



National Security

“Freedom of expression” and “national security” are very often seen as principles or interests that are inevitably opposed to each other. “National security” is one of the most common justifications offered by states for limiting freedom of expression by journalists and media organs. Unlike the ICCPR, the European Convention, and the American Convention, the African Charter does not contain this explicit limitation within the protection of freedom of expression.

Yet national security remains a genuine public good – and without it, media freedom would be scarcely possible. On the other hand, governments are seldom inclined to recognise that media freedom may actually be a means to ensure better national security by exposing abuses in the security sector. Examples might include the Pentagon Papers case in the United States, the Wikileaks exposure of abuses by US troops in Iraq and Afghanistan, as well as Edward Snowden’s revelations of mass electronic surveillance, all of which are instances where media revelations of abuse in the national security sector may lead to reforms and, ultimately, greater security.

National security is one of the most problematic areas of interference with media freedom. One particular difficulty is the tendency on the part of many governments to assume that it is legitimate to curb *all* public discussion of national security issues. Yet, according to international standards, expression may only be lawfully restricted if it *threatens actual damage* to national security. There may be many instances where reporting of national security issues – for example exposure of corruption or indiscipline within security institutions – may actually help to promote national security. Unfortunately, governments seldom tend to understand the issue that way.

In 1995, a group of international experts drew up the Johannesburg Principles on National Security, Freedom of Expression and Access to Information and National Security (Johannesburg Principles).²¹⁵ Although not binding law, these principles are frequently cited (notably by the UN Special Rapporteur on the promotion and protection of freedom of opinion and expression) as a progressive summary of standards in this area. The Johannesburg Principles address the circumstances in which the right to freedom of expression might legitimately be limited on national security grounds, at the same time as underlining the importance of the media, and freedom of expression and access to information, in ensuring accountability in the realm of national security.

²¹⁵ The Johannesburg Principles on National Security, Freedom of Expression and Access to Information (1996).

Definitions of National Security

The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (Siracusa Principles) define a legitimate national security interest as one that aims “to protect the existence of the nation or its territorial integrity or political independence against force or threat of force.”²¹⁶ Subsequent articles indicate that a national security limitation “cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order.”²¹⁷

The UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has repeatedly limited the scope of a national security limitation in similar terms. For example:

“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.”²¹⁸

In a similar vein, the Johannesburg Principles define a national security interest as being:

“to protect a country’s existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government.”²¹⁹

(Note that the Johannesburg Principles prefer the word “country” to “nation,” on the grounds that the latter is often invoked to defend the interests of a majority ideology or ethnic group.)

Like the Siracusa Principles, the Johannesburg Principles also offer a non-exhaustive list of reasons that cannot be used in invoking a national security interest to restrict freedom of expression, for example:

“to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest.”²²⁰

Interestingly, the Kenyan Constitution provides a definition of “national security”:

“National security is the protection against internal and external threats to Kenya’s territorial integrity and sovereignty, its people, their rights, freedoms, property, peace, stability and prosperity, and other national interests.”²²¹

National security interests must be carefully balanced so as not to unjustifiably limit rights. In a recent High Court decision in Kenya, the Court confirmed that “protecting

²¹⁶ Principle 29, Siracusa Principles.

²¹⁷ Principle 30, Siracusa Principles.

²¹⁸ Report of the Special Rapporteur on the nature and scope of the right to freedom of opinion and expression, and restrictions and limitations to the right to freedom of expression CN.4/1995/32 (1995).

²¹⁹ Principle 2(a), Johannesburg Principles.

²²⁰ Principle 2(b), Johannesburg Principles.

²²¹ Article 238(1) of the Kenya Constitution (2010).

national security carries with it the obligation on the State not to derogate from the rights and fundamental freedoms guaranteed in the Constitution.”²²²

The Court of Appeal in Kenya, in an appeal to an interlocutory application in the litigation mentioned above, reiterated the need to ensure that national security is not used in such a way that fundamental human rights are disregarded:

“However, national security is subject to the authority of the Constitution and Parliament and must be pursued in compliance with the law and with the utmost respect for the rule of law, democracy, human rights and fundamental freedoms. Article 238(2) of the Constitution. That implies that in enacting or amending any law that touches on national security (or any other law for that matter), Parliament (i.e. the National Assembly and the Senate) must ensure that there is no violation of the people’s rights and freedoms that are spelt out in the Bill of Rights and which are, moreover, part and parcel of what national security entails as per the Constitutional definition.”²²³

