



The Right to Freedom of Expression on the Internet as it applies to Social Media in Africa

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Preface

This report explores the international legal and regional regimes governing the freedom of expression and the use of social media¹ with a particular focus on Sub-Saharan Africa. During the “Arab Spring,” social media was posited to have had a significant influence, particularly in the Egyptian revolution. The report explores the suppression of social media by governments of Sub-Saharan African countries in the wake of the Arab Spring, and the legal means through which suppression has occurred, primarily through legislation, administrative methods, and suppression of advocacy on social media websites. The purpose of the report is not to promote or protect a particular point of view or political party, but rather to defend and advocate for the expansion of freedom of expression on social media, which is of particular importance in Africa where mobile technology is prevalent and growing.

This paper is divided into four parts. Part I summarizes a description of the Arab Spring and the role social media played in mobilizing actors and civil society and explores the importance of social media and the challenges of protecting freedom of expression on social media websites. Part II explores the evolution and growth of social media globally and in Sub-Saharan Africa, describes the technological infrastructure in Sub-Saharan Africa and its impact on the nature and extent of social media in that region, and analyzes the political use of that media in the region. Part III provides a summary of the international and regional regime governing freedom of expression generally, to reflect that international and regional law can be invoked in any of the regional commissions and court systems. Part IV looks at social media and the law in various countries in Sub-Saharan Africa – specifically, Angola, Burkina Faso, Burundi, Cameroon, Ethiopia, the Democratic Republic of Congo, Kenya, Malawi, South Africa, and Uganda. In the Conclusion, we advocate for certain policy changes to support the protection of freedom of expression in social media.

¹ Social media is defined as “forms of electronic communication (as Web sites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content (as videos).” Merriam-Webster Dict., <http://www.merriam-webster.com/dictionary/social%20media> (last accessed Oct. 31, 2015). Commonly-used social media sites include Facebook (www.facebook.com), LinkedIn (www.linkedin.com), and Twitter (<https://twitter.com/>). See “Top 10 most-visited social media sites,” Dayton Bus. J., June 2, 2012, available at <http://www.bizjournals.com/dayton/blog/socialmadness/2012/07/top-10-most-visited-social-media-sites.html> (last accessed Oct. 31, 2015).

TABLE OF CONTENTS

I. INTRODUCTION.....	1
A. The Arab Spring	1
B. Intellectual Underpinnings - Protecting the Medium	3
II. NEW TECHNOLOGY IN SUB-SAHARAN AFRICA.....	6
A. The Rise of Social Media Generally	6
B. Infrastructure, Internet, and Social Media in Sub-Saharan Africa	6
C. The Political Use of Social Media in Sub-Saharan Africa	9
III. INTERNATIONAL LAW ON FREEDOM OF EXPRESSION	11
A. Introduction	11
B. Universal Declaration of Human Rights	11
C. International Convention on Civil and Political Rights.....	13
D. International Telecommunication Union.....	15
E. Other Considerations	16
IV. LAW FROM THE AFRICAN REGION.....	17
A. The African Charter on Human and Peoples' Rights.....	17
B. African Court on Human and Peoples' Rights.....	18
C. African Commission on Human and Peoples' Rights.....	18
D. Other Instruments In Support of Freedom of Expression on the Internet.....	21
V. PRESS FREEDOM IN INDIVIDUAL COUNTRIES.....	24
A. Generally	24
B. Legal and Administrative Barriers	26
C. Model Practices	30
VI. CONCLUSION	32
 APPENDIX²:	
I. PERSUASIVE AUTHORITY FROM THE EUROPEAN COURT OF HUMAN RIGHTS.....	34
II. PERSUASIVE AUTHORITY FROM THE LATIN AMERICA/INTER-AMERICAN REGION.....	38
A. Freedom of Expression under the American Convention.....	38
B. Non-Discriminatory Protection of Journalistic Expression.....	40
C. Restrictions on Prior Censorship.....	40
D. Affirmative Obligations of the State.....	42

² Persuasive authority from the European Court of Human Rights and the Latin American/Inter-American Region are included in this report in the Appendix to provide additional support for the protection of the freedom of expression.

I. INTRODUCTION

A. The Arab Spring

On December 17, 2010, Tunisian grocery vendor Mohammed Bouazizi, who on the previous day was arrested and had his cart confiscated, set himself on fire in protest after being ignored by the Tunisian authorities when he complained to them about police brutality.³ On January 4, 2011, when Bouazizi died of his wounds,⁴ a revolution was sparked. At the news of Bouazizi's death, over 5,000 people took to the streets in his home town, Sidi, and demanded both better living conditions and an end to police brutality and corruption in the country⁵ – thus commencing what has come to be known as the Arab Spring.

Bouazizi was not the first Tunisian to set himself on fire in protest, but his act was particularly significant because it was recorded by cellphone cameras and disseminated over the Internet.⁶ After weeks of violent protest, the country's president, Zine el-Abidine Ben Ali, fled to Saudi Arabia and was replaced by the ruling party's parliamentary speaker. The president's departure came after several concessions that were insufficient to satisfy activists who demanded a complete overhaul of the country's government.⁷ Within a few weeks, in January 2011, Egyptians followed suit with mass demonstrations, similar to those in Tunisia.⁸ By February 2011, protesters were congregating *en masse* in Yemen.

The Arab Spring effect eventually reached nearly twenty countries in the region: Tunisia, Algeria, Lebanon, Jordan, Oman, Yemen, Saudi Arabia, Egypt, Syria, Iran, Israel, Morocco, Qatar, Turkey, The United Arab Emirates, Bahrain, Libya, Kuwait, and Western Sahara.⁹ While in some countries, the change in political leadership came swiftly and in a matter of weeks, as in Tunisia and Egypt,¹⁰ the impact of the Arab Spring has had long-term consequences, affecting the tenor and composition of social movements and upheavals. In Syria, the mass protests over two years merged into what is now a civil war.¹¹

³ Dep't of Peace & Conflict Res., Uppsala Conflict Data Program Conflict Encyc., Arab Spring 2010-2011: Timeline Arab Spring, p. 1, available at http://www.pcr.uu.se/digitalAssets/87/87711_chronologic_timeline_arabian_spring.pdf (last accessed Oct. 31, 2015).

⁴ *Id.*

⁵ *Id.*

⁶ Andrew Lam, "From Arab Spring to Autumn Rage: The Dark Power of Social Media," WorldPost, Sept. 14, 2012, available at http://www.huffingtonpost.com/andrew-lam/social-media-middle-east-protests-_b_1881827.html (last accessed Oct. 31, 2015).

⁷ *Id.*

⁸ "Timeline: The Major Events of the Arab Spring," NPR, Jan. 2, 2012, available at <http://www.npr.org/2012/01/02/144489844/timeline-the-major-events-of-the-arab-spring> (last accessed Oct. 31, 2015).

⁹ "Arab Uprising: Country by Country," BBC, Dec. 16, 2013, available at <http://www.bbc.co.uk/news/world-12482309> (last accessed Oct. 31, 2015); "The Arab Spring Country by Country," The Nat'l World, June 17, 2011, available at <http://www.thenational.ae/news/world/middle-east/the-arab-spring-country-by-country#full> (last accessed Oct. 31, 2015).

¹⁰ Andrew Lam, *supra* note 8.

¹¹ "Syria Profile – Overview," BBC, June 25, 2015, available at <http://www.bbc.co.uk/news/world-middle-east-14703856> (last accessed Oct. 31, 2015).

In Egypt – where, on February 11, 2011, President Hosni Mubarak was forced out of office after several weeks of protests¹² – *social media* played a unique role in mobilizing the revolution. Nearly nine out of 10 Egyptians as well as Tunisians surveyed in March 2011 said they were using Facebook to organize protests or spread awareness about them.¹³ Many activists initially made the calls to protest on Facebook.¹⁴ The rate of Facebook use during the 2011 protests as compared to the same period in 2010 more than doubled in Egypt, and almost tripled in other countries.¹⁵ For example, Egypt had 29 percent Facebook use growth in 2011 compared to 12 percent in 2010. Oman had 21 percent growth in 2011 as compared to 6 percent in 2010. Yemen had 47 percent growth as compared to 20 percent.¹⁶ The most extreme example of growth occurred in Libya which had 10 percent growth in contrast to negative 76 percent growth in the same period during the prior year. During the week before President Mubarak resigned, the total rate of “Tweets”¹⁷ from Egypt – and around the world – about political change in Egypt ballooned from 2,300 a day to 230,000 – a one-hundred-fold increase.¹⁸

In many cases, governments moved to quickly shut down the use of social media in mobilizing protests. In Tunisia, the government attempted to ban Facebook, Twitter, and video sites, such as Youtube, and even jailed some bloggers.¹⁹ During the last week of January 2011, President Mubarak attempted to shut down the telecommunications system to silence dissenters, which resulted in inciting more public activism as protestors took to the streets when they could no longer connect online.²⁰ In fact, the Egyptian government attempted to use Facebook and Twitter to obtain information for its counter-insurgency, and to anticipate movements by activists and arrest activists.²¹

Social media – its rise and its new activist uses – played a critical role in mobilization, citizen action, shaping public discussion,²² and influencing democratic change during the Arab

¹² Dep’t of Peace & Conflict Res., *supra* note 1 at pp. 2-3.

¹³ Carol Huang, “Facebook and Twitter key to Arab Spring uprisings: Report,” *The Nat’l*, June 6, 2011, available at <http://www.thenational.ae/news/uae-news/facebook-and-twitter-key-to-arab-spring-uprisings-report> (last accessed Oct. 31, 2015) (Social media “played a critical role in mobil[s]ation, empowerment, shaping opinions, and influencing change”).

¹⁴ Dubai Sch. of Gov’t, “Arab Social Media Report – Civil Movements: The Impact of Facebook and Twitter,” Vol. 1, No. 2 (May 2011), available at <http://unpan1.un.org/intradoc/groups/public/documents/dsg/unpan050860.pdf> (last accessed Oct. 31, 2015).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ A tweet is defined as “a post made on the Twitter online message service.” Merriam-Webster Dict., <http://www.merriam-webster.com/dictionary/tweet> (last accessed Oct. 31, 2015).

¹⁸ Philip N. Howard, *et al.*, “Opening Closed Regimes: What Was the Role of Social Media During the Arab Spring?,” Univ. of Wash. Project on Info. Tech. & Political Islam Working Paper 2011.1, p. 4 (Sept. 2011), available at www.philhoward.org/?p=789 (click “download” for Howard-Duffy-Freelon-Hussain-Mari-Mazaid_pITPI.pdf) (last accessed Oct. 31, 2015).

¹⁹ *Id.* at 8-9.

²⁰ *Id.* at 16.

²¹ *Id.*

²² Manuel Castells, “The New Public Sphere: Global Civil Society, Communication Networks, and Global Governance,” *The Annals of the Am. Academy of Political & Soc. Sci.*, pp. 78-93 (Mar. 2008), available at <http://annenberg.usc.edu/sites/default/files/2015/04/28/The%20New%20Public%20Sphere.pdf> (last accessed Oct. 31, 2015).

Spring.²³ However, social media did not cause the upheaval in North Africa and the Middle East; it merely altered the capacity of citizens to affect domestic politics, by creating a virtual ecology of civil society debate around issues that could not be discussed publicly.²⁴

B. Intellectual Underpinnings - Protecting the Medium

The use of technology to transform the political landscape in the Arab Spring was not novel. The first time social media was used to oust a political leader was in 2001, when thousands of Filipinos used text messaging to organize a protest during the impeachment trial of President Joseph Estrada, in which loyalists in the country's legislature voted to set aside key evidence against the President.²⁵ Text messages, reading in part, "Go 2 EDSA. Wear blk" resulted in a crowd of over one million citizens converging on a major crossroads in Manila.²⁶ The seven million texts sent by the "text-messaging generation" were so powerful, and the result of the protest so profound, that the Congress reversed its earlier vote and let the evidence against President Estrada be presented.²⁷ Other examples of social media being utilized in political protest against regimes before the Arab Spring include the ousting of Spanish Prime Minister José María Aznar in 2004 after he erroneously blamed the Madrid bombings on the Basque separatist movement and the removal of the Communist Party from power in Moldova in 2009 after a fraudulent election in the "Twitter Revolution".²⁸

The Arab Spring did however focus attention on social media, government censorship of that medium, and protection of the medium. As one commentator writes, "it is a basic truth -- communicative freedom is good for political freedom."²⁹ Other advocates have highlighted the fact that social networking tools have the potential to enhance citizen engagement, promote social inclusion and create opportunities for employment, entrepreneurship and development.³⁰

Social media's contribution to communicative freedom encompasses information dissemination as well as public discourse.³¹ In the communication landscape, social media has enabled people to discover more facts, and in the political realm, made governments more accountable.³² As social media has become a tool for activism,³³ some governments are moving towards censoring and limiting it.³⁴

²³ Dubai Sch. of Gov't, *supra* note 14.

²⁴ *Id.*

²⁵ Clay Shirky, "The Political Power of Social Media: Technology, the Public Sphere, and Political Change," *Foreign Affairs*, p. 1 (Jan./Feb. 2011), available at <http://www.foreignaffairs.com/articles/67038/clay-shirky/the-political-power-of-social-media> (last accessed Oct. 31, 2015).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*; Malcolm Gladwell, "Small Change: Why the Revolution Will Not Be Tweeted," *The New Yorker*, Oct. 4, 2010, available at http://www.newyorker.com/reporting/2010/10/04/101004fa_fact_gladwell (last accessed Oct. 31, 2015).

²⁹ Clay Shirky, *supra* note 25.

³⁰ Dubai Sch. Of Gov't, *supra* note 14.

³¹ Clay Shirky, *supra* note 25.

³² Hillary Rodham Clinton, Sec'y of State, "Remarks on Internet Freedom," *The Newseum*, Jan. 21, 2010, available at <http://www.state.gov/secretary/20092013clinton/rm/2010/01/135519.htm> (last accessed Oct. 31, 2015).

³³ Clay Shirky, *supra* note 25.

³⁴ Clay Shirky, *supra* note 25.

Protection of Internet freedom on the international scale began as early as 1998, when the idea of a free and open “Internet” was advanced by the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. In his 1998 report to the U.N. Commission on Human Rights, the Special Rapporteur affirmed these principles: “The new technologies and, in particular, the Internet, are inherently democratic, provide the public and individuals with access to information and sources and enable all to participate actively in the communication process.”³⁵

Yet another manifestation of the Internet’s effect on the free flow of communication is the plethora of information created on the Internet and transmitted through the Internet. The Internet is the primary venue and platform for disseminating as well as receiving information. Former United States Secretary of State Hillary Clinton remarked “in many respects, information has never been so free. There are more ways to spread more ideas to more people than at any moment in history.”³⁶ The ease with which modern technology has enabled the broadcast of ideas electronically has also facilitated freedom of expression.

In this new era of digital technology, freedom of expression does not exist without Internet freedom.³⁷ The Internet has been described as such “a major development in enabling persons to communicate with others and to obtain information [that] [s]ome have compared its importance to the invention of the printing press.”³⁸ The Internet has a certain role in filling in a “‘media gap’ between interpersonal communication facilitated by telephone, telegram, and letters, and mass communication facilitated by radio, television, and print media.”³⁹

For civil society, the Internet has “greatly facilitate[d] small-group participation--within groups, between groups, and between groups and their constituencies--and thus has helped to strengthen the forces of civil society.”⁴⁰ The Internet levels the playing field because it is “a means of exchanging information quickly and cheaply.”⁴¹ The Internet, as we have seen in the wake of the Arab Spring, has in fact, become a powerful tool for activism, a platform for protest, a springboard for organization and mobilization, and a medium for citizen participation.

