

Free speech as international human rights law

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Sources of international human rights law (Article 38(1) of Statute of the International Court of Justice)

- Customary international law (**applicable to all states**): Jus Cogens, etc.
 - Ex) Prohibition of slavery, genocide, murder/ disappearances, torture, prolonged arbitrary detention, and systematic racial discrimination.
- International human rights treaties (**applicable only to states which ratified the relevant treaty**)
- General principles of law recognized by civilized nations found in, for example, decisions of international tribunals and national courts;
- As subsidiary means: (i) judicial decisions (international, regional, and domestic level) and (ii) writings of most highly qualified publicists as a subsidiary means.

⇒ How to develop the existing norm to protect the “digital” aspects of rights/ or address human rights violation caused by advanced technologies.

International human rights treaties

- Nine international human rights treaties:
 - [International Covenant on Civil and Political Rights. \(ICCPR\)](#)
 - [International Covenant on Economic, Social, and Cultural Rights \(ICESCR\)](#)
 - [International Convention on the Elimination of All Forms of Racial Discrimination\(ICERD\)](#)
 - [Convention on the Elimination of All Forms of Discrimination Against Women\(CEDAW\)](#)
 - [Convention on the Rights of the Child \(CRC\)](#)
 - [Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment and Punishment \(CAT\)](#)
 - [Convention on the Rights of Persons with Disabilities \(CRPD\)](#)
 - [International Convention for the Protection of All Persons From Enforced Disappearances \(CPED\)](#)
 - [International Convention on the Protection of the Rights of Migrant Workers and Members of Their Families\(ICMW\)](#)
- US has ratified only **ICCPR (1992); ICERD (1994); and CAT (1994).**

Available fora – UN level

- Political bodies/ process: UN Human Rights Council and special procedure
 - Universal Periodic Review, accepting NGO reports
 - US's review: Oct. – Nov. 2025
 - [Special Procedure](#), including [Special Rapporteur on the human rights of migrants](#); Working Group on the issue of human rights and transnational corporations and other business enterprises
 - Accepting reports to Special Rapporteurs, requesting the SR(s) to issue a letter to a government to seek clarifications on the reported human rights violations
 - From time to time open [a call for input](#) for the preparation of a report
- Quasi-judicial bodies: Treaty bodies
 - Periodic review of member states of the relevant treaty
 - US's review: ICCPR (just finished in Nov. last year); CAT (next review not yet scheduled); CERD (finished in 2022).
 - Individual complaint mechanism (the US has not accepted the competence of any treaty body to examine individual complaints).
 - Call for input for the preparation of General Comments (or General Recommendations)
- Office of high commissioner of human rights
 - From time to time open [a call for input](#) for the preparation of a thematic reports

Available fora –

- UN Human Rights Committee
- UN Human Rights Council
- Regional level
 - The American Convention on Human Rights, which is a regional equivalent to ICCPR. The US signed but never ratified.
 - Inter-American human rights commission
 - Individuals, groups of individuals, and non-governmental organizations recognized in any OAS Member State may submit complaints (“petitions”) concerning alleged violations of the **American Declaration of the Rights and Duties of Man**, American Convention on Human Rights, and other regional human rights treaties.
 - Inter-American court of human rights
 - to enforce and interpret the provisions of the American Convention on Human Rights.
 - Review the cases referred to the court by the commission.
 - European Court of Human Rights
 - African Court of Human and People’s Rights

ICCPR

Article 19

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

Article 20

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

Free speech, why?

- All 200 or so constitutions put free speech at the top. Why?
- Intrinsic value? But non-communicative behavior can be intrinsically valuable.
- Instrumental value? “Marketplace of Ideas as the best way to truth”? So speech is protected only to serve some collectivistic interest such as democracy. Then ok to punish clearly false speech?
- Let’s stop asking why. Let’s ask why not. Why we should not restrict speech?

