

The Johannesburg Principles: *Overview and Implementation*

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1. Introduction

The *Johannesburg Principles: National Security, Freedom of Expression and Access to Information*,¹ were adopted by a group of experts on 1 October 1995. Their goal was to set authoritative standards clarifying the legitimate scope of restrictions on freedom of expression on grounds of protecting national security. Since that time, the Principles have been widely endorsed and relied upon by judges, lawyers, civil society actors, academics, journalists and others, all in the name of freedom of expression. They set a high standard of respect for freedom of expression, confining claims based on national security to what States can legitimately justify.

Despite their status, most countries around the world are a very long way from having implemented the Principles. In most of the world, national security remains an excessively broad area of restriction, both in terms of punishing those who speak out and in terms of government secrecy. National security is also one of the most difficult areas for campaigners and human rights activists to promote reform, both politically and through the courts.

This is particularly true since 11 September 2001, as security logic dominates to the detriment of freedom of expression and as officials around the world arrogate to themselves even greater security powers. These powers are justified on the basis that they are needed to combat terrorism but in practice they often lead to abuse of human rights. It does not help that some of the countries best-known for promoting and respecting human rights have also increased secrecy and rolled back rights in the aftermath of the terrorist attacks.²

Another unfortunate outcome of the attacks is that political energies are focused on combating terrorism rather than promoting human rights. Resources and attention are limited, and the overwhelming attention given to terrorism naturally undermines efforts in other areas. A related problem is that key international players have been willing to

¹ ARTICLE 19 (London: 1996).

² In Canada, for example, the Anti-Terrorism Act, S.C. 2001, c. 41, gave the Attorney General the power to issue certain confidentiality certificates which excludes the related records from the operation of the Access to Information Act and discontinues any related investigation by the commissioner or any court.

overlook human rights abuses as a trade-off for support in the fight against terrorism. A good example of this is Pakistan, where the international community had expressed serious concern about both the development of nuclear military capacity and the military takeover. These concerns were, however, summarily brushed aside in exchange for Pakistan's support for the war in Afghanistan.

Despite these problems, now is an appropriate time for human rights activists to consider how to address the issue of national security and to rekindle interest in the Johannesburg Principles and respect for the values they promote. Although security concerns remain very much at the forefront of global politics, there is increasingly scope to challenge the way in which these concerns undermine human rights. Furthermore, decision-makers are realising once again that, at root, security depends on promoting human rights. This is nowhere the case more than in the Middle East; the US, for example, is prioritising the promotion of freedom of expression and democracy in the Gulf countries.

This paper provides an overview of the main reasons why it has proven so difficult to ensure respect for freedom of expression in the face of national security concerns. It also provides an overview of the Johannesburg Principles, giving some examples of how they have, and have not, been implemented in practice. Finally, it points to some areas where more work needs to be done to assist campaigners to advocate for implementation of the Johannesburg Principles.

2. National Security and Freedom of Expression

Freedom of expression is a fundamental, indeed foundational right, guaranteed under international law, all three main regional human rights treaties and almost every national constitution with a bill of rights.³ Article 19 of the *Universal Declaration on Human Rights* (UDHR),⁴ guarantees the right to freedom of expression in the following terms:

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

The UDHR, as a UN General Assembly resolution, is not directly binding on States. However, parts of it, including Article 19, are widely regarded as having acquired legal force as customary international law since its adoption in 1948.⁵ It is now increasingly accepted that this right includes the right to access information held by public authorities,

³ As well as some that do not include such bills. See, for example, *Australian Capital Television v. The Commonwealth*; *State of New South Wales v. The Commonwealth* (1992) 177 CLR 106 (High Court of Australia), holding that the right to freedom of political communication was implicit in the structure of elected government provided for by the constitution.

⁴ UN General Assembly Resolution 217A(III), 10 December 1948.

⁵ See, for example, *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2nd Circuit).

commonly referred to as the right to freedom of information, or simply the right to information.⁶

Freedom of expression is a conceptually complex right because, although it is a fundamental, it is universally accepted that it may legitimately be subjected to restriction on various grounds. There is much debate at the national level about the test for restrictions, as well as the aims which such restrictions may legitimately serve but, at least under international law, the position is relatively clear, as set out in Article 19(3) of the *International Covenant on Civil and Political Rights (ICCPR)*,⁷ as follows:

The exercise of the rights provided for in paragraph 2 of this article [the right to freedom of expression] 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.

This Article both stipulates clearly the aims which any legitimate restriction on freedom of expression must pursue – namely the rights or reputations of others, national security, public order, public health or public morals – as well as the test which any such restrictions must meet, namely that they are provided by law and are necessary.

Formally, this provision seeks ensure that in imposing restrictions, States must balance the legitimate aim they seek to protect against the fundamental right to freedom of expression. In fact, however, apart from providing a procedural guarantee – that restrictions must be provided by law – it provides little guidance as to how any balancing is to take place. The aims listed are undefined and extremely broad, so that practically any legislation can arguably be accommodated and, in practice, international courts and tribunals rarely conclude that laws offend against freedom of expression on the basis that they do not pursue a legitimate aim.

The nub of the balancing takes place around the concept of necessity, a very context-dependent term. Unfortunately, international jurisprudence has done little to clarify the meaning of necessity. The European Court of Human Rights, for example, assessing a very similar phrase in the *European Convention on Human Rights*,⁸ has consistently interpreted the term necessity to mean:

The Court must determine whether the interference at issue was “proportionate to the legitimate aim pursued” and whether the reasons adduced by the Austrian courts to justify it are “relevant and sufficient”.⁹

⁶ See below, under Restrictions on Freedom of Information.

