers; exile to escape repression; legal and economic harassment; self-censorship in media platforms and the internet; and the destruction or confiscation of equipment and work premises.²²⁰ The safety of journalists working in war zones and areas of conflict is a well-established concern within the international community.²²¹ The concern for media workers has since expanded to call for protections more generally. In terms of violence against journalists, the UN SR has emphasized that States and their governments are primarily responsible for protecting journalists and fully investigating crimes against them and prosecuting those responsible.²²² Likewise, at the conference on Press Freedom, Safety of Journalists and Impunity in Medellín, Colombia in 2007, UNESCO presented the Medellín Declaration, calling on all States to condemn violence against journalists, to investigate all acts of violence against media workers, and to release journalists imprisoned for doing their job.²²³ The EU Human Rights Guidelines on Freedom of Expression Online and Offline suggest that these protections extend to support staff, “citizen journalists,” activists and human rights defenders who make use of various forms of online and offline media to share information.²²⁴

The IACHR SR maintains that States have an obligation to protect and to prevent violence and threats against media workers.²²⁵ As part of State obligations to prevent the obstruction of the right of free expression for media workers, the IACHR suggests that member states should maintain public discourse that contributes to preventing violence against journalists, instruct security forces about respecting the media, respect the right of journalists to keep sources and archives confidential,²²⁶ punish violence against journalists and maintain accurate statistics on violence against journalists.

However, it is worthwhile to note that the journalist’s right to confidentiality of sources is limited and in some cases may have to yield where the public interest outweighs this journalistic privilege. This was reiterated in *Goodwin v the United Kingdom*; the Court noted that Article 10 of the ECHR “required that any compulsion imposed on a journalist to reveal his source had to be limited to exceptional circumstances where vital public or individual interests were at stake.”²²⁷ Further, the United Kingdom in this case argued that this privilege “should not extend to the protection of a source who has conducted himself [with bad faith] or, at least, irresponsibly, in order to enable him to pass on, with impunity, information that has no public importance.”²²⁸ On the facts of this case, it was found that the protection of sources was of greater import to the freedom of expression and access of information than any public interest in unveiling the source’s identity.²²⁹

CASE LAW: GOODWIN v. THE UNITED KINGDOM (1996)

Mr. Goodwin was a trainee journalist who received information from a source who wished to remain anonymous. The information was about the financial status of a company and appeared to come from a confidential corporate plan; one of the eight copies of the plan had recently gone missing. The company obtained an order to prevent Goodwin from disclosing the confidential information and an order to give up the identity of his source. When he refused, he was fined for contempt of court and Goodwin brought the matter to the European Court of Human Rights claiming a violation of his Article 10 right to freedom of expression. The Court found that since there was already an injunction to prevent Goodwin from publishing the information, divulging his source was unnecessary, and the company's interests in finding out who the source of the information were outweighed by the public's interest of a free press in a democratic society. The potential "chilling effect" that disclosure of a journalist's sources could create would seriously inhibit the role of journalists as "public watchdogs," as well as the free flow of information.

The obligation to protect includes the creation of a legal environment and institutional framework that will allow for the effective investigation and prosecution of violence against media workers. There may also be a third party obligation for media companies to play a role in the protection of their employees. It was suggested that media company owners should provide support and implement training protocols to help protect the safety of journalists in the IACHR SR's 2010 report on Freedom of Expression in Mexico.²³⁰ This was echoed in the UN, OSCE, OAS and ACHPR 2012 Joint Declaration on Crimes against Freedom of Expression.²³¹

