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Article

Borrowing, rephrasing, or inventing? How the African Commission and Court on Human and Peoples' Rights have filled the gap on legitimate restrictions to freedom of expression

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ABSTRACT

The African Charter on Human and Peoples' Rights (ACHPR) does not contain a list of legitimate aims for the lawful restriction of freedom of expression. Article 9 ACHPR only provides a general formulation, leaving a wide margin to interpretation. Nevertheless, legitimate aims analysis is part and parcel of the case-law of the African Commission and Court on Human and Peoples' Rights. This article investigates how the two African bodies identified and applied legitimate aims for the restrictions of freedom of expression, comparing it with the law and practice of the European and the Inter-American courts. By reviewing all the cases on freedom of expression decided to date, the article shows that the African Court and Commission have filled the gap of Article 9 ACHPR by either borrowing legitimate aims from international instruments, rephrasing existing language in African or international documents, or inventing completely new grounds.

KEYWORDS: legitimate aims, Article 9 African Charter of Human and Peoples' Rights freedom of expression, regional human rights systems, human rights convergence

1 INTRODUCTION

Freedom of expression is a fundamental human right and a cornerstone of a democratic society.[1] The African Charter on Human and Peoples' Rights (ACHPR) recognizes the right to freedom of expression in Article 9, which states that 'every individual shall have the right to express and

[1] This Article is part of a Symposium on 'Legitimate Aims and Ulterior Purposes in International Human Rights Law: Comparative Perspectives' in (2026) 26(1) *Human Rights Law Review*. Human Rights Committee, General Comment No. 34: Article 19: Freedoms of opinion and expression, 12 September CCPR/C/GC/at para 2.

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disseminate his opinions within the law.'[2] This formulation differs significantly from that of other human rights conventions, such as the European Convention of Human Rights (ECHR) and the American Convention on Human Rights (ACHR). Both the ECHR and the ACHR have a more formulaic approach to the right to freedom of expression, indicating that this right is subject to limitation and enshrining a list of legitimate aims that allow for its restrictions (Articles 10.2 ECHR and 13.2 ACHR, respectively).

In contrast, the ACHPR neither explicitly state that this right can be lawfully limited, nor does it specify the legitimate grounds for a restriction to freedom of expression.[3] This has left the African Commission on Human and Peoples' Rights (ACommHPR) and the African Court on Human and Peoples' Rights (ACtHPR) with the task of developing their own jurisprudential approach on this issue. Evolutive interpretation of human rights treaties is a common feature among regional human rights courts aimed at adapting instruments adopted long time ago up to modern day challenges,[4] also in line with the general rules of interpretation of international treaties, as provided by the Vienna Convention on the Law of the Treaties (VCLT).[5] However, one could argue that the task assigned to the two African bodies goes beyond what the other regional bodies usually do, being required to decide if and when a Charter's right could be limited. Articles 60 and 61 ACHPR recognize the ACmmHPR's task in interpreting the Charter holistically, by indicating some sources of international law which can be used as inspiration by the Commission in interpreting rights. The articles are, however, silent with regards to the Court's task in holistically interpreting the Charter.

In this paper, we unpack how the two African bodies have designated and applied legitimate aims for the restrictions of freedom of expression. We do so by performing a two-folded analysis. First, considering the limited case law on the matter by both bodies, the paper systematically looks at all the adjudicated cases on freedom of expression to understand how the African Commission and Court (African bodies) have considered the issue of legitimate aims for restricting Article 9 between their inception until 2024. Second, we employ a comparative lens to assess how the African bodies' approach to recognising and assessing the scope of the legitimate aims to restrict freedom of expression compares to those of the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR). We identify three situations. First, the African bodies sometimes rephrase the existing aims. At other times, they 'borrow' from the list of existing legitimate aims recognized by other courts or international law. Finally, in some situations, the African bodies create new aims altogether. Importantly, we do not claim that any of these approaches should prevail over the other two.

On the contrary, this paper shows that, by adopting different approaches to filling the gap of Article 9, the African bodies ensure a convergence of the African case law with other regional systems and the UN bodies in terms of what aims are considered legitimate for restricting freedom of expression. However, it also reveals some inconsistencies in the use of explicit references by the two bodies to African instruments and external sources and a possible evolution through time. Particularly, we demonstrate that judicial dialogue and borrowing from other human rights systems seem to have a significant role in the African case law on freedom of expression and have considerably supported the ACommHPR and ACtHPR in filling the gaps of Article 9.

[2] African Charter on Human and Peoples' Rights (Banjul Charter) 1981, 1520 UNTS 217 (hereinafter ACHPR).

[3] Murray, The African Charter on Human and Peoples' Rights. A Commentary (2020), at 287; Ayalew 'Assessing the limitations to freedom of expression on the internet in Ethiopia against the African Charter on Human and Peoples' Rights' (2020) 20 *African Human Rights Law Journal* 315 at 339; Ilori 'Protecting digital rights through soft law: Ensuring the implementation of the revised Declaration of Principles on Freedom of Expression and Access to Information in Africa' (2024) 24 *African Human Rights Law Journal* 1.

[4] Art. 31, Vienna Convention on the Law of Treaties, United Nations 1969 331 UNTS 1155 (VCLT).

[5] Fitzmaurice, 'Interpretation of Human Rights Treaties' in Shelton (ed), *The Oxford Handbook of Human Rights Law* (2013), at 737.

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The African bodies have often referred to the UN International Covenant on Civil and Political Rights (ICCPR) and to the practice of the UN Human Rights Committee (HRC), the ECtHR and IACtHR to support their assessment of the legitimacy of the restrictions to freedom of expression. However, this use of external references has not always been consistent or coherent, and it is possible to observe a recent opposite trend, moving away from external sources and re-focusing the attention on African instruments.

Against this backdrop, we argue that the African bodies have managed to smoothly fill the gaps of Article 9 in relation to the legitimate aims for the restriction of freedom of expression and ensure convergence of their case law with that of the other international and regional human rights systems.[6] We illustrate the instances when the African bodies borrow, rephrase, or invent legitimate aims. At the outset, these approaches might not seem ideal. From a human rights perspective, it arguably reduces the predictability of when a state can lawfully interfere with human rights and grants a somewhat unfettered discretion to the states. Conversely, given that the ACHPR does not prescribe a list of legitimate aims, and that the Commission is prompted to drawing inspiration from other sources of international law by Articles 60 and 61 ACHPR, resorting to these interpretative tools is unavoidable and unsurprising. If anything, by rephrasing and borrowing legitimate aims, the African bodies contribute to harmonising the application of human rights law, ensuring convergence with other regional and international bodies. Furthermore, by adopting different approaches to filling in the gaps in Article 9, the African bodies comply with some of the original ideas of the ACHPR: to avoid copying for the sake of copying, but showing imagination and effectiveness.[7] As such, the African bodies follow closely the interpretation rule of Article 31 VCLT, which establishes that international treaties must be interpreted in light of their object and purpose.[8]

Finally, as we demonstrate below, the African bodies are not alone in adopting an expansive interpretation of the prescribed legitimate aims, as both the IACtHR and the ECtHR have, in some cases, resorted to expansive interpretation of the legitimate aims through narrowing or expanding the scope of the legitimate aims prescribed by the ECHR and the ACHR. Consequently, the remaining question concerns the importance of the analysis of the legitimate aims of restrictive measures, and whether having a structured list of legitimate aims (as enshrined in the ACHR and the ECHR) presents advantages over the ACHPR's approach.

This argument is developed in three-parts. We begin by introducing Article 9 of the African Charter, reflecting on the drafters' wording and the historical and political reasons behind this formulation. Section one also compares this freedom of expression provision with those contained in the European and Inter-American instruments to appreciate similarities and differences. Notably, we highlight that the ACHPR's wording does not refer to legitimate aims but allows for limitations to freedom of expression 'within the law'. Moreover, we introduce the Declarations on the Principles on Freedom of Expression ('Declaration of Principles') and the wording of Article 27(2). These instruments, together with the mention of legality within Article 9 ACHPR, constitute the normative background against which the African bodies adjudicate on freedom of expression issues. Subsequently, the paper looks at the doctrine and practice of the Commission and Court when filling gaps in the Charter's wording. We then explore the existing case law on Article 9 ACHPR, identifying their major adjudication approaches. Finally, in the third part of the paper, we explore the African bodies' approach to the legitimate aims by comparison to the case law of the IACtHR and the ECtHR. Specifically, we

[6] This article does not focus on the merit of convergence in international human rights law. For further discussion see Abrusci, *Judicial Convergence and Fragmentation in International Human Rights Law* (2023).

[7] Senghor, 'Address Delivered by Leopold Senghor, President of the Republic of Senegal.' (Address delivered at the opening of the Meeting of African Experts preparing the draft African Charter in Dakar., 28 December 1979).