⁷ UN General Assembly Resolution 2200A(XXI), adopted 16 December 1966, in force 23 March 1976. The ICCPR is an international treaty ratified by some 149 States as of December 2002.

⁸ Adopted 4 November 1950, in force 3 September 1953.

⁹ *Lingens v. Austria*, 8 June 1986, Application No. 9815/82, para. 40.

This is a very subjective assessment, a fact to which the jurisprudence of the Court stands as testament. Some national courts have successfully elaborated far more precise tests.¹⁰

The conceptual problems with freedom of expression are perhaps at their highest in relation to considerations of national security. National security is a social value of the highest order, upon which the protection of all human rights, indeed our whole way of life, depends. It is universally accepted that certain restrictions on freedom of expression are warranted to protect national security interests. A State can hardly allow its citizens to divulge information about its troop movements during an active conflict, to give just one obvious example.

At the same time, historic abuse of restrictions on freedom of expression and information in the name of national security has been, and remains, one of the most serious obstacles to respect for freedom of expression around the world. These problems manifest themselves in two related but different areas. First, many States impose criminal restrictions on the making of statements which allegedly undermine national security. Cases based on these restrictions are relatively rare in democratic countries and are usually pretty high-profile and contentious, but they can be common in repressive countries where they may be used to suppress political opposition and critical reporting.¹¹ Second, in almost all States where freedom of information is guaranteed by law, these laws limit the right in relation to national security, often in very broad terms. Excessive secrecy in relation to national security is a widespread problem around the world, even in established democracies.¹²

Most of the traditional arguments in favour of openness apply with at least equal force where national security is concerned. Intelligence and security bodies play an important role in society and they must, like all public bodies, be subject to democratic accountability. In some cases, they appear not to be accountable even to elected officials. During and after the referendum process in East Timor, for example, the Indonesian authorities appeared to have little control over the armed forces and the militia who reported to them. In other cases, elected officials take advantage of the secrecy surrounding these bodies to abuse their powers for political purposes. Perhaps the most famous example of this is the abuses committed by Nixon which eventually led to his impeachment.

Defence industries absorb enormous amounts of public money and, in many countries, spend more, and more discretionary funds through contractual procedures than most if not all other public sectors. This is a natural breeding ground for corruption and it is only through open public oversight that this can be contained.

¹⁰ See, for example, *R. v. Oakes* [1986] 1 SCR 103 (Supreme Court of Canada), p. 138-9. The so-called ‘Oakes’ test requires courts to ask three questions: are the measures adopted carefully designed to achieve the objective in question (the rational connection question); do the means impair the right or freedom in question as little as possible; and are effects of the measures proportionate to the objective.

¹¹ See box below on Malaysia.

¹² See the box below on the David Shayler case from the UK.

Public oversight is also crucial to ensure sensible policy- and decision-making, generally but also specifically including in relation to national security: “The problem with the ‘national security state’ is not so much that it violates ... rights, although it sometimes does just that, but that it can lead to the repetition of irrational decisions.”¹³

Malaysia – Political Abuse of National Security

Arrests under the Sedition Act, 1948, are commonly used for political purposes. For example, the popular online newspaper, *malaysiakini*, famous for its independent reporting, was raided by the Malaysian police on 20 January 2003 and 19 computers, including four servers, were seized for allegedly being in breach of the Sedition Act. Its crime was to publish a letter that satirised nationalist policies in favour of ethnic Malays by comparison to the United States, on the basis that this could cause racial disharmony.

In another recent example in October 2002, N. Gopalakrishnan, a senior member of the Parti Keadilan Nasional, an opposition party led by Wan Azizah, the wife of Anwar Ibrahim, was arrested for allegedly making serious allegations against the police force.

In some cases, the problem is simply repressive governments blatantly abusing their powers. But there are legitimate difficulties as well. What constitutes national security may be subject to very wide interpretation. In addition, the concept of necessity is particularly difficult in relation national security concerns and a lack of information, as well as the inability of non-experts, including judges to understand and assess threats to security, undermines oversight mechanisms.

One problem is that for national security, unlike most areas of restriction on freedom of expression, the very nature of the legitimate interest at stake is a highly political matter, involving an assessment of a threat, often from external sources. For example, faced with a restriction sought to be justified on the basis of privacy or public order, individuals have a broad, if subjective, social understanding against which to assess the potential for harm. The same is simply not true in relation to national security. Compare, for example, a citizen’s ability to independently assess claims that a demonstration would pose a public order risk and their ability to assess the risk posed to national security by Iraq.

This leads to a situation where security claims may be accepted, even though they are completely unwarranted. As Smolla has pointed out:

History is replete with examples of government efforts to suppress speech on the grounds that emergency measures are necessary for survival that in retrospect appear panicky, disingenuous, or silly.¹⁴

¹³ Chevigny, Paul, “Information, the Executive and the Politics of Information” in Shetreet, Simon, ed., *Free Speech and National Security* (Dordrecht: Martinus Nijhoff, 1990).

¹⁴ Smolla, Rodney, *Free Speech in an Open Society* (New York: Knopf, 1992), p. 319.

This problem is compounded by the shroud of secrecy, sometimes legitimate, that surrounds national security matters. This means that courts, human rights organisations and others are asked to rely on circumstantial or tangential evidence. To continue the example above, very little of the evidence the US and UK authorities claim proves Iraq has weapons of mass destruction has been made public, even to the UN Weapons Inspectors. The technical nature of many of the issues involved also makes it difficult for non-experts to accurately assess the risk.

These factors help to explain the high level of judicial deference, which sometimes seems absurd, in the face of national security claims. It is not only judges who face these problems; civil society actors also face a serious information and technical understanding gap. This acts as a brake on activism generally in this area and tends to perpetuate the culture of secrecy around national security.

