

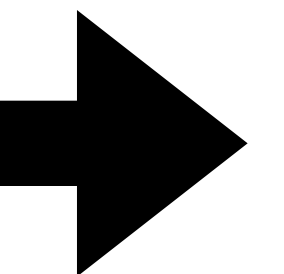
ARTICLE<sup>19</sup>

# ONLINE MODULE ON FREEDOM OF EXPRESSION

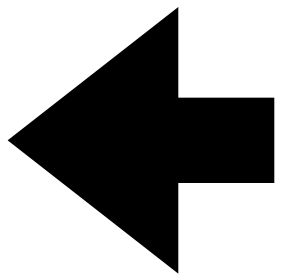
**For SUSMA members in Turkey**



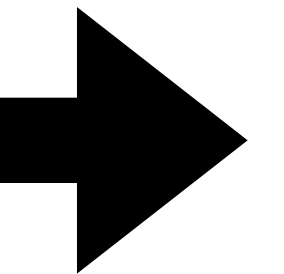
Funded by the European Union



# Chapter 1: The Right to Freedom of Expression



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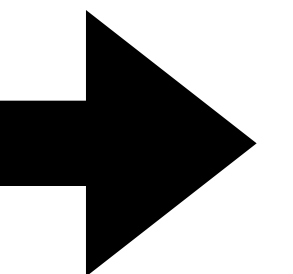
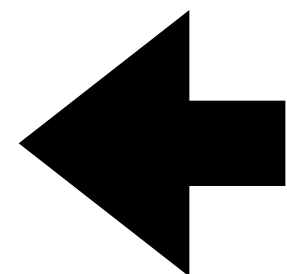
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# **Lesson 1:1 Defining freedom of expression.**

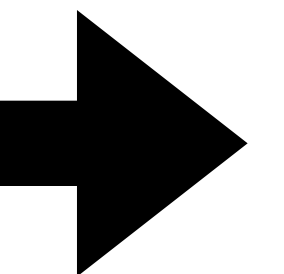
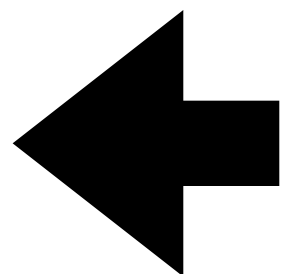
## **Defining freedom of expression**

What is freedom of expression and where does the right to freedom of expression come from? Why is freedom of expression considered such an important right and what are the principle justifications that this right should be upheld?

This lesson will present you with a history of the right to freedom of expression and introduce you to the key documents which define and justify it as a cornerstone right.



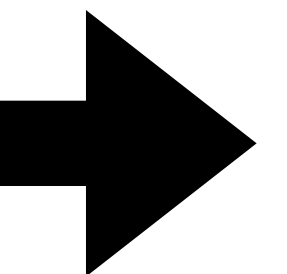
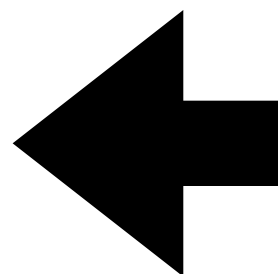
**What is the right to freedom of  
expression and information?**



# International law

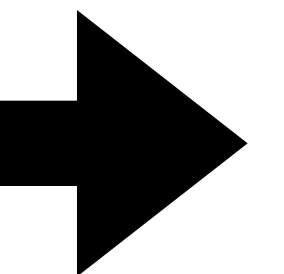
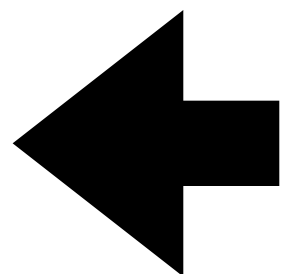
## Universal Declaration of Human Rights (UDHR)

The **Universal Declaration of Human Rights** is the first provision of international law on the freedoms of expression and information. It was adopted in 1948, in the aftermath of the Second World War, by the United Nations General Assembly. The entire framework of international human rights law and the international human rights system under the United Nations is based upon this Declaration.



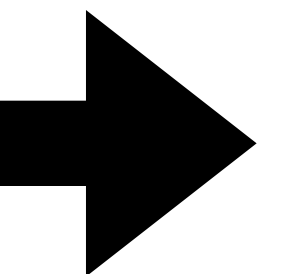
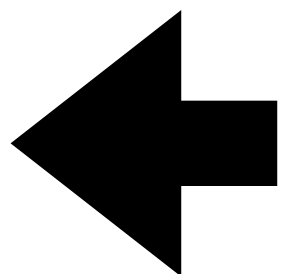
## **Article 19, Universal Declaration of Human Rights (1948)**

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



## **International Covenant on Civil and Political Rights (ICCPR)**

The Universal Declaration is a 'declaration' and therefore not legally binding, but it has inspired the body of international human rights treaties which are binding, including the International Covenant on Civil and Political Rights (ICCPR), adopted in 1966. Article 19 of ICCPR concern the freedoms of expression and information.



## **Article 19, International Covenant on Civil and Political Rights (1966)**

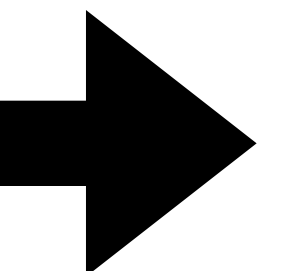
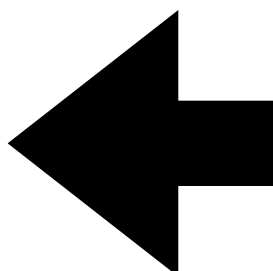
1. Everyone shall have the right to hold opinions without interference.

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.

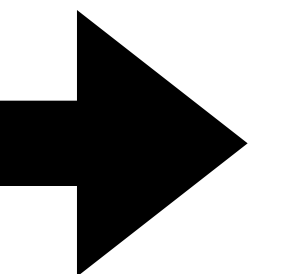
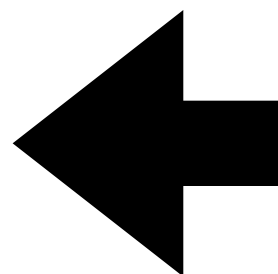




## **General Comment No 34 (2011)**

The Human Rights Committee, the United Nations human rights treaty body responsible for supervising the implementation of the International Covenant on Civil and Political Rights, including Article 19, have addressed these questions and others in General Comment No 34 (2011).

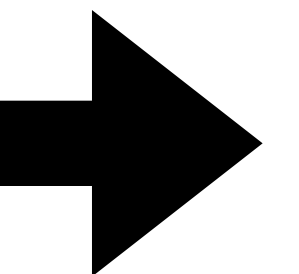
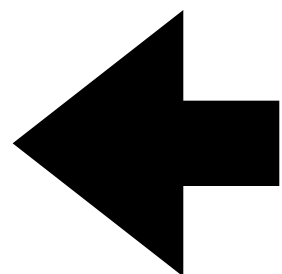
General Comment No 34 is considered to be the most important interpretation of international law on freedom of expression and freedom of information. It should be the first place journalists, activists and advocates go when they want to know what Article 19 of ICCPR means.



At the regional level, the European Convention of Human Rights (ECHR) is the legal instrument that sets standards for the protection of human rights. Article 10 of the ECHR states:

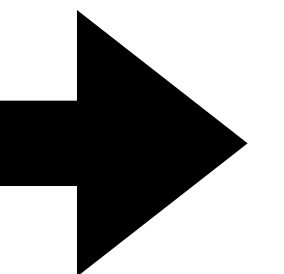
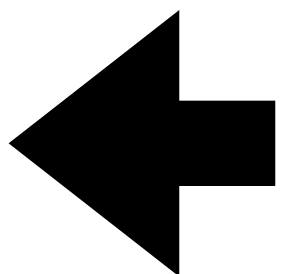
“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, 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 rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”



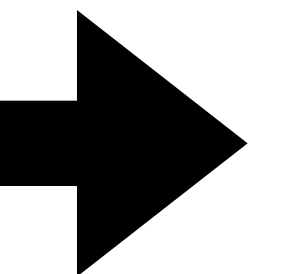
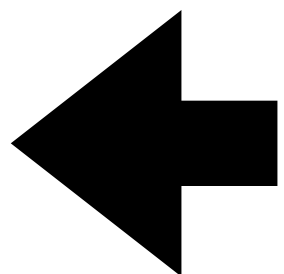
## **Handyside v the UK, European Court of Human Rights (1976) paragraph 49:**

“Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man (...) it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness, without which there is no ‘democratic society’”.

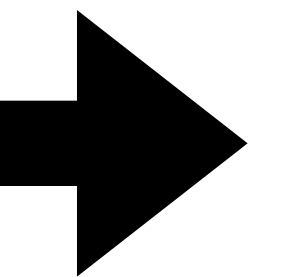
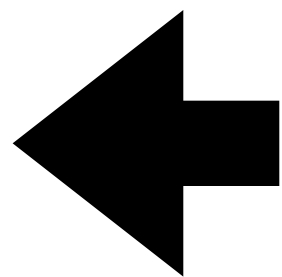


# National laws

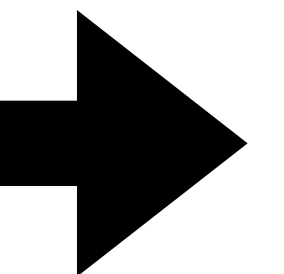
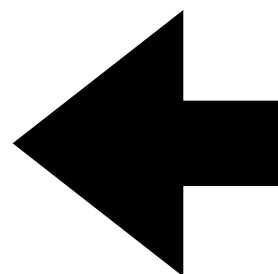
As a right, freedom of expression – often called free speech – has long been recognised in states' domestic laws, particularly their constitutions and Bills of Rights. Turkey's Constitution also recognises the right to freedom of expression in Article 25.



**Why is freedom of the media  
important?**



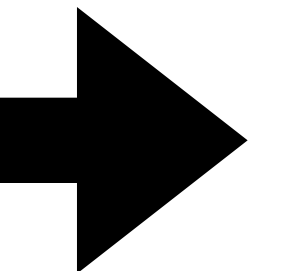
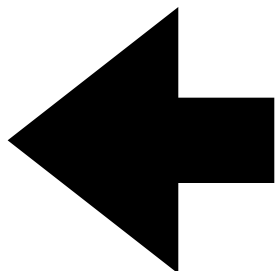
Freedom of the media is derived from the broader provision of freedom of expression. It is included in Article 19 of UDHR, which specifies that ideas and information can be shared “through any media”.



## **A) Media freedom promotes democracy**

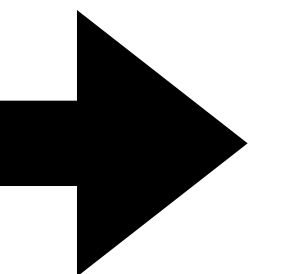
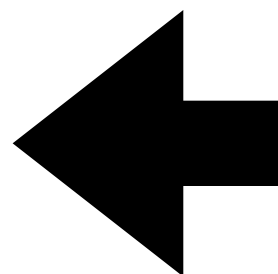
The most important justification is that the media is a crucial part of a democratic society – the “Fourth Estate” (Edmund Burke) and a “watchdog” over the branches of state, public actors and also non-state actors such as corporations.

Media freedom is therefore essential to the development of a “public sphere” within which to debate policies, influence agendas and examine the action of public officials and institutions, as well as private actors.



## **B) Media freedom promotes development**

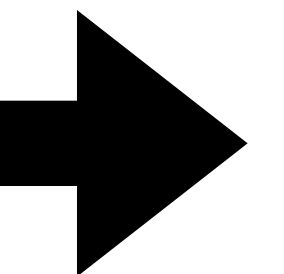
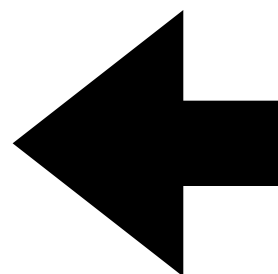
Media freedom also promotes development. As Nobel prize-winning economist Amartya Sen has stated:





## **Amartya Sen**

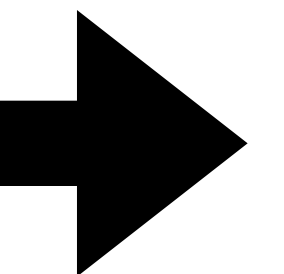
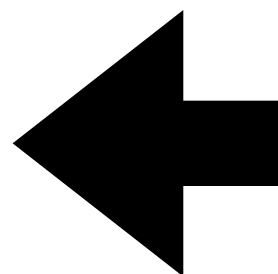
“In the terrible history of famines in the World, no substantial famine has ever occurred in any independent and democratic country with a free press (...). While India continued to have famines under British rule right up to independence (the last famine, which I witnessed as a child, was in 1943, four years before independence), they disappeared suddenly with the establishment of a multiparty democracy and a free press”.



# Conclusion

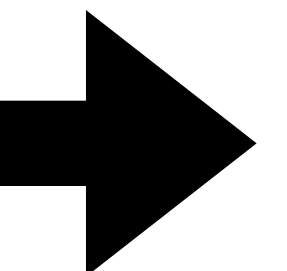
As you read through this module keep in mind the arguments above. They often appear together to support each other as you can see in General Comment No 34.

One of the most important illustrations of this can be seen in a key paragraph of a case called *Handyside v the UK* (1976) (paragraph 49). This is the European Court of Human Rights (ECtHR)'s most famous and widely-cited judgement of any regional human rights court on the meaning of freedom of expression. We will cover the role of the ECtHR in the next lesson.



# References to materials:

- The Constitution of the Republic of Turkey: <http://www.judiciaryofturkey.gov.tr/Current-version-of--Constitution-of-the-Republic-of-Turkey--including-latest--amendments> (in English); Türkiye Cumhuriyeti Anayasası: <https://www.mevzuat.gov.tr/MevzuatMetin/1.5.2709.pdf> (in Turkish).
- Universal Declaration of Human Rights: <https://www.un.org/en/universal-declaration-human-rights/> (in English); İnsan Hakları Evrensel Beyannamesi <http://www.un.org.tr/humanrights/images/pdf/insan-haklari-evrensel-beyannamesi.pdf> (in Turkish).
- UN International Covenant on Civil and Political Rights: <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> (in English); Medeni ve Siyasi Haklara İlişkin Uluslararası Sözleşme: <http://www.un.org.tr/humanrights/images/pdf/3-MedeniVeSiyasiHaklaralliskinSozlesme.pdf> (in Turkish).
- General Comment No 34: <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf> (in English); unofficial translation: Medeni ve Siyasi Haklara İlişkin Uluslararası Sözleşme Genel Görüş No.34 [http://ihop.org.tr/wp-content/uploads/2007/04/IHK-Genel\\_Yorum-No34.pdf](http://ihop.org.tr/wp-content/uploads/2007/04/IHK-Genel_Yorum-No34.pdf).
- European Convention on Human Rights: [https://www.echr.coe.int/Documents/Convention\\_ENG.pdf](https://www.echr.coe.int/Documents/Convention_ENG.pdf) (in English); Avrupa İnsan Hakları Sözleşmesi [https://www.echr.coe.int/Documents/Convention\\_TUR.pdf](https://www.echr.coe.int/Documents/Convention_TUR.pdf) (in Turkish).
- Amartya Sen, “Democracy as a Universal Value,” Journal of Democracy 10, no.3 (1999): 3-17, [https://www.unicef.org/socialpolicy/files/Democracy as a Universal Value.pdf](https://www.unicef.org/socialpolicy/files/Democracy_as_a_Universal_Value.pdf)
- Case of HANDYSIDE v. THE UNITED KINGDOM (Application no. 5493/72) [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-57499%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57499%22]})



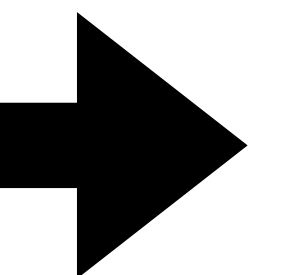
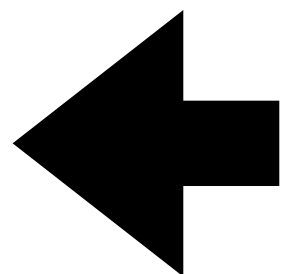
# **Lesson 1:2 Enforcing freedom of expression**

## **Part 1: international and regional mechanisms**

In this lesson, we will look at how the rights mentioned in the previous lesson may be implemented and enforced in practice.

