

GLOBAL TRENDS IN FREEDOM OF EXPRESSION JURISPRUDENCE IN 2014

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Introduction

A year ago, when we met for the first Columbia University Jurisprudence Conference, there was strong evidence that political instability worldwide was on the rise after nearly [20 years of decline in political violence worldwide](#). 12 months later, it is not just that the global situation has deteriorated. The nature, scale and extent of the challenges have dramatically transformed. What constituted localized, small or larger, armed violence and escalating political violence in 2014 have now morphed into full-blown warfare, most often regional or international in nature and involving many parties. It is thus not surprising that the latest Global Peace and Terrorism Indexes should show a notable deterioration in levels of peace, and a 61% increase in the number of people killed in terrorist attacks over the last year.

Global analyses of freedom of expression in 2014, available at the time of writing this article, also highlight the worldwide deterioration in indicators and indexes. According to **Reporters Without Border** 2014 world press freedom index, *“Beset by wars, the growing threat from non-state operatives, violence during demonstrations and the economic crisis, media freedom is in retreat on all five continents. The indicators compiled by Reporters Without Borders are incontestable. There was a drastic decline in freedom of information in 2014. Two-thirds of the 180 countries surveyed for the 2015 World Press Freedom Index performed less well than in the previous year.”* The **Committee to Protect Journalists**, focusing on imprisoned journalists highlight similar depressing trends: By the end of 2014, it had identified 221 journalists imprisoned around the world in 2014, an increase of 10 from 2013: *“The tally marks the second-highest number of journalists in jail since CPJ began taking an annual census of imprisoned journalists in 1990, and highlights a resurgence of authoritarian governments in countries such as China, Ethiopia, Burma, and Egypt.”*

The world situation compelled Kenneth Roth, the head of Human Rights Watch to write in the introduction to the organization’s 2015 World Report, *“The world has not seen this much tumult for a generation.”*¹

This is tumult or restiveness that eludes both categorization and geography. The killings of journalists are no longer country specific or territorially contained. The deliberate attack on and executions of *Charlie Hebdo* journalists in Paris in January 2015 demonstrates a globalization of the threats confronted by journalists. Whereas in a recent past identifying the greatest danger zones for journalists was fairly straightforward, the situation’s evolution over the last one or two years deeply challenges these assumptions. And thus, democracies in the making or well established, such as Mexico, the Philippines, France in 2015, compete with war ravaged locations such as Syria or Somalia for the tragic record of the deadliest places for the information providers.

The tumult occurs against a background of bi-polarity or multi-polarity in the making, with a range of countries (old and emerging powers) and of non-state actors (“terrorist” groups

¹ <http://www.hrw.org/world-report/2015/essays/tyranny-false-comfort>

² Multi-lateral or international ones, such as the United Nations (HRC, GA, ITU, UNESCO), Internet Governance

and religious actors with universalist ambitions) competing for global influence or supremacy. The competition is played out not only at political, economic or military levels, but also, and increasingly so, at the ideological or normative and “soft power” level.

And there too, the data indicate that we are confronting a multiplication in the number of fronts, which reflect, and at times add to, the tumult. Nowhere is this more striking than in the field of on-line freedom of expression and information, which is characterized by a multiplicity of normative battlegrounds² and would-be norms entrepreneurs³. There are conflicts on each of these fronts and conflicts between them. Together this is creating a normative cacophony of a kind that – in all likelihood – has never before been encountered, and not just over one generation⁴.

On the other hand, there is a risk that this political world tumult tempts us into overstating (emerging or long-lasting) conflicts about norms and values and thereby underestimating the level of consensus that may already have been generated, including over consensus new questions such as on-line freedom.

A more optimistic vision of the state of the legal and normative world emerges from the work of Professor Kathryn Sikkink - one of the leaders in this field. In her 2011 book “The Justice Cascade”⁵, Sikkink investigates the development of one particular norm, that of individual criminal responsibility for human rights violations. She argues and demonstrates that a combination of factors, in the first place human rights prosecutions driven by human rights activists and lawyers, have acted to *legitimize* the norm of individual criminal accountability, compelling states and Heads of States to accept it, as shown by the ratification of the International Criminal Court. In a later piece for the website Open Democracy, she and her co-authors argue that, “*What is emerging is not a new independent and supranational system of courts. Rather, we see a decentralized but interactive global system of accountability, in which international tribunals and international criminal law interact with domestic institutions and national and transnational civil society groups to help deter future crimes*”⁶. This conclusion presumes that, even in the absence of working supra-national judicial institutions, there are common legal norms that have founded an interactive globalized judicial “system” and indeed allow it to operate.

Global norms⁷ are at the heart of the Global Freedom of Expression initiative at Columbia. Its purpose is to better understand how global norms on freedom of expression and

² Multi-lateral or international ones, such as the United Nations (HRC, GA, ITU, UNESCO), Internet Governance Forum, and NetMundial but also regional (within the European Union) or bi-lateral.

³ A number of governments (the United States Open Internet, China Internet sovereignty) but also the private sector, civil society, IT engineers, etc.

⁴ Development of norms greatly affecting freedom of expression and information on-line is no longer the preserve of the Human Rights Council or the General Assembly of the United Nations; neither is it solely produced through the inventive multi-stakeholder processes of NetMundial focusing on Internet governance. Trade negotiations and agreements (e.g TPP or TTIP or TISA), have become another crucial normative space where far-reaching decisions are made that could potentially profoundly define on-line freedom of expression.

⁵ Kathryn Sikkink, **The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics**, W. W. Norton, 2012

⁶ “The ICC’s deterrent impact – what the evidence shows”, in **Open Democracy**, 3 February 2015

⁷ Finnemore and Sikkink define norms as a “*standard of appropriate behavior for actors with a given identity*”, and distinguish this definition and approach from that of institutions, which suggest a “*collection of practices and rules*”. They argue that norms go through a life cycle composed of three phases: norm emergence, norm cascade and norm internalization, the first of which relies heavily on a norm entrepreneur. Finnemore and Sikkink warn that completion of the life cycle is not an inevitable process and that a number of norms may never get to the “tipping point” allowing for norms cascade and norms internalization. Martha Finnemore and Kathryn Sikkink, International Norms Dynamics and Political Change in **International Organization**, Vol.52, No.4, 1998: pp.887-917. See also Kathryn Sikkink, Transnational Politics, International Relations Theory, and Human Rights, in **Political Science and Politics**, Vol. 31, No. 3, (Sep., 1998), pp. 516-523

information (FoE/I) come about in an era defined and dominated by information. Established early in 2014, the initiative seeks, amongst other things, to understand the role played by tribunals (from domestic to international) in addressing FoE/I challenges and protecting (or not) freedom of expression. This involves monitoring, analyzing and cataloguing court cases from around the world, to determine whether legal precedents are emerging and morphing into global norms.

Could Sikkink's conclusion apply to freedom of expression? Are we witnessing too the emergence of inter-meshed legal global system for freedom of expression and information, guided by common norms? One year into Global FoE@Columbia existence, it is too early still to conclude one way or the other as far as a *global system* goes. But this first monitoring of the global jurisprudence on freedom of expression points, overall, to worrisome trends and findings. With the exception of the continuing positive trend regarding the decriminalization of defamation (a trend, not a global norm), and a number of exemplary rulings by Courts in Africa and a few other jurisdictions, the vast majority of the 2014 jurisprudential trends paints a rather bleak picture of the judicial protection of freedom of expression.

A word about methodology

Before turning to analysis of the initial findings, the question of the methodology used should be considered.

This is the first year that Global FoE is collecting court cases globally so there is no benchmark – no previous collection with which to *compare* these data. Secondly, the monitoring of court cases started properly only in the middle of 2014. The collection suffers too from a number of biases: limited by language, on-line accessibility, the media biases in affecting reporting of cases, to cite only the more obvious.

Some 150 rulings were monitored in 2014. Criteria identified over the course of meetings and numerous exchanges with experts, and based on a regular monitoring of a number of key sources, guided the gathering of cases for review. A number of countries' jurisprudence was left out of this initial review, due to language constraints or because of little on-line reporting, while other countries may be over-represented. It is a matter of particular regret that Latin America did not figure very well in this first year's monitoring, given that, over the years, the jurisprudence emerging from Latin America and the Inter-American Court has been remarkably positive for the protection of freedom of expression - with notable exceptions, i.e. Venezuela to cite but one.

One key implication of these limitations is that the cases presented here, their issues and doctrinal questions, are not meant to be *statistically* significant. Rather, this first overview seeks to highlight the known "key" rulings that Courts in a number of countries rendered in 2014, being a very first step in the building of a picture - globally, regionally and/or nationally - of their role in securing justice for freedom of expression.

Further confirmation and validation of this first tranche of cases, and our understanding of these, is underway, being provided through expert review of the database and of the associated analysis presented in such as this article. Revisions will be made accordingly while specific national, regional and thematic interpretations will be further elucidated in sessions of the 2015 Jurisprudence Conference.