Leander Case – Unwarranted Judicial Deference

Leander was dismissed from a job with the Swedish government on national security grounds, but was refused access to information about his private life, held in a secret police register, which provided the basis for his dismissal. He appealed to the European Court of Human Rights¹⁵ claiming a breach of his rights to private life and freedom of expression. The Court found an interference with private life but held that this was justified as necessary to protect Sweden's national security.

Although no direct evidence was presented of the threat allegedly posed by Leander, the Court was prepared to accept that the official safeguards against abuse of the system were sufficient to satisfy the requirements of "necessity". It attached particular importance to the presence of parliamentarians on the National Police Board and to the supervision effected by various officials, including the Chancellor of Justice and the Parliamentary Ombudsman.

Ten years later, it transpired that Leander had been fired for his political beliefs and that the Swedish authorities had simply misled the Court. On 27 November 1997 the Swedish government officially recognised that there were never any grounds to label Leander a "security risk" and that he was wrongfully dismissed. They also paid him 400,000 Swedish crowns (approx. US\$48,000) compensation.

3. The Johannesburg Principles

3.1 Goals and Process

¹⁵ *Leander v. Sweden*, 26 March 1987, Application No. 9248/81.

The primary goal of the Johannesburg Principles is to address the concerns noted above and, in particular, the lack of clarity under international law about the scope of legitimate restrictions on freedom of expression and information on national security grounds. High profile events – such as the so-called Spycatcher case in the UK,¹⁶ the dismantling of apartheid in South Africa and the end of USSR and communism in Eastern Europe – all highlighted the need for reform in this area, as well as the need for clearer standards.

ARTICLE 19 and the Centre for Applied Legal Studies (CALs) at the University of Witwatersrand, South Africa, jointly convened a meeting of some 36 leading experts from every region of the world to discuss this issue. On 1 October 1995, after intensive discussions and debate, the group adopted the Johannesburg Principles, setting out standards on the extent to which governments may legitimately withhold information from the public and prohibit expression for reasons of national security.

The idea was not to create new standards but to distil existing standards from a variety of sources of international and comparative law. As the Introduction states:

The Principles are based on international and regional law and standards relating to the protection of human rights, evolving state practice (as reflected, *inter alia*, in judgments of national courts), and the general principles of law recognized by the community of nations.

The Principles aim to be at the cutting edge of international standards, playing a role in the positive development of these standards and reflecting the direction in which international law is, or should be, developing. At the same time, they have a solid legal basis, derived from the law and practice of democratic States, as well as in international standards. In other words, they seek to strike a balance between developing international and comparative standards and being rooted in this body of law.

The Principles have gained significant status since their adoption. Abid Hussain, the UN Special Rapporteur on Freedom of Opinion and Expression, in his 1996 annual report to the UN Commission on Human Rights, recommended that the Commission endorse the Principles.¹⁷ They have been noted in the annual resolutions of the Commission on freedom of expression every year since 1996.¹⁸ They have also been referred to by courts around the world,¹⁹ and used by numerous decision-makers, NGOs, academics and others.

¹⁶ *The Observer and Guardian v. United Kingdom*, (Spycatcher case), 26 November 1991, Application No. 13585/88, 14 EHRR 153, para. 60 (European Court of Human Rights).

¹⁷ Report of the Special Rapporteur, Promotion and protection of the right to freedom of opinion and expression, UN Doc. E/CN.4/1996/39, 22 March 1996, para. 154.

¹⁸ See, for example, Commission Res. 1996/53, preamble.

¹⁹ See, for example, *Gamini Athukoral "Sirikotha" and Ors v. Attorney-General*, 5 May 1997, S.D. Nos. 1-15/97 (Supreme Court of Sri Lanka) and *Secretary of State for the Home Department v. Rehman* [2001] UKHL 47 (House of Lords).

3.2 Overview of the Principles²⁰

The Johannesburg Principles comprise 25 principles divided into four sections: General Principles, Restrictions on Freedom of Expression, Restrictions on Freedom of Information and Rule of Law and Other Matters. The section on General Principles reiterates the general guarantee of freedom of expression as it applies in the context of national security restrictions, defines national security and addresses emergencies and discrimination. The section on Rule of Law and Other Matters summarises general rights relating to due process and the right to a remedy, and addresses the issue of disproportionate punishments and prior censorship.

The main standard-setting principles are found in the sections on Restrictions on Freedom of Expression and on Restrictions on Freedom of Information. These sections set out the tests restrictions of expression and denial of access to information on the grounds of national security must meet. They also list various forms of expression that shall not be restricted on grounds on national security and provide for procedural protections for the right to information.

General Principles

Principle 1 reiterates the general guarantee of freedom of expression and the three-part test for restrictions on that right, with minor modifications to make them specifically relevant to the issue of national security. Principle 1.1 sets out the first part of the test, that restrictions must be prescribed by law, reiterating the standard requirements of such laws, namely that they be accessible, clear and narrowly drawn. It also adds the requirement that the law should provide for adequate safeguards against abuse, including judicial scrutiny. Although this is not normally associated with the guarantee of freedom of expression, it is inherent in the idea of an effective remedy for violations of rights, set out, for example in Article 2(3) of the ICCPR.

Principle 1.2, addressing requirement that restrictions on freedom of expression serve a legitimate aim, requires restrictions to have both the genuine purpose and the demonstrable effect of protecting national security. Thus either bad faith or ineffectualness will defeat a restriction.