However, the very essence of the Internet – the free flow of communication and ease of exercising the freedom of expression – has made it subject to attack. As freedom of the Internet is threatened, so then, is the right to exercise the freedom of expression, and the right to freely disseminate and receive communications. “On the one hand, Internet empowers freedom of

³⁵ U.N. Econ. & Soc. Council, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, para. 45, U.N. Doc. E/CN.4/1998/40 (Jan. 28, 1998), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G98/103/12/PDF/G9810312.pdf?OpenElement> (last accessed Oct. 31, 2015).

³⁶ Hillary Rodham Clinton, *supra* note 32.

³⁷ “There is no freedom without freedom of information. There is no freedom of information without Internet Freedom.” Background, Global Internet Freedom Consortium, available at <http://www.internetfreedom.org>

³⁸ Hum. Rights. Watch, The Internet in the Mideast and North Africa: Free Expression and Censorship – Legal Standards (June 1999), available at <http://www.library.cornell.edu/colldev/mideast/unzipped/net-en-full/download/legal.htm> (last accessed Oct. 31, 2015).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

expression by providing individuals with new means of imparting and seeking information. On the other hand, the free flow of information has raised the call for content regulation.”⁴² Thus, the Internet has become a battlefield. All around the world, countries are taking measures to censor Internet content, regulating users by requiring individuals to register with authorities and restricting access to the Internet through surveillance. Social media sites and text messaging have also created new targets for censorship.⁴³

In part as a result of successful Internet regulation and censorship, the notion of participatory media as a catalyst for political action has been called into question in Africa. There are a host of threats to users who rely on consumer Internet tools to further online speech, including the subjection of activists to “intermediary” or non-governmental censorship.⁴⁴ Moreover, the lack of sophistication of many activists limits their ability to participate meaningfully in online speech, limiting its democratizing effect and leaving control of an imagined public sphere in the hands of a few. Perhaps most importantly, the attention span of interest audiences makes it difficult for online movements to be sustained. The idea of protecting Internet freedom, in this vein, represents a value system, and a choice of “whether we live on a planet with one Internet, one global community, and a common body of knowledge that benefits and unites us all, or a fragmented planet in which access to information and opportunity is dependent on where you live and the whims of censors.”⁴⁵

⁴² Rikke Frank Jørgensen, Internet and Freedom of Expression, Raoul Wallenberg Inst. European Master Degree in Hum. Rts. & Democratisation 2000-2001, p. 2, available at <http://www.ifla.org/files/assets/faife/publications/ife03.pdf> (last accessed Oct. 31, 2015).

⁴³ Hillary Rodham Clinton, *supra* note 32.

⁴⁴ Ethan Zuckerman, “Cute Cats to the Rescue? Participatory Media to the Rescue,” MIT Center for Civic Media, pp. 3-18 (2013), available at <http://ethanzuckerman.com/papers/cutecats2013.pdf> (last accessed Oct. 31, 2015).

⁴⁵ Hillary Rodham Clinton, *supra* note 32.

II. NEW TECHNOLOGY IN SUB-SAHARAN AFRICA

A. The Rise of Social Media Generally

Social media has numerous definitions. Merriam-Webster defines it as “forms of electronic communication (as web sites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content (as videos).”⁴⁶ Another definition is “interactive platforms via which individuals create and share user-generated content.”⁴⁷ The first definition emphasizes user-created communities; the second emphasizes user-created content. Together, these definitions emphasize the individual – not companies or institutions – as the locus of this particular sort of online life. Users, in this world, are both creating the content they share and creating the networks by which they share that content. Mediating institutions – like companies or governments – are largely excluded.

The rise of social media has been swift. By December of 2004, Facebook had one million users; on October 4, 2012, it announced that it had reached one billion users.⁴⁸ Twitter is said to have surpassed 500 million users in July of 2012.⁴⁹ As of May 2013, LinkedIn had 225 million users.⁵⁰ Youtube is the second-largest search engine in the world.⁵¹ Social network accounts for 20 percent of consumers’ time online and 30 percent of their time online via mobile technology, such as smartphones.⁵² Social media has overtaken pornography as the top activity on the web.⁵³

B. Infrastructure, Internet, and Social Media in Sub-Saharan Africa

In Sub-Saharan Africa, as in much of the rest of the world, the Internet is accessed both through fixed and mobile devices, entailing different networks. According to 2015 estimates,

⁴⁶ Definition of “social media,” Merriam-Webster Dict., <http://www.merriam-webster.com/dictionary/social%20media> (last accessed Oct. 31, 2015).

⁴⁷ Jan H. Kietzmann, *et al.*, “Social media? Get serious! Understanding the functional building blocks of social media,” *Bus. Horizons J.*, pp. 241–51 (May-June 2011), available at <http://busandadmin.uwinnipeg.ca/silvestrepdfs/PDF06.pdf> (last accessed Oct. 31, 2015).

⁴⁸ Aaron Smith, *et al.*, “Facebook reaches one billion users,” *CNNMoney*, Oct. 4, 2012, available at <http://money.cnn.com/2012/10/04/technology/facebook-billion-users/index.html> (last accessed Oct. 31, 2015).

⁴⁹ Ingrid Lunden, “Analyst: Twitter Passed 500M Users In June 2012, 140M Of Them In US; Jakarta ‘Biggest Tweeting’ City,” *Techcrunch.com*, July 30, 2012, available at <http://techcrunch.com/2012/07/30/analyst-twitter-passed-500m-users-in-june-2012-140m-of-them-in-us-jakarta-biggest-tweeting-city/> (last accessed Oct. 31, 2015).

⁵⁰ *Id.*

⁵¹ Allie Siarto, “5 Easy Ways To Use Video to Improve Your Business,” *Forbes*, May 6, 2013, available at <http://www.forbes.com/sites/theyec/2013/05/06/5-easy-ways-to-use-video-to-improve-your-business/> (last accessed Oct. 31, 2015).

⁵² “Social Networks/Blogs Now Account for One in Every Four and a Half Minutes Online,” *Nielsen Newswire*, June 15, 2010, available at <http://www.nielsen.com/us/en/newswire/2010/social-media-accounts-for-22-percent-of-time-online.html> (last accessed Oct. 31, 2015).

⁵³ Belinda Goldsmith, “Porn passed over as Web users become social: author,” *Reuters*, Sept. 16, 2008, available at <http://www.reuters.com/article/2008/09/16/us-Internet-book-life-idUSSP31943720080916> (last accessed Oct. 31, 2015).

about 28.3 percent of the Africans had Internet access.⁵⁴ Furthermore, while Africa accounts for 16.0 percent of the world's population, Africans account for only 9.8 percent of the world's Internet subscribers.⁵⁵ As of the end of 2014, Africa accounts for less than 0.5 percent of the world's fixed-broadband subscriptions.⁵⁶ Furthermore, Internet access is irregularly distributed. Egypt and South Africa account for almost half of the continent's Internet users,⁵⁷ and Nigeria and Kenya generate two-thirds of Sub-Saharan Africa's total Internet users.⁵⁸ In other words, at present, though it is relatively available in South Africa, traditional Internet access is largely unavailable in Sub-Saharan Africa.

On the other hand, the growth in mobile telephony in Sub-Saharan has been explosive. Mobile broadband will be available to 20 percent of Africans as of the end of 2014, in contrast to only 2 percent only four years ago.⁵⁹ The growth rate is over 40 percent, which is twice as high as the global average.⁶⁰ In fact, it is easier for Africans to obtain access to a mobile phone than to access clean drinking water.⁶¹ Africa is second behind only Asia as the world's largest mobile phone market,⁶² with approximately 700 million mobile connections.⁶³ The data usage generated from Africa's mobile use amounts to 14.85 percent of the world's total Internet traffic.⁶⁴

The mobile phone market in Sub-Saharan Africa will only expand in the upcoming decades given the pace of growth that the region has seen in the past decade and in the recent years. About a decade ago, there were 100,000 mobile lines in Nigeria; now there are close to 100 million – making it Africa's largest telecommunications market.⁶⁵ The trends in the rest of the continent are similar: between 2000 and 2010, the Kenyan mobile phone firm Safaricom saw its subscriber base increase in excess of 500-fold.⁶⁶ In 2010 alone, the number of mobile phone

⁵⁴ Internet World Stats, available at <http://www.Internetworldstats.com/stats1.htm#africa> (last accessed December 20, 2015).

⁵⁵ *Id.*

⁵⁶ Press Release, ITU releases 2014 ICT figures, Int'l Telecomm'cns Union, May 5 2014, available at http://www.itu.int/net/pressoffice/press_releases/2014/23.aspx#.VMWuUv7F9bc (last accessed Oct. 31, 2015).

⁵⁷ Gumisi Mutume, "Harnessing the Internet for Development", Africa Renewal Online, July 2006, <http://www.un.org/africarenewal/magazine/july-2006/harnessing-Internet-development> (last accessed Oct. 31, 2015).

⁵⁸ Cleopa Timon Otieno, "Kenya and Nigeria Account for Over Half of Sub-Saharan Africa's Internet Users," TeleCentre Found., July 24, 2013, available at <http://community.telecentre.org/profiles/blogs/kenya-and-nigeria-account-for-over-half-of-sub-saharan-africa-s-i> (last accessed December 20, 2015).

⁵⁹ Olusegun Abolaji Ogundeji, "As Africa Internet penetration lags, experts suggest ways to spur broadband growth," CIO, Oct. 6, 2014, available at <http://www.cio.com/article/2692173/as-africa-internet-penetration-lags-experts-suggest-ways-to-spur-broadband-growth.html> (last accessed Oct. 31, 2015).

⁶⁰ *Id.*

⁶¹ Gavin Davis, "The Rising Power of Social Media in African Politics," Good Governance Africa, May 1, 2013, available at <http://gga.org/stories/editions/aif-11-bit-by-bit-technology-transforms-africa/the-rising-power-of-social-media-in-african-politics> (last accessed Oct. 31, 2015).

⁶² "Social Media in Africa," Deloitte/Frontier Advisory 2012, p. 3, available at http://www.frontier-advisory.com/images/frontieradvisory_social_media_in_africa.pdf (last accessed Oct. 31, 2015).

⁶³ *Supra* note 61.

⁶⁴ *Id.*

⁶⁵ Tolu Ogunlesi & Stephanie Busari, "Seven ways mobile phones have changed lives in Africa," CNN, Sept. 13, 2012, available at <http://www.cnn.com/2012/09/13/world/africa/mobile-phones-change-africa/index.html> (last accessed Oct. 31, 2015).

⁶⁶ *Id.*

users in Rwanda grew by 50 percent.⁶⁷ In October of 2010, for the first time ever, the number of Nigerians accessing the Internet via their mobile phones surpassed the number of desktop Internet users.⁶⁸ Consultants project that by 2016 there will be 1 billion connections, or one phone per person.⁶⁹ By 2017, the percentage of phones with smartphone capability will increase from 6 percent to 17 percent.⁷⁰ Mobile phone use has the power to make profound changes in the lives of Africans in the areas of banking, entertainment, education, disaster management, agriculture, health, and not least, activism.⁷¹

Social media has also, correspondingly, grown in Africa. In February 2013, Africa's first ever social media week was held in Lagos, Nigeria.⁷² Facebook users in Africa grew from 10 million to 17 million in one year.⁷³ Nigeria and South Africa each have over six million Facebook users; Kenya and Ghana, over one million; the Democratic Republic of the Congo ("DRC"), Ethiopia, Senegal, Tanzania, Angola, Cameroon, and Uganda, over 500,000; and several other countries have over 100,000.⁷⁴ Significantly, the majority of Facebook users in Africa access Facebook from mobile devices, and in Nigeria and South Africa, 80 percent of Facebook logins are from a mobile device.⁷⁵

Likewise, Twitter has shown substantial penetration of the continent. More than 11.5 million geographically pinpointed Tweets originating on the continent during the last three months of 2011 were analyzed by the corporate communications firm Portland Communications' Kenya office and media platform Tweetminster.⁷⁶ The results of the study demonstrated that Africa's biggest economy, South Africa, generated the most Tweets, with over 5 million, more than double second-place Kenya, at nearly 2.5 million, and triple Nigeria, at 1.67 million.⁷⁷ Rwanda, which has invested heavily in information technology, produced nearly 100,000 tweets – far more than its giant and impoverished neighbor, the DRC, with 2,408.⁷⁸ People are also using Twitter in less "wired" countries, such as Angola, Burkina Faso, Cameroon, Ethiopia, Mali, Niger, and Sudan.⁷⁹

⁶⁷ *Id.*

⁶⁸ Tolu Ogunlesi & Stephanie Busari, *supra* note 65.

⁶⁹ *Id.*

⁷⁰ Gavin Davis, *supra* note 61.

⁷¹ Tolu Ogunlesi & Stephanie Busari, *supra* note 65.

⁷² Press Release, "Open & Connected: Principles for a Collaborative World (2013, Lagos, Nigeria)," Social Media Week, Nov. 7, 2012, available at <http://socialmediaweek.org/lagos/2012/11/08/social-media-week-announces-2013-global-theme-open-connected> (last accessed Oct. 31, 2015).

⁷³ André-Michel Essoungou, "A social media boom begins in Africa: Using mobile phones, Africans join the global conversation," Africa Renewal Online, December 2010, available at <http://www.un.org/africarenewal/magazine/december-2010/social-media-boom-begins-africa> (last accessed Oct. 31, 2015).

⁷⁴ Internet World Stats, available at <http://www.Internetworldstats.com/stats1.htm#africa> (last accessed December 20, 2015).

⁷⁵ "Social Media in Africa," Deloitte/Frontier Advisory 2012, p. 5, available at http://www.frontier-advisory.com/images/frontieradvisory_social_media_in_africa.pdf (last accessed Oct. 31, 2015).

⁷⁶ David Smith, "African Twitter map reveals how continent stays connected," The Guardian, Jan. 26, 2012, available at <http://www.theguardian.com/world/2012/jan/26/african-twitter-map-continent-connected> (last accessed Oct. 31, 2015).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

C. The Political Use of Social Media in Sub-Saharan Africa

As one might expect, authorities in Sub-Saharan Africa have taken notice of the power of social media – for better and for worse. More young people are using social media as a platform to discuss political issues.⁸⁰ However, some wisely caution that as people use social media for political engagement, so will government counter by curtailing it.⁸¹ For example, General Kale Kayihura, Uganda’s highest-ranking police officer, has stated that social media can be a bad thing because of the speed of dissemination of information.⁸² In particular, General Kayihura placed the negative consequences of quick dissemination with the example of information about genocide and provides a cautionary tale: “If it’s good information that is nice, but if it’s dangerous information like genocide information ... somebody tells lies like, you remember, the Kayunga riots, then you know how much damage it can do.”⁸³

The power of social media to influence politics in Sub-Saharan Africa is not speculative. During the 2011 general elections in Zambia, “the Facebook page of the private television station Muvi TV ... came to constitute an important, lively public space where Zambians actively discussed the elections. Within seconds, updates on the page elicited hundreds of responses.”⁸⁴ The station’s Facebook page is intended to provide “a voice to the Zambia’s working class as opposed to the heavy focus on hard news and political elites on the state-controlled Zambia National Broadcasting Corporation.”⁸⁵

Elected officials in Sub-Saharan Africa have taken to using Twitter for their own benefit. For instance, the Twitter account @presidencyza is an official page for South African president Jacob Zuma.⁸⁶ The account, with more than 157,223 followers, is politically driven and designed to portray Zuma in a good light, reporting his updates on various matters.⁸⁷ Similarly, the ex-African National Congress (“ANC”) Youth League Leader Julius Malema has used Twitter to enhance his political standing, as has Democratic Alliance leader Hellen Zille.⁸⁸

In addition to influencing politics, social media could transform conflict in Africa.⁸⁹ Harvard University doctoral candidates Gabrielle Ramaiah and Jason Warner note four ways. One, “[s]ocial media could help reduce civilian casualties by serving as early warning systems as

⁸⁰ “Ugandan police chief urges increased social media policing,” BBC, Oct. 18, 2012, available at <http://www.bbc.co.uk/news/technology-19989875> (last accessed Oct. 31, 2015).