Canonical View of Freedom of speech 1

- Speech is interactive, i.e., causes effect only through processing of the receivers → The harms caused cannot be attributed solely to the speaker or to the content because they are mediated. → Only speech likely to cause specific harms can be regulated
- **US** “clear and present danger” test; e.g. “falsely shouting fire in a crowded theater or on a public transportation vehicle (bomb hoax law)” vs **EU** “necessary for a democratic society” and “defined by clear law” test)
- ICCPR 3-Step test: Speech restriction must be:
 - (1) defined by law to protect
 - (2) legitimate state interest and
 - (3) necessary (appropriate means + least restrictive means) and proportionate.

Canonical View of Freedom of speech 2

- → Permissible speech regulations (target harms):
 - defamation (3P shunning the subject)
 - fraud(taking away of the listener's property)
 - copyright (depriving the author's market),
 - bomb hoax law(public facilities) (causing panic, "verbal act")
 - perjury (misleading on-going judicial fact-finding)
 - forgery (abusing people's trust in documents to harm them)
 - child pornography (harm in production caused by demand),
 - hate speech regulation (more on majority's hate speech on minority than the other way around b/c the former is more likely to cause the intended result)
 - OBSCENITY: A BIG EXCEPTION! (deterioration of morality)

False News

- How about “false news” crime?
- NO specific harm anticipated (different from defamation which has a specific victim)
- History of being abused by authoritarian Gs for suppressing truthful dissidence
- Value of inaccuracy, intentional lies

*Please think about which step of ICCPR 3-step test these facts feed into.

International human rights standards on “false news” crime

- R v. Zundel (Canada, 1992): false news regulation unconstitutional
- Chavanduka & Choto (Zimbabwe, 2000): President Mugabe’s persecution of 2 reporters on “spreading falsity to cause alarm”
- Minerva case (Korea, 2010): A blogger charged with spreading false information about SKG’s exchange rate policies
- Then, how to fight false news?:
- **Marcelo Mendoza Study on Twitter on 2010 Chile earthquake: proven self-corrective capacity**

Value of Inaccuracy for Democratic Society (*Zundel*)

- “Should a concerned citizen fear prosecution for stating in the course of political debate that a nuclear power plant in her neighbourhood “is destroying the health of the children living nearby” for fear that scientific studies will later show that the injury was minimal?
- “Should a medical professional be precluded from describing an outbreak of meningitis as an epidemic for fear that a government or private organization will conclude and a jury accept that his statement is a deliberate assertion of a false fact?
- “Should a member of an ethnic minority whose brethren are being persecuted abroad be prevented from stating that the government has systematically ignored his compatriots' plight?”

Value of intentional lies (*Zundel*)

- “Exaggeration -- even clear falsification -- may arguably serve useful social purposes linked to the values underlying freedom of expression.
- “A person fighting cruelty against animals may knowingly cite false statistics in pursuit of his or her beliefs and with the purpose of communicating a more fundamental message, e.g., 'cruelty to animals is increasing and must be stopped'.
- “A doctor, in order to persuade people to be inoculated against a burgeoning epidemic, may exaggerate the number or geographical location of persons potentially infected with the virus.
- “An artist, for artistic purposes, may make a statement that a particular society considers both an assertion of fact and a manifestly deliberate lie; consider the case of Salman Rushdie's *Satanic Verses*, viewed by many Muslim societies as perpetrating deliberate lies against the Prophet.
- “All of this expression arguably has intrinsic value in fostering political participation and individual self-fulfilment.”

Virtual Child Sexual Abuse Material

- Strict criminalization of real child's erotic nude photos b/c of permanent harms on mental growth of the child. Even possession is criminalized. (Korea: minimum sentencing, hiring bans, residence reporting obligations)
- **Apply the same restrictions on virtual child's erotic nudes?**
- US: Ashcroft unconstitutionality decision → separate provision for non-real fashioned after obscenity
- UK indecent image of children's law
- Swiss study: no causal relationship b/w obscene material and sex crimes. (necessary?) Even if casually related, should murder movie makers be punished for murders? (proportional?)
- "20 times increase in child sex offenses"? Police web surfing for virtual cases, diverted from real child (appropriate?)
- Court has no segregated data for real v virtual → weak sentencing on real cases, e.g., The Welcome To Video incident out of South Korea (appropriate?)