Principle 1.3 elaborates on the concept of necessity in relation to national security, providing that any restriction must apply only where the expression poses a serious threat, it is the least restrictive means available and it is compatible with democratic principles. This is a higher standard than that applied by most international human rights courts and tribunals, both inasmuch as it sets a threshold barrier of serious harm and that it requires the least restrictive means to be used. The threshold, however, is crucial since without it, States will be able to make national security-based claims for restrictions in

²⁰ This part of the paper draws on Coliver, Sandra, “Commentary on the Johannesburg Principles on National Security, Freedom of Expression and Access to Information” in Coliver, S., Hoffman, P., Fitzpatrick, J. and Bowen, S., eds., *Secrecy and Liberty: National Security, Freedom of Expression and Access to Information* (Dordrecht: Martinus Nijhoff, 1999).

excessively wide circumstances. The least restrictive means test is applied by a number of national courts²¹ and has a solid principled basis. The European Court of Human Rights, however, has not applied this test, allowing States a ‘margin of appreciation’ when assessing rights, effectively a system of judicial deference to national authorities. However, the margin of appreciation doctrine has been widely criticised and the Court has limited its application in certain contexts.²²

A narrow definition of a legitimate national security interest is provided in Principle 2, which draws its inspiration from *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*.²³ This provides that a restriction is not legitimate unless its purpose and effect is to, “protect a country’s existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force” from either an internal or an external threat. This is probably an unrealistically high standard, despite its pedigree. The attacks of 11 September 2001, for example, could hardly be said to have threatened the existence or territorial integrity of the US, unless this is interpreted very broadly, which would largely defeat the purpose of a narrow definition.²⁴

Principle 2 goes on to elaborate a number of illegitimate grounds for claiming a national security interest, such as protecting the government from embarrassment or entrenching a particular ideology. These are clearly not national security interests but, at the same time, countries around the world fail to respect this Principle.

Principle 3 deals with restrictions on freedom of expression pursuant to states of emergency. It repeats the conditions for imposing emergency rules under Article 4 of the ICCPR with a few differences. Principle 3 requires states of emergency to be in accordance with both national and international law and also explicitly imposes time limits on any emergency restrictions on freedom of expression. Most importantly, Principle 3, in contrast to Article 4, does not recognise the idea of derogations, limiting itself, instead, to the general concept of restrictions on freedom of expression. The guarantee of freedom of expression already explicitly recognises restrictions that are necessary, so this probably already implicitly covers emergency situations. Indeed, it is arguable that the emergency standard – “strictly required” - may not represent a higher standard than the default necessity one, in effect rendering the emergency power to apply restrictions superfluous.

²¹ See, for example, note 10 and Coliver, note 20, pp. 30-31.

²² See, for example, *Goodwin v. the United Kingdom*, 27 March 1996, Application No. 17488/90, 22 EHRR 123.

²³ UN Doc. E/CN.4/1985/4, Annex, on-line at <http://www.article19.org/docimages/1500.doc> and reprinted in (1985) 7 *Human Rights Quarterly* 3.

²⁴ Coliver, note 20, p. 19, states: “[I]t is not necessary that public disturbances threaten to erupt throughout the country, but their *effects* must be felt throughout”. This is not substantiated by the text and, in any case, introduces an unacceptably subjective, broad concept to the otherwise clear definition.

Egypt, Syria – States of Emergency

The rules on states of emergency are flouted in many countries. Egypt, for example, has had a state of emergency in place more-or-less continuously since it was first imposed in 1958 and Syria has had an emergency law in place since 1962.

The Egyptian emergency law confers wide-ranging and arbitrary powers on the president to censor the print media prior to publication and to confiscate or close down their printing facilities in the interests of “public safety” or “national security”. Trials held under the emergency law are heard by special State Security Courts and their verdict is not subject to appeal. The law has been used to detain thousands of people suspected of opposing the government. Threats to public safety and security have been interpreted very widely to include the actions of suspected supporters and sympathisers of unarmed Islamist groups. In a celebrated case, the sociology professor, Saad Eddin Ibrahim, was sentenced to seven years in prison in 2001 by a State Security Court for contravening a military order issued in 1992 pursuant to powers under the emergency law. The conviction was later overturned.

A prohibition on discrimination when restricting freedom of expression is provided for in Principle 4, which closely parallels Article 26 of the ICCPR, prohibiting any discrimination by law on a number of grounds. Given that the guarantee of freedom of expression only permits restrictions provided by law, these necessarily fall within the ambit of Article 26.

Restrictions on Freedom of Expression

The international guarantee of freedom of expression provides for an unqualified right to hold opinions without interference and this is reflected in Principle 5.

The key test for restrictions on freedom of expression in the name of national security is set out in Principle 6 which, subject to other principles, prohibits restrictions on expression unless:

- (a) the expression is intended to incite imminent violence;
- (b) it is likely to incite such violence; and
- (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

At the root of this principle are two central ideas. First, there is a difference between beliefs and actions and, in turn, between inciting to beliefs and inciting to actions. It may be noted that this rule applies only in the context of national security.²⁵

The potential for abuse of a rule prohibiting incitement to beliefs is fairly obvious. Whereas actions are clear, there are serious definitional problems with the idea of illegal

²⁵ It would not, for example, apply to a law prohibiting incitement to hatred which was aimed at preventing discrimination.

beliefs. It is not possible, for example, to maintain a principled difference between an academic theory about the use of violence and a party articulating its belief in such violence. Furthermore, political rhetoric can take extreme forms and a rule prohibiting incitement to beliefs could be used to silence opposition parties or critics. Perhaps most importantly, however, there is simply no basis for arguing that beliefs pose a sufficient threat to security to warrant overriding a fundamental right. A simple belief that violence or unlawful activities are necessary to change society, of itself, does little or no tangible harm.