⁸¹ Gavin Davis, *supra* note 61.

⁸² “Ugandan police chief urges increased social media policing,” *supra* note 80.

⁸³ *Id.*

⁸⁴ Marion Walton, Talking politics: Young South Africans and political participation in mobile and social media (July 17 2012), available at <http://www.marionwalton.com/2012/07/18/talking-politics-young-south-africans-and-political-participation-in-mobile-and-social-media/> (last accessed Oct. 31, 2015).

⁸⁵ *Id.*

⁸⁶ Brigitte Bugalo, “The use of social media in political campaigns,” Friedrich Ebert Stiftung, Sept. 28, 2012, available at <http://www.fesmedia-africa.org/what-is-news/media-matters-archive/news/article/the-use-of-social-media-in-political-campaigns/> (last accessed Oct. 31, 2015).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Gabrielle Ramaiah, & Jason Warner, “Four ways social media could transform conflict in Africa”, CNN World, July 16, 2012, available at <http://globalpublicsquare.blogs.cnn.com/2012/07/16/fours-ways-social-media-could-transform-african-conflicts/> (last accessed Oct. 31, 2015).

it has, for example, in hurricanes, helping citizens to stay connected to humanitarian organizations, and keeping citizens secure in the aftermath of crime.⁹⁰ One Kenyan village chief claims to have drastically reduced crime by sending out Tweets instructing citizens what to do in the aftermath of insecurity.⁹¹ Second, “[s]ocial media could make African states more sensitive to audience costs (that is, the benefits and drawbacks that it could accrue from lying or telling the truth), since citizens can now interact with their governments and with others in civil society in ways that they couldn’t before.”⁹² An example of this trend has been the recent #SudanRevolts social movement on Twitter, where Sudanese and global supporters have launched an unprecedented movement calling for an Arab Spring-like end to the rule of strongman Omar al-Bashir.⁹³ Third, “[s]ocial media could lead to a greater degree of clarity or veracity in reporting about various dimensions of conflicts.”⁹⁴ Dissenting Tweeters in Uganda laid bare some of the problematic assertions in the viral Kony2012 video, and many members of the African Diaspora use social media to relay information about the domestic politics of their native countries to the rest of the world.⁹⁵ And four, “[s]ocial media could serve as a tool to galvanize transnational peace and social justice advocacy groups, even bringing a swifter end to conflicts.”⁹⁶ For instance, the role of social media was an essential part of the Save Darfur intervention campaigns.

Clearly, the Internet, especially in mobile form, has taken hold in Africa, is growing rapidly, and is finding use in political expression. Social media is providing an outlet for conversation and commentary where other media or venues do not exist. It is no wonder that some governments are reacting with anxiety, suspicion, and outright repression.

⁹⁰ *Id.*
⁹¹ *Id.*
⁹² *Id.*
⁹³ *Id.*
⁹⁴ *Id.*
⁹⁵ *Id.*
⁹⁶ *Id.*

III. INTERNATIONAL LAW ON FREEDOM OF EXPRESSION

A. Introduction

Freedom of expression is recognized as a fundamental human right. Freedom of expression functions as a fundamental component of participation in a democratic society, and has been interpreted as a right which should not be interfered with by a state government (e.g., a “negative” right). A number of international legal instruments reinforce the right to Freedom of Expression. The most important are the Universal Declaration of Human Rights (“UDHR”) and the International Covenant on Civil and Political Rights (“ICCPR”). The UDHR, considered a foundational document of customary international law (“CIL”), underpins numerous other treaties. The ICCPR, as a binding treaty, renders the right of freedom of expression enforceable, and prohibits certain types of expression such as hate speech and incitement to terrorism.

While the principle of freedom of expression is widely supported in international law, mediums of expression may be challenged. Even in countries that have ratified treaties supporting freedom of expression, restrictions on the modes of distribution that impede speech have been documented. This raises the question of how much protection is available for freedom of expression under international law, and in particular, whether international law protects all modes of distribution. The Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has affirmed that attempts to restrict distribution are disallowed by international law, except in extreme and limited circumstances.⁹⁷ The international legal instruments that guarantee freedom of expression were carefully designed to allow protection for novel modalities of communication, and make clear Internet technologies are a protected means of expression.⁹⁸

B. Universal Declaration of Human Rights

The Universal Declaration of Human Rights,⁹⁹ adopted by the United Nations General Assembly in 1948, codifies the protection of freedom of expression in Post-WWII international relations. Article 19 of the UDHR provides specific protection for freedom of expression and opinion:

Everyone has the right to freedom of opinion and expression; this right includes

⁹⁷ U.N. Hum. Rts. Council, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, para. 68, U.N. Doc. A/HRC/17/27 (May 16, 2011), available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf (last accessed Oct. 31, 2015).

⁹⁸ In addition to regulation by state governments, technologies enabling mass expression are also subject to regulation by international treaty. The role of the International Telecommunications Union in regulating technology raises important issues of control and transparency, and debates over the utility of technology regulation. See Int’l Telecommc’ns Union homepage, available at <http://www.itu.int/en/Pages/default.aspx> (last accessed Oct. 31, 2015). Additional issues worth noting are the role of prohibited forms of expression, and the repercussions of Internet based technology on privacy.

⁹⁹ Universal Declaration of Human Rights, art. 19, G.A. Res. 217, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948), available at <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/043/88/IMG/NR004388.pdf?OpenElement> (last accessed Oct. 31, 2015).

freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.¹⁰⁰

The UDHR occupies a unique place in international relations because the UDHR is not a binding international treaty, but rather a framework upon which instruments of international law are based. Many international treaties incorporate the principles set forth by the UDHR,¹⁰¹ as do many national constitutions.¹⁰² The UDHR is the foundation and a source of customary international law¹⁰³ binding on all states. Customary international law refers to obligations that do not arise from formal treaties, but rather, from a general and consistent practice.¹⁰⁴

However, it is rare for states to incorporate all articles of the UDHR into domestic law, and therefore not all freedoms guaranteed by the UDHR, such as the freedom of opinion and expression, are protected under customary international law.¹⁰⁵ While states may express a commitment to the principles of the UDHR as a goal, wholesale adoption is not widespread¹⁰⁶ and there is no mechanism to enforce lapses since the failure to adhere to the totality of principles under the UDHR is generally not considered a violation of international law.¹⁰⁷

Specifically, with regard to Article 19 which governs speech, restrictions on the freedom of opinion and expression remain widespread.¹⁰⁸ Freedom of expression is particularly vulnerable, in that suspension of that right is sanctioned by many state governments in special situations, such as national emergency. Additionally, Article 29 of the UDHR makes allowances for suspension of rights if such an action is congruent with the notion of “public order.”¹⁰⁹ Because of the inherently subjective nature of this qualification, and the non-binding nature of the UDHR, it remains difficult to classify freedom of expression as customary international law. In sum, whether the freedom of expression is protected by customary international law depends on the context and circumstances of each state. Conversely, treaties that expressly guarantee protection of the right to freedom of expression bind ratifying states to that duty.

¹⁰⁰ *Id.*

¹⁰¹ Hurst Hannum, The Status of the Universal Declaration of Human Rights & International Law, 25 Ga. J. Int'l & Comp. L. 287, 392 (1996), available at <http://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1396&context=gjicl> (last accessed Oct. 31, 2015) (Annex 3 – International Instruments referring to the Universal Declaration of Human Rights).

¹⁰² *Id.*

¹⁰³ See generally Hurst Hannum, *supra* note 101.

¹⁰⁴ “Customary International Law”, Legal Information Institute, available at https://www.law.cornell.edu/wex/customary_international_law (last visited January 12, 2016).

¹⁰⁵ Hurst Hannum, *supra* note 101 at 340.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 348.

¹⁰⁹ Universal Declaration of Human Rights, art. 29, G.A. Res. 217, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948), <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/043/88/IMG/NR004388.pdf?OpenElement> (last accessed Oct. 31, 2015).

C. International Convention on Civil and Political Rights

The International Convention on Civil and Political Rights is a binding treaty, ratified by every country in Sub-Sahara Africa.¹¹⁰ The ICCPR builds upon the foundation of the spirit of the UDHR by guaranteeing freedom of expression. By ratifying the ICCPR, state governments signal a binding commitment to uphold the right of freedom of expression. In similar fashion to the UDHR, the ICCPR extends protections beyond traditional modalities and accommodates expression in new and emerging modalities.¹¹¹ Article 19 of the ICCPR provides:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through *any other media of his choice*.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order, or of public health or morals.¹¹²

Note that the provision allowing for restrictions in the interests of national security and public order leaves a wide berth for subjective interpretation by state governments.¹¹³

The United Nations Human Rights Committee (“HRC”) provides its interpretation of Article 19 in General Comment 34.¹¹⁴ HRC clarifies that political opinions are protected opinions and that harassment and intimidation such as arrest, trial or imprisonment based on those opinions violates Article 19.¹¹⁵ The HRC provides a non-exhaustive list of examples of protected expression, which includes political discourse and commentary on public affairs and journalism, and states that all forms of expression and means of expression are protected under Article 19.¹¹⁶ Finally, the HRC directs State parties to encourage independence of new media such as Internet and mobile based information systems and ensure public access to them.¹¹⁷

¹¹⁰ U.N. Treaty Collection, Int’l Covenant on Civil and Political Rights – Status 2015, available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (last accessed Oct. 31, 2015).

¹¹¹ Universal Declaration of Human Rights, art. 19, *supra* note 99.

¹¹² *Id.*

¹¹³ U.N. Treaty Collection, Int’l Covenant on Civil and Political Rights Status (2015), *supra* note 110.

¹¹⁴ U.N. Hum. Rts. Comm., General Comment 34 – Art. 19: Freedoms of opinion and expression, para. 21, U.N. Doc. CCPR/C/GC/34 (Sept. 12, 2011), available at <http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf> (last accessed Oct. 31, 2015).

¹¹⁵ *Id.* at para. 9.

¹¹⁶ *Id.* at paras. 11-12.

¹¹⁷ *Id.* at paras. 14-16.

Further, the Special Rapporteur's report on the promotion and protection of the right to freedom of opinion and expression attempts to outline when there can be permissible limitation of the right to freedom of expression and new and emerging or "online" modes of expression under Article 19.¹¹⁸ The report states that online content is protected by the same international human rights law that applies to traditional offline content.¹¹⁹ Furthermore, suspensions of the right to freedom of expression of online content must undergo the same test as traditional, offline content.¹²⁰ These standards are noted as a three-part test:

- (a) Any restriction must be provided by law, which must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and must be made accessible to the public;
- (b) Any restriction must pursue one of the legitimate grounds for restriction set out in article 19, paragraph 3, of the International Covenant, namely (i) respect of the rights or reputation of others; or (ii) the protection of national security or of public order, or of public health or morals;
- (c) Any restriction must be proven as necessary and proportionate, or the least restrictive means to achieve one of the specified goals listed above.¹²¹

Restrictions must also be specifically linked to the threat,¹²² and in the case of an abrogation in the interest of national security or public order, must be specific and individualized. Additionally, the Special Rapporteur gives specific instruction that any abrogation must not endanger the right to freedom of expression as a whole and that any such abrogation must be applied by a politically independent body and should not be arbitrary or discriminatory.¹²³ The Special Rapporteur supports restrictions on freedom of expression which are prohibited under international law, such as child pornography, incitement to commit genocide, incitement to violence based on discrimination based on nationality, race or religion and incitement to terrorism are permissibly restricted.¹²⁴

With regard to restriction of expression through Internet media, the Special Rapporteur notes that, despite the potential for prohibited activity, the benefits of protecting expression via Internet media, including social networks, are sufficient to underscore the need for such protection. The benefits include increased transparency, dissemination of real time information in the case of a natural or humanitarian disaster and increased access to research.¹²⁵

¹¹⁸ U.N. Gen. Assemb., Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, U.N. Doc. A/66/290 (Aug. 10, 2011), available at <http://www.ohchr.org/Documents/Issues/Opinion/A.66.290.pdf> (last accessed Oct. 31, 2015).

¹¹⁹ *Id.* at para. 14.

¹²⁰ *Id.* at para. 15.

¹²¹ *Id.*

¹²² *Id.* at para. 16.

¹²³ *Id.* at para. 17.

¹²⁴ *Id.* at paras. 8-12.

¹²⁵ *Id.* at paras. 12-13.

Accordingly, content blocking of “websites, blogs or any other Internet based [or] electronic” expression is prohibited except to the extent that such action is compatible with Article 19(3). Blocking content solely because it is critical of the state government or political or social system espoused by a government is treated as prior censorship and prohibited.¹²⁶

Article 19 of the ICCPR provides a binding and enforceable treaty by which the foundational principles of the UDHR are brought to bear on ratifying states. The interpretation of Article 19 by the HRC and the Special Rapporteur supports the premise that freedom of expression should be protected, especially in new/Internet media. Emerging technologies offer a robust means by which broader participation by under-represented groups reinforces democratic society. Abrogation of the right is permissible under Article 19(3), but subject to strict conditions; the guidelines for abrogation extend to new/Internet media, and should not be used solely to suppress critical or dissident speech.

D. International Telecommunication Union

The International Telecommunication Union (“ITU”) is a UN agency tasked with facilitating the standardization of telecommunications technology across member states. The ITU draws legal authority from its constitution and basic texts, which are binding on member states and define the structure of the agency.¹²⁷ As of 2011, the ITU is authorized to act only with regard to international telecommunications and radio.¹²⁸ However, there is an ongoing discussion regarding the ITU’s regulation of the Internet. At the World Conference on International Communications in 2012, the Draft of the Future International Telecommunications Regulations proposes a change in the definition of telecommunication to include Internet Communication Technologies (ICT),¹²⁹ a proposal that opened up the possibility of including Internet connectivity within the scope of the ITU.

The regulation of telecommunications technology is especially important in the context of freedom of expression in Sub-Saharan Africa. Mobile phone technology is widespread with coverage for approximately 69 percent of the population.¹³⁰ Data and Internet connectivity is limited, but it is important to note that many new/Internet media technologies are compatible with existing mobile phone infrastructure by means of Short Message Service (SMS), also known as text messaging.¹³¹ The binding provisions of the ITU thus regulate certain modalities of new/Internet media, as they overlap with existing telecommunications infrastructure.

Organizations such as Article19.org have voiced strong opposition to the inclusion of Internet connectivity in the ITU’s mandate based on concerns about issues of net neutrality,

¹²⁶ *Id.* at para. 39.

¹²⁷ Int’l Telecomm’ns Union, Collection of the Basic Texts of the International Telecommunication Union adopted by the Plenipotentiary Conference (2011), available at <http://www.itu.int/pub/S-CONF-PLEN-2011/en> (last accessed Oct. 31, 2015) (click “download” for full text).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Twitter’s Supported Mobile Phone Carriers, Twitter.com, available at <https://support.twitter.com/articles/20170024#> (last accessed Oct. 31, 2015) (lists several Sub-Saharan African countries and carriers accessible via SMS short code).

access and privacy.¹³² In particular, those advocates argue that the terminology of information communication technologies (“ICT”) is construed broadly to include content as well as the mode of technology, and thus such regulatory authority interferes with freedom of expression on the Internet.

E. Other Considerations

The jurisdiction of the International Criminal Court (“ICC”) extends to violations of internationally prohibited expression under Article 19, specifically, intentional incitement of violence based on discrimination or genocide. In this connection, the Special Rapporteur identifies the dissemination of hate speech and incitement as a key factor in the Rwandan Genocide.¹³³

As access to the Internet and mobile technology expands, issues of privacy are on the horizon. The Special Rapporteur notes that access to new technologies, including the Internet, allows for the tracking of the user. This possibility presents the novel issue of the erosion of anonymous speech and possible retaliation against individuals who participate in political or dissident speech.¹³⁴

¹³² ITU: Draft of the Future Int’l Telecommc’ns Regs., p. 2, Article 19 (Oct. 2012), available at <https://www.article19.org/data/files/medialibrary/3483/12-10-19-LA-itu.pdf> (last accessed Oct. 31, 2015).

