The Legal Aid Forum
Working Together For Equitable Access to Justice

TRAINING MANUAL ON NATIONAL AND INTERNATIONAL LEGAL FRAMEWORK ON FREEDOM OF EXPRESSION AND SAFETY OF JOURNALISTS

Adapted to Rwandan Context from UNESCO toolkit for African judiciary on freedom of expression by The Legal Aid Forum (LAF)

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Introduction

The Constitution of Rwanda under its article 13 recognizes the State obligation to respect, protect and defend human beings. The judiciary as a third power of the State, is key in safeguarding against erosion of the right, and ensuring that states and other relevant actors fulfil their obligations to respect, protect, promote as well as the right to freedom of expression. There is a strong interdependence between the role of the judiciary and that of the journalists and media.

The judiciary's role is to regulate the society and uphold its laws. The role of journalists is to highlight instances of bad governance, corruption, or any other wrongdoing and, as such, to be the citizens' voice. Therefore, judicial actors must be aware that journalists play a crucial role to get to a free and open society, and to guarantee a pluralistic flow of information and ideas for the public. They must also be aware that Journalists are in some cases outright persecuted, by some people who have the most to lose if the truth is known.

In Rwandan, the protection of journalists and media serves to strengthen the rule of law, democracy and good governance, as the main pillars of National Strategy for Transformation. In this regard, the Rwandan legal system has been dynamic to ensure its conformity with international standards on freedom of expression.

2. Keys Resources

These resources are key to have a full understanding of the complexities and dynamics of the issues discussed in this training manual:

i. Universal Declaration on Human Rights (UDHR)

ii. International Covenant on Civil and Political Rights (ICCPR)

iii. General Comment No. 34 on Article 19 of the ICCPR (General Comment No. 34)

iv. African Charter on Human and Peoples' Rights (African Charter)

v. Declaration of Principles on Freedom of Expression in Africa (African Declaration on Freedom of Expression)

vi. African Charter on Democracy, Elections and Governance (ACDEG)

3. The purpose of the manual

The purpose of this training manual is to provide a theoretical and practical understanding of the key issues impacting the exercise and enjoyment of the right to freedom of expression in today's context, particularly in Rwanda. The training manual highlights the pertinent legal frameworks at the national, regional and international levels, developments in respect of jurisprudence, guidelines and principles.

The training manual comprises six chapters. **Chapter I.** sets out the legal frameworks regarding the right to freedom of expression, and how this right has been given effect within the international, regional, and national context. **Chapter II** explores the limitations on the right to freedom of expression. **Chapter III** sets out the legal frameworks regarding the right of access to information, **Chapter IV** examines the safety of journalists and the issue of impunity, highlighting the physical risks that many journalists face in the pursuit of the truth. **Chapter V** explores contemporary challenges to freedom of expression that have arisen particularly through the exercise of the right online, and how existing legal frameworks can be applied online. **Chapter VI,** examines the gendered perspective to the enjoyment of the right to freedom of expression, and the ways in which some of the challenges experienced affect women in unique and disproportionately severe ways.

Chapter I: International, Regional and National Legal Framework

1.1. Fundamental principles of human rights law

Human rights are inherent to all persons, and are enshrined in both national and international law. All persons are entitled to enjoy such rights without distinction, by virtue of their humanity. Human rights are described as being inherent, inalienable, interdependent, indivisible, and non-discriminatory:

- UNIVERSAL: Human Rights belong to all people;
- INALIENABLE: Human Rights cannot be taken away;
- INTERCONNECTED: Human Rights are dependent on one another;
- INDIVISIBLE: Human Rights cannot be treated in isolation;
- NON-DISCRIMINATORY: Human Rights should be respected without prejudice.

1.2. Obligations of the States

States are primarily responsible for the realization of human rights. In this regard, they have the duty to respect, protect and fulfil human rights.

- **Respect:** Government must not deprive people of a right or interfere with persons exercising their rights**.** For ex: The Government must create constitutional guarantees of human rights; Provide ways for victims of violations to seek legal remedies from domestic and international courts and ratify international human rights treaties.
- **Protect:** The Government must prevent private actors from violating human rights of others. For example Government can prosecute perpetrators of human rights violations, such as crimes related to domestic violence; educate people about human rights and the importance of respecting human rights of others, cooperate with the international community in preventing and prosecuting crimes against humanity and other violations.
- **Fulfill:** This obligation requires states to take positive actions to enable the full enjoyment of basic human rights, for example: provide free, high quality public education; create a public defender system so that everyone has access to a lawyer, etc.

In the **Rwandan legal system**, state obligations are provided for under article 13 of the Constitution. It states that: *«The State has an obligation to respect, protect and defend the human being ».*

Section 1: International legal Framework for Human Rights

1.1. Keys instruments

Human rights under international law are rooted from the ***Universal Declaration of Human Rights (UDHR)***, which was proclaimed by the UN General Assembly in 1948 following the devastation wrought by World War II.

The UDHR is not a binding treaty itself, but has been the catalyst to create other binding legal instruments, notably the ***International Convention on Civil and Political Rights (ICCPR)*** and the ***International Covenant on Economic, Social and Cultural Rights (ICESCR).***

The ICCPR enshrines civil and political rights, sometimes referred to as first-generation rights, that include the rights to life, liberty, freedom of expression, access to information, privacy, and assembly. The ICESCR enshrines economic, social and cultural rights, sometimes referred to as second-generation rights, and includes the rights to health, education, work, and to participate in cultural life.

1.2. Sources of law at International level

The most common source of law that comes first in mind when dealing with international law is **treaty law.** Treaties that have been ratified by a State are binding to that state. However, treaties are not the only sources of international law. Other instruments, such as ***resolutions*** and ***guidelines***, ***General comments*** are of persuasive value and meant to guide member states in their application of international law frameworks.

Article 38 of the Statute of the International Court of Justice identifies the following sources:

i. *international conventions;*
ii. *international custom, as evidence of a general practice accepted as law;*
iii. *general principles of law recognized by Nations; and*
iv. *judicial decisions and teachings of the most highly qualified publicists, as subsidiary means for the determination of the rules of law.*

1.3. The importance of the right to freedom of expression

The right to freedom of expression serves four broad objectives:

i. *Helping individuals to obtain self-fulfillment;*
ii. *Assisting to discover the truth;*
iii. *promoting political and social participation;*

iv. *strengthening the capacity of individuals to participate in decision-making; and*

v. *providing a mechanism by which it is possible to establish a reasonable balance between stability and change.*

The importance of the right to freedom has been well articulated in the preamble of the Declaration of Principles on Freedom of Expression in Africa. It notes that: "the fundamental importance of freedom of expression as an individual human right, as a cornerstone of democracy and as a means of ensuring respect for all human rights and freedoms, and the important contribution that can be made to the realization of the right to freedom of expression by new information and communication technologies".

Freedom of expression is not only important as a fundamental right, but also as an enabler of other rights. In *Handyside v United Kingdom,* European Court of Human Rights (ECtHR), Application No. 5493/72, para 49, the ECtHR stated that: "The right to freedom of expression is applicable not only to 'information' or 'ideas' that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population…"

1.4 The international framework relating to freedom of expression

There are three tenets at the core of the right to freedom of expression:

i. *The right to hold opinions without interference;*
ii. *The right to seek and receive information;*
iii. *The right to impart information of all kinds through any media regardless of frontiers.*

The specific tenets of this right are contained in various national, regional and international instruments, and have been further applied through a wide number of judicial decisions. In International treaties, the first record of the right can be found in **article 19 of the UDHR**, which states as follows: *"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".*

This was later encapsulated in similar terms in **article 19 of the ICCPR**, which states as follows:

i. *"Everyone shall have the right to hold opinions without interference.*
ii. *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."*

Article 20 of the ICCPR, provides for certain restrictions on speech:

i. *"Any propaganda for war shall be prohibited by law,*
ii. *Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."*

The United Nations HR Committee, General Comment No. 34 on Article 19 of the ICCPR in 2011, notes that the right to freedom of expression includes, for example, political discourse, commentary on one's own affairs and on public affairs, canvassing, and discussion of human rights, journalism, cultural and artistic expression, teaching, and religious discourse.

Article 15(3) of the ICESCR states that: *"The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity."*
Article 12 of the **Convention on the Rights of the Child** states that: *"(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*. Article 13 provides that: *"(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."*

• Article 21 of the **Convention on the Rights of Persons with Disabilities (CRPD),** is **one of the most comprehensive** treaty-based provisions regarding freedom of expression and access to information. **One of its most notable features is that it refers specifically to technology and the internet.**

It provides as follows: *"States Parties shall take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others ….,* including by:

i. *Providing information intended for the general public to persons with disabilities in accessible formats and technologies appropriate to different kinds of disabilities….*
ii. *Encouraging the mass media, including providers of information through the Internet, to make their services accessible to persons with disabilities.*

Section 2: Regional legal framework for Human Rights

2.1. Keys Instruments

- African Charter on Human and People's Rights;
- The African Charter on Democracy, Elections and Governance (ACDEG);
- The Declaration of Principles on Freedom of Expression in Africa.

2.2. Sources of Law at Regional level

In African human rights system, "***article 60 of the African Charter*** allow the African Commission on Human and Peoples' Rights (African Commission or ACHPR), to draw inspiration from international law on human and peoples' rights: the UN Charter, the OAU (now AU) Charter, the UDHR. The Commission shall also take into consideration, as subsidiary measures, to determine the principles of law ***(article 61 of the African Charter)***.

For the African Court on Human and Peoples' Rights (African Court), **article 7** of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court requires reliance on "the provisions of the African Charter and other relevant human rights instrument ratified by the States concerned". In ***Konaté v Burkina Faso***, Application No. 004/2013, the African Court took into consideration: The *African Charter, the Revised Treaty of the Economic Community of West African States (ECOWAS), the Declaration of the Principles on Freedom of Expression in Africa, ICCPR, and General Comment No. 34 on its Article 19.*

2.2.1. African legal framework relating to freedom of expression

- ***African Charter on Human and People's Rights***

Article 9 of the African Charter:

"(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."

The reference to ***"within the law"*** contained in article 9(2) of the African Charter is sometimes referred to as a claw-back clause; this has led to article 9 being regarded as weakest of the freedom of expression provisions within international human rights treaties.

However, this concern has been cured by the ACHPR in **its interpretation of article 9**. In ***Media Rights Agenda and Constitutional Rights Project v Nigeria***, the ACHPR interpreted *"within the law"* as *"within international law"*, explaining that to do otherwise would *"defeat the purpose of the rights and freedoms enshrined in the Charter*", and that *"international human rights standards must always prevail over contrary national law"*.

Interpreting the **Claw-back Clause** in **Article 19 of the African Charter:** The African Commission stated a general principle that applies to all rights, not only freedom of association: "***Government should avoid restricting rights, and take special care with regard to those rights protected by constitutional or international human rights law"***.

To complete the freedom of expression provisions of the African Charter, the ACHPR adopted the **Declaration of Principles on Freedom of Expression in Africa**, in October 2002.

In its preamble, it states the fundamental importance of freedom of expression as an individual human right, as a cornerstone of democracy and as a means of ensuring respect for all human rights and freedoms.

Principle I (2) reaffirms that: *"Everyone shall have an equal opportunity to exercise the right to freedom of expression and access to information without discrimination"*.
The Principle III provides the obligations of States as follows: The *"Freedom of expression imposes an obligation on the authorities to take positive measures to promote diversity, which include*:

- *Availability and promotion of a range of information and ideas to the public;*
- *Pluralistic access to the media and other means of communication,*
- *The promotion and protection of African voices, including through media in local languages; and*
- *The promotion of the use of local languages in public affairs, including in the courts."*

Principle XVI calls on States to make every effort to give practical effect to the principles contained in the Declaration of Principles on Freedom of Expression in Africa.

The African Charter on Democracy, Elections and Governance (ACDEG) adopted in 2007 by the African Union recognizes the importance of freedom of expression to political, economic and social

governance through article 27(8), which obliges states to commit themselves to *"Promoting freedom of expression, in particular, freedom of the press and fostering a professional media"*.

2.2.2. African Human Rights mechanisms that monitor the implementation of the legal instruments

- ***African Commission on Human and People's Rights (ACHPR)***

ACHPR is, in accordance with article 45 of the African Charter, mandated to promote and protect human rights in Africa. As part of its protective mandate, the ACHPR receives communications (or complaints) from states or individuals, alleging violation of the rights guaranteed by the African Charter, hears them and makes a finding regarding the alleged violation.

The **Special Rapporteur** on Freedom of Expression and Access to Information of the ACHPR has been a key role-player in developing the right to freedom of expression, both offline and online. This has included through the development of principles and guidelines, recommendations to states through the treaty body reporting mechanisms, proposing resolutions, and undertaking fact finding missions.
The ACHPR is a quasi-judicial body which issues 'recommendations' and thus lacks the enforcement power of a court.

- **African Court on Human and People's Rights**

In 2004, the African Court was established to complement the work of the ACHPR in protecting human rights in Africa. The African Court can only hear cases brought against member states that have ratified the Protocol which establishes it. So far, 30 member States of the African Union (AU) out of 55 have ratified the African Court Protocol.

In the ordinary course, an individual or non-governmental organization cannot directly lodge a complaint alleging the violation of his or her rights by a member state before the African Court. Only the ACHPR, member states and African inter-governmental organizations can lodge a complaint. However, in terms of Article 34(6) of the African Court Protocol, a member state can make a declaration recognizing the jurisdiction of the African Court to accept cases brought by individuals and NGOs.

Only ten member states have made this declaration. However, in 2016, **Rwanda** withdrew its declaration, thus making it only nine countries presently allowing individual access to the African Court. In 2019, Tanzania has started the process to withdraw its declaration. The states which will remain are: Benin, Burkina Faso, Côte d'Ivoire, The Gambia, Ghana, Malawi, Mali, and Tunisia.

Nevertheless, the jurisprudence of the court is influential beyond the specific member countries, include to those which had withdrew the Declaration. The ACHPR and the African Court require that local remedies must be exhausted before a matter is brought before them. (This is not required by the EACJ or the ECOWAS Court of Justice).