On the occasion of the first Jurisprudence Conference organized by Columbia Global Freedom of Expression in 2014, expert reviewers have identified certain categories of arraignment to be impacting, potentially disproportionately, on freedom of expression and

information. These are:

- *National security, anti-terrorism and related issues;*
- *Surveillance;*
- *Hate speech, incitement speech, blasphemy and related issues*
- *Defamation – a continuing threat to freedom of expression.*

In addition, some experts have suggested that violence against journalists, and the ways in which courts around the world rule over such cases, were also impacting significantly on the exercise of the right to freedom of expression.

These five issues guide this first overview and analysis.

I - National security cases

Issues related to, and formal charges concerning, national security (understood in the broader sense of the term, and inclusive of issues pertaining to sedition, public order, anti-terrorism) appear to have largely dominated the judicial agenda in 2014.

2014 appears to stand out for its clear, and quasi-global, consolidation of (national) security – in law, mind and spirit - as an all-encompassing framework and subjected to little opposition.

Trends emerging from the available case law include:

- *The militarization of criminal law and criminal procedures related to freedom of expression:* Military law and associated considerations are creeping into legal procedures and evident in the legal arguments presented by parties; the language of the laws that underpin cases and in the seemingly disproportionate sentences applied (such as application of the death penalty for participating to a protest). In addition, special tribunals (such as military and other dedicated tribunals etc.) were used to handle free speech cases related to national security in Saudi Arabia and Egypt.
- There are a substantial number of cases related to the *criminalization of expression* (on security grounds) in the context of protest and the exercise of the right to assembly; many of which had not been settled by year-end. The Gezi protests in Turkey, various political protests in Egypt, protests in Ferguson USA, and many others raised a range of freedom of expression and press freedom issues, some of which came before the courts in 2014.
- Many irregularities in *application of judicial standards and fair trials procedures* were reported. A number of trials on charges related to national security were held behind closed doors. Some trials lasted but a few minutes and were conducted without essential legal procedures. In others, defendants were intimidated in the process or denied access to lawyers. In Egypt, the renewal of pretrial detention orders, despite a lack of evidence to warrant prosecution, appears to have been fairly common⁸, while mass death penalty sentences (a 1000 at a time) were issued for freedom of association or assembly crimes, etc.
- The 2014 cases confirm too that the *digital world* has become as important a focus of investigation and legal ruling as its analog, or physical, counterpart.

Courts are also interpreting threats to *national security*, or indeed *security*, broadly and in a wide range of ways. Although clearly not a trend new in 2014, the number of cases of

⁸ HRW, Global Report 2015

“national security” charges being heard globally may be/is increasing, broadening too the spectrum of definitions and approaches⁹.

Diversity of the definitions and approaches to what constitutes an actual or potential threat to national security is an issue at the level of *domestic jurisdictions*:

- *Malaysia* well exemplifies the expansionist approach in its treatment of sedition for which it has broadened the prosecutorial net in terms of content of speech, the medium used, the audience addressed, the motivation or intent of the speaker¹⁰. According to SUARAM, a Malaysian human rights group, 44 people were held under the Act in 2014, against 3 in 2011¹¹.
- *Lèse-majesté* (violation of majesty) and other charges related to protection of the reputation of public officials or a “country” tend to be deemed *defamation* or *libel* under media or freedom of expression laws. However, in 2014 (and this may also be an earlier trend), such charges or “crimes” are more directed to, and frequently justified with reference to, *national security* and *stability* rather than reputation proper¹². There too, “lèse-majesté” charges cover very disparate speech content, speech mediums, speakers etc.

Although the legal logic/arguments behind 2014 rulings *globally*, will require further in-depth analyses, preliminary review highlights some key issues:

- Across jurisdictions there seems to be little, or perhaps reduced, focus on the *intention* or *motivation* of the accused – of the “speaker”;
- One major implication of the absence of focus on *intention* is that the *nature of the activities* perceived as threatening national security is thus also very broad. So, for instance, in the trials against Al Jazeera journalists, the judge determined that “broadcasting materials” (about public protests on the Al Jazeera channels) amounted to assisting the “terrorist group” (Muslim Brotherhood).
- There was heavy reliance (sole reliance, in fact) on *official assessment of what constitutes national security threats* and little questioning of what security officials deem to be a threat. Judges may question the process but rarely the substance. This appears to be true of courts and judges around the world.

Perhaps oddly, it is in cases dealing with the protection of the right of privacy and *mass surveillance* (dealt with in the next section) that we may find emerging a counter-weight to this context of “increased securitization and exceptionalism”¹³ of free speech protection.

Examples of 2014 court rulings pertaining to national security

1. The **European Court for Human Rights** ruled in the case of **Pentikainen v. Finland**¹⁴ that a Finnish press photographer’s conviction for disobeying the police while covering a

⁹ This “finding” requires greater research. The increase of the number of cases on national security grounds can be deducted from various indexes, including that of CPJ. According to their imprisoned journalists index, 75 were jailed in 2007 on “anti state” charges, against 132 in 2014. Whether there is a wider spectrum of charges in 2014 than 8 or 10 years ago is intuited rather than empirically evidenced.

¹⁰ See H.R. Dipendra analysis of the 2014 trends in Malaysia – Global FoE @ Columbia Conference

¹¹ SUARAM, Malaysia: human rights report 2014, <http://www.suaram.net/?p=6789>

¹² Indeed, as highlighted by Duncan Mac Cargo in his 2013 analysis of Thailand judicial trends. “In the Thai Criminal Code it [lèse-majesté] is grouped with legislation to protect national security – in other words, it is legislation along the ‘treason spectrum’. See Litigating on the Free Flow of Information in Thailand, February 2014: <http://globalfreespeech.columbia.edu/publication/litigating-free-flow-information-thailand>

¹³ To borrow from: Marie-Pierre Granger and Kristina Irion, The Court of Justice and the Data Retention Directive in *Digital Rights Ireland: Telling Off the EU Legislator and Teaching a Lesson in Privacy and Data Protection*, in European Law Review, issue 6, 2014, p.849 <http://www.ivir.nl/publicaties/download/1456>

demonstration (that has involved acts of violence and alleged excessive use of force by police) did not breach article 10 of the European Convention. The Court ruled in particular that *“As the Government pointed out, the fact that the applicant was a journalist did not give him a greater right to stay at the scene than the other people”*¹⁵. The established European Court “margin of appreciation” doctrine was also mentioned in the Court’s final remarks: *“Having regard to all the foregoing factors and taking into account the margin of appreciation afforded to the State in this area, the Court considers that the domestic courts struck a fair balance between the competing interests at stake. In sum, the Court concludes that the domestic courts were entitled to decide that the interference complained of was “necessary in a democratic society”*¹⁶.

The decision was not unanimous and drew some sharply dissenting views from two judges who argue that the “margin of appreciation” doctrine should not be invoked to legitimize the violation of freedom of expression in situations for which, ultimately, the European Court has a strong track record of protection:

“Section 4(1) of Chapter 16 of the Penal Code (as amended) provides that the police may issue an order “for the maintenance of public order or security or the performance of a duty” and that to disobey would constitute “contumacy towards the police”, a criminal offence punishable by a fine or by imprisonment for up to three months. In the present case the order, issued orally by the police, could also have been orally revoked or varied, according to what the circumstances might have required. The object of the order was to restore peace by dispersing the crowd in a controlled way. It is surprising that it should have been thought that it could also apply to a journalist who was lawfully present and covering the event in the context of his media duties and that it could lead to his arrest.”

“Where a demonstration is peaceful, the journalist’s function is essentially one of collecting and transmitting information and, quite often, adding comment. But when tension builds up and violence breaks out, whereupon the authorities resort to suppressive control measures, the journalist assumes the role of “public watchdog” and his task then acquires even greater significance (..). He is entitled to be in the very thick of things until the very end, and sometimes does so at considerable risk to himself. The reason is because in a democratic society the public have the right to know what happens during such difficult times. This right forms one of the basic safeguards of democracy...”

The decision was referred, on appeal, to the European Grand Chamber in June 2014.