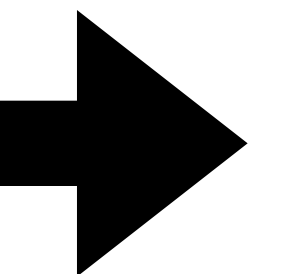
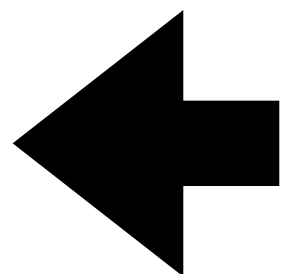
States have an obligation under international law make these rights a reality through national laws and policies.

National human rights institutions and civil society organisations also have an important role to play in protecting and promoting effective implementation of human rights at the national level.



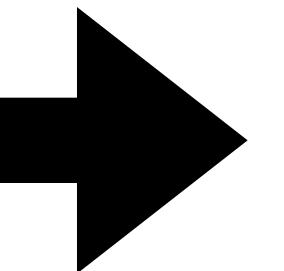
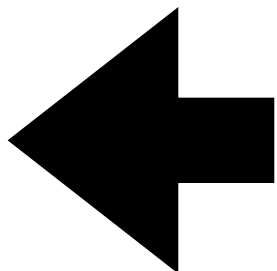
# United Nations human rights bodies

The United Nations has a range of human rights bodies which each have a number of functions: monitoring, standard-setting, awareness-raising and adjudicating. The texts produced by the United Nations human rights bodies are not necessarily legally binding but they are useful for international advocacy on holding states to account for human rights violations.



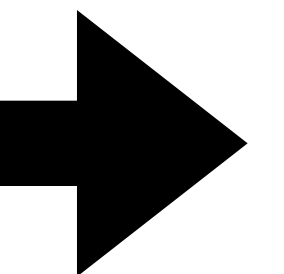
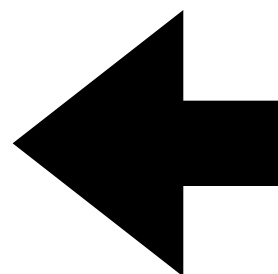
# **Key United Nations Rights bodies for freedom expression**

1. United Nations Human Rights Committee
2. United Nations Human Rights Council
3. Special Rapporteur on Freedom of Opinion and Expression



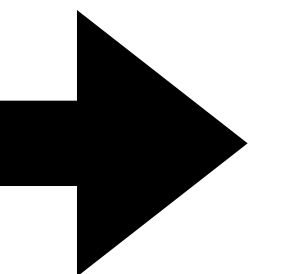
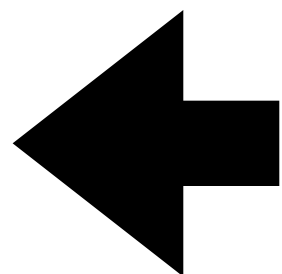
# 1. United Nations Human Rights Committee

The Human Rights Committee is the key UN “treaty body” on the freedoms of expression and information. It supervises the implementation of the International Covenant on Civil and Political Rights (including Article 19 on freedom of expression).



The Human Rights Committee has a range of functions:

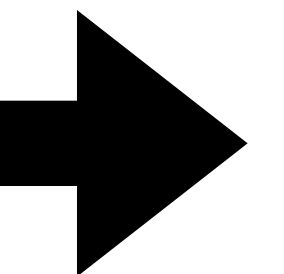
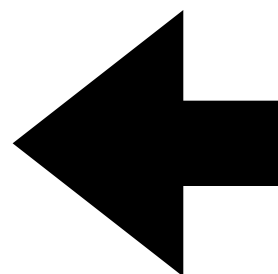
- a. It sets standards by developing General Comments (such as General Comment No. 34), which flesh out the meaning of particular provisions of the ICCPR
- b. It monitors the performance of States that have ratified the ICCPR and are as a result obliged to comply with its provisions and update the Human Rights Committee through periodic reports;
- c. It examines complaints from individuals from States who have ratified the Optional Protocol to the ICCPR. This is a separate treaty but attached to the ICCPR. In this way, the Human Rights Committee exercises a 'quasi-judicial function', similar to a court, although its decisions are not binding and do not have judicial weight.





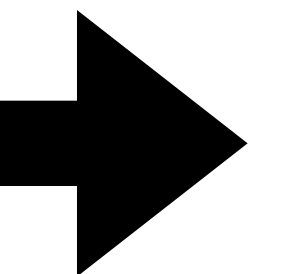
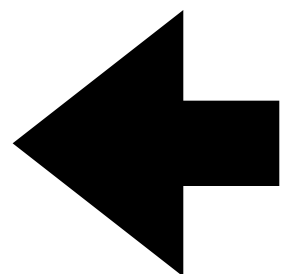
## 2. United Nations Human Rights Council

This is the central UN Charter-based human rights body (the UN General Assembly and the UN Security Council are the other two UN Charter-based bodies). The UN Charter is an international treaty, which establishes the UN itself.



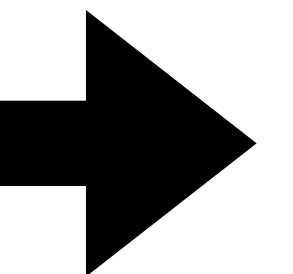
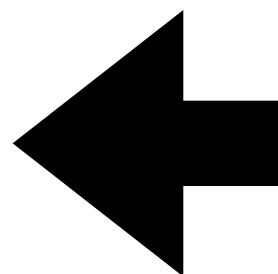
There are three areas of the UN Human Rights Council's work to be aware of:

- i) It may adopt resolutions, which are not binding but are nevertheless considered “soft law” (i.e. agreements, principles and declarations – as against “hard law”, which is instead binding)

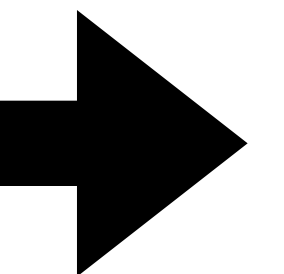
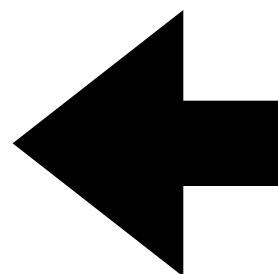


- ii) The Human Rights Council has a process for reviewing the human rights record of all UN Member States once every four to five years. This is called the Universal Periodic Review (UPR). The review is a peer to peer mechanism undertaken on the basis of a State's human rights treaty obligations and commitments. Through this process, the State under review to address its own human rights situation, including with respect to the freedoms of expression and information.

NGOs as stakeholders can engage with this process by submitting alternative UPR reports highlighting their monitoring of States' compliance with human rights standards and providing some recommendations to the State.

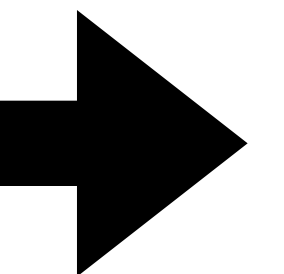
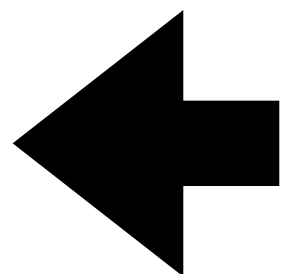


- iii) There are a number of special independent experts, called UN Special Rapporteurs, who are appointed by the Human Rights Council and are mandated to report on human rights in specific countries or on thematic issues, including on the right to freedom of opinion and expression.

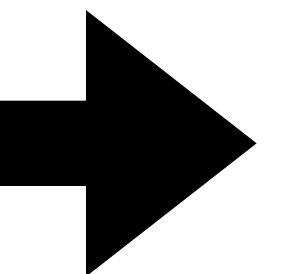
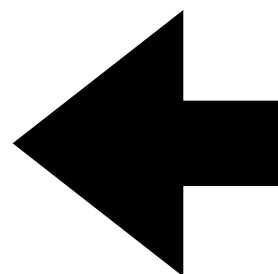


# 3. Special Rapporteur on Freedom of Opinion and Expression

The Special Rapporteur on freedom of expression and opinion and expression is an independent expert of the UN, who has the role of gathering all relevant information, wherever it may occur, relating to violations of the right to freedom of opinion and expression. The Special Rapporteur also has the mandate of seeking, receiving and responding to credible and reliable information from Governments, NGOs and any other parties who have knowledge of these cases; and of making recommendations and providing suggestions on ways and means to better promote and protect the right to freedom of opinion and expression in all its manifestations.

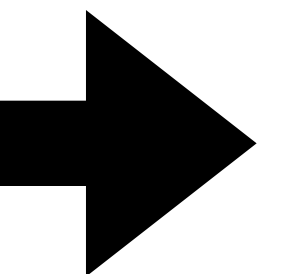


The Special Rapporteur submits annual reports to the Human Rights Council and to the General Assembly. This usually focuses on issues of particular concern to the mandate-holder. The Special Rapporteur presents the annual report and participates in person in interactive discussions with States and NGOs at the General Assembly and at the Human Rights Council. The Special Rapporteur can undertake fact-finding missions to States to assess the situation with respect to protection and promotion of the right to freedom of opinion and expression in the specific State.



# How does the Special Rapporteur on freedom of opinion and expression support advocacy for the enforcement of these rights?

- a. The considerations of the Special Rapporteur on freedom of opinion and expression tend to be much more detailed than other texts produced by the other UN human rights bodies;
- b. The recommendations included by the Special Rapporteur in the thematic and country reports tend also to reflect a more progressive understanding of international law and are therefore likely to be more far reaching (example: <https://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/ContentRegulation.aspx> );
- c. The recommendations are also more likely to concern the role of non-state actors – such as the media and internet intermediaries – in promoting the freedom of expression and information.

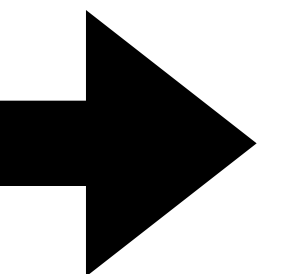
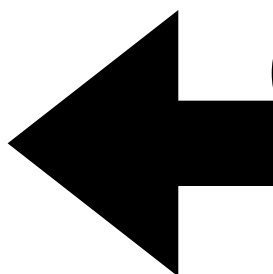


The European Court of Human Rights (ECtHR) is based on a regional human rights treaty (the European Convention of Human Rights). Its decisions are legally binding and have the force of international law. The Court has specific criteria which need to be met before individuals and groups are able to bring cases before it. These include the exhaustion of all remedies at domestic level for a case to be considered admissible by the Court.

Once a case is accepted by the Court and communicated to the State, a way for NGOs, civil society and individuals of interacting with the Court is to submit *amicus curiae* briefs or third party interventions, where they can argue for progressive interpretation of the relevant right(s) involved in a specific case.

Example: <https://www.article19.org/law-and-policy/civil-society-tells-strasbourg-court-blanket-ban-on-wikipedia-is-disproportionate/>

The ECtHR has jurisdiction over Turkey, as a member of the Council of Europe. Once the Court makes a judgment, the State concerned is required to *execute* the decision, which means giving it effect to the judgment within its jurisdiction, which can imply both individual measures (e.g. release) and more general ones (the law has to be changed).

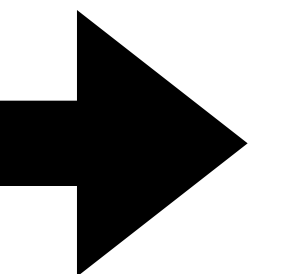
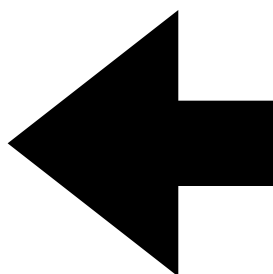




# Conclusion

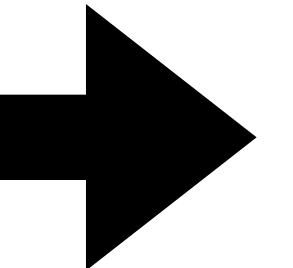
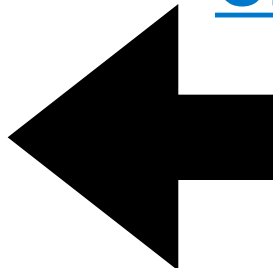
This lesson has outlined some of the international human rights bodies and courts for the implementation and enforcement of freedoms of expression and information at the global or regional level.

In the next lesson we will look at Turkey's court system and its role in the implementation and enforcement of the rights to freedom of expression and information at a national level.



# References to materials:

- Special Rapporteur on Freedom of Opinion and Expression <http://www.ohchr.org/EN/ISSUES/FREEDOMOPINION/Pages/OpinionIndex.aspx>
- Human Rights Committee: <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIntro.aspx>
- Human Rights Council: <https://www.ohchr.org/en/hrbodies/hrc/pages/home.aspx>
- The Universal Periodic Review of Human Rights Council <http://www.ohchr.org/EN/HRBodies/UPR/Pages/BasicFacts.aspx>; info page on Turkey's UPR: <https://www.ohchr.org/EN/HRBodies/UPR/Pages/TRindex.aspx>
- European Court of Human Rights, briefing [http://www.echr.coe.int/Documents/Court\\_in\\_brief\\_ENG.pdf](http://www.echr.coe.int/Documents/Court_in_brief_ENG.pdf)
- Joint declaration on universality and the right to freedom of expression, 4 May 2014 <http://www.article19.org/resources.php/resource/37539/en/joint-declaration-on-universality-and-the-right-to-freedom-of-expression> (drafted by ARTICLE 19 together with Centre for Law and Democracy).
- CoE, Department of Execution of Judgments of the European Court of Human Rights, <https://www.coe.int/en/web/execution>



# Lesson 1:3 Enforcing freedom of expression

## Part 2: National mechanisms

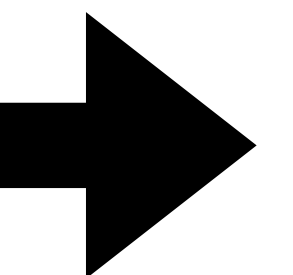
National law provisions:

***Turkish Constitution:*** Articles 25-32 address the right to freedom of thought and opinion, freedom of expression and dissemination of thought.

Article 25 – freedom of expression: “everyone has the freedom of thought and opinion. No one shall be compelled to reveal his/her thoughts and opinions for any reason or purpose; nor shall anyone be blamed or accused because of his/her thoughts and opinions.

Article 28 - freedom of the press: “The press is free, and shall not be censored. The establishment of a printing house shall not be subject to prior permission or the deposit of a financial guarantee” (subsequently amended). *Press law No. 5187*

Article 3 – freedom of press: “The press is free. This freedom includes the rights to acquire and disseminate information, and to criticize, interpret and create works.

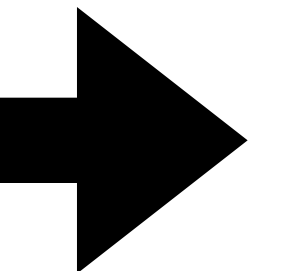
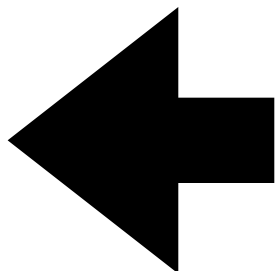


The Turkish criminal court system is composed of three layers:

1. Lower Courts

2. Appellate Courts

3. The Constitutional Court

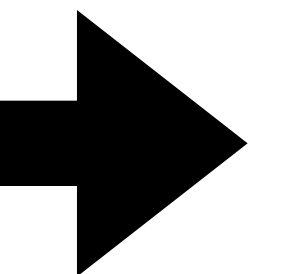
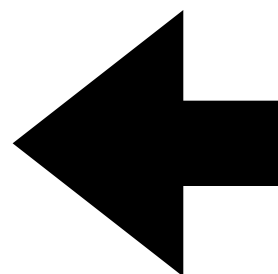


# LOWER COURTS

**Criminal Courts of Peace** (Sulh Ceza Hakimliği) - established by Law No. 6545 Art. 48.

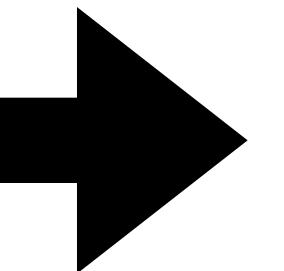
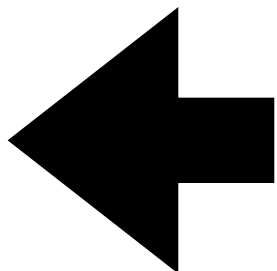
It makes decisions during criminal investigations. E.g., bail, search warrants, etc.