Second, this Principle reflects the idea that there must be a very close nexus between the expression and the risk of violence. Courts around the world have stressed this when assessing the legitimacy of restrictions on freedom of expression. Due to the very general nature of national security, a wide range of harmless speech could be banned in the absence of a requirement of a close nexus between the speech and the risk of harm. The Turkish authorities, for example, have banned Kurdish poems on the grounds that they promote nationalism and threaten territorial integrity.²⁶ The box below sets out some of the statements on this issue made by national courts. Despite these positive statements, most countries, as well as international courts, still have a very long way to go in recognising and respecting this standard.²⁷

²⁶ See, for example, *Karatas v. Turkey*, 8 July 1999, Application No. 23168/94 (European Court of Human Rights).

²⁷ Coliver, note 20, p. 38, states bluntly: “Principle 6 is not yet an accepted norm of international law.”

National Courts and Incitement to Violence

The following are a few statements made by national courts in assessing the required nexus between expression and a risk of harm to national security or the closely related problem of public order.

India:

The anticipated danger should not be remote, conjectural or far fetched. It should have proximate and direct nexus with the expression. The expression should be intrinsically dangerous.... In other words, the expression should be inseparably locked up with the action contemplated like the equivalent of a 'spark in a powder keg'.²⁸

United States:

[T]he constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.²⁹

South Africa:

In *S. v. Nathie*, the appellant was charged with inciting offences against the Group Areas Act in the context of protests against the removal of Indians from certain areas. The appellant stated, *inter alia*: "I want to declare that to remain silent in the face of persecution is an act of supreme cowardice. Basic laws of human behaviour require us to stand and fight against injustice and inhumanity." The Court rejected the State's claim of incitement to crime, holding that since the passage in question did not contain "any unequivocal direction to the listeners to refuse to obey removal orders" it did not contravene the law.³⁰

Principles 7-9 set out a number of specific examples of expression that shall not be considered a threat to national security. These are, by-and-large, uncontroversial, including things such as advocating change of government policy, criticizing the State or government, objecting to military service, transmitting information about a banned organisation,³¹ or using minority languages. As with the second part of Principle 2, however, all of these restrictions have been applied in the past, purportedly to protect national security, and many countries continue to apply them.

²⁸ *S. Rangarajan v. P.J. Ram* [1989](2) SCR 204, p. 226 (Indian Supreme Court).

²⁹ 395 U.S. 444, 447 (1969) (US Supreme Court).

³⁰ [1964](3) SA 588 (A), p. 595 A-D.

³¹ But see the box below, on the UK.

UK – Banning Reporting on ‘Terrorist’ Groups

The British Broadcasting Act grants the power to the authorities to prohibit broadcasting of certain material, a power which in terms of the Act would appear to be unlimited. In October 1988, the then Home Secretary, Douglas Hurd, issued notices banning any matter which included words spoken by persons representing a list of banned organisations, including Sinn Féin, a legal political party. The ban was appealed to the European Commission on Human Rights, which rejected the complaint as manifestly unfounded, in effect holding that the ban clearly fell within the scope of legitimate restrictions on freedom of expression.³²

The BBC and other British broadcasters effectively made a mockery of the rule by using Irish-accented voiceovers when presenting statements from the banned organisations. This is another example of the excessive defence of courts to security claims.

Principle 10 provides that States have an obligation to prevent private groups from interfering with freedom of expression. This is consistent with international case law, particularly from the Inter-American Court of Human Rights³³ but now also affirmed by the European Court of Human Rights.³⁴ There is little national case-law on this, in part because the problem does not arise in those countries where courts might accept these principles. The growing body of international case law, however, is very much the tip of the iceberg, and in many countries there is, instead of protection, collusion between the authorities and the ‘private’ actors perpetrating the abuse.

Restrictions on Freedom of Information

The right to access information held by public authorities has now gained widespread recognition but its status was far less established in 1995, when the Johannesburg Principles were drafted. Despite this, Principle 11 clearly recognises this right, as an aspect of the right to freedom of expression, subject to restriction only in accordance with the three-part test for all restrictions on freedom of expression. This right is now accepted in all regions of the world, as evidenced by the rapid growth in the number of countries that have passed freedom of information legislation – with the possible exception of Africa, where to date only South Africa and Zimbabwe³⁵ have passed such a law – as well as in a number of authoritative international standards. However, the extent to which such legislation respects the three-part test for restrictions, as well as a number of other established principles, varies considerably.

³² *Brind & Ors v. United Kingdom*, 9 May 1994, Application No. 18714/91.

³³ See, for example, *Velásquez Rodríguez v. Honduras*, 29 July 1988, Series C, No. 4.

³⁴ *Gundem v. Turkey*, 16 March 2000, Application No. 23144/93.

³⁵ The Zimbabwean Access to Information and Protection of Privacy Act does formally provide for a right to freedom of information but this is largely undermined by exceptions and most of the Act is about controlling journalists and the media.

Since the adoption of the Johannesburg Principles, there have been a number of significant developments regarding freedom of information, which applies to all information held by public authorities, not just information relating to national security. ARTICLE 19 has encapsulated these developments in two standard-setting documents, *The Public's Right to Know: Principles on Freedom of Expression Legislation*³⁶ and *A Model Freedom of Information Law*.³⁷ These set out in far more detail general standards and processes relating to freedom of information. Principle 4 of *The Public's Right to Know*, in particular, sets out a three-part test for exceptions to the right to access information, based on but slightly different from the general test for restrictions on freedom of expression, as follows:

- the information must relate to a legitimate aim listed in the law;
- disclosure must threaten to cause substantial harm to that aim; and
- the harm to the aim must be greater than the public interest in having the information.

³⁶ ARTICLE 19: London, 1999. Available on the ARTICLE 19 website at: <http://www.article19.org/docimages/512.htm>.

