Commentary on
the Johannesburg Principles on National Security,
Freedom of Expression and Access to Information

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I. Introduction

National security and freedom of expression and information are often viewed as pulling in opposite directions. On the one hand, governments, particularly those that feel threatened by external or internal violence, maintain that disclosure of "secret" information or airing of critical opinions can undermine the very institutions that protect the security and well-being of law-abiding citizens. On the other hand, human rights defenders point to government suppression of speech on national security and related grounds as having paved the way for some of the worst human rights violations, subversions of democracy, and threats to peace experienced in the last half of this century.

While there is an undeniable tension between national security and freedom of expression and information, a clear-eyed review of recent history suggests that legitimate national security interests are, in practice, better protected when the press and public are able to scrutinize government decisions than when governments operate in secret. Freedom of expression and access to information, by enabling public scrutiny of government action, serve as safeguards against government abuse and thereby form a crucial component of genuine national security.

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2 See, e.g., the "Pentagon Papers" case, New York Times Co. v. United States, 403 U.S. 713 (1971) (discussing the disclosure by Daniel Ellsberg of 47-volume Pentagon study entitled "History of Decision-Making Process on Viet Nam Policy"); Laurence Lustgarten, "United Kingdom," infra this volume, at Sec. IV.A (describing how Clive Ponting, a senior civil servant in the UK Ministry of Defence, supplied information to an Opposition Member of Parliament which demonstrated that information provided by the Government concerning the presence of an Argentine destroyer near the Falklands/Malvinas Islands - which had been used to justify Britain's entry into war - was misleading if not outright false).
3 As stated by Prof. Chevigny, "The problem with the 'national security state' is not so much that it violates [fundamental] rights, although it sometimes does just that, but that it can lead to the repetition of irrational decisions." Paul G. Chevigny, "Information, the Executive and the Politics of Information," in Shimon Shetreet, ed., Free Speech and National Security, at 138 (1990).
Equally, national security is a pre-condition for the full enjoyment of all human rights, including freedom of expression.

There are, without doubt, circumstances in which national security and freedom of expression clash head on. For instance, protection of a genuine national security interest may require the suppression of sensitive defense information or speech likely to promote violence against the state. However, most claimed conflicts arise because national security and related concepts (such as "state security", "internal security", "public security", and "public safety") are so imprecise that they may be, and frequently have been, invoked by governments to suppress precisely the kinds of speech that provide protection against government abuse, such as information or expression exposing circumvention of the democratic process, attacks on

4 For instance, the Malawian Preservation of Public Security Act defines public security to include the securing of the safety of persons and property, the maintenance of supplies and services essential to the life of the community, the preservation and suppression of violence, intimidation, disorder and crime, the maintenance of the administration of justice and the prevention and suppression of mutiny, rebellion and concerted defiance of and disobedience to lawfully constituted authority and the laws in force in Malawi. Laws of Malawi, Chapter 14:02, § 2.

Turkey's Anti-Terror Law defines terrorism to include any use of "pressure" to change "the characteristics of the Republic . . . [or] its political, legal, social, secular and economic system." Anti-Terror Law, art. 1, § 1. Article 8 of the law specifically penalizes the publication of propaganda that threatens the "indivisible unity of the state." Id. art. 8. Prior to 1995, people could be charged and convicted "regardless of the method, intention and ideas behind" what they wrote. In 1995, Article 8 was revised to ban only writings that "aim[] at damaging the State." Id. The excesses of enforcement of the prior law are demonstrated by the release, in the first eighteen months following the revision, of 269 prisoners, and reduction in sentences of another 1,408. US State Department, “Turkey,” Country Reports on Human Rights Practices for 1996 at 1163-64 (Feb. 1997). Despite amendment to the law, in 1996 at least 135 journalists were detained. A well-known musician was arrested and charged with "aiding members of an armed organization" when he participated in a discussion on a TV station associated with the Kurdish terrorist PKK. In March 1996, novelist Yasar Kemal was convicted under the revised Article 8 and Article 312 of the Criminal Code (for inciting to racial or ethnic enmity) for publishing a book in which he accused the Turkish Government of waging a "campaign of lies" in its censorship of reporting on the Kurdish question. Another ninety-nine individuals were charged as accomplices. Four pro-Kurdish former Members of Parliament were convicted and sentenced to prison under the revised Article 8 for peaceful advocacy of greater autonomy for the Kurdish region. Id. at 1163-66.


The Committee to Protect Journalists reported that, as of March 1994, "at least 126 journalists were held in prison for their reporting . . . under charges such as 'separatist propaganda,' 'treason,' 'counterrevolutionary activities,' or 'undermining national security;' sometimes there were no charges. The only crime committed by these journalists, 71 of whom h[a]d been in prison for more than two years, was to have written something that their governments disliked." Committee to Protect Journalists, Attacks on the Press in 1993 (1994), at 16 (1994).
opposition parties, damage to the environment, corruption, wasting of public assets, and other forms of wrongdoing by government officials and their associates.  

Courts in countries around the world tend to demonstrate the least independence and greatest deference to the claims of government when national security is invoked. This deference is reinforced by provisions in the security laws of many countries that trigger exceptions to ordinary rules of evidence and due process upon a minimal showing by the government of a national security risk. A government’s claim of a security threat can deal a knock-out blow to the main institutional safeguards against government abuse: independence of the courts, due process of law, freedom of the press, and open government.

The tension between expression and national security is particularly vexing because there is little margin for error and much at stake. Quick action often is necessary to thwart a genuine threat to national security but restraints on political speech can trigger an inexorable slide into tyranny. The more fragile the democracy, the less likely it is to be able to tolerate either a threat to its genuine security or the suppression of legitimate political debate.

It is this profound tension that led Article 19, the International Centre Against Censorship, to convene a group of independent experts to draft a set of principles that would adequately safeguard both the right to freedom of expression and information as well as the prerogative of governments to limit the right when necessary to protect a legitimate national security interest. The result were the Johannesburg Principles on National Security, Freedom of Expression and Access to Information.

The Principles are based on international and regional law and standards relating to the protection of human rights, evolving state practice (including judgments of national courts), and general principles of law. While some of the Principles undoubtedly are more protective of freedom of expression than widely accepted international norms, they reflect the drafters' view of the direction in which international law is, or should be, developing.

Thirty-seven experts participated in the drafting, representing expertise in the relevant areas of law and practice of nineteen countries from all regions of the world, the United Nations, the Council of Europe, the European Union, the Organization of American States, and the Organization of African Unity. This commentary sets forth the law, standards, and practice that support the Principles, as well as the discussion that informed the drafting.

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5 See Rodney A. Smolla, *Free Speech in an Open Society*, at 319 (1992): “History is replete with examples of governmental efforts to suppress speech on the grounds that emergency measures are necessary for survival that in retrospect appear panicky, disingenuous, or silly.”


7 The participants are listed in Appendix C.
II. National Security, Freedom of Expression, and Access to Information: General Principles

A. Freedom of Expression: Preamble to the Johannesburg Principles and Principle 1

Freedom of expression and access to information are indispensable to the protection of all other human rights as well as to a democratic society governed by the rule of law. As declared by the UN General Assembly at its first session: "Freedom of information is a fundamental human right and . . . the touchstone of all of the freedoms to which the United Nations is consecrated." 8 The Inter-American Court of Human Rights ("Inter-American Court") elaborated:

Freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion . . . . It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free. 9

The European Court of Human Rights ("European Court") has called attention to the importance of freedom of expression to self-fulfillment, in addition to the progress of a democratic society:

Freedom of expression . . . constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfillment. . . . [I]t is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". 10

The Universal Declaration of Human Rights ("Universal Declaration") 11 includes a strong protection of the right to freedom of expression and information. 12 That protection was codified

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12 See id. art. 19. ("Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.").
and elaborated in Article 19 of the International Covenant on Civil and Political Rights ("International Covenant").13 Paragraph 1 asserts the absolute right to hold opinions "without interference."14 Paragraph 2 states the positive content of the right to freedom of expression:

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.15

The right may be subject to certain enumerated and narrowly circumscribed restrictions, including as necessary to protect national security.16 The right to freedom of expression and information, and permissible restrictions, are set forth in similar terms in the European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention")17 and the American Convention on Human Rights ("American Convention").18 The right is phrased more restrictively in the African Charter on Human and Peoples' Rights: individuals are granted the right to receive information but not necessarily opinions, and to express and disseminate opinions, but only consistent with national law; restrictions, moreover, are permitted in the “common interest” as well as for purposes stated in the other treaties.19

14 Id. art. 19(1).
15 Id. art. 19(2).
16 See id. art. 19(3) which reads:

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.

Id. art. 19(3).

(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.

Article 9 grants the right to receive information but not necessarily opinions, and to express and disseminate opinions but not necessarily information. More importantly, the phrase "within the law" gives governments wider discretion than they have under the other human rights treaties to impose
As of 1 January 1997, 136 countries had ratified or acceded to the International Covenant; 20 110 countries had accepted the obligations of one of the three regional human rights treaties, including twelve that are not party to the International Covenant. 21 Thus, in total, 148 countries are parties to the International Covenant and/or one of the regional treaties. Moreover, all countries are bound by the Universal Declaration, which "constitutes an obligation for the members of the international community" 22 and "applies to every member of the human family, everywhere, regardless of whether or not his Government accepts its principles or ratifies the Covenants." 23 Provisions protecting freedom of expression in the constitutions and laws of dozens of countries reflect the influence of the Universal Declaration, and courts around the world have endorsed the importance of freedom of expression in language that resonates with the sentiments expressed by the international bodies. 24

A logical corollary of the fundamental relationship between democratic society, human rights, and freedom of expression is that restrictions on freedom of expression weaken the foundations of a democratic society. As noted by the European Court, restrictions imposed on freedom of expression and other rights in the name of national security pose a genuine danger "of undermining or even destroying democracy on the ground of defending it". 25

B. National Security: Johannesburg Principle 2

Although the right to freedom of expression is fundamental, it is not absolute. 26 All of the main human rights treaties recognize that the right may be subject to restrictions, including in the

restrictions on freedom of expression and information. See Claude E. Welch, Jr., The African Charter, infra this volume. Article 27(2) permits restrictions in the "common interest" in addition to the grounds stated in the other treaties.


21 See id. at 84-86. The twelve states are Andorra, Lichtenstein, and Turkey (which are bound by the European Convention); and Botswana, Burkina Faso, Comoros, Djibouti, Ghana, Guinea-Bissau, Mauritania, and the Saharawi Arab Democratic Republic (which are bound by the African Charter); and Honduras (which is bound by the American Convention). See id. at 93-95.


23 United Nations Action in the Field of Human Rights, UN Doc. ST/HR/2/Rev. 2, ¶ 68, UN Sales No. E.83.XIV.2 (1983). The manual further emphasizes that "the very existence of the Covenants [on Civil and Political Rights, and Economic, Social and Cultural Rights], and the fact that they contain the measures of implementation required to ensure the realization of the rights and freedoms set out in the Declaration, give greater strength to the Declaration." Id. ¶ 67.


26 Rights that are absolute include (but are not limited to) the right not to be arbitrarily deprived of life; the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment; the right not to be held in slavery or servitude; and the right to freedom of religious belief (though not observance).
interest of protecting national security. Yet, none of the international bodies charged with interpreting and applying these treaties has provided a definition of national security, and few have even offered meaningful guidance in limiting its scope.

1. Components of a Legitimate National Security Interest

The most thoughtful contribution to the inquiry was made in 1985 by a group of experts, convened by the International Commission of Jurists and partner organizations, who drafted the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights. These Principles have been widely endorsed by international law scholars and UN experts. Principles 29-32 address national security:

29. National security may be invoked to justify measures limiting certain rights only when they are taken to protect the existence of the nation or its territorial integrity or political independence against force or threat of force.

30. National security cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order.

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27 See ICCPR, supra note 13, art. 19(3) ("national security," "public order"); American Convention, supra note 18, art 13(2)(b) ("national security," "public order"); African Charter, supra note 19, art. 27(2) ("collective security") and art. 29(3) (duty of individual "not to compromise the security of the state whose national or resident he is"); European Convention, supra note 17, art. 10(2) ("national security, territorial integrity and public safety").


The terms "public safety" and "national security" are not sufficiently precise to be used as a basis for limitation or restriction of the exercise of certain rights and freedoms of the individual. On the contrary, they are terms with a very broad meaning and application. Therefore they can be used by certain States to justify unreasonable limitations or restrictions.

Id. ¶ 227.


31 Siracusa Principles, supra note 29, at 6.

32 Id.
31. National security cannot be used as a pretext for imposing vague or arbitrary limitations and may only be invoked when there exist adequate safeguards and effective remedies against abuse.\(^{33}\)

32. The systematic violation of human rights undermines true national security and may jeopardize international peace and security.\(^{34}\) A state responsible for such violation shall not invoke national security as a justification for measures aimed at suppressing opposition to such violation or at perpetrating repressive practices against its population.\(^{35}\)

Principles 29 and 30 reflect, and contributed to the further development of, what is now a broad consensus among independent experts that any restriction justified on national security grounds must respond to a threat to the country as a whole, and must be necessary to protect the country's political independence or territorial integrity from the use, or threatened use, of force.\(^{36}\) To pose a threat to the entire country, it is not necessary that public disturbances threaten to erupt throughout the country, but their effects must be felt throughout, and the threats cannot be merely to the ruling party nor relatively isolated.\(^{37}\)

Johannesburg Principle 2(a) expands on Siracusa Principles 29 and 30 in three ways. First, it provides that restrictions on national security grounds are justifiable only if necessary to

\(^{33}\) Id. This Principle is endorsed and amplified in Johannesburg Principle 1.1(b), discussed *infra* in the text accompanying notes 57-69.

\(^{34}\) This key point is expanded upon in the Preamble of the Johannesburg Principles.

\(^{35}\) Siracusa Principles, *supra* note 29, at 6. Johannesburg Principles 7-9 expand upon this principle as it relates to the protection of freedom of expression.

\(^{36}\) For instance, Abid Hussein, the Rapporteur on Freedom of Expression appointed by the UN Commission on Human Rights in 1993, wrote in his 1995 report:

> For the purpose of protecting national security, the right to freedom of expression and information can be restricted only in the most serious cases of a direct political or military threat to the entire nation.


\(^{37}\) See, e.g., Alexandre Kiss, “Permissible Limitations on Rights,” in *The International Bill of Rights, supra* note 36, at 290, 296-97. Professor Kiss argues:

> [R]estrictions on human rights can be adopted under this concept only if the interest of the whole nation is at stake. This excludes restrictions in the sole interest of a government, regime or power group. Limitations are not based on "national security," moreover, if their only purpose is to avoid riots or other troubles, or to frustrate revolutionary movements which do not threaten the life of the whole nation."

*Id.* at 296; *see also* Lockwood, *supra* note 36, at 56-63, 70-76.
protect the existence of a "country" rather than a "nation". Although the term "nation" may convey more strongly than the word "country" the sense of a population connected to a territory, the Principles do not use the term because of the too frequent abuse by governments of their authority to defend the "nation" to justify measures aimed at entrenching the hegemony of the majority national group, its culture, or heritage.\textsuperscript{38}

Second, Principle 2(a) permits restrictions on freedom of expression to the extent necessary to protect not only a country's existence or its territorial integrity against the use or threat of force, but also "its capacity to respond to the use or threat of force." This latter phrase was added in recognition of the legitimate prerogative of governments to limit the disclosure of information about particular weapons systems or troop movements.

Third, Principle 2(a) makes explicit that not only must the genuine purpose of a restriction be to protect national security, but the restriction must have the "demonstrable effect" of doing so. These added words require that any restriction, before it is imposed, must be judged to be likely to be effective in enhancing national security, and, in order to be maintained, must be shown in fact to have been, and continue to be, effective.

"Territorial integrity" was included in Principle 2(a) (and is also in the Siracusa Principles) because protection of territorial integrity is expressly recognized by the European Convention on Human Rights to be a legitimate state interest closely linked to national security,\textsuperscript{39} and is generally understood to be implicitly recognized as such by the other main human rights treaties. Although the interest in protecting territorial integrity may justify restrictions aimed at suppressing violent secessionist movements, it may not justify restrictions on peaceful advocacy of minority rights, self-determination, or arguably even secession.\textsuperscript{40}

In sum, Principle 2(a) envisages that legitimate national security interests are limited to preventing violence aimed at changing a country's government, institutions, or borders;

\textsuperscript{38} For instance, several of the new democracies of Central and Eastern Europe have adopted laws that make "defamation of the nation" a crime on the ground that such crimes are necessary to promote respect for the culture and honor of the ruling ethnic or "national" group. \textit{See generally} Ana Arana, "The Americas," in Committee to Protect Journalists, \textit{Attacks on the Press in 1995}, at 69 (1996); David Satter, "Central Europe and the Republics of the Former Soviet Union," in \textit{Attacks on the Press in 1995}, supra at 36.

\textsuperscript{39} European Convention, supra note 17, art. 10(2).