[8] Vienna Convention on the Law of Treaties, United Nations 1969 331 UNTS 1155 (VCLT)

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analyse how the IACtHR, the ECtHR and the African bodies interpret and assess the following legitimate aims: (i) protection of honour and reputation; and (ii) protection of national security, public order, or 'public interest'. Additionally, we consider some new aims arguably invented by these bodies. In this final part of the paper, we adopt a comparative approach, assessing not only the list of legitimate aims of the IACtHR and the ECtHR against Article 9 ACtHPR, but also the level of scrutiny conferred by each Court and body to these aims. In doing so, we demonstrate that all regional courts have at times adopted an expansive interpretation to fill the gaps of the legitimate aims. However, each Court adopted different approaches.

2 THE PROTECTION OF FREEDOM OF EXPRESSION IN THE AFRICAN CHARTER OF HUMAN AND PEOPLES' RIGHTS

Freedom of expression is protected by the African Charter on Human and Peoples' Rights in Article 9, which very succinctly provides that:

> '1. Every individual shall have the right to receive information.
> 2. Every individual shall have the right to express and disseminate his opinions within the law.'

Differently from the formulation of other international and regional instruments, Article 9 does not list any specific grounds for legitimate restrictions of the right, nor additional requirements to fulfil. For example, Article 19 (3) ICCPR establishes that:

> '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.'[9]

Interpreting this provision, the Human Rights Committee (HRC) established, in its General Comment 34, that any restrictions to the right to freedom of expression must be:

> 'imposed for one of the grounds set out in subparagraphs (a) and (b) of paragraph 3 (. . .) Restrictions are not allowed on grounds not specified in paragraph 3, even if such grounds would justify restrictions to other rights protected in the Covenant. Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated.'[10]

The ECHR and the ACHR similarly provide a list of legitimate aims which can justify an interference with the right to freedom of expression. Specifically, Article 10 ECHR enshrines:

> '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

[9] Article 19 International Covenant on Civil and Political Rights 1966, 999 UNTS 171 (ICCPR)
[10] Human Rights Committee, supra n 1 at para 22.

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> 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.'[11]

The American Convention on Human Rights is the most complete in its discussion of the allowed restrictions to freedom of expression, both by listing legitimate aims for restrictions and by providing safeguards against any possible abuse of those by the state. Article 13 (2), (3) and (4) provides that:

> '2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
>
> a. respect for the rights or reputation of others; or
> b. the protection of national security, public order, or public health or morals.
>
> 3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.
> 4. Notwithstanding the provisions of paragraph 2 above, public entertainment may be subject by law to censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.'[12]

Compared to the ICCPR, ECHR and ACHR, the formulation of the African Charter clearly lacks any provision for the lawful restriction of freedom of expression, thus suggesting either an absolute protection of the right or a *carte blanche* permission for restrictions, stemming from the broad expression 'within the law'.[13]

2.1 Interpreting the 'Within the Law' framework established by Article 9 ACHPR

Article 31 of the VCLT establishes the general rule of interpretation of international law treaties. According to this provision, any treaties must be interpreted in good faith, considering (i) its object and purpose (teleological interpretation); and/or (ii) the ordinary meaning of the terms of the treaty.[14] To perform a teleological interpretation of Article 9 ACHPR, one can look at its *traveaux préparatoires*. Information on the drafting history and preparatory works for the African Charter is, however, limited, lacking verbatim transcriptions of the deliberations.[15] Yet, the preliminary draft of the Charter prepared by the Organisation of the African Union (OAU) was very similar to the ECHR and ACHR, which caused significant reactions from lawyers and member states who, under the guide of Mr Egbunike (the OAU Chief Legal Advisor) agreed that there was a need for a different Charter to deal 'with the problems of human rights in Africa'.[16] Earlier drafts of the Charter either did not explicitly safeguard the right to freedom of expression, or contained a similar wording to Article 9(2).[17] Notably, the Dakar draft of 1979 provided that freedom of expression was to be exercised 'subject to the respect of others' honour and reputation [. . .] within the law'. The subsequent deletion of this provision likely sought

[11] Article 10 European Convention on Human Rights, as amended by Protocols Nos. 11, 14 and 151,950, ETS 005 (ECHR)
[12] Article 13 American Convention on Human Rights (Pact of San Jose) 1978, 1144 UNTS 123 (ACHR).
[13] Bondzie-Simpson, 'A critique of the African Charter' (1988) 31 *Howard Law Journal* 643, at 660.
[14] Article 31 VCLT.
[15] Viljoen, 'The African Charter on Human and Peoples' Rights: The Travaux Préparatoires in the Light of Subsequent Practice' (2004) 25 *Human Rights Law Journal* 313.
[16] Bello, 'The African Charter on Human and Peoples' Rights A Legal Analysis (Volume 194)', *Collected Courses of the Hague Academy of International Law* (1985).
[17] 'M'Baye Draft African Charter on Human and People's Rights' (1979).

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to allow limitations on freedom of expression justified by other considerations.[18] Moreover, Hansungule suggests that the very expansive limitations on several Charter's rights was due to the fact that the 'prevailing constitutional arrangements in most of the African countries at the time would not allow for a more robust protection mechanism'.[19]

While the *traveaux préparatoires* arguably do not help in providing additional information as to the objective and purpose of Article 9(2), one could still attempt at interpreting it according to its ordinary meaning. Accordingly, the expression 'within the law' at the end of the second paragraph could be interpreted in several ways and could either open to a list of legitimate aims similar to those included in other international instruments or be considered the only needed requirement for a lawful restriction to freedom of expression. In the early years after the adoption of the Charter, several commentators expressed concerns about this vague formulation. Gittleman noted how the 'African Charter's freedom of information provision is much simpler in structure yet more complicated in application' and hypothesized completely different scenarios that could all be possibly lawful under the letter of Article 9 ACHPR. In particular, he warned that a literary interpretation of Article 9 ACHPR would allow any member state to restrict freedom of expression as they please, as long as there was a law providing so.[20]

The clawback clause 'within the law' has been further criticised by several scholars but they all ultimately point out at the resolutive case law of the African Commission that has always moved beyond the 'within the law' expression to request member states to provide more than a justification based on a national legislation to lawfully restrict a right, hinting to the need to demonstrate also legitimate aims. Yet, for the first decade of operation of the Commission, scholars remained confused as to what was the exact position of the Commission on the matter and urged clarity on the matter. In particular, Ankumah[21], echoed by Nmehielle,[22] expressed concerns about the lack of clarity on the interpretation of clawback[23] clauses, including the one under Article 9. Indeed, she argued that the expression 'within the law' could suggest a supremacy of national laws over the Charter and the potential 'perpetrations of violations of rights enshrined in it.'[24] However, in *Media Rights Agenda and Others v Nigeria,* the Commission held that the reference to 'law' in Article 9(2) was to be interpreted as international, rather than national law.[25] Quite confusingly, this could then bring up other interpretative issues as well, and could challenge rule of law guarantees such as the certainty of the law.

Yet, the expression 'within the law' does not seem too distant from the well-established 'prescribed by law' requirement contained in the ICCPR, ECHR or ACHR, thus possibly encouraging a holistic interpretation akin to that of the HRC, ECtHR or IACtHR,[26] also for what concerns the legitimate aims. Indeed, as discussed later in this article, the African bodies have often interpreted and applied Article 9 ACHPR in line with the approach of these three conventions, requiring both legality and legitimate aims to allow a lawful restriction to the

[18] 'Dakar Draft African Charter on Human and People's Rights' (1979) CAB/LEG/67/3/Rev. 1.; Ouguergouz, *The African Charter on Human and Peoples' Rights. A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* (2003), at 162–163.

[19] Hansungule, 'The African Charter on Human and Peoples' Rights' in A. Yusuf and Ouguergouz (eds), *The African Union: Legal and Institutional Framework* (2012), at 424.

[20] Gittleman, 'The African Charter on Human and Peoples' Rights: A Legal Analysis' (1982) 22 *Virginia Journal of International Law* 667, at 696.

[21] Ankumah, The African Commission on Human and Peoples' Rights. Practices and Procedures (1996), at 177.

[22] Orlu Nmehielle, The African Human Rights System. Its Laws, Practice, and Institutions (2001), at 166.

[23] For a differentiation between the wording and structure of clawback clauses and content-based internal limitations, see Viljoen, supra n 15.

[24] ibid.

[25] 105/93, 128/94, 130/94 and 152/96, *Media Rights Agenda, Constitutional Rights Project, Media Rights Agenda and Constitutional Project v Nigeria,* 12th Annual Activity Report of the ACHR, 31 October 1998, at para 66.

[26] Ayalew, supra n 3.

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right.[27] For instance, this is what the African Commission concluded in *Zegveld and Ephrem v Eritrea*.[28] Moreover, in the landmark case *Constitutional Rights Project and others v Nigeria,* the Commission clearly stated that 'it is a well settled principles of the African Commission that any laws restricting freedom of expression must conform to international human rights norms and standards relating to freedom of expression and should not jeopardize the right itself'[29] but it did not say anything more about the possible allowed grounds for restriction.