¹³³ U.N. Gen. Assemb., Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, *supra* 118 at paras. 23-31.

¹³⁴ *Id.* at para. 11.

IV. LAW FROM THE AFRICAN REGION

A. The African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights ("African Charter")¹³⁵ guarantees the right to receive information as well as the right of individuals to express and disseminate opinions. Specifically, Article 9 provides:

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.¹³⁶

The caveat in Section 2, "within the law," has been interpreted by the African Commission on Human and Peoples' Rights ("ACmHPR")¹³⁷ to mean international law,¹³⁸ which gives individuals asserting their rights under Section 2 wide latitude to draw from international law to support their claims for the freedom of expression. Significantly, the African Charter does not contain an explicit derogation clause, which has been interpreted to mean that "such that limitations on the rights and freedoms enshrined in the Charter cannot be justified by emergencies or special circumstances."¹³⁹

However, Article 9 is subject to the general restrictions set forth in Article 27 of the ACmHPR which requires that protected freedoms be exercised "with due regard to the rights of others, collective security, morality and common interest."¹⁴⁰ The Courts have interpreted this provision to mean that any limitation on the rights and freedoms of the African Charter "must be strictly proportionate with and absolutely necessary," and that "[m]ost important[ly], a limitation may not erode a right such that the right itself becomes illusory."¹⁴¹ International law principles

¹³⁵ African (Banjul) Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5 (1982), entered into force Oct. 21, 1987, preamble, available at http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf (last accessed Oct. 31, 2015).

¹³⁶ *Id.* at art. 9.

¹³⁷ The ACmHPR is distinguished from the African Court on Human and Peoples' Rights ("ACTHPR"). The ACmHPR is the quasi-judicial body that promotes and protects human rights and collective (peoples') rights throughout the continent of Africa as well as interpreting the ACHPR. The ACTHPR makes judgments on the compliance of the state parties of the African Union with the ACHPR.

¹³⁸ *Article 19 v. Eritrea*, Comm. No. 275/03, Decision, paras. 91-92 (Afr. Comm'n on Hum. & Peoples' Rts. May 30, 2007), available at <http://caselaw.ihrda.org/doc/275.03/pdf/en/> (last accessed Oct. 31, 2015).

¹³⁹ *Constitutional Rts. Project, Civil Liberties Organisation & Media Rts. Agenda v. Nigeria*, Comm Nos. 140/94, 141/94, 145/95, para. 41 (Afr. Comm'n on Hum. & Peoples' Rts. Nov. 15, 1999), available at <http://www1.umn.edu/humanrts/africa/comcases/140-94.html> (last accessed Oct. 31, 2015); *Liesbeth Zegveld & Mussie Ephrem v. Eritrea*, Comm. No. 250/02, Decision, para. 60 (Afr. Comm'n on Hum. & Peoples' Rts. Nov. 13, 2003), available at <http://www1.umn.edu/humanrts/africa/comcases/250-2002.html> (last accessed Oct. 31, 2015).

¹⁴⁰ The Article 19 Freedom of Expression Handbook – International and Comparative Law, Standards and Procedures, p. 11, Article 19 (Aug. 1993), available at <http://www.article19.org/data/files/pdfs/publications/1993-handbook.pdf> (last accessed Oct. 31, 2015).

¹⁴¹ *Constitutional Rts. Project, Civil Liberties Organisation & Media Rts. Agenda v. Nigeria*, *supra* note 139.

also provide the standards and norms for interpreting laws that restrict the freedom of expression.¹⁴²

B. African Court on Human and Peoples' Rights

On December 5, 2014, the African Court on Human and Peoples' Rights ("ACtHPR") directly addressed the issue of freedom of expression in a landmark decisions in *Lohé Issa Konaté v. Burkina Faso*.¹⁴³ In this case, the applicant Lohé Issa Konaté, an editor and founder of a small independent newspaper, *L'Ouragan*, was prosecuted and found guilty for publishing three articles which criticized the State prosecutor.¹⁴⁴ Mr. Konaté was found guilty of defamation and sentenced to 12 months imprisonment and 1.5 million CFA francs.¹⁴⁵ Upon appeal, his sentence was upheld.¹⁴⁶ Mr. Konaté's case was eventually brought to the ACtHPR, which held that criminal defamation should be charged in rare occasions and that imprisonment for defamation violates the freedom of expression.¹⁴⁷

C. African Commission on Human and Peoples' Rights

The ACmHPR¹⁴⁸ has decided several cases which implicate Article 9's protection of the freedom of expression. In *Liesbeth Zegveld and Mussie Ephrem v. Eritrea*, the ACmHPR stated that "[t]he right to freedom of expression has been recognised by the African Commission as a fundamental individual human right which is also a cornerstone of democracy and a means of ensuring the respect for all human rights and freedoms."¹⁴⁹ This principle was reiterated in *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v. Nigeria*, as well as *Media Rights Agenda, Constitutional Rights Project, Media Rights Agenda and*

¹⁴² *Liesbeth Zegveld & Mussie Ephrem v. Eritrea*, Comm. No. 250/02, Decision, para. 60 (Afr. Comm'n on Hum. & Peoples' Rts. Nov. 13, 2003), available at <http://www1.umn.edu/humanrts/africa/comcases/250-2002.html> (last accessed Oct. 31, 2015).

¹⁴³ "African Court upholds appeal against criminal defamation," Comm. to Protect Journalists, Dec. 5, 2014, available at <https://cpj.org/2014/12/african-court-upholds-appeal-against-criminal-defa.php> (last accessed Oct. 31, 2015); see also *Lohé Issa Konaté v. Burkina Faso*, App. No. 004/2013 (Afr. Ct. on Hum. & Peoples' Rts. Dec. 4, 2014) (case summary), available at http://www.african-court.org/en/images/documents/Court/Cases/casae_summaries/Summary_of_Facts_in_Issa_Lohe_Konate_v_Burkina_Faso.pdf (last accessed Oct. 31, 2015).

¹⁴⁴ Jonathan McCully, "Criminalising Speech in Africa: What Did The African Court On Human And Peoples' Rights Actually Say About Defamation Law?," MediaBelf, Jan. 16, 2015, available at <https://mediabelf.wordpress.com/2015/01/16/criminalising-speech-in-africa-what-did-the-african-court-on-human-and-peoples-rights-actually-say-about-defamation-law/> (last accessed Oct. 31, 2015).

¹⁴⁵ "Burkinabe journalist convicted for criminal defamation," Comm. to Protect Journalists, Oct. 31, 2012, available at <https://cpj.org/2012/10/burkinese-journalists-convicted-for-criminal-defam.php> (last accessed Oct. 31, 2015).

¹⁴⁶ Mohamed Keita, "Jailed Burkinabe journalist appeals to African Court," Comm. to Protect Journalists, July 29, 2013, available at <https://cpj.org/blog/2013/07/jailed-burkinabe-journalist-appeals-to-african-cou.php> (last accessed Oct. 31, 2015).

¹⁴⁷ "African Court upholds appeal against criminal defamation," Comm. to Protect Journalists, Dec. 5, 2014, available at <https://cpj.org/2014/12/african-court-upholds-appeal-against-criminal-defa.php> (last accessed Oct. 31, 2015); see also *Lohé Issa Konaté v. Burkina Faso*, *supra* note 143.

¹⁴⁸ There are no decisions from the ACERWC on this topic.

¹⁴⁹ *Liesbeth Zegveld & Mussie Ephrem v. Eritrea*, *supra* note 142 at para. 59.

Constitutional Rights Project v. Nigeria, wherein the ACmHPR held that “[f]reedom of expression is a basic human right, vital to an individual’s personal development, his political consciousness, and participation in the conduct of public affairs in his country.”¹⁵⁰ Taking inspiration from the European Court of Human Rights and the Inter-American Court of Human Rights, the ACmHPR has carved out a special protection for political speech: In keeping with its role of promoting democracy in the continent, the African Commission should also find that speech that contributes to political debate must be protected.¹⁵¹ Thus, the ACmHPR supports the idea that freedom of expression underlies the protection of democracy and public participation in politics.

Moreover, several decisions of the ACmHPR also specifically protect the *mediums* of freedom of expression, both protecting the medium, like newspapers, and protecting against arbitrary administrative hurdles. In *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v. Nigeria*, the ACmHPR found that the government of Nigeria violated Article 9 of the ACHPR when it prohibited the publication and circulation of three newspapers and sealed off the premises of the newspaper’s offices, with no countervailing threat to national security or public order.¹⁵² In *Media Rights Agenda v. Nigeria*, the ACmHPR held that Nigeria violated Article 9 by arresting and detaining a staff member of a newspaper for his alleged involvement in a coup which was connected with the articles that the newspaper had published about the coup.¹⁵³

Mandatory registration of newspapers is also considered a violation of Article 9.¹⁵⁴ Following the annulment of the Nigerian elections in June, 1993, the government issued decrees which proscribed the publication of two magazines and 10 newspapers, set up mandatory registration of newspapers and gave sole discretion to a Newspapers Registration Board to decide whether to register a newspaper, providing no procedure to challenge the Board’s denial of a registration.¹⁵⁵ There was an additional N100.00 registration fee, and N250.00 deposit for any damages or penalty imposed by a court in the future.¹⁵⁶ This decree was issued on August 16, 1993 and made retroactive to June 23, 1993, and gave newspapers a three-week deadline to comply, thereafter rendering all non-registered newspapers illegal and owners, printers, and

¹⁵⁰ *Constitutional Rts. Project, Civil Liberties Organisation & Media Rts. Agenda v. Nigeria*, Comm Nos. 140/94, 141/94, 145/95, Decision, para. 36 (Afr. Comm’n on Hum. & Peoples’ Rts. Nov. 15, 1999), available at <http://www1.umn.edu/humanrts/africa/comcases/140-94.html> (last accessed Oct. 31, 2015); *Media Rts. Agenda, Constitutional Rts. Project, Media Rts. Agenda & Constitutional Rts. Project v. Nigeria*, Comm Nos. 105/93, 128/94, 130/94, 152/96, Decision, para. 54 (Afr. Comm’n on Hum. & Peoples’ Rts. Oct. 31, 1998), available at http://www1.umn.edu/humanrts/africa/comcases/105-93_128-94_130-94_152-96.html (last accessed Oct. 31, 2015).

¹⁵¹ *Law Offices of Ghazi Suleiman v. Sudan*, Comm. No. 228/99, Decision, para. 53 (Afr. Comm’n on Hum. & Peoples’ Rts. May 19, 2003), available at <http://www1.umn.edu/humanrts/africa/comcases/Comm228-99.pdf> (last accessed Oct. 31, 2015).

¹⁵² *Constitutional Rts. Project, Civil Liberties Organisation & Media Rts. Agenda v. Nigeria*, *supra* note 150 at para. 43.

¹⁵³ *Media Rts. Agenda v. Nigeria*, Comm. No. 224/98, Decision, paras. 68-69 (Afr. Comm’n on Hum. & Peoples’ Rts. Nov. 6, 2000), available at <http://www1.umn.edu/humanrts/africa/comcases/224-98.html> (last accessed Oct. 31, 2015).

¹⁵⁴ *Media Rts. Agenda, Constitutional Rts. Project, Media Rts. Agenda & Constitutional Rts. Project v. Nigeria*, *supra* note 150 at paras. 54-57.

¹⁵⁵ *Id.* at paras. 1-5.

¹⁵⁶ *Id.* at para. 6.

publishers liable to be arrested and detained.¹⁵⁷ The ACmHPR found that the use of registration fees did not in itself violate the African Charter, but that excessive registration fees and the unlimited discretion of the Board without due process violated Article 9 because it invited censorship.¹⁵⁸ In addition, the ACmHPR found that the government failed to provide any evidence that the prohibition was justified by national security or public order.¹⁵⁹

Three cases challenging Zimbabwe's 2002 Access to Information and Protection of Privacy Act ("AIPPA"), which requires registration with the Media and Information Commission ("MIC"), have been heard by the ACmHPR. First, in *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v. Zimbabwe*, the Associated Newspapers of Zimbabwe Ltd. ("ANZ") filed an application challenging the constitutionality of AIPPA and refused to register with MIC until a ruling about the constitutionality had been determined by the Supreme Court, which refused to hear the case until ANZ registered itself.¹⁶⁰ Following the Supreme Court decision, ANZ's newspaper, the Daily News, was forcibly closed; ANZ assets were seized; and several ANZ officials were arrested, while others were threatened with arrest and criminal charges.¹⁶¹ The Commission found that the responses by the Government to the actions of ANZ were not justified by security concerns and that the State must respect the rule of law and comply with procedures, such as seeking a court order rather than use force.¹⁶²

Second, in *Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development in Africa (on behalf of Andre Barclay Meldrum) v. Zimbabwe*, the applicant published an article in the Daily News on the Internet version of the Mail and Guardian, and was subsequently charged with "publishing falsehood" under AIPPA, of which he was found not guilty.¹⁶³ The AIPPA was subsequently found unconstitutional.¹⁶⁴ Mr. Meldrum was subsequently found subject to deportation.¹⁶⁵ The Commission found that Mr. Meldrum's rights under Article 9 were violated.¹⁶⁶

Third, in *Scanlen & Holderness v. Zimbabwe*, Comm. No. 297/05, the Commission found that AIPPA imposed prior censorship and excessive burdens on journalists, restricting their effective enjoyment of the right to freedom of expression.¹⁶⁷ The applicants challenged AIPAA

¹⁵⁷ *Id.* at para. 7.

¹⁵⁸ *Id.* at paras. 56-57.

¹⁵⁹ *Id.* at paras. 73-75.

¹⁶⁰ *Zimbabwe Lawyers for Hum. Rts. & Associated Newspapers of Zimbabwe v. Zimbabwe*, Comm. No. 284/03, Decision, paras. 1-5 (Afr. Comm'n on Hum. & Peoples' Rts. Apr. 3, 2009), available at http://www.achpr.org/files/sessions/6th-eo/comunications/284.03/achpreo6_284_03_eng.pdf (last accessed Oct. 31, 2015).

¹⁶¹ *Id.* at para. 7.

¹⁶² *Id.* at para. 7.

¹⁶³ *Zimbabwe Lawyers for Hum. Rts. & IHRDA (on behalf of Andrew Barclay Meldrum) v. Zimbabwe*, Comm. No. 294/04, Decision, para. 3 (Afr. Comm'n on Hum. & Peoples' Rts. Apr. 3, 2009), available at <http://www.ihrda.org/wp-content/uploads/2010/10/294-04-ZLHR-IHRDA-v-ZIMBABWE-Meldrum-eng.pdf> (last accessed Oct. 31, 2015).

¹⁶⁴ *Id.* at para. 3.

¹⁶⁵ *Id.* at para. 4.

¹⁶⁶ *Id.* at para. 112.