Decisions can be reviewed by another judgeship of peace.



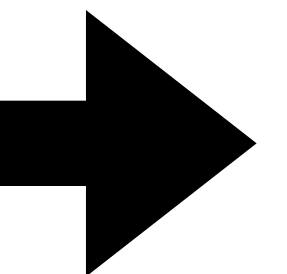
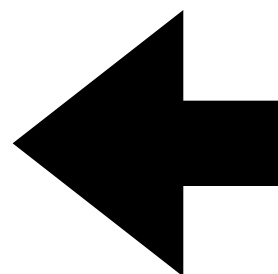
**Criminal Court of First Instance** (Asliye Ceza Mahkemesi) - established by Law No. 5235 Art. 11.

It hears all adult criminal cases for crimes that can be punished with up to 10 years' imprisonment; except cases of terrorism (Assize Courts), intellectual property and bankruptcy cases (these have their own special courts).



**Assize Court** (Ağır Ceza Mahkemesi) – established by Law No. 5235 Art. 12.

It hears cases of aggravated life sentence, life sentence, +10 years. It can also hear **special cases by subject:** terror, coup, crime against constitutional order, drug trafficking - or **by status:** some persons who hold a qualification are on trials in assize courts (lawyers, prosecutors and judges).



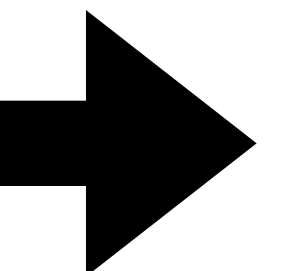
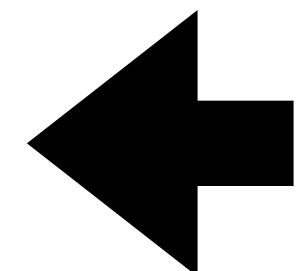
# APPELLATE COURTS

**Regional Court of Appeals** (criminal chambers) (Bölge Adliye Mahkemesi) – established by Law No. 5235 Art. 25 on 26.09.2004 and entered into force on 20.07.2016.

The court can rule in accordance with the Code of Criminal Procedure Art. 280 as follows:

1. Accepting the appeal and reverse the verdict of the Court of First Instance.
2. Passing or correcting a verdict without the need to reverse the judgment (it may hear new evidence)
3. Rejecting the appeal and approving the original decision.

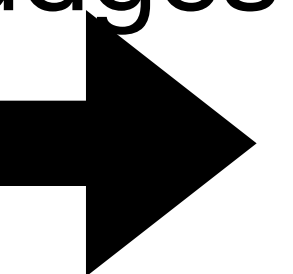
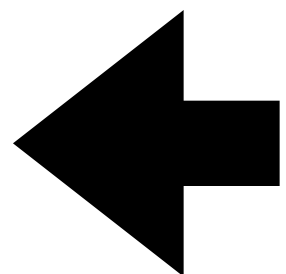
*Amendments have been introduced by the Judicial Reform Package passed by Parliament in October 2019.*





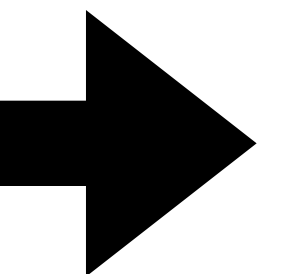
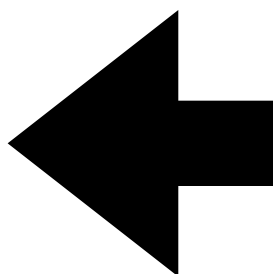
# Court of Cassation/ Supreme Court of Appeals (Yargitay)

- ➡ If the decision from a lower court is not final, it can be appealed to the Court of Cassation.
- ➡ The Court hears appeals for reversal from:
  - Decision from regional courts of appeal after 20.07.2016 on sentence above 5 years.
  - Decisions before 20.07.2016 from other lower courts.
- ➡ The Court cannot evaluate new evidence (except in some circumstances); it examines the case on the papers from the lower court, although parties can ask for a hearing to take place (rarely).
- ➡ This Court also hears cases related to some legally qualified persons (e.g. higher judges and prosecutors and members of cassation courts) as a first instance court



# The Constitutional Court of Turkey (Anayasa Mahkemesi)

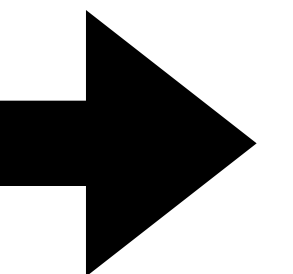
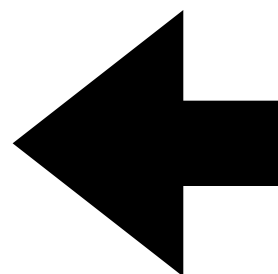
- The Constitutional Court represents an extraordinary legal path because it doesn't have the competence to alter sentences. It has jurisdiction to rule if a constitutional right of an applicant has allegedly been violated.
- Its rulings are binding on lower courts under Article 153 of the Constitution.
- A decision of the Constitutional Court finding a violation of right can lead to a re-trial.
- To access the Constitutional Court, all other avenues of appeal available at national level must first be exhausted.
- In 2010, the system of individual applications to the Court was introduced and supported by the ECtHR, although it was operational since 2012.



## **Relevant case law on freedom of expression from the Constitutional Court of Turkey:**

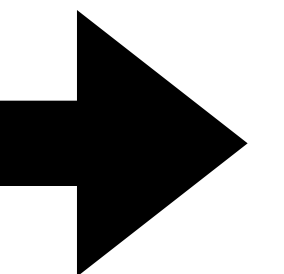
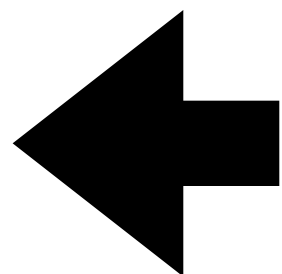
TCC, Ali Karatay, App. No. 2012/990; TCC, Emin Aydın App. No. 2013/2602; TCC, Fatih Taş, App. No. 2013/1461 – “freedom of expression means that individuals can freely access news and information, and others’ opinions; that individuals cannot be accused for having thoughts and opinions, and that individuals can express, share, defend, pass on to others and disseminate these thoughts and opinions in various ways individually or in collaboration with others”.

Other relevant decision from the TCC will be mentioned in the next Chapter.

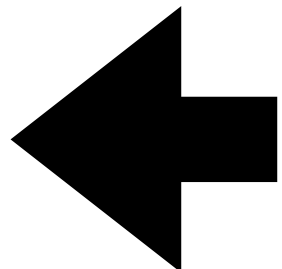


## References to materials:

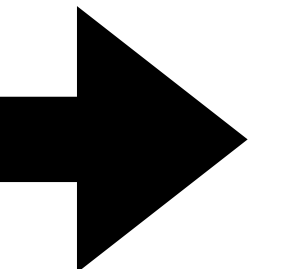
- The Constitution of the Republic of Turkey: <http://www.judiciaryofturkey.gov.tr/Current-version-of--Constitution-of-the-Republic-of-Turkey--including-latest--amendments> (in English); Türkiye Cumhuriyeti Anayasası: <https://www.mevzuat.gov.tr/MevzuatMetin/1.5.2709.pdf> (in Turkish) (in Turkish).
- Press Law No. 5187: <http://www.judiciaryofturkey.gov.tr/Sayfalar/press-law> (in English); 5187 Nolu Basın Kanunu <https://www.mevzuat.gov.tr/MevzuatMetin/1.5.5187.pdf> (in Turkish).
- The Constitutional Court of Turkey (Anayasa Mahkemesi): <https://www.anayasa.gov.tr/en/home-page/>
- Supreme Court (Yargıtay), <https://www.yargitay.gov.tr>



# Chapter 2: Freedom of Expression and Counter-Terror legislation



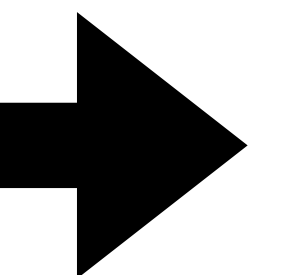
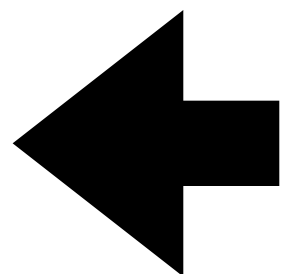
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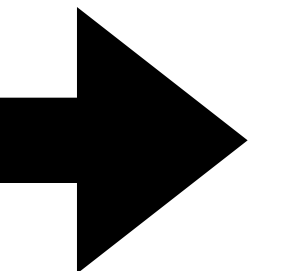
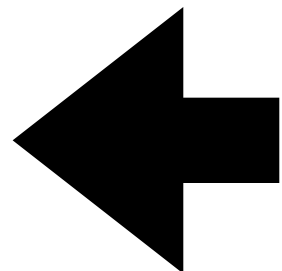
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## **Lesson 2:1 Freedom of expression and national security**

In this chapter we will focus on the relationship between freedom of expression and information and national security and terrorism legislation. It is important to consider the far-reaching effects of anti-terrorism legislation and national security legislation and how they are applied and extended in many countries. While action by States is necessary to prevent and effectively sanction terrorist acts, not all means are justifiable.

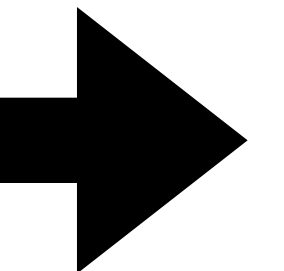
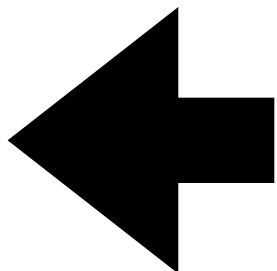


It is the primary duty of States to protect individual rights to liberty and security (Article 5 ECHR). Under international and regional law, there is a compelling duty for States to protect the general interest of public security and the rule of law without jeopardising the core of human rights.



# Key questions

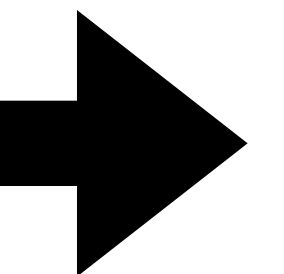
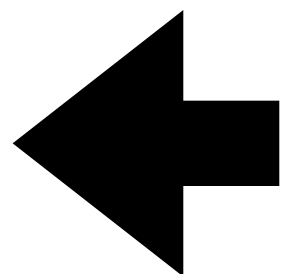
- What happens if these rights apparently clash or collide?
- How do we balance these rights?
- What does that mean for the right to freedom of expression?





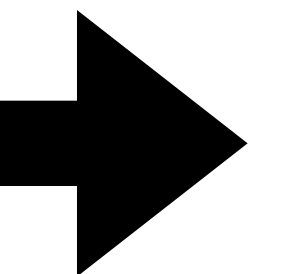
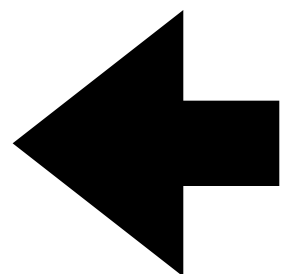
# The three-part test for restrictions to the right to FoE

Consider what ICCPR Article 19(3), says about restrictions on freedom of expression. We will now go through the three-part test in a bit more detail as it is particularly relevant for this topic.



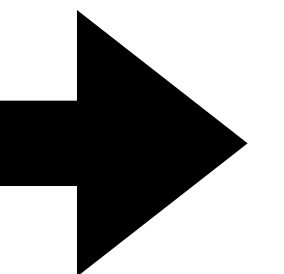
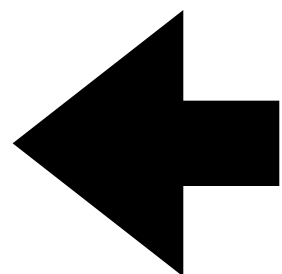
# Part one:

ICCPR Article 19(3) requires that restrictions on freedom of expression, such as those based on national security and terrorism laws, are **protected by law**. This means that the law needs to be clear and precise so individuals know what it actually is and can behave accordingly. Ambiguous, vague and overly broad restrictions on the freedoms of expression and information would not meet the requirements of Article 19(3).



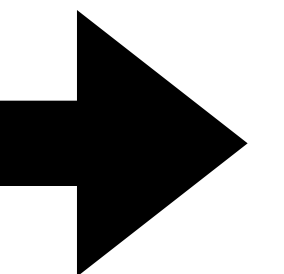
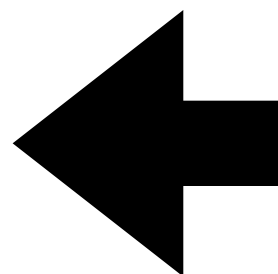
# Part two:

ICCPR Article 19(3), requires that restrictions must **pursue a legitimate aim** as indicated in Article 19(3a) and (3b). These aims include: “the protection of national security”. However, States should not prohibit or punish speech that is critical of government using national security as a pretext (General Comment No 34, paragraph 30). In other words, reliance on national security or the other grounds indicated in Article 19(3) must be genuine.



# Part three:

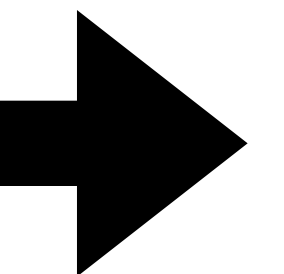
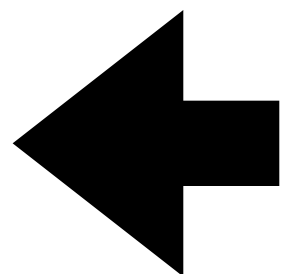
ICCPR Article 19(3), requires that legitimate restrictions on the freedoms of expression and information are **necessary**. This part of the test is the most critical element and the basis upon which the vast majority of international and regional human rights cases are decided. Necessity requires that there must be a “pressing social need” for the restriction. Furthermore, it must be shown that the restriction is proportionate, or narrowly tailored and not overbroad in terms of achieving its protective function. Thus, any restriction on freedoms of expression or information imposed as a result of national security or counterterrorism laws must meet that high threshold of necessity.



# General Comment No. 34 on Freedom of Expression and National Security

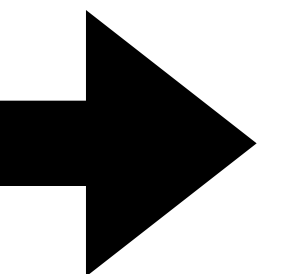
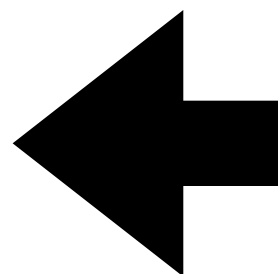
## General Comment No 34, paragraph 30

“Extreme care must be taken by States parties to ensure that treason laws 64 and similar provisions relating to national security, whether described as official secrets or sedition laws or otherwise, are crafted and applied in a manner that conforms to the strict requirements of paragraph 3. It is not compatible with paragraph 3, for instance, to invoke such laws to suppress or withhold from the public, information of legitimate public interest that does not harm national security or to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information”.



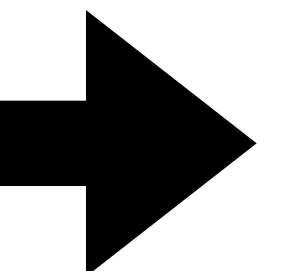
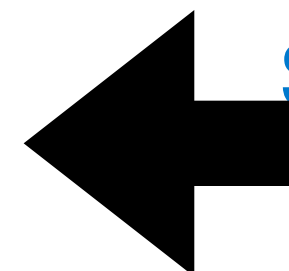
## **General Comment No. 34, paragraph 46**

“States parties should ensure that counter-terrorism measures are compatible with paragraph 3. Such offences as “encouragement of terrorism” and “extremist activity” as well as offences of “praising”, “glorifying”, or “justifying” terrorism, should be clearly defined to ensure that they do not lead to unnecessary or disproportionate interference with freedom of expression. Excessive restrictions on access to information must also be avoided. The media plays a crucial role in informing the public about acts of terrorism and its capacity to operate should not be unduly restricted. In this regard, journalists should not be penalized for carrying out their legitimate activities.”