2.2 Article 27(2) ACHPR

While Article 9 ACHPR completely lacks a list of legitimate aims for its restriction, raising the question of whether it could even be restricted, the ACHPR has a very peculiar clause in Article 27 ACHPR, establishing the duties of all individuals under the jurisdiction of its member states. Article 27 ACHPR is a one-of-a-kind legal provision stemming from the unique approach of the African Charter towards human rights, seen as rights and freedoms to enjoy vis-à-vis the state but also duties to bear vis-à-vis the rest of the community.[30]

Article 27(2) establishes the following: 'The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.' This entails that also Article 9(2) should be interpreted and applied in conjunction with Article 27(2), thus adding possible legitimate grounds for restrictions. Yet, it is interesting to note that the perspective of Article 27(2) is opposed to that of Article 19 ICCPR, 10 ECHR or 9 ACHR or of the Declaration of Principles presented below. While traditionally these provisions establish the possibility for the State to restrict freedom of expression on the basis of a list of legitimate grounds, Article 27(2) ACHPR only requires the individual or community to exercise the Charter's rights having due regard to a set of values and interests.[31] It follows that, while the former takes the standpoint of the state or who is restricting the right, the latter takes that of the individual/community or who is enjoying the right. Moreover, while the former explicitly mentions the word 'restriction' and the possibility for the right to be restricted, the latter only requires *due consideration* in the exercising of the rights but does not allow restrictions, at least explicitly.[32]

Despite these linguistic differences, the African bodies have interpreted Article 27(2) ACHPR as supplementing Article 9(2) ACHPR and providing the legitimate aims that a member state can invoke when restricting freedom of expression. In *Media Rights*, the African Commission clearly held that 'The only legitimate reasons for limitations to the rights of the freedoms of the African Charter are found in Article 27(2), that is, the rights of the Charter "shall be exercised with due regard to the rights of others, collective security, morality and common interest"'.[33] Several scholars have reflected on the importance of this limitation clause in supporting the African bodies application of the Charter's rights, highlighting how Article

[27] Murray, supra n 3at 275; Abrusci, supra n 6.

[28] 250/02 *Liesbeth Zegveld and Messie Ephrem v Eritrea*, 17th Activity Report of the ACHR, November 2003, at para 59.

[29] 102/93 *Constitutional Rights Project and others v Nigeria,* 12th Annual Activity Report of the ACHR, 31 October 1998, at para 40.

[30] See, among others, Murray, supra n 3 at Chapter 29; Naldi 'Limitation of Rights Under the African Charter on Human and Peoples'Rights: The Contribution of the African Commission on Human and Peoples'Rights' (2001) 17 *South African Journal on Human Rights* 109, at 115; Umozurike 'The African Charter on Human and Peoples' Rights' (1983) 77 *The American Journal of International Law* 902, at 907.

[31] Ouguergouz, supra n 18, at 402 and 413–416.

[32] Article 27(2)'s wording in earlier drafts was arguably that of a limitation or restriction clause. Specifically, in the M'Baye draft, Article 27(2) read: "2.The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society. However, by removing the wording of 'limitation, the final wording of this Article arguably acquires a different meaning. Some scholars point to the fact that the article reflects the centrality of community and family, and the wording is not an attempt at diluting the rights provided for in Articles 2–24. Murray, supra n 3 at 760.

[33] *Media Rights Agenda, Constitutional Rights Project, Media Rights Agenda and Constitutional Project*, supra n 23 at para 65.

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27(2) has been systematically used to interpret limitations to all rights under the Charter, except in cases where a specific right included its own limitation clause.[34]

Nonetheless, both the Commission and Court have expanded their approach and adjudicated freedom of expression cases on the basis of other legitimate grounds as well, either going beyond the wording of Article 27(2), or simply invoking different instruments and provisions as legal basis, adopting an expansive interpretation according to Articles 60 and 61 ACHPR, as further unpacked below.

2.3 The declaration of principles on freedom of expression in Africa

In 2002, the African Commission adopted the Declaration of Principles on Freedom of Expression in Africa,[35] which was recently updated in 2019 to include also the right to access to information.[36] This document provides detailed guidance on the meaning and application of Article 9 ACHPR, including on the justifiable limitations to the right. In 2001, in its Resolution 54(XXXIX)01, the African Commission decided to develop and draft such a declaration 'mindful of the potential narrow scope of protection given by Article 9',[37] thus explicitly recognising the need to fill the gaps of the provision.

The Declaration of Principles is a soft law instrument and, as such, is not legally binding. However, it is an extremely important tool for interpreting Article 9, providing the Commission and Court with a strong legal basis to consider legitimate aims for the restriction of freedom of expression.

The role and influence of international human rights instruments is evident throughout the document. The preamble, for instance, mentions explicitly the ICCPR and the Universal Declaration of Human Rights (UDHR).[38] Principle 9 adopts the same language as the ICCPR and its General Comment 34, and the ECHR (yet without an explicit mention of these instruments) and establishes that: 'States may only limit the exercise of the rights to freedom of expression and access to information, if the limitation: a. is prescribed by law; b. serves a legitimate aim; and c. is a necessary and proportionate means to achieve the stated aim in a democratic society.'[39]

Furthermore, Principle 9 lists what types of 'legitimate aims' for restricting freedom of expression are allowed, providing that '[a] limitation shall serve a legitimate aim where the objective of the limitation is: a. to preserve respect for the rights or reputations of others; or b. to protect national security, public order or public health.' Once again, the implicit influence of the ICCPR, ECHR and ACHR as interpreted and applied by the HRC, ECtHR and IACtHR is clear even though there are notable differences, such as the absence of 'morals', present in all the three other documents. As none of this was present in the African Charter's provision, the Declaration of Principles laid the foundation for the ACommHPR and the ACtHPR's expansive interpretation of the legitimate aims, borrowing the aims from other international instruments.

The Declaration of Principles on Freedom of Expression certainly add clarity and fills an important gap in Article 9: it provides a list of legitimate aims for restricting the right to freedom of expression. While it certainly allows a better understanding of the limitations to Article 9

[34] Ayalew, supra n 3at 339; Viljoen, supra n 15; Murray, supra n 3.

[35] African Commission on Human and Peoples' Rights, Resolution on the Adoption of the Declaration of Principles on Freedom of Expression and Access to Information in Africa, ACHPR/Res.62 (XXXII)02, 32nd Ordinary Session (2002).

[36] African Commission on Human and Peoples' Rights, Declaration of Principles on Freedom of Expression and Access to Information in Africa, 65th Ordinary Session (2019) (hereinafter Declaration of Principles 2019). See also African Commission on Human and Peoples' Rights, Resolution to modify the Declaration of Principles on Freedom of Expression to include Access to Information and Request for a Commemorative Day on Freedom of Information, ACHPR/Res.222(LI)2012, 50th Ordinary Session (2012).

[37] African Commission on Human and Peoples' Rights, Resolution on Freedom of Expression, ACHPR/Res.54 (XXIX)01, 29th Ordinary Session (2001).

[38] Declaration of Principles 2019, at Preamble.

[39] ibid

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ACHPR, however, it does not constitute a permanent solution. Specifically, nothing prevents the Commission or the Court to depart from the list of legitimate aims set by the Declaration of Principles, due to its non-binding nature. As noted by Rachel Murray, the Commission has not been consistent when it comes to the grounds on which freedom of expression can be restricted. Grounds included the 'protection of public and individuals' or 'morals' even if none of them are listed in the Principles on Freedom of Expression as well as the protection of the right to privacy, which is not a right protected by the African Charter.[40] Thus, while the Declaration of Principles on Freedom of Expression constitute the basis for the African bodies to borrow aims from other instruments and Courts, they do not stop the African bodies from rephrasing these aims, or creating new ones.

This confusion necessitates further discussion and analysis to be able to understand why the African adjudicatory bodies decided to allow certain limitations to freedom of expression to a provision that would, otherwise, be subject to a very vague and potentially dangerous clawback clause.[41] This is a unique situation among regional human rights courts, since neither the ECtHR or the IACtHR were called to fill a substantial gap in their treaty provision concerning limitations to freedom of expression. Yet, as it will be shown, the example and case law of the two other regional courts significantly assisted both African bodies in dealing with lawful restrictions to freedom of expression.