The Court eloquently explained the fundamental nature of human rights, and that they are not to be regarded as transitory:

“It must always be borne in mind that the rights and fundamental freedoms in the Bill of Rights are not granted by the State and therefore the State and/or any of its organs cannot purport to make any law or policy that deliberately or otherwise takes away any of them or limits their enjoyment, except as permitted by the Constitution. They are not low-value optional extras to be easily trumped or shunted aside at the altar of interests perceived to be of greater moment in moments such as this.”²²⁴

Terrorism

In the past decade or so – since the attacks in the United States on 11 September 2001 – much of the focus of security legislation has been on countering terrorism. In part this reflects a genuine change in understanding the nature of the threat to national security – seen also in the notion that terrorism or terrorist organisations are the object of a “war”. More generally, it serves as a rhetorical device whereby dissent – including critical media coverage – may be characterised as giving succour to terrorists.

The UN Security Council has required member states to take a number of steps to combat terrorism. One measure of particular relevance to the media is contained in Resolution 1624 of 2005, which was the first international instrument to address the issue of incitement to terrorism. The preamble to Resolution 1624 condemns “incitement to terrorist acts” and repudiates “attempts at the justification or glorification (*apologie*) of terrorist acts that may incite further terrorist acts.”

²²² Kenya High Court: *Coalition for Reform and Democracy and Others v Republic of Kenya and Attorney General* Petition 628 of 2014 (2015) at para 1.

²²³ Kenya Court of Appeal: *Attorney General v Coalition for Reform and Democracy* Petition 628 of 2014 (2015), 31.

²²⁴ *Id.*, 31-32.

The operative section of Resolution 1624:

1. *Calls upon* all States to adopt such measures as may be necessary and appropriate and in accordance with their obligations under international law to:
 - (a) Prohibit by law incitement to commit a terrorist act or acts;
 - (b) Prevent such conduct;
 - (c) Deny safe haven to any persons with respect to whom there is credible and relevant information giving serious reasons for considering that they have been guilty of such conduct;

This may at first sight be seen as overly restrictive of media expression. However, in the event that Resolution 1624 is used as a rationale for censoring media, a number of points should be borne in mind:

- Resolution 1624, unlike other counter-terrorism resolutions of the Security Council, is not binding on member states. It is not issued under the Council's powers in Chapter VII of the UN Charter (preserving peace and security).
- Although the preamble mentions "glorification" or apology for terrorism, this is explicitly when such glorification may have the effect of inciting terrorist acts.
- The preamble also makes explicit reference to the guarantee of the right to freedom of expression in Article 19 of the ICCPR and the limited circumstances and conditions under which this right may be restricted. In other words, Resolution 1624 confers no additional basis for curbing free expression, beyond the criteria and process already set out in international law.

One serious problem with legal restrictions on glorification (or even incitement) of terrorism is the lack of any commonly accepted definition of terrorism in international law. Early counter-terrorism treaties focused on criminalisation of particular acts, such as hijacking aircraft, without using the term terrorism. Later treaties, such as that addressing financing of terrorism do offer a definition, although this has no binding character beyond the treaty itself.

Many states, as well as entities such as the European Union, additionally define terrorism with reference to certain organisations "listed" as terrorist. This may hold particular dangers for the media in reporting the opinions and activities of such organisations. In Swaziland, the People's United Democratic Movement (PUDEMO), a group advocating for democratic change in the kingdom, has been declared a terrorist organisation in terms of the Suppression of Terrorism Act, 2008. Under that legislation, any support for a proscribed organisation is an offence in itself, and carries heavy jail terms.

The UN Special Rapporteur on protecting human rights while countering terrorism has offered a definition of terrorism, based upon best practices worldwide, which focuses on the act of terror rather than the perpetrator:

“Terrorism means an action or attempted action where:

1. The action:

- (a) Constituted the intentional taking of hostages; or
- (b) Is intended to cause death or serious bodily injury to one or more members of the general population or segments of it; or
- (c) Involved lethal or serious physical violence against one or more members of the general population or segments of it; and

2. The action is done or attempted with the intention of:

- (a) Provoking a state of terror in the general public or a segment of it; or
- (b) Compelling a Government or international organization to do or abstain from doing something; and

3. The action corresponds to:

- (a) The definition of a serious offence in national law, enacted for the purpose of complying with international conventions and protocols relating to terrorism or with resolutions of the Security Council relating to terrorism; or
- (b) All elements of a serious crime defined by national law.”²²⁵

The advantage of the Special Rapporteur’s definition is that it clearly sets out both the subjective and objective elements of the crime: the coercive political objective and the serious crime. This excludes the possibility of labelling political opinions alone as terrorist.