\textsuperscript{40} International law does not recognize a right of peoples or groups to secede (at least, outside of the decolonization context), but neither does it recognize a duty not to secede. Rather, secession is a matter for domestic law, and international law becomes relevant only if international peace and security are threatened. \textit{See} T.M. Franck, "Postmodern Tribalism and the Right to Secession," in \textit{Peoples and Minorities in International Law} 3, 12-13 (Catherine Brölman et al. eds., 1993) (international law is implicated "when the secessionist struggle is fomented from external sources, . . . has caused large numbers of casualties, when no decisive military outcome is in sight, and when the struggle creates a flood of refugees and threatens to involve or engulf neighbouring states."). Professor Hurst Hannum adds: "Unless a group has no option but to secede in order to protect itself from massive violations of human rights, self-determination must be sought within the framework of existing states." Hurst Hannum, "Minorities, Indigenous Peoples and Self-Determination," in \textit{Human Rights: An Agenda for the Next Century} 1, 10-11 (Louis Henkin & John Lawrence Hargrove eds., 1995).
preventing espionage; and protecting genuine military secrets, such as the movement of troops and details of weapons design.\footnote{This definition comports with Professor Kiss's interpretation of "national security" restrictions. See Kiss supra note 37, at 297. Similarly, Thomas Emerson, an American professor and author of an early and influential article on the right of the public to have access to government information, was of the view that governments legitimately may keep information secret on national security grounds only if it concerns "tactical military movements, design of weapons, operation of espionage or counterespionage, and similar matters." Thomas Emerson, "Legal Foundations of the Right to Know," 1976 Wash. U.L.Q. 1, 17 (1976).}

This list is narrower than the range of national security interests that may justify restrictions under the Siracusa Principles,\footnote{Compare Kiss, supra note 37, at 297.} reflecting the sense of the Johannesburg drafters that the widescale abuse of the concept over the intervening ten years warranted an even further tightening of its definition.

2. Illegitimate Grounds for Invoking National Security

A restriction sought to be justified on grounds of national security is clearly not legitimate if it is used as a pretext to protect interests unrelated to national security imperatives. Johannesburg Principle 2(b) provides an illustrative list of interests that are illegitimate. In particular, Principle 2(b) states that it is illegitimate to use national security as a pretext for protecting the government from "embarrassment or exposure of wrongdoing," including diplomatic embarrassment. This proposition finds support in the European Court's ruling in the \textit{Spycatcher} case,\footnote{Observer and Guardian v. United Kingdom, 216 Eur. Ct. H.R. (ser. A) ¶ 69 (1991).} which held that an injunction on the publication of the memoirs of a retired high-ranking official of the British Security Service MI-5 could not be sustained on national security grounds after publication in the United States. This was so even though the injunction might well have promoted the efficiency and reputation of the Security Service, notably by: preserving confidence in that Service on the part of third parties; making it clear that the unauthorized publication of memoirs by its former members would not be countenanced; and deterring others who might be tempted to follow in [the official's] footsteps.\footnote{Id. ¶ 69.}

Too many governments consider that, because good relations with foreign governments form part of their national security, they are entitled to keep secret a broad spectrum of foreign relations information.\footnote{See id. For instance, the UK government has contended that national security includes action "in support of the Government's defence and foreign policies," as well as actions to combat terrorism, espionage, and major subversive activities. Graham Zellick, "Spies, Subversives, Terrorists and the British Government: Free Speech and Other Casualties," 31 Wm. & Mary L. Rev. 773, 794 (1990) (quoting and discussing Home Office, The Interception of Communications in the United Kingdom, Cmnd. 9438, annex 2 (1985)).} The economic well-being of a country is undoubtedly a component of its stability and, therefore, its security. This does not mean, however, that a government is entitled to
impose restrictions on freedom of expression and information in order to conceal information about the country's economic situation.\textsuperscript{46} Nor may a government justify suppressing a country-wide strike of all workers on the ground that a strike of such scale necessarily threatens national security and public order.\textsuperscript{47}

Also illegitimate is the elevation of an official ideology or religion to a position where it is beyond challenge.\textsuperscript{48} As stated by Professor Nowak, "[n]ational laws and bills of rights that permit freedom of expression only in the interest of a certain purpose or a sole belief or religion (e.g., socialism or Islam) violate th[e] international minimum standard [of protection of freedom of expression], even when this belief or religion constitutes the \textit{ordre public} of the State concerned."\textsuperscript{49}

C. Legitimacy of Restrictions on Freedom of Expression: \textit{Principle 1}

Not all restrictions on freedom of expression justified by reference to a legitimate national security interest are therefore legitimate. As stated by the UN Human Rights Committee (which interprets and monitors compliance with the International Covenant), "a restriction on freedom of expression may never jeopardize the right itself."\textsuperscript{50} Freedom of expression is the principle, and

\textsuperscript{46} See Kiss, \textit{supra} note 37, at 296. A particularly outrageous case involved Xi Yang, a Chinese reporter who was convicted in 1994 by a Chinese court and sentenced to 12 years imprisonment for "spying and stealing state secrets." His crime was to publish a story in a Hong Kong paper on official Chinese plans to sell gold and raise interest rates. The conviction and sentence were strongly criticized by the UN Human Rights Committee. UN Human Rights Committee, \textit{Annual Report, 1996}, §§ 60-61 (Concluding Observations on Fourth Periodic Report of the UK, Supplementary Report on Hong Kong).

\textsuperscript{47} Jong-Kyu Sohn v. Republic of Korea, App. No. 518/1992, U.N. GAOR, Hum. Rts. Comm., views adopted July 1995. Under a law which prohibited third parties from intervening in labor disputes, the applicant in this case was convicted for persuading a solidarity group to issue a statement that supported a nation-wide strike and condemned the government's threats to send in troops. The government contended that the statement incited the strike and moreover that a national strike in any country would threaten national security and public order. The applicant was convicted and sentenced to jail for a term of one and a half years. The Committee concluded that his right to freedom of expression had been violated and that he was entitled to a remedy, including compensation. See Evatt, \textit{infra} this volume, at Sec. II.B.3, notes 32-33.

\textsuperscript{48} See Türk & Joinet, \textit{supra} note 30, ¶ 32; see also Viviana Krsticevic, et al., “The Inter-American System of Human Rights Protection,” \textit{infra} this volume, at Sec. II.A.1, note 23 (condemning Cuba's constitutional commitment to “the socialist objectives of the State”). For another example of a constitution that elevates an ideology to a position where it is beyond challenge, see Kerim Yildiz, “Turkey,” \textit{infra} this volume, at Sec. II.B, esp. note 13.

\textsuperscript{49} Nowak, \textit{supra} note 36, at 357 (citing Partsch, \textit{supra} note 36, at 224).

any exception must be narrowly interpreted. The two UN Sub-Commission Rapporteurs on Freedom of Expression, Danilo Türk and Louis Joinet, elaborated:

In interpreting the legal norms, the principle [of freedom of expression] must be interpreted broadly and the permissible restrictions restrictively. . . .

The presumption is always in favour of freedom of expression, i.e., in favour of the principle. The proponent of a restriction bears the burden of proof regarding the necessity and legality of the proposed restriction, as well as regarding its compatibility with the principle of the right to freedom of expression.

The main human rights treaties and declarations all set forth essentially the same three-part test for assessing the legitimacy of restrictions on the right to freedom of expression (and other human rights); to be permissible a restriction must (1) be prescribed by law, (2) aim to protect one of a short list of legitimate purposes, including national security, expressly enumerated in the text, and (3) be necessary to protect that purpose.

1. Principle of Legality: Principle 1.1

To be "prescribed by law", a restriction must either be codified in legislation or else set forth in unwritten law such as the common law. An administrative practice, even if made public and approved by the legislature, is not sufficient because it is not legally binding on the public authorities. Nor is it sufficient that the restriction complies with domestic law; in addition, the law must meet minimum standards of the rule of law, so as to provide “legal protection ... against

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51 See Sunday Times v. United Kingdom, 30 Eur. Ct. H.R. (ser. A) ¶ 64 (1979) (evaluating a particular restriction, the Court is faced "not with a choice between two conflicting principles but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted").
52 Türk & Joinet, supra note 30, ¶¶ 20, 25.
53 The standard used by the Human Rights Committee in interpreting Article 19 of the ICCPR is stated in General Comment 10. General Comment No. 10, supra note 50, Annex VI.


The Inter-American Court applied the test to freedom of expression for the first time in Compulsory Membership. Compulsory Membership, supra note 9, ¶¶ 39, 42-46. It expressly stated that it followed the jurisprudence of the European Court on this point. Id. (citing Sunday Times v. United Kingdom, 30 Eur. Ct. H.R. (ser. A) ¶¶ 59, 62).

arbitrary interferences by public authorities". This requires that the law be "adequately accessible," that is, there must be notice of what the law requires. The law must also meet the tests of "legal certainty" and "foreseeability," that is, it must be "formulated with sufficient precision" to enable individuals to (a) understand their obligations and (b) foresee whether particular action is unlawful.

If it confers discretionary power on public authorities, the law must indicate the scope and manner of exercise of any such discretion with sufficient clarity to protect individuals against arbitrary interference with their rights and must afford adequate safeguards against abuse. Furthermore, the government carries the burden of showing that the law clearly applies in the circumstances of the particular case.

The restriction (whether codified or unwritten) must not be vague or over-broad. As stated by the Inter-American Commission of Human Rights ("Inter-American Commission") in examining the incompatibility with the American Convention of various Nicaraguan decrees that imposed broad restrictions on the press in the interest of state security:

[A] limitation on freedom of the press is justified only when the order and the security of the State are truly compromised. . . . The legislation currently in effect may give rise to serious abuses, because of its great ambiguity and breadth. When freedom of the press is at stake, any restrictions must be clearly established so that anyone may know precisely what activities are prohibited or may be subject to censorship.

The Commission singled out for special criticism a number of vaguely stated grounds for limiting expression, including because a statement "in any way damage[s] or compromise[s] the economic stability of the nation," or "harm[s] the national defence."
The UN Sub-Commission Special Rapporteurs on Freedom of Expression similarly condemned restrictions that are so broad in scope or drafted in such terms as to put the right itself in jeopardy. For instance, limitations which would otherwise be permissible under article 19, paragraph 3 (for instance laws relating to official secrecy) may be defined too vaguely or too broadly and thus jeopardize the right to freedom of expression.

The UN Rapporteurs expressly condemned "délits d'opinion . . . which are broad, unclear, ambiguous or 'catch-all' in nature, . . . [such as] 'hostile propaganda' or 'agitation.'" The danger, as noted by the Rapporteurs, is that "[i]n practice, such formulations sometimes provide the legal basis for the imposition of heavy penalties on people who have expressed opinions but have not resorted to or advocated violence." Other offenses that suffer from ambiguity are "subversion," "disinformation," and "false rumours." A law may not contain terms that are so vague or "over broad" that it could be used to suppress expression protected by international law.

The UN Rapporteurs noted that the requirements of legality are particularly important regarding laws that provide for sanctions. Such laws must be precise and specific with regard to all the constituent elements of the restriction and the offense, especially the element of intent. . . . [T]he laws should rule out any possibility of a presumption of bad faith, which is admissible under some national legislation on defamation. . . . If sanctions are based on laws that are vague or manifestly imprecise or formulated with clear intent to provide a "legal" basis for silencing people, they come close to "informal" or arbitrary sanctions.

2. Principle of Legitimacy: Principle 1.2

All of the main human rights instruments recognize the protection of national security as a permissible ground for imposing restrictions on freedom of expression. To be legitimate, a restriction must be genuinely directed towards achieving that aim. The international human rights treaty bodies have rarely, if ever, challenged a government's assertion that a restriction was genuinely aimed at protecting national security.

63 Türk & Joinet, supra note 30, ¶ 29.
64 Id. ¶ 30.
65 Id. ¶ 30.
66 Id. ¶ 62.
67 See id. ¶ 63.
68 See id. ¶ 72.
69 Id. ¶¶ 72, 74.
70 See Universal Declaration, supra note 11, art. 29; ICCPR, supra note 13, art. 19(3); American Convention, supra note 18, art. 13(2); African Charter, supra note 19, art. 27 ("collective security"), art. 29(3) ("security of the State"), art. 29(5) ("national independence"); European Convention, supra note 17, art. 10.
72 See Mahoney and Early on the European Court and Commission on Human Rights, and Evatt on the UN Human Rights Committee, infra this volume.

The requirement that any restriction must be shown to be necessary is the prong of the tri-partite test that is most frequently violated. "Necessary" here does not mean what the government in power considers to be necessary, but rather what may reasonably be considered necessary "in a democratic society." The European Convention expressly includes the phrase "in a democratic society" to modify the concept of necessity. The Inter-American Court has also adopted this standard, as well as the pertinent jurisprudence of the European Court discussed below. Likewise, the Universal Declaration of Human Rights requires that any restriction on a human right must meet "requirements of morality, public order and general welfare in a democratic society." The International Covenant applies the standard of democratic necessity to restrictions on public access to trials, freedom of assembly, and freedom of association, but not to freedom of expression. However, even if the drafters of the International Covenant intended to set a different standard for freedom of expression than for the other freedoms, the Human Rights Committee has indicated in recent decisions that it now applies the "democratic necessity" test to restrictions imposed on any fundamental right, including the right to freedom of expression. Although the drafters of the International Covenant did not agree on what they meant by "democratic necessity," several country representatives expressed their opinion that a "democratic society was one that respected the principles of the UN Charter and the Universal Declaration."

The European Court has amplified that a democratic society is built on a foundation of freedom of expression, and is characterized by "pluralism, tolerance and broadmindedness," including tolerance for information and ideas "that offend, shock or disturb the state or any sector of the population." Moreover, "[i]n a democratic system the actions or omissions of the

73 See Türk & Joinet, supra note 30, ¶ 64.
74 European Convention, supra note 17, art. 10(2).
75 See Compulsory Membership, supra note 9, ¶¶ 42, 44. For a discussion of the European Court's relevant jurisprudence, see infra sub-section (a) of the text.
76 Universal Declaration, supra note 11, art. 29.
77 See ICCPR, supra note 13, arts. 14, 19, 21, 22.
78 Professor Nowak argues that at least some significance should be attached to the fact that ICCPR Articles 21 and 22 expressly require that restrictions on the rights to peaceful assembly and freedom of association be "necessary in a democratic society" while Article 19 requires only that restrictions on freedom of expression be "necessary." Nowak, supra note 36, at 350.
79 See Evatt, infra this volume, at note 20 and accompanying text.
80 See Lockwood, supra note 36, at 50-51, citing 10 U.N. GAOR Annexes (Agenda Item 28) at 42, U.N. Doc. A/2929 (1955); see also Kiss, supra note 37, at 294.
82 Id.
government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion."^{83}

The requirements of "democratic necessity" as elaborated by the European Court and the UN Human Rights Committee are set forth in sub-sections (a) and (b), below. Sub-sections (c) and (d) examine additional requirements based on comparative law and practice as well as evolving international standards.

a. Any restriction must be supported by specific evidence that it is necessary.

In a series of decisions, the UN Human Rights Committee has made clear that governments bear the burden of proving, with specific evidence, that restrictions on freedom of expression and other rights are necessary to protect state security or some other legitimate interest.\(^{84}\) For instance, in a case against Uruguay, the Committee found a violation because the applicant had been "arrested, detained and tried for his political and trade union activities" and the prosecutor had not presented specific evidence of activities that could legitimately be treated as criminal.\(^{85}\) Courts around the world have adopted the Committee's approach.\(^{86}\)

The European Court has held that reasons given by a government to justify a restriction must be "relevant and sufficient".\(^{87}\) When a government refuses, on national security grounds, to reveal information that it claims justifies restrictions on fundamental rights, it must nevertheless "furnish at least some facts or information" to support the need for the restrictions and for keeping the evidence secret, even if the information concerns a serious terrorist threat.\(^{88}\) Moreover, the Court has required governments that seek to justify restrictions on matters of

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86 See, e.g., Josepat v. Republic, High Court of Malawi, Misc. Civil App. No. 28 of 1992 (holding that the state must adduce evidence to support claims that the exercise of a fundamental liberty is prejudicial to national security).
88 Murray v. United Kingdom, 300-A Eur. Ct. H.R. (ser. A) ¶¶ 59, 60 (1994) (holding that the UK government was required to provide some concrete information to justify the detention of a person suspected of assisting IRA terrorists).
"undisputed public concern" (including information and opinions critical of government policies and actions) to demonstrate that they are "absolutely certain" that dissemination would have "identifiable, adverse consequences."  

b. Any restriction must be proportionate to the legitimate aim pursued.

The European Court has stated that, to be "necessary", a restriction does not have to be "indispensable" or "strictly required," but it must be more than merely "reasonable" or "desirable"; a "pressing social need" must be demonstrated, and the restriction must be proportionate to the legitimate aim pursued. A court should not approve an interference with expression unless the court is "satisfied that the interference was necessary having regard to the facts and circumstances prevailing in the specific case before it." Similarly, the Human Rights Committee, in its General Comment on freedom of religion, stated: "Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated." The Committee has applied that standard to freedom of expression and other Covenant rights as well.

The practice of states that are party to a common human rights treaty may be relevant in assessing a restriction's proportionality. For instance, the European Court, in ruling in 1979 that the Belgium Government's unequal treatment of children born in and out of wedlock violated the European Convention, relied in part on the fact that the law of most of the states parties to the European Convention had, by the time of the decision, evolved towards requiring greater equality in the treatment of such children. Similarly, the European Court cited evolving standards throughout Western Europe in disapproving laws in Northern Ireland, Ireland, and Cyprus that...