3 HOW THE AFRICAN COMMISSION AND COURT OF HUMAN AND PEOPLES' RIGHTS HAVE JUSTIFIED RESTRICTIONS TO FREEDOM OF EXPRESSION

3.1 A doctrinal analysis

Both the African Commission and the African Court have adjudicated freedom of expression cases where they had to decide on the lawfulness of the restrictions to this right. Due to the complex legal framework presented above, they all had to come up with innovative tests and exercise their judicial discretion. However, Articles 60 and 61 of the ACHPR and the Protocol on the establishment of the Court puts the African bodies in a different position in relation to its ability to interpret and adjudicate the African Charter and offers them the possibility to expand and creatively interpret Article 9(2) ACHPR.[42]

As the African Court was not initially established by the Charter in 1998, member states of the African Union (AU) had to adopt another instrument. The dedicated protocol on the establishment of the African Court of Human and Peoples' Rights[43] set up an important novel approach in relation to its jurisdiction. Article 3(1) extends the jurisdiction of the Court beyond the African Charter to 'all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned'. This is a very innovative provision that constitute a *unicum* among regional human rights systems. Both the ECtHR and the IACtHR have similar provisions on jurisdiction, but they are limited to the respective Convention and Protocols and do not extend outside the regional framework.[44] This formulation encourages and legally allows the African Court to deal with any human rights treaty ratified by the states, including all UN instruments, both in terms of violations contained therein and in taking them into account

[40] Murray, supra n 3 at 287.

[41] See also Olaniyan, 'Civil and Political Rights in the African Charter: Articles 8–14' in Evans and Murray (eds), *The African Charter on Human and Peoples' Rights. The System in Practice, 1986–2006,* 2nd edn (2008), at 225.

[42] *Ramcharan, 'The Travaux Préparatoires of the African Commission on Human Rights' (1992) 13 Human Rights Law Journal* 307, at app I and II.

[43] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, OAU DOC.CAB/LEG/66.5 (1998).

[44] See Article 32(1) of the ECHR and Article 62(3) of the ACHR.

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in the interpretation and application of AU documents.[45] For the sake of this paper, Article 3(1) practically allows the African Court to look at the ICCPR, and in particular at Article 19, when adjudicating freedom of expression cases, thus potentially filling the gap left by the overly succinct formulation of the Charter.

Article 3(1) builds on the already open interpretative approach commanded by the African Charter to its adjudicatory bodies. Indeed, the African Charter, in Article 60, requires the Commission (and therefore also the Court) to '*draw inspiration from international law* on human and peoples' rights, particularly from [. . .] the Charter of the United Nations, [. . .] the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of Human and Peoples' Rights, as well as from the provisions of various instruments adopted within the Specialised Agencies of the United Nations'. Article 61 adds that the Commission shall 'take into consideration, as subsidiary measures to determine the principles of law, *other general or special international conventions* [. . .]'. These provisions allow the African bodies to adopt expansive interpretations, grounded on the wording of the ICCPR or regional conventions, such as the ECHR or the ACHR.

Interestingly, the first drafts proposals for setting up an African Commission already used a similar wording. Notably, they indicated that the Commission should have been 'guided by the international law of human rights including the provisions of the United Nations Charter' and 'have regard to other international conventions, whether general or particular (. . .) as subsidiary means for the determination of rules of law'.[46] Thus, since the inception of the Commission, the legislator's intention was arguably aiming at approximating the African and international human rights law systems. If this argument holds true, then, through a teleological interpretation, one could argue that the African bodies can, and should, borrow legitimate aims to restrict freedom of expression from other instruments of human rights. We will delve into an assessment of how the Court borrows legitimate aims in Section 4 below.

For now, it suffices to highlight that the obligation to draw inspiration from international law has been enthusiastically endorsed by the Commission under the more general objective of fostering universalism.[47] Indeed, in *Purhoit and another v The Gambia*, the ACommHPR stated that it is 'more than willing to accept legal arguments with the support of appropriate and relevant international and regional human rights instruments, principles, norms and standards taking into account the well-recognized principle of universality which was established by the Vienna Declaration and Programme of Action of 1993 and which declares that "all human rights are universal, indivisible and interdependent and interrelated".'[48]

Articles 60 and 61 are useful to compensate for any gaps and shortcomings in the ACHPR's wording.[49] This is what Burgorgue-Larsen labels as 'faithful' opening to external references, which she observes in particular in the case of the African Commission.[50] This is a reliance on external sources with a continuous attention to adhere to the original wording of the African Charter's provisions. On the contrary, when looking at the practice of the African Court, Burgorgue-Larsen acknowledges the more flexible and welcoming approach of the Court, especially when dealing with specific issues, such as the restriction grounds for freedom of expression.[51]

[45] Nmehielle, supra n 22 at 264.
[46] Ramcharan supra n 42 at app I and II.
[47] Abrusci, supra n 6.
[48] 241/01, *Purhoit and Moore v. The Gambia,* 16th Annual Activity Report of the ACHPR, at para 48.
[49] Brems, Human Rights: Universality and Diversity. 1st ed. (2001), at 95.
[50] Burgorgue-Larsen, *Les 3 Cours Regionales des Droits de l'Homme in Context* (2020), at 264.
[51] ibid, at 268–269.

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3.2 A case law analysis

The African bodies adjudicated matters related to freedom of expression in just a handful of cases. At the time of writing, the ACommHPR has adjudicated on the merits of only 21 cases, and the ACtHPR, of just nine.[52] Nonetheless, even from this limited sample, one can gain a picture of how the two bodies approached the task of deciding on whether restrictions to freedom of expression were compliant with the Charter.

In *INTERIGHTS*, the African Commission provided a very textbook explanation of its approach to interpreting restrictions to Article 9. First, it held that Article 9 should always be read in conjunction with Article 27(2), considering the grounds stated therein as legitimate aims for restricting freedom of expression. Second, it recalled the Declaration of Principles that should be used to supplement Article 9 when assessing restrictions to the right. Third, it mentioned the similar provisions in the ICCPR and UDHR and the case law of the Inter-American system to be used to support the interpretation of the Charter and the assessment of the restriction under analysis.[53]

Unsurprisingly, when called to adjudicate on Article 9(2) cases and interpret the wording of this clawback clause, the Commission and the Court's approach has been inconsistent. As shown in the following sections, the African bodies adopted three different approaches in terms of establishing a *list* of legitimate aims. First, they extensively borrowed from external sources, including the ICCPR and the case law of the European and Inter-American courts and established a list of legitimate aims consistent with international case law. However, the copious in-text references to other regional systems eventually moved to the footnotes, leaving more and more space to internal references to other African cases or instruments. Second, in other cases, the two bodies sometimes rephrased existing aims, by strongly adhering strictly to Article 27(2) ACHPR or relying on the Declaration of Principles. Finally, the African bodies also occasionally invented new legitimate aims which find no correlation in other instruments or jurisprudence.[54] When it comes to determining the scope of deferral conferred to the states when analysing simply the *existence* or not of legitimate aims, the African bodies have been generous and generally accept that state measures are justified by at least one legitimate aim.

4 WHEN DO THE AFRICAN BODIES BORROW, REPHRASE, OR INVENT LEGITIMATE AIMS? A COMPARATIVE ANALYSIS

If one compares the approach followed by the two African bodies when assessing legitimate aims to restricting freedom of expression with that of the European and Inter-American systems, the difference is striking. As mentioned earlier, the ECtHR and the IACtHR share the common feature of already having a detailed limitation clause for freedom of expression in their instruments and were not faced with the challenge of coming up with some. On the contrary, their task has been mainly focused on interpreting the listed legitimate aims in light of the facts of the cases before their attention. This is certainly an equally difficult task, considering the continuously changing and evolving challenges surrounding human rights protection and the attempts of respondent states to justify their limitation to freedom of expression. Accordingly, the ECtHR and the IACtHR's analyses focus primarily on determining the scope of the legitimate aims, not on establishing or recognising them. Against this backdrop, they have not completely invented new legitimate aims, while they certainly at times adopted expansive interpretations

[52] The analysis of the judgments and conclusions contained in this article is updated to the 15th October 2024. Data are collected from the official database of the African Court of Human and Peoples' Rights and the African Commission on Human and Peoples' Rights.

[53] 323/06 *Egyptian Initiative for Personal Rights & INTERIGHTS v Egypt*, 10th Extra-Ordinary Session of the ACHR, 12 December 2011), at paras 239–256.

[54] See section 4. C.

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of the existing ones. Importantly, the broad and undefined aim of 'protection of the rights of others' formulation allows both the ECtHR and the IACtHR to adopt a broad and evolutive interpretation approach to include hate speech, blasphemy, Islamophobia and anti-Semitism, as well as defamation.[55] On the other hand, an attempt to invent new legitimate grounds altogether would have raised legitimacy and legality concerns. Due to the more restrictive jurisdictional clauses that the ECtHR and the IACtHR have, coming up with brand new legitimate aims could have been seen as falling outside the scope of their foundation treaties and relevant provisions.

Moreover, taking a closer look at the individual behaviour of the regional courts, one can observe how the IACtHR has been traditionally more preoccupied by limiting the abuse by states of restriction clauses for freedom of expression, rather than expanding the grounds for legitimate restrictions.[56] The IACtHR's concerns often reflect in its focus on reiterating the applicable principles to freedom of expression, or a detailed assessment of the necessity and proportionality of a given measure, often skipping a detailed assessment of the legitimate aim. The IACtHR case law confirms a strong intent of limiting the possibility for the state to justify censorship and other types of restrictions to freedom of expression.