¹⁶⁷ *Scanlen & Holderness v. Zimbabwe*, Comm. No. 297/05, Decision, paras. 122-23 (Afr. Comm'n on Hum. & Peoples' Rts. Apr. 3, 2009), available at <http://dev.ihrda.org/doc/297.05/view/> (last accessed Oct. 31, 2015).

based on constitutional grounds, arguing that compulsory accreditation of journalists interferes with freedom of expression, the accreditation fees the law required are an additional restriction on the freedom of expression, and that compulsory accreditation of journalists by a Commission which lacks independence interferes with the professional independence and the autonomy of the journalism profession.¹⁶⁸ The Complainants further alleged that the MIC is not democratically constituted.¹⁶⁹

The ACmHPR found that official involvement in the registration of journalists creates considerable scope for politically motivated action by authorities,¹⁷⁰ and that the profession should be self-regulated. As noted by the Commission, “[t]he same concept of public order in a democratic society demands the greatest possible amount of information. It is the widest possible circulation of news, ideas and opinions as well as the widest access to information by society as a whole that ensures this public order.”¹⁷¹ Significantly, the Commission held that the restrictions violated freedom of expression of a Zimbabwean by depriving the society of the right to receive information.¹⁷²

D. Other Instruments In Support of Freedom of Expression on the Internet

The principles of freedom of expression are reiterated elsewhere in African regional law. For example, Article 7 of the African Charter on the Rights and Welfare of the Child (“ACRWC”) sets forth the following:

Every child who is capable of communicating his or her own views shall be assured the rights to express his opinions freely in all matters and to disseminate his opinions subject to such restrictions as are prescribed by laws.¹⁷³

In addition, Article 10 protects against arbitrary or unlawful interference with children’s privacy and correspondence.¹⁷⁴

In March 2012, the Economic Community of West African States (“ECOWAS”) reviewed the “Draft Supplementary Act on a Uniform Legal Framework on Freedom of Expression and Right to Information in West Africa” which is a protocol to establish regional standards for the right to information for the 15 countries that are part of ECOWAS.¹⁷⁵ The Act received the endorsement of Nigeria’s Attorney General and Minister of Justice, Mohammed

¹⁶⁸ *Id.* at para. 6.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at para. 90.

¹⁷¹ *Id.* at para. 110.

¹⁷² *Id.* at para. 118.

¹⁷³ African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), entered into force Nov. 29, 1999, art. 7, available at <https://www1.umn.edu/humanrts/africa/afchild.htm> (last accessed Oct. 31, 2015).

¹⁷⁴ *Id.* at art. 10.

¹⁷⁵ “West Africa: ECOWAS Champions Regional Right to Information Agreement,” Article 19, May 10, 2010, available at <http://www.article19.org/resources.php/resource/1415/en/west-africa:-ecowas-champions-regional-right-to-information-agreement> (last accessed Oct. 31, 2015).

Bello Adoke,¹⁷⁶ who has stated that it would enhance the right to information and freedom of expression already set forth in national constitutions and international treaties and conventions.¹⁷⁷ Significantly, Article 1 of the protocol specifically provides for the freedom of expression and right to information through “new information and communication technologies across all frontiers.”¹⁷⁸

Another instrument of the ACmHPR that protects freedom of expression is the Declaration of Principles on Freedom of Expression in Africa¹⁷⁹ which provides the following:

- (1) No one shall be subject to arbitrary interference with his or her freedom of expression; and
- (2) Any restrictions on freedom of expression shall be provided of law, serve a legitimate interest and be necessary in a democratic society.¹⁸⁰

In 2013, government, non-profit, and private entities developed the concept for the African Declaration on Internet Rights and Freedom (“Declaration”) at the African Internet Governance Forum in Nairobi, Kenya.¹⁸¹ The purpose of this Declaration is to “elaborate on the principles which are necessary to uphold human and peoples’ rights on the Internet, and cultivate an Internet environment that can best meet Africa’s social and economic development needs and goals.”¹⁸² Some of the key provisions of this Declaration are:

- Access to the Internet is essential for the full realization of human development and facilitates the exercise and enjoyment of a number of human rights and freedoms, including the rights to freedom of expression and access to information, peaceful assembly and association. For universal access to the Internet to be assured, the Internet should be widely available and affordable to enable all persons to realize their full potential.¹⁸³

¹⁷⁶ “Nigeria’s attorney-general advocates adoption of regional free expression legal framework,” Media Found. for W. Africa, Mar. 14, 2012, available at http://www.ifex.org/west_africa/2012/03/14/regional_framework/ (last accessed Oct. 31, 2015).

¹⁷⁷ “Nigerian minister tasks ECOWAS legal experts on Freedom of expression,” Panapress, Mar 7, 2012, available at <http://www.panapress.com/Nigerian-minister-tasks-ECOWAS-legal-experts-on-Freedom-of-expression--12-821293-100-lang2-index.html> (last accessed Oct. 31, 2015).

¹⁷⁸ The Law Library of Cong, “Economic Community of West African States: Uniform Framework on Freedom of Expression, Information Considered”, Global Legal Monitor, Mar. 21, 2012, available at <http://www.loc.gov/law/foreign-news/article/economic-community-of-west-african-states-uniform-framework-on-freedom-of-expression-information-considered/> (last accessed Oct. 31, 2015).

¹⁷⁹ Declaration of Principles on Freedom of Expression in Africa, Afr. Comm’n on Hum. & Peoples’ Rts. (2002), <https://www1.umn.edu/humanrts/achpr/expressionfreedomdec.html> (last accessed Oct. 31, 2015).

¹⁸⁰ *Id.* at sec. II.

¹⁸¹ The African Declaration on Internet Rights and Freedom (2015), available at <http://africanInternetrights.org/about/> (last accessed Oct. 31, 2015).

¹⁸² Mike Palmedo, “African Declaration on Internet Rights and Freedom,” infojustice.org, Sept. 9, 2014, available at <http://infojustice.org/archives/33243> (last accessed Oct. 31, 2015).

¹⁸³ The African Declaration on Internet Rights and Freedom, *supra* note 181, key principle 2.

- The cutting off or slowing down of access to the Internet, or parts of the Internet, for whole populations or segments of the public can never be justified on any ground, including on public order or national security grounds.¹⁸⁴
- Everyone has the right to hold opinions without interference. Everyone has the right to freedom of expression on the Internet; this right includes the freedom to seek, receive and impart information and ideas, regardless of frontiers.¹⁸⁵
- The right to freedom of expression on the Internet should not be subject to any restrictions, except those which are provided by law, for a legitimate purpose and necessary and proportionate in a democratic society, as consistent with international human rights standards.¹⁸⁶

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*, principle 3.

¹⁸⁶ *Id.*

V. PRESS FREEDOM IN CERTAIN COUNTRIES

A. Generally

Generally, the constitutions of many countries protect freedom of expression. However, equally common are restrictions on the Internet on grounds of national security and public order. Moreover, in practice, government control of media, harassment and intimidation of journalists, and various laws and administrative hurdles restrict the freedom of the Internet.

Governments control the media in many African countries and often utilize their power over the media to silence dissent. For example, in Angola, the government not only controls the government media, but also controls privately owned newspapers and radio and television stations through legal, political and security-related means.¹⁸⁷ As a result, independent voices are silenced.¹⁸⁸ In Burundi, the government controls media outlets and prohibits political parties, labor unions and foreign nongovernmental organizations from owning media outlets.¹⁸⁹ In addition, although only 0.5 percent of the population is online, in Ethiopia, the government owns and controls the nation's sole Internet Service Provider, Ethio Telecom.¹⁹⁰

Accordingly, the use of the Internet, social networks and text messaging as a medium of expression for journalists has arisen as an alternative to other forms of media, such as television, radio, and print that are subject to such restrictions. Antigovernment protests have been organized through social networks and text messaging.¹⁹¹ In response, governments have begun to exert restrictions on the Internet and SMS equivalent similar to the restrictions they exert over other forms of media.¹⁹² This happened in the Democratic Republic of Congo, where in December 2011, in the wake of the presidential and parliamentary elections, the Congolese government suspended SMS messaging and access to social media networks on mobile phones nationwide for three weeks.¹⁹³ Providing the rationale of preventing dissemination of erroneous election results, the DRC stated that it had ordered cell phone operators to block texting services.¹⁹⁴

¹⁸⁷ Freedom House, "Freedom of the Press 2013: Angola", available at <https://freedomhouse.org/report/freedom-press/2013/angola> (last visited January 12, 2016).

¹⁸⁸ Hum. Rts. Watch, "Dispatches: Angola Denies Repressing Media, Protests," Nov. 3, 2014, available at <http://www.hrw.org/news/2014/11/03/dispatches-angola-denies-repressing-media-protests> (last accessed Oct. 31, 2015).

¹⁸⁹ Freedom House, "Freedom of the Press 2012: Burundi," FreedomHouse.org, available at <https://freedomhouse.org/report/freedom-press/2012/burundi> (last accessed Oct. 31, 2015).

¹⁹⁰ Reporters Without Borders, World Report - Ethiopia, Mar. 2012, Refworld.org, available at <http://www.refworld.org/docid/4f6c6c182.html> (last accessed Oct. 31, 2015).

¹⁹¹ Freedom House, "Freedom in the World 2013: Angola," *supra* note 187.

¹⁹² *Id.*

¹⁹³ Michael Malakata, "DRC bans SMS and social media networks to curb violence," IDG News, Dec. 6, 2011, available at <http://news.idg.no/cw/art.cfm?id=D6E6F733-EA52-A399-B678CC192B3F0A6A> (last accessed Oct. 31, 2015).

¹⁹⁴ *Id.*

In addition, on April 18, 2013, the Gambia banned the use of Voice over Internet Provider services such as Skype at Internet cafes.¹⁹⁵ In Kenya, following the March 4, 2013 elections, the government not only blocked the dissemination of what it considered hate speech over text messaging, but also hired personnel to filter content.¹⁹⁶ Governments have even shut down social media services preemptively to prevent what they foresaw to be an instigator to uprising. For example, in Cameroon, from March 8 through 18, 2011, the government suspended the Twitter service of MTN, the South Africa based telecommunications provider, citing security reasons.¹⁹⁷ The Cameroonian government did this despite only 50 persons being affected by the Twitter suspension.¹⁹⁸

Other ways in which governments restrict criticism is through direct harassment and intimidation of journalists include the following:

- Angola: a journalist for the online radio news outlet, Voice of America, was assaulted for his reporting on human rights issues, political violence, and corruption in Angola.¹⁹⁹
- Cameroon: the military interrogated two journalists charged with withholding information and they were told not to flee the country.²⁰⁰
- Democratic Republic of Congo: journalists experienced repeated threats of physical harm and death, as well as beatings for investigating corruption cases.²⁰¹
- Ethiopia: journalists experienced arbitrary detentions and excessive force.
- The Gambia: journalists have been arrested, detained, harassed, threatened, and expelled from the country.²⁰²
- Kenya: journalists, including Osinde Obare of The Standard and David Musindi of Radio Citizen, were harassed, threatened with deportation and otherwise intimidated by senior police officials for publishing stories about a police raid at a market in Kitale.²⁰³ In addition, blogger Robert Alai was detained for posting messages on Twitter that alleged

¹⁹⁵ “Amended Gambian media law restricts Internet freedom,” Comm. to Protect Journalists, July 10, 2013, available at <https://cpj.org/2013/07/amended-gambian-media-law-restricts-internet-freed.php> (last accessed Oct. 31, 2015).

¹⁹⁶ Freedom House, “Freedom on the Net 2013: Kenya,” FreedomHouse.org, available at <https://freedomhouse.org/report/freedom-net/2013/kenya#.VOoE8LDF9XY> (last accessed Oct. 31, 2015).

¹⁹⁷ Mohamed Keita, “Fearing Egypt-style revolt, Cameroon bars Twitter service,” Comm. to Protect Journalists, Mar. 14, 2011, available at <https://cpj.org/blog/2011/03/fearing-egypt-style-revolt-cameroon-bars-twitter-s.php> (last accessed Oct. 31, 2015).

¹⁹⁸ Sylvie Siyam, *et al.*, Cameroon: The Internet and Mobile Technology in Social Resistance and Public Demonstrations, pp. 98-99 (2011), GISWatch, http://giswatch.org/sites/default/files/gisw_-_cameroon.pdf (last accessed Oct. 31, 2015).

¹⁹⁹ Freedom House, “Freedom on the Net 2013: Angola,” *supra* note 187.

²⁰⁰ “Cameroon journalists questioned in military court for withholding information,” Comm. to Protect Journalists, Oct. 31, 2014, available at <https://cpj.org/2014/10/cameroon-journalists-questioned-in-military-court.php> (last accessed Oct. 31, 2015).

²⁰¹ Fed’n of African Journalists, Journalists Under Fire: Report of Solidarity Mission to Cameroon, p. 3 (May 2010), available at <https://www.nuj.org.uk/documents/faj-journalists-under-fire-cameroon/> (last accessed Oct. 31, 2015).

²⁰² Commonwealth Hum. Rts. Initiative, “CHRI Submission to the Commonwealth Ministerial Action Group on the Gambia” (Sept. 2013), available at <http://www.humanrightsinitiative.org/pressrelease/2013/CHRI%20Submission%20to%20CMAG%20on%20The%20Gambia-September%202013.pdf> (last accessed Oct. 31, 2015).

²⁰³ U.S. Dep’t of State, Kenya 2012 Human Rights Report, available at <http://www.state.gov/documents/organization/204343.pdf> (last accessed Oct. 31, 2015).

the involvement of government spokesperson Alfred Mutua in the 2009 murder of human rights activists Oscar King'ara and Paul Oulu. (Alai was later released without being charged.)²⁰⁴

- Malawi: In November 2013, online journalist Justice Mponda was arrested for “intimidating the royal family” but was acquitted for lack of evidence.²⁰⁵ More generally, as a result of government harassment and intimidation, including through the use of government surveillance, online users and commentators are reported to exercise generally self-censorship and exhibit caution when handling sensitive topics, such as ethnic, racial, or religious minorities.²⁰⁶
- Rwanda: Journalists have been arrested, detained and killed for criticizing the government.²⁰⁷ In addition, it is widely reported that the government monitors email and chat rooms,²⁰⁸ and blocks websites that are critical of state leadership.²⁰⁹
- Uganda: Reports have been made of the raids of two newspapers²¹⁰ and the arrest of journalists for “inciting violence” due to coverage critical of the government.²¹¹

B. Legal and Administrative Barriers

Governments in the region have increased their regulation of online media platforms and SMS technology following a rapid increase in the use of such technologies. Some examples include the following:

- Angola: information technology bill that was passed by the legislature in March 2012 (but eventually withdrawn), which criminalized the posting of photos, videos and recordings without the consent of the individuals depicted therein, punishment of those offenses by jail sentences of up to 14 years, and allowing government officials to search homes and seize computer equipment without a warrant.²¹²

²⁰⁴ *Id.*

²⁰⁵ Freedom House, “Freedom on the Net 2014: Malawi,” FreedomHouse.org, available at <https://freedomhouse.org/report/freedom-net/2014/malawi> (last accessed Oct. 31, 2015).

²⁰⁶ *Id.*

²⁰⁷ Human Rights Watch, World Report 2013: Rwanda, available at <https://www.hrw.org/world-report/2013/country-chapters/rwanda> (last accessed Oct. 31, 2015); U.S. Dep’t of State, Rwanda 2012 Human Rights Report, available at <http://www.state.gov/documents/organization/204366.pdf> (last accessed Oct. 31, 2015); “Rwanda: Newspaper editor murdered,” Pen Int’l, June 28, 2010, available at <http://www.pen-international.org/newsitems/rwanda-newspaper-editor-murdered/> (last accessed Oct. 31, 2015).

²⁰⁸ U.S. Dep’t of State, Rwanda 2012 Human Rights Report, *supra* note 207.

²⁰⁹ *Id.*

²¹⁰ Freedom House, “Freedom House Condemns Raids on Ugandan Media,” FreedomHouse.org, May 21, 2013, available at <http://www.freedomhouse.org/article/freedom-house-condemns-raids-ugandan-media> (last accessed Oct. 31, 2015).

²¹¹ “Uganda: Three Ugandan Journalists Arrested At Kampala’s Wandegeya Police Station in a Day,” allAfrica.com, Nov. 28, 2013, available at <http://allafrica.com/stories/201311291272.html> (last accessed Oct. 31, 2015).

²¹² Hum. Rts. Watch, “Angola: Withdraw Cybercrime Bill – Draft Bill Violates Rights to Access to Information, Freedom of Expression,” May 13, 2011, available at <https://www.hrw.org/news/2011/05/13/angola-withdraw-cybercrime-bill> (last accessed Oct. 31, 2015).