2. Among the countries of the European Union, a UK decision addressed the relationship between freedom of expression and national security in the following way: the **UK High Court** ruled in February 2014 that David Miranda's detention at Heathrow airport, and the retention of his property, including sensitive journalistic materials, was lawful and proportionate under Schedule 7 of the Terrorism Act¹⁷. The decision rests on an analysis of what constitutes a lawful and proportionate interference (in this case the arrest and retention). The judge did recognise the importance of freedom of expression and freedom of the press [paragraph 41 to 47] but ended his review of British common law (having rejected the European Court decisions) with some unusual reflections:

¹⁴ The ruling can be found here:

[http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{"languageisocode":\["ENG"\],"documentcollectionid2":\["JUDGMENTS"\],"itemid":\["001-140395"\]}](http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{)

¹⁵ Pentikainen v. Finland, par. 47

¹⁶ Pentikainen v. Finland, par. 55

¹⁷ The judgment is available here:

http://www.article19.org/data/files/medialibrary/37465/MIRANDA_v_SofS_x3_-_11_2_14_-_FINAL_DRAFT.pdf

44. *Freedom of speech may indeed be “the lifeblood of democracy”; but the idea that the essential justification of free expression as a fundamental value is the promotion or betterment of democratic government (if that is what is suggested, not least in Shayler) seems to me, with respect, to be false... But free speech is not a creature of democracy; if anything, the converse. The critics of democracy may keep democracy on its toes.*
45. *It follows that so far as Mr Ryder claims a heightened protection for his client (or the material his client was carrying) on account of his association with the journalist Mr Greenwald, the application of requirement (iv) in the toll of proportionality – “whether... a fair balance has been struck between the rights of the individual and the interests of the community” – needs at least to be modified. The contrast is not between private right and public interest. The journalist enjoys no heightened protection for his own sake, but only for the sake of his readers or his audience. If there is a balance to be struck, it is between two aspects of the public interest.*

The decision follows quintessential “national security” logic and is a typical, if elaborate, example of the unwillingness of judges to challenge official assessments of national security concerns. The judge determined that forming an accurate judgment on the matter would depend on “*knowing the whole “jigsaw” of disparate pieces of intelligence.*”

56. *There may no doubt be obvious cases, where the information on its face is a gift to the terrorist. But in other instances the journalist may not understand the intrinsic significance of material in his hands; more particularly, the consequences of revealing this or that fact will depend upon knowledge of the whole “jigsaw” (a term used in the course of argument) of disparate pieces of intelligence, to which the classes of persons referred to by Mr Greenwald will not have access.*

The judge also stresses that he “*had no reason to doubt any of the evidence from Oliver Robbins, the deputy national security adviser at the Cabinet Office, that the material was likely to cause very great damage to security interests and possible loss of life*”. The Judge thus concludes that:

“In my judgment the Schedule 7 stop was a proportionate measure in the circumstances. Its objective was not only legitimate, but very pressing. The demands of journalistic free expression were qualified in the ways I have explained. In a press freedom case, the fourth requirement in the catalogue of proportionality involves as I have said the striking of a balance between two aspects of the public interest: press freedom itself on one hand, and on the other whatever is sought to justify the interference: here national security. On the facts of this case, the balance is plainly in favour of the latter.” [par.73]

3. In the **US**, the Supreme Court refused to hear the case of **Tarek Mehanna**¹⁸, following his conviction by First Circuit Court of Appeal¹⁹. In essence, the Supreme Court denial of the petition, and the Appeal Court’s conviction strengthened the Supreme Court decision in *Holder v. Humanitarian Law Project*, which upheld the constitutionality of the prohibition against material support for terrorism, including provision of expert advice and assistance, training, service and personnel. In the Mehanna case, the prosecution insisted that “*in light of Humanitarian Law Project, the standard for judging material support for terrorism was not whether the speech was intentional incitement to imminent lawless action that was likely to succeed, but whether it was coordinated or independent advocacy.*” The Court had also the opportunity to determine the meaning and extent of the “coordination” test but decided against it. Mehanna's “material support for terrorism” included translating texts, subtitling videos, writing a poem and discussing his political and religious views online and in person²⁰.

¹⁸ <http://www.scotusblog.com/case-files/cases/mehanna-v-united-states/>

¹⁹ <http://media.ca1.uscourts.gov/pdf/opinions/12-1461P-01A.pdf>

²⁰ See analysis of case in: <http://truth-out.org/opinion/item/27088-does-crying-terrorism-trump-free-speech>

4. Also in the **US**, the courts could not quite agree whether the threat of violence abroad (a type of “heckler’s veto”) constitutes a valid ground for suppressing information domestically. In *Dhiab v. Obama*²¹, the District Court judge concluded that allowing the threat of violence abroad to suppress transparency in a U.S. Court would be a type of “Heckler’s veto” and she rejected the government’s claim that the disclosure of videos on the forced cell extraction and forced feeding of a Guantanamo detainee (Abu Dhiab) will violate the Geneva Conventions²². In contrast, in *Center for Constitutional Rights v. CIA*,²³ the Second Circuit Court upheld the government’s right to withhold the forced cell extraction videos of Mohammed al-Qahtani, on the ground that “the government has met its burden of establishing that these images are exempt from disclosure pursuant to FOIA Exemption 1, which authorizes non-disclosure of records properly authorized by Executive Order to be kept secret in the interest of “national defense or foreign policy”, as release of such images could logically and plausibly harm national security²⁴.

5. Finally, **in the U.S.**, Judge John D Bates’ February 2013 redacted opinion²⁵ pursuant to Section 215 of The Patriot Act, was released in 2014 in response to a public access motion. According to Jennifer Granick, the heavily redacted opinion suggests that an “*American may be investigated as part of a terrorism investigation for their first amendment protected speech or activity so long as someone else’s related conduct is not protected, even where the relationship between the American and the other party is too attenuated to support suspicion of aiding and abetting or conspiracy*”²⁶.”

6. In **Egypt**, Al Jazeera journalists Mohamed Fahmy, Peter Greste and Baher Mohamed were sentenced to between seven and 10 years in jail on charges of “aiding terrorists” and “falsifying news” in harm of the country’s image and unity. The defendants were absolved of the crime of perjury. The extensive judgment court referred to the defendants as being “guided by the devil” and of using journalism as a “tool that spreads falsified news for the purpose of ruining the image of Egypt as a nation not only internally but also externally in front of the rest of the world”.

Considering that the subject of the case, the crime for publicizing and exporting overseas fabricated news and data which offends and harms the country’s internal and external security in support of the approach of the terrorist group referred to (The Muslim Brotherhood), as well as providing them with monetary aid while knowing the purpose that the group calls for, is a misdemeanor act accordingly with articles 86, 86 bis. (modified) /1,3,4, 86 bis. (modified) A/ 1,2 of the penal code... and taking in consideration the defendants’ approach and behavior, including their diligence to hide their activities and broadcast material that they are providing this terrorist group ... the court shall rule for the ultimate crime....” [p.49]

The defendants... have agreed to aid them by providing them with some broadcasting material and have made deletions and addition alterations and then they publicized it (broadcasted it) through the international information network and one of the satellite channels- Al-Jazeera Channel- and so the offense occurred on the basis of this agreement, and this assistance as shown in the documents...

²¹ *Dhiab v. Obama*, 2014 U.S. Dist. LEXIS 140684 (D.D.C. 2014)

https://scholar.google.com/scholar_case?case=7857261164990394798&hl=en&as_sdt=6&as_vis=1&oi=scholar

²² On appeal, the court dismissed the appeal for lack of jurisdiction and denied the request for a writ of mandamus. *Dhiab v. Obama*, No. 14-5299 (D.C. Cir. 2015) <http://law.justia.com/cases/federal/appellate-courts/cadc/14-5299/14-5299-2015-05-29.html>

²³ 765 F.3d 161 (2nd Cir. 2014)

²⁴ See more at: <http://caselaw.findlaw.com/summary/opinion/us-2nd-circuit/2014/09/02/271286.html#sthash.aneQIFVA.dpuf>

²⁵ The redacted opinion can be found here: <http://www.fisc.uscourts.gov/sites/default/files/BR%2013-25%20Opinion-1.pdf>

²⁶ FISC OKs Section 215 Investigations of Americans, Despite First Amendment, August 28, 2014 <http://justsecurity.org/14418/fisc-law-abiding-americans-subject-section-215-orders-amendment/>

“They [the defendants] possessed unreal (fabricated) pictures of the country’s internal affairs with the purpose of viewing them, and these pictures (material) can harm the country’s reputation as shown in the documents (papers). The court relied on the testimony of the witnesses and the technical team’s report in addition to observing the case papers and its documents...²⁷”

7. In **Turkey**, the Constitutional Court overturned the amendment to the Internet Law passed by the Turkish parliament on September 10, 2014 as well as the blocking of Twitter and You Tube ordered on national security grounds. The blocking of Twitter was overturned on the basis of its failure to meet the legality test: There were court orders to block some URL addresses but there were no court orders to directly blocking access to the web site twitter.com.