Sometimes expression on its own is deemed a threat to national security – and these situations are addressed under incitement. The Johannesburg Principles discuss the circumstances in which expression may be regarded as a threat to national security:

“Expression may be punished as a threat to national security only if a government can demonstrate that:

- (a) the expression is intended to incite imminent violence;
- (b) it is likely to incite such violence;
- (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.”²²⁶

²²⁵ Report of the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism A/HRC/15/51 (2010).

²²⁶ Principle 6, Johannesburg Principles.

Example

The United Kingdom case of *DPP v Chambers*²²⁷ is an interesting case study. Here, a man due to fly out of Robin Hood Airport in Yorkshire at a time when flights were being cancelled due to bad weather tweeted “Robin Hood airport is closed. You’ve got a week and a bit to get your shit together otherwise I’m blowing the airport sky high!”. He was charged under the Communications Act of 2003, and fined £385. In an appeal, the man was acquitted, and the High Court, Queen’s Bench Division made some interesting observations on the nature of a terrorist threat.

“[T]he more one reflects on it, the clearer it becomes that this message did not represent a terrorist threat, or indeed any other form of threat. It was posted on ‘Twitter’ for widespread reading, a conversation piece for the appellant’s followers, drawing attention to himself and his predicament. Much more significantly, although it purports to address ‘you’, meaning those responsible for the airport, it was not sent to anyone at the airport or anyone responsible for airport security, or indeed any form of public security. The grievance addressed by the message is that the airport is closed when the writer wants it to be open. The language and punctuation are inconsistent with the writer intending it to be or to be taken as a serious warning. Moreover... it is unusual for a threat of a terrorist nature to invite the person making it to [be readily] identified, as this message did. Finally, although we are accustomed to very brief messages by terrorists to indicate that a bomb or explosive device has been put in place and will detonate shortly, it is difficult to [imagine] a serious threat in which warning of it is given to a large number of tweet ‘followers’ in ample time for the threat to be reported and extinguished.”²²⁸

Necessary in a Democratic Society

Most cases involving national security restrictions tend to be decided on the necessity leg of the three-part test. In a 2015 Federal District Court decision from the United States, Judge James Boasberg warned that “[i]ncantation of the magic words ‘national security’ without further substantiation is simply not enough to justify significant deprivations of liberty.”²²⁹ He accepted that the Executive branch of government has the expertise to make policy decisions based on national security, but stated that “when its chosen vehicle demands significant deprivation of liberty, it cannot be justified by mere lip service.”²³⁰

In the Human Rights Committee case of *Mukong v Cameroon*,²³¹ the Committee ruled that laws which had been used against Albert Mukong, a journalist and author who had spoken publicly criticising the President and Government, and criminalised statements “intoxicat[ing] national or international public opinion,” were not necessary. The government justified the arrests to the Committee on national security grounds, but the Committee held that laws of this breadth “muzzled advocacy of multi-party democracy,

²²⁷ United Kingdom High Court: *Chambers v DPP* [2012] EWHC 2157.

²²⁸ *Id.*

²²⁹ United States Federal District Court: *R. I. L-R v Johnson* Civil Action No 15-11 (JEB), 37.

²³⁰ *Id.*, 38.

²³¹ Human Rights Committee: *Womah Mukong v Cameroon* Communication No 458/1991 (1994).

democratic tenets and human rights” and so could not be necessary.

The African Commission has taken similar positions. In *Constitutional Rights Project and Civil Liberties Organisation v Nigeria*,²³² opponents of the annulment of the 1993 presidential elections, including journalists, had been arrested and publications were seized and banned. The Commission said that no situation could justify such a wholesale interference with freedom of expression.

Various bodies have found that the burden is on the government to show that a restriction on freedom of expression was necessary. In *Jong-Kyu v Republic of Korea*,²³³ the Human Rights Committee found against the state for failing to explain the specific threat to national security behind Jong-Kyu’s statement, which was in support of striking workers. It made a similar argument in the case of *Vladimir Petrovich Laptsevich v Belarus*.²³⁴

Courts have also insisted that there must be a close nexus between the restricted expression and an actual damage to national security or public order. Courts will tend to look closely at the exact words used and the context of publication.