- Burundi: criminal penalties for defamation, discrediting the state, insulting the head of state, and “threatening state security.”²¹³
- Burkina Faso: prohibited from insulting the head of state, publishing or broadcasting graphic images, criminal penalties for libel (with the burden of proof on the defendant).²¹⁴
- Cameroon:
 - Article 77 of Act No. 96/0 provides for criminal penalties for press offenses.²¹⁵
 - Article 78 of Act No. 96/0 allows prosecution for slander and defamation at the request of an individual.²¹⁶
 - Law N.° 2010/012 of 21 December 2010 mandates security audits for information and communication technology infrastructure and information systems of operators, access providers and Internet Service Providers (ISPs)²¹⁷ and allows criminal investigation officers to gain access to user data from ISPs and Internet Content Providers (ICPs) without limitation or time or circumstance.²¹⁸
 - Decree N° 2012/180/PR of 10 April 2012 assigning the National Agency for Information and Communications Technologies the mission of regulating electronic security activities and the regulation of the Internet in Cameroon.²¹⁹
 - The two regulatory bodies, The Telecommunications Regulatory Authority and the National Agency for Information Technologies and Communication, fall under the appointment of the government and the state.²²⁰
- Democratic Republic of Congo:
 - The passage of repressive criminal defamation laws.²²¹
 - Jamming signals for failure to submit programming schedule to the Higher Council for Broadcasting and Communication, the state media regulatory agency established in 2009, all of whose members were appointed by the president.²²²
 - Shutting down media outlets for failure to pay fees.²²³

²¹³ Freedom House, “Freedom of the Press 2012: Burundi,” FreedomHouse.org, available at <https://freedomhouse.org/report/freedom-press/2012/burundi> (last accessed Oct. 31, 2015).

²¹⁴ Freedom House, “Freedom of the Press 2013: Burkina Faso,” FreedomHouse.org, available at <https://freedomhouse.org/report/freedom-press/2013/burkina-faso#.VOoITbDF9XY> (last accessed Oct. 31, 2015).

²¹⁵ “Spotlight on the UPR: Cameroon,” Pen Int’l, May 1, 2013, available at <http://www.pen-international.org/newsitems/spotlight-on-the-upr-cameroon/> (last accessed Oct. 31, 2015).

²¹⁶ *Id.*

²¹⁷ Ass’n for Progressive Commc’n & Humanist Inst. for Cooperation with Developing Countries, Global Information Society Watch 2014: Communications surveillance in the digital age – Cameroon, p. 89, GISWatch, available at <http://www.giswatch.org/sites/default/files/gw2014-cameroon.pdf> (last accessed Oct. 31, 2015).

²¹⁸ Pen Int’l, Comm. to Protect Journalists, Internet Sans Frontieres (Internet Without Borders), Joint contribution on Cameroon to the 16th session of the Working Group of the Universal Periodic Review, p. 8 (Oct. 2012), available at <http://www.pen-international.org/wp-content/uploads/2013/05/12-10-07-Cameroon-UPR-PEN-CPJ-ISF-ENGLISH.pdf> (last accessed Oct. 31, 2015).

²¹⁹ Ass’n for Progressive Commc’n & Humanist Inst. for Cooperation with Developing Countries, *supra* note 217.

²²⁰ Pen Int’l, Comm. to Protect Journalists, Internet Sans Frontieres (Internet Without Borders), *supra* note 218.

²²¹ “DRC Journalist jailed after story on Chinese-run hospital,” Comm. to Protect Journalists, Feb. 15, 2013, available at <https://cpj.org/2013/02/drc-journalist-jailed-after-story-on-chinese-run-h.php> (last accessed Oct. 31, 2015).

²²² Freedom House, “Freedom in the World 2013: Congo, Democratic Republic of (Kinshasa),” FreedomHouse.org, available at <https://freedomhouse.org/report/freedom-world/2013/congo-democratic-republic-kinshasa#.VOodKLDF9XY> (last accessed Oct. 31, 2015).

- Regulating local media by the High Authority on Media, which has the power to suspend outlets.²²⁴
- Ethiopia:
 - 2005 Criminal Code prohibits “obscene” communications, criminal defamation and criticism of public officials.²²⁵
 - 2009 Anti-Terrorism Proclamation has been used heavily against journalists.²²⁶
 - 2012 Telecom Fraud and Offenses Proclamation proscribes significant fines and up to eight years in prison for disseminating “terrorizing message” and criminalizes Voice-over Internet Provider services (VoIP).²²⁷
- The Gambia
 - July 2013 amendment to the Information and Communication Act of 2009 makes it an offense to use the Internet to “spread false news” against government or public officials, a crime to “caricature, abuse, or make derogatory statements against the person or character of public officials,” and criminalizes anyone who “incites dissatisfaction or instigates violence against the government” or face penalties of up to fifteen years in prison or a fine of 3 million dalasi (about \$100,000 USD) and applies to persons living in the Gambia or abroad.²²⁸
 - Newspaper Registration Act of 2004 requires print and broadcast media outlets to put up a surety of close to \$14,000 and to register with the government.²²⁹
- Kenya
 - October 31, 2013, the Information and Communications Amendment Bill was passed by parliament and signed by the President on December 4, 2013²³⁰ and creates the government-appointed Communication and Multimedia Appeals Tribunal with broad powers to revoke journalists’ accreditation, seize property, and impose hefty fines of up to one million Kenyan shillings (\$12,000) on

²²³ Freedom House, “Freedom of the Press 2012: Congo, Democratic Republic of (Kinshasa),” FreedomHouse.org, available at <https://freedomhouse.org/report/freedom-press/2012/congo-democratic-republic-kinshasa#.VOoeJ7DF9XY> (last accessed Oct. 31, 2015).

²²⁴ *Id.*

²²⁵ Freedom House, “Freedom of the Press 2014: Ethiopia,” FreedomHouse.org, available at <https://freedomhouse.org/report/freedom-press/2014/ethiopia#.VOof1LDF9XY> (last accessed Oct. 31, 2015).

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ Sanya Awori, “New law stifles free expression in The Gambia,” Pambazuka News, Sept. 11, 2013, available at <http://www.pambazuka.net/en/category/features/88863> (last accessed Oct. 31, 2015); “CPJ condemns Gambia’s amended Information, Communication law,” Panapress, July 11, 2013, available at <http://www.panapress.com/CPJ-condemns-Gambia-s-amended-information,-Communication-law--12-876455-42-lang2-index.html> (last accessed Oct. 31, 2015).

²²⁹ Commonwealth Hum. Rts. Initiative, “CHRI Submission to the Commonwealth Ministerial Action Group on the Gambia” (Sept. 2013), available at <http://www.humanrightsinitiative.org/pressrelease/2013/CHRI%20Submission%20to%20CMAG%20on%20The%20Gambia-September%202013.pdf> (last accessed Oct. 31, 2015).

²³⁰ Nation Reporter, “Controversial media Bill signed into law”, Daily Nation, December 16, 2013, available at <http://mobile.nation.co.ke/news/Media-Bill-Uhuru-Kenyatta-Justin-Muturi-/1950946/2114230/-/format/xhtml/-/enasn7/-/index.html> (last visited January 12, 2016).

journalists, and up to 20 million Kenyan shillings (\$235,000) on media companies.²³¹

- Media Council Bill of 2013 grants the state the power to appoint the Board of Communication Authority, which regulates broadcast and telecommunications sector, creates prohibitive monetary penalties for media outlets and journalists, gives jurisdiction to the Multimedia and Communications Tribunal jurisdiction to hear appeals from the Complaints Commission of the Media Council of Kenya, provides educational standards in order to qualify as a journalists, and allows legislators to revise the code of conduct of journalists via the inclusion of the Journalists Code of Conduct as part of the law.²³²
- Malawi:
 - E-Bill introduced in 2012 to require editors of online public communications services to reveal their personal information (names, addresses, telephone and registration numbers) and the appointment of “cyber inspectors” to monitor websites.²³³
 - The Malawi Communications Regulatory Authority regulates the telecommunications and broadcasting sectors, and attempted to implement the Consolidated ICT Regulatory Management System, which would monitor the performance of mobile phone companies in order to improve the quality of service and in the process, obtain such data from telephone operators, such as time, duration and location of calls, SMS messages sent and received, the type of handset used, and other subscriber details.²³⁴
- Rwanda
 - Amendments to the penal code signed into law in May 2012 expand the scope of a former law that prohibited the display of contempt for the head of state or other high-level public officials to include administrative authorities or other public services.²³⁵
 - The new penal code also incorporates existing press offenses from the media law, such as illegally starting media, refusing to publish a correct, reply or rectification; and having the intent to undermine public order and territorial integrity.²³⁶
 - Under the current media law, the Media High Council has the power to suspend newspapers.²³⁷
 - Courts may order journalists to reveal sources when necessary to carry out criminal investigations or proceedings.²³⁸

²³¹ Hum. Rts. Watch, “Kenya: New Laws Would Undermine Basic Rights – Reject Restrictions on Media, Independent Groups,” Nov. 11, 2013, available at <http://www.hrw.org/news/2013/11/11/kenya-new-laws-would-undermine-basic-rights> (last accessed Oct. 31, 2015).

²³² “Kenya: New laws mark major setback for media freedom,” Article 19, Dec. 16, 2013, available at <http://www.article19.org/resources.php/resource/37407/en/kenya:-new-laws-mark-major-setback-for-media-freedom> (last accessed Oct. 31, 2015).

²³³ Freedom House, “Freedom on the Net 2013: Malawi,” FreedomHouse.org, available at <https://freedomhouse.org/report/freedom-net/2013/malawi#.VOOj7DF9XY> (last accessed Oct. 31, 2015).

²³⁴ *Id.*

²³⁵ U.S. Dep’t of State, Rwanda 2012 Human Rights Report, available at <http://www.state.gov/documents/organization/204366.pdf> (last accessed Oct. 31, 2015).

²³⁶ *Id.*

²³⁷ *Id.*

- Requiring an associate’s degree in journalism or communication, a certificate obtained from an institute of journalism and communication, or a university degree with training in journalism.²³⁹
- South Africa
 - The proposed Protection of State Information Act would criminalize the possession and distribution of state information.²⁴⁰ However, this law has been criticized for failing to appropriately limit the types of information that can be deemed classified and for its overbroad criminalization of the transmission of classified information, even when that information is in the public domain.²⁴¹
 - General Intelligence Laws Amendment Act (“Spy Bill”) provides security agencies authority over communications from foreign servers without judicial oversight.²⁴²
 - Under law, the truth of a statement is not in itself a defense to defamation, but rather the words must also be in the service of the public interest.²⁴³
 - Electronic Communications and Transactions Act of 2002 provides that Internet Service Providers and Members of the Internet Service Providers’ Association can lose protection from liability if they do not respond to take-down notices.²⁴⁴
- Uganda
 - Public Order Management Bill was passed on August 7, 2013 by the Uganda Parliament, and gives the President the power to restrict speech, assemblies and expressions of political dissent.²⁴⁵

C. Model Practices

Some countries are examples of model practices that protect the freedom of expression on the Internet and abide by international law principles governing freedom of expression. These countries have either set forth progressive laws, have taken action to repeal repressive laws, or have a practice that promotes free discussion over the Internet. Some examples are listed below.

- Cameroon
 - Decree N° 2013/0399/PM of 27 February 2012 established the modalities of protection for electronic communications consumers.²⁴⁶

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ Freedom House, Freedom on the Net 2014: South Africa,” FreedomHouse.org, available at <https://freedomhouse.org/report/freedom-net/2014/south-africa> (last accessed Oct. 31, 2015)

²⁴¹ Sarah Evans, “‘Altered’ secrecy Bill passed in Parliament,” Mail & Guardian, Apr. 25, 2013, available at <http://mg.co.za/article/2013-04-25-info-bill-passedf-by-national-assembly> (last accessed Oct. 31, 2015).

²⁴² Freedom House, Freedom on the Net 2014: South Africa,” *supra* note 230.

²⁴³ *H v. W*, 2013 (2) SA 530 (GSJ) (30 January 2013),

²⁴⁴ Freedom House, Freedom on the Net 2014: South Africa,” *supra* note 230.

²⁴⁵ Freedom House, “Freedom House Condemns Uganda’s Restriction of Political Speech,” FreedomHouse.org, Aug. 7, 2013, available at <https://freedomhouse.org/article/freedom-house-condemns-ugandas-restriction-political-speech> (last accessed Oct. 31, 2015); Amnesty Int’l, “Uganda: Public Management Order Bill is a serious blow to open political debate,” Amnesty.org, Aug. 5, 2013, available at <https://www.amnesty.org/en/latest/news/2013/08/uganda-public-management-order-bill-serious-blow-open-political-debate/> (last visited Oct. 31, 2015).

- Malawi
 - In May 2012, the National Assembly repealed Section 46 of the penal code that had empowered the information minister to ban any news “not in the public interest.”²⁴⁷
- South Africa
 - Online self-censorship is low and the government does not actively try to limit or manipulate online discussions.²⁴⁸

²⁴⁶ Ass’n for Progressive Commc’n & Humanist Inst. for Cooperation with Developing Countries, Global Information Society Watch 2014: Communications surveillance in the digital age – Cameroon, pp. 89-90, GISWatch, available at <http://www.giswatch.org/sites/default/files/gw2014-cameroon.pdf> (last accessed Oct. 31, 2015).

²⁴⁷ “CPJ welcomes Malawi’s repeal of news censorship law”, Comm. to Protect Journalists, May 31, 2012, available at <https://cpj.org/2012/05/cpj-welcomes-malawis-repeal-of-news-censorship-law.php> (last accessed Oct. 31, 2015).

²⁴⁸ Freedom House, Freedom on the Net 2014: South Africa,” *supra* note 230.

VI. CONCLUSION

With social media becoming a growing tool for political dissent, it is necessary to ensure that it enjoys the same protections that apply to traditional print media. Considering that Africa has seen tremendous growth in the telecoms market, it is likely that the rapid proliferation of social media use in Africa will continue.

International law guarantees the protection of freedom of expression regardless of the medium of expression. Article 19 of the UDHR, Article 19 of the ICCPR, Article 10 of the ECHR, Article 9 of the African Charter, and Article 13.3 of the American Convention all clearly protect freedom of expression. Moreover, decisions of regional human rights bodies applying the law of the applicable regional mechanisms have recognized the importance of freedom of expression, particularly in the context of political speech. The ECtHR, the ACtHR, and the IACmHR have all addressed the issues of freedom of expression in the promotion of a democratic society, the imposition of disproportionate criminal penalties on journalists, and prior censorship. The ACtHR and IACmHR have also specifically protected all mediums of expression and have held that undue administrative hurdles violate the law. The ECtHR also recently held unconstitutional the wholesale blocking of an Internet website.

Notwithstanding the strong international law in support of freedom of expression, individual countries still engage in practices that undermine such freedom, in part due to the broad discretion provided to governments by the instruments of international law to restrict freedom of expression in the furtherance of national security. In fact, despite the very strong law supporting freedom of expression, many countries engage in repeated threats against journalists, using harassment and intimidation tactics and even murder; impose harsh criminal penalties against those accused of defamation or libel, the charges of which are usually filed against those criticizing the government; and require individuals to obtain degrees in journalism to qualify as journalists.

Given the fact that media in Africa is often used to criticize the government, the protection of the freedom of expression on social media requires the media to be independent from government. Local communities as well as the international community can support an independent media by monitoring the changing laws and advocating for reforms. Accordingly, the realization of freedom of expression in Africa on social media should be supported by the following:

On the regional level,

Proposing reforms to the African Union or other regional bodies that would expand restrictions on prior censorship similar to those being proposed in the Inter-American and European systems; and

Supporting existing recommendations by APS, ICANN and regional and international journalist federations, such as World Association of Newspapers and News Publishers (“WAN-IFRA”) that prohibit regulating journalists through non-direct means.