The next three sections will offer a closer analysis of the legitimate aims considered by the two African bodies: honour and reputation (defamation cases), which are usually adjudicated under the guise of 'protection of the rights of the others', and national security and public order. We will also offer assessment of other legitimate aims invented by the African bodies. This exercise will allow a more detailed analysis of the ways in which the Commission and Court used these aims and how this compares with the European and Inter-American courts. Importantly, this section assesses not only the types of legitimate aims considered by the regional Courts, but also the level of scrutiny afforded to each of these aims. As we will demonstrate, the levels of scrutiny can at times be intrinsically connected to the recognition of a given aim. Finally, we provide an overview of the importance of legitimate aims, seeking to understand the importance of this prong in the three-partite test on lawful restrictions to freedom of expression.

4.1 Borrowing aims: honour and reputation

Defamation cases feature predominantly among the limited rulings and decisions on freedom of expression before the two African bodies. These cases relate to the restriction of freedom of expression for the protection of the honour or reputation of others and require a delicate balancing of rights between freedom of expression and the right to privacy. However, the right to privacy is not explicitly protected by the African Charter,[57] thus making the adjudication of this type of dispute even more challenging for the Commission and Court. Indeed, any decision requires the African bodies to fill both the gap of Article 9 in relation to the legitimate aims and that of the Charter in relation to the right to privacy, thus prompting the use of interpretative tools enumerated by Articles 60 and 61 of the Charter, in addition to Article 31 of the VCLT.

In 2013, the Court ruled on its landmark case on defamation, *Konaté Issa v Burkina Faso*. In this case, the applicant was convicted to 12 months of imprisonment, in addition to the payment of more than USD 10,000 in fines and damages for allegedly incurring in defamation and public insult against a public prosecutor and public contempt of Court. Before the ACtHPR, the applicant claimed these measures violated his freedom of expression. The respondent state claimed that the measures were lawful and consistent with ECtHR judgments, being a necessary

[55] See, for instance, *Surek (No 1) v Turkey,* Application no 23927/94 Merits and Just Satisfaction, 8 July 1999; *Vejdeland and Others v Sweden,* Application no 1813/07 Merits and Just Satisfaction, 9 May 2012;

[56] See Botero-Marino, 'Freedom of Expression. Inter-American Standards and Their Transformative Impact' in von Bogdandy (ed) *The Impact of the Inter-American Human Rights System: Transformations on the Ground* (2024), at 473–494, 475.

[57] Murray, supra n 3 at 583; Ayalew supra n 3 at 339

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and proportionate response to protect the rights of the prosecutor.[58] Unfortunately, it is not possible to ascertain which ECtHR judgments were referred by the respondent state from the documents made available.

Examining the matter, the Court started by acknowledging the lack of legitimate aims in Article 9 ACHPR for restricting freedom of expression and immediately referred to Article 27(2) ACHPR.[59] However, the Court recognized the need to also consider Article 19 ICCPR when referring to the legitimate purposes to restrict freedom of expression. Interestingly, it did so implicitly, not mentioning the ICCPR directly but only 'Article 19 (3) (a) and (b) of the Covenant', assuming that it was obvious that that Covenant referred to the ICCPR. Moreover, it seemed not to consider it necessary to provide additional justification for its decision to use an international instrument with the same value and importance as the African Charter.[60] Furthermore, the Court completely ignored the 2002 Declaration of Principles on Freedom of Expression. Despite the point raised by the respondent that the aims of the impugned measure were consistent with the ECtHR case law, the ACtHPR did not refer to that court. Importantly, as mentioned earlier, the right to privacy is not explicitly protected by the African Charter. However, as Ayalew and Murray argue, the right to privacy could be considered within the ground for 'protection of the rights of others' set by Article 27(2) ACHPR.[61] Also, the 2002 Declaration of Principles on Freedom of Expression include 'protection of reputation' as one of the legitimate grounds. Nevertheless, the Court referred to the ICCPR wording to support its reasoning, instead of further developing the interpretation of its own instruments.[62] This revealed a more 'external' and 'international' attitude of the ACtHPR when filling the gaps of Article 9 ACHPR. In sum, the ACtHPR ultimately was satisfied that the impugned measure sought to protect the honour and reputation of a person or a profession, finding this aim 'perfectly legitimate' in light of Article 19 ICCPR.

Comparing the African bodies' approach to interpreting the legitimate aim of 'protection of honour and reputation', the ACtHPR in *Konaté* appears to have adopted a more detailed examination of this aim than the IACtHR and the ECtHR. Notably, these Courts have analysed several cases of limitations on freedom of expression to safeguard 'the rights of honour and reputations of third persons'. Yet, they do not delve into a thorough examination of the scope of this aim.

For instance, in *Herrera Ulhoa v Chile*, the IACtHR assessed the lawfulness of measures imposed against a journalist for allegedly defaming a diplomat. Although the parties made repeated arguments concerning the legitimate aim of the measure, the Court did not conduct any assessment of this prong, focusing on the necessity of the measure instead.[63] Similarly, in *Álvarez Ramos v Venezuela*, the Court considered that the case concerned 'the restriction of the right to freedom of expression by means of a complaint filed by a private citizen', leading the Court to accept that the measure sought to safeguard the rights or reputations of others.[64] In *Kimel v Argentina*, the Court assessed the legitimate aim of the measure separately without conflating it with the analysis of the other prongs; however, it just briefly accepted that 'under the provisions of the Convention, the protection of a person's honour and reputation is a legitimate end.'[65]

[58] 004/2013, *Lohé Issa Konaté v Burkina Faso*, 41st Ordinary Session of the ACHPR, 3 June 2016, at para 117.
[59] ibid., at para 134.
[60] ibid., at para 135.
[61] Murray, supra n 3; Ayalew, supra n 3.
[62] *Konatè* supra n 58, at paras 134–135.
[63] *Case of Herrera Ulhoa v Costa Rica* IACtHR Series C No 107 (2001). See also *Case of Ricardo Canese v Paraguay* IACtHR Series C No 111 (2004); *Case of Palamara-Iribarne v Chile* IACtHR Series C no 135 (2005)
[64] *Case of Álvarez Ramos v Venezuela* IACtHR Series C No. 380 (2019), at para 106.
[65] *Case of Kimel v Argentina* IACtHR Series C no 177 (2008), at para 71. A similar brief assessment was also conducted in *Case of Fontevecchia and D'Amico v Argentina* IACtHR Series C No 238 (2011).

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It goes without saying that this does not mean that the IACtHR did not consider defamation cases important. On the contrary, the IACtHR has been leading in the case law on the matter in response to the numerous *desacato laws* curbing down freedom of expression in the Americas.[66] However, due to the extensive provision on the matter in the American Convention and to the commitment to protect freedom of expression against states' attempt at political censorship, the attention of the IACtHR has always been focused on the necessity and proportionality of the measures which were deemed, without any substantial doubts, to fall within the legitimate aim of protecting the right of others.[67]

Similarly, the ECtHR does not seem to delve too much into the intricacies of this legitimate aim, as the protection of the honour and reputation is often an uncontroversial legitimate aim on which the parties agree. This was the case, for instance, in landmark rulings such as *Axel Springer AG v Germany*,[68] *Delfi AS v Estonia*,[69] and *Steel and Moris v the United Kingdom*.[70] Some cases, however, contested this aim and the Court granted a somewhat extensive interpretation to the aim of protection of honour and reputation, finding that a restriction to one's freedom of expression is justifiable to protect the identity and dignity of a community. This was the Court's view, for instance, in *Perinçek v Switzerland*, when the applicant claimed that the occurrence of the Armenian Genocide in 1915 was an international lie, which triggered the imposition of sanctions by Switzerland. Switzerland claimed that it imposed the sanctions to protect the rights of present-day Armenians, who descend from the victims of the events of 1915 and the following years and who have construed their identity around the perception that their community has been the victim of genocide. The Court accepted this argument and ruled that the measure could indeed seek to protect the identity and dignity of that community.[71]

It is interesting to note that, while the ECtHR found that measures to curb expressions denying the Armenian genocide sought to protect 'the rights of others', the ACtHPR found another legitimate aim to curb similarly harmful expressions. Specifically, in *Ingabire Victoire Umhoza v Rwanda*, the applicant faced sanctions for revisionism and minimisation of the genocide in Rwanda. When examining whether the impugned measures violated the applicant's right to freedom of expression, the Court relied on *Konaté* and echoed the legal basis of Article 27(2) ACHPR and Article 19(3) ICCPR to list the legitimate aims for the restriction of freedom of expression.[72] Once again, the Court did not refer at all to the Declaration of Principles nor it explained why it preferred an international instrument over a regional one when applying Article 9 ACHPR. After carefully examining these instruments, the Court found that the restriction sought to protect national security and public order,[73] diverging from the ECtHR's ruling in *Perinçek*. These significant divergencies in the interpretation of this aim in two cases on expressions concerning genocide events highlight the need to examine the context of the expression also to determine the legitimate aim of any restrictive measures.