“In the concrete case, it is observed that the action of blocking access is not performed on the basis of URL but by means of blocking access to an entire web site. Taking into consideration the regulations present in the Law No. 5651, it is obvious that the action which goes beyond the court judgments indicated to be the basis of the decision of TİB and which brings along the complete blockage of access to the web site twitter.com that is a social media network with millions of users does not have any legal basis and that the blockage of access to this social sharing web site without a legal basis and by means of a decision of prohibition whose borders are not definite constitutes a severe intervention on the freedom of expression which is one of the most basic values of democratic societies.” [par.48]

8. On a more positive note as well, a Ugandan high court judge overturned a decision by a Magistrate Court in Kampala that had barred journalists and the general public from attending the trial of a police officer for reasons of national security. In Uganda Court reporters Association LTD v. Attorney General of Uganda, the High Court judge ruled that “the Trial Magistrate had acted unreasonably, unfairly, irrationally and committed an illegality... Following this Judgment in September 2014, the State dropped charges against the police officer and withdrew the case.²⁸”

Other cases

- In **Malaysia**, some 44 persons were charged and/or arrested for violation of Section 4 of the *Sedition Act 1948*, as part of what the Malaysian Media has described as the Malaysian government 2014 Malaysian sedition dragnet. Most trials are pending but some decisions have been rendered. For instance, the Kuala Lumpur Sessions court sentenced social activist Safwan Anang to 10 months jail after finding him guilty of sedition for uttering “*sedition words*” at a May 13 rally last year at the Kuala Lumpur and Selangor Chinese Assembly Hall. Several Pakatan Rakyat politicians, social activists, journalists and a law professor have been charged in court with sedition²⁹.
- In **Thailand**, close to a dozen cases of *lèse-majesté charges* were monitored, including that of a taxi driver, sentenced to two years and six months in jail under the *lèse-majesté* laws for a conversation he had with a passenger. On 4 November 2014, a University student was sentenced to five years imprisonment because a Facebook post

²⁷ Global FoE @Columbia, unofficial translation

²⁸ Cited by Catherine Anite, in *Strides of Hope in Uganda*, a review of global freedom of expression jurisprudence in 2014, paper written for the Justice for Free Expression in 2014 Conference, Columbia University, March 10-11, 2015

²⁹ The sedition Act was passed during colonial rule in 1948, prior to independence. It was also not passed through Parliament. The lawyers that have filed the case are arguing that the Sedition Act violates Article 10 of the Federal Constitution, which guarantees freedom of speech and that it violates the Constitution because Article 10(2) of the constitution states that by law, only Parliament may impose restrictions on the rights under Article 10.

was considered by the court to be in contempt of the monarchy. The court said the student's act was an "extremely serious threat."

- In **Myanmar**, the *State Secrets law* was used to hand down a 10 year jail sentence with hard labor to a newspaper owner and 4 journalists following the January 2014 publication of a story alleging that chemical weapons were being produced at a military facility in Magwe.
- In **Egypt**, the judicial environment for freedom of expression and information was dominated by national security related charges. Whether called *treason*, *aiding terrorism*, *spreading false news* to ruin the image of Egypt, or *staging demonstrations* in violation of the law, national security interest appear to have trumped all. Throughout the year, Egypt also relied heavily on military courts, including for crimes related to freedom of expression/information (FoE/I). Hence in April 2014, a military court sentenced a social media manager for the online news website Rassa to one year in prison for helping to leak a tape of remarks by al-Sisi during his time as defense minister³⁰.
- In **Saudi Arabia**, charges related to freedom of expression "crimes" were also largely about national security concerns, with some handled by the so-called Special Criminal Court, established to deal with "terrorism". Charges deployed in 2014 to curtail freedom of expression included: "breaking allegiance with the ruler," "contact with foreign news organizations to exaggerate the news," "inciting [people] to violate public order and spreading discord," "insulting the judiciary," "setting up an unregistered organization," "insulting Islam", (by founding a critical liberal website, or for posting comments on Twitter about Islamic religious leaders), etc. Mikhlif Al-Shammari, a well-known writer and activist, was sentenced, on 3 November by a special criminal court in the eastern city of Al-Khobar, to two years in prison and 200 lashes for, in essence, a Twitter posting (240 characters) calling for the peaceful co-existence between Sunnis and Shiites.
- In **Turkey**, the government initially used the law and/or special powers to tighten an already restrictive Internet law and blocked Twitter and YouTube for several weeks, without prior court orders, for reasons of "national security, the restoration of public order and the prevention of crimes." The Constitutional Court of Turkey lifted the blanket bans. National security was also directly cited in cases related to freedom of assembly: 35 Gezi Park protestors, including Çarşı leaders (a local football club), were tried on charges of "attempting a coup". The prosecutor is seeking aggravated life sentences for the protestors. Charges included "coup attempt" but also "being members of an armed group," "resisting public officials," "staging demonstrations in violation of the law" and "possessing unlicensed weapons."

II - Blasphemy, Hate- and incitement- speech cases³¹

2014 saw an increasing number of cases of hate and incitement speech flirting with national security, further confusing and muddying one of the most complicated freedom of expression issues and restrictions. The trend is not recent. In fact, it may be argued that article 20(2) of the ICCPR, which prohibits incitement to hatred that may result in violence,

³⁰ Human Rights Watch highlighted the case in the organisation annual report launched in 2015.
<http://www.hrw.org/world-report/2015/country-chapters/egypt>

³¹ For the purpose of this review, I distinguish between "incitement speech" prohibited under article 20 of the ICCPR and the broader category of "hate speech" which may be legitimately restricted under article 19 of the ICCPR provided the restrictions meet a three part test (legality, necessity and proportionality).

discrimination and hostility, has itself established the links with national security. It is not only the wording of the article (with its focus on violence as a likely result of incitement) but also its location, following on Article 20(1), which prohibits war propaganda.

Still, the last decade has certainly solidified the links between hate and incitement speech on one hand, and national security. Two intertwined factors contributed to this evolution. The first is the enactment of laws criminalizing the “glorification” of terrorism, adopted in the aftermath of 9/11 and of other terror attacks, such as 7/7 in the UK. The second is the multiplication of acts of violence around the world, in response to the publication of content deemed offensive by some to their religious beliefs.

The issue gained immediate international attention on the publication in 2007 of the so-called “Prophet Mohammed cartoons” by a Danish newspaper with ensuing acts of violence elsewhere that resulted in hundreds of death. Since then, the issue has never slipped fully from the front pages, sparked seemingly at regular intervals by content and forms of expression (including cartoons, movies, videos, or articles, many of which are accessible to all on-line) deemed by some to be offensive to their religion.

In January 2015, some ten years after the first publication of the “Prophet Mohammed cartoons”, the offices of the French magazine Charlie Hebdo were attacked in broad daylight in Paris, and 12 persons, including four cartoonists, executed in cold blood, in a seeming revenge for the magazine’s publication of Prophet Mohammed cartoons years earlier. That same day, four customers of a Jewish Hyper Cacher supermarket were also killed. Within days of the attacks, some 70 persons had been arrested in France on charges of “*apologie du terrorisme*” using a law adopted in November 2014 that shifts the crime of “incitement and glorification” of terrorism from the Press Law to the Penal code – thus allowing for faster procedures³².

The adoption in 2014 of this law testifies to the centrality of the issue amongst French policy makers and the French public way before the attack on Charlie Hebdo. In reality, incitement and hate speech “emerged”³³ as a global issue of concern for governments and societies alike in 2014, largely powered off by on-line speeches seeking allegedly to justify, glorify and incite to terrorism, and/or religious violence, in relation to the war in Syria and Iraq, and the so-called Islamic State (ISIS).

In 2014, the key developments were not to be found in the Courts but in parliaments, on Internet, or in the media (and of course on the battlefields). One issue dominated the agenda of political leaders and Internet platforms and other service providers in this regard and that was the possible ways of tackling “online extremism”, including through better cooperation between governments and Internet platforms – often a euphemism for greater government control and censorship.

Courts, however, did play a role in 2014. As presented below, they tended to give more credence and provide further legal groundings to social and political anxieties, by establishing new thresholds to legitimize restrictions to freedom of expression (e.g. the notion of “social cohesion”) and pushing jurisprudence (including in the US) further away from the threshold of “clear and immediate danger.”

A defining issue for the decade, freedom of expression and information sits at the confluence of three thunderous streams: *religion*, “*terrorism*” and *national security*. In 2014, these flows grew in force and volume. The denouement of these compulsions has yet to be achieved – either legally or otherwise.

³² <http://bugbrother.blog.lemonde.fr/2014/09/15/une-entreprise-de-terrorisme-mediatique-notamment/>

³³ The issue never quite went away since the publication of the Danish Cartoons of 2007 but its centrality to political discourse and actions was largely determined by specific incidents.