³⁷ ARTICLE 19: London, 2001. Available on the ARTICLE 19 website at: <http://www.article19.org/docimages/1112.htm>. Both documents are also available via the ARTICLE 19 online Handbook, <http://handbook.article19.org>, under Key Documents.

Recognition of the Right to Freedom of Information

Freedom of information has been recognised as an aspect of the right to freedom of expression by UN officials, as well as all three regional human rights systems. In November 1999, the three special mandates on freedom of expression – the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression – meeting together for the first time under the auspices of ARTICLE 19, adopted a Joint Declaration which included the following statement:

Implicit in freedom of expression is the public's right to open access to information and to know what governments are doing on their behalf, without which truth would languish and people's participation in government would remain fragmented.³⁸

Declarations or Recommendations adopted by the Committee of Ministers of the Council of Europe, the African Commission on Human and Peoples' Rights and the Inter-American Commission on Human Rights have all affirmed the right to access information held by public officials.³⁹

These official statements have been accompanied by a significant trends towards the adoption of freedom of information legislation all over the world during the last decade with laws having been adopted in the last five years in all regions of the world including Europe (e.g. Bosnia- Herzegovina, Romania and Slovakia), Africa (e.g. South Africa and Zimbabwe), Latin America (e.g. Mexico and Peru) and Asia (e.g. Japan, Thailand and India).

Principle 12 provides that States must “designate in law only those specific and narrow categories of information that it is necessary to withhold in order to protect a legitimate national security interest.” This is consistent with the “prescribed by law” part of the test for restrictions, and in particular that restrictions should be clear and narrowly drawn. Despite this, most laws simply list ‘national security’ as a ground for restricting access to information without defining this term at all, let alone providing a specific list of categories of exceptions. In many cases, these laws do not even require the disclosure to pose a risk of harm to national security. Even where they do, as the box below illustrates, countries have found ways to limit disclosures.

³⁸ 26 November 1999. See also, Report of the UN Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2000/63, 18 January 2000, paras. 42-44

³⁹ Recommendation R(2002)2 the Committee of Ministers of the Council of Europe on access to official documents, adopted on 21 February 2002; the *Declaration of Principles on Freedom of Expression in Africa*, adopted by the African Commission on Human and Peoples' Rights at its 32nd Session in October 2002; and the *Inter-American Declaration of Principles on Freedom of Expression*, adopted by the Inter-American Commission Human Rights on 19 October 2000 at its 108th Regular Session.

New Zealand, UK – Broad National Security Exceptions

The New Zealand Official Information Act, 1982 contains an exception for material likely to prejudice the security or defence of New Zealand. Although this does incorporate a harm test, the law also provides that a ministerial certificate shall be conclusive evidence of the threat, effectively granting the minister unsupervised power to classify information (see sections 6 and 7). The UK Freedom of Information Act, 2001, exempts information where this is “required for the purpose of safeguarding national security” but also provides for a ministerial override (section 24).

Even when the disclosure of information is likely to harm a legitimate interest, it should still be subject to disclosure unless the harm outweighs the public interest in accessing the information. This is a logical inference from the principles underlying freedom of information and is reflected in many laws. A public interest override of this sort is necessary since it is not possible to frame exceptions sufficiently narrowly to cover only information which may legitimately be withheld. Furthermore, a range of circumstances, for example the presence of corruption, will generate an overriding public interest in disclosure. Principle 13 reflects this, providing that in decisions on information disclosure, the public interest “shall be a primary consideration”. Principle 13 differs slightly from the last element of the three-part test in Principle 4 of *The Public’s Right to Know*, set out above. In particular, the latter requires the harm to the protected interest to outweigh the public interest in disclosure, a more stringent, or at least more clearly stringent, standard.

The NATO Conundrum

Most countries in East and Central Europe have recently passed freedom of information laws and some of these laws provide a very solid basis for government openness. However, many of these countries also want to join NATO which, as a security organisation, requires certain minimum standards of secrecy. As a result, countries such as Romania and Bulgaria have followed up their freedom of information laws by passing secrecy or classification laws which seriously undermine the earlier openness legislation. Unfortunately, the NATO secrecy standards are themselves set out in a classified document, C-M(2002)49. This document has remained secret notwithstanding the clear illegitimacy of withholding a classification standards document, and despite the best efforts of a group of people trying to access it both directly from NATO and via national freedom of information laws.

Principle 14 requires States to put in place “appropriate measures to give effect to the right to obtain information”, including a right of review by an independent authority and finally by the courts. Experience in many countries with constitutional guarantees for freedom of information but no legislation to implement these guarantees bears testament

to this need. *The Public's Right to Know* makes it clear that specific implementing legislation is required to give effect to freedom of information and sets out in some detail the procedural and appeal mechanisms which such legislation should provide for.

Malawi – Constitutional Guarantee without Implementing Legislation

Article 37 of the Malawian Constitution contains the following guarantee of freedom of information:

Subject to any Act of Parliament, every person shall have the right of access to all information held by the State or any of its organs at any level of Government in so far as such information is required for the exercise of his rights.

The lack of implementing legislation has seriously undermined respect for this right in practice, despite its limited nature, applying as it does only to information needed to exercise a right.

Principle 15 prohibits punishment for disclosure of information if this does not result in actual harm, or a likelihood thereof, or where the overall public interest is served by disclosure. This applies, for example, to situations where the media discloses classified information but it also covers civil servants applying, as it does, to everyone. This Principle recognises that no matter how well freedom of information legislation is designed, there will still be cases where disclosure is refused and it is only through a leak that important information, for example exposing corruption or wrongdoing, may become public. Indeed, the unauthorised release of classified information serves as an important safety value for ensuring the flow of information to the public, a social role which is recognised in the law and practice of a number of countries.⁴⁰

In fact, the principle is not as controversial as it may seem since, in the absence of a showing of harm, or where this is in the overall public interest, information should anyway be subject to disclosure.