91 Observer & Guardian, 216 Eur. Ct. H.R. (ser. A) ¶ 63. For instance, the European Court ruled that the Irish Supreme Court's ban on information about where to obtain legal abortions outside of Ireland was "disproportionate" and therefore unnecessary because it was "absolute" and failed, e.g., to take account of the woman's age, state of health, or reasons for seeking to terminate her pregnancy. Open Door & Dublin Well Woman v. Ireland, 246-A Eur. Ct. H.R. (ser. A) ¶¶ 73, 74 (1992).
made it a crime for consenting male adults to engage in homosexual activity. The two UN Sub-Commission Rapporteurs on Freedom of Expression noted that "comparative law . . . helps in developing evidence of democratic necessity."\(^{96}\)

c. Any restriction must be the least restrictive means possible.

Principle 1.3(b) of the Johannesburg Principles states that, to be legitimate, a restriction must not only aim to protect a legitimate national security interest, but in addition, it must be "the least restrictive means possible for protecting that interest." This requirement is more demanding than the proportionality tests applied by the European Court and the UN Human Rights Committee, which in general require only that a restriction be reasonably proportionate to the legitimate aim pursued.

The European Court, however, has ruled that a "strict proportionality" test is appropriate for measures, such as secret surveillance, that "characterize the police state."\(^{97}\) The states participating in the Organization for Security and Cooperation in Europe have also adopted a "strict proportionality" standard, agreeing in 1990 that "any restriction on rights and freedoms must, in a democratic society . . . be strictly proportionate to the aim of that law."\(^{98}\)

The Inter-American Court applied the "least restrictive means" standard in its leading freedom of expression case. Stated the court:

[T]he "necessity" and, hence, the legality of restrictions imposed . . . on freedom of expression depend upon a showing that the restrictions are required by a compelling governmental interest. Hence, if there are various options to achieve this objective, that which least restricts the right protected must be selected.\(^{99}\)

The standard is also applied by the US Supreme Court which holds that any content-based restriction on freedom of expression must be "narrowly tailored" to achieve a compelling state interest, and that a restriction will not satisfy the test if "a less restrictive alternative is readily available."\(^{100}\)


\(^{96}\) Türk & Joinet, supra note 30, ¶ 67.


\(^{98}\) Document of the Copenhagen Meeting, supra note 53, ¶ 24 (emphasis added). Cf. ICCPR, supra note 13, art. 4(1). Article 4(1)(a) provides that any derogations from the Covenant's obligations must be "strictly required by the exigencies of the situation." Id. 4(1)(a).

\(^{99}\) Compulsory Membership, supra note 9, ¶ 46.

\(^{100}\) Boos v. Barry, 485 U.S. 312, 329 (1988). See also Carey v. Brown, 447 U.S. 455, 461-62 (1980). "Content-based" speech restrictions are those that are "justified only by reference to the content of speech." Boos, 485 U.S. at 321. In Boos, the Supreme Court concluded that a law which made it a crime to display signs "tending to bring a foreign government into . . . public disrepute" was content based and was not narrowly tailored because there existed a substantially narrower law that adequately
The decision of the Johannesburg drafters to adopt the "least restrictive means" test reflects their awareness of the all-too-common tendency of courts to accord excessive deference to executive claims of national security. Experience has shown that judicial independence is often compromised in national security cases, even in "mature" democracies. Additionally, the speech that is most at risk is precisely the sort which is entitled to the greatest protection, namely, political speech that exposes government wrongdoing or ineptitude and may thereby alter government policy or even the government itself. For these reasons, the Johannesburg drafters required that restrictions on such speech meet the most exacting standard of necessity.

d. Governments should not be afforded a margin of appreciation.

The Johannesburg Principles do not allow governments a "margin of appreciation" or other measure of discretion in determining the necessity of restrictions imposed on the ground of national security. The "margin of appreciation" doctrine, developed by the European Court, affords governments a measure of discretion in determining the necessity of restrictions, subject to a "European supervision." Governments are granted a broad margin concerning the demands of "public morals," which differ widely among European states. In contrast, governments are afforded only a narrow margin regarding such concepts as the independence of the judiciary, which have a relatively uniform understanding across Europe. At least as of 1978 the Court was prepared to afford governments a fairly wide margin of appreciation regarding matters affecting national security, so long as the applicable laws provided "adequate and effective guarantees against abuse."

However, according to one judge of the European Court, the Court does not and should not apply a "margin of appreciation" to restrictions on freedom of expression, especially where political debate is involved. Judge Martens wrote in a concurring opinion to the 1992 Schwabe judgment:

As in [two prior] judgments, the Court makes it clear in its present judgment that, where the right to freedom of expression is at stake, there is no room for leaving to the national courts a margin of appreciation as to the assessment of the relevant statements, but that it will effect a full review of such assessments. Rightly so, for such control is indispensable, especially where freedom of public debate on political issues is at stake.

accomplished the state's legitimate interest in discharging its international law obligations towards foreign officials. Id.

101 See, e.g., Zellick, supra note 45.
103 See id.
105 See id.
107 Id.
The majority of the Court did not comment on Judge Marten's statement or otherwise address the issue of the margin of appreciation. Recent judgments involving political expression and press freedom seem to confirm his views.108

Despite the fact that the "margin of appreciation" has occupied a significant place in the jurisprudence of the European Court, the doctrine has not been embraced by the UN Human Rights Committee. The Committee applied a "margin of discretion" in a 1982 decision upholding the permissibility of a restriction on freedom of expression justified on the ground of public morals,109 but since then has not applied the doctrine, and indeed expressly rejected it in at least two cases.110 The Johannesburg Principles, in rejecting the "margin of appreciation" doctrine, place the burden on national authorities to establish the necessity of restrictions, and recognize that international bodies may and should scrutinize the conclusions of national authorities concerning both fact and law.

D. States of Emergency: Principle 3

Circumstances that justify restrictions on human rights in the interest of national security may constitute a state of emergency,111 but they need not rise to that level. Thus, for example, governments may impose restrictions even during peacetime that are necessary to prevent espionage or to protect genuine military secrets.112

108 See, e.g., Goodwin v. United Kingdom, 7 Eur. Ct. H.R. App. 16/1994/463/544, 22 EHRR 123, ¶ 40 (1996-II). ("[T]he national margin of appreciation is circumscribed by the interest of democratic society in ensuring and maintaining a free press. . . . In sum, limitations on the confidentiality of journalistic sources call for the most careful scrutiny by the Court."). See also R. St. J. Macdonald, “The Margin of Appreciation,” in The European System for the Protection of Human Rights 83, 93 (R. St. J. Macdonald et al. eds., 1993) (agreeing with Judge Martens that it is certainly arguable that, at least concerning freedom of political debate, the Court has moved away from applying a margin of appreciation).


111 The European Court has applied the following test to assess whether a situation meets the requirements of a "public emergency":

(1) It must be actual or imminent.
(2) Its effects must involve the entire nation.
(3) The continuance of the organized life of the community must be threatened.
(4) The crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate.


112 See Kiss, supra note 37, at 297.
International law, as codified, *inter alia* in Article 4 of the International Covenant, recognizes that, during times of emergency, states may derogate from a number of fundamental human rights including the right to freedom of expression. However, this derogation is only allowable when (a) the emergency "threatens the life of the nation," (b) the emergency "is officially proclaimed," (c) the measures are "strictly required by the exigencies of the situation" and are "not inconsistent with [the state's] other obligations under international law," and (d) the measures "do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin."\(^{113}\)

While this emergency standard may appear sufficiently precise to guard against misuse, in practice it has been frequently and massively abused.\(^{114}\) Governments claim emergency powers even when only the life of the regime rather than "the life of the nation" is under threat; they frequently fail to proclaim the emergency officially, let alone meet their treaty obligations to notify other states parties; and they often suspend derogable rights completely rather than limit them only as "strictly required."\(^{115}\) Moreover, as noted by the UN Sub-Commission Rapporteurs on Freedom of Expression, "Freedom of opinion and expression are generally among the first victims when derogations from human rights are imposed in a state of emergency."\(^{116}\)

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113 ICCPR, *supra* note 13, art. 4(1). The Article reads:

> In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

*Id.; see also* European Convention, *supra* note 17, art. 15.


For these reasons, Johannesburg Principle 3 on States of Emergency does not refer to the possibility of derogation. Rather, it treats emergencies as a sub-category of the general standard and narrows the circumstances in which emergency restrictions may be imposed. The emergency must not only be "officially" proclaimed, it must also be "lawfully proclaimed in accordance with both national and international law." Derogations are not envisaged; any restrictions on freedom of expression must be "strictly required" by the exigencies of the situation, and may be imposed "only when and for so long as they are not inconsistent with the government's other obligations under international law."

E. Prohibition of Discrimination: Principle 4

The drafters of the Johannesburg Principles considered the principle of non-discrimination to be so important, even during states of emergency, that they devoted a separate principle to it. Principle 4 differs in several respects from the non-discrimination provision in the "emergency" clause of the International Covenant (which provides that measures may not be taken even during emergencies if they involve "discrimination solely on the ground of race, colour, sex, language, religion or social origin"). The word "solely" has been dropped and several categories, including "national origin," have been added. The travaux preparatoires of the International Covenant's emergency clause disclose that inclusion of the word "solely" and exclusion of "national origin" reflected a compromise between country delegates who wanted to permit discriminatory treatment of enemy aliens during wartime and those who wanted non-discrimination to be a non-derogable right. Inclusion of the word "solely" was understood by the delegates to permit differential measures against "a minority which poses a singular threat to the nation, but not against a minority which is simply unpopular." As genuine as may have been the delegates' belief that governments in emergency situations would distinguish between minorities who were merely unpopular and those who posed a singular threat, the word "solely" provides a loophole that has severely undermined the non-discrimination principle.

By omitting the word "solely" from Johannesburg Principle 4, the drafters did not create a standard that prohibits all differential treatment. Rather, Principle 4 prohibits differential treatment only if based on one of a list of enumerated grounds. In addition to the grounds listed in the International Covenant's emergency clause (race, color, sex, language, religion, and social origin), the drafters added all of the other prohibited grounds for discrimination in the International Covenant's general non-discrimination clauses; namely, "national origin," "political or other opinion," "property," and "birth or other status." The Johannesburg drafters added one more category, "nationality," so as to make clear that non-citizens may not be subjected to

117 For text of the emergency clause, see supra note 113.
119 Id. at 118.
120 ICCPR, supra note 13, arts. 2, 26.
discrimination on the ground of lack of citizenship. Principle 4's protections are narrower than those of the International Covenant's main non-discrimination clauses in one regard, however: Principle 4 omits the words "such as" before the list of grounds of prohibited discrimination, thus making the list inclusive rather than illustrative. The drafters omitted these words to limit the Principle's divergence from the International Covenant's emergency clause.

III. Requirements for Restrictions on Freedom of Expression Based on National Security

Part II of the Johannesburg Principles begins by emphasizing, in Principle 5, the absolute nature of the right to freedom of opinion, which admits of no restriction of any kind.

Principle 6 defines the limited category of expression that legitimately may be punished as a threat to national security.\(^\text{121}\) The Johannesburg drafters considered it important to affirm that a category of expression may indeed be punishable, as well as to define that category narrowly and with precision.

Principles 7-10 set forth in some detail the two main obligations of governments regarding expression or information they deem threatening to national security. First, governments must respect, and may not punish, expression, however challenging to the regime in power, that falls short of incitement to violence. Second, governments must take reasonable measures to prevent third parties from interfering with protected expression.

A. Right to Hold Opinions: *Johannesburg Principle 5*

The right to hold opinions under the International Covenant is absolute,\(^\text{122}\) in contrast to the right to express opinions and, indeed, in contrast to treatment of the right to hold opinions under the regional treaties.\(^\text{123}\) While it is certainly the case that the Inter-American and European treaty bodies generally interpret the rights set forth in their Conventions to be at least as protective as corresponding rights in the International Covenant,\(^\text{124}\) the European Court has declined to extend

\(^{121}\) *See id.* ("Expression may be punished as a threat to national security only if a government can demonstrate that: . . . the expression is intended to incite imminent violence; . . . it is likely to incite such violence; and . . . there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.").

\(^{122}\) *See ICCPR, supra* note 13, art. 19(1).

\(^{123}\) *See American Convention, supra* note 18, art. 13(1); European Convention, *supra* note 17, art. 10; African Charter, *supra* note 19, art. 9(2).

\(^{124}\) *See, e.g., Müller v. Switzerland, 133 Eur. Ct. H.R. (ser. A) ¶ 27 (1988) (referring to ICCPR Article 19 in concluding that freedom of expression under the European Convention includes artistic expression); Groppera Radio, 173 Eur. Ct. H.R. (ser. A) ¶ 61 (1990) (referring to the text and history of Article 19 in concluding that European Convention Article 10(1) permits states to regulate technical aspects of broadcasting but otherwise requires that content regulation comply with the requirements of Article 10(2)).
absolute protection to the right to hold opinions, and neither the Inter-American Court nor the Commission has directly addressed the issue.

Principle 5’s absolute protection of the right to hold opinions or beliefs is premised on the International Covenant's protection as well as on the understanding that the mere holding of opinions or beliefs cannot threaten legitimate national security interests.

B. Incitement to Violence that Threatens National Security: Johannesburg Principle 6

Principle 6 states that, subject to Principles 15 and 16 concerning the disclosure of secret information, expression may be punishable as a threat to national security only if it is intended and likely to incite imminent violence. No one may be punished for "mere advocacy" of violence. Advocacy rises to the level of incitement when those to whom the advocacy is addressed are urged to commit violence now or in the near future, and are reasonably likely to do so.

Principle 6 further provides that no one may be punished on national security grounds for incitement to non-violent activity, even if the activity is unlawful under national law. The Johannesburg drafters included this last prohibition reasoning that to allow punishment under national security laws for incitement to "unlawful activity" would open a loophole that would eviscerate the principle: governments could escape the application of Principle 6 simply by pronouncing various activities to be unlawful under national law.

It may indeed be that Principle 6 protects a small range of speech that legitimately could be prohibited under even the most liberal interpretations of international free speech law. Arguably, the Principle could adequately protect freedom of expression and yet prohibit incitement to actions, though non-violent, that violate legitimate national security interests as defined in Principle 2. Such acts might, for instance, involve disobedience of lawful military orders necessary for the protection of legitimate interests. In addition, a footnote could usefully

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125 See, e.g., Glassenapp v. Germany, 104 Eur. Ct. H.R. (ser A.) (1986) (ruling that a teacher could be dismissed from her probationary civil service job for refusing to dissociate herself from the German Communist Party, of which she was not a member); Vogt v. Germany, 323 Eur. Ct. H.R. (ser. A) ¶¶ 75-82 (1995) (concluding that a civil servant may be dismissed for membership in a group “the aims of which are inimical to the constitutional order” if the job entails access to sensitive information).

126 See Viviana Krsticevic, et al., infra this volume, at Sec. II, text preceding note 16.

127 This Principle does not, however, preclude the dismissal of a government servant from a job granting him or her access to sensitive information based on membership in a group “the aims of which are inimical to the constitutional order,” coupled with words or deeds demonstrating an inclination to act in furtherance of those aims. Cf. Vogt, 323 Eur. Ct. H.R. (ser. A) ¶ 75, supra note 125.

128 See infra Section III.D.

129 This definition is based upon the reasoning of the United States Supreme Court in Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

130 The UN Human Rights Committee and the European Court and Commission have all authorized restrictions on fundamental rights, including freedom of expression, in the interest of protecting a state's authority to raise an army. The UN Human Rights Committee upheld Finland's denial of a passport to a man who had failed to report for military service, reasoning that a state may legitimately determine that prohibiting conscripts from leaving the country during their period of military service is necessary for the
be added to Principle 6 clarifying that it does not prevent governments from conditioning employment in jobs that involve handling classified information on loyalty to the state and the constitutional order.\textsuperscript{131}

Principle 6 is not yet an accepted norm of international law. However, the core principle that political speech should not be subject to criminal sanctions unless it is likely to cause violence has been embraced by a number of international bodies, and also finds support in the case law of several countries and the writings of distinguished experts.\textsuperscript{132} While most of the precedents do not concern speech that allegedly threatens national security, the principle is equally valid in the security context: speech that is neither aimed at nor likely to incite violence (and does not disclose national secrets or incite others to do so) simply cannot threaten legitimate national security interests (with the possible exception of speech that incites disobedience of lawful military orders and similar actions). Of course, all speech that incites violence does not thereby threaten national security; the government must also establish that the violence is likely to endanger national security. Equally, speech that falls short of incitement to violence may be restricted in the interest of protecting other legitimate interests (but any sanctions must be proportionate and, arguably, should not involve imprisonment).\textsuperscript{133}

The closest precedent for Principle 6 is the US Supreme Court's unanimous 1969 judgment in \textit{Brandenburg v. Ohio}.\textsuperscript{134} In that case the Court held that speech that advocates unlawful conduct may only be punished where two conditions are satisfied.\textsuperscript{135} First, the speech must be "directed to inciting or producing imminent lawless action"\textsuperscript{136} (often referred to as the "clear and present danger" test\textsuperscript{137}). Second, the speech must be "likely to incite such action."\textsuperscript{138}


\textsuperscript{131} See discussion of the European Court's decision in \textit{Vogt}, 323 Eur. Ct. H.R. (ser. A), supra note 125, at ¶ 75. See also Ulrich Karpen, "Germany," infra this volume, at Sec. II.B., note 24 and accompanying text, discussing a judgment (\textit{Dienstpflicht von Offizieren}, 28 FCC 36, 47 (1970)) in which the Federal Constitutional Court upheld a law requiring civil servants to display loyalty to the state in both words and deeds.

\textsuperscript{132} See infra notes 135-53.