In ***Jawara v The Gambia***, the ACHPR explained (at para 32) that the onus rests on the respondent state to establish that the local remedies are available (the petitioner can pursue it without impediment); effective (it offers a reasonable prospect of success); and sufficient (it is capable of redressing the complaint).

The exceptions to the rule of exhaustion of local remedies are those situations where local remedies are non-existent; are unduly and unreasonably prolonged; recourse to local remedies is made impossible; or from the face of the complaint there is *"no justice"* or there are no local remedies to exhaust.

- ***East African Community (EAC)***

The Treaty for the Establishment of the EAC does not contain an express right to freedom of expression, but does include amongst its fundamental principles, in article 6(d), the principle of good governance, which include the principles of democracy, the rule of law, accountability, transparency, and the rights contained in the African Charter.

Article 6(d) mentioned above was relied on by the EACJ (The sub-regional court for the EAC) in upholding the right to freedom of expression in *Burundi Press Union v Attorney General of Burundi* and *Managing Editor, Mseto and Another v Attorney General of the United Republic of Tanzania.*

In this case, the EACJ stated that the impugned order banning the publication of a newspaper in Tanzania "*constitutes a violation of the Respondent's obligation under the Treaty to uphold and protect the principles of democracy, rule of law, accountability, transparency and good governance as specified under Articles 6(d) and 7(2) of the Treaty"* and that the order *"violates the right to freedom of expression and constitutes a violation of the Respondent's obligations under the Treaty to promote, recognize and protect human and peoples' rights…."*

2.2.3. Interplay between the Jurisprudence of the Regional Courts and the Domestic Courts

The Africa Court's decision in ***Konaté v Burkina Faso*** is a prime example of how the jurisprudence from a regional court can have a knock-on effect in other countries. The judgment has since been applied and followed in the following decisions regarding criminal defamation.

In **Zimbabwe:** ***Misa-Zimbabwe and Others v Minister of Justice and Others*****,** Case No CCZ/07/15 – in 2016, the Constitutional Court of Zimbabwe declared the offence of criminal defamation unconstitutional and inconsistent with the right to freedom of expression as protected under the Zimbabwean constitution.

In **Kenya:** **Okuta v Attorney-General** [2017] eKLR (Petition No 397 of 2016) in 2017, the High Court of Kenya declared the offence of criminal defamation under the Penal Code unconstitutional, finding it to disproportionate and excessive for the purpose of protecting personal reputation, and that there existed an alternative civil remedy for defamation.

In **Lesotho:** ***Peta v Minister of Law, Constitutional Affairs and Human Rights and Others*****,** Case No CC 11/2016 – in 2018, the Constitutional Court of Lesotho also declared the offence of criminal defamation inconsistent with the right to freedom of expression and therefore unconstitutional.

In **Rwanda**: In ***Mugisha Richard, -RS/INCONST/SPEC 00002/2018/SC-, (2019),*** The Supreme Court acknowledges that article 154 defines defamation as a crime contrary to article 38 of the Constitution, since it prejudices the freedom of press, expression and of access to information. Article 154 punishes the act of public defamation of religious rituals, symbols and religious cult's objects. The Court declared the article contrary to article 38 of the Constitution and repealed it.

On the issue whether article 236 violates freedom of press, expression, and access to information (the provision provides that any person insults or defames the President of the Republic commits an offence); The Supreme Court finds that there is a difference between defaming the President of the Republic and defaming other people. The Court notes that article 41 of the Constitution provides limitations to the freedom of press, expression and access to information, to preserve matters like public morals and public order, thus, article 236 serves to protect the public order, given that the President represents the public.

The Court concludes that criminalized defamation and insulting the President does not any way violate Freedom of press, expression, and access to information. The court declared that article 236 is not contrary to article 38 of the Constitution.

Section 3: National Human Rights legal framework

3.1. Sources of law at national level

In Rwanda's legal system, article 95 of the Constitution enumerates sources of law as follows:

- The Constitution,

- The Organic law,
- The international and regional Treaties ratified by Rwanda, Ordinary Law and Orders. Article 92 of the Constitution provides that: a Decree-Law promulgated by the President of the Republic, has the same force as ordinary law; if adopted by the Parliament at the next session.

3.1.1. Keys legal instruments at national level

i. The Constitution of the Republic of Rwanda of 2003 revised in 2015
ii. Law n°68/2018 of 30/08/2018 determining offences and penalties in general
iii. Law no 2/2013 of 08/02/2013 Regulating Media
iv. Law no 4 /2013 of 08/02/2013 Relating to Access to Information
v. The Law n°59/2018 of 13/08/2018 on the crime of genocide ideology and related crimes
vi. The Law n°60/2018 of 22/08/2018 on prevention and punishment of cyber crimes
vii. The Law n°60/2013 of 22/08/2013 regulating the interception of communication
viii. The Law n°35/2012 of 19/09/2012 relating to the protection of whistleblowers
ix. The Law n°44 bis/2017 of 06/09/2017 relating to the protection of whistleblowers.

3.1.2. Rwandan legal framework on freedom of expression

- **The Constitution of the Republic of Rwanda of 2003 revised in 2015**

The preamble of the Constitution of Rwanda of 2003 revised in 2015 states that the *"People of Rwanda is committed to build a State governed by the rule of law, based on the respect for human rights, freedom and on the principle of equality of all Rwandans before the law as well as between men and women."*

- **Article 38 of the Constitution: Freedom of press, of expression and access to information:** states that: *« Freedom of press, of expression and of access to Information are recognized and guaranteed by the State. Freedom of expression and Freedom of access to information shall not prejudice public order, good morals, the protection of the youth and children, the right of every citizen to honour and dignity and protection of personal and family privacy. Conditions for exercising and respect for these freedoms are determined by law ».*
- ***Article 41 of the Constitution*** states that: In exercising rights and freedoms, everyone is subject only to limitations provided for by the law aimed at ensuring recognition and respect of other people's rights and freedom, as well as public morals, public order and social welfare which generally characterize a democratic society.

- **Law n°68/2018 of 30/08/2018 determining offences and penalties in general**
  - ***Article 154 : Public defamation of religious rituals*****:** Any person who publicly defames religious rituals , symbols, and religious cults objects, by use of actions, words, signs, writing……, commits an offence. This provision was repealed by the Supreme Court in the Mugisha case (2019).
  - ***Article 160: Secretly listening to conversation, taking photos or disclosing them:*** « Any person in bad faith, and in any way, infringes the personal privacy of another person …..Commits an offence.
  - ***Article 157: Publication of edited statement or images:*** « Any person in bad faith, publishes in any way whatsoever an edited version of a personal statement, or images and photos without explicitly stating that it is not the original version, commits an offence.
  - ***Article 160: Collection of individuals' personal information in computers*****:** « Any person in bad faith, records, collects individual's personal information or who archives or uses others ways of keeping the personal information in computers that is likely to adversely affect the individual's honor or his/her privacy, commits an offence.
  - ***Article 163: Crime of discrimination:*** Any person who acts with conveniences a person or group of people or causes divisions among person on the basis of race , sex (….); acts aimed at denying a person or group of people their rights granted under Rwandan law or international convention ratified by Rwanda (….), on basis of race, sex (…), commits an offence.
  - ***Article 164: Crime of instigating divisions:*** A person who makes use of speech, writing, or any other act which divide people or may set them against each other or cause civil unrest on the basis of discrimination, commits an offence ».
  - ***Article 233: Humiliation of national authorities and persons in charge of public service:*** Any person who, verbally, by gestures or threats, in writing or cartoons, humiliates a members of Parliament when exercising his/her mandate, a member of cabinet, security officers or any other person in charge of a public service in the performance (…) of his/her duties, commits an offence. This provision was repealed by the Supreme Court in Mugisha Case.
  - ***Article 236: Insults or defamation against the President of the Republic****:* Any person who insults or defames the President of the Republic commits an offence.

- **Law n° 2/2013 Regulating Media: Freedom to receive and broadcast information**

- **Article 1:** Indicates that the purpose of the law is among others to determine rights and obligations of the Media in Rwanda.
- **Article 3:** recognizes the right to exercise the profession of Journalism.
- **Article 5: Obligations and restrictions of journalists:** To inform, to educate population and promote leisure activities, to defend freedom of information, analyze and comment on information.
- **Article 6: prohibited publications to journalists:** The right to know or to publish documents from Legislative, Executive or Judiciary Powers may be limited where necessary in respect of confidentiality…

➢ **Law n° 2/2013 Regulating Media: Freedom to receive and broadcast information**

- **Article 8:** "Freedom of the media and freedom to receive information are recognized and respected by the state. Such freedom shall be applicable in accordance with the law".
- **Article 9: Limits to Freedom of Opinion**: "Censorship of information is prohibited. However the freedom of opinions and information shall not jeopardize the general public order and good morals, individual's right to honor and reputation in public eye and to the right to inviolability of a person's private life and family".
- **Article 10: Modalities for seizure** provides that: "The material of a journalist shall not be seized. Except if it is ordered by the court".

➢ **Law n° 4 /2013 Relating to Access to Information**

- **Article 2: Purpose of the Law**: "The law shall enable the public and journalists to access information possessed by public organs and some private bodies".
  Article 3: Access to Information: "Everyone has the right to access to information in a possession of a public organ and some private bodies".
- **Article 6: Public Interest in disclosure of information:** "A public organ or a private body to which this law applies shall disclose information where the public interest outweighs the interest of not disclosing such information".

➢ **The Law n°60/2018 of 22/08/2018 on prevention and punishment of cyber crimes**

- **Article 35: Cyber – stalking,** states that: Any person who, intentionally, uses a computer or a computer system to harass or threaten with the intent to place another person in distress of fear

through one of the following acts when: 1°) he/she displays, distributes or publishes indecent documents, sounds, pictures or videos; 2°) in bad faith, he/she takes pictures, videos or sounds of any person without his/her consent of knowledge; 3°) he/she displays or distributes information in a manner that substantially increases the risk of harm or violence to any other person; Commits an offence.

- **Article 38: Publishing indecent information in electronic form:** Any person who publishes, transmits or causes to be published any indecent message using a computer or a computer system, commits an offence.
- **Article 39: Publication for rumours:** Any person who, knowingly and through a computer or a computer system, publishes rumours that may incite fear, insurrection or violence amongst the population or that may make a person lose their credibility, commits an offence.
- **Article 52: Additional penalties:** The competent court may, in all cases, orders the confiscation of a computer or a computer system, software or media used in the commission of these crimes; It may also, permanently or temporary for the period that considers appropriate, order the closure of the premise or corporate body in which any of the offences (….)

➢ **The Law n°59/2018 of 13/08/2018 on the crime of genocide ideology and related crimes**

- **Article 2 provides the definition of the term**: « **Public »** as follows:
- Acts considered as done in public: 1°) a publication on a website;
- 2°) a publication on social media; 3°) a publication in media; 4°) a message sent to a person; 5°) audio recording or video recordings performed by use of an appropriate device; 6°) any other publication through information and communication technologies.
- **Article 4 provides that:** A person who, **in public**, either verbally, in writing through image or in any other manner, commits an act that manifests an ideology that supports or advocates for destroying, in whole or in part, a national, ethnic, racial or religious group, commits an offence.
- **Article 5**: punishes the denial of genocide;
- **Article 6**: punishes the minimization of genocide;
- **Article 7**: punishes the justification of genocide; refers to acts committed in Public that constitute an offence.
- **Article 8** provides that a person who, deliberately, conceals, destroys, eliminates or degrades evidence or information relating to genocide, commits an offence.

- **The Law n°60/2013 of 22/08/2013 regulating the interception of communication**
  - **Article 3: Lawful interception communication,** states that: Interception of a communication is considered as lawful where it is done in the interest of national security and in accordance with this law.
  - **Article 4: Prohibited interception of communications:** states that: Interception of the President of the Republic is strictly prohibited.
  - **Article 5: Unlawful interception of communication:** provides that: The interception of any communication in the course of the transmission by means of public or private communication system or a public or a private postal service when it is done without authorization of the competent authority shall be unlawful.

- **The Law n°35/2012 of 19/09/2012 relating to the protection of whistle-blowers**

In exercising their role of highlighting instances of bad governance, corruption, or any other wrong-doing, journalists may benefit from this law in case they make to the relevant organ a whistle-blowing.

  - **Article 12: Protection of a whistle-blower,** states that: « Any entity which receives information from a whistle blower must establishes reliable mechanisms designed to protect whistle-blowers, including receiving information in secret and the filing of disclosures by using a code.

- **The Law n°44 bis/2017 of 06/09/2017 relating to the protection of whistle-blowers.**
  - **Article 5: Prohibitions in whistleblowing: «** A whistle blower is prohibited from: 1°)Providing false information aimed at his/her personal interest or based on grounds of hatred, jealousy or potential conflict between the whistle blower and the person subject to whistle blowing or other person with any relationship with the person subject to whistleblowing ; 2°) Providing information in the interest of a person he/she seeks to protect or with intent to defame and dishonour an individual or an entity subject to whistle blowing ».
  - **Article 12: Protection of a whistle blower summoned by judicial organs: «** In case the whistle blower is summoned before the judicial organs, his/her code is used and his/her identity must not be disclosed. In case the whistle blower is subject to interrogation before judicial organs, the procedure is conducted in camera without any cross examination by any other person ».

- **Article 13: International cooperation in protection of whistle blowers:** « Any whistle blower who discloses information in accordance with the provisions of this law must be protected from any victimization whether within the country or abroad in accordance with provisions ratified by Rwanda or any other agreement of cooperation Rwanda may conclude with other countries ».