Examples of 2014 court rulings pertaining to *hate- and incitement- speech*

- **France**, *Arret Dieudone*: On 9 January 2014, the French *Conseil d'Etat* annulled the decision of an Administrative Court that had itself annulled the prohibition of a public show of controversial comedian Dieudonné M'Bala M'Bala. (The prohibition by the Prefect was on the grounds of incitement to racial hatred and anti-Semitism). In its decision, the Conseil d'Etat recognised the importance of freedom of expression and observed the three-part test that restrictions must follow. But it went on to state that the Show poses "serious risks" to public order and violates principles and values embodied in the Universal Declaration of Human Rights. It also, and possibly more controversially, argues that Dieudonné's speech in the Show is criminally reprehensible and of such nature as to challenge "national cohesion"³⁴. Many French observers criticized this decision for breaking with the precedent established in 1933 regarding the balance between public order and freedom of expression and assembly³⁵.
- **US**, *Arab Festival v. Bible Believers*: In possibly a similar fashion to the French case cited above, a Sixth Circuit court considered the problem of the "hecklers' veto", free exercise and equal protection claims. It concluded that the police did not violate the First Amendment when they threatened to ticket Christian evangelists at an Arab-American street festival in suburban Detroit. The court concluded – having reviewed videos of the festival – that there was actual violence and that law enforcement was simply discharging their duty to maintain the peace by removing the speakers for their own protection. The decision drew a pointed dissent from a judge who called it a "blueprint" to stifle speech³⁶.
- **US**, *Elonis v. US*³⁷: Elonis was convicted by a federal court of posting violent threats — in the form of rap lyrics — on Facebook. His lyrics spoke of killing his estranged wife, shooting up a school and slitting the throat of an FBI agent. Elonis was sentenced to nearly four years in prison. However, the decision was appealed and is now with the US Supreme Court, which heard arguments in December 2014. The Supreme Court will have to decide the test(s) that should guide determination of whether a speech is protected or instead falls within the category of "true threats" and thus is unprotected. Do "true threats" require a *subjective intent* (and what does that entail) to cause fear, which would be consistent with previous jurisprudence (*Virginia v. Black*) and first amendment principles, as has been argued by Elonis and a range of first amendment organisations³⁸? Or should the Court consider whether a **reasonable person** would interpret the statement as reflecting a serious intent to harm someone, as has been argued by the US Government?
- The **Grand Chamber of the European Court for Human Rights** in *S.A.S. v. France*³⁹, in a case that did not directly address hate speech but spoke to the same issues of "social cohesion", held that France's prohibition on clothing concealing the face interfered with both Article 8 (the right to respect for private and family life) and Article 9 (freedom of thought, conscience and religion). The Court noted that wearing the full-face veil is "the

³⁴ <http://www.chronculture.com/index.php/fr/accueil/7-actualite-et-information/2163-ordonnance-du-conseil-detat>

³⁵ <https://ledroitetmoi.wordpress.com/2014/01/12/a-propos-dune-ordonnance-du-conseil-detat/>

³⁶ <http://lawprofessors.typepad.com/conlaw/2014/08/sixth-circuit-rejects-first-amendment-challenge-by-bible-believers-excluded-from-arab-international-.html>

³⁷ <http://www.scotusblog.com/case-files/cases/elonis-v-united-states/>

³⁸ Cato, the American Civil Liberties Union, the Abrams Institute for Freedom of Expression at Yale Law School, the Center for Democracy & Technology, and the National Coalition Against Censorship have all joined effort:

³⁹ <http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#>

expression of a cultural identity which contributes to the pluralism that is inherent in a democracy.” However, the European Court also ultimately found that this interference pursues a legitimate aim in ensuring “living together” through “respect for the minimum requirements of life in society”, premised on the important role the face plays in social interaction⁴⁰. The Court rejected a number of claims made by the French government (including those related to gender equality and the protection of human dignity) but accepted (somewhat reluctantly) the legitimacy of the “living together” aim, thus breaking new grounds. The Court did keep with earlier rulings by applying its controversial doctrine of wide margin of appreciation⁴¹.

Charges related to incitement to violence and hate speech continued to be used throughout the year to undermine or restrict legitimate political or religious speech. This is an “old” phenomenon and an abuse of “hate speech” laws that many freedom of expression organisations have warned against for years⁴². For instance:

- In the **UAE**, after spending six months in pre-trial detention, human rights activist Osama Al-Najjar appeared before the State Security Court at the Federal Supreme Court in Abu Dhabi on Sept. 23 for his first hearing. Al-Najjar is charged with “belonging to a banned group”, “offending and inciting hatred against the state via social media” and “passing information to foreign organisations.” Prior to his arrest, he advocated for better prison conditions and reported on poor treatment in detention. Al-Najjar’s father is one of 94 Emiratis jailed for “attempting to overthrow the government” and is currently serving an 11-year jail sentence⁴³.
- The majority of the cases listed in the previous section on national security included charges related to “hate speech” or “incitement to hatred”, in addition to those on national security or terrorism.

Examples of 2014 court rulings pertaining to blasphemy, religious insults

Similarly and in keeping with established patterns, *blasphemy charges* were used to attack and silence legitimate political speech, and impose a regime of fear on religious minorities. The complicity or cowardice of the Courts and the legal system in pursuing blasphemy cases is marked:

- In **Pakistan**, what may prove to be a landmark case once settled, continued along its rather Kafkaesque course in 2014, under benefit of 22 hearings. The case concerns the comprehensive blocking of YouTube in response to one video (“the innocence of the Muslims”), which according to the Government of Pakistan, causes offence to Islam and to people of Pakistan. The Pakistan Telecommunication Authority (PTA) had initially stated that their technology could block the offensive video. However, at the 22nd hearing, in Lahore, PTA denied it had access to such technology. Following this exchange, the Honorable Justice reissued its earlier directive to seek interpretation of the original Supreme Court decision of September 2012. In May 2014, Bytes for All had already requested that the Chief Justice “intervene and resolve a long standing issue of public importance that is infringing upon the fundamental rights of the citizens as enshrined in the Constitution of Pakistan”. Bytes for All now plans to formally approach the Supreme Court of Pakistan for a hearing so as to secure clarification of the interim

⁴⁰<http://www.article19.org/resources.php/resource/37610/en/european-court-ruling-on-french-sthash.5sx8uH9z.dpuf>

⁴¹ The decision has been the object of multiple analyses and critiques. See for instance: <http://strasbourgobservers.com/2014/07/03/s-a-s-v-france-missed-opportunity-to-do-full-justice-to-women-wearing-a-face-veil/>

⁴² ARTICLE 19, Pew, Freedom House, etc.

⁴³ <http://www.gc4hr.org/news/view/824>

orders of the Supreme Court of Pakistan issued on 17 September 2012, in the Civil Miscellaneous application 3908/2012⁴⁴.

- In **Mauritania**, a death sentence was handed down to blogger Mohamed Cheikh Ould Mohamed on apostasy charges in connection with an article he published the year before. Mohamed was arrested on January 2, 2014, for his December 31, 2013 article called "Religion, religiosity and craftsmen," which he suggests that followers of Islam interpret the religion according to circumstance. The article criticized Mauritania's caste system, an extremely delicate subject⁴⁵.
- In **Pakistan**, 26-year prison terms was handed to the owner of Pakistan's biggest media group GEO, actor Veena Malik, her husband Asad Bashir, and TV host Shaista Wahidi for their participation in a TV programme in which a religious song was played while they re-enacted their wedding. GEO has had tense relationships with Pakistani authorities and was temporarily taken off air earlier in 2014 following the blasphemy allegations. It has been further locked in a standoff with authorities after its main anchor Hamid Mir, in April, accused the Inter-Services Intelligence of being behind an assassination attempt on him⁴⁶.
- In July, **Kuwait's** highest court endorsed a 10-year jail sentence for a Twitter user belonging to the country's 30 percent Shia Muslim minority, who was found guilty of insulting the Prophet Muhammad, his wife, and his companions in a Twitter post (140 characters)⁴⁷.

III – The Slow Emerging Jurisprudence on Surveillance

2014 marked a new beginning for challenges to surveillance laws and practices around the world. Global FoE @Columbia recorded only very few decisions in 2014, a finding echoed by Barbora Bukovska in her paper and presentation for the "Justice for freedom of expression in 2014" conference. She notes, that "there has only been limited development in jurisprudence to address the lawfulness and unprecedented and untargeted scale of these programs." There are though a number of cases pending and what should expect a number of decisions in 2015.

Overall as far as the interplay between surveillance, security and privacy is concerned, the judicial decisions of 2014 create a rather confusing and confused picture. However, insofar as this fails to cement legitimation of undue curtailment of freedoms, this can be seen as a rather positive situation, particularly given the overall "national security" context (see for instance the outcome of the free speech cases discussed in the first part).

Examples of 2014 court rulings pertaining to surveillance

- The most important judicial decision in 2014 – indeed a landmark decision - was that of the **Court of Justice of the European Union (CJEU)**, which determined in the spring of 2014, in the *Digital Rights* judgment, that the EU Data Retention Directive is entirely invalid.⁴⁸ The Court took the view that, "*by requiring the retention of those data and by*

⁴⁴ <http://content.bytesforall.pk/node/156>

⁴⁵ <http://www.nytimes.com/2014/12/26/world/asia/death-sentence-in-mauritania-for-islam-insult.html>

⁴⁶ See Amnesty International Report

⁴⁷ <http://www.arabtimesonline.com/NewsDetails/tabid/96/smId/414/ArticleID/208698/refTab/36/Default.aspx>

⁴⁸ <http://eulawanalysis.blogspot.co.uk/2014/04/the-data-retention-judgment-cjeu.html>: the Court gave three reasons why the rules on data retention in the Directive were not strictly necessary. First of all, the Directive had an extremely broad scope, given that it applied to all means of electronic communication. Secondly, it

allowing the competent national authorities to access those data, the directive interferes in a particularly serious manner with the fundamental rights to respect for private life and to the protection of personal data.”