\textsuperscript{133} See Türk & Joinet, supra note 30, ¶ 83. Similarly, Article 19, the International Centre Against Censorship, maintains that speech that does not promote violence should not be punished with imprisonment; rather, expression that violates a private right (e.g., defamation, invasion of privacy) or a public interest (e.g., protection of public health) is better redressed by fines, rights of reply, required retractions, or other remedies. See Article 19, “Policy Statement on Incitement to Hatred or Discrimination,” in \textit{Striking a Balance: Hate Speech, Freedom of Expression and Non-Discrimination} 315-18 (Sandra Coliver ed., 1992).


\textsuperscript{135} See id. at 447.

\textsuperscript{136} Id.

\textsuperscript{137} This test was first stated by Justice Oliver Wendell Holmes, on behalf of a unanimous court, in affirming the conviction of a Socialist Party leader who urged draft age men to avoid conscription, in Schenck v. United States, 249 U.S. 47, 52 (1919).

\textsuperscript{138} Brandenburg, 395 U.S. at 447.
This part of the standard makes the important distinction between support for an abstract doctrine or principle on the one hand, and incitement to concrete, unlawful action on the other. In a previous case, the Court explained that "[t]he essential distinction is that those to whom the advocacy is addressed must be urged to do something, now or in the future, rather than merely to believe in something." Principle 6 "internationalizes" the Brandenburg ruling.

Providing additional and strong support for Principle 6 is the Inter-American Commission’s conclusion that speech “particularly in the political arena” may be criminalized only if likely to result in “lawless violence”:

Particularly in the political arena, the threshold of State intervention with respect to freedom of expression is necessarily higher because of the critical role political dialogue plays in a democratic society. The Convention requires that this threshold be raised even higher when the State brings to bear the coercive power of its criminal justice system to curtail expression. Considering the consequences of criminal sanctions and the inevitable chilling effect they have on freedom of expression, criminalization of speech can only apply in those exceptional circumstances where there is an obvious and direct threat of lawless violence.

As strong a protection of freedom of expression as that is, Principle 6 is stronger in at least one respect: It opposes all punishment for advocacy of unlawful conduct, not merely criminal sanctions. This aspect of Principle 6 is based on the reasoning that civil penalties can be as onerous as some criminal penalties, and that the harm to legitimate public interests which could result from speech short of incitement to violence is far less than the risk of harm due to excessive punishment, whether civil or criminal. In addition, it is not clear whether "an obvious and direct threat" is as demanding as Principle 6's "incitement" standard. Conceivably, a "direct threat" of violence could be satisfied by speech that is likely to provoke violence by a hostile crowd or lead to violence unintentionally.

The two UN Sub-Commission Special Rapporteurs endorsed a standard very similar to that put forward by the Inter-American Commission:

139 Yates v. United States, 354 U.S. 298, 324-25 (1957). For instance, in 1969 the Supreme Court ruled that even a public threat to murder President Johnson could not be punished where it was clear from all the circumstances that the speaker intended to convey strong criticism of the President and not to advocate violence. See Watts v. United States, 394 U.S. 705, 708 (1969). The speaker, an anti-war activist, declared in a public speech: "If they ever make me carry a rifle, the first man I want to get in my sights is L.B.J." Id. at 706. Relevant to the Court's conclusion was that the threat was conditional and the audience responded with laughter. Id. at 707.

140 Principle 6 extends Brandenburg to the extent that it protects all speech short of incitement to violence from restrictions based on national security (though not other) grounds, including speech that incites unlawful action. Thus, for instance, Brandenburg would allow prosecution of incitement to draft evasion, while Principle 6, as written, would not.

In the Special Rapporteurs’ opinion, deprivation of liberty [as a punishment for the unlawful expression of opinion] is clearly a disproportionate sanction. Moreover, deprivation of liberty carries the inherent risk of leading to numerous violations of human rights. In principle it should not be provided for as a penalty save in wholly exceptional cases in which there is a clear and present danger of violence.142

The Rapporteurs' inclusion of the term "clear and present danger" suggests incorporation of the U.S. requirement of incitement.

Courts of several countries have adopted tests similar to the Brandenburg standard, prohibiting the punishment of speech that constitutes mere advocacy of opinions or action absent a showing that the speech is likely to cause violence or other unlawful action. However, few if any of these courts apply the standard as rigorously as do U.S. courts, and few require that the speech must intend to incite violence (and thus may restrict speech that provokes a hostile reaction). For example, India's Supreme Court stressed the requirement of a direct, causal relationship between a statement and the feared unlawful consequences:

The anticipated danger should not be remote, conjectural or far-fetched. It should have a proximate and direct nexus with the expression ... [which] should be inseparably locked up with the action contemplated like the equivalent of a 'spark in a powder keg'.143

Using similar reasoning, the Nagoya High Court of Japan overturned a conviction for distributing politically inflammatory printed material supportive of crimes of insurrection.144 The Court reasoned that there was a distinction between the abstract and concrete danger of inciting the encouraged crimes, and ruled that the establishment of foreknowledge of a clear and present danger to public safety on the part of the accused was an essential element of the offense.145

In Pakistan, the Lahore High Court, expressly adopting the U.S. Supreme Court's "clear and present danger" test, stated that "criticism of the government does not always indicate an intention to bring about disorder."146 The Peshawar High Court ruled that criticism of the government may only be restricted if it encourages the use of force or violence.147

In several cases, the Supreme Court of Sri Lanka ruled that expression of views short of advocacy of violence or other unlawful conduct may not be restricted.148 In a 1987 case, the

142 Türk & Joinet, supra note 30, ¶ 83. See also id. ¶ 30 (condemning "the imposition of heavy penalties on people who have expressed opinions but have not resorted to or advocated violence").
145 Id. at 136-37
146 See id. at 137 (quoting Maluvi Farid Ahmad v. Government of West Pakistan, PLD 1965 (WP) Lahore 135).
147 See id. at 136 (discussing Hussain Bakhsh Kasuar v. the State, PLD 1958 (WP) Peshawar 15).
Chief Justice emphasized that "what is prohibited is advocacy of action and not advocacy of ideas." 149

The courts of England which developed the common law crime of seditious libel have made clear in recent decades that the crime is limited to punishing speech that is both likely and intended to incite violence aimed at disturbing "constituted authority" (that is, authority which is lawful and based on some manifestation of the will of the people). In 1991, the Queen's Bench Divisional Court (England), in the most authoritative, modern statement of the crime of sedition, 150 expressly endorsed the following statement of a Canadian court:

It cannot be that words which, for example, are intended to create ill-will even to the extent of violence between any two of the innumerable groups into which society is divided, can, without more, be seditious. In my opinion, to render the intention seditious, there must be an intention to incite to violence or resistance or defiance for the purpose of disturbing constituted authority. I do not think there is any basis in the authorities for defining the crime on any lower plane. 151

Similarly, the Supreme Court of India ruled that speech, to be seditious, must be likely to incite violence. 152

C. Protected Expression: Johannesburg Principles 7, 8, and 9

Governments around the world subject people to long prison terms for exercising their rights to freedom of expression (or association or assembly) on the ground that their peaceful expression—from forming an opposition party, to criticizing the government, to advocating minority rights—is aimed at removing the government in power. It is a bedrock principle of democratic society that there must be a process by which an undemocratic government can be removed by peaceful means. People are entitled to call (or at least cannot be condemned under international law for calling) for the overthrow of a tyrannical government. As proclaimed in the preamble of the Universal Declaration of Human Rights: "[I]t is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law." 153

Johannesburg Principles 7-9 enumerate six categories of expression (discussed below in subsections 1-6) that have been the most frequent targets of government censure.

1. Advocacy of Non-Violent Change of Government: Johannesburg Principle 7(a)(i)

150 See id. at 128 (discussing R v. Chief Metropolitan Stipendiary Magistrate, ex parte Choudhury, 1 Q.B. 429, 453 (1991)).
153 Universal Declaration, supra note 11, pmbl. ¶ 3.
Johannesburg Principle 7(a)(i) asserts that people are entitled to advocate non-violent change of government policy or the government itself, including calling for self-determination, even if prohibited under national law. This Principle finds support in several statements of the UN Human Rights Committee and bodies of the Council of Europe. For instance, the UN Human Rights Committee concluded in its General Comment on the prohibition of war propaganda and hate speech:

> The provisions of article 20 [of the International Covenant] . . . do not prohibit advocacy of the sovereign right of self-defence or the right of peoples to self-determination and independence in accordance with the Charter of the United Nations.\(^{154}\)

In several cases, the Human Rights Committee has made clear that leadership of an opposition political party and other efforts to change the government through peaceful means, even if in violation of national law, are protected forms of political expression or association that may not properly be punished.\(^{155}\) For instance, in a 1984 decision, the Committee examined the application of a Zairean political activist who had been imprisoned, held \textit{incommunicado}, and subjected to torture on charges that he had "attack[ed] the internal and external security of the State [by means of] having established a clandestine political party and of having, while abroad [in France], sought ways of changing the established institutions -- acts which are . . . punishable by death under Zairean law."\(^{156}\) The Committee concluded that the charges, as well as the detention and mistreatment, amounted to persecution on grounds of political opinion, signaling that leadership of a political party, even one which seeks to change the government, is entitled to full protection.\(^{157}\)

Similarly, in a case against Cameroon, the Committee concluded that the applicant was unjustly punished for having given an interview to the BBC in which he criticized the government and advocated multi-party democracy.\(^{158}\) While the government's stated objective--to safeguard and indeed strengthen national unity under difficult political circumstances--was

\(^{154}\) General Comment on Article 20, General Comment No. 11, U.N. GAOR, Hum. Rts. Comm., ¶ 2, (1983), reprinted in Compilation of General Comments, supra note 50. See also Hannum, supra note 40; Franck, supra note 40.


\(^{157}\) \textit{Id.}

legitimate, the objective could not be advanced by muzzling advocacy of multi-party democracy and respect for human rights.\textsuperscript{159}

The Parliamentary Assembly of the Council of Europe declared its view that peaceful advocacy of at least some degree of autonomy for a region of a country is entitled to the protection of Article 10 of the European Convention.\textsuperscript{160} Accordingly, it roundly condemned the detention and prosecution of six members of the Turkish Grand National Assembly for charges "solely based on the public statements and writings of these members claiming recognition of a Kurdish identity and advocating some form of (cultural) autonomy for the region."\textsuperscript{161} The Assembly concluded that advocacy of changes to the Constitution, even though prohibited by the Constitution itself, fell "within the limits of free speech."\textsuperscript{162}

In a 1994 judgment, the European Court upheld the right of a German Member of the European Parliament to make statements in French Polynesia calling for its independence from France (as well as for an end to nuclear testing), given that she did not advocate violence or disorder.\textsuperscript{163} The French government, invoking its interest in territorial integrity, expelled the MEP from Polynesia and refused to let her leave the airport upon arrival in New Caledonia.\textsuperscript{164} The Court ruled that the French government's measures were disproportionate, even though "the political atmosphere was tense and [the applicant's] arrival [in New Caledonia] led to a limited demonstration of hostility,"\textsuperscript{165} because "at no time did the MEP call for violence or disorder."\textsuperscript{166}

2. Criticism of, or Insult to, the Government, Foreign Governments or Officials: \textit{Johannesburg Principle 7(a)(ii)}

Prosecutions for insult to the government, leaders of state, or public officials often are motivated by the same illegitimate concerns that motivate national security prosecutions, and often pose similar threats to freedom of political expression. As the U.S. Supreme Court observed, in its landmark 1964 judgment in \textit{New York Times v. Sullivan}, defamation actions by public officials concerning their public functions pose a threat of discouraging robust criticism of government institutions and policies just as surely as had the sedition laws which were condemned a century earlier.\textsuperscript{167} The Court emphasized that freedom of expression requires "breathing space" to survive, and that even some false speech had to be shielded from sanction in order to ensure free political debate.\textsuperscript{168} Accordingly, the Supreme Court ruled that public officials, to sustain an

\textsuperscript{159} Id.
\textsuperscript{160} See Council of Europe, Parliamentary Assembly, Res. 1030 (1994), ¶ 6, text adopted by the Assembly on 13 Apr. 1994 (13th Sitting).
\textsuperscript{161} Id. ¶ 6.
\textsuperscript{162} Id. ¶ 7(iii).
\textsuperscript{164} See id. ¶¶ 12, 18-20.
\textsuperscript{165} Id. ¶ 85.
\textsuperscript{166} Id. ¶ 77.
\textsuperscript{168} Id. at 271-72.
action for defamation, must prove by clear and convincing evidence that an allegedly libelous statement was published with actual knowledge of its falsity or with reckless disregard for its truth. The Supreme Court of India endorsed the Sullivan reasoning and adopted its holding.\textsuperscript{169} The UK House of Lords, citing Sullivan, ruled that it was "contrary to the public interest [to allow governmental institutions to sue for libel] because to admit such actions would place an undesirable fetter on freedom of speech."\textsuperscript{170} The highest court of Australia and a South African trial court have also adopted the main points of the Sullivan judgment.\textsuperscript{171}

The European Court ruled in a series of judgments that individuals have a broad right to criticize political leaders, public officials, governments, and institutions of state. In the landmark Lingens case, the Court established that the "limits of acceptable criticism are . . . wider as regards a politician as such than as regards a private individual."\textsuperscript{172} In Castells v. Spain,\textsuperscript{173} the European Court ruled that governments are required to tolerate an even greater degree of scrutiny than politicians:

The limits of permissible criticism are wider with regard to the Government than in relation to a private citizen, or even a politician. In a democratic system the actions or omissions of the Government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion. Furthermore, the dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media.\textsuperscript{174} This ruling is all the more significant in light of the government's claim that Mr. Castells had, in essence, threatened its security and territorial integrity by having "insulted a democratic government in order to destabilize it, and during a very sensitive, indeed critical, period for Spain, namely shortly after the adoption of the Constitution, at a time when groups of differing political persuasions were resorting to violence concurrently."\textsuperscript{175} Mr Castells, a senator who represented a Basque separatist coalition, had published an article condemning murders and attacks committed by armed groups against Basque citizens and accusing the government, through its failure to investigate any of the crimes, of actually encouraging them.\textsuperscript{176} The European Court suggested that a government may prohibit criticism of itself only in

\textsuperscript{169} See id. at 279-80.
\textsuperscript{170} See Rajagopal v. State of Tamil Nadu, JT 1994 (6) SC 514.
\textsuperscript{175} Id. ¶ 46.
\textsuperscript{176} Id. ¶ 41.
\textsuperscript{177} See id. ¶¶ 6, 7.
extraordinary circumstances, such as when necessary to protect public order and when the accusations are "devoid of foundation or formulated in bad faith."\textsuperscript{178}

Defamation actions have long been used by public officials and institutions to suppress criticism of the government. The practice became more common throughout Eastern Europe and much of Africa following the thawing of the Cold War owing to the pressure placed by some donor governments on recipient states to hold elections and become "democratic". For the first time, former single-party regimes had to contend with competition at the polls. Many responded by jailing their opponents without charges; then, when donors objected, they brought such charges as seditious libel, "spreading false rumors likely to bring the government into contempt," and defamation.\textsuperscript{179}

Clearly, the characterization of a statement as defamatory (rather than, for example, seditious) should not remove its prosecution from international scrutiny or censure. Although governments maintain that defamation charges are justified in the interest of protecting the rights and reputations of government institutions or officials, consensus is developing in international and comparative law that their rights and reputations must give way to the right of the press and public to engage in robust political debate and criticism.

For instance, the Czech Parliament adopted an amendment to the Penal Code, effective 1 January 1998, which abolished the crime of defamation of the Czech Republic or its president.\textsuperscript{180} That law had been used against Vaclav Havel and other dissidents before the democratic transition, and thereafter by President Havel against his sharpest critics. In 1987 the Supreme Court of South West Africa set aside a Cabinet order directing the Namibian newspaper to pay a

\textsuperscript{178} Id. ¶ 46. The Court based its ruling that the government had violated Article 10 of the European Convention on the narrow ground that the government had prevented Castells from offering evidence as to the truth of his allegations. See id. ¶¶ 47-50.

\textsuperscript{179} For instance, Chikufwa Chihana, the leading candidate challenging President Banda in Malawi's first presidential election, was convicted and jailed for sedition during the campaign period. Multi-Party Republic of Malawi vs. Chikufwa Chihana, High Court of Malawi, Criminal Case No. 1 of 1992 (on file with the author). In March 1996, two editors of "The Post," Zambia's leading opposition publication, were held in a maximum security jail under an order that allowed indefinite detention for publishing a "contemptuous" article about the Vice-President's statements in Parliament. A high court later quashed the sentences, but only after the two editors had spent several weeks in prison. U.S. Department of State, "Zambia," Country Reports on Human Rights Practices for 1996 (Feb. 1997). The Republic of Slovakia passed an antisubversion law in March 1996 that allows prison sentences to be imposed for the crime of "disseminating false information abroad damaging to the interests of the Republic," Adrian Bridge, "Slovaks Protest as Their Freedoms are Whittled Away," The Independent (London), 1 Apr. 1996. Two Ghanaian editors and a publisher stood trial beginning in February 1996 for "publishing false information likely to injure the reputation of the Government of Ghana," the first time that anyone had been prosecuted under that law, which carries a penalty of up to ten years imprisonment. See Letter from Nana Akufo Addo, Counsel for the editors and publisher, to Article 19, (15 Mar. 1996) (on file with author); Letter from Nana Akufo Addo, Counsel for the editors and publisher, to Article 19, (22 Mar. 1996) (on file with author).