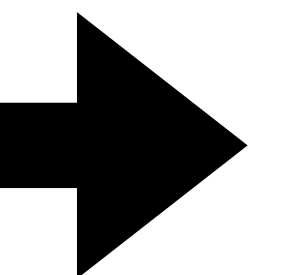
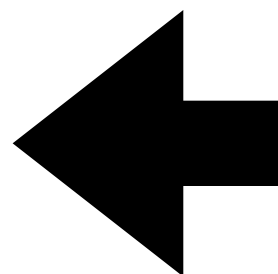
## References to materials:

- CoE Commissioner for Human Rights, *Counter terrorism and human rights protection*, <https://www.coe.int/en/web/commissioner/thematic-work/counter-terrorism>
- Human Rights Watch and the American Civil Liberties Union, *With Liberty to Monitor All: How Large-Scale US Surveillance is Harming Journalism, Law, and American Democracy*, 28 July 2014 (Press release on report only) <http://www.hrw.org/news/2014/07/28/us-surveillance-harming-journalism-law-democracy>
- ICCPR General Comment No. 34: <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>
- Promotion and protection of the right to freedom of opinion and expression, A/71/373, 6 September 2016, [https://www.un.org/ga/search/view\\_doc.asp?symbol=A/71/373](https://www.un.org/ga/search/view_doc.asp?symbol=A/71/373)



## Lesson 2:2 International standard-setting initiatives

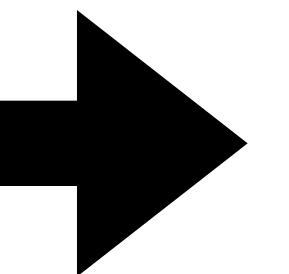
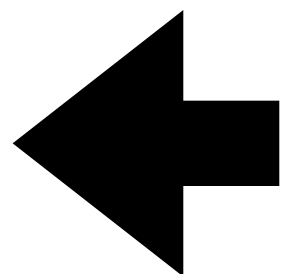
Besides General Comment No. 34, another important source for supporting the freedoms of expression and information against State claims of national security are the *Johannesburg* and *Tshwane Principles*. In this lesson we will examine these standards in more detail.





# The Principles

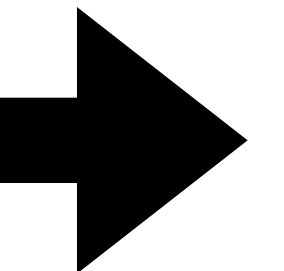
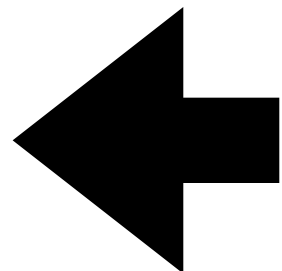
Developed by NGOs and endorsed and supported by a wide range of intergovernmental actors and experts, the 1996 *Johannesburg Principles* and the 2013 *Tshwane Principles* address the question of how to ensure public access to government information without jeopardising legitimate efforts to protect people from threats to national security.



# **The Johannesburg Principles on National Security, Freedom of Expression and Access to Information (1995)**

These Principles were adopted by a group of experts in international law, national security, and human rights convened by ARTICLE 19, in collaboration with the Centre for Applied Legal Studies of the University of the Witwatersrand, in Johannesburg.

These Principles set out the standards for restriction of the right to freedom of expression and access to information in the context of national security. They are based on international and regional law and standards relating to the protection of human rights, evolving state practice (as reflected, inter alia, in judgments of national courts), and the general principles of law recognized by the community of nations.

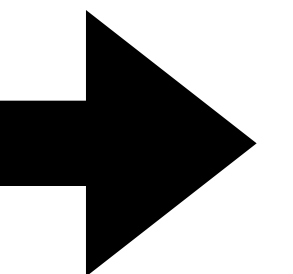
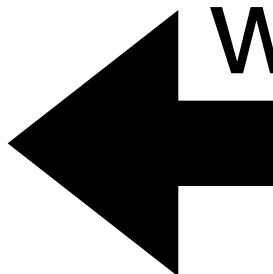


# The Tshwane Principles (2013)

The Tshwane Principles on National Security and the Right to Information address the question of how to ensure public access to government information without jeopardizing legitimate efforts to protect people from national security threats.

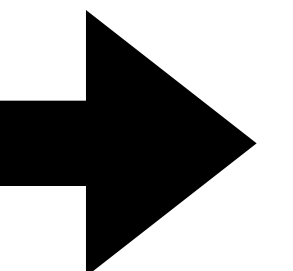
These Principles are based on international and national law and practices. They were developed in order to provide guidance to those engaged in drafting, revising, or implementing relevant laws or policies.

Based on more than two years of consultation around the world with government actors, the security sector and civil society, they set out in unprecedented detail, guidelines on the appropriate limits of secrecy, the role of whistleblowers, among other issues.



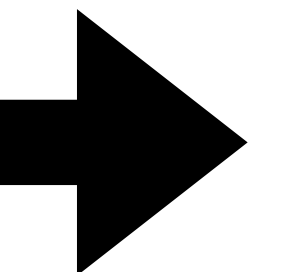
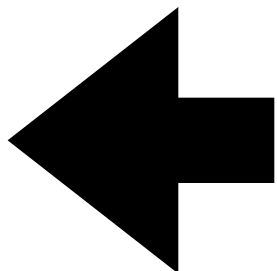
## References to materials:

- Open Society Foundations, *The Tshwane Principles on National Security and the Right to Information*, An Overview in 15 Points, June 2013 <http://www.opensocietyfoundations.org/fact-sheets/tshwane-principles-national-security-and-right-information-overview-15-points>
- “UK: Miranda ruling fails to protect public interest journalism”, 19 February 2014 <http://www.article19.org/resources.php/resource/37465/en/uk:-miranda-ruling-fails-to-protect-public-interest-journalism>
- The Johannesburg Principles on National Security, Freedom of Expression and Access to Information: <https://www.article19.org/wp-content/uploads/2018/02/joburg-principles.pdf>
- The Tshwane Principles on National Security and the Right to Information: <https://www.justiceinitiative.org/publications/tshwane-principles-national-security-and-right-information-overview-15-points>



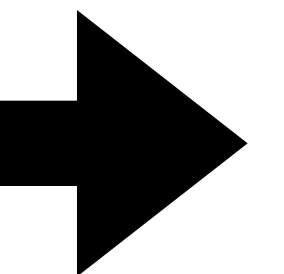
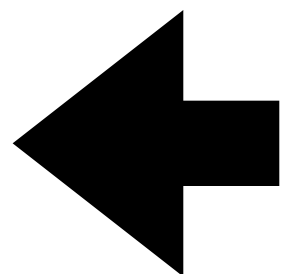
## **Lesson 2:3 International and regional case law**

There are numerous international legal cases on the relationship between national security State policies and the rights to freedom of expression and access to information. In this lesson we will highlight two cases in which the European Court of Human Rights examines the balance between the two.



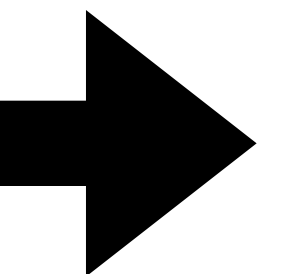
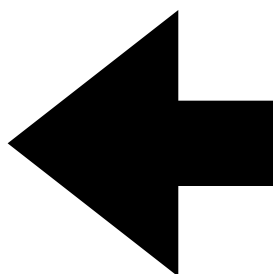
# Ürper and Others v. Turkey (20.10.2009)

The applicants were the owners, executive directors, editors-in-chief, news directors and journalists of four daily newspapers whose publication and distribution was repeatedly suspended in 2006 and 2007 for periods ranging from fifteen days to a month by court orders issued under anti-terrorist legislation. The newspapers were accused of publishing propaganda in favour of a terrorist organisation, condoning crimes the organisation had committed, and revealing the identity of officials engaged in the fight against terrorism, so making them targets for terrorist attack. The applicants lodged unsuccessful objections to the suspension orders.



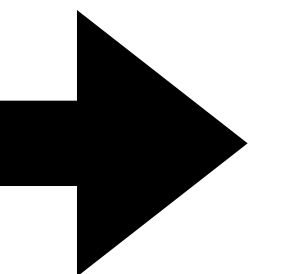
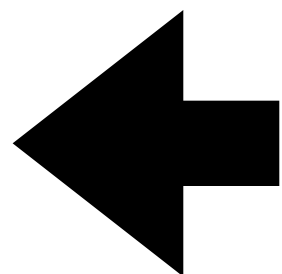
**ECtHR's view:** The preventive effect of the suspension orders entailed implicit sanctions to dissuade the applicants from publishing similar articles in the future and to hinder their professional activities. The Court believes that less draconian measures could have been envisaged. Accordingly, by suspending the publication and distribution of the newspapers, even if for short periods, the domestic courts had largely overstepped the narrow margin of appreciation afforded to them and unjustifiably restricted the press's essential role as a public watchdog. Therefore, the practice of banning the future publication of entire periodicals under section 6(5) went beyond any notion of necessary restraint in a democratic society and, instead, amounted to censorship.

**Conclusion:** violation of Article 10 of the Convention (freedom of expression)



# Ahmet Şık v. Turkey and Nedim Şener v. Turkey (8.7.2014)

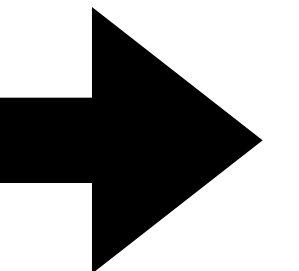
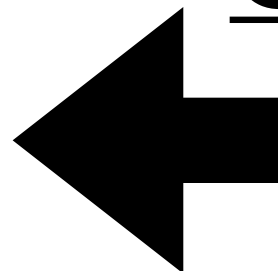
The applicants are two investigative journalists. In March 2011 the police searched the applicants' homes and took them both into police custody. They were accused, in particular, of having been involved in the production of publications criticising the government and/or serving as propaganda for the criminal organisation Ergenekon, whose members were convicted in 2013 of fomenting a coup d'état. The applicants were not released until March 2012.





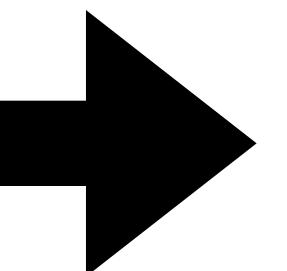
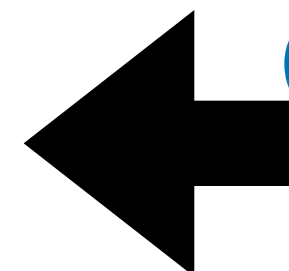
**ECtHR's view:** the applicants' pre-trial detention in the context of criminal proceedings for offences which carried a heavy sentence did not constitute a purely hypothetical risk but was a real and effective constraint and thus amounted to "interference" with the exercise of their right to freedom of expression. The Government argued that the interference in question had been aimed at preventing crime. The Court wondered whether the aim had not been rather to stifle any criticism or commentary on the conduct of a trial that had already been the subject of widespread public debate. In detaining the applicants for such a lengthy period without relevant or sufficient reasons, the judicial authorities had had a chilling effect on the applicants' willingness to express their views on matters of public interest. Applying such a measure was liable to create a climate of self-censorship for the applicants and for any investigative journalist planning to carry out research and comment on the conduct and actions of State bodies.

**Conclusion:** violation of Article 5(3) and Article 10 of the Convention.



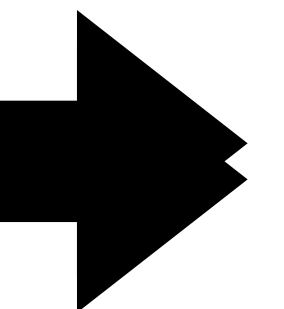
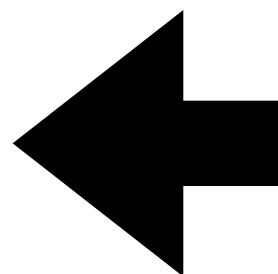
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- Council of Europe, Thematic Factsheet – August 2017, Freedom of Expression and Terrorism <https://rm.coe.int/factsheet-on-anti-terror-legislation-final-rev1august2017/1680735d7f>
- ECtHR, Ürper and Others v. Turkey – application no. 14526/07, 20 October 2009, [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-95201%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-95201%22]})
- ECtHR, Sık v. Turkey, application no. 53413/11, 8 July 2014, [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-145345%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-145345%22]}) (in French) [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-145620%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-145620%22]}) (in Turkish). Nedim Şener v. Turkey, application no. 38270/11, 8 July 2014, <https://hudoc.echr.coe.int/eng?i=001-145343> (in French) and [https://hudoc.echr.coe.int/eng#{"itemid":\["001-145622"\]}](https://hudoc.echr.coe.int/eng#{) (in Turkish).
- More information on ECtHR's cases: [https://www.echr.coe.int/Documents/CP\\_Turkey\\_ENG.pdf](https://www.echr.coe.int/Documents/CP_Turkey_ENG.pdf)



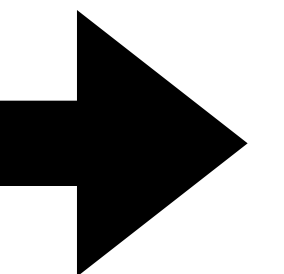
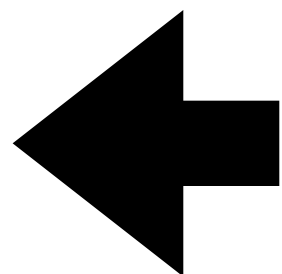
## **Lesson 2:4 Turkish case studies on balancing Freedom of Expression in relation to national security.**

Turkey's Constitutional Court has pronounced itself on various cases scrutinizing the balance between the right to freedom of expression in relation to national security. In the next slides, we will highlight two cases.



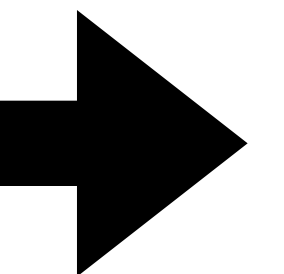
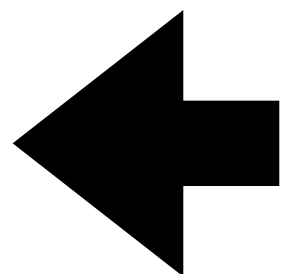
# **Füsün Üstel and others, App. No: 2018/17635, 26.07.2019, Judgment of the Constitutional Court (Academics for Peace case)**

On 26 July 2019, Turkey's Constitutional Court ruled on 10 individual applications on the case of Academics for Peace. In its judgment, it decided that the sentences imposed upon the 10 academics on the charge of "terror propaganda" has violated their freedom of expression. This judgment is crucial, given that it will affect all other Academics for Peace cases.



# **İlker Deniz Yücel, App. No: 2017/16589, 28.05.2019, Judgment of the Constitutional Court**

Deniz Yücel, a journalist at Deutsche Welle, was detained for 1 year on charges of propaganda for a terrorist organization. On 28 June 2019, Turkey's Constitutional Court gave a judgment over the individual application of Yücel's sentence, finding a violation of his rights to liberty and security and of freedom of expression.