➢ **Ministerial Order n°005/07.01/13 of 19/12/2013 determining which information could destabilize national security**

- **Article 18** indicates prohibited acts, including:

  Intentional revelation of State Secrets in any form and by means with the intention to use such secrets against Rwanda;

  Spreading false information with intent to create a hostile international opinion against Rwanda;

  Publish, disseminate, transmit or reveal in any form classified information to a foreign country or its agents military operations on troops, arsenals…

3.2. The application of freedom of expression standards by Rwandan courts

In **Mugisha Richard, -RS/INCONST/SPEC 00002/2018/SC-,** Mugisha R. submitted an application to the Supreme Court, he contends that article 154, 233 and 236 of the Law determining offences and penalties in general, contravene the Constitution. He argued that these articles infringe upon freedom of the press, whether print or audio-visual, as provided in article 38 of the Constitution, whereas the Constitution protects the freedom of press, of expression and of access to information. He argued that the provisions of article 154 are not explicit enough which could result into unjust prosecution of one who did such an act. He further argues that it encroaches on the Freedom of press and of expression. The Advocate representing the Journalists Association (as Amicus Curae) argued that this article disregards the people's freedom of religion to the degree that its provisions may discourage people from airing their views on the belief of others. The State Attorney representing the State, contended that even if some of the stipulations of this article are ambiguous, this does not constitute ground to repeal the whole law or article.

The professors representing the University of Rwanda (as Amicus curae) argued that article 154 is ambiguous, as it doesn't give a clear definition of religion and rituals, thus it infringes the Principle of legal certainty; they supported theirs arguments by article 19 of International Convention on civil and

Political Rights (ICCPR) and on article 19 of Universal Declaration on human Rights (UDHR). The Supreme Court acknowledges that article 154 defines defamation as a crime contrary to article 38 of the Constitution, since it prejudices the freedom of press, expression and of access to information. *The Court declared the article contrary to article 38 of the Constitution and repealed it.*

On article 233, Mugisha R. argues that is contrary to article 38 of the Constitution because it discriminates people that it is meant to protect, and that it prejudices the Freedom of press, of expression, and of access to information. While concede that international instruments provide limitations on freedom of expression, Mugisha and his Lawyers argue that article 233 generally prohibits both the press and citizens from criticizing the leaders mentioned in the law. Advocate representing the Association of Journalists (Amicus Curae) argues that article 233 violates the freedom of press and of expression as it criminalizes the act of publishing information on the poor performance of leaders or public servants. He contends that drawing someone in cartoons, it is done in public interest, if the person feels defamed, he/she should lodge a complaint seeking civil damages.

The Professors of University of Rwanda (Amicus curae), argue that article 233 is contrary to the principle of legal certainty, as it does not define what defamation really means, it does not elucidate whether the persons protected by this article include all servants. The Attorney said that article 233 is ambiguous on the ground that the people it protects. The clause: any other person in charge of public service is problematic, because there are others private persons who provide important services to the citizens.

The Supreme Court finds that the article penalizing humiliation, either verbally, by gestures or threats, or in writings or cartoons, violates freedoms that are constitutionally protected , since someone may fear that if he or she expresses his or her opinion by publishing an article criticizing one of the leader mentioned in the article, he or she risks prosecution. The Court considers that freedom of expression, and the freedom to impart information on the activities of national leaders, underscores the democratic principle of transparency and accountability by leaders who serve the people.

The Court refers to article 4 of the Constitution, which reflects the founding principle of the Republic of Rwanda: Government of Rwandans, by Rwandans and for Rwandans; thus Freedom of expression in one of the principles of any democratic state and should not be restricted for certain people.
The Court further considers that freedom of expression and the freedom to seek and impart information should be exercised without threats or harassment. The Court finds that article 233 violates the right

to critically examine and disseminate information on the conduct of those leaders. *The Court declared the article contrary to article 38 of the Constitution and repealed it*.

On the issue whether article 236 violates freedom of press, expression, and access to information (the provision provides that any person insults or defames the President of the Republic commits an offence); Mugisha R. argues that this article may be used as a pretext for interfering with freedom of press, considering that the crime of defamation is itself unclear.

The State Attorney's position is that article 236 does not cover only Journalists. In addition, the freedom of press is limited by honour and security of the leader. The Amicus curae argue that such a law would undermine the principle of accountability, that a similar crime was omitted from the penal code for other persons on the grounds that it was ambiguous.

The Supreme Court finds that there is a difference between defaming the President of the Republic and defaming other people. The Court notes that article 41 of the Constitution provides limitations to the freedom of press, expression and access to information, to preserve matters like public morals and public order, thus, article 236 serves to protect the public order, given that the President represents the public. The Court concludes that criminalizes defamation and insulting the President does not any way violate Freedom of press, expression, and access to information. *The court declared that article 236 is not contrary to article 38 of the Constitution.*

*In **Mushayidi Deogratias v Prosecution, Case n° RPA 0298/10/CS,** a*fter analysis of article 33 of Constitution of 2003, the current article 38 of the Constitution of 2003 revised in 2005, and article 19 of the ICCPR, The Supreme Court recognizes the freedom of expression as a right to every person, however, the exercise of this right has limitation, especially if the opinions can bring to discrimination, divisionism or impede the national security or the public order (paragr 24-25-26). Both the UN and the African Commission have affirmed that the same rights that people have offline must also be protected online.

At international level, in 2016, the United Nations Human Rights Council adopted Resolution 32/13, which noted that the internet is a driving force that can accelerate progress towards development in different forms, and affirmed the importance of applying a rights-based approach in providing and expanding access to the internet, requesting states to make efforts to bridge the many forms of the digital divide.

The Resolution notes that the internet plays an important role in facilitating a wide range of rights, notably, the right to education, which plays a decisive role in development, and calls on states to promote digital literacy and facilitate access to information on the internet. This was again reaffirmed by the United Nations Human Rights Council in Resolution 38/35 in July 2018.

At regional level, in 2016, the African Commission adopted Resolution 362(LIX), which similarly notes the transformative nature of the internet in terms of giving a voice to billions around the world, and calls on states to respect and take legislative and other measures to guarantee, respect and protect citizen's right to freedom of information and expression through access to internet services.

In Rwanda, the protection of the right online, is reflected in the Law n°60/2018 of 22/08/2018 on prevention and punishment of cyber-crimes. For *example* **article 35: Cyber – stalking,** provides that: Any person who, intentionally, uses a computer or a computer system to harass or threaten with the intent to place another person in distress of fear through one of the following acts when: 1°) he/she displays, distributes or publishes indecent documents, sounds, pictures or videos; 2°) in bad faith, he/she takes pictures, videos or sounds of any person without his/her consent of knowledge; 3°) he/she displays or distributes information in a manner that substantially increases the risk of harm or violence to any other person; Commits an offence. **Article 38 Publishing indecent information in electronic form** states that any person who publishes, transmits or causes to be published any indecent message using a computer or a computer system, commits an offence.

General Comment of UN Ctte No. 34 (at para 15) states as follows:

> *"States parties should take into account of the extent to which developments in information and communication technologies, such as internet and mobile based electronic information dissemination systems, have substantially changed communication practices around the world. There is now a global network for exchanging ideas and opinions that does not necessarily rely on the traditional mass media intermediaries. States parties should take all necessary steps to foster the independence of the new media and to ensure access of individuals thereto."*

The question of access to the internet has two inter-related dimensions: the first is access to content online; and the second relates to access to the physical infrastructure to enable access to such online content.

Module I: Assessment

The assessments for Chapter 1 cover a broad range of topics. In particular, the practical activities look at topics relating to sources of law; the impact of regional courts on courts at the national level; and how the existing frameworks might be amended in line with technological developments in the digital age. It also calls for independent research through a review of case law of the regional and sub-regional courts. The practical exercises are intended to get participants to start grappling with some of the complexities relating to freedom of expression, and will be expanded upon further in later modules. The topic for the individual analysis relates to access to the internet, and poses several questions for the participants to consider.

Exercises: Working groups

I. Assignment N°I:

- Identify the case Law from the African Commission, African Court, on the right to freedom of expression, to press and access to information
- Identify key findings of the court and legal frame work applied
- Consider if the case was handled at nation level, which legal frame work could be applied.

Working Group I: example: The African Court on Human and people's rights: *Konaté v Burkina Faso*, Application No. 004/2013,

Working group II: example: The African Commission for Human and people's rights: In *Media Rights Agenda and Constitutional Rights Project v Nigeria*,

II. Assignment n° II:

Analysis of the case law: Mugisha Richard, -RS/INCONST/SPEC 00002/2018/SC-.

- Identify key findings of the court and legal frame work applied,
- Which other legal instruments, soft law related to freedom of expression should be applied.

N.B: More exercises can be added.

Chapter II: Legitimate Restrictions on Freedom of Expression

2.1. Introduction

Most rights are not absolute. Rights may be lawfully restricted, subject to specific requirements or conditions that are laid down by law, where those restrictions ***are reasonable*** and ***justifiable*** in an ***open*** and ***democratic society***. For the purpose of this chapter, the terms *'limitations'* and *'restrictions'* in reference to rights are used interchangeably. Some rights may be subject to internal limitations within the right itself, or as part of the general limitations clause of the relevant treaty.

2.2. Limitations clauses in international treaties

2.2.1. Internal limitations of freedom of expression

Article 19(3) of ICCPR contain internal limitations clauses to the right to freedom of expression. Article 19(3) of ICCPR states that: *"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 for respect of the rights or reputations of others; for the protection of national security or of public order or of public health or morals."*

2.2.2. General limitation of freedom of expression

Article 29 of the UDHR, contains a general limitation clause: It provides that: "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."

In the same context, article 27(2) of the African Charter provides that: "The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest."

The United Nations Human Rights Council (HRC), in **Resolution 12/16 on Freedom of Opinion and Expression,** noted that states should still refrain from imposing restrictions on Discussion of government policies; reporting on human rights, government activities, corruption in government; engaging in election campaigns, peaceful demonstrations or political activities.

The General Comment No. 34 (at para 21) provides that restrictions on the right to freedom of expression may not put the right itself in jeopardy.

2.2.3. Unjustifiable Limitations of the Right to Freedom of Expression

In these rulings, the regional and sub-regional courts across the continent, have found an unjustifiable limitations on the right to freedom of expression:

- ***Zongo v Burkina Faso:*** The African Court held that the state had violated the right of freedom of expression under article 9 of the African Charter by failing to investigate and prosecute the murderers of Mr Zongo, a media professional.
- ***Konaté v Burkina Faso:*** The African Court held that the right to freedom of expression in terms of article 9 of the African Charter was unjustifiably infringed by aspects of the criminal defamation law, particularly the provisions that imposed a sanction of imprisonment.
- ***Hydara Jr v The Gambia:*** The ECOWAS Court of Justice held that a state will be in violation of its international obligations if it fails to protect media practitioners.
- ***Federation of African Journalists and Others v The Gambia****:* The ECOWAS Court of Justice ordered the state to immediately repeal or amend its laws on criminal defamation, sedition and false news as the impugned provisions did not comply with the state's obligation under international law.

2.2.4. Derogation of rights

Article 4 of ICCPR provides for the derogation of rights in times of public emergency. This is generally considered to be a drastic measure, and one that states should only invoke subject to the prescripts contained in article 4. In this regard, article 4 of ICCPR provides as follows:

"(1) In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, 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 Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation." **General Comment No. 29** deals with derogations during a state of emergency. As noted (at para 2), a measure derogating from the ICCPR must be of *"an exceptional*

and temporary nature", and must meet two fundamental preconditions before it can be invoked: (i) the situation must amount to a public emergency which threatens the life of the nation; and (ii) the state party must have officially proclaimed a state of emergency. Even in instances where a lawful derogation has been invoked, there are still important restrictions on a state's conduct.

The rights listed in article 4(2) of the ICCPR are non-derogable. Notably, the African Charter does not contain any express derogation's clause similar to Article 4 of the ICCPR. As such, under the African Charter, all restrictions on rights must be subject to the limitations analysis discussed above.

Limitation clauses in regional legal framework.

2.2.5. Internal limitations of freedom of expression

Article 9(2) of the African Charter contains internal limitations clauses to the right to freedom of expression. Article 9(2) of the African Charter provides a much wider restriction, in that it requires that freedom of expression is exercised ***'within the law'.*** It states: *"Every individual shall have the right to express and disseminate his opinions within the law*".

In ***Media Rights Agenda and Constitutional Rights Project v Nigeria***, the ACHPR interpreted "***within the law***" as "***within international law***", explaining that to do otherwise would "defeat the purpose of the rights and freedoms enshrined in the Charter", and that "international human rights standards must always prevail over national laws which are contrary".

The grounds for limitation contained in the UDHR, the ICCPR and the ACHPR, The Rwandan Constitution may be summarized respectively, as follows: ***All limitations must be interpreted holistically, in the light and context of the particular right concerned.*** They must be consistent with other rights recognized under the treaty in question and other international human rights instruments, as well as with the fundamental principles of universality, interdependence, equality and non-discrimination. Wherever doubt exists as to the interpretation or scope of a law imposing limitations or restrictions, the protection of fundamental human rights shall be the prevailing consideration.

While, indeed, all speech can arguably be limited in line with provisions of the applicable limitations clauses, certain forms of speech – for instance, political speech, or matters relating to corruption or human rights issues – should be carefully guarded in light of the important public interest role that it serves.

Guidance on the Application of Article 19(3) of the ICCPR

In ***Amnesty International v Zambia***, the ACHPR found that freedom of expression is a fundamental human right essential to an individual's personal development, political consciousness and participation in the public affairs of a country.

In ***Kenneth Good v Botswana***, the ACHPR added that "a higher degree of tolerance is expected when it is political speech and even higher threshold is required when it is directed towards the government and government officials".

The Zimbabwe Constitutional Court, in ***Chimakure v Attorney-General of Zimbabwe***: stated that *"To control the manner of exercising a right, should not signify its denial or invalidation".* A limitation must not undermine or jeopardize the essence of the right of freedom of expression, and the relationship between the right and the limitation ".

2.2.6. Justifiability of a limitation: The three-part test

The Declaration of Principles on Freedom of expression, states clearly in Principle II that:

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

Thus, in ***Kenneth Good v Botswana*** (at para 188), the ACHPR said: *"Though in the African Charter, the grounds of limitation to freedom of expression are not expressly provided as in other international and regional human rights treaties, the phrase 'within the law' under article 9(2) provides a leeway to cautiously fit in legitimate and justifiable individual, collective and national interests as grounds of limitation."* To be justified, any limitation should meet the satisfaction of all three legs of the three-part test: (i) it must be provided for by law; (ii) it must pursue a legitimate aim; and (iii) it must be necessary for a legitimate purpose. Ultimately, when contested, it is for a court or appropriate tribunal to determine whether the test has been properly met both procedurally and substantively, following due process of the law.