On the local level,

Establishing watchdog organizations run by independent third parties to monitor local laws that would potentially restrict the freedom of expression through administrative measures, and

Advocating for the elimination of laws that impose criminal penalties against reporters and journalists and laws that allow ad hoc and arbitrary censorship and shutting down of communication channels, and

Finally, within the international legal community,

Encouraging members of the legal profession to monitor and review new laws to determine whether they are unconstitutional or not in keeping with the international instruments to support the work of non-governmental organizations.

APPENDIX A

I. AUTHORITY FROM THE EUROPEAN CONVENTION ON HUMAN RIGHTS

The European Convention on Human Rights (“ECHR”) guarantees the right to receive information as well as the right of individuals to express and disseminate their opinions. Article 10 of the ECHR states:

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

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.²⁴⁹

All States Party to the ECHR have incorporated the ECHR into their national legislation,²⁵⁰ and judgments of the European Court of Human Rights (“ECtHR”), the judicial body that oversees the enforcement of the ECHR, are binding precedent on all States Party.²⁵¹ In fact, in civil law systems, judgments from the ECtHR are given the same status as statutes.²⁵² Because the enforcement of the ECHR lies primarily with each State, and the purpose of the ECtHR is to monitor the actions of each state, there is considerable discretion given to each State Party.²⁵³ For example, states have considerable discretion in the case of a public emergency under Article 15, which allows derogation from the ECHR in time of emergency.²⁵⁴ In the case of restrictions of freedom of expression, however, discretion is “reduced almost to vanishing point.”²⁵⁵ The ECtHR takes into account the constitutional practices of states, including the United States of America, which has a strong protection for the freedom of expression, when

²⁴⁹ European Convention on Hum. Rts., art. 10, Council of Europe (2010), available at http://www.echr.coe.int/Documents/Convention_ENG.pdf (last accessed Oct. 31, 2015).

²⁵⁰ Monica Macovei, “Freedom of expression: A guide to the implementation of Article 10 of the European Convention on Human Rights,” Council of Europe, Hum. Rts. Handbooks No. 2, p. 5 (Jan. 2004), available at: <http://www.echr.coe.int/LibraryDocs/DG2/HRHAND/DG2-EN-HRHAND-02%282004%29.pdf> (last accessed Oct. 31, 2015).

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.* at p. 6.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

considering cases involving Article 10, as well as the International Covenant on Civil and Political Rights and other international documents.²⁵⁶

The right to freedom of expression has been interpreted as “one of the essential foundations of a democratic society, one of the basic conditions for its progress and for each individual’s self-fulfillment.”²⁵⁷ This right belongs to both individuals as well as society, and includes the right to receive information, hold opinions, disseminate information, free press, radio and television broadcasting and debate.²⁵⁸ Article 10 protects both the person providing information and the person receiving information.²⁵⁹ In addition, Article 10 also protects the form in which information and ideas are expressed.²⁶⁰ Therefore, written speech, as well as spoken speech, pictures, images, actions, films, radio broadcasts, paintings and electronic information systems, are protected under Article 10.²⁶¹ When considering whether speech should be protected, the European Court considers the type of speech, how it is disseminated and the audience.²⁶²

States Parties have restricted freedom of expression by prohibiting publication, confiscating publications, convicting people of crimes or imposing civil penalties, blocking transmissions, or refusing to grant licenses.²⁶³ The ECtHR treats methods to restrict freedom of expression prior to publication as the “most dangerous” form of restriction on freedom of expression.²⁶⁴ The ECtHR has interpreted the right to freedom of expression progressively, rejecting State attempts to limit freedom of expression, under Article 10 of the ECHR, with respect to civil servants who hold certain “duties and responsibilities.”²⁶⁵ For example, in *Vogt v. Germany*, the ECtHR determined that the dismissal of a secondary school teacher for being an active member of the German Communist Party, whose avowed purpose was to overthrow the constitutional order of Germany, was not proportional to the government’s interest in promoting national security because the applicant, as a French and German teacher, did not pose a security risk nor was there a risk of her indoctrinating students.²⁶⁶

²⁵⁶ *Id.* at p. 7.

²⁵⁷ *Id.*

²⁵⁸ Amaya Úbeda de Torres, “Freedom of Expression under the European Convention on Human Rights: A Comparison With the Inter-American System of Protection of Human Rights,” 10 No. 2 Hum. Rts. Brief 6, 6-7 (2003), available at <http://www.wcl.american.edu/hrbrief/10/2torres.pdf> (last accessed Oct. 31, 2015); Monica Macovei, *supra* note 250 at pp. 11-15.

²⁵⁹ Amaya Úbeda de Torres, *supra* note 258 at 6.

²⁶⁰ Monica Macovei, *supra* note 250 at p. 15.

²⁶¹ *Id.*

²⁶² *Id.* at p. 7.

²⁶³ *Id.* at p. 25.

²⁶⁴ *Id.*

²⁶⁵ *Id.* at p. 21.

²⁶⁶ *Vogt v. Germany*, No. 17851/91 (European Ct. of Hum. Rts. Sept. 26, 1995), available at <http://hudoc.echr.coe.int/eng?i=001-58012> (last accessed Oct. 31, 2015); Steven Greer, “The exceptions to Articles 8 to 11 of the European Convention on Human Rights,” Counsel of Europe, Hum. Rts. Files No. 15, p. 21 (1997), available at [http://www.echr.coe.int/library/DIGDOC/DG2/HRFILES/DG2-EN-HRFILES-15\(1997\).pdf](http://www.echr.coe.int/library/DIGDOC/DG2/HRFILES/DG2-EN-HRFILES-15(1997).pdf) (last accessed Oct. 31, 2015). In the dissent, Judge Jambrek argued that the majority had failed to consider Germany’s history, the role of the German communist party as a client party of the East German state, and the fact that the applicant had taken a high profile role in the political party. *Id.* at p. 22.

Nevertheless, Article 10 is subject to several limitations under the ECtHR, which provides that in some instances, States Party may restrict rights, including the right to freedom of expression.²⁶⁷ For example, Article 15 provides that all rights except the “absolute rights” in the ECtHR can be suspended in time of war or other public emergency that threatens the life of the nation.²⁶⁸ Section 2 of Article 10 allows limitations on the right to freedom of expression, provided that such limitation has a legitimate aim – “national security, territorial integrity or public safety, protection of health or morals, prevention of disorder or crime, protection of the reputation or rights of others, prevention of the disclosure of information received in confidence or maintenance of the authority and impartiality of the judiciary.”²⁶⁹ However, the ECtHR has established the legal standard that in any borderline case, the presumption will be in favor of the freedom of expression and against the State Party’s legitimate aim.²⁷⁰

Even if a legitimate aim exists to justify restriction on freedom of expression, such restriction must still be “prescribed by law.”²⁷¹ A restriction is “prescribed by law” when the domestic legal system has enacted or created a law allowing the restriction, citizens are aware of the law and consequences of its violation, and the law “provide[s] adequate safeguards against arbitrary interference with the respective substantive rights[.]”²⁷² In addition, the restriction must be “necessary in a democratic society,” meaning that there is a “pressing social need” and the severity of the restriction must be proportional to the legitimate aim behind the restriction, or else the restriction will be considered a violation of Article 10.²⁷³

All three requirements – a legitimate aim, prescribed by law and necessary in a democratic society – must be met before the restriction is found to be legitimate.²⁷⁴ The three requirements are not concomitant: if one is not met, the restriction will be found to be a violation of the freedom of expression.²⁷⁵

In *Lingens v. Austria*, the ECtHR addressed the “necessary to a democratic society” prong when an Austrian journalist made an application after being convicted and fined for defamation of the Austrian Chancellor in magazine articles.²⁷⁶ The journalist had accused the Chancellor of protecting former SS members and for being accommodating towards former Nazis.²⁷⁷ The articles in the magazine were published near the general election in October 1975,

²⁶⁷ Steven Greer, *supra* at note 266 at pp. 5.

²⁶⁸ *Id.*

²⁶⁹ “Freedom of expression in Europe: Case-law concerning Article 10 of the European Convention on Human Rights,” *supra* note 266 at 7.

²⁷⁰ Monica Macovei, *supra* note 250 at p. 29-30.

²⁷¹ “Freedom of expression in Europe: Case-law concerning Article 10 of the European Convention on Human Rights,” *supra* note 266 at 8.

²⁷² Steven Greer, *supra* at note 266 at pp. 9-13.

²⁷³ Amaya Úbeda de Torres, *supra* note 258 at 6-7; “Freedom of expression in Europe: Case-law concerning Article 10 of the European Convention on Human Rights,” *supra* note 269 at pp. 8-9.

²⁷⁴ Monica Macovei, *supra* note 250 at p. 30.

²⁷⁵ *Id.* at p. 30.

²⁷⁶ *Lingens v. Austria*, No. 9815/82 (European Ct. of Hum. Rts. July 8, 1986), available at <http://hudoc.echr.coe.int/eng?i=001-57523> (last accessed Oct. 31, 2015); Steven Greer, *supra* note 266 at 36; Case Summary, *Lingens v. Austria*, Article 19, July 8, 1986, available at <http://www.article19.org/resources.php/resource/2586/en/lingens-v.-austria> (last accessed Oct. 31, 2015).

²⁷⁷ *Lingens v. Austria*, *supra* note 276, paras. 12-15; Steven Greer, *supra* note 266.

a time when it was rumored that the Chancellor's political party would require the support of another party whose leader was a former SS member.²⁷⁸ The ECtHR determined that the journalist had criticized the Chancellor in his public capacity and the facts upon which he based his articles were undisputed.²⁷⁹ It held that the conviction and fine were disproportionate to Austria's interests, noting that "freedom of political debate is at the very core of the concept of democratic society."²⁸⁰

In *Karatas v. Turkey*, the applicant was convicted of disseminating propaganda and fined for authoring and publishing poems about rebellion.²⁸¹ The ECtHR found the restriction on the applicant's free expression to be prescribed by law, and determined that the sensitive security situation in Turkey led to a legitimate aim of national security.²⁸² Specifically, the ECtHR noted that the protection of national security was a legitimate aim where "[a] separatist movement had recourse to methods which rely on the use of violence."²⁸³ Nevertheless, the ECtHR noted that while the applicant's poems were aggressive and could be considered incendiary, poetry is "a form of artistic expression that appeals to only a minority of readers," and freedom of artistic expression, in both form and substance, is protected under Article 10.²⁸⁴ Ultimately, the ECtHR found the restriction to be disproportionate to Turkey's legitimate aims, and thus the applicant's right to freedom of expression to have been violated.²⁸⁵

The *Biol v. Turkey* case involved a trade unionist who was convicted for calling members of government fascists and murderers.²⁸⁶ The ECtHR found that the speech did not incite violence and was not hate speech.²⁸⁷ The penalties imposed were found to be disproportionate to the government's stated aims.²⁸⁸

The ECtHR most recently addressed Internet freedom in *Ahmet Yildirim v. Turkey*,²⁸⁹ in which it found that Turkey's blocking of access to sites.google.com breached the right to

²⁷⁸ Steven Greer, *supra* note 266 at 37.

²⁷⁹ Case Summary, *Lingens v. Austria*, *supra* note 276.

²⁸⁰ Steven Greer, *supra* note 266 at 36.

²⁸¹ *Karatas v Turkey*, No. 23168/94, Judgment, paras. 8-12 (European Ct. of Hum. Rts. July 8, 1999), available at <http://hudoc.echr.coe.int/eng?i=001-58274> (last accessed Oct. 31, 2015).

²⁸² *Id.* at paras. 37-44.

²⁸³ *Id.* at para. 44.

²⁸⁴ *Id.* at para. 49.

²⁸⁵ *Id.* at paras. 52-54.

²⁸⁶ *Biol v. Turkey*, No. 44104/98, Judgment (European Ct. of Hum. Rts. Mar. 1, 2005), available at <http://hudoc.echr.coe.int/eng?i=001-68429> (last accessed Oct. 31, 2015) (available in French or Turkish only); "Freedom of expression in Europe: Case-law concerning Article 10 of the European Convention on Human Rights," *supra* note 266 at 115.

²⁸⁷ "Freedom of expression in Europe: Case-law concerning Article 10 of the European Convention on Human Rights," *supra* note 266 at 115-116.

²⁸⁸ *Id.* at 116.

²⁸⁹ *Ahmet Yildirim v. Turkey*, No. 3111/10, Judgment (European Ct. of Hum. Rts. Dec. 18, 2012), available at <http://hudoc.echr.coe.int/eng-press?i=001-115705> (last accessed Oct. 31, 2015); "Turkey: Landmark European Court Decision finds blanket Google ban was a violation of freedom of expression," Article 19, Dec. 18, 2012, available at <http://www.article19.org/resources.php/resource/3567/en/turkey:-landmark-european-court-decision-finds-blanket-google-ban-was-a-violation-of-freedom-of-expression> (last accessed Oct. 31, 2015).

freedom of expression.²⁹⁰ Yildirim owned and managed a website on the “Google sites” portal which he used to publish academic papers and his opinion on other matters.²⁹¹ However, under a Turkish law which criminalized content that insulted Mustafa Kemal Atatürk, the president of Turkey, the Criminal Court ordered the Turkish Telecommunications and Electronic Data Authority (“TİB”) to block sites.google.com in its entirety.²⁹² The ECtHR reasoned that the wholesale blocking of sites.google.com was not a restriction formulated with specific precision, failed to safeguard against potential abuses, and conferred overly broad powers on the TİB in relation to blocking one site, which was a clearly disproportionate measure.²⁹³

II. AUTHORITY FROM THE LATIN AMERICA/INTER-AMERICAN REGION

A. Freedom of Expression under the American Convention

The principles of Freedom of Expression are set forth in Article 13 of the American Convention on Human Rights (the “American Convention”).²⁹⁴ Article 13.3 provides:

The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.²⁹⁵

Similar language is found in the Declaration of Principles on Freedom of Expression issued by the Inter-American Commission on Human Rights (“ICmHR”) which provides that the ownership and control of media must be regulated in order to conform to “plurality and diversity which ensure the full exercise of peoples’ right to information.”²⁹⁶ Principle 2 of the Declaration reiterates the principles found in Article 13 of the Convention,²⁹⁷ and Principle 5 of the Declaration explicitly requires the prohibition of restrictions on expression that result in prior censorship.²⁹⁸

²⁹⁰ “Turkey: Landmark European Court Decision finds blanket Google ban was a violation of freedom of expression,” *supra* note 289.

²⁹¹ *Id.*

²⁹² Adi Kamdar, “European Human Rights Court Finds Turkey in Violation of Freedom of Expression”, Electronic Frontier Found., Dec. 18, 2012, available at <https://www.eff.org/deeplinks/2012/12/european-human-rights-court-finds-turkey-violation-freedom-expression> (last accessed Oct. 31, 2015).

²⁹³ “Turkey: Landmark European Court Decision finds blanket Google ban was a violation of freedom of expression,” *supra* note 289.

²⁹⁴ American Convention on Hum. Rts., Org. of Am. States (1969), available at <http://www.cidh.org/Basicos/English/Basic3.American%20Convention.htm> (last accessed Oct. 31, 2015).

²⁹⁵ *Id.* at art. 13.3.

²⁹⁶ Declaration of Principles on Freedom of Expression, principle 12, Inter-Am. Comm’n on Hum. Rts. (2000), available at <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=26> (last accessed Oct. 31, 2015).

²⁹⁷ *Id.* at principle 2.

²⁹⁸ Principle 5 provides, “[p]rior censorship, direct or indirect interference in or pressure exerted upon any expression, opinion or information transmitted through any means of oral, written, artistic, visual or electronic communication must be prohibited by law. Restrictions to the free circulation of ideas and opinions, as well as the arbitrary imposition of information and the imposition of obstacles to the free flow of information violate the right to freedom of expression.” Declaration of Principles on Freedom of Expression, principle 5, Inter-Am. Comm’n on

The protection afforded under the American Convention is broad and extends to information or ideas of all kinds, whether expressed orally or in writing, in print, in art forms, or through any other media.²⁹⁹ Restrictions on freedom of speech are bound by three general prescriptions: (1) any restriction must be provided by law; (2) it must serve one of the legitimate purposes expressly enumerated in their texts; and (3) it must be necessary.³⁰⁰ Under the Convention, both collective and individual freedom of expression is protected.