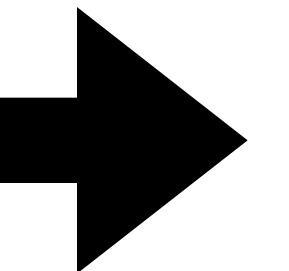
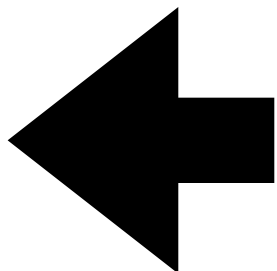
## References to materials:

- İlker Deniz Yücel, App. No: 2017/16589, 28.05.2019, Judgment of the Constitutional Court

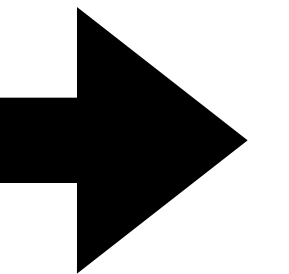
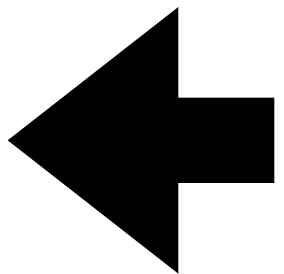
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- Füsun Üstel and others, App. No: 2018/17635, 26.07.2019, Judgment of the Constitutional Court (Academics for Peace case)

<https://kararlarbilgibankasi.anayasa.gov.tr/BB/2018/17635>

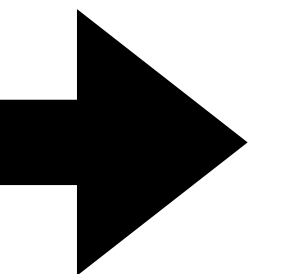
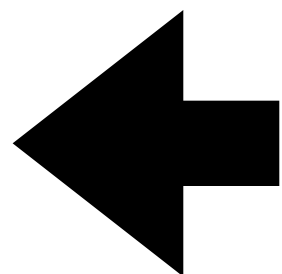


# Chapter 3: Protection of journalists



## Lesson 3:1 The rights of journalists

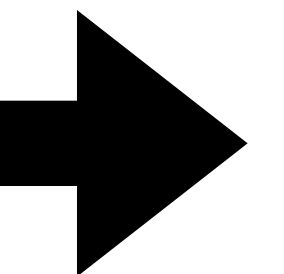
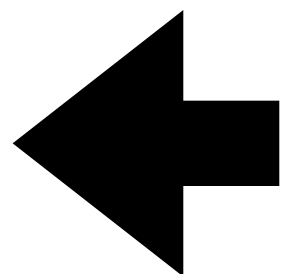
In this chapter, we examine the protection of journalists and others expressing themselves. This concerns the issue of physical attacks on journalists, which may or may not result in actual killings, and the threats of such attacks against individuals, particularly journalists but also others, simply for exercising their freedom of expression.





# Rights of journalists: Who is a journalist?

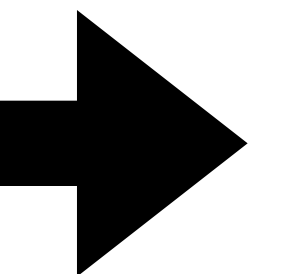
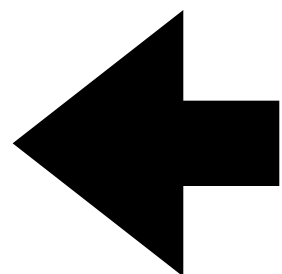
Answering this question is increasingly difficult today, due to the changing media landscape and the growth of so-called “open journalism” whereby other communicators – such as bloggers and those who communicate on social networks – take part in public debate and in disseminating information. As we know, the rise of the Internet over the past two decades has radically transformed the media and the practice of journalism (as we will see in Chapter 4).



# Rights of journalists: Definitions in law

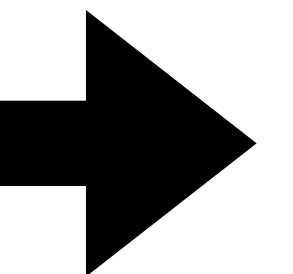
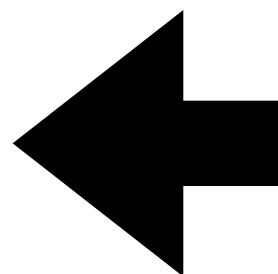
International and regional human rights treaties do not single out “journalists” as a special category of people to be protected. At the same time, international and regional human rights bodies do regularly take account of the status of an individual as a journalist when looking at States’ duties to protect that person.

*It should be noted that international humanitarian law, which applies in situations of armed conflict, does make this distinction. – under the First Additional Protocol to the Geneva Conventions –*



ARTICLE 19 has long argued that ‘journalism’ and ‘journalists’ should not be defined by reference to some recognised body of training, or by affiliation with a media entity or professional body. We have argued that journalism is an activity that can be exercised by anyone, and that it is important that any legal standards and principles applicable to the activity should reflect this.

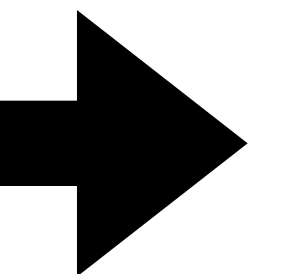
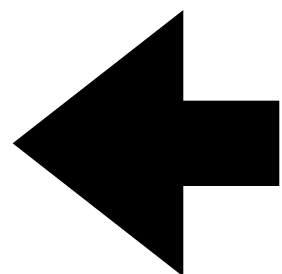
In particular, the definition of the term ‘journalist’ should be broad enough to include any person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication.



# Rights of journalists: General Comment No 34 ICCPR

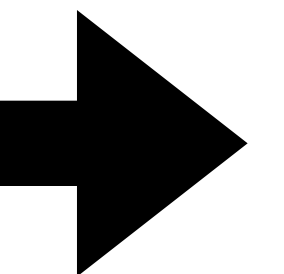
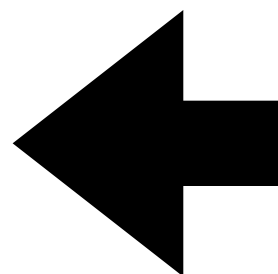
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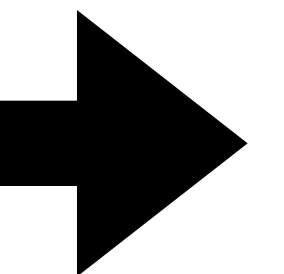
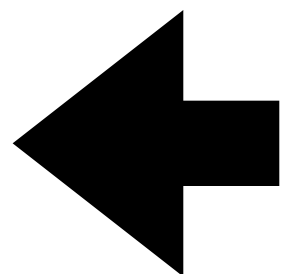
## **General Comment No. 34 paragraph 44:**

“Journalism is a function shared by a wide range of actors, including professional full-time reporters and analysts, as well as bloggers and others who engage in forms of self-publication in print, on the internet or elsewhere (...)”



# The challenges of attacks: Rights violations

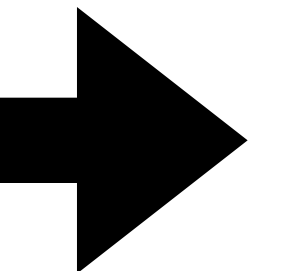
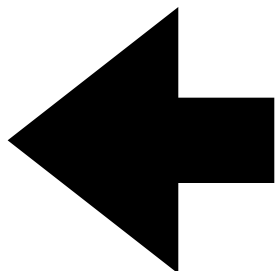
Journalists and media workers play an essential role within a democracy by conveying information and the ideas of public interest to the wider society. Attacks on them therefore constitute violations of their own rights to life, physical integrity and the right to freedom of expression, as well as the rights of other individuals in societies to seek and receive all types of information and ideas.



# The challenges of attacks: Impunity

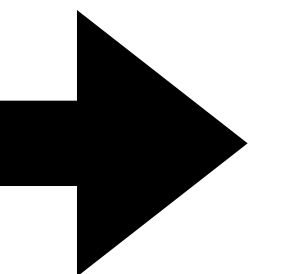
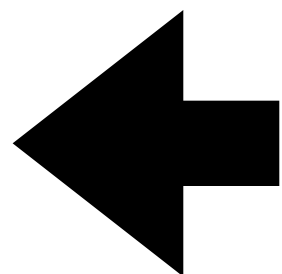
Furthermore, the failure of state authorities to properly respond to such attacks makes the likelihood of such attacks more likely, as has been noted on numerous occasions by international courts and bodies.

Impunity is problematic because it has a “chilling effect” on journalists, dissuading other individuals from speaking out and preventing the free flow of information on matters of public interest. As David Kaye, UN Special Rapporteur on Freedom of Opinion and Expression, and other UN experts noted:



“Impunity for crimes against journalists triggers further violence and attacks. We urge States to comply with their obligations to conduct impartial, prompt, thorough, independent and effective investigations, including international investigations where necessary. Perpetrators, including those who order or otherwise bear responsibility, must be brought to justice and held to account. Victims and their families should have access to remedies”.

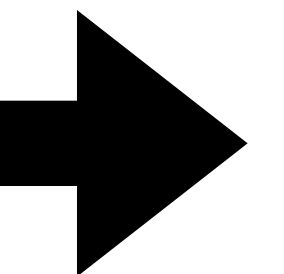
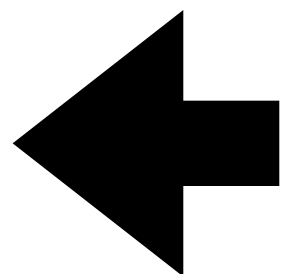
**UN experts: Time to end global crisis of impunity for crimes against journalists, International Day to End Impunity for Crimes Against Journalists  
2 November 2018**





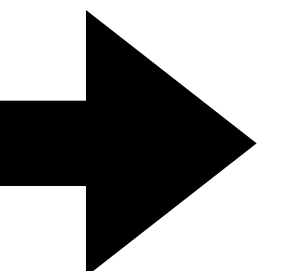
# Conclusion

This lesson has given an overview of the diverse rights challenges posed by attacks on journalists, media workers, and other communicators as well as some key issues concerning the definition of “who is a journalist”. In the next lesson we will look at the positive duties of states through the case-law of regional human rights law and international human rights bodies.



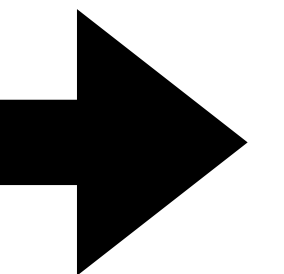
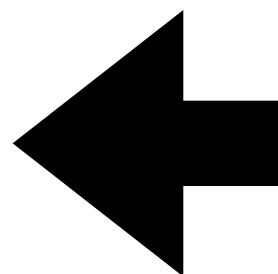
# References to materials:

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- International Day to End Impunity: States Must End Cycle of Impunity, 2 November 2014 <http://www.article19.org/resources.php/resource/37746/en/international-day-to-end-impunity:-states-must-end-the-cycle-of-impunity>
- CoE, Journalists under pressure - Unwarranted interference, fear and self-censorship in Europe (2017), <https://book.coe.int/en/human-rights-and-democracy/7295-pdf-journalists-under-pressure-unwarranted-interference-fear-and-self-censorship-in-europe.html#>
- General Comment No 34 ICCPR, paragraph 44, <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>.
- UN experts: Time to end global crisis of impunity for crimes against journalists, International Day to End Impunity for Crimes Against Journalists, 2 November 2018, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23803&LangID=E>.
- ARTICLE 19, The Right to Blog, Policy Brief (2013): <https://www.article19.org/wp-content/uploads/2018/02/Right-to-Blog-EN-WEB.pdf>



# **Lesson 3:2 Standard setting and other initiatives on journalists' protection**

## **Standard setting and other initiatives on journalists' protection**



## Standard-setting initiatives:

- There are 12 resolutions passed within the UN system, 10 of them passed after 2012, which although not binding, do establish political commitments. These resolutions have also evolved, providing more concrete recommendations which can be used in advocacy efforts. States are required to report on the implementation of these resolutions, including a specific one on addressing violence against women journalists.

- **UN Plan of Action for the Safety of Journalists and the Issue of Impunity**

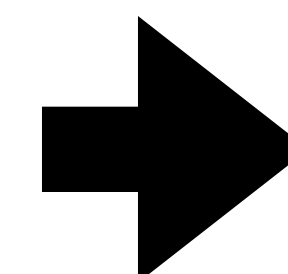
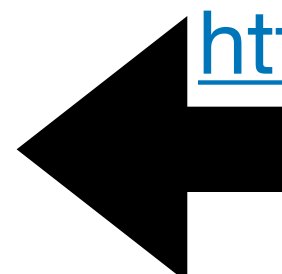
The Plan of Action aims to create a free and safe environment for journalists and media workers, both in conflict and non-conflict situations, with a view to strengthening peace, democracy and development worldwide. Its measures include: among other undertakings,

- i. the establishment of a coordinated inter-agency mechanism to handle issues related to the safety of journalists
- ii. assisting countries to develop legislation and mechanisms favourable to freedom of expression and information
- iii. supporting their efforts to implement existing international rules and principles.

It calls on States to create national multi-stakeholder action plans for the Safety of Journalists.

- The SDGs have recognized the importance of the SoJ by including indicator 16.10.1. to monitor attacks against journalists as a way to measure the advancement of SDGs. More info:

<https://ifex.org/sustainable-development-goals-sdgs-what-role-for-freedom-of-expression/>

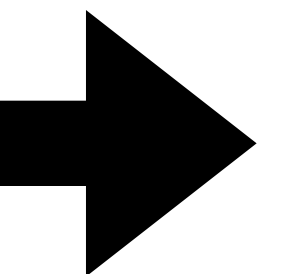
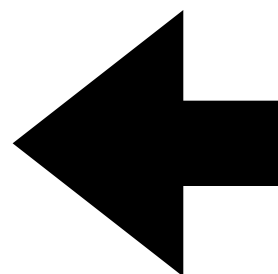


- **Council of Europe**

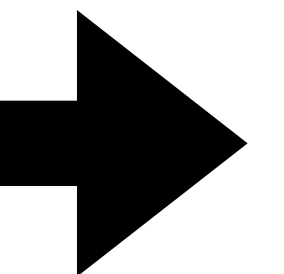
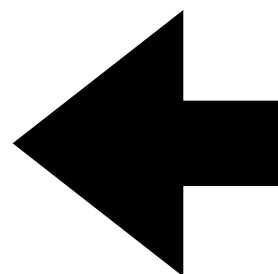
- **CoE - 2016 Recommendations of the Committee of Ministers to member States on the protection of journalism and safety of journalists and other media actors.**
- **Platform on Safety of Journalists:**

The CoE platform on safety of journalists is a public space to facilitate the compilation, processing and dissemination of information on serious concerns about media freedom and safety of journalists in Council of Europe member States, as guaranteed by Article 10 of the European Convention on Human Rights.

It aims to improve the protection of journalists, better address threats and violence against media professionals and foster early warning mechanisms and response capacity within the Council of Europe.

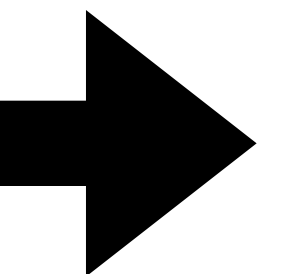
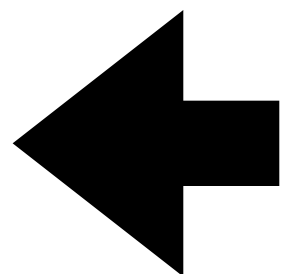


- **Columbia University – Global Database on Freedom of Expression case law:** it surveys jurisprudence around the world, critically reviews exemplary cases, engages in comparative analysis, and aims to identify national, regional and global trends.



- **Examples of national initiatives on protection of journalists:**

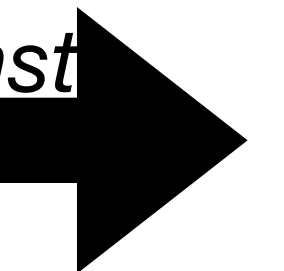
- ➡ Some countries have put in place national level initiatives for the safety of journalists, in some cases following the UN Plan of Action for the Safety of Journalists. Examples of such national initiatives are [documented](#) in Afghanistan, Colombia, Indonesia, Iraq, Nepal and Pakistan.
- ➡ The Commission for Investigating the Killings of Journalists in Serbia: Founded in 2013 to reopen unsolved cases of journalists who were killed and to raise awareness of threats and safety issues in the country. Serbian police and security agents, as well as journalists and media association representatives, were appointed to the Commission. Among the successes of this Commission, there was the resolution of a murder case of journalist Zladko Curuvija in 1999.