\textsuperscript{180} ICFJ Clearinghouse on the Central and East European Press, published by the International Center for Journalism, Washington, D.C., editor@icf.org. Under the new law, the president may still file a defamation suit under the Civil Code.
high registration fee before it could lawfully engage in publishing.\textsuperscript{181} The Cabinet's order was based on its finding that the Namibian's editor had written articles critical of various Cabinet members which tended to lower the esteem in which its members were held by the public, and thus was likely to endanger the security of the state.\textsuperscript{182} The Court criticized the Cabinet for contending that attacks upon Cabinet members could endanger state security matters and, accordingly, set aside the decision.\textsuperscript{183}

South African courts, even during the apartheid era, recognized the right of citizens in a democracy to level criticism at the government, its policies, or actions:

[I]t would involve a serious interference with the free expression of opinion hitherto enjoyed in this country if the wealth of the State, derived from the State's subjects, could be used to launch against those subjects actions for defamation because they have, falsely and unfairly it may be, criticized or condemned the management of the country.\textsuperscript{184}

Similarly, the Privy Council ruled that protection of freedom of expression requires tolerance of statements critical of the government, even if false and even if they undermine public confidence in the government.\textsuperscript{185} In Hector v. Attorney General of Antigua and Barbuda, a newspaper editor was convicted of publishing a false statement "which was likely to cause fear or alarm in or to the public or to disturb the public peace or to undermine public confidence in the conduct of public affairs."\textsuperscript{186} The Privy Council, finding for the editor, declared the law unconstitutional, reasoning that it was a grave impediment to a free press:

In a free, democratic society, it is almost too obvious to need stating that those who hold office in government and who are responsible for public administration must always be open to criticism. Any attempt to stifle or fetter such criticism amounts to political censorship of the most insidious and objectionable kind. At the same time it is no less obvious that the very purpose of criticism levelled at those who conduct . . . public affairs by their political opponents is to undermine public confidence in their stewardship and to persuade the electorate that the opponents would make a better job of it than those presently holding office. In the light of these considerations, their Lordships cannot help viewing a statutory

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\textsuperscript{182} See id. The court observed:
Because people (or a section thereof) may hold their government in contempt does not mean that a situation exists which constitutes a danger to the security of the State or to the maintenance of public order. In fact, to stifle just criticism could as likely lead to these undesirable situations.
\textsuperscript{183} See id.
\textsuperscript{184} See id. § 7.1.4. (discussing 1946 SA 999, 1013 (A)).
\textsuperscript{186} Id.
\end{flushleft}
provision which criminalises statements likely to undermine public confidence in the conduct of public affairs with the utmost suspicion.\textsuperscript{187}

3. Objection to Military Service: \textit{Johannesburg Principle 7(a)(iii)}

Johannesburg Principle 7(a)(iii) states that protected expression includes "objection, or advocacy of objection . . . to military conscription or service, a particular conflict, or the threat or use of force to settle international disputes." The Principle protects advocacy of, not incitement to, such objection.\textsuperscript{188} This Principle finds support in U.S. jurisprudence and in the reasoning of the European Commission of Human Rights, although its protection exceeds that currently provided by the Strasbourg case law.

In a 1975 decision, the European Commission considered a UK applicant's conviction under the Incitement to Disaffection Act for disseminating copies of two documents, one of which invited soldiers to turn their guns on their officers.\textsuperscript{189} Although the Commission concluded that the conviction did not violate the right to freedom of expression, it made clear its opinion that not all speech aimed at persuading soldiers to disobey orders could be made criminal.\textsuperscript{190} As the Commission stated:

\begin{quote}
If any lesson can be drawn from the Judgment of the International Military Tribunal at Nuremberg, it is that soldiers must not be permitted to be used as mindless machines. To prevent this they must be permitted to be exposed to the kind of political and philosophical propaganda that may very well conflict with the military aims of the government that commands them.\textsuperscript{191}
\end{quote}

Three years later the European Commission, in the \textit{Arrowsmith} case, concluded that a British court legitimately could convict a person of a national security offense for distributing leaflets to British soldiers in Northern Ireland that encouraged them to desert.\textsuperscript{192}

In 1994, the European Court ruled that the Austrian government's refusal to allow a soldier to distribute a satirical magazine in his barracks violated his freedom of expression.\textsuperscript{193} The government asserted that the magazine, which included stories critical of the armed forces and calling for reforms, represented a threat to discipline and to the army's effectiveness.\textsuperscript{194}

\begin{flushright}
\textsuperscript{187} Id.
\textsuperscript{188} In contrast, Principle 6 (which states that expression may be punishable on national security grounds only if it is intended and likely to incite imminent violence) implicitly protects incitement to objection to military service. See text accompanying note 130 for discussion of the difference between advocacy and incitement.
\textsuperscript{190} See id. at 64-65.
\textsuperscript{191} Id. at 64.
\textsuperscript{194} See id. ¶ 54, 68-70, 100, 104 (references to the decision of the European Commission on Human Rights).
\end{flushright}
Court concluded that the Government had not substantiated its claim because the articles "did not call into question the duty of obedience or the purpose of service in the armed forces . . . [and therefore] could scarcely be seen as a serious threat to military discipline."\(^{195}\)

In 1966 the US Supreme Court ruled that exclusion of Julian Bond from membership in the Georgia House of Representatives violated his constitutional rights.\(^{196}\) Bond, an opponent of the Vietnam War, had joined a statement of "sympathy with, and support, [for] the men in this country who are unwilling to respond to a military draft."\(^{197}\) The Court held that Bond could not be penalized for that statement because it did not constitute a call for unlawful draft resistance but was merely a general, abstract declaration of opposition to the war, and Bond in other statements had explicitly denied advocating the breaking of the draft laws.\(^{198}\) The Court emphasized that in order "to give freedom of expression the breathing space it needs to survive, . . . statements criticizing public policy and the implementation of it must be . . . protected."\(^{199}\)

4. Information about Violations of International Human Rights or Humanitarian Law: *Johannesburg Principle 7(a)(iv)*

The right to communicate information about violations of international human rights forms one of the crucial, and much debated, Articles of the "UN Draft Declaration on the Rights and Responsibilities of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms."\(^{200}\) Article 4 reads, in part:

Everyone has the right, individually and in association with others,

(a) To know, seek, obtain, receive and hold information about all human rights and fundamental freedoms . . .;

. . .

(c) To study, discuss, form and hold opinions on the observance, both in law and practice, of all human rights and fundamental freedoms, and, through these and other appropriate means, to draw public attention on these matters.\(^{201}\)

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195 *Id.* ¶ 49.
197 *Id.* at 120.
198 *See id.* at 133-34.
199 *Id.* at 136.
201 *Id.* art. 4. As useful as this Article is in reaffirming and elaborating upon the right to seek and obtain information about human rights violations, the language represents a retreat from language that earlier had been accepted by all countries of the working group save Cuba and China. The earlier draft made more explicit the right to "study, discuss and form opinions as to whether these rights and freedoms are observed, both in law and in practice in their own country and elsewhere." Drafting a Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Human Rights and Fundamental Freedoms: Report of the Working Group on its twelfth session, U.N. ESCOR, Comm'n on Hum. Rts., 53rd Sess., Agenda Item 20, U.N. Doc. E/CN.4/1997/92, Annex I (1997).
The UN General Assembly is expected to adopt the Draft Declaration in 1998, marking the fiftieth anniversary of its adoption of the Universal Declaration of Human Rights.

Human Rights Watch provided copious documentation of the extent to which this right is violated around the world in its *World Report* publications which, since 1991, have included a separate section in each country report on violations of “The Right to Monitor.”

5. Publicity of Activities that May Threaten National Security: *Johannesburg Principle 8*

Principle 8 states that "[e]xpression may not be prevented or punished merely because it transmits information issued by or about an organization that a government has declared threatens national security or a related interest." This Principle responds to laws in several countries that make it a crime to republish communiqués of, or information about, proscribed organizations, on the theory that these organizations draw vitality from the "oxygen of publicity."  

The Principle is based on the press's right to publish information and ideas on matters of public interest and the public's right to receive them. Governments may restrict that right only if they can prove that the statements threaten legitimate public interests or private rights. The activities and statements of terrorist organizations are undoubtedly matters of considerable public interest.

The Constitutional Court of Spain ruled that a state's interest in countering terrorism cannot justify restrictions on information about statements by terrorist groups except where the expression *intends* to build support for terrorism:

> [B]oth the right of the journalist to inform and the rights of his readers to receive full and accurate information constitute, in the last resort, an objective institutional guarantee, which effectively prevents the imputation of any criminal will on the part of those who only transmit information.

In the 1980s, the UK and Irish governments imposed bans on the broadcast of interviews with members of various proscribed groups and also Sinn Fein (a lawful political party that supports the aims of the outlawed IRA). Because the European Commission on Human Rights...
ruled challenges to these bans inadmissible, the European Court did not have the opportunity to assess their compatibility with international law. However, the Supreme Court of Ireland, in a unanimous 1993 judgment, placed some limits on the Irish ban. It ruled that a mere member of Sinn Fein, who was also a union spokesperson, could not be excluded from talking about the union’s grievances on RTE, Ireland’s national broadcasting service. It made clear that, while access to broadcasting is not a right, access could not be denied on arbitrary grounds. Moreover, the UN Human Rights Committee, examining Ireland’s broadcasting ban in 1993, observed that the prohibition on broadcasting interviews with members of certain groups, in the absence of a particularized showing that the broadcasts would threaten legitimate state interests, infringed on freedom to receive and impart information.

The Supreme Court of Israel applied a similar test in 1985 in striking down a directive that prohibited TV interviews with "public personalities identified with those who see the PLO as the exclusive or legitimate representative of Arabs living in the Judea and Samaria Region and in the Gaza Strip." The Court ruled that the directive was over-broad and, accordingly, could be applied only if the Israeli Broadcasting Authority issued "a clear and unequivocal definition for the terms 'public personalities' and 'identifying themselves with the PLO.'"

The European Court ruled, in its 1994 Jersild judgment, that a journalist’s conviction and fine for broadcasting the racist statements of others violated his right to freedom of expression and information. The journalist had not endorsed the sentiments and indeed was motivated by a good faith desire to inform the Danish public about the existence in their country of racist groups. The Court stated that journalists should not be hampered in the exercise of their editorial judgment about matters of public interest absent "particularly strong reasons for doing so." The reasoning is equally applicable to statements about terrorist groups and other matters affecting national security.

6. Use of a Minority or Other Language: Johannesburg Principle 9

207. See id.
208. See id. The court stated:

[S]omeone speaking on an innocuous subject on the airwaves, even though he is a member of an organisation which includes in its objects a desire to undermine public order or the authority of the State, is [not] . . . outside the constitutional guarantee . . .

[H]e should be treated equally with others when his views do not transgress either the Constitution or the law.

Id. (O’Flaherty, J., concurring).


211 See id. at 284 § 6.1.


213 Id. ¶ 35.
A number of countries faced with movements for autonomy or separation of part of the territory have banned or restricted the use of minority languages on grounds that their use threatens national security or unity. Most notably, until 1991 Turkey banned all publications or communication in Kurdish; still today, all discussion that takes place at political meetings must be in Turkish, and Kurdish may not be spoken in court proceedings or in other official government settings.\(^{214}\)

Principle 9 declares that expression can never be prohibited on the ground that it is in a particular language. The Principle is based on the right to use one's own language, at least outside of official proceedings, which is a fundamental aspect of freedom of expression. The UN Human Rights Committee, affirming this right, concluded that Quebec's "French only" sign law (which prohibited the posting of government or commercial signs in languages other than French) violated the International Covenant's protection of freedom of expression.\(^{215}\) As it stated: "A State may choose one or more official languages, but it may not exclude, outside the spheres of public life, the freedom to express oneself in a language of one's choice."\(^{216}\) The Council of Europe's Convention on the Protection of Regional and Minority Languages also protects this principle.\(^{217}\)

D. Unlawful Interference with Expression by Third Parties: Johannesburg Principle 10

Principle 10 states the obligation of governments to take reasonable measures to ensure that private parties do not violate the rights of others to freedom of expression, even where the expression advocates non-violent change of government. Reports and precedent-setting decisions issued by human rights bodies in the past decade provide a solid foundation for this principle.

In one 1988 judgment, the European Court reviewed an application from an association of Austrian doctors opposed to Austria's relatively liberal abortion laws.\(^{218}\) The association complained that the police had not taken adequate measures to prevent two of its demonstrations from being disrupted by counter-demonstrators. The Court held that governments must take "reasonable and appropriate measures" to prevent private groups or individuals from violating the free expression rights of others, but concluded that the Austrian government had discharged its duty by deploying a reasonable number of police.\(^{219}\) Also in 1988, the Inter-American Court of

\(^{214}\) See Kerim Yildiz, “Turkey,” infra this volume, at Sec. III.E, esp. note 36.
\(^{216}\) Id.
\(^{219}\) Id. ¶ 34. The court reasoned:

The participants [in a demonstration] must . . . be able to hold the demonstration without having to fear that they will be subjected to physical violence by their opponents; such a fear would be liable to deter associations or other groups . . . from openly expressing
Human Rights ruled that the government of Honduras was responsible for the disappearance and presumed murder of a man in light of findings that his was but one of many disappearances that the government had done nothing to "prevent, investigate [or] punish."\textsuperscript{220} The Court stated:

An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the [American] Convention [on Human Rights].\textsuperscript{221}

In a 1993 report on Guatemala, the Inter-American Commission applied the above doctrine of state responsibility to violations of freedom of expression committed by non-state actors.\textsuperscript{222} The Commission declared that "State authorities must not only provide proper protection, but must explicitly denounce and repudiate [a campaign by individuals against those who expressed opposition to the government] and investigate and bring to trial or administratively censure those responsible."\textsuperscript{223}

IV. Restrictions on Freedom of Information

The right to freedom of information is central to the concept of democratic accountability. James Madison, a leading figure in the drafting of the US Constitution, eloquently described the importance of an informed citizenry to democratic governance:

A popular Government, without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy; or, perhaps, both. Knowledge will forever govern ignorance; and a people who mean to be their own governors must arm themselves with the power which knowledge gives.\textsuperscript{224}

The right to freedom of information increases with the importance of the information at issue to the individual or society.\textsuperscript{225} Matters of particular importance include the competency for public
service of public officials and candidates,\textsuperscript{226} the functioning of government and public agencies,\textsuperscript{227} and public health issues.\textsuperscript{228}

A. Access to Information: \textit{Johannesburg Principle 11}

Most of the main human rights instruments protect the right "to seek, receive and impart" information as an integral aspect of the right to freedom of expression.\textsuperscript{229} Traditionally, the right has been understood to be limited to the right to receive and impart information free from government interference, and not to establish a general right to receive information from the government or others.\textsuperscript{230} In recent years, however, developments at the international, regional and national levels suggest the emergence of a positive duty on governments to provide information necessary for the enjoyment of fundamental rights.\textsuperscript{231} Johannesburg Principle 11, reflecting this trend, declares the right of everyone to obtain information from public authorities, including information relevant to national security, subject only to the restrictions on freedom of expression discussed above regarding Principle 1.\textsuperscript{232}

In 1981, the Committee of Ministers of the Council of Europe, the Council's highest political body, issued a Recommendation to the member states on access to information held by public authorities.\textsuperscript{233} The Committee called on member states to ensure to "everyone" within their jurisdictions "the right to obtain, on request, information held by the public authorities other than legislative bodies and judicial authorities" and to provide "[e]ffective and appropriate means . . . to ensure access to information."\textsuperscript{234} The right to obtain information should be "subject only to such limitations and restrictions as are necessary in a democratic society for the protection of

\begin{itemize}
\item \textsuperscript{228} \textit{See, e.g.}, \textit{Sunday Times}, 30 Eur. Ct. H.R. (ser. A) ¶ 66.
\item \textsuperscript{229} Universal Declaration, \textit{supra} note 11, art. 19; ICCPR, \textit{supra} note 13, art. 19; American Convention, \textit{supra} note 18, art. 13; European Convention, \textit{supra} note 17, art. 10 (establishes the right to "receive and impart" information); African Charter, \textit{supra} note 19, art. 9 (protects the right of every individual to receive information).
\item \textsuperscript{231} \textit{See, e.g.}, Gaskin v. United Kingdom, 160 Eur. Ct. H.R. (ser. A) ¶ 49 (1989).
\item \textsuperscript{232} \textit{Section II.C., supra}.
\item \textsuperscript{234} \textit{Id.} at 97.
\end{itemize}
legitimate public interests (such as national security . . .) and for the protection of privacy and other legitimate private interests."\textsuperscript{235} The relevant public authority should decide a request for information "within a reasonable time" and should state the reasons for any denial, which should be subject to review.\textsuperscript{236} In the application of these principles "every endeavor should . . . be made to achieve the highest degree of access to information."\textsuperscript{237}

In a 1982 Declaration, the Committee of Ministers confirmed the above Recommendation.\textsuperscript{238} The member states of the Council of Europe declared their commitment to strive to achieve the protection of the right of everyone to seek and receive information from whatever source and to pursue "an open information policy in the public sector, including access to information, in order to enhance the individual's understanding of, and his ability to discuss freely, political, social, economic and cultural matters."\textsuperscript{239}

The European Court has recognized the right of individuals to obtain vital personal data held by the government,\textsuperscript{240} and the right of the public to information relevant to public health held by a private company that a newspaper obtained and sought to publish.\textsuperscript{241} The UN Human Rights Committee and the Inter-American Commission have concluded that governments have a positive duty to protect the rights to life and health, which reasonably should include an obligation to publish information that could assist people in protecting their life or health.\textsuperscript{242} The right also arguably applies to information relevant to the environment, including impacts caused by the development of weapons systems, and to information necessary for effective public oversight of government institutions.\textsuperscript{243}

These decisions and declarations by the Inter-American and European bodies have been matched by legislative and judicial developments at the national level. According to a 1994 survey of the legal guarantees of access to government-held information in forty-five countries, twelve provided constitutional guarantees, fourteen had a law that stated a presumption of public access to government information (three of which also had constitutional guarantees), and in an

\textsuperscript{235} Id.
\textsuperscript{236} Id.
\textsuperscript{237} Id. at 96.
\textsuperscript{238} Council of Europe, Committee of Ministers, Declaration on the Freedom of Expression and Information, \textit{adopted} 29 Apr. 1982 by the Committee of Ministers at its 70th Session, 1982 O.J. at 214 (1989).
\textsuperscript{239} Id.
\textsuperscript{242} See, e.g., UN Human Rights Committee, General Comment No. 6, 16th Sess., 1982, ¶ 5 (concluding that "the inherent right to life" recognized in Article 6 "requires that states adopt positive measures"); Case 7615, Inter-Am. C.H.R. 24, 33-34, OEA/Ser.L/V/II.66, doc. 10, rev. 1 (1985) (regarding the positive obligation to protect health).
additional nine countries, legislation was under consideration. In a few countries, the public is granted a right of access to information (albeit qualified) held by corporations in addition to government bodies. The presumption of access to government information is strongest in the United States and Northern Europe, and finds solid support throughout western Europe and in India. Hungary was the first of the formerly Soviet Bloc countries to adopt a freedom of information act in 1992, and Latvia adopted one in 1994. Laws granting access to some categories of government information are common throughout Latin America, and access laws are actively being considered in, among other countries, South Africa, Hong Kong, and Japan.