The Court acknowledges that the data retained may satisfy an objective of public interest, including that of national security. But it goes on to state that *“the wide-ranging and particularly serious interference of the directive with the fundamental rights at issue is not sufficiently circumscribed to ensure that that interference is actually limited to what is strictly necessary”*⁴⁹. It reached this conclusion on three grounds: first, the Directive had an extremely broad scope, given that it applied to all means of electronic communication; second, it failed to limit sufficiently precisely access to the data concerned by law enforcement authorities, and their subsequent use of that data; thirdly, the Directive did not set out sufficient safeguards, e.g. the period for retention of the data; categories of data to be retained; protection of the data from unlawful access and use, etc.

- There were no decisions by the European Court for Human Rights – only an inadmissibility decision for **Riina v. Italy** (application no. 43575/09, decision of 11 March 2014).
- There were a number of cases initiated in the **US** over the National Security Agency (NSA) mass surveillance of communication, which are either on appeal or had not yet been ruled upon, by the end of 2014:
 - **Smith v. Obama**⁵⁰ is on appeal following an initial dismissal of the case on the basis of **Smith v. Maryland**, a US Supreme Court decision of 1979 that established the “third party doctrine”⁵¹. **Klayman vs. Obama** ended up with an opposite decision to **Smith**: U.S. Federal Judge Richard Leon ruled that bulk collection of American telephone metadata likely violates the US Constitution. That decision is also on appeal
 - **Jewel v. NSA** is an older (pre-Edward Snowden revelations), complex, multi-faced case regarding an NSA tap on AT&Ts fiber optic “Internet backbone”. The case involves a number of different legal issues and claims, one of which (regarding the constitutionality of the UPSTREAM data collection) was decided in favor of the Government in February 2015⁵².
 - There were also cases settled outside the court related to the US government’s requests of social media platforms to provide access to some of their users’ data. **Google** settled its case with the US government at the beginning of 2014 (agreeing a public display of the number of requests made of it in relation to

failed to limit access to the data concerned by law enforcement authorities, and the subsequent use of that data, sufficiently precisely. Thirdly, the Directive did not set out sufficient safeguards, as regards: the data retention period, for instance.

⁴⁹ For a summary of the decision see: <http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-04/cp140054en.pdf>

⁵⁰ http://www.gpo.gov/fdsys/pkg/USCOURTS-idd-2_13-cv-00257/pdf/USCOURTS-idd-2_13-cv-00257-0.pdf

⁵¹ **Smith V. Maryland** established the “third party doctrine” according to which people have no reasonable expectation of privacy when they voluntarily entrust information to others. Analysts believe the doctrine to be in decline. See EFF for instance: <https://www.eff.org/deeplinks/2014/06/smith-v-maryland-turns-35-its-healths-declining>

⁵² The Judge ruled that the challenge of the constitutionality of the UPSTREAM data collection would require the “impermissible disclosure of state secret information,” and that the plaintiffs did not have standing to pursue its claims. The court did not rule on the constitutionality of the NSA’s collection of Internet and phone content. See analysis by EFF: <https://www.eff.org/deeplinks/2015/02/jewel-v-nsa-making-sense-disappointing-decision-over-mass-surveillance>

security matters – by groups of 1000s) while **Twitter** pursued its own for the right to reveal greater information about surveillance requests⁵³.

- In the **UK**, with a December 2014 ruling, the UK Investigatory Powers tribunal (IPT) held that GCHQ's access to NSA data was *lawful* from that time onward because certain of the secret policies governing the US-UK intelligence relationship were made public. In January 2015, the IPT ruled that the UK surveillance agency had acted *unlawfully* by keeping details about the scope of its Internet spying operations secret. The Tribunal declared that intelligence sharing between the United States and the United Kingdom was unlawful prior to December 2014, because the rules governing the UK's access to the NSA's PRISM and UPSTREAM programmes were secret.
- In **Austria**⁵⁴, the Constitutional Court ruled that the Austrian statutory provisions on data retention was unconstitutional because legal safeguards were lacking, and the broad scope of data retention exceed all permissible interferences with the fundamental right of data protection and the European Convention.

One issue at least cut across the global jurisprudence: that of search of a mobile phone:

- In **Costa Rica**, *Diario Extra*, the Constitutional Court ruled that a government surveillance of a reporter's phone records was unconstitutional.
- In Canada, **R v Fearon**, the Supreme Court (split vote) held that police could lawfully search mobile phones without a warrant, a decision considered to be a setback for privacy in Canada.
- In the **US**, in **Riley vs. California**, the Supreme Court ruled that a warrant is needed to search a phone.

Policy development: extra-territorial obligations

Arguably, one of the most important developments related to surveillance occurred outside the courts, at policy level, and concerned the issue of extra-territorial obligations and the principles that should guide infringements on the right to privacy.

Controversy about extra territorial obligations dates back to 1995 when the United States argued forcefully that their obligations under the International Convention on Civil and Political Rights (ICCPR), including those related to freedom of expression or the right to privacy, only apply to individuals who are both within the territories of a state party and subject to that state party's sovereign authority⁵⁵. This position ran contrary to that of the Human Rights Committee, which, by 1981 already had interpreted ICCPR article 5.1 as establishing a strong negative inference *against* a rigid territorial restriction⁵⁶.

2014 saw a number of international and national developments, which in addition to initiatives by civil society, academics and governments, may be said to have (further) amplified the conflict over the existence of a norm on extra-territorial obligation.

- First, in March 2014, *The New York Times* revealed that a former Legal Adviser at the US State Department Harold Kohl had written two major opinions on the extraterritorial

⁵³ The company argues that non-disclosure regulations applying to National Security Requests and FISA letters violate its First Amendment rights to free speech.

⁵⁴ Case 47/2012, decision of 27 June 2014, cited by Barbora Bukovska, "Jurisprudence Trends: Focus on Surveillance" a paper and presentation for "Justice for Freedom of Expression 2014", Columbia University, March 10-11, 2014

⁵⁵ 1 U.N. Hum. Rts. Comm., 53rd Sess., 1405th mtg., March 31, 1995

⁵⁶ Hum. Rts. Comm, *Lopez Burgos v. Uruguay*, Communication [Comm.] No. 52/1979,,12.3, UN Doc. CCPR/C/13/D/5211979 (1981) [hereinafter "*Lopez Burgos*"].

application of human rights treaties⁵⁷, in which he argued that both the ICCPR and the Convention Against Torture should apply outside a state's own territory⁵⁸. Distinguishing between positive and negative obligations, Kohl argues that a state incurs obligations to *respect* Covenant rights in those circumstances where a state *exercises authority or effective control over the person or context* at issue, while it incurs obligations to *ensure* Covenant rights *only where such individuals are both within its territory and subject to its jurisdiction*, since in such cases the exercise of such affirmative authority would not conflict with the jurisdiction of any other sovereign.

- Second, shortly thereafter, the **UN Human Rights Committee** reviewed the US implementation of the ICCPR, and questioned the US interpretation of its extra-territorial obligations under the terms of the ICCPR. In its concluding observations, the Committee regrets *“that the State party continues to maintain the position that the Covenant does not apply with respect to individuals under its jurisdiction, but outside its territory, despite the interpretation to the contrary of article 2, paragraph 1, supported by the Committee’s established jurisprudence, the jurisprudence of the International Court of Justice and State practice”*⁵⁹. The Committee went on to ask that the US interpret the Covenant “in good faith” and *“ensure that effective remedies are available for violations of the Covenant, including those that do not, at the same time, constitute violations of the domestic law of the United States of America, and undertake a review of such areas with a view to proposing to Congress implementing legislation to fill any legislative gaps”*⁶⁰. In response, the US State Department’s acting legal adviser was quoted as saying that “The United States continues to believe that its interpretation — that the Covenant applies only to individuals both within its territory and within its jurisdiction — is the most consistent with the Covenant’s language and negotiating history⁶¹.”
- Thirdly, in June 2014, the **UN Human Rights Commissioner** issued a long awaited report on the right to privacy in the digital age⁶², as requested by a UN General Assembly resolution, adopted without a vote. The report endorses the HRC position on extra-territoriality obligations and states unequivocally that:

“digital surveillance therefore may engage a State’s human rights obligations if that surveillance involves the State’s exercise of power or effective control in relation to digital communications infrastructure, wherever found, for example, through direct tapping or penetration of that infrastructure. Equally, where the State exercises regulatory jurisdiction over a third party that physically controls the data, that State also would have obligations under the Covenant. If a country seeks to assert jurisdiction over the data of private companies as a result of the incorporation of

⁵⁷ Memorandum Opinion on the geographic scope of States Parties' obligations under the International Covenant on Civil and Political Rights ("ICCPR"), US Department of State, Office of the Legal Adviser, October 19, 2010.