# References to materials:

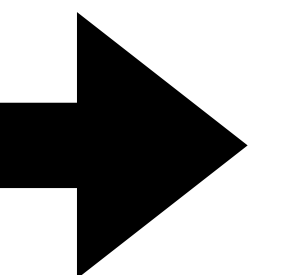
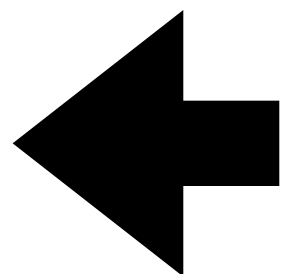
- UN Plan of action: <https://en.unesco.org/un-plan-action-safety-journalists>
- 2016 CoE Recommendation on the SoJ. [https://www.coe.int/en/web/freedom-expression/committee-of-ministers-adopted-texts/-/asset\\_publisher/aDXmrol0vvsU/content/recommendation-cm-rec-2016-4-of-the-committee-of-ministers-to-member-states-on-the-protection-of-journalism-and-safety-of-journalists-and-other-media-](https://www.coe.int/en/web/freedom-expression/committee-of-ministers-adopted-texts/-/asset_publisher/aDXmrol0vvsU/content/recommendation-cm-rec-2016-4-of-the-committee-of-ministers-to-member-states-on-the-protection-of-journalism-and-safety-of-journalists-and-other-media-)
- IFEX explainer on the SOJ. <https://ifex.org/how-can-un-resolutions-make-it-safer-to-be-a-journalist/>
- IFEX explainer on the UN reports on the SoJ: <https://ifex.org/resolutions-on-journalists-safety-how-does-the-un-monitor-their-implementation/>
- Acting on HRC Resolution 33/2: [https://www.article19.org/wp-content/uploads/2017/11/safety\\_of\\_journalists\\_WEB\\_23.10.pdf](https://www.article19.org/wp-content/uploads/2017/11/safety_of_journalists_WEB_23.10.pdf)
- IMS, Defending Journalism, <https://www.mediasupport.org/publication/defending-journalism/>
- Council of Europe's Platform for Safety of Journalists <https://www.coe.int/en/web/media-freedom>
- Columbia University – Global Database on Freedom of Expression <https://globalfreedomofexpression.columbia.edu/cases/>
- International Women's Media Foundation and International News Safety Institute, *Violence and Harassment against Women in the News Media: A Global Picture*, 10 March 2014, Executive Summary only, <http://www.iwmf.org/executive-summary/>





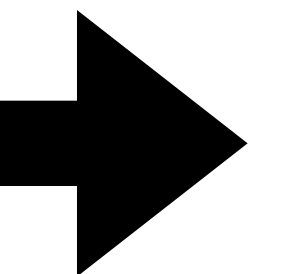
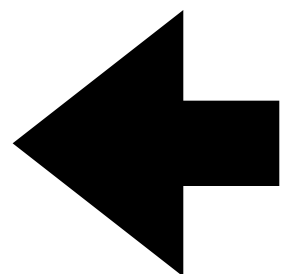
## **Lesson 3:3 Key international cases on the protection of journalists**

In this lesson we will look at States' positive and negative duties in more detail through the examples of key international cases.



# Positive duties: Introduction

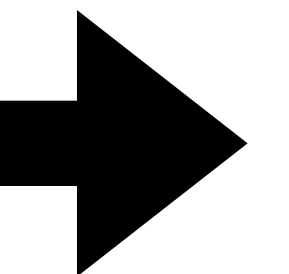
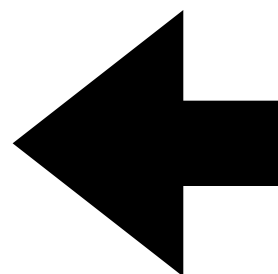
There are essentially three sets of positive duties that States hold. These are drawn from the case-law of regional human rights courts and international human rights bodies, including the international mandate-holders on freedom of expression.



# Positive duties: 1) Prevent, Protect and Prosecute

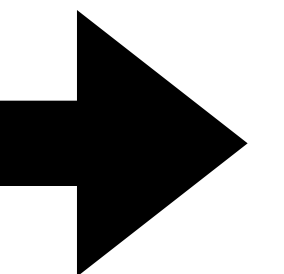
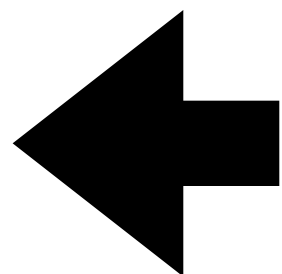
First, States have the duty to prevent violations, protect journalists and prosecute those responsible for such attacks.

- State authorities involved in these processes should be independent and anonymous;
- Investigations, prosecutions and judicial processes should be: conducted in a speedy manner; effective (so that it generates a judicial decision); and accessible for family members, who should also be protected if they are at risk.



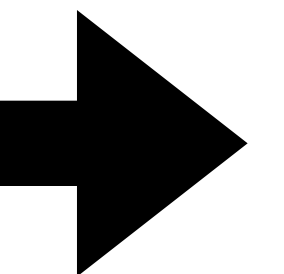
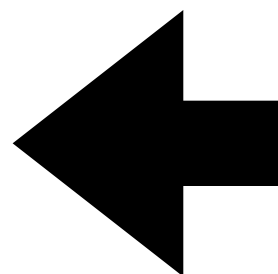
# Positive duties: 2) Protection

Second, states have a duty to protect individuals who are at risk of such attacks. Such a duty exists if: “authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and . . . they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk” (Kilic v Turkey, ECHR).



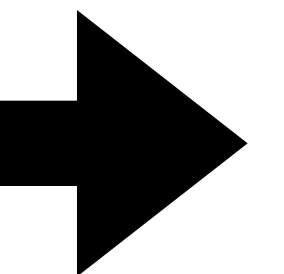
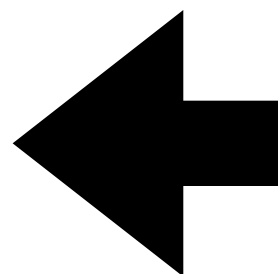
# Positive duties: 2) Protection – continued...

In addition, states should ensure that there is an enabling climate for the exercise of freedom of expression. As the European Court of Human Rights said in the most famous case in Europe on the protection of journalists, *Dink v Turkey*:



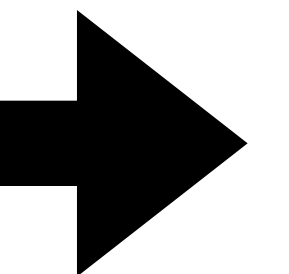
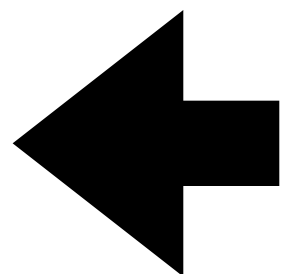
## **ECtHR, Dink v Turkey**

“States should create a favourable environment for full participation in public debates by all persons concerned, enabling them to express their opinions and ideas without fear, even if such opinions and ideas are contrary to those held by authorities or a significant share of public opinion, or viewed as offensive or shocking”.



# Positive duties: 3) Prevention

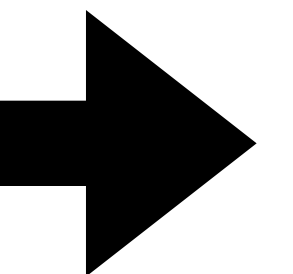
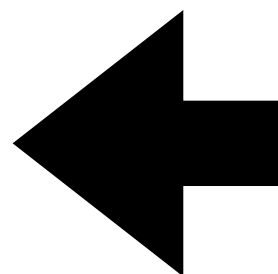
Third, states have a duty to prevent attacks. This positive duty means that states are obliged to take “preventative operational measures to protect an individual or individuals whose lives are at risk from the criminal acts of another individual” (Gongadze v Ukraine, ECHR). Key elements of an effective prevention strategy are highlighted in both the Joint Declaration on Crimes Against Freedom of Expression and the UN Plan of Action.



# Positive duties: 3) Prevention – continued...

The duty to prevent should encompass a range of measures including:

- 1.the establishment of a specific category of “crimes against freedom of expression” in order to use this dissuasive power of criminal law to prevent violence against journalists
- 2.public condemnations of attacks by state officials
- 3.training and education programmes for law enforcement and security officials



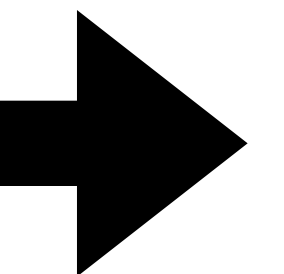
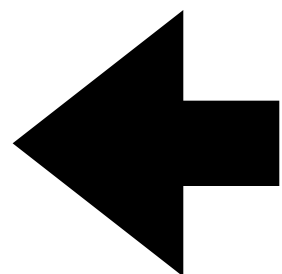


# Positive duties: 3) Prevention – continued...

4.the gathering of detailed and disaggregated data and statistics on such attacks

5.a gender-specific / sensitive approach, including the countering of stereotypes of women which may further attacks on them

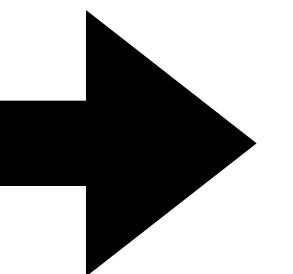
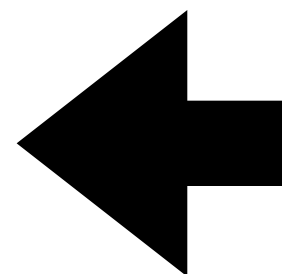
6.more broadly, creating an environment where independent, free and pluralistic media can flourish



## **ECtHR, Mazepa and Others v Russia**

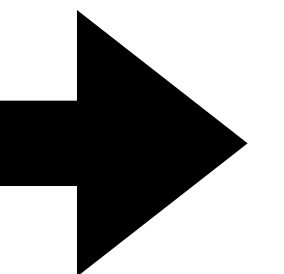
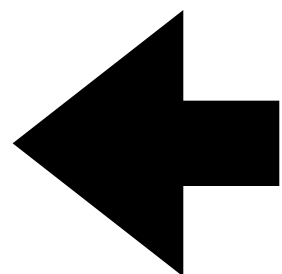
(Developments regarding obligations to investigate relationship to journalist's work)

“in cases where the victim of a killing is a journalist, it is of utmost importance to check whether the crime is connected to the journalist's professional activity. In this connection, the Court would also refer to Recommendation CM/Rec (2016) 4 on the protection of journalism and safety of journalists and other media actors, in which the Committee of Ministers recommended in paragraph 19 that the conclusions of an investigation must be based on a thorough, objective and impartial analysis of all the relevant elements, including the establishment of whether there is a connection between the threats and violence against journalists and other media actors and the exercise of journalistic activities or contributing in similar ways to public debate... [T]he Court takes the view that the investigation into a contract killing cannot be considered adequate to the extent of discharging the obligation of means implicit in the procedural limb of Article 2 in the absence of genuine and serious investigative efforts taken with the view to identifying the intellectual author of the crime, that is, the person or people who commissioned the assassination. The domestic authorities' scrutiny in the case concerning a contract killing must aim to go beyond identification of a hitman and it is incumbent on the Court to satisfy itself that the investigation in the present case has addressed this important point.”



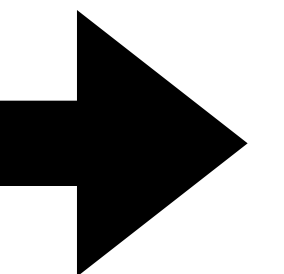
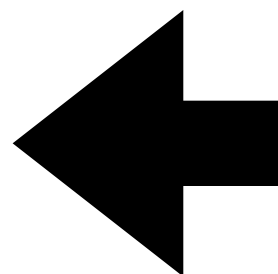
# Conclusion

This lesson has introduced the range of duties that states must fulfill in order to meet their international obligations. In the next lesson we will look at key standard-setting initiatives on protection of journalists led by civil society.



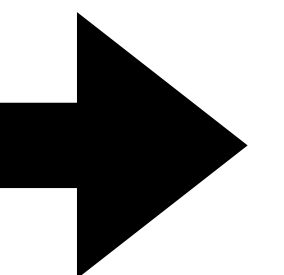
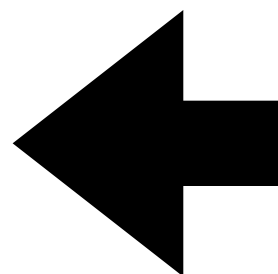
## References to materials:

- ECtHR, Dink v Turkey, Application Nos 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09 judgment of the European Court of Human Rights, 14 September 2010, <https://globalfreedomofexpression.columbia.edu/cases/dink-v-turkey/>
- ECtHR, Mazepa and Others v Russia, Application no. 15086/07, 17 October 2018, [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-184660%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-184660%22]})
- ARTICLE 19, Joint Declaration on Crimes Against Freedom of Expression, <https://www.article19.org/resources/joint-declaration-crimes-freedom-expression/>



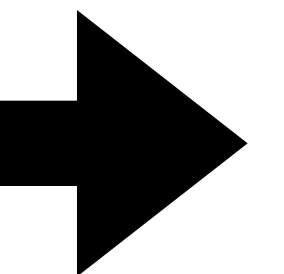
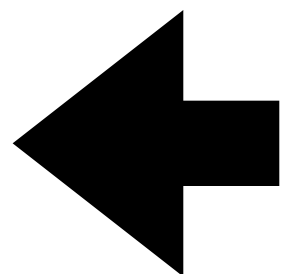
## **Lesson 3:4 Turkish case studies on the protection of journalists**

This lesson will provide reference to two decisions of the Constitutional Court of Turkey where the Court found a violation of the right to freedom of expression for two journalists in Turkey.



# **Constitutional Court of Turkey, Şahin Alpay, App. No. 2016/16092, 11.01.2018**

Journalist Şahin Alpay was facing charges in relation to his alleged involvement in the attempted coup of July 2016 and was detained for 594 days in pre-trial. In this decision, the Constitutional Court of Turkey ordered for Alpay's release from pre-trial detention, finding a violation of his rights to freedom of expression, liberty and security.

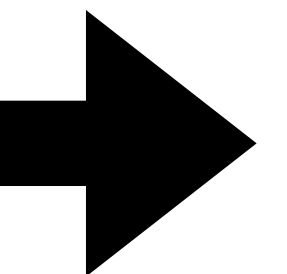
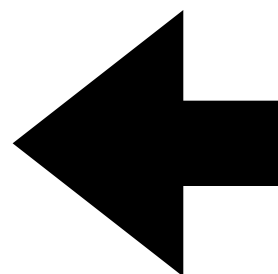


## **Constitutional Court of Turkey - Decision on the violation of the right to FoE:**

“Resorting to detention measure in respect of the applicant mainly on the basis of his articles and without establishing strong indications of guilt is contrary to the safeguards [that] are set out in Articles 26 and 28 of the Constitution with respect to the freedoms of expression and press.

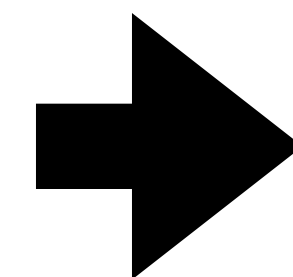
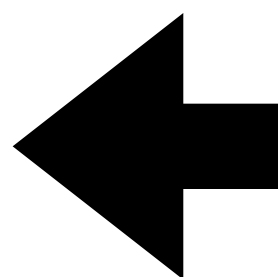
It has been considered that nor does Article 15 of the Constitution, which prescribes the suspension and restriction of fundamental rights and freedoms in time of a “state of emergency”, justify this interference.

For these reasons, it has been held that, also taken in conjunction with Article 15 of the Constitution, the applicant’s freedoms of expression and press were violated”.



# **Constitutional Court of Turkey, Mehmet Hasan Altan, App. No. 2016/23672, 11.01.2018**

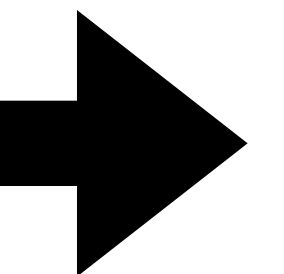
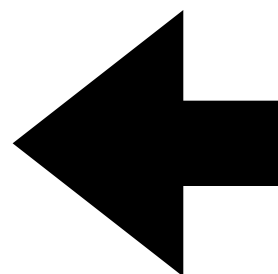
The Applicant was charged with attempt to overthrow the government, connected to the 2016 coup attempt, on the basis of unsubstantiated evidence amounting to newspaper articles and an appearance in a TV programme the day before the coup attempt. As a result, he was held in pre-trial detention for 18 months. His brother Ahmet Altan was convicted under the same charges, however the Court failed to find a violation in his case on the basis of similar facts.