Sweden provides one of the strongest and oldest constitutional protections of the right. The core of the principle, dating from the Constitution of 1766, is that all government documents are public in the absence of a statute which expressly regulates otherwise. This presumption of openness is considered one of the most important foundations of Swedish democracy.

A number of modern constitutions expressly mention the public's right of access to government information and the constitutional courts of several countries have declared that the

244 See Giny Scuttrups, International Freedom of Information Acts (Washington, D.C.: The National Security Archive, Oct. 1994). Countries that have constitutional guarantees (explicit or articulated in case law) include Austria, Costa Rica, Germany, Guatemala, India, Mexico, Portugal, South Africa, South Korea, Spain, Sweden, and the United States. Countries that have laws on the books include Australia, Austria, Canada, Colombia, Denmark, Finland, France, Greece, Hungary, Netherlands, New Zealand, Norway, Sweden, and the United States. As of 1994, draft legislation was under consideration in Belgium, Czech Republic, Hong Kong, Iceland, India, Ireland, Japan, Latvia, and the United Kingdom.

245 For instance, Article 20(4) of the Federal Constitution of Austria reads, in relevant part: "All federal, state and local government bodies and all corporations under public law must give information on affairs within their responsibility unless laws protecting confidentiality provide for non-disclosure . . . ."

246 It is not clear whether the First Amendment of the Constitution guarantees some measure of a right of access to government information. There have been few cases because most claims are made pursuant to the Federal Freedom of Information Act, 5 U.S.C. § 552(b) (1966), adopted in 1966 and amended substantially in 1974. The Act exempts from disclosure information properly classified as secret in the interest of "national defense or foreign policy". When a classification is challenged, the government is required to give detailed reasons supporting the classification, and the courts may examine the classified documents. See Paul Hoffman & Kate Martin, "United States," infra this volume, at Sec. II.A, on the Freedom of Information Act.

247 Information received on 23 Apr. 1996 from the National Democratic Institute of International Affairs (Washington, D.C.) (on file with the author).

248 See Scuttrups, supra note 244.


"public's right to know" is an implicit aspect of freedom of expression or representative democracy or both.251 For instance, the Supreme Court of India, in a 1975 judgment, offered the following reasoning:

In a government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing. The right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security.252

B. Exceptions to Access: Johannesburg Principles 12 and 13

The right to freedom of information is subject to the same restrictions as are applicable to the broader right to freedom of expression.253 Principles 12 and 13 state two specific limits on permissible government restrictions in addition to those discussed above regarding Principle 1. First, a state may not categorically deny access to all information related to national security but must designate in law those narrow categories the disclosure of which could harm legitimate national interests. Second, the public interest in obtaining the information requested must be given substantial weight in assessing the need for secrecy.

These Principles are based on a small, but nonetheless steadily growing, trend among national courts and legislatures to place constraints on the executive's discretion to classify information as secret. For instance, in 1990 the Constitutional Court of the Republic of Korea ruled that a law that penalized unauthorized collection and intentional or negligent disclosure of military secrets could only be constitutional if the term "military secrets" were defined more narrowly.254 In a subsequent case, the Constitutional Court concluded that "the boundary of

251 See, e.g., Constitutional Court of South Korea, Judgment of 13 May 1991, 90 Honma 133, 3 Honbop Chaepanso Panraejip [Constitution Court Case Report] 234, at 237-38 and 246 (1992), in which the Court referred to the UDHR as well as the Constitution in support of its conclusion that the right to know is "naturally included in the freedom of expression," and that the essence of the right lies in the "people's right to know about information in the possession of the government."

252 State of Uttar Pradesh v. Raj Narain, A.I.R. 1975 S.C. 865, 884. Accordingly, despite the fact that tensions within the country were growing, the Court ordered the government to disclose documents regarding security arrangements for the Prime Minister's travels within the country so long as they did not endanger his security or public order. See also Handbook, supra note 24, § 6.2.4 (discussing this case).

253 See supra Section II.C, Commentary to Principle 1.

254 The Court stated:

The definition of military secrets is ambiguous and misleading enough to restrict the freedom of information and expression. [Accordingly,] there needs to be a more exact
military secrets should be as minimal as necessary to extend the parameters of people's freedom of expression or 'right to know' to a maximum possible degree."^255

The Dutch Act on Public Access to Information imposes an "active" obligation to transfer information "when it is 'in the interest of a just and democratic government.'"^256 Exemptions are provided for information the disclosure of which would endanger the unity of the Crown or state security, information imparted confidentially to the government by private parties, and "internal" documents (those that include personal views on policy matters).^257 Information may be designated as secret only pursuant to regulations promulgated by the Minister of Home Affairs. These provide that only a small category of officials are authorized to designate information as a state secret; each ministry, in consultation with the Minister of Home Affairs, must specify categories of data that are secret; and these classifications generally are valid only for a limited time.\(^258\) French law imposes similarly strict requirements on the classification of information.\(^259\)

In several countries, the press is granted a more powerful right of access to government information than is the public, based on the "public function" of the press to inform the public about matters of public concern. In Germany, the "Länder press laws provide . . . access to government information . . . [and] Federal government information is protected by Article 5 of the Basic Law."\(^260\) Information may be refused "only if disclosure would interfere with judicial proceedings; 'the rules of secrecy stand in the way'; an overriding public or private interest would be infringed; or the amount of information requested is excessive."\(^261\) The press may apply to the courts for a ruling in the event of a refusal.\(^262\)

The International Criminal Tribunal for the former Yugoslavia set a precedent concerning government-held information needed by the UN for a war crimes prosecution. The Tribunal ruled, in October 1997, that the Government of Croatia could not refuse to provide information on national security grounds that the Tribunal's prosecutor had subpoenaed in a case against a

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^257 See id. (discussing, in particular, Articles 10 and 11 of the Act on Public Access to Information).

^258 See id. § 14.2.

^259 Penal Code art. 413-9 and the Decree of 12 May 1981, discussed in Roger Errera, “France,” infra this volume, at Sec. IV.B., esp. notes 84-86.


^261 See id.

^262 See id.
Bosnian Croat general. The Appeals Chamber of the Court deemed that the validity of such claims were to be examined during *in camera, ex parte* proceedings.263

C. Right to Review on the Merits of Denial of Information: *Johannesburg Principle 14*

Principle 14 states that individuals must be able to seek review of a government's refusal to release information on national security grounds from an authority independent of the agency that denied the request, and that the reviewing authority must have the right to examine the information withheld. In addition, individuals must be able to seek some form of judicial review of the legality of any such denial. The Principle is crucial; however broadly stated may be the right of access to government information, the ability of people actually to obtain information is only as strong as their right to have denials of such information reviewed by an independent authority.

This Principle finds support in the law and jurisprudence of several countries, although it offers stronger protection than most of them in that it directs courts to review the merits of a denial of information including, where necessary, to examine the withheld information. It also affords stronger protection than the European Court of Human Rights, which requires review by an administrative authority independent of the agency that denied access, but does not require judicial review.264

In the *Leander* case, the European Court considered the application of a person who sought access to information in a police register which, allegedly, rendered him unfit for a civil service job that required a security clearance.265 The Government refused to disclose the information on national security grounds. The European Court stated that, although it had concluded in a previous case that there is no right to a civil service job, "in view of the risk that a system of secret surveillance for the protection of national security poses of undermining or even destroying democracy on the ground of defending it, the Court must be satisfied that there exist adequate and effective guarantees against abuse."266 Accordingly, the applicant was entitled to "a remedy that is as effective as can be, having regard to the restricted scope for recourse inherent in any system of secret surveillance for the protection of national security."267 The Court decided that the system of administrative review at issue in the case was adequate.268

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263 *The Prosecutor of the Tribunal v. Blaskic*, ruling of the Appeals Chamber, 29 Oct. 1997, on the Government of Croatia’s appeal against the decision of Trial Chamber II affirming the Tribunal’s power to issue subpoenas duces tecum.
265 See *Leander*, 116 Eur. Ct. H.R.
266 Id. ¶ 60.
267 Id. ¶ 84.
268 See id. ¶¶ 83-84; see also *Gaskin v. United Kingdom*, 160 Eur. Ct. H.R. (ser. A) ¶ 49 (1989). In *Gaskin*, the European Court ruled that the UK government had not violated the applicant's right to freedom of information by refusing to let him see his personal data files on the ground that they contained information given in confidence, but the court did hold that the UK government had violated
In several countries, refusal of information is subject to administrative review either by a body specially constituted to oversee compliance with the disclosure laws or else by a general administrative body.\textsuperscript{269} Decisions of these bodies may then be appealed to the courts.\textsuperscript{270} In a number of countries, an administrative body that refuses to grant disclosure must specify its reasons in writing, and must inform the applicant of the right to appeal.\textsuperscript{271} Courts in most countries, however, will reverse a decision of an administrative body only if it is based on an incorrect application of the law (rather than an incorrect weighing of the facts) or if, for other reasons, it is patently unreasonable.

A notable exception is the United States. A 1974 amendment to its Freedom of Information Act (FOIA) provides that (a) courts should have the final say as to whether documents are properly classified and therefore exempt from disclosure, and (b) the government has the burden of proving that information is exempt from disclosure.\textsuperscript{272} To meet that burden, the government must submit sworn statements by appropriate officials explaining with some particularity why the disclosure of each item of classified information would pose a threat to national security. Courts are authorized to review the documents themselves and to decide on the

\textsuperscript{269} See generally Sandra Coliver, “Comparative Analysis of Press Law in European and Other Democracies,” in \textit{Press Law and Practice}, supra note 245, at 255:

In France, a special commission, the \textit{Commission d'acces aux documents administratifs} (CADA) examines complaints and difficulties concerning access. Most problems are resolved at this level. An applicant dissatisfied with CADA’s decision may seek review by an administrative court. In Sweden, a Justice Ombudsman, appointed by the Parliament, supervises disclosure and tries to resolve disputes. Australia allows appeals to an ombudsman or an administrative appeals tribunal, and Canada allows appeals to a special commissioner. However, only the Australian tribunal can order disclosure; the ombudsman and commissioner are limited to recommendations. In the US, an appeal may be made to the head of the agency which denied the request.

\textit{Id.} at 276 § 14.3.


\textsuperscript{271} Examples include Australia, France, Norway, and Sweden. See Coliver, supra note 268, at 257 § 14.3; Errera, “France,” infra this volume, at Sec. III.A.1, text following note 13.

merits whether the government's classification was substantively correct.\textsuperscript{273} Similarly, in Canadian deportation hearings, including where exclusion is sought on grounds of a national security threat, judges are entitled to review all of the evidence and the alien is entitled to a summary of the evidence.\textsuperscript{274}

In France, courts may not challenge an administrative decision to classify a document as secret.\textsuperscript{275} However, if the Administration refuses to grant access to a document on national security grounds that has not been classified, the applicant may request review by an independent commission established for that purpose; one of the Commission’s members, after receiving a security clearance, must be able to see the document.\textsuperscript{276}

D. No Punishment for Disclosure of Secret Information in the Public Interest

1. The General Rule: \textit{Johannesburg Principle 15}

In a growing number of countries that recognize the importance to a democracy of access to government information, journalists and other members of the media are not liable for publishing government information, even if classified, so long as the disclosure did not risk serious damage to national security or, in some countries, international relations.\textsuperscript{277} In several countries, the fact that disclosure was in the public interest provides a defense even if the disclosure risked, but did not actually cause, serious damage. There is a developing trend to refrain from punishing or even prosecuting the media unless disclosure actually harmed a legitimate national security interest and the harm resulting from the disclosure outweighed the public interest in knowing the information. Johannesburg Principle 15 reflects this trend and goes one step further by extending the protection to all persons (not merely the press), other than those who received the secret information in the course of government service. (The standard applicable to government servants is set forth in Principle 16, discussed below.) The extension is based on the notion that researchers who discover information of public interest should have the same right as the press to publish the information.

In the United States, the media have not, in recent memory, been held liable for publishing secret information. Several narrowly drawn laws criminalize the release of certain categories of information by people who have come into possession of the information by virtue of their government service; however, only one, the Intelligence Identities Protection Act, 

\textsuperscript{273} See Hoffman & Martin, “United States,” \textit{infra} this volume, at Sec. II.A.
\textsuperscript{274} Canadian Immigration Act 1976, as amended by the Immigration Act 1988.
\textsuperscript{275} Errera, “France,” \textit{infra} this volume, at Sec. IV.B.1.b, text preceding note 87.
\textsuperscript{276} Errera, \textit{supra}, at Sec. III.A.1, text accompanying note 27.
\textsuperscript{277} For instance, in the United Kingdom, even where there is an enforceable duty of confidence, the courts will not apply it to information the disclosure of which would be in the public interest. \textit{See} British Steel v. Granada TV, 3 W.L.R. 780 (House of Lords 1980). \textit{See generally} Y. Cripps, \textit{The Legal Implications of Disclosure in the Public Interest} (2d ed. 1994).
expressly makes it a crime to publish such information.\textsuperscript{278} Even when people in government service have been convicted for "leaking" information, the media publishers have not been prosecuted.\textsuperscript{279}

In Austria,\textsuperscript{280} Germany,\textsuperscript{281} the Netherlands,\textsuperscript{282} and Sweden,\textsuperscript{283} journalists and editors are not subject to prosecution for publishing official secrets, unless the disclosure risked severe damage to national defense or international relations. The courts make the determination as to whether a disclosure risked, or was likely to risk, such damage; the administrative classification of information as "secret" is not decisive.\textsuperscript{284} The courts tend to scrutinize government claims of secrecy with considerable independence. In Austria, "within the last decades, only a very few charges have been filed against the mass media."\textsuperscript{285} In Sweden, only one case in recent years resulted in prison terms: a member of the Investigation Bureau and two journalists received sentences from nine months to one year for publishing secret information about the security services.\textsuperscript{286}

In Germany, courts will scrutinize whether published information should have been labeled secret in the first place, so long as the information was not an "absolute secret."\textsuperscript{287} Journalists will not be punished if the information should not have been labeled secret. "Absolute secrets" include facts, objects, or information that are accessible only to a limited number of persons and must be kept secret from foreign powers to avert serious damage to the external security of the Federal Republic.\textsuperscript{288} Moreover, the Federal Constitutional Court (FCC) has ruled that publication of secret information may be excused if the interest in disclosure was strong and outweighed the interest in keeping the information from the public.\textsuperscript{289} This constitutional doctrine has been codified in various statutes.\textsuperscript{290}

\textsuperscript{278} Intelligence Identities Protection Act, 50 U.S.C. § 421 (1982). The Act penalizes the publication of the names of intelligence agents when publication is part of a pattern of activities intended to expose covert agents and is done with knowledge that such activities would impair intelligence activities. See Hoffman & Martin, “United States,” \textit{infra} this volume, at Sec. II.B, re criminal penalties for public disclosure.

\textsuperscript{279} See Hoffman & Martin, \textit{infra} this volume, at Sec. II.B.


\textsuperscript{281} See Karpen, “Germany,” \textit{infra} this volume, at Sec. III.B.

\textsuperscript{282} See van Lente & Boerefijn, \textit{supra} note 256, at 98 § 14.1.


\textsuperscript{284} See, \textit{e.g.}, van Lente & Boerefijn, \textit{supra} note 256, § 14.2 (citing HR 14 May 1974).

\textsuperscript{285} Berka, \textit{supra} note 245, at 22 § 14.

\textsuperscript{286} See Axberger, \textit{supra} note 250, at 150 §§ 14.2, 18.