In ***Managing Editor, Mseto and Another v Attorney General of the United Republic of Tanzania***, Reference No. 7 of 2016, the EACJ declared that an order issued by the Tanzanian Minister for Information, Culture, Arts and Sports, dated 10 August 2016, restricted the freedoms of expression and press and thereby constituted a violation of the respondent's obligation under the Treaty for the

Establishment of the EAC to uphold and protect the principles of democracy, rule of law, accountability, transparency and good governance. The EACJ concluded that the restrictions imposed by the Minister were unlawful, disproportionate and did not serve any legitimate or lawful purpose.

2.2.7. Examination of each aspect of the three-part test in turn

- ***It must be provided for by law***

Limitations must be provided for by a prior existing law in the domestic legal framework of the state seeking to limit the right. Such law must have been adopted by the legislative body of the relevant state, be publicly accessible, and formulated with sufficient precision to enable the public to regulate their conduct accordingly. In other words, the law must be concrete, clear and unambiguous, such that it can be understood and applied by everyone.

In ***Media Rights Agenda and Constitutional Rights Project v Nigeria***, the government had by decree proscribed certain newspapers. In finding a violation of Article 9(2) of the African Charter, the ACHPR explained (under para 66) that: "According to Article 9.2 of the Charter, dissemination of opinions may be restricted by law. This does not mean that national law can set aside the right to express and disseminate one's opinions; this would make the protection of the right to express one's opinions ineffective.

Article 9(2) of the African Charter provides that: "Every individual shall have the right to express and disseminate his opinions within the law." The reference to "*within the law*" has been interpreted by the ACHPR in ***Constitutional Rights Project v Nigeria***. The Commission in its decision on communication 101/93, with respect to freedom of association, stated that: *"competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution and international human rights standards' …; Government should avoid restricting rights, and take special care with regard to those rights protected by constitutional or international human rights law. In fact, general restrictions on rights diminish public confidence in the rule of law and are often counterproductive."* The African Commission has therefore made it clear that a state cannot rely on its domestic framework to justify non-compliance with its obligations under international human rights law.

- ***It must pursue a legitimate aim***

In ***Media Rights Agenda and Constitutional Rights Project v Nigeria***, the ACHPR noted (under paragraph 68-69) that: "The only legitimate reasons for limitations to the rights and freedoms of the African Charter are found in Article 27.2, that is, that the rights of the Charter '*shall be exercised with due regard to the rights of others, collective security, morality and common interest.*' The reasons for possible limitations must be founded in a legitimate State interest and the evils of limitations of rights must be strictly proportionate with and absolutely necessary for the advantages which are to be obtained." Article 17 of the ICCPR protects citizens against attacks on their honor and reputation. However, this limitation of freedom of expression should never be used to protect the state or public officials from public opinion or criticism. Furthermore, Principle XII (1) of the Declaration of Principles on Freedom of Expression in Africa, under the heading *"Protecting reputations"* provides as follows: *"States should ensure that their laws relating to defamation conform to the following standards: (1)no one shall be found liable for true statements, opinions or statements regarding public figures which it was reasonable to make in the circumstances; (2) public figures shall be required to tolerate a greater degree of criticism; and (3)sanctions shall never be so severe as to inhibit the right to freedom of expression, including by others."*

In respect of public figures, the African Court in ***Konaté v Burkina Faso*** (at para 155) confirmed that public officials are expected to withstand more scrutiny and criticism that the average citizen.
In this regard, the African Court stated that: "Freedom of expression in a democratic society must be the subject of a lesser degree of interference when it occurs in the context of public debate relating to public figures. Consequently, people who assume highly visible public roles must necessarily face a higher degree of criticism than private citizens; otherwise public debate may be stifled altogether'."

- ***Morality***

As stated in the UN Human Rights Committee's General Comment No. 22 on Article 18 of the ICCPR (General Comment No. 22), relating to freedom of thought, conscience or religion, the HR Committee observed (at para 8) that: *"[T] he concept of morals derives from many social, philosophical and religious traditions; consequently, limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition".* As stated in General Comment No. 34 (at para 32), any limitation sought to be justified on the ground of morality must therefore be understood in the light of the universality of human rights

and the principle of non-discrimination. It states further (in para 48) that legal provisions relating to an alleged lack of respect for a religion or other belief system, such as blasphemy laws, are generally incompatible with international human rights law, as they would run contrary to the principle of non-discrimination.

- ***National security***

While the protection of national security interests is certainly a legitimate aim, it is the ground that is arguably most vulnerable to abuse. This is partially due to states refusing to disclose complete information about the content and extent of the national security threat, and courts and other institutions generally being deferent to the state and allowing it significant leeway in determining what constitutes national security.

Principle XIII(2) of the Declaration of Principles on Freedom of Expression in Africa provides that freedom of expression should not be restricted on public order or national security grounds *"unless there is a real risk of harm to a legitimate interest and there is a close causal link between the risk of harm and the expression"*.

The ACHPR's decision in ***Media Rights Agenda and Constitutional Rights Project v Nigeria***, in which it stated (at para 75) that: *"It is important for the conduct of public affairs that opinions critical of the government be judged according to whether they represent a real danger to national security. If the government thought that this particular article represented merely an insult towards it or the Head of State, a libel action would have been more appropriate than the seizure of the whole edition of the magazine before publication."*

In that case, the ACHPR found that the limitation could not be justified on the ground of national security, and that there had consequently been a breach of article 9(2) of the African Charter. Counter-terrorism measures may also fall within the ambit of national security, but must also comply with all three legs of the test to establish a justifiable limitation.

- **The principle of proportionality**

The HRCtte's General Comment No. 34 (para 46) notes that: any offences relating to the encouragement of terrorism or extremist activity, or to the praising, glorifying or justifying of terrorism, should be clearly defined to ensure that they do not lead to unnecessary or disproportionate interferences with freedom of expression. It further notes that the media plays an important role in

informing the public about acts of terrorism, and it should be able to perform its legitimate functions and duties without hindrance.

In February 2018, the ECOWAS Court of Justice in the case of ***Federation of African Journalists and Others v The Gambia*** held that: The set of laws on sedition, false news and defamation, used in the case against four journalists who were arrested and tortured by the regime of Yahya Jammeh; were found to have violated freedom of the press and access to information. Having critically examined the criminal laws of the Gambia, the ECOWAS Court of Justice declared that the criminal sanctions imposed on the applicants are disproportionate and not necessary in a democratic society where freedom of speech is a guaranteed right under the international provisions cited."

2.2.8. Criminal defamation and other criminal laws limiting freedom of expression

Many countries worldwide still have the criminal law offence of criminal defamation in their statute books as well. Both the United Nations and the African Commission have urged states to reconsider this. For instance, the HRCtte's General Comment No. 34 provides (at para 47) that: "States Parties should consider the decriminalization of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty".

In African Court's decision ***Konate v Burkina Faso,*** it was held that imprisonment for defamation violates the right to freedom of expression, and that criminal defamation laws should only be used in restricted circumstances. In concluding that the applicable criminal defamation laws were incompatible with article 9 of the African Charter, the African Court further notes that other criminal sanctions, be they (fines), civil or administrative, are subject to the criteria of necessity and proportionality; which therefore implies that if such sanctions are disproportionate, or excessive, they are incompatible with the Charter and other relevant human rights instruments."

Apart from criminal defamation, there are other criminal laws that are often used to restrict freedom of expression. In Africa, these include offences such as sedition, insult to a head of state, and the publication of false news. Usually, these criminal offences are vaguely worded, broadly formulated and attract lengthy prison sentences and/or fines.

For instance, in 2016, ***Misa-Zimbabwe and Others v Minister of Justice and Others***, the Constitutional Court of Zimbabwe declared the offence of criminal defamation unconstitutional and inconsistent with the right to freedom of expression as protected under the Zimbabwean constitution.

The following year, in ***Okuta v Attorney-General***, the High Court of Kenya similarly declared the offence of criminal defamation under the Penal Code unconstitutional, finding it to be disproportionate and excessive for the purpose of protecting personal reputation, and that there existed an alternative civil remedy for defamation.

- **Prohibited speech**

Not all speech is protected under international law. Some kinds of speech are required to be prohibited by states. Article 20 of the ICCPR provides that: *"(1) Any propaganda for war shall be prohibited by law; (2) Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."*

Article 4(a) of the International Convention on the Elimination of All Forms of Racial Discrimination requires that the dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, must be declared an offence that is punishable by law. There are activities under article 4(a) that must be declared as offences punishable by law: 1) Dissemination of ideas based on racial superiority; 2) Dissemination of ideas based on racial hatred; 3) Incitement to racial discrimination; 4) Acts of racially motivated violence; 5) Incitement to acts of racially motivated violence.

The criminalization of incitement for certain forms of speech is also well established under international criminal law. In this regard, article III(c) of the Convention on the Prevention and Punishment of the Crime of Genocide states that "*direct and public incitement to commit genocide*" shall be punishable. Similarly, the Rome Statute of the International Criminal Court criminalizes the incitement to commit international crimes, including prohibition on incitement to commit genocide as contained in article 25(3) (e) thereof.

- **Limitation clause in national legal framework**

In Rwandan legal system, limitations are provided in article 38 and article 41 of the Constitution of 2003 revised in 2015. Article 41 of the Constitution states that: In exercising rights and freedoms, everyone is subject only to limitations provided for by the law, aimed at ensuring recognition and respect of other people's rights and freedom, as well as public morals, public order and social welfare which generally characterize a democratic society.

In respect of Freedom of expression, the general and internal limitations are found in article 38 of the Constitution: « ……..*Freedom of expression and Freedom of access to information shall not prejudice public order, good morals, the protection of the youth and children, the right of every citizen to honour and dignity and protection of personal and family privacy (general limitation). Conditions for exercising and respect for the freedoms are determined by law (Internal limitation).* The three legs of the three-part test, are found in both articles:

i. Limitation must be provided for by law;
ii. It must pursue a legitimate aim; and
iii. It must be necessary for a legitimate purpose.

- **The Application of Article 19(3) of the ICCPR at national level**

In *UWIMANA Nkusi Agnès & MUKAKIBIBI Saidati v The Prosecution*, CASE Nº RPA 0061/11/CS,

The Supreme Court examining the boundaries of exercising the right to freedom of expression and of press in accordance to what is provided by both the Rwandan Law and international conventions (par 8-13), finds that:

> *Human rights in general and freedom of journalists, but in particular, the freedom of expression, goes hand in hand with the duty to observe other people's rights and the public interests, referring to article 34 of the Constitution of 04/06/2003 now article 38 of the revised Constitution in 2015.*
>
> *Article 19 (3) of the international convention for civil and Political Rights (ICCPR) elucidate that right to freedom of expression is subject to certain restrictions and exercising of these rights carries with it special duties and responsibilities such as respect of the rights or reputation of others; the protection of national security or of public order (ordre public).*

The Law no 2/2013 of 08/02/2013 Regulating Media provides duties and prohibitions of a journalist, article 12, 4º states that journalist must publish verified information, and article 13, 5º provides what a journalist is restricted from doing which includes slandering, abuse and defamation.

A journalist has the right and the freedom of expression and information, but that does not insinuate that they have more rights than those of other people to the degree that they are permitted to do things other people cannot.

A journalist as well as any other person in the country has different rights guaranteed by the Constitution of the Republic of Rwanda and other different laws, whether concerning their professions or the normal social life.

Nonetheless, no one can capitalize on his/her rights to prejudice other people's rights or even to act contrary to the law.

- ***It must pursue a legitimate aim***

In ***UWIMANA Nkusi Agnès & MUKAKIBIBI Saidati***, Case nº RPA 0061/11/SC, the Supreme Court of Rwanda finds that: "to write a defaming article without any evidence is an act of defamation. The Court stated that Uwimana did not write such article with good intent, but she did it with bad intent because she was aware that it would be read by many persons and it degraded the concerned person. Therefore, the Supreme Court Decided that Uwimana Nkusi Agnès is found guilty of the offence of defamation provided for and punished by the article 391 of the Penal Code in Rwanda.

- ***Morality***

The concept of Morality is as well provided in article 38 of the Constitution of Rwanda, Freedom of expression and Freedom of access to information shall not prejudice good morals.

- ***National security***

Article 38 of the Constitution states that: «*Freedom of expression and Freedom of access to information shall not prejudice public order*».

In ***UWIMANA Nkusi Agnès & MUKAKIBIBI Saidati,*** Case nº RPA 0061/11/SC, the Supreme Court of Rwanda after analysis of the content of articles written in their Newpaper, decides that Mukakibibi Saidati and Uwimana Nkusi Agnès are found guilty of the offence against internal State security.

With regards to Criminal defamation and other criminal laws limiting freedom of expression,

In Rwanda, The content of article 288 of the Penal Code of 2012 on "*defamation in Public*" and article 290 on defaming and insulting a person in a private area are no longer in the new law determining offences and penalties in general. Article 154 on public defamation of religious rituals which was in the new law, was repealed by the Supreme Court in the case Mugisha Richard, -RS/INCONST/SPEC 00002/2018/SC.

In Mugisha Richard, -RS/INCONST/SPEC 00002/2018/SC-, The Supreme Court finds article 154 which punishes the act of public defamation of religious rituals, symbols and religious cults objects,

contrary to article 38 of the Constitution, since it prejudices the freedom of press, expression and of access to information. The Court repealed the article.

In relation to **Prohibited speech,** in Rwanda's legal system, hate speech is criminalized under article 164 of the Law determining offences and penalties in general, as a **Crime of instigating divisions.** This article states**:**

> *« A person who makes use of speech, writing, or any other act which divide people or may set them against each other or cause civil unrest on the basis of discrimination, commits an offence ».*

Module II: Assessment

The focus of the assessments contained in Chapter 2 are to give practical application to the three-part limitations analysis, and understand how this has been applied and implemented in different court decisions when seeking to strike the appropriate balance with the right to freedom of expression.

Participants are invited to critically assess particular laws, with due regard to the legal frameworks discussed in Chapter1. The individual analysis focuses specifically on the issue of criminal defamation and the rationale and legal bases relied upon by the different courts across Africa in decriminalizing defamation.