The relationship between Principles 6 and 15 is not entirely clear. Although formally Principle 6 applies subject to Principle 15, they overlap considerably. Principle 6 applies to all expression while Principle 15 covers “disclosure of information”. All disclosure of information is expression (so Principle 15 falls entirely within the scope of Principle 6) and most expression, apart perhaps from pure opinions, involves some disclosure of information. It might be preferable to interpret Principle 15 as being restricted in scope to confidential information, given that it imposes a much lower standard on restrictions than Principle 6.

Principle 15 should probably also be restricted in scope to civil servants and public officials. In the UK, for example, the Official Secrets Act, 1989, prohibits secondary disclosure of classified information, for example by journalists, under more stringent

⁴⁰ See Coliver, note 20, pp. 63-65.

conditions than those set out in Principle 15 and yet this rule has been widely criticised by the media and free speech advocates. It will always be controversial to punish secondary disclosures, so prosecutions are rare in democratic countries. It is the responsibility of the government to ensure that secret information is adequately protected and not of journalists to assess when and whether disclosure will cause harm. Indeed, there are serious problems with imposing a burden of this sort on private actors, at least where the criminal law is concerned.

UK – David Shayler Case

The high-profile case of David Shayler in the UK illustrates the need for whistleblower protection. Shayler, a former MI5 Intelligence Officer, was charged, and ultimately convicted, under section 1(1) of the Official Secrets Act, 1989 for various allegations, including that MI5 had plotted to assassinate the Libyan leader, Colonel Gaddafi. It is clearly a matter of great public interest that any serious allegation of this nature be subject to independent investigation.

Neither a public interest defence nor a defence based on the fact that the disclosure had not actually harmed security was available to Shayler, who was ultimately convicted. The House of Lords held that these defences were not necessary because Shayler could have used internal complaints procedures or gone to his superiors, and that ultimately he could have sought judicial review of his superiors' decision. This seems to woefully underestimate the practical difficulties associated with these courses of action.

Principle 16 applies specifically to civil servants and protects them against any detriment, including employment-related sanctions, for disclosure of information learned by virtue of government service, where this is in the overall public interest. This is again consistent with the test for exceptions to freedom of information, which, if applied, should mean that this information is, at least upon request, subject to mandatory disclosure. *A Model Freedom of Information Law* has added a refinement to this rule, providing that individuals who disclose information on wrongdoing or harm, commonly known as whistleblowers, should be protected against sanction, "as long as they acted in good faith and in the reasonable belief that the information was substantially true and disclosed evidence of wrongdoing or a serious threat to health, safety or the environment."⁴¹ Relative to the standard in Principle 16, this relieves them from having to assess whether the disclosure is in the public interest, something they are not qualified to do. A number of countries have adopted specific legislation to protect whistleblowers.

Subsequent ARTICLE 19 standard-setting has also added protection for individuals who disclose information pursuant to freedom of information legislation, as long as they acted reasonably and in good faith, even if they make mistakes.⁴² This is important to help address the culture of secrecy in government and to give civil servants the confidence to disclose information under freedom of information legislation.

⁴¹ Note 37, section 47.

⁴² *Ibid.*, section 48.

South Africa – Whistleblower Protection

The South African Protected Disclosures Act, 2000, provides protection against employment-related sanctions for disclosures which reveal various types of wrongdoing or risks of harm, including criminal activities, the failure to comply with a legal obligation, a miscarriage of justice, health or safety risks, harm to the environment or discrimination. Disclosures are protected if they are made to legal practitioners, via formal employment complaints procedures or to various high-level officials, such as ministers. Disclosures are also generally protected, including for example to the media, where they are made in good faith and in the reasonable belief that they are true and where one of the following conditions is met:

- the employee has reason to believe he or she will be sanctioned for making the disclosure;
- there is no complaints procedure and the employee has reason to believe the wrongdoing or harm will be concealed;
- a similar disclosure has already been made to no effect; or
- the risk is of exceptionally serious wrongdoing or harm.

Principle 17 provides that it is not legitimate to try to prevent further publication of a document which is already public which, although obviously logical, has sought to be denied in a number of countries.⁴³ The growing prevalence of the Internet will soon render nugatory any efforts by the authorities in most countries⁴⁴ to prevent further publication. Indeed, the Internet community will almost invariably undercut attempts to prevent further publication by mirroring websites and by widely publicising target documents.

The right of journalists to protect the secrecy of confidential sources of information is recognised in Principle 18, which prohibits orders of source disclosure based on national security interests. International law recognises this right, although not in absolute terms. The European Court of Human Rights, for example, has stated that restrictions to this right must be, “justified by an overriding requirement in the public interest.”⁴⁵ A serious national security risk would presumably meet this test. A number of countries around the world, however, protect source confidentiality even in light of a national security claim while others place severe restrictions on source disclosure in this context.⁴⁶

Principle 19 addresses the issue of access to restricted areas, ruling out restrictions that “thwart the purposes of human rights and humanitarian law”. It also provides that States may limit access to zones of conflict only where this is necessary to protect the safety of

⁴³ See, for example, *The Observer and Guardian v. United Kingdom*, (*Spycatcher* case), 26 November 1991, Application No. 13585/88, 14 EHRR 153, (European Court of Human Rights).

⁴⁴ Most NGOs, academics and other civil society actors now have access to the Internet and broad public access is growing rapidly in most parts of the world.

⁴⁵ *Goodwin v. the United Kingdom*, 27 March 1996, Application No. 17488/90, 22 EHRR 123, para 39.