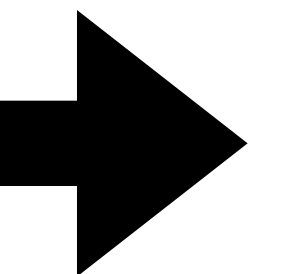
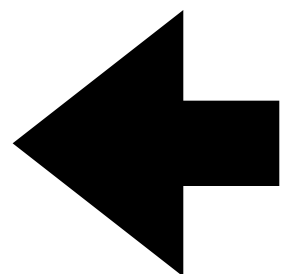
## **Court's decision on the violation of the right to FoE:**

“The applicant was detained on the ground that in his articles and speeches he expressed opinions similar to those expressed by a segment of the public, which constituted a breach of the freedoms of expression and press. Which “pressing social need” led to such an interference and why it was necessary in a democratic society could not be substantiated from the circumstances of the case and the grounds for detention”.

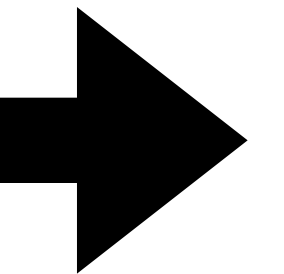
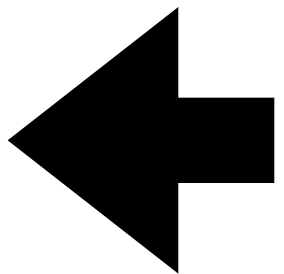


## References to materials:

- Constitutional Court of Turkey, *Şahin Alpay*, Application no. 2016/16092, 11 January 2018) <https://anayasa.gov.tr/en/leading-judgments/individual-application/decision-on-detention-of-the-applicant-who-is-a-journalist-sahin-alpay/>
- Constitutional Court of Turkey, *Mehmet Altan*, Application no. 2016/23672, 11 January 2018, <https://www.anayasa.gov.tr/en/news/individual-application/press-release-concerning-the-decision-on-detention-of-the-applicant-who-is-a-journalist-mehmet-hasan-altan/>



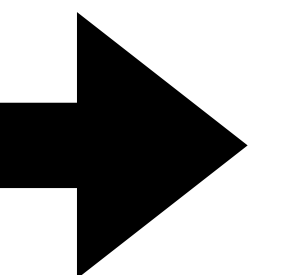
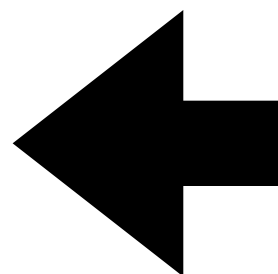
# Chapter 3: Freedom of expression online



# **Lesson 4:1 Challenges and opportunities of freedom of expression online – rights and obligations**

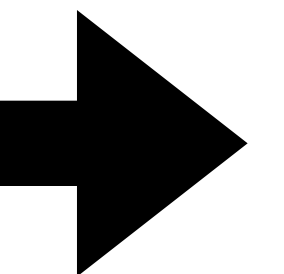
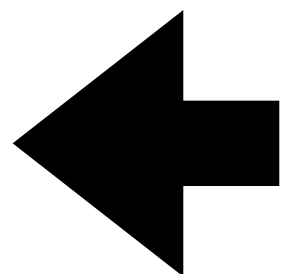
## **Changes and challenges: Introduction**

The rise of the Internet over the past two decades has radically transformed the exercise of freedom of expression and freedom of information, by ordinary members of the public and also the media.



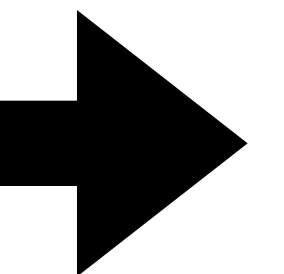
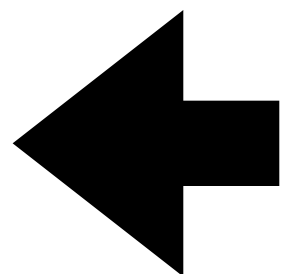
# Changes and challenges: Media online

For the media, the Internet has altered the practice of journalism, with news media concentrating on promoting their online presence instead of their hard copy distribution, and featuring users' comments on articles and own contributions alongside those of professional journalists. News sites, online news aggregators, blogs and social networks have come to dominate the dissemination of information. In this climate, an increasing constituency of bloggers and so-called "citizen journalists" are able to generate content in a process known as "open journalism".



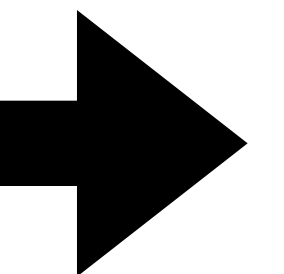
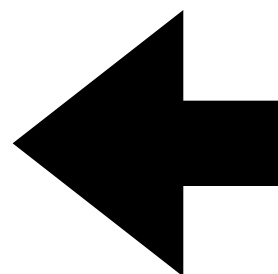
# Changes and challenges: Freedom of expression and freedom of information online

There are three sets of challenges to freedom of expression and information online:



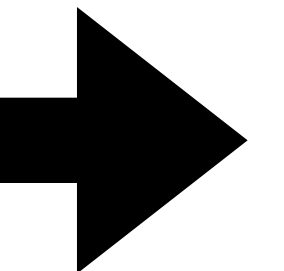
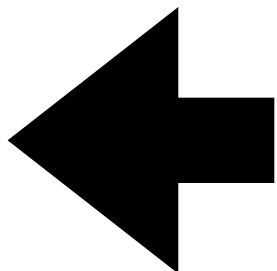
# 1) Access

The lack of universal access to the Internet and particularly online media - the so-called “digital divide” – is the first challenge related to freedom of expression online. This means that while in some States almost everyone has access to the Internet, in emerging States or in States facing violent conflict or economic crisis, Internet access is considerably lower.



## 2) Content restrictions

Restrictions on content on the Internet represent the second and major set of challenges. These directly impact on plurality of information and also have an indirect impact through the “chilling effect” that such policies exert, either because they create fear of persecution, or lack of confidence in the security of the Internet and online freedom of expression.

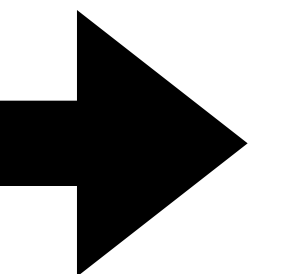
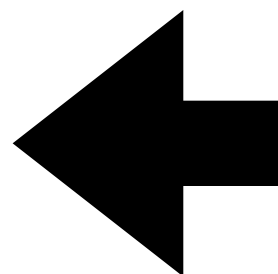




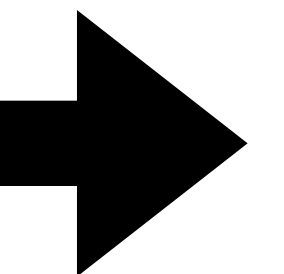
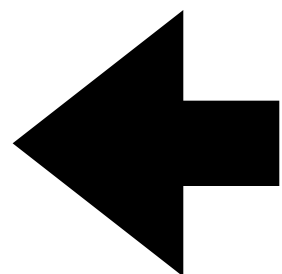
## 2) Content restrictions - continued...

Online restrictions include:

- A. Compulsory registration scheme;
- B. Specific measures to block or filter content, including on social media;
- C. The imposition of intermediary liability through specific laws governing the Internet, or privacy and data protection laws;
- D. Cyber-attacks or denial of service attacks and hacking into accounts or computer networks, which are often conducted at key political moments and target human rights and dissident groups;
- E. The monitoring of collection of information about individual online communications by security agencies conducted in the name of national security and counter-terrorism;
- F. The criminalisation of legitimate expression on the Internet and persecution of individual users, such as bloggers and tweeters;
- G. Judicial decisions which restrict Internet-based media, such as compulsory registration schemes.

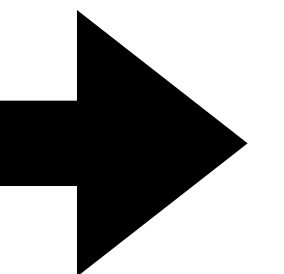
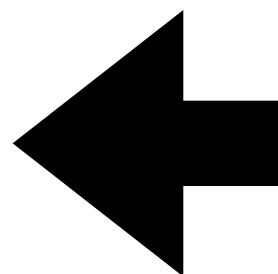


Since 2012, international and regional human rights bodies, NGOs and academics working on freedom of expression issues have, with increased concern, highlighted challenges to the realisation of freedom of expression and of information, and related rights online and through digital technologies, particularly privacy.



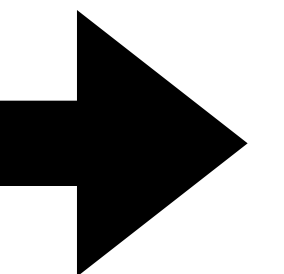
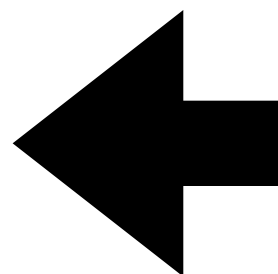
At the international level, in recent years the UN Special Rapporteur on Freedom of Opinion and Expression, David Kaye, published a number of reports on freedom of expression online:

- Artificial Intelligence technologies and implications for the information environment (2018);
- Online content regulation (2018);
- The role of digital access providers (2017);
- On Freedom of expression, states and the private sector in the digital age (2016).



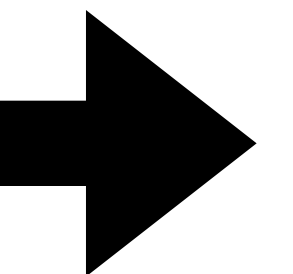
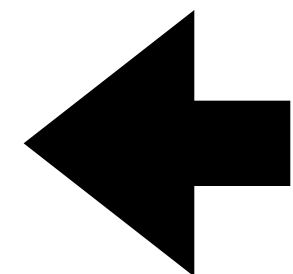
# Conclusion

In this lesson we have looked at some of the key challenges concerning online freedom of expression and information. In the following lesson we will explore the issues raised by judgments of regional courts and other international human rights bodies in relation to freedom of expression online.



# References to materials:

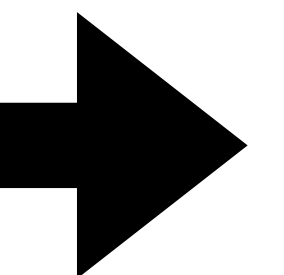
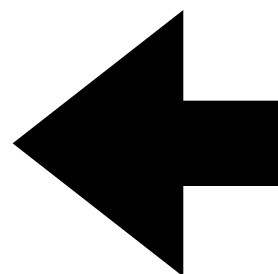
- Vindu Goel and Andrew E Kramer, “Web Freedom Is Seen as a Growing Global Issue”, New York Times, 1 January 2015 [http://www.nytimes.com/2015/01/02/business/international/web-freedom-is-seen-to-be-growing-as-a-global-issue-in-2015.html?\\_r=0](http://www.nytimes.com/2015/01/02/business/international/web-freedom-is-seen-to-be-growing-as-a-global-issue-in-2015.html?_r=0)
- Central European University, Opportunities and Challenges of Doing Journalism in a Digital Age, Center for Media, Data and Society, 21 November 2014 <https://www.youtube.com/watch?v=TPXjW1JFokc>
- UN Special Rapporteur on the Right to Freedom of Opinion and Expression, various reports accessible at: <https://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/Annual.aspx>
- Wolfgang Benedek and Matthias C Kettemann, *Freedom of expression and the Internet* (Council of Europe, 2014).
- ARTICLE 19, *Policy brief: Freedom of expression and ICTs: Overview of International Standards*, 3 December 2013 <http://www.article19.org/resources.php/resource/37380/en/freedom-of-expression-and-icts:-overview-of-international-standards>
- ARTICLE 19, *Policy brief: Internet liability: Dilemma of liability*, 29 August 2013 <http://www.article19.org/resources.php/resource/37242/en/internet-intermediaries:-dilemma-of-liability>
- ARTICLE 19, *Policy brief: Right to Blog*, 20 August 2013 <http://www.article19.org/resources.php/resource/37382/en/the-right-to-blog>
- ARTICLE 19, *The Right to Share: Principles on Freedom of Expression and Copyright in the Digital Age*, 25 April 2013 <http://www.article19.org/resources.php/resource/3716/en/the-right-to-share:-principles-on-freedom-of-expression-and-copyright-in-the-digital-age>
- ARTICLE 19, “*Tunisia: Background paper on Internet regulation*”, 5 July 2013 <http://www.article19.org/data/files/medialibrary/37135/Tunisia-Report-on-Internet-.pdf>



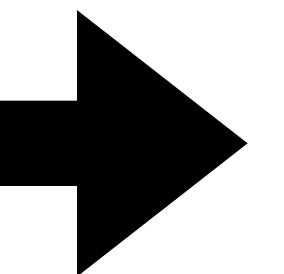
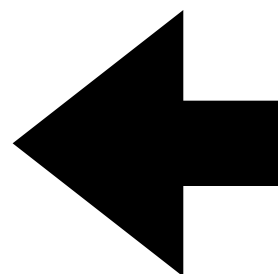
# **Lesson 4:2 Key international cases on freedom of expression online**

## **Introduction**

The basic principle is that the same rights that people have offline must also be protected online, in particular freedom of expression. This right is applicable regardless of frontiers and through any media of one's choice, in accordance with Article 19 of ICCPR and of UDHR. This is the key tenet which has informed various United Nations initiatives.

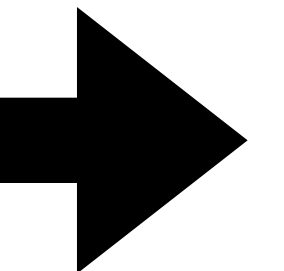
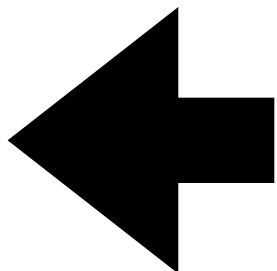


This principle also means that any restrictions on access to the Internet are covered by ICCPR Article 19 and by the equivalent regional protections on freedom of expression. We will explore how this principle is or is not applied in practice through the decisions of regional courts on the following key cases.



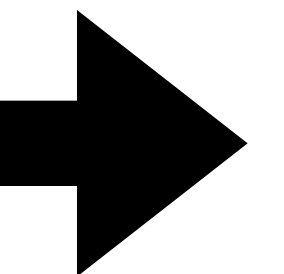
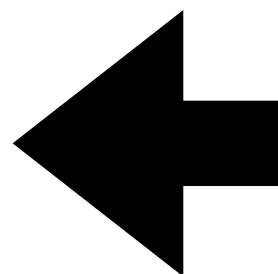
# ECtHR, Yıldırım v Turkey

In this case, the ECtHR held that there was a violation of Article 10 of the ECHR on freedom of expression as a result of the decision by a Turkish court to block access to Google Sites, which hosted an Internet site whose owner was facing criminal proceedings for insulting the memory of Atatürk. As a result of the decision, access to all other sites hosted by the service was blocked. In this case, the Court emphasised the following:



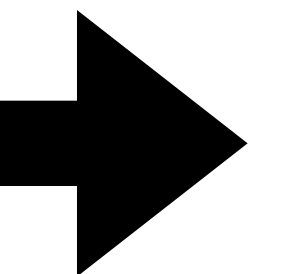
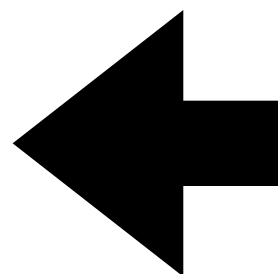


“The Internet has now become one of the principal means by which individuals exercise their right to freedom of expression and information, providing as it does essential tools for participation in activities and discussions concerning political issues and issues of general interest” (paragraph 54).