Exercises

Assignment n° III:

Consider: 1) The case law *UWIMANA Nkusi Agnès & MUKAKIBIBI Saidati v The Prosecution*, case Nº RPA 0061/11/CS.

2) The case law Gasasira Jean Bosco v Prosecution, Case n°RPA 0297/10/CS;

Group I: Analyze how the limitations to the right to freedom of expression were applied by the Supreme Court.

Group II: Compare these cases to ***Konaté v Burkina Faso***, Application No. 004/2013,

Identify which legal instruments (international, regional, national) could be applied to all cases, consider the Konaté case was handled in Rwanda. *The analysis should focus on the three-part limitations*

N.B: More exercises can be added during the training.

Chapter III: The Right to Access Information

3.1. The importance of the right of access to information

3.1.1. Access to Information as a Cross-cutting Right

The right of access to information guaranteed by Article 9 of the African Charter on Human and Peoples' Rights (the African Charter) is an invaluable component of democracy, as it goes beyond in facilitating participation in public affairs.

Access to information, commonly referred to also as *'freedom of information'*, the '*right to information'* or the '*right to know'*, is an important element of democratic governance, as it goes a long way in ensuring transparency and accountability of elected representatives and ensuring public participation in the planning and implementation of government policies which affect the day to day life of citizens. The importance of the right of access to information is underpinned by the fact that it is a crosscutting right. It is a right that is necessary for the realization of other human rights, including the right to participate in government directly or through freely chosen representatives, as guaranteed by Article 13 of the African Charter."

The HR Committee's General Comment No. 34 on Article 19 of the ICCPR views this right "*access to information"* as imposing three main obligations on States Parties:

i. *to make available in the public domain, 'Government information for public interest';*
ii. *to ensure easy, prompt, effective and practical access to such information;*
iii. *to enact procedures to give effect to this right in the form of legislation.*

In terms of laws, African countries that have adopted specific legislation laying down the process for enforcing the right of access to information include Angola, Ethiopia, Côte d'Ivoire, Guinea, Kenya, Liberia, Malawi, Mozambique, Niger, Nigeria, **Rwanda**, Sierra Leone, South Africa, South Sudan, Sudan, Tanzania, Togo, Tunisia, Uganda and Zimbabwe.

3.1.2. The legal framework on the right of access to information

The right of access to information has its origins from the right of freedom of expression. Specifically, with reference to the right to *"seek receive and impart information"* in the UDHR and the ICCPR, and the right to *"receive information"* under the African Charter. Article 19 of the UDHR in this regard provides that:

"Everyone has the right to freedom of expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any medium regardless of frontiers".

Similarly, article 19 of the ICCPR states:

"Everyone shall have the right to hold opinions without interference. 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."

The UN Convention against Corruption, in articles 10 and 13, also provides for access to information in the context of transparency in public administration as well as public participation as a tool for fighting corruption.

- **In Africa, the African Charter and several other regional treaties provide for access to information in various contexts.**

Article 9 of the African Charter provides 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."

Article 2 of the ACDEG lists as one of its objectives,

"the establishment of the necessary conditions to foster citizen participation, transparency, access to information, freedom of the press and accountability in the management of public affairs".

Article 9 of the AU Convention on Preventing and Combating Corruption obliges state parties to *"adopt such legislative and other measures to give effect to the right of access to any information that is required to assist in the fight against corruption and related offences".*

Article 6 of the African Charter on Values and Principles of Public Service and Administration provides for access to information in the context of public service and administration as follows:

"(1) Public Service and Administration shall make available to users information on procedures and formalities pertaining to public service delivery.

(2)Public Service and Administration shall inform users of all decisions made concerning them, the reasons behind those decisions, as well as the mechanisms available for appeal ....."

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa also reinforces the need for access to information. This includes in relation to eliminating discrimination against women (article 2(2)); the elimination of harmful practices (article 5(a)); health and reproductive

rights (article 14(2) (a)); and the right to a healthy and sustainable environment (article 18(2) (b)). General Comment No. 2 on Article 14 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa further specifically provides that: *'Information on health expenditures should be available to facilitate monitoring, control and accountability'.*

The African Youth Charter contains several provisions on the right of access to information in the context of development in article 10(3), of particular relevance is article 10(3) (d), which obliges state parties to provide access to information and education and training for young people to learn their rights and responsibilities, to be schooled in democratic processes citizenship, governance and leadership.

Lastly, article 3 of the African Charter on Statistics requires statistics authorities in member states to facilitate transparency by providing *"information on their sources, methods and procedures that have been used in line with scientific standards"* and further requires that *"the domestic law governing operation of the statistical systems must be made available to the public".*

The African Commission has developed soft laws on access to information to explain and for comprehensive understanding of this right:

1) The Model Law on Access to Information in Africa (the Model Law), adopted in 2013.
2) The Model Law is a non-binding instrument that can serve as a guide to lawmakers. A model law assists states to comply with article 1 of the African Charter, which obliges states to adopt legislative or other measures to give effect to the rights, duties and freedoms enshrined in the African Charter. This instrument highlight the importance of the right to access to information and it lies with the principle of governance and good governance.

For Democracy: information should be made as freely available as possible, to enable people who are after all the chief stakeholders in a democracy to participate in the democratizing process, and to hold government accountable.

For good governance: "Access to information may play a role in poverty eradication and the realization of socio-economic rights. Openness is a tool to combat governance ills such as corruption, secret deals between government and multi-national companies to sell off land, and misappropriation of taxpayers' contributions.

- **The Guidelines on Access to Information and Elections in Africa** (ATI Guidelines) published in 2017.

"Access to information empowers the electorate to be well-informed about political processes with due regard to their best interests: to elect political office holders; to participate in decision-making processes

on the implementation of laws and policies; and to hold public officials accountable for their acts or omissions in the execution of their duties.

Thus, access to information is a foundational requirement of the practice of democratic governance. It has been rightly stated that: *'No democratic government can survive without accountability and the basic postulate of accountability is that people should have information about the functioning of government*.'

It is the responsibility of State Parties to create an atmosphere that fosters access to information and to ensure '*adequate disclosure and dissemination of information'* in a manner that offers '*the necessary facilities and eliminates existing obstacles to its attainment.* The importance of access to information in the electoral process and for democratic governance is recognized in the African Charter on Democracy, Elections and Governance, as well as other sub-regional treaties and standards."

In Rwanda, the Law no 4 /2013 Relating to Access to Information enables the public and journalists to access information possessed by the public organs and some private bodies (article 1).

- **Article 3: Access to Information:** states that:

"Everyone has the right to access to information in a possession of a public organ and some private bodies".

- **Article 6: Public Interest in disclosure of information:**

"A public organ or a private body to which this law applies shall disclose information where the public interest outweighs the interest of not disclosing such information".

In Mugisha Richard, -RS/INCONST/SPEC 00002/2018/SC-, The Supreme Court finds that article 154 which punishes the act of public defamation of religious rituals, symbols and religious cults objects, prejudices the right to seek, receive and impart information and opinions in the public concerning religious rituals, symbol and religious cults objects (Para 67).

- **The impact of the internet on the right of access to information**

The internet has an unparalleled role to play in realizing the right of access to information. In 2003, UNESCO member states adopted a Recommendation Concerning the Promotion and Use of Multilingualism and Universal Access to Cyberspace, which provides:

> *"Member States and international organizations should promote access to the Internet as a service of public interest through the adoption of appropriate policies in order to enhance the process of empowering citizenship and civil society.*

Member States should recognize and enact the right of universal online access to public and government-held records including information relevant for citizens in a modern democratic society, giving due account to confidentiality, privacy and national security concerns, as well as to intellectual property rights to the extent that they apply to the use of such information."

- **Challenges in realizing the right of access to information**

Even in countries with comprehensive access to information laws, there is a frequent trend in public and private bodies ignoring requests or refusing on spurious grounds, and therefore causing the seekers to pursue litigious action in order to obtain the information.

Litigation in this regard is often costly and time-consuming, and therefore ineffective where the information sought is time-sensitive. For instance, members of the media who seek information for a story may find that the story is no longer relevant and of interest to the public once the information has finally been obtained.

As a mark of displeasure of unnecessary refusals or dilatory conduct, some courts have awarded punitive costs orders against bodies that cause requesters to institute litigious proceedings in circumstances where it was manifestly appropriate to disclose the information.

Chapter III: Assessment

The assessments are aimed at understanding the legal frameworks on access to information, and comparing regional standards with that provided for under domestic frameworks. The assessments provide for various topics to be discussed and debated, and participants are encouraged to rigorously analyze the laws in question and consider the extent to which such laws meaningfully give effect to the right of access to information. The individual analysis focuses specifically on the Model Law, and the extent to which national laws align with its terms.

Exercise:

Assignment n° IV: Analysis of the Law no 4 /2013 Relating to Access to Information ,specifically article 1 and 3 in comparison with the principles reflected in different legal instruments and identify gaps that can impede the exercise on this right: article 19 of the UDHR, article 19 of ICCPR, article 9 of the African Charter, Article 2 of the ACDEG, article 9 of AU Convention on Preventing and Combating Corruption, the

Model Law on Access to information in Africa and The HRCtte's General Comment No. 34 on Article 19 of the ICCPR.

-To what extend this law has integrated international standards on access to information.

Group I: Principles reflected in article 19 of the UDHR, article 19 of ICCPR, article 9 of the African Charter, article 2 of the ACDEG, the HRCtte's General Comment No. 34 on Article 19 of the ICCPR

Group II: Principles reflected in article 9 of AU Convention on Preventing and Combating Corruption, article 2 of the ACDEG, the Model Law on Access to information in Africa and the HRCtte's General Comment No. 34 on Article 19 of the ICCPR.

N.B: More exercises can be added during the training.

Chapter IV: Safety of Journalists and the issue of impunity

4.1. The importance of journalists and the media

The important role that journalists play in a democracy, justify why it is crucial to ensure their safety and accountability for attacks against them. The media lies at the heart of the full realization of the public's right to receive and access information under the ambit of the right to freedom of expression. In particular, the media plays a crucial role in ensuring transparency and accountability, rooting out corruption and increasing public awareness.

The **UN Plan of Action on the Safety of Journalists and the Issue of Impunity** states that: "Without freedom of expression, and particularly freedom of the press, an informed, active and engaged citizenry is impossible. In a climate where journalists are safe, citizens find it easier to access quality information, the result is: democratic governance and poverty reduction; conservation of the environment; gender equality and the empowerment of women; justice and a culture of human rights.

As stated in the preamble to the 2011 ACHPR Resolution on the Safety of Journalists and Media Practitioners in Africa, freedom of expression, of press, access to information can only be enjoyed when journalists and media practitioners are free from intimidation, pressure and coercion.

- **Who is a Journalist?**

"Journalists are understood to be individuals who are dedicated to investigating, analyzing and disseminating information, in a regular and specialized manner, through any type of written media, broadcast media (television or radio) or electronic media."

With the advent of new forms of communication, journalism has extended into new areas, including "*citizen journalism"* (according UN Special Rapporteur on the Protection and Promotion of Freedom of Opinion and Expression, in a 2010 report to the UN General Assembly). UNESCO uses the term journalist to cover *traditional reporters as well as 'media workers'* and *social media producers* who generate content in the public interest, which would include, for instance, *bloggers*.

The African Commission has also recognized the broad category of persons that may be regarded as journalists by its use of the term ***'media practitioners'*** rather than 'journalists' in relation to issues of promoting professionalism, safety and protection of sources.

4.2. Legal protection for journalists under international law

The issue of safety of journalists has been a concern both under international human rights law and international humanitarian law.

The right to freedom of expression set out in article 19 of the ICCPR and article 9 of the African Charter provide clear and important legal frameworks for the protection of the media and journalists.

The General Comment No. 34 provides (at para 23) that an attack on any person because of the exercise of his or her right to freedom of expression, including forms of attack such as arbitrary arrest, torture, threats to life and killing, cannot be justified under article 19 of the ICCPR.

The last of the four Geneva Conventions, adopted in 1949, deals with the protection of civilians, and in particular, Protocol I Additional to the Geneva Convention expressly extends this protection **accorded to civilians also to journalists**. It provides as follows:

Journalists engaged in dangerous professional missions in areas of armed conflict shall be considered as civilians within the meaning of article 50, paragraph 1. They may obtain an identity card similar to the model in Annex II of this Protocol. This card, which shall be issued by the government of the State of which the journalist is a national or in whose territory he resides or in which the news medium employing him is located, shall attest to his status as a journalist." Should citizen journalists find themselves in situations of armed conflict, they would also be protected under international humanitarian law as civilians. In Principle XI of the Declaration of Principles on Freedom of Expression in Africa, the ACHPR also identifies attacks on media practitioners as a violation of the right to freedom of expression guaranteed by article 9 of the African Charter.

The African Charter goes further and states that: *Attacks such as the murder, kidnapping, intimidation of and threats to media practitioners and others exercising their right to freedom of expression, as well as the material destruction of communications facilities,* ***undermines independent journalism, freedom of expression and the free flow of information to the public***."

As stated in Resolution 70/162 on the Safety of Journalists and the Issue of Impunity, *"journalists, media professionals and associated personnel engaged in dangerous professional missions in areas of armed conflict shall be considered as civilians and shall be respected and protected as such, provided that they take no action adversely affecting their status as civilians".*

4.3. Attacks on journalists and the issue of impunity

One of the key challenges identified by the UN and other international organizations is the high level of impunity in the case of attacks, including fatal attacks, on journalists. The relevance of such impunity to respect for the wider rule of law and for public confidence in the justice system of a country is underlined in many UN resolutions. When such attacks go unpunished, it sends a public signal that the state and the public authorities do not truly value the important role that the media plays in that country. The Security Council for the first time in 2006 adopted a **Resolution** condemning attacks against 'journalists, media professionals and associated personnel', and urged states and other parties to armed conflict to prevent violations of international humanitarian law against them.