\textsuperscript{287} See Karpen, “Germany,” \textit{infra} this volume, at Sec. III.B; C. Starck, \textit{Archiv fur Presserecht} 177 (1978).

\textsuperscript{288} See § 93 StPO (German Criminal Code).

\textsuperscript{289} See 61 FCC 1, 11 (1982) (Christlich Soziale Union).

\textsuperscript{290} See Karpen, “Germany,” \textit{infra} this volume, at Sec. III.B. He notes two provisions of the Criminal Code in particular: § 93(2) StPO, which states that “[f]acts which are in contradiction to the free
Of considerable interest is the policy of the European Union to require states applying for membership to provide a defense in their criminal law for journalists who publish military or state secrets in order to reveal irregularities, provided the disclosure does not harm the state. In November 1997, the Slovenian Justice Minister announced his government’s intention to amend the Criminal Code in response to the EU’s request.\(^{291}\)

In several countries, including Australia, Germany, and Norway, the fact that disclosure serves the public interest provides a defense for publication of information collected by illegal means.\(^{292}\)

The European Court, in a 1995 judgment, indicated that it might not follow this liberal trend.\(^{293}\) In dictum, it suggested that it might find unobjectionable the prosecution of two journalists who published classified information.\(^{294}\) However, even in such a case, the Court might well weigh the public’s interest in the information; in its landmark *Sunday Times* judgment, it made clear that, in assessing whether an interference with freedom of information was "necessary in a democratic society," it would consider "any public interest aspect of the case."\(^{295}\)

2. Information Obtained through Government Service: *Johannesburg Principle 16*

While there is a cognizable trend among democracies not to punish publication of classified information so long as the information does not endanger national security, support for a norm protecting government employees who "leak" such information is considerably weaker.

Nonetheless, Johannesburg Principle 16 calls for protection for people who disclose information learned in the course of government service, so long as "the public interest in knowing the information outweighs the harm from disclosure." This Principle provides less democratic order or which are kept secret from treaty partners in violation of arms limitation agreements are not state secrets," *id.*; and § 97 B, which states that publication of a genuine secret by one who, however erroneously, believed that the information was not entitled to be kept secret, is not a crime if the person acted with the intent to stop an activity that he believed to be illegal. *Id.*

\(^{291}\) Reuters, 13 Nov. 97, "Slovenia to liberalise journalist legislation".

\(^{292}\) See David Flint, “Press Law in Australia,” in *Press Law and Practice*, supra note 245, at 1 § 14; Karpen, *supra* note 261, at 78 § 14; Steingrim Wolland, “Press Law in Norway,” in *Press Law and Practice*, supra note 245, at 116 § 14 ("The law does not explicitly permit disclosure of information of legitimate public interest, but the public interest principle is likely to be taken into consideration both by prosecutors when deciding whether to file charges as well as by judges when formulating their opinions.")


\(^{294}\) See *id.* ¶ 45; see also Hadjianastassiou v. Greece, 252 Eur. Ct. H.R. (ser. A) ¶¶ 39, 44-47 (1992) (noting that members of the armed forces have certain "duties" and "responsibilities" and, accordingly, their freedom to impart information is more limited than private individuals).

protection for government servants than Principle 15 provides for the press and members of the general public: persons engaged in government service are entitled to protection only if there is a public interest in the information they disclosed, whereas the press and general public are also entitled to protection if the disclosure does not actually, and is unlikely, to harm a legitimate national security interest.

Principle 16 is premised on the recognition that the public often has a particularly strong interest in knowing about the information that governments seek to keep secret on bogus national security grounds. Clearly, there is some information that the public has no interest in knowing (e.g., particulars about the movement of troops, weapons systems, and military capacity). However, there have been few instances anywhere in the world in recent memory where information disclosed by a government servant damaged a vital state interest. To the contrary, most information that governments have sought to suppress disclosed government ineptitude or wrongdoing, sometimes on a grand scale. One of the most notorious cases was Daniel Ellsberg’s disclosure that the US government had lied to the US Congress and the American people about its bombing of Cambodia. More recent cases abound.

When governments commit violations of human rights or humanitarian law, disclosure by government servants (the only people who usually have access to information about the violations) can and has in many situations led to the stopping of the violations. Moreover, disclosures stimulate open debate which in turn generally results in the adoption of better decisions and policies. Principle 16 reflects the view that human rights and indeed national

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297 For instance, in 1995, US Congressman Robert Torricelli published a letter to President Clinton informing him that the CIA had known for years that one of its paid informants in Guatemala had ordered the killings of an American citizen and a guerilla leader married to Jennifer Harbury, an American lawyer. Tim Weiner, “Guatemalan Agent of CIA Tied to Killing of American,” N.Y. Times, 23 Mar. 1995, at 1. Because Torricelli had obtained the information by virtue of his position on the House Intelligence Committee, he was investigated for possible violation of the House oath not to disclose classified information. He was cleared of the charge on the ground that publication of the information served the public interest. Adam Clymer, “Congressman Is Cleared of Breaking Oath,” N.Y. Times, 13 July 1995, at 9. The CIA station chief in Guatemala was removed from his post and an investigation was launched into CIA violations of a 1980 law that requires the CIA to keep Congress "fully and currently informed" about its activities. See Tim Weiner, “More is Told About CIA in Guatemala,” N.Y. Times, 25 Apr. 1995, at 6; Tim Weiner, “Senators Seek Legal Inquiry on CIA in Guatemala,” N.Y. Times, 30 Sept. 1995, at 5.

In February 1996, Alexander Nikitin, a retired Russian submarine captain, was arrested on charges of treason and disclosing state secrets based on a book he was writing for a Norwegian nongovernmental organization about the dangers of nuclear waste contamination caused by Russia’s Northern fleet. He was held in prison for a year and, as of October 1997, continued to face charges that carried penalties of up to 15 years’ imprisonment. Amnesty International, “Urgent Action Appeal”, 9 Feb. 1996; Bellona Foundation, “The Nikitin Case”, Oct. 1997.

security are better protected by giving government servants immunity for disclosing information in the public interest than by permitting governments to demand of them complete secrecy.\footnote{51}

Principle 16 finds support in German law,\footnote{300} although it offers stronger protection by providing that people who disclose information of substantial public interest learned in the course of government service may not be dismissed from their posts or indeed subjected to any detriment, whereas German law protects people in such positions only from criminal prosecution. Section 97B of Germany's Criminal Code provides that publication of a genuine secret by one who, however erroneously, believed that the information was not entitled to be kept secret, is not a crime if the person acted with the intent to stop an activity that he or she believed to be illegal.\footnote{301}

Principle 16 also finds a degree of support in US law. A US statute protects federal employees who disclose information of government wrongdoing confidentially to members of Congress or to the Inspector General of the relevant agency.\footnote{302} Although statutory protection does not extend to public disclosures, "the Supreme Court has held that the First Amendment protects government employees' speech about matters of public concern in circumstances where the free speech interests outweigh the government's interest in promoting an efficient workforce."\footnote{303} The reasoning of those cases would seem to apply as well to information in the public interest relevant to national security. However, government employees are prohibited from disclosing classified information as a condition of their employment and may be dismissed for doing so.\footnote{304} They may also be subject to criminal penalties if they disclose the names of intelligence agents when done with "reason to believe that such disclosure would impair the US government's foreign intelligence activities."\footnote{305}

More problematically, government employees may be subject to criminal penalties under the general espionage statute\footnote{306} and the theft of government property statute,\footnote{307} which have been used on occasion as surrogates for an Official Secrets Act.\footnote{308} The first government contractor prosecuted under the general espionage law for leaking information of public interest was Daniel

\footnote{299 For an excellent discussion of this strong form of the public's right of access to government information, see Mary M. Cheh, "Judicial Supervision of Executive Secrecy: Rethinking Freedom of Expression for Government Employees and the Public Right of Access to Government Information," 69 Cornell L. Rev. 690, 720-34 (1984) (volume dedicated to a symposium on National Security and Civil Liberties).
\footnote{300} See Ulrich Karpen, "Germany," \textit{infra} this volume, at Sec. III.B.
\footnote{301} See \textit{id.}, esp. text accompanying note 28.
\footnote{302} See 5 U.S.C. § 2302.
\footnote{304} Hoffman and Martin, \textit{infra} this volume, at Sec. II.B., re civil and administrative penalties for public disclosure of information by government employees.
\footnote{305} See \textit{id.} § 14.3.
\footnote{308} See Hoffman & Martin, \textit{infra} this volume, at Sec. III.C, re criminal penalties.}
Ellsberg, but the prosecution was dismissed for government misconduct. The first government servant convicted under the law was a Navy employee, prosecuted by President Reagan's Justice Department for leaking a classified photograph of a Russian aircraft carrier to *Jane's Defence Weekly*. The employee was convicted despite demonstrating that publication of the photograph did not reveal any secret information and did not harm the national security of the United States. The government has since successfully prosecuted a handful of government officials.

E. Information in the Public Domain: *Johannesburg Principle 17*

Principle 17 states that, once information has been published, its further re-publication cannot be prevented, even if the initial disclosure was unlawful. The Principle is based on the notion that the government looses whatever interest it had in keeping information secret once the information has been made available to some portion of the public.

The Principle reflects the holding of the European Court in the *Spycatcher* cases. These twin cases followed publication by a number of U.K. newspapers of extracts from *Spycatcher*, the unauthorized memoirs of a retired member of the British security service. The Crown obtained permanent injunctions restraining publication of any further Spycatcher material, which remained in force even after the book had been published in the United States. The Court concluded that restraint prior to publication in the U.S. lay within the Government’s margin of appreciation regarding measures necessary to protect national security and its role as a litigant in pending litigation. However, following U.S. publication, the Government’s interest in promoting “the efficiency and reputation of the Security Service” was overridden by the public’s right to know. The Court applied similar reasoning in ruling that the Dutch Government had exceeded its margin of appreciation when it enjoined further publication of a 6-year old confidential report of the internal security service. Several national courts have reached similar results.

F. Protection of Journalists' Sources: *Johannesburg Principle 18*

Principle 18 states that protection of national security may not be used as a reason to compel a journalist to reveal a confidential source. This Principle reflects the law of Austria and France, and the reasoning of Norway's Supreme Court. Courts of several other countries, as well as the European Court of Human Rights, have recognized the crucial need for the press to be able to

309 See Russo v. Byrne, 409 U.S. 1219 (1972) (granting a stay against the prosecution).
311 See Hoffman & Martin, infra this volume, at Sec. III.C, re criminal penalties.
313 Id. at paras. 66-70 (Observer and Guardian), and paras. 52-56 (The Sunday Times (No.2)).
315 See, e.g., Lord Advocate v. The Scotsman Publications and Ors [House of Lords] AC (1990) 812 (the “Scottish *Spycatcher* case”).
protect the confidentiality of its sources if it is to fulfill effectively its public function as a watchdog of government.

In Austria and France, a journalist may not be compelled to reveal the source of information, even concerning matters relevant to national or state security, if the information was received in confidence in the course of his or her journalistic activity.316

The Supreme Court of Norway established the principle that "the more important the interest violated, the more important it will be to protect the sources."317 A Parliamentary oversight body sought to compel the authors of a book to reveal their source of information about connections between the Norwegian Labour party and the intelligence agency. In rejecting the petition of the Parliamentary body, the Supreme Court reasoned: "It must be assumed that a broad protection of sources will lead to more revelations of hidden matters than if the protection is limited or not given at all."318

In Germany, Sweden, and the majority of states of the United States, a journalist may not be compelled to reveal the source of information concerning matters relevant to national or state security unless publication of the information actually harmed a legitimate security interest, the party seeking the information convincingly establishes that the identity of the source is necessary to prove a central claim in a court proceeding, and there is no alternative way to obtain the necessary information.319 This right to refuse in turn provides considerable protection for public sector employees who "blow the whistle" on governmental misconduct.

Germany's Federal Constitutional Court (FCC) reasoned that the Basic Law's constitutional guarantee of press freedom permits journalists to protect confidential sources if the interest in promoting press freedom is found to outweigh the interest in the enforcement of justice.320 The constitutional right to protect confidential sources is intended primarily to protect the role of a free press in controlling government abuse.321

The Sapporo District Court of Japan, sustained by the appellate courts, held that journalists may refuse to divulge, even to a court, information about a source as "an occupational secret" unless the information is necessary for a fair trial.322 The High Court of Lagos State

316 See Berka, supra note 245, § 19; Roger Errera, “Press Law in France,” in Press Law and Practice, supra note 245, at 57 § 19 (citing Article 109(2), added to the French Code of Criminal Procedure by the Act of 4 Jan. 1993, which reads: "Any journalist who appears as a witness concerning information gathered by him in the course of his journalistic activity is free not to disclose its source").
318 Id.
319 See Karpen, supra note 260, at 92-93; Axberger, supra note 250, at 164; Strossen, supra note 303, at 212-13.
321 See id. In this case, the FCC rejected the journalist's effort to protect the confidentiality of the source of an advertisement because the matter did not touch public affairs at all.
(Nigeria) ruled that protection of the journalistic privilege must be all the stronger where the published information concerns a matter of general public interest.\(^{323}\)

The European Court concluded that the UK authorities violated the free expression rights of a journalist when they ordered him to reveal the confidential source of a story which, if published, could have damaged a private company's business.\(^{324}\) The Court reasoned:

Protection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and the professional codes of conduct in a number of Contracting States and is affirmed in several international instruments on journalistic freedoms . . . Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result, the vital watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with . . . the Convention unless it is justified by an overriding requirement in the public interest.\(^{325}\)

The Court concluded that the UK had not established such an overriding interest, particularly given that the company had already obtained an injunction against publication of the damaging information.\(^{326}\)

F. Access to Restricted Areas: *Johannesburg Principle 19*

Principle 19 states that any restrictions on the free flow of information should not be of such a nature as to thwart the purposes of humanitarian law. In particular, governments may not prevent journalists from entering into conflict zones, except where their presence would pose a clear risk to the safety of others. Governments may not harass journalists found within or seeking entry into conflict zones, such as by confiscating their equipment, or interrogating or detaining them. This Principle finds solid support in the four Geneva Conventions of 1949, as well as in statements of UN rapporteurs and the UN Secretary General.

\(^{323}\) See Oyegbemi v. Attorney-General of the Federation and Others [1982] FNLR (Federation of Nigeria Law Reports) 192. The Court stated:

> When a newspaper has investigated a matter of general public interest or concern (such as it ought to make known to the public), the publication of an article upon the matter is so much in the public interest that the newspaper ought not to be restrained or "interfered" with by any person or authority, solely on the ground that the information in the article originated in confidence. . . . Nor should a newspaper be compelled (except in grave and exceptional circumstances . . .) to disclose the source of the information.


\(^{325}\) Id. ¶ 39.

\(^{326}\) See id. ¶ 46.
Pursuant to Article 1 of the four Geneva Conventions, the High Contracting Parties undertake not merely to respect those conventions but also to ensure that all other High Contracting Parties respect them in all circumstances. These obligations include, for example, respect for various measures to protect the civilian populations and in particular the prohibition of indiscriminate attacks. Clearly, each Contracting Party needs information if it is to satisfy itself that other parties are indeed respecting the Conventions. Moreover, as the two UN Rapporteurs on Freedom of Expression recognized, informed public opinion is one of the most effective means of preventing violations of international norms. For these reasons, any restrictions that affect the free flow of information during wartime cannot be such as to block efforts to monitor compliance with, or publicize violations of, humanitarian law obligations by the High Contracting Parties.

Once a military operation is over, restrictions on freedom of expression and information about the operation may be maintained only if necessary to protect the security of troops and civilians. There can be no justification for a government authority to deny journalists access to, for example, prisoner-of-war camps, shelters and hospitals when there no longer is any risk to their lives. Concern not to disclose strategic information to the enemy is justifiable, but can only be temporary.

In 1994, when UN Secretary-General Kofi A. Annan was Under-Secretary General for Peacekeeping Operations, he offered a compelling rationale for his policy of allowing journalists access to areas of recent conflict:

This new policy recognizes the need for assisting journalists in obtaining access to areas of conflict. Peacekeeping operations in particular depend for their support on widespread public awareness of the conflicts they have been deployed to

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328. See id. ¶ 114.


330. See id. ¶ 134.

331. See id. ¶ 131.

332. See id. ¶ 127.

333. See id. ¶ 128.
resolve, and we are committed to doing everything we can to facilitate the work of the media to this end.\textsuperscript{334}

In several armed conflict situations, coverage by journalists has helped generate support for peacekeeping operations or other forms of humanitarian intervention and, indeed, journalists have uncovered or drawn attention to mass violations of human rights and humanitarian law.\textsuperscript{335} Conversely, where journalists have been excluded, either by government orders or by random violence, reporting has dropped and international scrutiny, even of massive violations, has waned.\textsuperscript{336}

V. Rule of Law and Other Matters

Part IV of the Johannesburg Principles addresses various procedural protections for freedom of expression. These become particularly important in the context of prosecutions for security-related offenses owing to the greater likelihood in such cases of government interference with judicial independence, and the increased powers of governments to withhold "sensitive" information from the courts thus further reducing their ability to assess independently the merits of the government's claims.