# Intermediaries

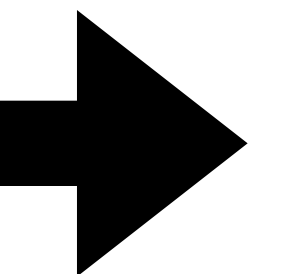
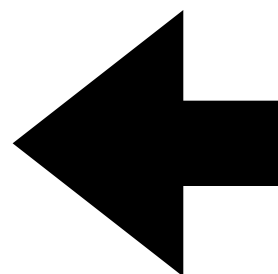
Internet companies and social media platforms play a fundamental role in enabling people to exercise their right to freedom of expression and access to information online. Given their influence over how and what is circulated on the Internet, such intermediaries face increasing pressure and control from States who would like to hold them legally liable for online expression.



# Intermediaries - continued...

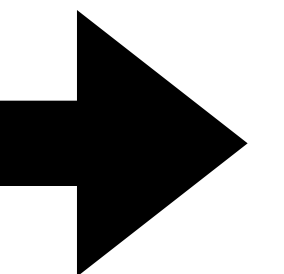
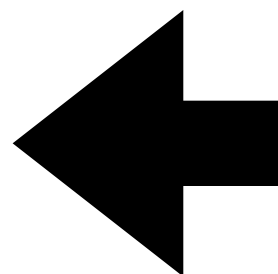
Intermediaries should not be held liable for the online expressions of third parties. Moreover, any requests by States to block certain content or disclose private information should only be done through proper independent processes, such as through the courts.

Intermediaries also have responsibilities to act with due diligence and not infringe upon the rights of individuals. This means they should not give in to pressure from the State to restrict access to content unless there has been a judicial intervention and the restrictions are clear to users and the wider public. Such standards were emphasised by the 2011 report of the UN Special Rapporteur on freedom of opinion and expression.



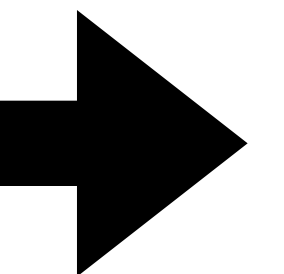
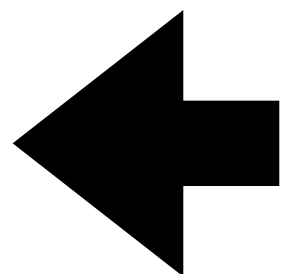
# ECtHR, Delfi v Estonia

In the case of Delfi v Estonia, the ECtHR found that intermediaries may be liable for defamatory content, even though there may be a notice and take-down procedure. In that case, the applicant, one of the largest Internet news portals in Estonia, published an article and comments (including those using offensive language) about a ferry company and its owner.



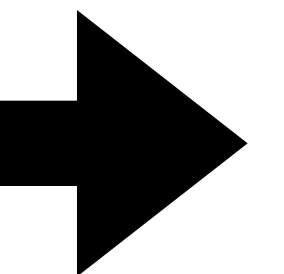
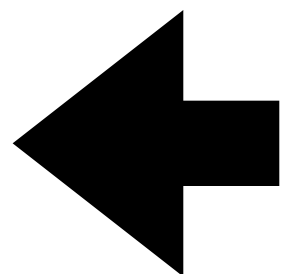
# ECtHR, Delfi v Estonia – continued...

Even though the applicant removed the articles after six weeks on the insistence of the company, he was ordered to pay 320 Euro after defamation proceedings in which it was held that the applicant should have prevented clearly unlawful comments from being published and should have removed them on its own initiative. In a very controversial judgement, the Court upheld that decision and didn't find a violation of Article 10 of the European Court of Human Rights.



# ECtHR, Delfi v Estonia – continued...

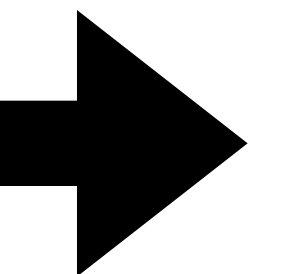
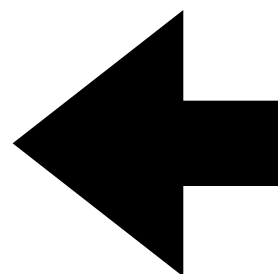
The Court treated it as a hate speech cases. Since then it has distinguished other cases on e.g. defamation. The decision was widely criticised as setting a worrying precedent, demonstrating a lack of understanding on how intermediary liability and the Internet works and failing to accord with international standards, amongst other reasons.



# ECtHR, Cengiz v Turkey

In 2008, an Ankara Criminal Court found that ten pages on YouTube infringed a criminal law prohibition on insulting the memory of the founder of the modern State of Turkey, Mustafa Kemal Atatürk, and imposed a blocking order on the entire website.

The applicants who were Turkish law professors, applied to have the blocking order set aside and argued that the restriction interfered with their right to receive and impart information and ideas. They argued that the blocking order had impacted their professional academic activities, and also that there was a wider public interest in having access to YouTube. They stated that they used the platform to access videos relating to their professional activities as well as to download and further share these materials. Some of the applicants also published recordings about their academic activities on the site.

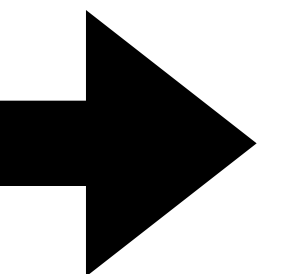
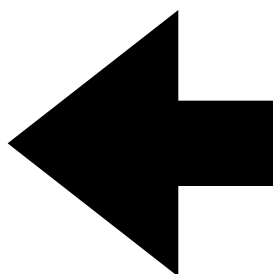


# ECtHR, Cengiz v Turkey – continued...

The European Court of Human Rights began by examining whether the applicants could be considered as “victims” of a human rights violation, and thus whether they had standing before the Court. It noted that the applicants had actively used YouTube for professional purposes, and that YouTube was a singular platform which enabled information of specific interest, particularly on political and social matters.

The Court observed that YouTube constituted an important source of information, and that the blocking order restricted access to specific information that could not be accessed by any other means. The Court also noted that YouTube was a platform which fostered the emergence of citizen journalism, imparting political information not conveyed by traditional media.

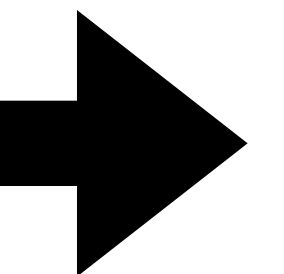
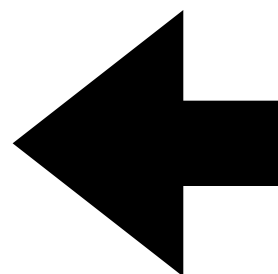
The Court therefore accepted that in the present case YouTube had been an important means by which the applicants exercised their right to receive and impart information and ideas, and that the applicants had been affected in the enjoyment of this right by the blocking order even though they had not been directly targeted by it.





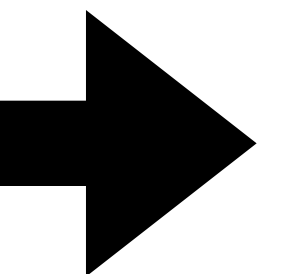
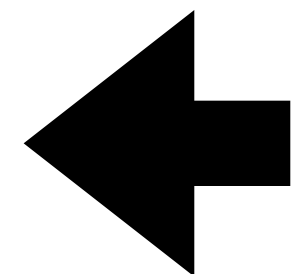
# Conclusion

This lesson has highlighted three cases which address freedom of expression online, including the issues raised by two controversial decisions of the two European courts – the European Court of Human Rights and the Court of Justice of the European Union. In the next lesson we will look at cases of freedom of expression online in the Turkish courts.



## References to materials:

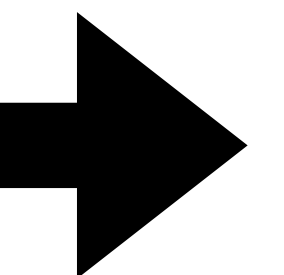
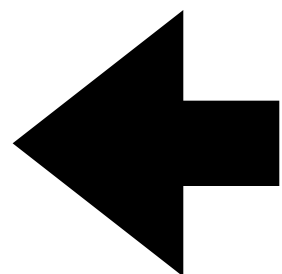
- ECtHR, *Yildirim v Turkey*, Application No. 3111/10, judgment of the European Court of Human Rights 10 December 2012, paragraphs 6-14, 38-72 [https://hudoc.echr.coe.int/eng#{\"fulltext\": \[\"yildirim\"\], \"documentcollectionid2\": \[\"GRANDCHAMBER\", \"CHAMBER\"\], \"itemid\": \[\"001-115705\"\]}](https://hudoc.echr.coe.int/eng#{\) (in English)
- ECtHR, *Delfi v Estonia*, Application No 64569/09, judgment of the European Court of Human Rights of 10 October 2013 [https://hudoc.echr.coe.int/eng#{\"fulltext\": \[\"delfi\"\], \"documentcollectionid2\": \[\"GRANDCHAMBER\", \"CHAMBER\"\], \"itemid\": \[\"001-155105\"\]}](https://hudoc.echr.coe.int/eng#{\)
- Gabrielle Guillemin, “Case Law, Strasbourg: Delfi AS v Estonia: Court Strikes Serious Blow to Free Speech Online” INFORRM’s Blog, 15 October 2013 <http://inform.wordpress.com/2013/10/15/case-law-strasbourg-delfi-as-v-estonia-court-strikes-serious-blow-to-free-speech-online-gabrielle-guillemin/>
- Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, 4 June 2011, A/HRC/20/17, [https://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27\\_en.pdf](https://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf)
- Global Freedom of Expression – Columbia University, *Cenzig v. Turkey*, <https://globalfreedomofexpression.columbia.edu/cases/cengiz-v-turkey/>



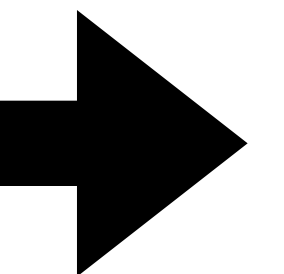
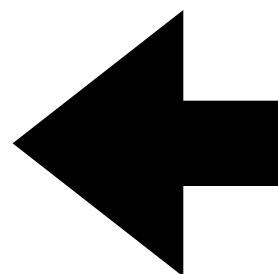
## **Lesson 4:3 Key Turkish case studies on freedom of expression online**

### **Constitutional Court of Turkey, Yaman Akdeniz and Others, App. No. 2014/3986, 02.04.2014**

On 21 March 2014, TIB (Telekomunikasyon İletişim Başkanlığı) issued an order to block Twitter, citing that Twitter failed to comply with three court orders and one prosecutor's decision, ordering the ban of "fake" users allegedly defaming public officials. Twitter challenged one of the blocking decisions in a local court in Turkey, on the basis of its status as a hosting provider in the country and, given that it does not hold operations within it, it argued that this would put the company outside of Turkish legal jurisdiction.



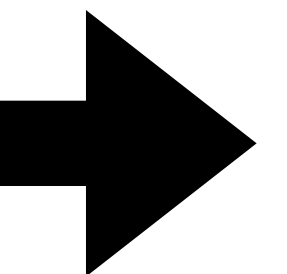
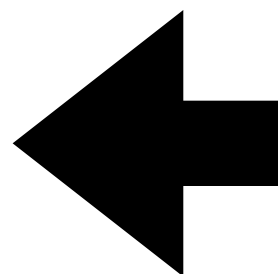
Lawyers Yaman Akdeniz and Kerem Altiparmak challenged the blocking before the Constitutional Court of Turkey on the basis that the blocking was arbitrary and was not supported by sufficient legal grounds. In April 2014, the Constitutional Court found a violation of the right to freedom of expression of the applicant and ordered the lifting of the blocking of Twitter in Turkey.



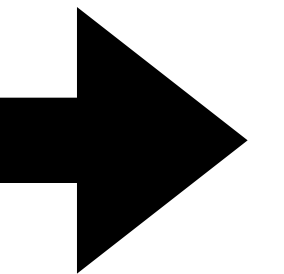
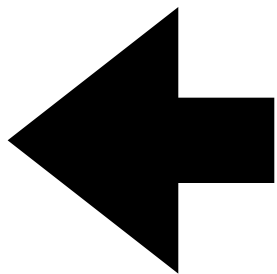
# **Constitutional Court of Turkey, YouTube LLC Corporation Service Company and others, App. No. 2014/4705, 29.05.2014**

With a decision of 27 March 2014, TIB banned YouTube in Turkey after the posting of a two-part voice recording that allegedly disclosed top-secret conversations by high-ranking State Officials about a strike in Syria.

In its final decision, the Constitutional Court of Turkey found a violation of the right to freedom of expression of the applicants, stating that Internet had become an important medium for freedom of expression and that it should not be blocked in a democratic society. The ban on Youtube in Turkey was subsequently lifted as a result of this judgment.

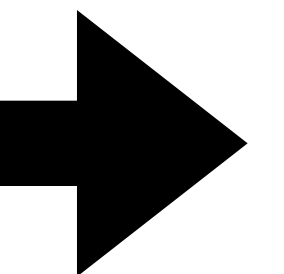
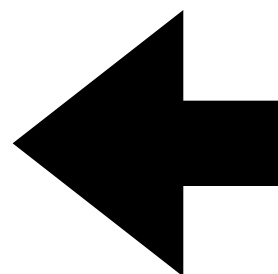


You will find some additional useful resources and links to websites that monitor website blockings in Turkey, in order to be up-to-date on new developments.

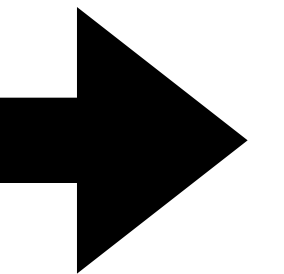
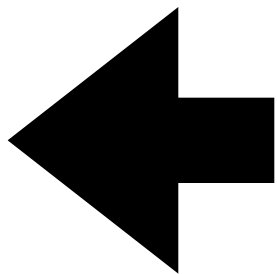


## References to materials:

- Constitutional Court of Turkey, Yaman Akdeniz and Others, App. No. 2014/3986, judgment 02.04.2014 <http://www.constitutionalcourt.gov.tr/inlinepages/leadingjudgements/IndividualApplication/judgment/2014-3986.pdf>
- Constitutional Court of Turkey, Youtube LLC Corporation Service Company and others, App. No. 2014/4705, judgment 29.05.2014 <http://constitutionalcourt.gov.tr/inlinepages/leadingjudgements/IndividualApplication/judgment/2014-4705.pdf>



# Conclusion

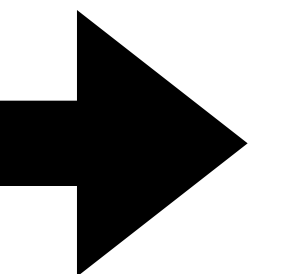
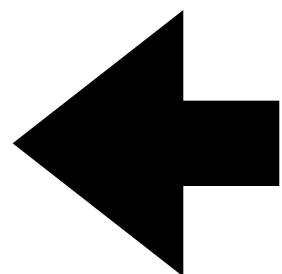




# Conclusion of the module

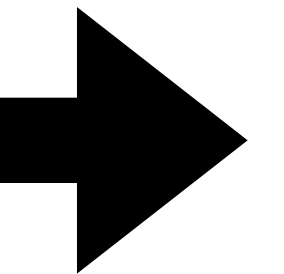
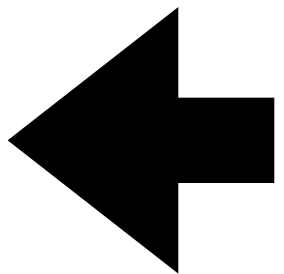
In this module we have highlighted some of the key aspects related to the right to freedom of expression, looking in specific to its linkages with national security and counter-terrorism, protection of journalists and freedom of expression online.

We hope that the information shared has been useful and that you have enjoyed the course. Please check out the relevant materials under each lesson, which could be useful additional references for your work.



**Congratulations on completing this course.**

**Thank you!**



*Disclaimer:*

*This course is adapted from Article 19 Diploma on Freedom of Expression.*