In summary, the African bodies tend to 'borrow' the legitimate aim of protecting the honour and reputation of others from the lists enacted by their counterparts in the Americas and in Europe. This is because Article 27 ACHPR does not indicate this aim and the ACHPR itself does not enshrine the protection of the right to privacy explicitly. However, adopting

[66] Botero-Marin, supra n 56 at 473–494.
[67] Bertoni, 'The Inter-American Court of Human Rights and the European Court of Human Rights: A Dialogue on Freedom of Expression Standards' (2009) 3 *European Human Rights Law Review* 333.
[68] *Axel Springer AG v Germany* Application no. 39954/08 Merits and Just Satisfaction, 7 February 2012.
[69] *Delfi AS v Estonia* Application no. 64569/09 Merits and Just Satisfaction, 16 June 2015.
[70] *Steel and Morris v the United Kingdom* Application no. 68416/01 Merits and Just Satisfaction, 15 February 2005.
[71] *Perinçek v Switzerland* Application no. 27510/08 Merits and Just Satisfaction, 15 October 2015, 151.
[72] 003/2014, *Ingabire Victoire Umhoza v Republic of Rwanda*, 41st Ordinary Session of the ACHPR, 03 June 2016, at paras 139–141.
[73] ibid, 141.

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the wording of the Declaration and the ICCPR, the African bodies accept the protection of honour and reputation as legitimate aims to restrict expression. Interestingly, although this aim is significantly uncontroversial, the African bodies still engage in a (brief) examination of it. This contrasts with the approach adopted by the IACtHR, which often conflates the assessment of this aim with the necessity in a democratic society. Similarly, only in exceptional cases the ECtHR performs a thorough assessment of the scope of this legitimate aim.

4.2 Rephrasing: protection of national security, public order, or 'public interest'

Cases concerning the protection of 'national security', 'public order', or 'public interest' are also somewhat frequent before the African bodies. However, neither the Declaration of Principles nor Article 27(2) of the ACHPR explicitly recognize the existence of the legitimate aim of 'protection of national security or public order'. At most, Article 27(2) provides that 'collective security' and 'common interest' should be considered when exercising the rights and freedoms recognized by the Charter.

Notwithstanding the lack of explicit mention to the 'protection of national security' aim, the Commission extensively interpreted the Declaration of Principles and Article 27(2) ACHPR in *Kenneth Good v Botswana* to recognize national security and public interest as justifiable grounds for limiting freedom of expression. Notably, in the case, the Commission discussed the extent of freedom of expression and, after mentioning Article 27(2) and the Declaration of Principles, held that 'there seems to be an international consensus among states on [...] the need to restrict the right to freedom of expression to protect the rights or reputation of others, for national security, public order, health or morals'.[74] In doing so, it clearly used the language of the ICCPR, ECHR, and ACHR. The reference to the ICCPR could be linked to the facts of the case, as it concerned the deportation of an Australian citizen due to his expressed views, thus constituting an attempt to show that the standards applied by the Commission are global. Regardless of the Commission's reason for referencing the ICCPR in *Kenneth Good*, later cases consolidated the Court's understanding that national security, public order and public morality constitute legitimate grounds for restricting freedom of expression.[75] Another noteworthy point in *Kenneth Good* concerns the expression 'public interest', which seems to be an invention of the Commission. It can be traced back to the submission of the respondent state and the language used by Botswana in its own Constitution, which establishes that the enjoyment of human rights is 'subject to the respect [. . .] for the public interest to each and all'.[76]

Comparing the ACommHPR's approach with the other regional bodies, the ECtHR received an application, where the respondent state argued that the imposed restrictions to freedom of expression (allegedly defamation) was motivated by the 'protection of public interest'.[77] In *Alithia Publishing Company Ltd & Constantinides v Cyprus,* however, the ECtHR, ruling in favour of Cyprus, did not adopt this 'new' wording or ground, rather relying on the 'protection of the rights of others'. Importantly, the ECHR does not enshrine the protection of 'public interest' or 'public order' as legitimate aims to restrict freedom of expression. Conversely, Article 10(2) ECHR prescribes the 'prevention of disorder' as a legitimate aim, while other articles of the ECHR refer to 'interest of public order' or 'protection of public order'. The precise meaning of 'prevention of disorder' was thoroughly analysed in *Perinçek*, where the ECtHR also highlighted linguistic differences in the term (eg the French version of the ECHR refers to '*la défense de l'ordre*', which has a wider meaning than the former). Ultimately, to reconcile the different

[74] 313/05, *Good v Republic of Botswana*, 28th Activity Report of the ACHR, 26 May 2010, at para 187.
[75] 028/2020, *Houngue Eric Noudehouenou v Republic of Benin* 67th ordinary session of the ACHR, 1 December 2022.
[76] ibid, at paras 145–146, 202.
[77] *Alithia Publishing Company Ltd & Constantinides v Cyprus,* Application no. 17550/03 Merits and Just Satisfaction, 22 May 2008, at para 55–57.

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meanings of the term, the Court resorted to Article 31 VCLT, according to which divergencies in terms of a treaty must be resolved by adoption of the interpretation which 'best reconciles the texts, having regard to the object and purpose of the treaty'.[78] Against this backdrop, the ECtHR considered that Article 10(2) ECHR enumerates justifications for interference with human rights, thus, it must be interpreted restrictively. Conclusively, the ECtHR favoured the expression 'prevention of disorder' rather than '*la défense de l'ordre*', which has a broader meaning.[79]

It is interesting to compare the ECtHR's approach to the interpretation of 'prevention of disorder' in *Perinçek* and the ACommHPR's rule in *Kenneth Good.* While the ECtHR elaborated on the rationale behind the interpretation given to the legitimate aim, explicitly referring to the VCLT and the object and purpose of the ECHR, the ACommHPR did not provide further elucidation on its reasoning to recognize 'public interest' as a legitimate aim. Particularly, the ACommHPR neither referred to the VCLT nor to Articles 60 and 61 of the ACHPR.

Further investigating the application of 'public interest', we found that within the Inter-American system, the expression 'public interest' holds significant space, especially in defamation cases. However, similarly to the ECtHR, the IACtHR never really accepted it as a legitimate ground for restricting freedom of expression and, in *Gomes Lund* et al. *v Brazil,* it held that 'State authorities cannot resort to citing [. . .] public interest'[80] to avoid releasing information requested for investigations. The engagement with this expression could be also interpreted as a silent acceptance of the possibility of invoking this as a legitimate ground under different circumstances but there are no cases where this manifested nor an apparent reason for doing so since the broad formulation 'protection of the rights of others' in Article 13(2) ACHR allows a comprehensive interpretation. This shows that the ACommHPR seems to have borrowed a new legitimate ground from the parties' submission and make it its own.

Although the African bodies seemingly accepted an expansive interpretation of Article 27 ACHPR to encompass the protection of 'public interest' as a legitimate aim to restrict freedom of expression, the Court and the Commission ruled that the restrictive measures failed to protect this legitimate aim, thus finding a violation to Article 9. *INTERIGHTS* provides a good illustration of this point. This is a complex case concerning the ill-treatment of four journalists who took part in demonstrations against the government. As mentioned earlier, the African Commission provided a very textbook explanation of its approach to interpreting restrictions to Article 9. First, it held that Article 9 should always be read in conjunction with Article 27(2), considering the grounds stated therein as legitimate aims for restricting freedom of expression. Second, it recalled the Declaration of Principles that should be used to supplement Article 9 when assessing restrictions to the right. Third, it mentioned the similar provisions in the ICCPR and UDHR and the case law of the Inter-American system to be used to support the interpretation of the Charter and the assessment of the restriction under analysis.[81] In this case, the respondent state did not contest the allegation that the impugned measures had violated the applicants' Article 9 rights. In light of this omission, the Commission highlighted that the state did not provide any information on how the victims were threatening national security or public order. Given that the measure did not safeguard any legitimate aims, the Commission found that it violated the applicants' rights.

[78] *Perinçek*, supra n 62 at para 149.

[79] ibid. The Court also took a similar approach in carefully explaining the rationale behind the interpretation of a legitimate aim under Article 10 ECHR with conflicting translations in *Stoll v Switzerland [GC]* Application no. 69698/01 Merits and Just Satisfaction, 10 December 2007.

[80] *Case of Gomes Lund* et al. *v Brazi ('Guerrilha do Araguia')* IACtHR series C 219 (2010), at para 202.

[81] *Egyptian Initiative for Personal Rights & INTERIGHTS,* supra n 47 at paras 239–256.