Individual freedom has been interpreted to cover all private and public persons and to include the right to seek, receive, and disseminate ideas and information of any kind, as well as to receive information and be informed about that which is disseminated by others.³⁰¹ Collective freedom has been judicially constructed as the right of society to receive information that contributes to the free flow of ideas, public debate, and social dialogue.³⁰² The explicit imitations on said freedoms in Article 13 are set forth in Sections 2, 4 and 5. The Convention provides that the laws of member States should be self-executing with respect to the Articles of the Convention.³⁰³ Further, the Inter-American Court has held that the State has an affirmative obligation to ensure the protection of the right to freedom of expression as provided for in the Convention.³⁰⁴

Hum. Rts. (2000), available at <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=26> (last accessed Oct. 31, 2015).

²⁹⁹ American Convention on Hum. Rts., art. 13, Org. of Am. States (1969), available at <http://www.cidh.org/Basicos/English/Basic3.American%20Convention.htm> (last accessed Oct. 31, 2015).

³⁰⁰ Report of Special Rapporteur for Freedom of Expression, Inter-American Legal Framework Regarding the Right to Freedom of Expression, ch. 1, para. 67, Inter-Am. Comm'n on Hum. Rts. (2010), available at http://www.oas.org/es/cidh/expresion/docs/cd/sistema_interamericano_de_derechos_humanos/index_IALFR.html (last accessed Oct. 31, 2015).

³⁰¹ *Kimel v. Argentina*, Series C No. 177, Judgment, para. 53 (Inter-Am. Ct. of Hum. Rts. May 3, 2008), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_177_ing.pdf (last accessed Oct. 31, 2015).

³⁰² Report of Special Rapporteur for Freedom of Expression, *id.* at paras. 13-17.

³⁰³ Article 28 of the Convention provides, “[1] Where a State Party is constituted as a federal state, the national government of such State Party shall implement all the provisions of the Convention over whose subject matter it exercises legislative and judicial jurisdiction. [2] With respect to the provisions over whose subject matter the constituent units of the federal state have jurisdiction, the national government shall immediately take suitable measures, in accordance with its constitution and its laws, to the end that the competent authorities of the constituent units may adopt appropriate provisions for the fulfillment of this Convention.” American Convention on Hum. Rts., arts. 28.1, 28.2, Org. of Am. States (1969), available at <http://www.cidh.org/Basicos/English/Basic3.American%20Convention.htm> (last accessed Oct. 31, 2015). The extent to which member States’ laws deviate from the American Convention and other international laws varies. Article 23 of the Constitution of Venezuela provides, for example, “treaties, pacts and conventions relating to human rights which have been executed and ratified by Venezuela have a constitutional rank, and prevail over internal legislation, insofar as they contain provisions concerning the enjoyment and exercise of such rights that are more favorable than those established by this Constitution and the laws of the Republic, and shall be immediately and directly applied by courts and the organs of Public Power.” Constitution of the Bolivarian Republic of Venezuela, art. 23 (1999), available at <http://venezuela-us.org/live/wp-content/uploads/2009/08/constitucioningles.pdf>.

³⁰⁴ Report on the Situation of Human Rights in Venezuela, Inter-Am. Comm'n on Hum. Rts. (2003), available at <http://www.cidh.org/countryrep/Venezuela2003eng/toc.htm> (last accessed Oct. 31, 2015); Report on the Situation of Human Rights in Jamaica, Inter-Am. Comm'n on Hum. Rts. (2012), available at <http://www.oas.org/en/iachr/docs/pdf/Jamaica2012eng.pdf> (last accessed Oct. 31, 2015).

B. Non-Discriminatory Protection of Journalistic Expression

According to the Inter-American Rapporteur on Freedom of Expression, “its direct nexus to freedom of expression distinguishes journalism from other professions. In the opinion of the Inter-American court, the practice of journalism means that a person is involved in activities defined by or consisting of the freedom of expression that the American Convention protects specifically.”³⁰⁵ The Commission stated that “the thought and expression of those who do critical reporting of the government enjoys broad protection under the Convention as far as they form part of the political debate of the society. Likewise, the democracy itself needs that the expression of the thought of those who are political figures or followers of the ruling party within the framework of this debate, enjoys equal protection.”³⁰⁶ In connection with these findings, the Inter-American Commission has found that laws of compulsory membership in a professional journalism association amount to a restriction of freedom of expression in violation of Article 13.³⁰⁷

Further, the expression of journalism through a broad range of communications channels, including social media, has been protected under the Inter-American system. The Commission has held that Article 13.3 is not exhaustive as it does not take into account indirect methods of communication, such as those derived from new technologies.³⁰⁸ In *Ríos v. Venezuela*, the court referred to Article 13.3’s prohibition on the direct or indirect restriction on the free dissemination of information, saying that, “[a] word-for-word interpretation of this stipulation lets us consider that it specifically protects the communication, diffusion, and circulation of ideas” and “based on those stipulations, these have promised, by virtue of the Convention, to not introduce in their legal systems discriminatory regulations regarding the protection of the law.”³⁰⁹

C. Restrictions on Prior Censorship

Prior censorship is prohibited under the American Convention,³¹⁰ with certain exceptions for the protection of public morals and security.³¹¹ However, not every instance of state

³⁰⁵ Report of Special Rapporteur for Freedom of Expression, Inter-American Legal Framework Regarding the Right to Freedom of Expression, ch. 1, para. 168, Inter-Am. Comm’n on Hum. Rts. (2010), available at http://www.oas.org/es/cidh/expresion/docs/cd/sistema_interamericano_de_derechos_humanos/index_IALFR.html (last accessed Oct. 31, 2015).

³⁰⁶ *Ríos v. Venezuela*, Series C No. 194, Dissenting Opinion, p. 12 n.17 (Inter-Am. Ct. of Hum. Rts. Jan. 28, 2009) (Pasceri Scaramuzza, J.), available at http://corteidh.or.cr/docs/casos/articulos/seriec_194_ing.pdf (last visited Oct. 31, 2015) (quoting Merits Report N° 119/06, *Ríos v. Venezuela*, para. 180 (Inter-Am. Comm’n on Hum. Rts. Oct. 26, 2006)).

³⁰⁷ Declaration of Principles on Freedom of Expression, principle 6, Inter-Am. Comm’n on Hum. Rts. (2000), available at <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=26> (last accessed Oct. 31, 2015); see also Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 of the American Convention on Human Rights), Adv. Op. OC-5/86, paras. 74, 78-81 (Inter-Am. Ct. of Hum. Rts. Nov. 13, 1985), available at https://www1.umn.edu/humanrts/iachr/b_11_4e.htm (last accessed Oct. 31, 2015) (arguing that the profession of journalism cannot be distinguished from the exercise of freedom of expression).

³⁰⁸ See *Ríos v. Venezuela*, Series C No. 194, Judgment, para. 340 (Inter-Am. Ct. of Hum. Rts. Jan. 28, 2009), available at http://corteidh.or.cr/docs/casos/articulos/seriec_194_ing.pdf (last visited Oct. 31, 2015).

³⁰⁹ *Id.* at paras. 340, 348.

³¹⁰ American Convention on Hum. Rts., *supra* note 299, art. 13.2. Similarly, the Declaration of Principles on Freedom of Expression states in Principle 5 that, “[p]rior censorship, direct or indirect interference in or pressure exerted upon any expression, opinion or information transmitted through any means of oral, written, artistic, visual

regulation will amount to prior censorship. The court has carefully weighed sanctions on journalists imposed by legislative or executive regulations not clearly falling with the mentioned exceptions to Article 13. In the case of *Kimel v. Argentina*,³¹² the Court considered the necessity of the restriction at hand and found that civil sanctions – as opposed to criminal penalties – could be applied against Kimel, a journalist, to protect the reputation of a public official. However, the court held that sanctions could not be used punitively as against Kimel, considering the crimes charged against him were in connection with his investigative journalism work, and that such sanctions constituted a deprivation of freedom.³¹³

In the case of *Palamara-Iribarne v. Chile*,³¹⁴ the Court examined the situation of a civilian employee of the Chilean Armed Forces who had been criminally prosecuted for having attempted to publish a book without the authorization of his military superiors, and had made critical comments regarding the military system in comments to the media while his case was pending; those comments resulted in additional prosecution for the offense of *desacato* (disrespect) under the Penal Code. The Inter-American Court held that, “by pressing a charge of contempt, criminal prosecution was used in a manner that is disproportionate and unnecessary in a democratic society, which led to the deprivation of Mr. Palamara-Iribarne’s right to freedom of thought and expression with regard to the negative opinion he had of matters that had a direct bearing on him and were closely related to the manner in which military justice authorities carried out their public duties during the proceedings instituted against him.”³¹⁵

Further, the Commission has written in relation to similar regulations in Venezuela’s criminal code that the offenses are incompatible with the American Convention. Such regulations restrict the possibilities of free, open, plural and uninhibited discussion on matters of public importance.³¹⁶

In *The Last Temptation of Christ v. Chile*,³¹⁷ the Court ruled that prior censorship of *The Last Temptation of Christ* by the Cinematic Censorship Council was unconstitutional. At issue in the case were Article 13.5 and 13.4 OF WHAT?????. Article 13.5 establishes the positive obligation of the State to avoid the dissemination of information that could result in illegal actions, in particular, propaganda for war and any advocacy of national, racial, or religious

or electronic communication must be prohibited by law.” Declaration of Principles on Freedom of Expression, principle 5, Inter-Am. Comm’n on Hum. Rts. (2000), available at <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=26> (last accessed Oct. 31, 2015).

³¹¹ Article 13.4 provides that, “[n]otwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.” American Convention on Hum. Rts., art. 13.4, Org. of Am. States (1969), available at <http://www.cidh.org/Basicos/English/Basic3.American%20Convention.htm> (last accessed Oct. 31, 2015).

³¹² *Kimel v. Argentina*, *supra* note 301 at paras. 73-78.

³¹³ *Id.* at paras. 93-94.

³¹⁴ *Palamara-Iribarne v. Chile*, Series C No. 135, Judgment (Inter-Am. Ct. of Hum. Rts. Nov. 22, 2005), available at http://corteidh.or.cr/docs/casos/articulos/seriec_135_ing.pdf (last accessed Oct. 31, 2015).

³¹⁵ *Id.* at para. 88.

³¹⁶ Democracy and Human Rights in Venezuela, paras. 385-97, Inter-Am. Comm’n on Hum. Rts. (2009), available at <http://www.cidh.org/pdf%20files/VENEZUELA%202009%20ENG.pdf> (last accessed Oct. 31, 2015)

³¹⁷ “*The Last Temptation of Christ*” v. Chile, Series C No. 73, Judgment (Inter-Am. Ct. of Hum. Rts. Feb. 5, 2001), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_73_ing.pdf (last visited Oct. 31, 2015).

hatred that could incite lawless violence against any person or group of persons.”³¹⁸ Article 13.4 enables the State to regulate access to information for the moral protection of childhood and adolescence.³¹⁹ The court found that the case did not fall within either of these exceptions to freedom of expression set forth in Article 13. The court found Article 13 to be violated by the prohibition of the release of the film, “since the Martin Scorsese film has been defined as a work of art with a religious content that does not attempt to disseminate propaganda.”³²⁰ Further, the Court found that the precautionary prohibition of a book or film based on the claim that it damaged the honor of certain persons amounted to prior censorship.³²¹

D. Affirmative Obligations of the State

As alluded to above, Article 13 explicitly imposes affirmative obligations on the State to make unlawful and subject to criminal penalties the dissemination of information that could generate violence and unlawfulness by one group against another group. The Article has also been interpreted to impose affirmative obligations on the State to protect journalists and artists from acts of physical abuse and prior censorship.³²²

In *Ríos v. Venezuela*, verbal and physical attacks on journalists employed by RCTV in a climate of high political and social polarization resulted in affirmative obligations on the state to protect the journalists. Further, the State overextended its reach through the Partial Regulations on Television Broadcasts Decree 2,625 in targeting RCTV for non-compliance with standards prohibiting violent content broadcast during classified time frames. The Court found that the intent of State letters to RCTV station managers was to pressure the directors to alter their content affecting alleged victims who testified to abuses by the State.³²³ Though there was insufficient evidence to find a regulation amounting to an indirect restriction on freedom of speech, the Court reminded the State of its obligation to keep restriction on speech narrowly tailored.³²⁴

³¹⁸ American Convention on Hum. Rts., art. 13.5, Org. of Am. States (1969), available at <http://www.cidh.org/Basicos/English/Basic3.American%20Convention.htm> (last accessed Oct. 31, 2015); see also Democracy and Human Rights in Venezuela, para. 480, Inter-Am. Comm’n on Hum. Rts. (2009), available at <http://www.cidh.org/pdf%20files/VENEZUELA%202009%20ENG.pdf> (last accessed Oct. 31, 2015) (discussing *Globovision v. Venezuela* and signaling a more broad prohibition on prior censorship: “in accordance with Principle 5 of the Declaration of Principles: ‘[p]rior censorship, direct or indirect interference in or pressure exerted upon any expression, opinion or information transmitted through any means of oral, written, artistic or electronic communication must be prohibited by law. Restrictions to the free circulation of ideas and opinions, as well as the arbitrary imposition of information and the imposition of obstacles to the free flow of information, violate the right to freedom of expression.’”) (citations omitted).

³¹⁹ American Convention on Hum. Rts., art. 13.4, Org. of Am. States (1969), available at <http://www.cidh.org/Basicos/English/Basic3.American%20Convention.htm> (last accessed Oct. 31, 2015).

³²⁰ “*The Last Temptation of Christ*” v. Chile, Series C No. 73, Judgment, p. 23 (Inter-Am. Ct. of Hum. Rts. Feb. 5, 2001), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_73_ing.pdf (last visited Oct. 31, 2015).

³²¹ *Id.* at p. 15.

³²² *Id.* at pp. 27-28; see also *Ríos v. Venezuela*, Series C No. 194, Judgment, para. 399 (Inter-Am. Ct. of Hum. Rts. Jan. 28, 2009), available at http://corteidh.or.cr/docs/casos/articulos/seriec_194_ing.pdf (last visited Oct. 31, 2015); *Ricardo Canese v. Paraguay*, Series C No. 111, Judgment, para. 195 (Inter-Am. Ct. of Hum. Rts. Aug. 31, 2004), available at http://corteidh.or.cr/docs/casos/articulos/seriec_111_ing.pdf (last visited Oct. 31, 2015).

³²³ *Ríos v. Venezuela*, *supra* note 322 at para. 353.

³²⁴ *Id.* at para. 357.

Issues on the horizon for the Inter-American Commission include the requirement of certain credentials for journalists, such as a diploma in journalism and professional registration with the Ministry of Labor as a condition for practice, which was found to be unconstitutional in Brazil under Article 13.³²⁵

³²⁵ See Antonio Moreira Maués, Supra-Legality of International Human Rights Treaties and Constitutional Interpretation, 18 SUR Int'l J. on Hum. Rts. 205, 211 (June 2013), available at <http://www.conectas.org/en/actions/sur-journal/issue/18/1000446-supra-legality-of-international-human-rights-treaties-and-constitutional-interpretation> (last visited Oct. 31, 2015) (“In the judgment of Extraordinary Appeal No. 511,961 (J. 17/06/2009), the Supreme Court declared the requirement for journalists to have a higher education degree, stipulated in article 4, item V of Decree-Law No 972/1969, unconstitutional”). Subsequent to this judgment, No. 972/1969 was repealed and new legislation was drafted.