However, where a positive obligation for States to protect journalists arises is not always straightforward. The ECtHR has shown that it will need to be demonstrated that there is a risk of harm as well as a reasonable possibility of preventing or avoiding that harm. For instance, in *Kiliç v Turkey*, the ECtHR found that, "For a positive obligation to arise, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate danger to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that danger."²³² This was reiterated in the case at the IACtHR, *Pueblo Bello Massacre v Colombia*. To determine whether or not a risk exists whereupon the State has a positive obligation to protect, the *Corte Constitucional de Colombia* (Constitutional Court of Colombia) developed a "risk scale" from "minimal risk" where there is no duty to protect, to "extreme" risk, where there is a duty to protect, and finally "consummated" risk, which is a risk that has already played out.²³³ In the ECtHR case of Özgüz *Gündem v Turkey*, the discovery of a positive obligation to protect was developed through a contextual approach that involved the balancing of the general interests of the community with individual interests. "The scope of this obligation will inevitably vary, having regard to the diversity of situations obtaining in Contracting States, the difficulties involved in policing modern societies and the choices which must be made in terms of priorities and resources."²³⁴

II. OBLIGATIONS OF MEDIA WORKERS

As noted previously, the protections afforded to journalists and media workers in general do not protect those working outside of the ethical boundaries of their profession, if they have violated laws, or where there are legitimate restrictions or limitations on expression. As in *Ungváry and Irodalom KFT v Hungary*, the ECHR reiterated that journalists must, “abide by the principles of responsible journalism, namely to act in good faith, provide accurate and reliable information, objectively reflect the opinions of those involved in a public debate, and refrain from pure sensationalism.”²³⁵

Journalist associations and organizations around the world recognize the particular responsibility and duties of journalists to the public in their coverage of events and dissemination of information. Duties and responsibilities are generally provided for in professional codes of conduct and ethics guidelines. For example, the Munich Declaration of Rights and Duties of Journalists was developed by the International Federation of Journalists and journalists’ unions in Europe in 1971. It in essence sets out a code of conduct for journalists to fulfill their obligations to the public.

CASE LAW: UNGVÁRY AND IRODALOM KFT V HUNGARY (2013)

Irodalom Kft, the publisher of a literary and political weekly, published a report by historian, Mr. Ungváry, concerning the actions of the secret service against a spontaneous student peace movement. Ungváry was accused of relying on false and unproven statements, which led to the tarnishing of the reputation of an individual mentioned in the report, Mr. K. The European Court of Human Rights noted that expression may fall outside of the protection afforded to it under Article 10 of the European Convention “if it amounts to wanton denigration, for example where the sole intent of the offensive statement is to insult.”²³⁶ In this case, Ungváry was found to have relied on archival research and uncontested facts in regards to the operation of State security; there was no indication that Mr. K suffered any negative consequences as a result of the publication; and given the fact that it was a weekly publication meant to facilitate political dialogue, Mr. K had the opportunity to respond to the allegations through the same medium. As such, Ungváry’s right to freedom of expression was violated by the accusations against him.

Conclusion

XIV. Conclusion

The right to freedom of expression enjoys fairly broad protection in international law. However, since this right is not absolute it must be balanced in consideration of other rights, notably the right to privacy and the right to non-discrimination. States have obligations to protect free speech, to protect the individual's right to privacy, and to protect media workers from harm related to their line of work; as well as an obligation to restrict the freedom of expression in certain circumstances, provided they pass the three-part test for restriction outlined in Article 19, or are necessary in the case of a national emergency as purported in Article 4 of the ICCPR.

Appendix

Appendix

I. How to Determine Which Countries Have Signed and Ratified UN-Based Treaties

STEP 1: Go to <http://indicators.ohchr.org/>

STEP 2: Search for your country in the list of countries on the left

STEP 3: Click on your country and the status of each of the human rights treaties for that country will be displayed. For example, below is a chart showing the ratification status of UN-based treaties for France:

Human Rights Instrument : (Date into force)	Ratification Status	Declaration
International Convention on the Elimination of All Forms of Racial Discrimination :1969	Signature: NA, Ratification/Accession: 1971	✓
International Covenant on Civil and Political Rights :1976	Signature: NA, Ratification/Accession: 1980	✓
Optional Protocol to the International Covenant on Civil and Political Rights :1976	Signature: NA, Ratification/Accession: 1984	✓
Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty :1991	Signature: NA, Ratification/Accession: 2007	✓
International Covenant on Economic, Social and Cultural Rights :1976	Signature: NA, Ratification/Accession: 1980	✓
Optional Protocol to the International Covenant on Economic, Social and Cultural Rights :2013	Signature: 2012, Ratification/Accession: 2015	
Convention on the Elimination of All Forms of Discrimination against Women :1981	Signature: 1980, Ratification/Accession: 1983	✓
Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women :2000	Signature: 1999, Ratification/Accession: 2000	
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment :1987	Signature: 1985, Ratification/Accession: 1986	✓
Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment :2002	Signature: 2005, Ratification/Accession: 2008	✓

STEP 4: Click on the “Declarations” tab to see any declarations/reservations associated with any of the ratified treaties. For example, below is a chart showing the declarations/reservations made by France in regards to the treaties it has ratified:

The screenshot shows the 'STATUS OF RATIFICATION INTERACTIVE DASHBOARD' for France. The 'Declarations' tab is selected. A dropdown menu shows 'France'. Below the menu are three colored boxes: a dark blue box for 'State Party', a light blue box for 'Signatory', and an orange box for 'No Action'. To the right are social media icons for Facebook, Twitter, and a print icon. The main content is a table with two columns: 'Ratifications (Acronym)' and 'Declarations'.

Ratifications (Acronym)	Declarations
International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)	<p>With regard to article 4, France wishes to make it clear that it interprets the reference made therein to the principles of the Universal Declaration of Human Rights and to the rights set forth in article 5 of the Convention as releasing the States Parties from the obligation to enact anti-discrimination legislation which is incompatible with the freedoms of opinion and expression and of peaceful assembly and association guaranteed by those texts. With regard to article 6, France declares that the question of remedy through tribunals is, as far as France is concerned, governed by the rules of ordinary law. With regard to article 15, France's accession to the Convention may not be interpreted as implying any change in its position regarding the resolution mentioned in that provision. 16 August 1982</p> <p>[The Government of the French Republic declares], in accordance with article 14 of the International Convention on the Elimination of all Forms of Racial Discrimination opened for signature on 7 March 1966, [that it] recognizes the competence of the Committee on the Elimination of Racial Discrimination to receive and consider communications from individuals or groups of individuals within French jurisdiction that either by reason of acts or omissions, events or deeds occurring after 15 August 1982, or by reason of a decision concerning the acts or omissions, events or deeds after the said date, would complain of being victims of a violation, by the French Republic, of one of the rights mentioned in the Convention.</p>
International Covenant on Civil and Political Rights (ICCPR)	<p>Declarations and reservations: (1) The Government of the Republic considers that, in accordance with Article 103 of the Charter of the United Nations, in case of conflict between its obligations under the Covenant and its obligations under the Charter (especially Articles 1 and 2 thereof), its obligations under the Charter will prevail. (2) The Government of the Republic enters the following reservation concerning article 4, paragraph 1: firstly, the circumstances enumerated in article 16 of the Constitution in respect of its implementation, in article 1 of the</p>

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- 231 UN, OSCE, OAS, ACHPR, *Joint Declaration on Crimes Against Freedom of Expression*, 25 June 2012, 6(b).
- 232 *Kiliç v Turkey*, No. 22492/93, ECHR 2000, at para 63.
- 233 Corte Constitucional de Colombia. Sentencia T-719/03 (20 August 2003), summarized in IACHR Report 2013, *supra* note 135, Chapter III, 385 at para 69.
- 234 *Özgür Gündem v. Turkey*, No. 23144/93, ECHR 2000, at para 43.
- 235 *Ungváry and Irodalom KFT v Hungary*, No. 64520/10, ECHR 2013, at para 42.
- 236 *Ibid* at para 43.