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Another interesting example is *Houngue Eric Noudehouenou v Benin.* In this case, Benin's legislation criminalised speech aiming at discrediting a judicial act or decisions. When analysing the legitimate aim of the sanctions imposed to the applicants, the Court considered that the measure could not have sought to protect 'national security, public order or public morality, (. . .) since paragraph 1 of the Article already punishes the discrediting of a judicial decision with the aim of undermining the authority or independence of the judiciary.'[82] In other words, the ACtHPR did not accept an alternative argument for the legitimate aim, categorically sticking to the most plausible legitimate aim. The Court's rigid approach in *Houngue Eric Noudehouenou* differs from that of the ECtHR in *Castells v Spain*, for instance, when the ECtHR showed some leniency to the State by indicating that a measure which originally sought to 'preserve the respondent government's honour' was to be interpreted as having the legitimate aim of 'preventing disorder'.[83]

In summary, overall, the analysis of the African bodies' approaches to the aims of protection of national security and public order allows for two broad conclusions. First, the older cases demonstrate that the Commission interpreted this aim expansively, in light of the ICCPR. While Article 27 only refers to 'collective security', the Commission established that 'national security', 'public morality' and 'public order' can also justify restrictions to the right to freedom of expression, mirroring Article 19 ICCPR. However, the Court's reasoning behind this expansive interpretation lacks clarity, especially if compared to the ECtHR's, reasoning in *Perinçek*, when the Strasbourg Court thoroughly analysed the interpretation of 'public disorder'. On the other hand, when applying this legitimate aim, the Strasbourg Court is seemingly more lenient towards the state, — at least in *Castells*, the Court accepted that a measure which sought to protect the government's honour should have been interpreted as aiming to prevent disorder. In contrast, the ACtHPR did not accept an alternative interpretation to the legitimate aims of a measure which sought to protect the independence of the judiciary.

4.3 Inventing: 'legitimate prejudice' and 'combatting incitement to hatred or discrimination'

In addition to borrowing legitimate aims from other international instruments and rephrasing the existing aims established by the Declaration of Principles and Article 27(2) ACHPR, the African bodies also created new legitimate aims. In *Elgak and others v Sudan,* the Commission explicitly mentioned the Declaration of Principles on Freedom of Expression in Africa and held that any restriction to Article 9 should be provided by law, serve a legitimate interest, and be necessary in a democratic society. However, when concluding that the State did not show how the restriction of the applicants' freedom of expression was pursuing a legitimate aim, it referred to the broader list of aims mixing the Declaration of Principles with Article 27(2) ACHPR and created yet another general ground for restriction. In fact, it held that 'it has not been shown that the Complainants [. . .] endangered the lives of others, national security, morality, common interest or caused *any other legitimate prejudice*'.[84] The Commission did not give any further explanation what constitutes a 'legitimate prejudice' was, or what falls within this category. This is certainly a unique formulation among regional systems, and one that the Commission itself did not use again in following cases.

Another very interesting case in which the Court considerably expanded the list of legitimate aims is *Sébastien Germain Marie Aikoué Ajavon v Republic of Benin*. In this case, the applicant claimed the violation of various civil and political rights relating to laws promulgated by Benin.

[82] *Houngue Eric Noudehouenou*, supra n 66 at para 113.
[83] *Castells v Spain* [GC] Application no 11798/85, Merits and Just Satisfaction, 23 April 1992.
[84] 379/2009, *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v Sudan*, 15thExtra Ordinary Session, 14 March 2014, at para 114.

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The challenged provisions criminalized, specifically, offences of racially motivated and xenophobic insults using a computer system and incitement to hatred and violence grounded on race, colour, national or ethnic origin, or religion. In assessing the legitimate aim of the measure, the Court referred to Article 27(2) of the Charter and reiterated that national security, public order and public morals constitute legitimate aims, although not established in Article 27(2). In addition, the Court referred to Article 20 ICCPR, which enshrines the prohibition of speech which constitute incitement to discrimination. Against this legal backdrop, the Court concluded that 'the restriction imposed pursues a legitimate purpose since it seeks to combat any form of incitement to hatred or discrimination.'[85] In other words, in *Sébastien Germain Marie Aikoué Ajavon v Republic of Benin,* the ACtHPR seemed to have accepted a new legitimate aim, in addition to the ones set by Article 27 of the Charter and Article 19 ICCPR.

Interestingly, the ECtHR often adopted a different approach when analysing cases in which the impugned expression arguably incites hatred or discrimination. Instead of recognising the existence of a new legitimate aim, in *Garaudy v France*, the Court ruled that expressions that denied historically established facts of the holocaust were not subject to the protection of Article 10 ECHR, as Article 17 ECHR prohibits the abuse of the rights established by the Convention. Accordingly, by reference to Article 17 ECHR, the Court did not even examine whether the impugned measure against the applicant was prescribed by law, pursued a legitimate aim, and was necessary in a democratic society, since the applicant did not enjoy Article 10 rights to contest the holocaust.[86] Similarly, in *Norwood v UK*, the ECtHR held that a poster with a photograph of the Twin Towers in flame and the words 'Islam out of Britain—Protect the British People' constituted an attack to all Muslims in the UK, thus being incompatible with the Convention values of tolerance, social peace and non-discrimination. Accordingly, the Court held that this expression was not subject to protection under Article 10 ECHR and did not assess the existence of a legitimate aim to restrict it.[87]

Although the ECtHR did not expand the list of legitimate aims in the mentioned cases, it infamously adopted an expansive interpretation of the list of legitimate aims in *S.A.S. v France*, a case concerning freedom of expression and thought. There, the government argued that a legislation prohibiting the use of face veils sought to protect the 'respect for the minimum requirements of life in society' or of 'living together'. The Court found that this aim, although not explicitly enshrined in the wording of the ECtHR, could be linked to the consolidated legitimate aim of 'protection of the rights and freedoms of others', ultimately ruling that the measure had passed the legitimate interest test.[88]

In sum, the analysis of the ECtHR case law demonstrates that, unlike the ACtHPR, the Strasbourg Court has not expanded the interpretation of the legitimate aims to encompass combatting any form of incitement to hatred or discrimination. Article 17 ECHR might explain the lack of recognition of this aim, as Article 17 prohibits the abuse of rights, enshrining that no individuals have rights to 'engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth' in the Convention. As such, the Court consistently interpreted that speech which incited hatred or discrimination fell outside of the scope of Article 10, precluding the analysis of the legitimate aim for limiting this kind of expression. Conversely, similarly to the ACtHPR, the Strasbourg Court has also expanded the list of legitimate aims in certain situations. For instance, in *S.A.S. v France* (a case which does not concern solely freedom

[85] 062/2019, *Sébastien Germain Marie Aikoué Ajavon v Republic of Benin,* 04 December 2020 at para 125.
[86] *Garaudy v France* Application no. 65831/01, Merits and Just Satisfaction, 24 June 2003. See also *M'Bala M'Bala v France* Application no. 25239/13, Merits and Just Satisfaction, 20 October 2015.
[87] *Norwood v the United Kingdom* Application no. 23131/03, Merits and Just Satisfaction, 16 November 2004.
[88] *S.A.S v France* Application no. 43835/11, Merits and Just Satisfaction, 01 July 2014.

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of expression), the ECtHR interpreted 'living together' as a legitimate aim, encompassed under the umbrella of 'protection of the rights and freedoms of others.'

The IACtHR has similarly expanded the list of legitimate aims. For instance, in *Granier* et al. *(Radio Caracas Televisión) v Venezuela*, the Court accepted that the impugned measures imposed by the State on the applicant's freedom of expression sought to '*protect pluralism*'.[89] However, when assessing this purpose vis-à-vis the facts of the case, the Court concluded that the declared purpose of the intervention of the Venezuelan government did not correspond to the real one, therefore lacking legitimacy.[90] While the Court ultimately ruled that the impugned measure did not pursue a legitimate aim in practice, the IACtHR appeared to have accepted the possibility of declaring a new legitimate aim in theory.

In sum, the ACtHPR arguably expanded the list of legitimate aims enshrined in Articles 27 ACHPR and Article 19 ICCPR. This expansion is not unprecedented in regional human rights courts, as demonstrated by comparison with previous cases from the ECtHR and the IACtHR.

4.4 Does the analysis of the legitimate aim matter? Cases in which the African bodies skipped this analysis altogether

Although we showed that the African bodies often borrow, rephrase, or invent legitimate aims when analysing freedom of expression cases, it is also worth asking whether the recognition of legitimate aims matters at all. This question is posed mainly due to some scenarios in which the Commission omitted the consideration of legitimate grounds completely, either because the respondent state did not submit any justification for their restriction to freedom of expression[91] or because it directly moved to the necessity and proportionality assessment. For instance, in *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Zimbabwe*, the Commission avoided discussing the legitimacy of the aims provided by the respondent state for restricting Article 9 (in addition to Articles 14 and 15) and jumped to assessing the proportionality of the restriction, concluding that the State had violated the Charter's rights because the measure was not proportionate.[92] By doing so, the Commission skipped one of the prongs of the three-partied test for assessing lawful restrictions to qualified rights and departed from the established practice within human rights adjudicatory bodies, including the African ones. Importantly, we note that the practice of skipping the analysis of the legitimate aims of an impugned measure is not exclusive to the African bodies. In fact, the IACtHR and the ECtHR conflate the analysis of the legitimate aim of measures with the other prongs so frequently that some scholars have suggested that the legitimate aim test is seemingly unimportant. In contrast, others have found that the Courts increasingly find that states implemented measures without a legitimate aim.[93]

The Strasbourg court recurrently conflates the assessment of the legitimate aim and the necessity and proportionality of the measure. This was the case, for instance, in *Bayev and Others v Russia*, when the Court assessed whether Russia had violated the applicants' freedom of expression by imposing sanctions after a non-violent demonstration to counter stigma associated with homosexuality.[94] Russia argued that the measure sought to protect the morals, health and the rights of others, specifically minors. In examining these legitimate aims, the Court examined

[89] *Case of Granier* et al. *(Radio Caracas Televisión) v Venezuela* IACtHR Series C 293 (2015), at para 188.