See also analysis by Marko Milanovik, *Harold Koh’s Legal Opinions on the US Position on the Extraterritorial Application of Human Rights Treaties*, in EJITalk, March 7, 2014 <http://www.ejiltalk.org/harold-kohs-legal-opinions-on-the-us-position-on-the-extraterritorial-application-of-human-rights-treaties/comment-page-1/>

⁵⁸ The two leaked documents can be found there: <http://justsecurity.org/wp-content/uploads/2014/03/state-department-iccpr-memo.pdf> and there: <http://justsecurity.org/wp-content/uploads/2014/03/state-department-iccpr-memo.pdf>

⁵⁹ Human Rights Committee, Concluding observations on the fourth periodic report of the United States of America*, CCPR/C/USA/CO/4, 23 April 2014, paragraphs 4-

⁶⁰ Ibid, par. 4 (c)

⁶¹ Cited in the New York Times: http://www.nytimes.com/2014/03/14/world/us-affirms-stance-that-rights-treaty-doesnt-apply-abroad.html?ref=world&_r=0

⁶² The right to privacy in the digital age, Report of the Office of the United Nations High Commissioner for Human Rights, A/HRC/27/37, 30 June 2014 http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session27/Documents/A.HRC.27.37_en.pdf

*those companies in that country, then human rights protections must be extended to those whose privacy is being interfered with, whether in the country of incorporation or beyond. This holds whether or not such an exercise of jurisdiction is lawful in the first place, or in fact violates another State's sovereignty*⁶³.

These three developments, and a multitude of older judicial and jurisprudential positions at regional and international level, along with contributions by academics and civil society⁶⁴ do not mean that the question of extra-territorial obligations has been settled or indeed that a global norm of "extra-territorial" obligation has reached the "cascade of the internalization stage" to use Sikkink's terminology. US opposition constitutes the main obstacle to such a stage. Yet, as demonstrated in other fields (e.g. the principle of universal jurisdiction and of international accountability as embodied by the International Criminal Court), such opposition may not prevent norm emergence, although it clearly slows it down and weakens its effectiveness.

The continuation of the **norms conflict over extra-territoriality** (with little sign of it abating except perhaps under force of a US Supreme Court ruling) was well illustrated by the UN debate on the 2014 United Nations General Assembly resolution on privacy, sponsored by Germany and Brazil. The resolution includes many positive dimensions and progressive interpretations with regard to the protection of freedom of expression. It was ultimately adopted but failed to establish the principle of extra territoriality: the resolution expresses concern about "*extraterritorial surveillance and/or interception of communications,*" but does not specifically call for governments to extend protections to users abroad, a situation sharply criticized by the Brazilian Ambassador at the time of the adoption.

IV - Criminal and civil defamation cases

Arguably the largest single category of cases and the most global in its outreach, there is not a single country included in the Columbia Global Freedom of Expression initiative that is not also concerned with defamation, whether civil or criminal. This is evident even though our database captures only a small percentage of all cases (e.g. two cases in the UK are recorded against the 43 reported in 2014 in a UK-based media monitoring database, down from 52 in 2013)⁶⁵.

The most obvious characteristic of the 2014 case law is that it was in lock step with well-established and entrenched patterns:

- The right to defend one's reputation remains a deeply entrenched phenomenon within all societies, even though the definition of what constitutes *reputation* varies a great deal from jurisdiction to jurisdiction. *Reputation* may be attached to individuals, but also to a Kingdom, a monarch, a nation, a religion, the police force, etc.
- The question of *reputation* is deeply entwined with political power and stability and with the social and political status quo more generally. It is not only about powerful people using reputation threats to maintain their power. It is also about established systems and institutions (political and religious) using *reputation* to protect and maintain their grip over society.
- The 2014 defamation cases also confirm a trend that first emerged a few years ago, namely that reputation on-line mirrors reputation in the analogue and physical worlds.

⁶³ UNHRC June 2014 report, Privacy Rights, Paragraph 34

⁶⁴ Many of which were cited by the 2010 Report from the then US State Department legal adviser

⁶⁵ <https://inforrm.wordpress.com/2014/12/29/media-and-law-review-of-the-year-2014-part-1-the-cases-defamation-privacy-and-google/>

- Imprisonment for defamation remains a widespread and common practice
- 2014 stands out for the **forceful extension of reputation claims into the realm of on-line technology.**

A positive development in 2014 is that the trend of decriminalization of defamation continued, powered off by some dramatic decisions on the African continent.

- In **Zimbabwe**, the Constitutional Court ruled that criminal defamation was unconstitutional⁶⁶. The essence of the CCZ's reasoning may be found in its conclusion: *"the harmful and undesirable consequences of criminalising defamation, viz. the chilling possibilities of arrest, detention and two years imprisonment, are manifestly excessive in their effect. Moreover, there is an appropriate and satisfactory alternative civil remedy that is available to combat the mischief of defamation. Put differently, the offence of criminal defamation constitutes a disproportionate instrument for achieving the intended objective of protecting the reputations, rights and freedoms of other persons."* The decision of the Constitutional Court of Zimbabwe, as the sole authority to interpret the Constitution, binds the lower courts and establishes the judicial precedent concerning the unconstitutionality of Section 96 of the Criminal Law under the country's former Constitution. The Madanhire judgment had the immediate effect of thawing the chilling effect inflicted on journalistic practice by the imposition of criminal defamation. The decision is among a few judicial rulings rendered by African national courts, which found that the criminalization of defamatory statements imposes serious restrictions on freedom of expression and access to public information.
- The **African Court**, in its first FoE case, ruled that the imprisonment of a journalist for defamation, and the use of criminal law against journalists generally, violate the right to freedom of expression. The court ruled that the harsh criminal penalties levied by Burkina Faso against journalist Lohé Issa Konaté, on charges of defamation for publishing several newspaper articles alleging corruption by a state prosecutor, represented a disproportionate interference with his guaranteed rights to freedom of expression⁶⁷.

Another 2014 development concerned **"single publication."** The rule was adopted by the US for defamation and traditional media and extended to the cyber space for the first time in *Firth v State* in 2002. It was adopted by the UK and India in 2014⁶⁸.

- The **UK Defamation Act of 2013** entered into force at the beginning of 2014. Limited to **England** and **Wales**, amongst other things, it has done away with the Multi-Publication rule.
- In **India**, the New Delhi High Court, in the course of the November 2013 case of *Khawar Butt vs Asif Nazir Mir*, on defamation on the Internet, rejected the Multiple Publication rule and adopted the Single Publication Rule for Libel on the Internet⁶⁹.

⁶⁶The Zimbabwean Constitutional Court also declared in 2014 that the criminal law prohibition on publishing so called "false statements" was unconstitutional.

⁶⁷ <https://globalfreedomofexpression.columbia.edu/cases/lohe-issa-konate-v-the-republic-of-burkina-faso/>

⁶⁸The outcome of *Petro Lubricant v Adelman* is not known at the time of writing this report. One of the issues which the Court has to debate is whether alteration to a website constituted republication or not. See UCLA First Amendment Amicus, Brief Clinic brief in *Petro-Lubricant Testing Laboratories, Inc. v. Adelman* (N.J. Super. Ct.), 2014; <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/08/20/ucla-first-amendment-amicus-brief-clinic-in-petro-lubricant-testing-laboratories-inc-v-adelman-n-j-super-ct/>

⁶⁹<http://www.mondaq.com/india/x/346258/Libel+Defamation/The+Single+Publication+Rule+Of+Defamation+On+Social+Networking+Websites>

V - Physical and legal violence, and impunity cases

An important dimension of the protection for freedom of expression and information, not yet well captured by the jurisprudence, is the criminalization of acts of violence against those that express themselves or otherwise inform and communicate, and the overall regime of impunity for crimes committed against them. This dimension is in addition to situations (some of which highlighted above) in which freedom of expression and information is sanctioned or limited on the basis of laws and procedures that violate international standards (e.g. related to fair trials)⁷⁰.

In view of the large number of cases of violence against those exercising their right to freedom of expression, including journalists, bloggers, human rights defenders, and others, the number and nature of the trials of their assailants and killers put simply is dumbfounding - a sad testament to the limits of the rule of law and the absence of justice.