Subsequently, the Security Council adopted Resolution 2222 of 2015, which goes further to urge notably *"the immediate and unconditional release of journalists, media professionals and associated personnel who have been kidnapped or taken as hostages, in situations of armed conflict"* by state parties as well as respect by all parties in armed conflict of the "*professional independence and rights of journalists, media professionals and associated personnel".*

- ***Measures to be taken***

What is required in the face of attacks on journalists is swift and firm justice, holding those responsible for such attacks to account. However, the reality is that many perpetrators commit criminal acts of violence against journalists and other members of the media with impunity. Impunity perpetuates a cycle of violence against journalists, which is why it is important to address the worrying numbers of journalists killed.

The root cause of the continuing trend of impunity has been attributed to: (1) **lack of political will to pursue investigations, (2) a weak judicial system, (3) lack of resources allocated to law enforcement, (4) negligence, and corruption**.

> *"For judicial actors in particular, there is potential to raise levels of knowledge about the wider importance of protecting journalists as a means towards safeguarding freedom of expression and strengthening the rule of law more broadly. There are strong norms that can be referenced in guiding decision making and which can galvanize attention to the issue.*
>
> *There is emerging jurisprudence from around the world, as well as growing numbers of good practices in how best to investigate cases so these come before the courts for due assessment.*

It is, in short, evident that lawyers, judges, prosecutors and police have a key role to play, within their mandate, in ending a scourge that has wide social visibility and ramification."

- **The protection of sources, encryption and anonymity**

The protection of journalistic sources is central to the ability of journalists to properly investigate stories, as well as for the protection of individuals and whistleblowers who provide information to them. Compelling the disclosure of sources has a chilling effect on freedom of speech and media freedom, in addition to hindering the free flow of information. Thus, **General Comment No. 34** provides that state parties *"should recognize and respect that element of the right of freedom of expression that embraces the limited journalistic privilege not to disclose sources."*

Particularly, **principle XV of the Declaration of Principles on Freedom of Expression in Africa** deals with issue of protection of sources by providing as follows:

"Media practitioners shall not be required to reveal confidential sources of information or to disclose other material held for journalistic purposes except in accordance with the following principles:

- *the identity of the source is necessary for the investigation or prosecution of a serious crime, or the defense of a person accused of a criminal offence; the information or similar information leading to the same result cannot be obtained elsewhere;*
- *the public interest in disclosure outweighs the harm to freedom of expression; and*
- *disclosure has been ordered by a court, after a full hearing."*

The **2016 UN Resolution** provides that: *"Also calls upon States to protect in law and in practice the confidentiality of journalists' sources, in acknowledgement of the essential role of journalists in fostering government accountability and an inclusive and peaceful society, subject only to limited and clearly defined exceptions provided in national legal frameworks, including judicial authorization".*

In its application however, limitations to this protection are conceded in certain circumstances. The **2008 Joint Declaration on Defamation of Religions, and Antiterrorism and Anti-extremism Legislation** identifies only two circumstances in which **journalists should be required to reveal their sources** by stating:

*"Normal rules on the protection of confidentiality of journalists' sources of information including that this **should be overridden only by court order** on the basis that access to the source is necessary to protect an overriding public interest or private right that cannot be protected by other means should apply in the context of anti-terrorist actions as at other times."*

It is important to note that the protection of sources has acquired new significance in the digital age in the context of its intersection with the right to privacy of communications. The technological advances in the world today have made surveillance, **often justified** as necessary for the protection of national security, a problem for the protection of sources. In this regard, the **2016 UN Resolution** emphasized ***"the particular risks with regard to the safety of journalists in the digital age,*** *including the particular vulnerability of journalists to becoming targets of unlawful or arbitrary surveillance and/or interception of communications, in violation of their rights to privacy and to freedom of expression".*

In *Bosasa Operations (Pty) Ltd v Basson and Another*, Case No. 09/29700, the High Court of South Africa refused to order the journalist in question to reveal his source, thereby upholding the journalistic right of source protection. As noted by the court, *"it is apparent that journalists, subject to certain limitations, are not expected to reveal the identity of their sources. If indeed freedom of press is fundamental and sine qua non for democracy, it is essential that in carrying out this public duty for the public good, the identity of their sources should not be revealed, particularly, when the information so revealed, would not have been publicly known…."*

In 2013, UNESCO's member states recognized at its General Conference that *"**privacy** is essential to protect journalistic sources, which enable a society to benefit from investigative journalism, to strengthen good governance and the rule of law".*

4.4. Measures to ensure the safety of journalists and accountability for perpetrators

The UN Plan of Action as UN-wide approach to the safety of journalists and the issue of impunity', under para 1.6, states that:

"Promoting the safety of journalists and fighting impunity requires prevention mechanisms and actions to address some of the root causes of violence against journalists and of impunity. This implies the need to deal with issues such as corruption, organized crime and an effective framework for the rule of law in order to respond to negative elements….."

The protection of journalists should adapt to the local realities affecting journalists. Journalists reporting on corruption and organized crime, for example, are increasingly targeted by organized crime groups and parallel powers. Approaches that are tailored to local needs should be encouraged.

- ***The role of states***

States are under an obligation to take effective measures to prevent attacks and, when they do occur, to investigate them, to punish perpetrators and to ensure that victims have access to effective remedies.

In times of conflict, States shall respect the status of media practitioners as non-combatants. *"Take all necessary measures to uphold their obligations under the African Charter and other international and regional instruments, providing for the right to freedom of expression and access to information* (The ACHPR Resolution on the Safety of Journalists of 2011).

All states involved in situations of armed conflict have to respect the independence and freedom of journalists and media practitioners to exercise their profession and guarantee their safety and security in accordance with international humanitarian law.

States must create and maintain, both in law and in practice, a safe and enabling environment for journalists to perform their work independently and without undue interference.

- **Regular monitoring and reporting of attacks against journalists.**

Collecting and analysing concrete quantitative and qualitative data on attacks or violence against journalists that are disaggregated by, among other factors, sex.

Publicly and systematically condemning violence and attacks.

States should dedicate the resources necessary to investigate and prosecute such attacks and to develop and implement gender-sensitive strategies for combating impunity for attacks and violence against journalists, put in place safe gender-sensitive investigative procedures, in order to encourage women journalists to report attacks against them and provide adequate support, including psychosocial support, to victims and survivors.

The role of the judiciary

- Judges, as the ultimate and final barrier against arbitrariness, play a predominant role in the protection of human rights.
- The role of judges as guarantors of human rights is particularly important in the case of the rights to freedom of expression and access to public information.
- Judges not only guarantee individual rights, but their decisions also define conflict resolution criteria, which may become key precedents for a more structural protection of these rights and institutional guarantees for a more robust and uninhibited public debate.
- Court decisions also set the standards and indications for positive actions of public bodies, particularly administrative agencies in charge of promotion and protection of human rights.
- Judges are also an essential mechanism in fostering and guaranteeing the adoption of the highest international standards on human rights in national law.

- Judicial rulings engaged with the protection of universal rights foster a more guarantee-based interpretation of domestic legislation and strengthen the protection of rights. This type of judicial action is not only useful to protect a person and foster an institutional environment that is more favorable to democratic deliberation, but also frequently affects the international liability of the state for actions violating the international treaties it has ratified, as well as other soft law and political commitments it has adopted.
- The judiciary particularly has an important role in ensuring that there is accountability for attacks against journalists. It is important to strengthen the capacity of the judiciary to be able to deal with these issues in a meaningful and effective manner, fully cognizant of the developing media environment of the digital age in which journalists currently operate.

Training on freedom of expression and access to public information favors the adoption of suitable, guarantee-based judicial rulings, as well as policies and practices to satisfy these rights within the judiciary. This clearly shows the importance of knowing the international standards on access to information to adopt the necessary measures within the judiciary itself, and to ensure the public can access judicial or administrative information held by this branch of government. The court subsequently held the respondent in contempt of court for continuing to engage in certain activities, including the harassment of members of the media, following the interdict having been granted. Through the judiciary, these legal provisions can be interpreted and given effect in the specific context of the media and the need to ensure protection of journalists.

Where journalists allege imminent threats to their safety, courts are empowered to grant interdictory relief in appropriate circumstances and subject to the relevant legal requirements.
The judiciary also has a role to play in ensuring accountability and redress for journalists who have been subject to attack or who have had their rights violated. It is therefore clear that the judiciary has had and can continue to have a significant role in ensuring the protection of journalists, and ensuring accountability for attacks that are perpetrated.

The developing body of jurisprudence at the national and regional levels can serve to ensure that states and other perpetrators are firmly aware that they cannot act with impunity without some measures of redress being granted by the courts. One of the measures is an award of damages to a journalist who has suffered a violation.

Examples of Damages Awarded by the Regional and Sub-Regional Courts

In *Ebrima Manneh v Republic of The Gambia*, the ECOWAS Court of Justice found in favour of the plaintiff, a journalist, who had been arrested without a warrant of arrest and without reasons being provided for his arrest. The court held that the arrest and detention were contrary to articles 6 and 7(1) of the African Charter, and that the plaintiff was entitled to the restoration of his personal liberty and security of the person. The court determined that an award of compensatory damages was justified, and ordered the Republic of The Gambia to pay the plaintiff US$ 100 000 as damages.

In *Musa Saidykhan v the Republic of The Gambia*, the plaintiff, a journalist, had been arrested without a warrant and held incommunicado for twenty-two days and subjected to torture. The ECOWAS Court of Justice found a violation of the right to freedom from torture, freedom from unlawful arrest, the right to be presumed innocent until proven guilty and the right to be tried within a reasonable time. Accordingly, the court awarded damages in the amount of $200 000.

In *Beneficiaries of the late Norbert Zongo and Another v Burkina Faso*, the African Court awarded damages posthumously to the beneficiaries of the murdered journalist. In this case, the African Court held that the state had violated article 7 of the African Charter, as it had not shown due diligence to seek out, investigate, prosecute and put to trial the killings of the deceased. Furthermore, the African Court found that the state violated article 1 of the African Charter, by failing to take appropriate legal measures to guarantee respect for the rights of the applicants in terms of article 7 of the African Charter.

In *Deyda Hydara Jr and Others v Republic of The Gambia*, the ECOWAS Court of Justice dealt with the 2004 disappearance of Mr Hydara, a prominent Gambian journalist and advocate of media freedom, who had been critical of the government. The court held that the state did not conduct a proper investigation, and in doing so, allowed impunity in violation of the right to freedom of expression. It held further that the state was obligated to provide redress to Hydara's family because of its failure to investigate the crime. As such, the court awarded the applicants US$50 000 in damages.

Chapter IV: Assessments

i. There is a wide range of legal instruments regionally and internationally that address issues relating to attacks on journalists and the need for accountability for such attacks.
ii. The assessments are aimed at assisting in understanding the ambit of these instruments, both binding and non-binding, through exercises that require participants to engage in some independent research.

iii. The assessment also intended to provide context and a practical understanding of the challenges being experienced, and to invite participants to work together to develop strategies to deal with the attacks and the issue of impunity.

Exercise:

i. Two Journalists working together published an article revealing information on corruption, mismanagement, in the Ministry of finances and economy involving some high authorities. These acts may affect significantly the national economy. The Prosecution filed a case before the court, that the journalists have infliged article 16 of the Ministerial Order n°005/07.01/13 of 19/12/2013 determining which information could destabilize national security. The two journalists were arrested and detained in custody (cachot) for more than one year, to allow the Prosecution to complete investigations.

   Discuss how this case can be handled? Support reasoning and arguments with different legal instruments of African Union and of the UN, African and UN soft laws that protect Journalists.

N.B: More exercises may be added during the training.

Chapter V: Protecting Freedom of Expression in the Digital Age

5.1. Contemporary challenges to freedom of expression

In the digital age, with the advent of the internet, people are able to generate and share more content, more easily than ever before. There are therefore various new forums, platforms and opportunities for members of the public and the media to exercise the right to freedom of expression. However, the expanded opportunities have also given rise to new challenges to the full enjoyment of the right.

While article 19 of the ICCPR and article 9 of the African Charter were drafted before the existence of the internet, the rights set out within them are fully applicable to the digital sphere.

Article 19 of the ICCPR states that the right to freedom of expression is applicable to **any media and regardless of frontiers**. Furthermore, as mentioned above, ACHPR and the UN have firmly established that individuals' rights offline must also be protected online, in particular the right to freedom of expression. The corollary to this is that the right to freedom of expression, whether exercised through digital or non-digital means, can also be justifiably limited if it meets the requirements of the three-part test:

i. *It must be provided for in law;*
ii. *It must pursue a legitimate aim; and*
iii. *It must be necessary for a legitimate purpose.*

This chapter focuses on particular challenges that are seen to be more prevalent in the digital age and which find application online. While the basic principles of human rights law remain applicable, the challenge is to interpret and apply these principles in a manner that addresses particular challenges that the internet has given rise to, while still meaningfully giving effect to the right to freedom of expression. While the internet offers many significant benefits and opportunities, it can also have harmful consequences on the enjoyment of fundamental rights. **Internet shutdowns and the blocking or filtering of content**

Some of the ways in which information is censored or restricted is through the blocking of websites (or particular pages of websites) and the intentional disruption or shutdown of the internet. An internet shutdown may be defined as *"an intentional disruption of internet or electronic communications, rendering them inaccessible or effectively unusable, for a specific population or within a location, often to exert control over the flow of information"*.

In other words, this arises when someone, be it the government or a private sector actor, intentionally disrupts the internet or a mobile application, arguably to control or curb what people say or do. This is sometimes also referred to as a *"kill switch"*.

This may take different forms. It may entail there being a total network outage, it may also arise when access to mobile communications, websites or social media and messaging applications is blocked, throttled or rendered effectively unusable.

Typically, the government seeking to impose an internet shutdown will order private actors in charge of operating networks to shut down or limit internet traffic.

As set out in General Comment No. 34 (at para 43): "Any restrictions on the operation of websites, blogs or any other internet based, electronic or other such information dissemination system, including systems to support such communication, such as internet service providers or search engines, **are only permissible to the extent that they are compatible with [Article 19(3) of the ICCPR].**

Permissible restrictions generally should be content-specific; generic bans on the operation of certain sites and systems are not compatible with [Article 19(3) of the ICCPR]. It is also inconsistent with [Article 19(3) of the ICCPR] to prohibit a site or an information dissemination system from publishing material solely on the basis that it may be critical of the government or the political social system espoused by the government."