⁴⁶ See Coliver, note 20, pp. 69-70.

others. This rule has probably not been observed in practice since the Vietnam war and security forces certainly do not facilitate access. Indeed, in most modern conflicts, the authorities have sought as far as possible to maintain control over, and indeed manipulate, information.

Control over Information During Conflict

An interesting example of manipulation of information during an ongoing conflict relates to the failed US raid of 19 October 2001 on Afghan territory, which was successfully repulsed by Taliban forces. The Taliban reported significant numbers of US fatalities, whereas in fact no Americans were killed. The US authorities, on the other hand, claimed the next day that the raid had been a success, with General Richard Myers, Chairman of the US Joint Chiefs of Staff, stating that it had been conducted “without significant interference from Taliban forces”. The US authorities even released footage demonstrating this, later revealed to be showcased rather than actual, acknowledging only much later that the raid had led to a number of casualties.

Rule of Law and Other Matters

Principles 20, 21 and 22 deal with various due process and rule of law issues, including pre-trial and trial rights, the right to all available remedies and the right to trial by an independent, civilian court. These provisions are based on, and in some cases elaborate further, rights protected by the ICCPR.

Principle 23 prohibits prior censorship to protect national security except in case of an emergency which meets the conditions of Principle 3. Prior censorship is not defined but it can be understood in two ways, either as a system for vetting certain means of communication, such as books or films, before they are made public (for example, by an official censor) or as any measure which prevents or delays original dissemination to the public (this would include, for example, a court injunction). The Johannesburg Principles use this term in its latter, broader sense.

Sri Lanka – Prior Censorship

On 3 May 2000, the President of Sri Lanka adopted emergency regulations that provided for the appointment of a censor with the power to require newspapers to submit in advance material on certain subjects. The censor issued a directive requiring any material relating to national security to be vetted by his office. *The Sunday Leader*, a local English-language daily was held in breach of this rule three times: for publishing a photo of an opposition rally, for publishing two almost identical cartoons, one targeting the opposition, which had not been censored, and one targeting the governing party, which had been completely censored (so publication was in breach of the rules), and for publishing a spoof entitled “War in Fantasy Land – Palaly is not under attack”. The censor then banned the newspaper, which appealed this to the Supreme Court on constitutional and procedural grounds. The Court struck down the censorship regime, and the ban on *The Sunday Leader*, ostensibly on the basis that the censor had not been appointed properly. However, the ruling effectively brought the system of prior censorship to an end.

This Principle thus limits prior censorship measures to situations where there is a legitimate emergency in place and where the measures are “strictly required by the exigencies of the situation”. As has already been noted, this standard may not actually be any more stringent than the requirement of necessity that applies to all expression. The European Court of Human Rights has been relatively conservative about prior restraint, but has at least held that it calls, “for the most careful scrutiny on the part of the Court.”⁴⁷ The *American Convention of Human Rights*, however, rules out any form of prior censorship except to protect children and adolescents.⁴⁸ The prohibition on prior censorship has been upheld by the Inter-American Court of Human Rights in a case finding a breach in relation to the banning of a film.⁴⁹

⁴⁷ *The Observer and Guardian v. United Kingdom*, (*Spycatcher* case), 26 November 1991, 14 EHRR 153, para. 60.

⁴⁸ Adopted 22 November 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, in force 18 July 1978, Article 13.

⁴⁹ “*The Last Temptation of Christ*” case (*Olmedo Bustos et al. vs. Chile*), 5 February 2001, Series C, No. 73, para. 72.

US – Prior Restraint

The US Supreme Court has all but ruled out prior restraints and has never upheld one on national security grounds. In particular, the Court has set out the following conditions on any prior restraint:

- (a) the material would pose a threat of immediate and irreparable harm to a “near sacred right”;
- (b) the measures would be effective; and
- (c) no other less restrictive measures would be effective.⁵⁰

Principle 24 rules out punishments for expression which are disproportionate to the seriousness of the offence. It is now clear that international guarantees of freedom of expression not only set standards relating to restrictions themselves, but also the sanctions which may result from breach of a restriction.⁵¹

Finally, Principle 25 provides that the Principles shall not be interpreted as restricting established human rights.

4. Future Work

The Johannesburg Principles have made a considerable contribution to clarifying the appropriate standards for national security-based restrictions on freedom of expression. However, they fail to provide specific guidance on one key issue: what information, in practice, is it legitimate to withhold on grounds of national security. Principle 12 requires States to designate specific and narrow categories of information that may be withheld, but the Principles provide no guidance as to what these categories might look like beyond the general test for restrictions on freedom of expression.

A concrete example, much debated, is whether and to what extent defence expenditures must be made public. It is fairly obvious that some detail is required if effective public oversight is to prevent corruption and mismanagement in relation to military procurement. On the other hand, States claim a right to some secrecy here, so as not to undermine their capacity to respond to an attack by exposing their potential to the enemy. Obviously this question can never be answered in the abstract, but guiding principles could at least set limits on the scope of secrecy claims.

A closely related issue, noted above, is that Principle 2, defining a legitimate national security interest, is not sufficiently clear. A more precise definition of national security, reflecting the actual practice of those States which are least restrictive in this area, would provide a better underpinning for the Principles and also help answer the question posed above.

⁵⁰ See Coliver, note 20, p. 78.

⁵¹ See, for example, *Tolstoy Miloslavsky v. United Kingdom*, 13 July 1995, Application No. 18139/91 (European Court of Human Rights).

There is clearly no question of revising or reissuing the Johannesburg Principles themselves, and this is in no way necessary or desirable. Rather, supplementary material needs to reinforce them. A starting point may be research on the practice in these areas by the more open democracies around the world. This could lead to the formulation of guidelines as to legitimate categories of secrecy, as well as the scope of those categories.