Examples of 2014 court rulings pertaining to violence against journalists

- In **Russia**, on a somewhat positive note, in June 2014 the five men convicted of murdering **Anna Politkovskaya**, including three defendants who had been acquitted in a previous trial, were sentenced to prison, two of them receiving life sentences. It is still unclear who ordered or paid for the contract killing⁷¹.
- In **Iran**, on August 7, 2014, a Tehran court closed the case against the interrogator accused of murdering blogger Sattar Beheshti on November 6, 2012, determining that it was not murder but rather “quasi-murder” (manslaughter). The court imposed a three-year prison term, followed by two years of internal exile, and a flogging of 74 lashes. Sattar’s family and their lawyer criticized the manslaughter conviction as “ridiculous”: “...the entire system is at fault and they [the Court] are unable to put the entire system on trial. Closing Sattar’s murder case means that there is torture, a lot of it too, only the authorities are afraid to say it...”
- In **Mexico**, in the summer of 2014, a second instance court declared a mistrial in the murder case of journalist Regina Martinez Perez, because the confession of the main suspect had been obtained through torture. The suspect is still in prison but for only for charges of armed robbery. The other suspect is still on the run. Organizations and journalists close to the case have contended that Regina’s murder was political and the police investigation botched. Regina Martinez Perez, a journalist for *Proceso* in Vera Cruz, was murdered in her home in April 2012⁷²
- In **Mexico**, a development to watch in the years to come, concerns the Human Rights Committee and the kidnapping and torture of journalist Lydia Cacho at the hands of Mexican officials. This will be the first case of impunity for violence against journalists to be reviewed by the HRC.

VI - Other cases

There were some interesting rulings with regard to the protection of lesbian, gay, bi-sexual transgender and intersex (LGTBI) rights to freedom of expression and association that are worth highlighting. It is too early to determine whether these signal shifts locally or globally

⁷⁰Determining exactly which cases fall into this category is of course highly dependent on agreeing what constitutes international standards as far as freedom of expression is concerned.

⁷¹The perpetrators of the 2009 killing of leading Chechen human rights defender Natalia Estemirova had still not been brought to justice in 2014.

⁷²For a summary of the case, see (in Spanish): Jorge Carrasco Arraizaga, Homicidio de Regina Martínez: mil días de impunidad, in *proceso.com.mx*, January 22, 2015 <http://www.proceso.com.mx/?p=393810>

in normative standards and social demeanour. Most likely, these judgements evidence good legal training and sound analyses of the facts, loyalty to the law or Constitution, and an unbiased mind in the rendering of the decision:

- A **Kenya** high court judge ordered the Non-Governmental Organisations (NGOs) coordination board to register an advocacy group for transgender people in a landmark ruling. Justice Odunga said “the board’s refusal to register the group amounted to a failure in discharging statutory functions and mandate” and “was unfair, unreasonable, unjustified and in breach of rules of natural justice.” The judge said the Constitution upheld the individuals’ rights to assembly and cannot be deterred on grounds of gender orientation⁷³.
- In **Botswana**, the court held that the refusal by the government in 2012 to register the organization known as LEGABIBO (Lesbians, Gays and Bisexuals of Botswana) violates the rights to freedom of expression, assembly and association protected by the country’s constitution. Judge Terrence Rannowane ruled that Legabibo could register the organisation. Handing down judgment, Rannowane said he had examined the objective of Legabibo “with view of finding out if any of the them offends against section 72 of the Society’s Act”. He concluded this was not the case and set aside the decision by the Register of Societies to deny them registration and recognition in 2012.”⁷⁴
- In **Malaysia**, the Court of Appeal declared unconstitutional a Negeri Sembilan enactment that made it an offence for Muslim men to dress and behave like women. The Center for Independent Journalism is quoted as saying that “the Court of Appeal affirmed that such a law violates Articles 5, 8, 9 and 10 of the Federal Constitution. These provisions relate to the rights to life and liberty, equality, freedom of movement and freedom of expression. This decision affirms the constitution’s position as the supreme law of the land. Article 4(1) of the constitution states that any law passed after Merdeka Day, which is inconsistent with the constitution shall be void, to the extent of the inconsistency”⁷⁵.

On a different issue, Ontario, Canada has introduced an **anti-SLAPP Bill** in 2014, likely to be adopted in 2015⁷⁶. The Ontario law would allow Courts to dismiss a lawsuit that seeks to prevent freedom of expression on a matter of public interest unless the plaintiff can demonstrate that there are grounds to believe that: (i) the underlying proceeding has *substantial* merit; (ii) the moving party has *no* valid defence in the proceeding; and (iii) the harm that would be suffered by the responding party as a result of the moving party’s expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression⁷⁷.

In the United States, the question of confidentiality of **journalists sources** (also referred to as reporters’ privilege) continued to be played out in Courts and in policy making. In June 2014, the U.S. Supreme Court turned down an appeal from James Risen, a reporter for The New York Times facing jail for refusing to identify a confidential source. But Attorney

⁷³ <https://deniszioka.co.ke/gender/breaking-news-we-won-court-allows-kenyan-transgender-group-to-be-registered-officially/>

⁷⁴ Cited by the Southern Africa Litigation Center that brought the case:

<http://www.southernafricalitigationcentre.org/2014/11/26/botswana-legabibo-re-applies-for-registration/>

⁷⁵ <http://www.themalaymailonline.com/what-you-think/article/constitution-the-ultimate-guide-on-freedom-of-expression-sonia-randhawa-and>

⁷⁶ Bill 83, Protection of Public Participation Act, 2014, 2nd Sess, 40th Leg, Ontario, 2013 (referred to Standing Committee 16 April 2014)

⁷⁷ <https://www.osler.com/en/resources/regulations/2014/ontario-s-proposed-anti-slapp-legislation-moves-fo>

General Eric Holder ultimately said prosecutors would not force him to reveal his sources. Still, the final positive decision hanged on the discretion of the Attorney General rather than on a Supreme Court decision, which in fact sided with the Government and continued to reject a first amendment testimonial privilege that could protect a reporter from testifying about his/her sources. Throughout 2014, and in response to the multiplication of charges against journalists and “leakers”, there were various attempts to strengthen or quality a reporters’ privilege. These included the 2014 amendments to the Department of Justice Guidelines and the attempt to pass a federal shield law⁷⁸.

In the guise of a conclusion...

In December 2014, in a public statement released on the day of the adoption of the UN resolution on Surveillance and Privacy, Brazilian Ambassador Patriota lamented the compromises in the resolution and highlighted three critical issues, one of which was mentioned earlier⁷⁹:

- The Resolution makes only weakly references the **principles of necessity and proportionality**, “*the most basic principles of International Law*” which some Member States “*were not in a position to acknowledge*”;
- The dangerous steps that some Member States were and are willing to take in the name of the fight against counter-terrorism, which “***cross dangerous threshold morally and legally***”, potentially paving the way to “*a state of exception, encroaching upon or transcending the rule of law;*” and, finally,
- The **failure to establish the principle of extra territoriality**: the resolution expresses concern about “*extraterritorial surveillance and/or interception of communications,*” but does not specifically call for governments to extend protections to users abroad.

The monitoring and the overview of the Court cases tend to reflect some of these issues. *Altogether*, the Courts appear to be moving towards a stricter interpretation of domestic law and of regional or international standards, reducing the scope and extent of freedom of expression, a situation that owes much to the first two issues identified by the Ambassador. Most striking indeed, is the weakness of a standards test, which should be the first port of calls for all cases dealing with freedom of expression. In fact, the broad principles of **necessity** and **proportionality** (however these may be translated in domestic jurisprudence) are rarely systematically pursued or well implemented, particularly in situations involving (national) security concerns.

There were notable exceptions at the level of individual decisions, which have been highlighted throughout the document.

From a global norms standpoint, the **decriminalisation of defamation** in 2014 has progressed, particularly on the African continent where perhaps such a development was not expected.

However, a tipping point to trigger a decriminalisation “cascade” to follow is yet to be reached. Indeed, where it is in the law, criminal defamation is seemingly *deeply* entrenched.

There was a range of doctrinal issues raised throughout the year. These included:

⁷⁸ These are elaborated upon by David Schulz, in “State of the Federal Reporters’ Privilege,” his contribution to Justice for Free Expression in 2014 conference, Columbia University, 10-11 March 2015.

⁷⁹ <http://statements.unmeetings.org/media2/4655554/brazil-l26-rev1.pdf>

- The threshold to assess (national) security threats, e.g. true threat v. reasonable person test; whether such an assessment requires a consideration of the defendants' intention; social cohesion as an emerging legitimate aim; etc.
- Related: the questions of strict scrutiny, intermediate scrutiny and rational basis review were debated in the US and in Europe
- The definition of what constitute a publisher and publishing evolved considerably in 2014. The concept of a neutral technology has been well challenged throughout the year, resulting (with opposite effects on liability) in the application of the notions of publishing and control over a range of on-line medium and technology, including Users-generated News Website, Search Engines and Autocomplete.
- The assertion of national (regional) jurisdiction over data processing activities that are carried outside national or regional territories, and over *data* that may be localised and retained outside the territories.
- Single publication rule may be gaining in strength.

At best, the 2014 Court cases reveal an intense competition over *norms* and growing. At worse, and possibly more likely, the 2014 Court cases highlight regression in the domestication of what may have been considered well-established norms for the protection of freedom of expression.