5.1.1. The Principle of network neutrality

> *"Network neutrality implies that all Internet data should be treated equally without undue interference promotes the widest possible access to information.*
>
> *In management of internet services, the Principle of network neutrality should be respected.*
>
> *The State's positive duty to promote freedom of expression argues strongly for network neutrality in order to promote the widest possible non-discriminatory access to information."*

According to the 2011 Joint Declaration on Freedom of Expression and the Internet, in respect of network neutrality: there should be no discrimination in the treatment of Internet data and traffic, based on the device, content, author, origin and/or destination of the content, service or application.

Internet intermediaries should be required to be transparent about any traffic or information management practices they employ, and relevant information on such practices should be made available in a form that is accessible to all stakeholders.

5.1.2. National Security as a Ground of Justification

National security is often raised as a ground of justification for an internet shutdown. However, this concept is typically broadly defined and therefore easily susceptible to abuse. Principle XIII(2) of the Declaration of Principles on Freedom of Expression in Africa provides that freedom of expression should not be restricted on public order or national security grounds ***"unless there is a real risk of harm to a legitimate interest and there is a close causal link between the risk of harm and the expression*".**

In relation to the blocking and filtering of content, there may indeed be circumstances where such measures are justifiable, for example in relation to websites distributing child pornography. Such measures still constitute a limitation of rights, and are therefore required to meet the three-part test for a justifiable limitation. This should assessed on a case by-case basis, giving consideration to the fact that such measures can often be ineffective at achieving a targeted outcome, and lack transparency.

In this regards, article 34 of the Law n°60/2018 of 22/08/2018 on Prevention and Punishment of Cyber-crimes states that: Any person who 1°) publishes or causes to be published pornography through a computer system or through any other means of information and communication technologies; 2°) proposes, grooms or solicits, through a computer or a computer system or any network, to meet a child for purpose of engaging in sexual activities with a child , commits an offence.

5.4.3. Access to the internet and the need for digital literacy

The 2016 UN Resolution also urges states to "consider formulating, through transparent and inclusive processes with all stakeholders, and adopting national Internet-related public policies that have the objective of universal access and enjoyment of human rights at their core". However, physical access to the internet is not the end goal in itself. Rather, states should seek to foster a digital literate society in which persons using the internet can do so in an effective and meaningful way.

For UNESCO, digital literacy is best understood as a wider set of media and information literacies, covering inter alia privacy literacy, global citizenship, security literacy, intercultural competencies, etc. As steps are taken to expand user access to the internet, steps must commensurately be taken by all relevant stakeholders to ensure that these challenges are addressed, both in the interests of individual safety and the future of internet economy, in a way that strikes the appropriate balance in upholding fundamental rights online.

5.4.4. The impact of social media, including social messaging

Social media and social messaging are a common platform through which information is shared online. Given the ease with which information can be shared, individuals can share information quickly and with a wide audience; it is public to greater or lesser degrees. One of the challenges when dealing with cases regarding social media is that each platform operates differently, for instance using different terminology and allowing different levels of public access. When litigating such cases, petitioners should seek to ensure that the court is made properly aware, to the extent necessary, of the relevant practicalities of the particular social media site or service; in the absence of this, the court itself should not be hesitant to invite the parties to make submissions and provide particularities on the platform in question.

In cases where there has been a breach of rights that have occurred online, such as defamatory material that has been published and cannot be justified in terms of truth or public interest, the courts have the typical remedies available, for instance the granting of an interdict or the award of damages. However, when considering whether or not to grant an interdict, ***courts should bear in mind the efficacy that this may have in circumstances where the material has already been widely disseminated on social media.***

5.1.5. Access to the internet and the need for digital literacy

In ***Isparta v Richter and Another*** [2013] ZAGPPHC 243, the first defendant posted several comments on her Facebook wall, each time tagging the second defendant. The plaintiff contended that two of these posts were defamatory, in particular that they were disparaging and belittling, malicious, and aimed at damaging her reputation by implying that she was a bad mother. In upholding the plaintiff's claim of defamation, the court reached the following findings:

> *Even though the second defendant was not the author of the posts, the court held that he was as liable as the first defendant on the basis that the second defendant knew about the posts and had allowed his name to be coupled with that of the first defendant.*

An apology on the same medium would have had an impact in mitigating the plaintiff's damages. In this regard, the court noted that an apology to the plaintiff, or a retraction in writing, in the same forum that the offending statements had been made would also clear the name of the plaintiff. However, on the facts of the case, the defendants had not apologized and had instead continued to hold their view. The court awarded damages to the plaintiff in the amount of R40 000 (ZAR) to be paid jointly and severally by the first and second defendants.

5.1.6. Hate speech online

Hate speech has already been discussed in chapter 2. As set out therein, any restriction or penalty on speech as a result of it being labelled as 'hate speech' must still conform to the three-part test for a lawful limitation or restriction of the right to freedom of expression. There is presently no uniform definition for hate speech, and as such it is often a challenge to identify precisely what constitutes hate speech, and whether it falls within the realm of speech that must be prohibited (such as that referred to in article 20(2) of the ICCPR), speech that may be prohibited (such as that referred to in article 19(3) of the ICCPR), and speech that should be protected from restriction, but nevertheless raises concerns in terms of intolerance and discrimination, and may merit a critical response by the state (such as that referred to in article 19(2) of the ICCPR).

The legal principles set out in chapter 2 apply irrespective of whether one is dealing with hate speech online or offline. However, the context of hate speech online does differ. Some of the considerations that arise in this regard is the immediacy with which one can share hate speech online, the size of the audience with whom it can be shared, and difficulties that may arise in identifying the person responsible for the speech.

- **Civil and criminal consequences for hate speech**

Hate speech can have dire consequences for persons responsible for the speech. When this is uttered online, for example on Facebook or Twitter, the wide audience and speed with which it can be disseminated can cause it to be all the more egregious.

On 3 January 2016, ***ANC v Penny Sparrow (Case No. 708/2016)*** a South African estate agent posted the following on social media in reference to a photograph depicting predominately black people at a beach:

> *"These monkeys that are allowed to be released on New Year's Eve and onto public beaches towns etc. obviously have no education whatsoever. So to allow them loose is inviting huge dirt and troubles and discomfort to others. I'm sorry to say I was among the revelers and all I saw were black on black skins what a shame……"*

The Equality Court, held that Sparrow words constituted hate speech in terms of section 10 of the South African Promotion of Equality and Prevention of Unfair Discrimination Act, 2000. The Equality Court ordered Sparrow to pay R150 000 (ZAR) in damages. The Magistrate's Court, she pleaded guilty to a charge of *crime injuria*, which is a criminal offence relating to the unlawful impairment of the

dignity of another. She was convicted and sentenced to a fine of R5 000 or 12 months' imprisonment. She was further ordered to make a public apology for her remarks on Facebook.

5.1.7. Harassment and threats online

Harassment, threats and online violence severely restricts the enjoyment that persons have of their rights online, and the ability to exercise the right to freedom of expression freely and without undue hindrance. Persons from vulnerable, marginalized or disenfranchised groups are typically most affected by this.

While the internet provides a forum for people to seek information about their identities, to articulate themselves on these topics and to express themselves artistically, many people suffer a wide range of attacks in doing so, including attacks on sexuality, cyber-bullying, exposing personal information, and the manipulation of images that are then used for blackmail and destroying credibility. This can lead to self-censorship and serious concerns for people's physical safety. **One of the key challenges is in getting lawmakers and law enforcement officials to recognize the severity of such harassment and threats, and to treat it with the appropriate levels of concern.**

In relation to this, article 35 of the Law n°60/2018 of 22/08/2018 on Prevention and Punishment of Cyber-crimes provides that: Any person who, intentionally, uses a computer or a computer system to harass or threaten with intent to place another person in distress or fear through acts such as to display, distributes or publishes indecent documents, sounds, pictures or videos; In bad faith takes pictures, videos, or sounds of any person without his/her consent or knowledge; displays or distributes information in a manner that substantially increases the risk of harm or violence to any other person; commits a offence.

Article 38 of this Law, provides that: Any person who publishes, transmit or causes to be published any indecent message using computer or computer system, commits an offence; while article 39 states that: Any person who, knowingly and through a computer or a computer system, publishes rumours that may incite fear, insurrection or violence amongst the population or that may make a person lose their credibility, commits an offence.

5.1.8. 'Fake news', disinformation and propaganda

"Fake news" is used by diverse actors to mean many different things, with just one being the sense of referring to disinformation in the form of news items that are intentionally and verifiably false, and seek to mislead readers. The efforts to regulate *"fake news"* present a myriad of challenges. Most

importantly, it is essential to ensure that any such regulatory effort strikes an appropriate balance with the right to freedom of expression.

One of the key challenges is of definition. While the terms *'fake news'* and *'false news'* are often used interchangeably, the arguably more accurate nomenclature now leans towards the intentional dissemination of 'disinformation'. According to a 2018 UNESCO publication titled 'Journalism:

- *Disinformation is generally used to refer to deliberate (often orchestrated) attempts to confuse or manipulate people through delivering dishonest information to them.*
- *Misinformation is generally used to refer to misleading information created or disseminated without manipulative or malicious intent.*

Both are problems for society, but disinformation is particularly dangerous because it is frequently organized, well resourced, and reinforced by automated technology."

In the matter of ***Chavunduka and Another v Minister of Home Affairs and Another***, the Zimbabwe Supreme Court dealt with the constitutionality of the criminal offence of publishing false news under Zimbabwean law. The editor and journalist challenged the constitutionality of provision as being an unjustifiable limitation of the right to freedom of expression and the right to a fair trial.

In finding that the section was indeed unconstitutional, the Supreme Court stated that:

"Because s 50(2)(a) is concerned with likelihood rather than reality and since the passage of time between the dates of publication and trial is irrelevant, it is, to my mind, vague, being susceptible of too wide an interpretation. The expression 'fear, alarm or despondency' is over-broad. Almost anything that is newsworthy is likely to cause, to some degree at least, in a section of the public or in a single person, one or other of these subjective emotions.

The court went on to explain that the use of the word *"false"* is wide enough to embrace a statement, rumour or report which is merely incorrect or inaccurate, as well as a blatant lie; and actual knowledge of such condition is not an element of liability; negligence is criminalized.

In this regard, it noted that failure by the person accused to show, on a balance of probabilities, that any or reasonable measures to verify the accuracy of the publication were taken, suffices to incur liability even if the statement, rumour or report that was published was simply inaccurate. Accordingly, the court held that the criminalization of false news, as contained in section 50(2) (a), was unconstitutional and a violation of the right to freedom of expression.

5.1.9. Data protection and the *'right to be forgotten'*

The so-called *'right to be forgotten'* which is perhaps better described as *'the right to erasure'* or 'the right to be de-listed' entails a right to request that commercial search engines or other websites that gather personal information for profit, such as Google, should remove links to private information when asked. This arises in terms of data protection laws that provide that personal information held about a person should be erased in circumstances where it is inadequate, irrelevant or no longer relevant, or excessive in relation to purposes for which it was collected.

A court dealing with such issues will need to assess the balance of issues such as an individual's right to dignity or reputation, and the public's interest in expression and access to information. In some cases, links to journalistic content of historical and enduring public interest have been removed under a 'right to be forgotten'.

- **Examples of Criminal Sanctions for Online Speech**

As noted in a 2017 report published by CIPESA on the **State of Internet Freedom in Africa**, there are a number of examples of persons being charged or arrested by state officials on the basis of statements or other conduct online. For example:

- In 2016, **Botswana** security services arrested an individual for allegedly producing and disseminating a satirical digitally manipulated image of President Ian Khama.
- In **Tanzania**, six people have been charged under section 16 of the Cybercrime Act, 2015 for insulting or criticizing the leadership style of president Magufuli through posts on Facebook and WhatsApp.
- In **Uganda,** Dr. Stella Nyanzi was taken by law enforcement officials, detained and later charged with two counts of cyber harassment and offensive communication under section 24 (1) (2) (a) and 25 of the Computer Misuse Act 2011 for *"repeatedly insulting the person of the President"* on her Facebook page, and was remanded in prison for 33 days before being freed on bail in May 2017.

5.1.10. Jurisdiction and the borderless exercise of freedom of expression online

The internet enables the borderless enjoyment of the right to freedom of expression. The corollary, however, is that it is possible to violate the rights of another, for instance through harassment or threats, from a different country. **This creates significant difficulties for law enforcement officials.**

Jurisdiction in legal cases relating to Internet content should be restricted to States to which those cases have a real and substantial connection, normally because the author is established there, the

content is uploaded there and/or the content is specifically directed at that State. Private parties should only be able to bring a case in a given jurisdiction where they can establish that they have suffered substantial harm in that jurisdiction (rule against *'libel tourism'*). Standards of liability, including defenses in civil cases, should take into account the overall public interest in protecting both the expression and the forum in which it is made (i.e. the need to preserve the *'public square'* aspect of the Internet).

Chapter V: Assessment

The assessments focus in particular on the challenges posed by the internet to the enjoyment of the right to freedom of expression in the digital age. They are intended to encourage debate and discussion, and facilitate a practical understanding of the challenges. For instance, the group exercises invite participants to draft a short judgment regarding online speech, engage in a debate on the criminalization of hate speech online, and develop a *'Social Media Charter'*.

The individual analysis focuses on the recent report of the UNSR on Freedom of Expression relating to the regulation of online content. As these issues are complex and often nuanced, enough time will be allowed for group discussions for participants to share different viewpoints.

Exercise: All Groups

Consider the challenges involved in litigating matters pertaining to freedom of expression online. Consider the following:

- *The speed with which information can be disseminated,*
- *The cross-border nature of the interactions*
- *The challenges that may arise in identifying the person responsible for making the statements*
- *The differences in the way in which platforms operate, and the need for technical expertise may arise,*

i. What do you think are the most significant challenges when litigating such cases, as well as when deciding on such case?

ii. What support does the judiciary need to address these challenges?