\textsuperscript{335} Roy Gutman of Newsday was the first journalist, on 3 July 1992, to enter one of the transit camps run by Bosnian Serbs near Banja Luka and report on the atrocities he witnessed. As stated by two chroniclers of the Yugoslav conflict, "his detailed series of interviews blazed a trail that would rouse international public opinion about the nature of Bosnia's war." Laura Silber & Alan Little, \textit{The Death of Yugoslavia: a Companion to the BBC Television Series} 274 (1995). Penny Marshall of ITN and Ed Vulliamy of the Guardian were the first journalists to enter the infamous Omarska camp. The international community had information about the camps beginning in May but took no action until the media captured the horrors on film. The chain of events "reveal[ed] a recurring characteristic of the foreign policy-making of the main western powers with regard to Bosnia: that it was driven substantially by television coverage." \textit{Id.} at 278.

\textsuperscript{336} According to the Committee to Protect Journalists, the murders in 1993 by an angry mob of four reporters and photographers working for Western media in Somalia "brought to a halt the on-going coverage of the conflict." Committee to Protect Journalists, \textit{Attacks on the Press in 1993}, at 36 (1994). In Algeria, a campaign of terror against journalists launched by Islamic extremists in May 1993 (including the murders of at least fifty-two journalists through the end of 1995), has been effective in minimizing international attention to the widespread human rights abuses committed there. \textit{See} Committee to Protect Journalists, \textit{supra} note 38, at 9. "The 'blackout,' as many editors call it, has eclipsed the profile of a war that is victimizing an increasing number of innocent civilians," Youssef Ibrahim, "Algeria is Too Risky for Press: Civil War's Extent and Horror Little Known," \textit{Intl Herald Trib.}, 29 Dec. 1994. Laurent Kabila, the new president of the Democratic Republic of the Congo, has been able to conceal evidence of massacres in eastern Congo by refusing access to journalists as well as UN investigators. Farhan Haq, "Congo: Human Rights Groups Say Kinshasa Hiding Massacre Evidence," \textit{Inter Press Service}, 9 Oct. 1997.
A court that is reluctant to second-guess the government's asserted need to impose restrictions in the name of national security may, nevertheless, be willing to insist that it must at least comply with internationally recognized due process requirements.

The first three parts of the Principles discuss restrictions on freedom of expression and access to information imposed in the interest of national security, and thus define the term narrowly. Part IV, in contrast, addresses procedural protections against abuse of the concept. Thus, its scope is wider, encompassing prosecutions for all "security-related crimes" defined by Principle 20 to comprise acts or omissions "which the government claims must be punished in order to protect national security or a closely related interest." This wider definition ensures that targets of government repression do not lose the protections of this Part merely because a government's prosecution does not in fact implicate legitimate national security concerns.

A. General Rule of Law Protections: Johannesburg Principles 20-22

Principle 20 states the general principle that persons accused of security-related crimes involving expression or information are entitled to all of the rule of law protections that are part of international law, and lists the most important ones. In particular, it emphasizes that a person convicted of a security-related crime has the right to have the conviction reviewed by a court or tribunal which is independent of the lower tribunal as well as the government and which is authorized to review decisions on law for error and decisions on facts for substantial evidence. This standard of review is more demanding than that required by international or regional law; it was adopted by the Johannesburg drafters for the same reasons they endorsed, in Principle 14, an exacting standard of review of denials by the government of requests for information.

Principle 21 emphasizes that persons accused of security-related crimes are entitled to apply for all available remedies, including habeas corpus or amparo, even during public emergencies.

Principle 22 sets forth particular safeguards for the independence of the judiciary, in recognition of the fact that no cases place greater pressure on judicial independence than those that raise claims of national or state security. Principle 22 amplifies that where there has been a pattern of governmental interference with the independence of the judiciary, the trial of persons accused of security crimes by judges without security of tenure constitutes a prima facie violation of the right to be tried by an independent tribunal. The Principle notes that trial by jury can be

337 For example, Article 14(5) of the ICCPR states that "[e]veryone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law." It does not require that the higher tribunal be authorised to review decisions on law for error and decisions on facts for substantial evidence.

338 The European Court has noted several factors to be considered in assessing a court's independence, including the "manner of appointment of its members and the duration of their term of office, . . . the existence of guarantees against outside pressures . . . and the question whether a body presents an appearance of independence." Campbell & Fell v. United Kingdom, 7 EHRR 165 (1984), Series A, No. 80, ¶ 78. The European Court has also said that the irremovability of judges by the executive during their term of office must in general be considered as a corollary of their independence although the absence of
an effective means of ensuring a measure of independence. It further insists that civilians may not be tried by military courts. This point reflects the views of the UN Human Rights Committee, which has concluded that, under the International Covenant, military courts may only try cases concerning offenses committed by members of the armed forces in the course of their duties. The Principle also reflects the jurisprudence of the European Court which has stated that "the irremovability of judges by the executive during their term of office must in general be considered as a corollary of their independence." The court added, however, that "the absence of a formal recognition of this irremovability in the law does not in itself imply lack of independence provided that it is recognised in fact and the other necessary guarantees are present." Other factors relevant to assessing a court's independence include "the manner of appointment of its members and the duration of their term of office, . . . the existence of guarantees against outside pressures . . . and . . . whether a body presents an appearance of independence."

Although Principles 20-22, and indeed also 23 and 24, apply directly only to prosecutions for security-related crimes, their rationales apply equally to deportation proceedings. The consequences of a deportation decision are often as onerous as criminal punishment, entailing separation from family and risk of persecution upon return, and yet the government's discretion in many countries is virtually unchecked. The Johannesburg drafters did not expressly extend Principles 20-24 to deportation primarily owing to a shortage of time and the difficulty of crafting an appropriate standard given the broad discretion international law affords governments concerning admission and exclusion of aliens.

Nevertheless, various precedents suggest the development of greater protections for aliens facing deportation actions, even when they are alleged to be a risk to the host country's national security. For instance, in 1987, the UN Human Rights Committee concluded that the government of Madagascar violated the Covenant when it expelled an alien on national security grounds without demonstrating that there were compelling reasons for doing so. The Canadian Immigration Act 1976, as amended by the Immigration Act 1988, authorizes judges in deportation cases to hold in camera hearings of all the evidence, at which the applicant is

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339 See Laurence Lustgarten, “United Kingdom,” infra this volume.
340 See id.
343 Id.
344 Id. ¶ 78.
provided with a statement summarizing, as far as possible, the case against him or her and has the right to be represented and to call evidence.\footnote{See Chahal v. United Kingdom, Eur. Ct. H.R., Judgment of 15 Nov. 1996, App. No. 70/1995/576/662, ¶ 144 (summarizing Canadian law).} The confidentiality of security material is protected by the requirement that such evidence may be examined only in the absence of both the applicant and his or her representative, who are instead represented by a security-cleared counsel instructed by the court. The applicant is entitled to a summary of the evidence obtained by this procedure.\footnote{See id.}

The European Commission on Human Rights, in a 1995 report, gave its unanimous opinion that the power of review of deportation decisions on national security grounds by UK courts "was too restrictive to satisfy the requirements of . . . [the European Convention]."\footnote{348 The Chahal Family v. the United Kingdom, Report adopted on 27 June 1995, App. No. 22414/93, ¶ 152. The Commission described the process of review by UK courts as follows: \[W\]here national security considerations are invoked as a ground for the deportation decision, the powers of review of domestic courts are limited to determining, first, whether the decision of the Home Secretary that the deportation was required for reasons of national security was irrational, perverse or based on a misdirection and, secondly, whether there was sufficient evidence that the Home Secretary balanced the gravity of the national security risk against all other circumstances, including the likely risk of persecution if the person were deported.} First, the Home Secretary was not required to present to the court any information concerning the evidence supporting his view of the perceived threat to national security posed by the person subject to deportation. Second, the court was not empowered to carry out its own assessment of the respective risks. The European Court agreed with the Commission that the UK had failed to provide an adequate remedy, but on different grounds, and thus did not reach the national security issue.\footnote{See id. ¶¶ 150-51.}

B. Prior Censorship: Johannesburg Principle 23

Principle 23 reflects the near-absolute ban on prior censorship set forth in the American Convention.\footnote{See Chahal v. United Kingdom, Eur. Ct. H.R., Judgment of 15 Nov. 1996, App. No. 70/1995/576/662, ¶ 151. The Court concluded that the United Kingdom's judicial review was inadequate because it failed to require independent scrutiny of the claim that there existed substantial grounds for fearing that the applicant would face ill-treatment if deported to his home country. See id. ¶ 160.} Although the International Covenant does not expressly preclude prior censorship, it requires protection of national security in certain cases.\footnote{See American Convention, supra note 18, art. 13(2). Article 13(2) reads, in part: "The exercise of the right [to freedom of thought and expression] . . . shall not be subject to prior censorship but shall be subject to subsequent imposition of liability . . . expressly established by law to the extent necessary in order to ensure [inter alia.] . . . the protection of national security." See also Krsticevic, et al., “The Inter-American System,” infra this volume, at Sec. II.B.1, esp. notes 41-42.}
censorship, the *travaux préparatoires* indicate that at least a majority of its drafters shared the understanding that it did. As summarized by Professor Nowak:

Whereas the Human Rights Committee generally took the view that none of the grounds for interference provided for in Art. 19(3) authorized pre-censorship, several delegates in the 3d Committee of the General Assembly were of the opinion that in exceptional cases, such as subversive propaganda by foreign newspapers, pre-censorship should be permitted. Nevertheless, 11 Latin American States moved that every form of pre-censorship be absolutely prohibited. They then withdrew this motion subject to the express understanding that the text drafted by the Human Rights Committee already precluded prior censorship.

Concluding the debate, drafters emphasized that "appropriate forms for restricting freedom of expression were . . . limited to subsequent criminal or civil prosecution." The UN Sub-Commission Rapporteurs on Freedom of Expression have similarly condemned "all forms of prior censorship," noting:

The principle of legality requires the elimination of all informal sanctions and all forms of prior censorship, which in practice are usually informal. . . . Similarly, "preventive sanctions" (censorship, banning and seizure) raise serious questions of legality, especially having regard to the inherent imprecision and arbitrariness in the definition of the material element and element of intent and of the injury likely to be caused. The inherent imprecision and arbitrariness of preventive sanctions also raise the question of the legitimacy of laws providing for such sanctions.

While the laws of many countries, and the constitutions of some, prohibit prior restraints on publication of printed matter, most courts interpret the prohibition to apply only to administrative censorship. The two outstanding examples of countries that have, in practice, eschewed prior restraints are Sweden and the United States. The Swedish Constitution admits no exceptions whatsoever to the ban on pre-publication censorship, and no form of prior censorship has been upheld in recent memory.

The US Supreme Court has stated that prior restraints are presumptively unconstitutional; the presumption may be overcome only upon a showing that: (1) the publication would pose a clear threat of immediate and irreparable damage to a "near sacred

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353 Id. (citations omitted).

354 Id.

355 Türk & Joinet, *supra* note 30, ¶ 73.

356 See generally Coliver, *supra* note 268, at 280.

357 Id. A case from the early 1970s illustrates the absolute nature of the prohibition. A member of the Investigation Bureau (IB), a secret part of the security services, disclosed information about the IB to two journalists who published a series of articles in a magazine and later in a book that was translated into English. The IB agent and the two journalists were convicted of espionage and sentenced to prison for terms of up to one year. No attempt was ever made to restrain publication of the articles or the book, nor could any such attempt have succeeded. *Id.* at 280-81.
right”; (2) the prior restraint would be effective; and (3) no other measures, less restrictive of freedom of expression, would be effective.\(^{358}\) The Court has amplified that a prior restraint could be tolerated on national security grounds only concerning an exceedingly narrow range of publications and only under exceptional circumstances, such as "when a nation is at war," information that amounts to "actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops."\(^{359}\) The Court has never upheld a restraint on national security grounds.

The Johannesburg Principles recognize the legitimacy of restraints on publication based on national security grounds only during a declared state of emergency and only under the circumstances stated in Principle 3.\(^{360}\) The drafters adopted this approach for the above reasons and also because of their assessment that the dangers posed by prior restraint far outweigh the risk that information substantially harmful to national security might be published. The drafters noted the frequency with which governments suppress information of no legitimate security consequence on national security grounds, compared to the smattering of cases where national security could reasonably be said to have been harmed, and in no case seriously.

It should be noted that the European Court has taken a more conservative approach. It has made clear that publications may be seized and withdrawn from circulation upon an ex parte judicial order, provided that (a) the information has not already been published and (b) the publisher has an opportunity to have the order promptly reviewed in a judicial proceeding at which he or she is represented.\(^{361}\) In its judgments in the two Spycatcher cases, the Court reiterated that the European Convention does not "prohibit the imposition of prior restraints on publication, as such."\(^{362}\) It continued:

On the other hand, the dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court. This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest.\(^{363}\)


\(^{359}\) Near v. Minnesota, 283 U.S. 697, 716 (1931).

\(^{360}\) Principle 3 states that for restrictions justified by a state of emergency to be legitimate, the emergency must threaten the life of the country and must be officially and lawfully proclaimed, and the restrictions must be strictly required by the exigencies of the situation and last only for so long as necessary.


\(^{363}\) Id.
The Court upheld the restraint on publication of *Spycatcher*, the memoirs of a retired official of the British Security Services, until its publication in the United States. At that point, the balance of interests shifted; the injunction became ineffective and thus could no longer be justified.364

Similarly, in a 1995 judgment, the Court ruled that an order to withdraw from circulation copies of a magazine that reprinted a classified report of the Dutch internal security services violated the European Convention because a few thousand copies had already been distributed, the report was six years old, and the head of the security service had admitted that the various items of information taken separately were no longer state secrets.365

C. Disproportionate Penalties: *Johannesburg Principle 24*

Principle 24 amplifies Principle 1(d)'s requirement that any restriction on freedom of expression or information on the ground of national security must be "necessary in a democratic society," and thus proportionate. The Johannesburg drafters added Principle 24 to drive home the points that (a) civil fines and injunctions must be proportionate no less than sentences of imprisonment, and (b) any sanction must be proportionate to the *actual* crime committed and may not, for example, be based simply on the severity of the crime charged.

The drafters considered including an express prohibition of imprisonment for speech-related crimes short of incitement to violence, based on authorities discussed in support of Principle 6, but decided not to do so on the grounds that heavy fines may be even more onerous than light prison sentences and that the requirement of proportionality to the actual crime sufficed. Nonetheless, it is worth noting the strong trend in international and comparative law towards shielding speech offenses from sanctions of imprisonment except where violence is threatened. The UN Sub-Commission Rapporteurs on Freedom of Expression concluded in their 1992 final report that, "In principle [deprivation of liberty] should not be provided for as a penalty save in wholly exceptional cases in which there is a clear and present danger of violence."366 They reasoned that (a) "deprivation of liberty is clearly a disproportionate sanction" for most speech offenses and (b) reports of UN human rights bodies show that imprisonment for free expression "crimes" places the detained person at high risk of torture or other cruel, inhuman or degrading treatment.367 For the latter reason, only in a situation where freedom of expression can be exercised without risk is it "possible to discuss the question of the proportionality of sanctions against persons who, in the course of expressing their opinions, break the laws protecting [interests recognized to be legitimate under international law]."368

366 Türk & Joinet, supra note 30, ¶ 83.
367 See id. The Rapporteurs note that, of the cases examined by the Human Rights Committee between its second through sixteenth sessions, four out of nine cases of alleged torture related to exercise of the right to freedom of expression. See id. ¶ 81. In addition, the Working Group on Arbitrary Detention has estimated that some 90 percent of the cases of arbitrary detention involved freedom of expression. See id.
368 Id.
The UN Human Rights Committee has frequently criticized countries for retaining laws that authorize imprisonment for speech crimes. For instance, the Committee indicated that Iceland's libel law was inconsistent with Article 19 of the International Covenant because it permitted "[t]he possibility of a sentence of up to one year's imprisonment for libel."\(^{369}\) The Committee similarly criticized Norway for maintaining "certain obsolete laws . . ., in particular with regard to penal sanctions against defamation."\(^{370}\)

VI. Looking Forward: Developing Widespread Acceptance

Abid Hussain, the UN Special Rapporteur on Freedom of Opinion and Expression, attached the Johannesburg Principles to his report to the UN Commission on Human Rights for its March/April 1996 session and recommended that the Commission endorse them.\(^ {371}\) As a result, the Principles have been disseminated widely. Mr. Param Cumaraswamy, the UN Commission's Special Rapporteur on the Independence of Judges and Lawyers "welcomed" the Principles in his 1996 Report to the Commission and stated that he would "from time to time refer to these standards to the extent that they are applicable to his mandate."\(^ {372}\)

A member of the UN Human Rights Committee said that the Principles would be of great value in interpreting standards concerning freedom of expression and movement under the Covenant on Civil and Political Rights. Article 19 has sent copies of the Principles to all Committee members, as well as to all judges of the European Court of Human Rights. Two experts who frequently work with the Inter-American Commission and Court of Human Rights said that they would bring the Principles to the attention of the Inter-American bodies as appropriate. The Principles have been translated by human rights organizations into several languages, including Arabic, Croatian, Indonesian, Japanese, Korean, Romanian, Serbian, Sinhalese and Slovakian.\(^ {373}\)

By these activities, and with the publication of this Commentary, it is hoped that the Principles will win increasing acceptance as a guide to the interpretation of the provisions of the

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\(^{370}\) Id. ¶ 91.


\(^{373}\) Translations may be obtained from Article 19 (e-mail: article19@gn.apc.org). The Japanese translation by Mamoru Jino is reprinted along with an introduction by Prof. L.W. Beer in Horitsu Jiho (The Law Review), Vol. 68, No. 12 (Nov. 1996, Tokyo), at 73.
International Covenant and regional human rights treaties concerning national security, freedom of expression and access to information.