Criminal defamation

- UN Human Rights Committee, General Comment 34: “All State Parties should consider decriminalizing defamation, and incarceration should never be an appropriate remedy”
- UK abolished, South Africa is abolishing, and Zimbabwe Constitutional Court struck it down.
- Where is **“my” reputation**? Is it in me? Isn’t it what others think of me? So, if my reputation is subject to capricious thinking of Others, can the State punish someone for lowering my reputation to the same extent for injuring my arm?
- Is it proportionate to restrict bodily freedom to protect Others’ opinion of me?

Truth defamation

- UN Human Rights Committee GC34: “Truth shall be a defense”. Why should we be restricted in speaking truths about others just because it is uncomfortable to them?
- Truth is needed for self-protection, justice, economy. (legitimate state interest?)
- “Presumption of innocence”? – applicable to powerful state not to powerless individuals who need truthful information to protect themselves from harms.
- “Public Interest” exception?
 - Media speaker vs non-media speaker (esp. victims)
 - Collectivistic concept v. pluralistic ideal
 - E.g. the fact of K.S. Park’s plagiarism 20 years ago – relevant to no one?
 - 10-15% of cases in defense of public officials
- Privacy – a whole another reason for restricting or punishing information . E.g. forced coming-out is privacy-infringing but what if I voluntarily did “coming out”? Should people be punished for relaying that news to others?

Statements of feelings and opinions

- UN Human Rights Committee GC34 “Statements not subject to verification shall not be punished”
- Statements of feelings and opinions; statements of religious beliefs
- Can statements of feelings and opinions really lower another’s reputation? Do people act upon others’ feelings and opinions? E.g. “City is building subway station here”, “I think that City will. . .” → necessary?
- Cohen - “f___ the draft” – Words serve dual functions including expression of emotions. Some words are necessary to express certain feelings. Banning those words means banning those feelings.
- Germany – Privateklage/ Japan – 100 USD fine / Taiwan – 300 USD
- Hate speech vs. general insult

Hate speech

- ICCPR Article 20: Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.
- Such hate speech usually involves factual or non-factual attacks against groups of people, and therefore it is often called “defamation”
- But, not all such advocacy gives rise to liability but only those that are likely to cause actual “discrimination, hostility or violence” → pre-existing state-sponsored OR majority-sponsored discriminatory structure ready to function upon giving of SIGNALS

Another theory: "Chilling effects"

- Definition: lawful speech voluntarily restricted b/c of burden of proving that it is lawful
- Speech is more vulnerable to chilling than other behaviors.
- Eating, sleeping, and other physiological behaviors are not chillable.
- Why not let speech be chilled? → because intrinsic/extrinsic value of speech?
- **Prior censorship (pre-publication) – Chilling effects**
- **Administrative censorship (post-publication)** – Bantam Books v. Sullivan, France HADOPI/Avia decision, Spain Women on Web decision, Philippines

Bantam Books v Sullivan

- Youth Purity Protection Commission sending notices of obscenity to book stores and book distributors.
- We are not the first court to look through forms to the substance and recognize that informal censorship may sufficiently inhibit the circulation of publications to warrant injunctive relief
- What Rhode Island has done, in fact, has been to subject the distribution of publications to a system of prior administrative restraints, since the Commission is not a judicial body and its decisions to list particular publications as objection- able do not follow judicial determinations that such publications may lawfully be banned.
- We do not hold that law enforcement officers must renounce all informal contacts with persons suspected of violating valid laws prohibiting obscenity. Where such consultation is genuinely undertaken with the purpose of aiding the distributor to comply with such laws and avoid prosecution under them, it need not retard the full enjoyment of First Amendment freedoms.
- What is the court's concern? Avoiding judicial proceedings ultimately