N.B: More exercises can be added during the training

Chapter VI: A Gendered Perspective on Freedom of Expression

6.1. The gendered dynamic to freedom of expression: The double attack

The right to gender equality is a component of the right to equality. As one of the Sustainable Development Goals, it is widely regarded as an enabler of other goals and indeed other rights. This chapter deals with the intersection of gender equality and freedom of expression. It must be noted that the challenges set out in this chapter are not only experienced by women. Men, too, are subject to attacks during the course of their journalistic activities both online and offline. In 2017, 86% of journalists killed were men, and 14% women. However, the proportion of women is increasing, as reflected in this graph from the 2018 UNESCO Director General's Report on the Safety of Journalists and the Danger of Impunity:

The reason for the focus on women in this chapter is the recognition that women experience particular challenges in the exercise and enjoyment of the right to freedom of expression. There are different reasons for this, including societal pressures and perceived vulnerabilities. In respect of women journalists, in particular, this is often referred to as the 'double attack', as they are attacked both for being women and for being journalists.

In a report published in 2018 by Trollbusters and the International Women's Media Foundation, a survey conducted among 597 women journalists and media workers revealed that nearly two out of three respondents stated that they had been threatened or harassed online at least once.
Among them, around 40 percent said they avoided reporting certain stories as a consequence of online harassment. Fifty-eight percent of the women journalists surveyed stated that they had already been threatened or harassed in person, while 26% indicated that they had been physically attacked. The specific plight faced by women has been highlighted in the 2017 UN General Assembly Resolution on the Safety of Journalists and the Issue of Impunity, in which it was stated *inter alia* as follows:
"Acknowledged the specific risks faced by women journalists in the exercise of their work, and underlining in this context the importance of taking a gender sensitive approach when considering measures to address the safety of journalists, in particular to effectively tackle gender-based discrimination, and to enable women to enter and remain in journalism on equal terms with men.

6.2. Access to information and ICT

The **Atlanta Declaration for the Advancement of Women's Rights of Access to Information (February 2018)** states that:

> *The right of women to access information is essential to their economic empowerment, participation in public life, and the promotion and protection of their human rights. Yet, women from all walks of life and regions of the world continue to be denied access to critical public information they need to transform their own lives. The Sustainable Development Goals provide an opportunity to demonstrate the value of access to information for* women, and correspondingly, without information reaching women, the goals will not be achieved.

Although CEDAW (The Convention on the Elimination of All Forms of Discrimination Against Women) calls for all public policy to be reviewed through a gendered lens, the existing access to information laws have not been developed with gender-sensitivity nor reviewed to ensure that the statutory provisions and its implementation do not adversely impact women.

As stated in principle 13 of the African Declaration on Internet Rights:

> *"To help ensure the elimination of all forms of discrimination on the basis of gender, women and men should have equal access to learn about, define, access, use and shape the Internet. Efforts to increase access should therefore recognize and redress existing gender inequalities, including women's under- representation in decision-making roles, especially in Internet governance."*

The 2016 UN Resolution stressed the importance of empowering all women and girls by enhancing their access to information and communications technology, promoting digital literacy and the participation of women and girls in education and training on information and communications technology, and encouraging women and girls to embark on careers in the sciences and information and communications technology.

6.3. Media diversity and gender equality

As noted in the 2017/2018 UNESCO *World Trends Report* (at p 62), *"the freedom to participate in media, the rights of expression, and access to and production of media content are all issues that can be fully understood only by considering their gender equality dimensions."* Women do not enjoy full equality with men, nor do they have their work valued to the same extent as men, making it difficult

for women to progress. A related challenge has been the absence of women's voices as an issue in media freedom.

6.4. Gender and Representation

As noted in the UNESCO World Trends Report:

> *"Many feminist media scholars have argued that what we see in front of the camera is determined to some extent by who is behind the camera and there is some reason to believe that more women in the newsroom would produce news that is more diverse*."

Simply increasing the number of women in decision-making roles does not automatically change the small proportion of women seen, heard and read about in the news. Even if more women appear in media, there may be limited impact on the entrenched biases and stereotypes present in media content. This can promote narrow gender roles that limit the choices and options available to everyone.

This is why many actors continue to encourage all media workers to become more gender-sensitive through training and internal policies that monitor coverage and promote greater awareness of gender issues."

6.5. Physical attacks on female journalists

Women journalists, whether they are working in the field or in a newsroom, face risks of physical assault, sexual harassment, sexual assault, rape and even murder. The two distinct but interrelated circumstances should be understood: on the one hand, women's access to high risk reporting jobs; and on the other, gendered attacks against female journalists.

In this regard, they are vulnerable to attacks not only from those attempting to silence their coverage, but also from sources, colleagues and others. One of the most significant challenges in understanding attacks against women journalists is that many incidences are not reported particularly by young women and those in the early stages of their careers.

As measures to these attacks, the UN Plan of Action calls on states to, amongst other things: To adopt strategies to combat impunity, by developing and implementing strategies to combat pervasive impunity for crimes against journalists based on good practices and ensuring a consistent gender-sensitive approach;

6.6. Attacks against women online

Female journalists, activists and the broader public have come to rely on social media and digital tools as an important means of communicating, sharing information and views, and obtaining information.

However, the rise in the use of these technologies has also seen a rise in online abuse. Digital threats and abuse tend to manifest in a particular way with women, with online sexual harassment, sexist comments, threats of rape and violence towards female journalists and their families and cybers talking being prevalent. The safety of women journalists was the main focus of the UN Secretary General's 2017 report on *"The safety of journalist and the issue of impunity"*.

6.7. How can the internet be made a safe space?

Judicial officers and law-makers must ensure that gender is given due consideration why also exercising caution to not unjustifiably limit the right to freedom of expression when dealing with this issue. Well informed judges who are comfortable with the terminology and application of the technology and online platforms will have a significant role to play in ensuring effective and timely relief for victims, ensuring that the role-players fulfil their necessary duties, and serving to implement measures aimed at guarding against continuing or repeated violations.

Chapter VI: Assessment

The assessments are intended to encourage the participants to contribute to finding solutions to the challenges faced by women seeking to exercise their right to freedom of expression.

Through the group activities, the participants are invited to discuss and debate various pertinent questions, such as what role the judiciary can play in making the internet a safe space and addressing technology-related violence against women, and the resources that would be needed to realize this.

In the individual assessment, participants are encouraged to consider the Feminist Principles on the Internet, published by the Association for Progressive Communications, and assess their domestic contexts in light of the principles suggested therein.

Exercise

Discuss the Feminist Principles on the Internet,

i. What role the judiciary can play in making the internet a safe space and addressing technology-related violence against women, and the resources that would be needed to realize this.
ii. Identify in national legislation, regional legal and international legal framework support provisions to handle the case of violence against women journalist (harassment, insults, defamation, sexist comments).
iii. Identify challenges that the Rwandan judiciary may face in considering such cases.

RESOURCES

A. National Legislation

1. The Constitution of the Republic of Rwanda of 2003 revised in 2015
2. Law n°68/2018 of 30/08/2018 determining offences and penalties in general
3. Law no 2/2013 of 08/02/2013 Regulating Media
4. Law no 4 /2013 of 08/02/2013 Relating to Access to Information
5. The Law n°59/2018 of 13/08/2018 on the crime of genocide ideology and related crimes
6. The Law n°60/2018 of 22/08/2018 on prevention and punishment of cyber crimes
7. The Law n°60/2013 of 22/08/2013 regulating the interception of communication
8. The Law n°35/2012 of 19/09/2012 relating to the protection of whistleblowers
9. The Law n°44 bis/2017 of 06/09/2017 relating to the protection of whistleblowers.
10. Ministerial Order n° 005/07.01/13 of 19/12/2013 determining which information could destabilize national security

B. **International Conventions**

1. The Universal Declaration on Human Rights (UDHR)
2. The International Convention on civil and political rights (ICCPR)
3. The International Convention on Economic, Social and Cultural Rights (ICESCR)
4. The International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)
5. The Convention on the Prevention and Punishment of the Crime of Genocide
6. The International Convention on the Elimination of All Forms of Racial Discrimination
7. Convention on the Rights of Persons with Disabilities
8. UN Convention Against Corruption
9. The Convention on the Rights of the Child
10. The Protocol I Additional to the Geneva Conventions of 12 August 1948, and Relating to the Protection of Victims of International Armed Conflicts (1977)
11. Rome Statute of the Internationa Criminal Court
12. The Statute of International Court of Justice

C. **African Legal Instruments**

1. The African Charter on Human and People's Rights

2. The African Charter on Democracy, Elections and Governance (ACDEG)
3. The Protocol to the African Charter on the Rights of Women in Africa
4. The African Youth Charter
5. The African Charter on Statistics
6. The AU Convention on Preventing and Combating Corruption
7. The Protocol to the African Charter on Establishment of the African Court
8. The African Charter on Values and Principles of Public Service and Administration

D. **Case Laws**

1. *Mugisha Richard, (Petition), Case n° RS/INCONSTITUTIONALITE/SPEC00002/2018/SC.*
2. *UWIMANA Nkusi Agnès & MUKAKIBIBI Saidati v The Prosecution*, Case nº RPA 0061/11/CS,
3. *Mushayidi Déogratias v Prosecution, Case n° RPA 0298/10/CS*
4. *Gasasira Jean Bosco v Prosecution, Case n°RPA 0297/10/CS*
5. *Konaté v Burkina Faso,* <http://en.african-court.org/ index.php/>
6. *Burundi Journalists' Union v The Attorney General of the Republic of Burundi,* <http://eacj.org/cases>
7. *Federation of African Journalists and Others v The Gambia,* <https://www.mediadefence.org/sites/.pdf>
8. *Media Rights Agenda and Constitutional Rights Project v Nigeria*, <http://www.chr.up.ac.za/index.php/ -achpr-1998.
9. *Constitutional Rights Project v Nigeria* (2000) AHRLR 227 (ACHPR 1999), <http://www.achpr.org/communications/decision/102.93/>
10. *Amnesty International and Others v Sudan* (2000) AHRLR 297 (ACHPR 1999), <http://www.achpr.org/communications/decision/>
11. *Okuta v Attorney-General* [2017] eKLR (Petition No. 397 of 2016), <https://globalfreedomofexpression.columbia.edu/cases/>
12. *Peta v Minister of Law, Constitutional Affairs and Human Rights and Others* (CC 11/2016), https://lesotholii.org/ls/judgment/high-court-constitutionaldivision/2018.pdf
13. *Charles Onyango-Obbo v Attorney General* (Constitutional Appeal No. 2, 2002): https://ulii.org/ug/judgment/supreme-court/2004/1
14. *Constitutional Rights Project v Nigeria* (2000) AHRLR 235 (ACHPR 1999): <http://www.achpr.org/communications/decision/>

15. *Sudan Human Rights Organisation and Another v Sudan* (2009) AHRLR 153(ACHPR)2009, <http://www.achpr.org/communications/decision/>
16. MISA-Zimbabwe v Minister of Justice,CCZ/07/15, https://globalfreedomofexpression.columbia.edu/cases/
17. *Andrew Mwenda v Attorney General:* <http://acjr.org.za/resource-centre/Ugan da%20Mwenda.pdf>
18. *Beneficiaries of late Zongo and Others v Burkina Faso* (application 013/2011): <http://en.african-court.org/images/Cases/Judgment/.pdf>
19. *Deyda Hadara Jr and Others v Republic of The Gambia:* <https://www.opensocietyfoundations.org/sites/.pdf>
20. *Musa SaidyKhan v Republic of the Gambia:* <http://www.Courtecowas.org/site
21. *Ebrima Manneh v Republic of the Gambia:* http://www.chr.up.ac.za/index.php/
22. *Njaru v Cameroon* (2007) AHRLR 21 (HRC 2007) http://www.omct.org/files/. Pdf
23. *Goodwin v United Kingdom* (case no. 17488/90): <https://globalfreedomofexpression.columbia.edu/cases/>

E. Other instruments

International

1. General Comment n°34 on Article 19 of the ICCPR, of UN CHR
2. General Comment n°22 on Article 18 of the ICCPR relating to freedom of thought, Conscience or religion of UNHRC
3. General Comment n°29 of the UN CHR
4. Resolution 32/13 of the UNHRC
5. Resolution 70/162 on the Safety of Journalist and Issue of Impunity of UNGA
6. Resolution 12/16 on Freedom of Opinion and Expression of UNHRC
7. Resolution 2222 of UNHRC
8. Atlanta Declaration for the Advancement of women's Rights of Access to Information
9. Resolution on the Safety of Journalists of UNHRC(2016): <https://documents-dds ny.un.org/doc/ UNDOC/
10. Resolution on the Safety of Journalists of UNHRC(2018): http://undocs.org/A/HRC/39/L.7
11. Resolution on The promotion, protection and enjoyment of human rights on the internet, UNHRC, (2012): <https://www.apc.org/en/news/>

12. Resolution on The promotion, protection and enjoyment of human rights on the internet, UNHRC, (2016): https://digitallibrary.un.org/record/. Pdf

Regional

1. The Declaration of Principles on Freedom of Expression in Africa of the ACHPR
2. Model Law on Access to Information in Africa of the ACHPR
3. The Guidelines on Access to Information and Election in Africa (ATI Guidelines), of the ACHPR
4. Resolution on the Safety of Journalists and Media Practioners in Africa of the ACHPR
5. Resolution 362 (LIX), on the right to freedom of information and expression on the internet in Africa (2016) , ACHPR
6. African Declaration on Internet Rights
7. General Comment on Article 14(1)(d) and(e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa
8. General Comment No. 2 on Article 14.1(a), (b), (c) and (f) and Article 14.2(a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

F. Text Books, Journals, papers

1. Banisar D., 'The right to information and privacy: Balancing rights and manag-ing conflicts' (2011), http://foiadvocates.net/wp-content/uploads/Publication_WBI_RighttoInfoandPrivacy.pdf
2. Benchelah, M. "*Freedom of expression and opinion in the Tunisian constitution*", <http://www.arabstates.undp.org/content/dam/rbas/doc/
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4. Centre of Governance and Human Rights, University of Cambridge, 'Safety of journalists research pack', 2012: http://www.cghr.polis.cam.ac.uk/research-themes/right_to_life/
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6. Heyns C., The African regional human rights system": In need of reform', (2001) 2 AHRLJ
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