[90] ibid, at para 196.

[91] See, for instance, 147/95 and 149/96, *Jawara v Gambia* 13th Annual Activity Report of the ACHPR, 11 May 2000, at para 65.

[92] 284/03, *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Zimbabwe*, 26th Annual Activity Report of the ACHPR, 3 April 2009, at paras 175–178.

[93] Orcan, 'Legitimate Aims, Illegitimate Aims and the E.Ct.H.R.: Changing Attitudes and Selective Strictness' (2022) 7 *University of Bologna Law Review* 7, at 10.

[94] *Bayev and Others v Russia* Applications nos. 67,667/09, 44,092/12 and 56,717/12, Merits and Just Satisfaction, 20 June 2017.

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the legitimate aim of the measure *in concreto* by conflating the assessment of the aims and the necessity and proportionality of the measure, ruling that 'to determine the proportionality of a general measure, it must primarily assess the legislative choices underlying it, regarding being had to the quality of the parliamentary and judicial review of the necessity of the measure, and the risk of abuse if a general measure were relaxed.'[95] Ultimately, the Court found that the measure implemented by Russia did not protect any of the stated legitimate aims.

Baka v Hungary also helps illustrate the Court's assessment of legitimate aim of an impugned measure *in concreto*. In this case, the Court accepted that changing the rules for electing the president of a country's highest judicial body could be linked to the legitimate aim of 'maintaining the authority and impartiality of the judiciary'. Nonetheless, the Court found this aim was not adequate to justify the early termination of a court president's mandate because of his previous exercise of freedom of expression. Consequently, by assessing the situation *in concreto*, the Court ruled that Hungary had violated its Article 10 obligations.[96] Similarly, the IACtHR also either skipped or conflated the analysis of the legitimate aim, for instance, in the *Last Temptation of Christ*.[97] In this case, the Court did not address or analyse the legitimate aim of censoring a movie which allegedly had violated the honour of Jesus.

Notwithstanding, the Courts' recurrent approach to skipping the legitimate aim assessment should not be interpreted, by itself, as indicative that the Courts are not concerned with the legitimate aim of a given measure. On the opposite, these findings might further corroborate scholars' arguments that 'the grounds that the Court relied on when finding a breach of the legitimate aim condition are gradually changing from an *in abstracto* assessment of the invoked aims' justificatory capacity towards an evidence-based *in concreto* examination of the factual circumstances surrounding the case.'[98] As such, the Courts appear to skip the assessment of the legitimate aim, but insert its analysis within the broader context of the measure. In other words, the Courts might consider the evidence presented surrounding the context of a given measure to perform an *abstracto* assessment of the legitimate aim, in detriment of a formal and mechanic assessment of such aim, where the respondent state should simply 'tick a box' indicating the legitimate aim.

The argument of the *'in abstracto'* assessment of the legitimate aim appears to be more prevalent among scholars investigating the working practices of the ECtHR. However, the argument also seems replicable to the realm of the African bodies. For instance, in *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Zimbabwe*, although the Commission assessed the proportionality of the measure and skipped a separate analysis of legitimate aims, it concluded that 'it is clear that the action of the State to stop the Complainants from publishing their newspapers, close their business premises, and seize all equipment cannot be supported by any genuine reasons'.[99] Put differently, the Commission seemingly performed an 'in abstracto' assessment of the legitimate aim of the measure, under the guise of the analysis of the other prongs of the three-tiered test. Ultimately, considering the concrete circumstances of the case, there were no invokable legitimate aims to justify the measures.

[95] ibid, at para 63.

[96] *Baka v Hungary* Application no. 20261/12, Merits and Just Satisfaction, 23 June 2016), at paras 155–156. Interestingly, the approach taken in this case, namely, to conflate the assessment of the legitimate aim with the necessity in a democratic society prong differs from the approach taken in Kövesi v. Romania, the facts of which resemble those of Baka. In *Kövesi*, the Court assessed the legitimate aim *in concreto*, but separately from the necessity in a democratic society prong, ultimately ruling that the measure did not pursue any legitimate aim. *Kövesi v Romania* Application no. 3594/19, Merits and Just Satisfaction, 5 May 2020.

[97] *Case of Olmedo-Bustos* et al. *v Chile ('The Last Temptation of Christ')* IACtHR Series C 73 (2001)

[98] Orcan, supra n 93 at 10.

[99] 284/03, *Zimbabwe Lawyers for Human,* supra n 83 at para. 178

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5 CONCLUSIONS

Unlike other international and regional human rights instruments, the ACHPR establishes unique provisions concerning the right to freedom of expression. First, its wording on Article 9 merely provides for a general protection of the right to freedom of expression, without any references to the conditions under which this right can be restricted or limited. In other words, Article 9 ACHPR does not prescribe a list of legitimate aims that serve as a justification for an interference with the right to freedom of expression. At most, Article 9 ACHPR establishes a right for every individual to express and disseminate their opinions 'within the law'. However, the meaning of 'within the law' is unclear and this article explored the processes adopted by the African bodies in filling interpreting this provision.

Article 27(2) provides for another peculiarity of the ACHPR: a clause with the duties of all individuals under the jurisdiction of the member states. This Article provides that 'all rights and freedoms shall be exercised with due regard to the rights of others, collective security, morality and common interest'. As we have argued, it is challenging to argue that this constitutes a general limitation clause. Yet, it has been used in conjunction with Article 9 to determine the aims for restricting freedom of expression.

In other words, neither the lack of a precise list of legitimate aims which might justify restrictions to the right to freedom of expression or the lack of precise definition of 'within the law' seem to significantly affect the African bodies' assessment of restrictive measures to freedom of expression under Article 9 ACHPR. This is because Articles 60 and 61 of the ACHPR allow and incentivize the African bodies to draw inspiration from international law and/or other general or special international conventions in filling the Convention gaps.

Accordingly, in the few cases decided by the Commission and the Court on freedom of expression, the African bodies have adopted different approaches to interpreting the expression 'within the law', both in terms of identifying legitimate aims and assessing their scope. When dealing with defamation cases, the African bodies 'borrowed' aims from international law or other international and regional instruments. Notably, the ACHPR does not prescribe the protection of the right to privacy, yet the African bodies recognize the protection of 'rights of others', including the right to reputation, as a legitimate aim, adopting a wording which resembles Article 19 ICCPR. In cases concerning national security or public order, the African bodies seemingly rephrased the same aims as those protected under other Article 27 ACHPR, the Principles on Freedom of Expression or international and other regional instruments. Finally, we have also identified instances in which the African bodies adopted a very expansive interpretation of the legitimate aims, inventing new aims.

From a human rights law standpoint, this inconsistent consideration and application of legitimate aims for the restriction of freedom of expression is problematic as it undermines the principle of certainty of the law in two respects. First, it allows states to justify restrictive measures by invoking potentially any ground. Second, it creates uncertainty for applicants regarding the criteria that the Commission and Court will use to assess the suitability of a given legitimate aim. However, these concerns should not be overstated. The robust application of the three-parts test of prescription by law, legitimate aim, and necessity and proportionality offers a crucial safeguard against arbitrary limitations. The thorough and consistent assessment of the necessity and proportionality of restrictive measures in the case law of the ACommHPR and the ACtHPR serves as a vital bulwark against undue limitations. The fact that this analysis often takes centre stage, overshadowing and diminishing the focus on legitimate aims, further highlights its pivotal role.

Moreover, the observed inconsistencies are not unique to the African context, with both the ECtHR and IACtHR exhibiting similar tendencies, despite having a detailed list of legitimate

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aims in their relevant freedom of expression provisions. This suggests a broader trend in regional human rights adjudication towards a pragmatic convergence in the interpretation and application of legitimate aims for the protection of freedom of expression. This convergence could be considered pragmatic because although the three regional courts are not fully aligned in all aspects of legitimate aims selection, assessment and interpretation for freedom of expression cases, they nevertheless manage to ultimately rule in overall similar ways considering the facts of the cases. They may differ in the wording used or in the level of scrutiny granted but they all are often inconsistent in their dealing with legitimate aims and strongly adopt a case-by-case approach.

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