The African Commission’s Declaration of Principles of Freedom of Expression in Africa also links the acceptability of limitations to expression with the potential harm that expression may cause. Principle XIII explicitly calls on African states to ensure that criminal restrictions “serve a legitimate interest in a democratic society,”²³⁵ and states that “[f]reedom of expression should not be restricted on public order or national security grounds unless there is a real risk of harm to a legitimate interest and there is a close causal link between the risk of harm and the expression.”²³⁶

Examples

This approach can be seen very clearly in the many national security cases from Turkey before the ECtHR. In *Başkaya and Okçuoğlu v Turkey*,²³⁷ an academic published an article entitled “The past and present of the Kurdish problem.” He was imprisoned for these comments and later required to pay a fine, under a law protecting national security and preventing public disorder.²³⁸ To determine if the restrictions were necessary, the Court looked at the words used and the context. It noted the “sensitivity of the security situation in south-east Turkey” and the government’s fear that the comments would “exacerbate the serious disturbances.” Yet the negative terms of some of the comments did “not amount to incitement to engage in violence, armed resistance, or an uprising” because the comments were published in a “periodical whose circulation was low, thereby significantly reducing their potential impact on ‘national security’, ‘public order’, or ‘territorial integrity.’”

²³² African Commission: *Constitutional Rights Project and Civil Liberties Organisation v Nigeria*, Communication No 102/93 (1998).

²³³ Human Rights Committee: *Jong-Kyu Sohn v Republic of Korea*, Communication No 518/1992 (1995).

²³⁴ Human Rights Committee: *Laptsevich v Belarus* Communication No 780/1997 (2000).

²³⁵ Principle XIII Section 1, Declaration of Principles of Freedom of Expression in Africa.

²³⁶ Principle XII Section 2, Declaration of Principles of Freedom of Expression in Africa.

²³⁷ ECtHR: *Başkaya and Okçuoğlu v Turkey*, Application No 24246/94 (1999).

²³⁸ *Id.*

On the other hand, in another Turkish case, *Zana v Turkey*,²³⁹ a mayor had expressed support for the Kurdistan Workers Party (PKK), engaged in armed struggle against the Turkish authorities. Incidents of terrorism had increased in response to the mayor's comments. The Court held:

“[T]he support given to the PKK ... by the former mayor of Diyarbakir, the most important city in south-east Turkey, in an interview published in a major national daily newspaper, had to be regarded as likely to exacerbate an already explosive situation in that region.”²⁴⁰

In some cases the necessity of restrictions has been denied because material said to damage national security has already been published elsewhere. The most famous example of this was the “*Spycatcher*” case – actually two cases before the ECtHR, *The Observer and Guardian v United Kingdom*²⁴¹ and *The Sunday Times v United Kingdom*.²⁴² The government succeeded in gaining injunctions against the newspapers in question to prevent publication of passages from unauthorised memoirs of a former member of the security service. The injunctions remained in place even after the book had been published in the United States, which made the material widely available in the United Kingdom too. The ECtHR held that that there was a violation of the right to freedom of expression, since there could be no necessity to prohibit the circulation of material that was already widely available. Of course, this consideration is likely to be even more frequent in the days of internet publication.

In a 2006 Report to the United Nations General Assembly, the Special Rapporteur on the promotion and protection of human rights while countering terrorism warned that infringing citizens' fundamental human rights can actually harm national security:

“The systematic violation of human rights undermines true national security and may jeopardize international peace and security; therefore, a State shall not invoke national security as a justification for measures aimed at suppressing opposition or to justify repressive practices against its population.”²⁴³

Prior Restraint in National Security Cases

There is a general presumption against prior restraint – the judicial suppression of material before its publication. In fact, the American Convention explicitly precludes prior restraint in its protection of freedom of thought and religion. Article 13(2) states that:

“The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which

²³⁹ ECtHR: *Zana v Turkey* No 18954/91 (1997).

²⁴⁰ *Id.*

²⁴¹ ECtHR: *The Observer and Guardian v United Kingdom* *supra* note 213.

²⁴² ECtHR: *The Sunday Times v United Kingdom* Application No 13166/87 (1991).

²⁴³ Report of Special Rapporteur on the promotion and protection of human rights while countering terrorism A/61/267 (2006).

shall be expressly established by law to the extent necessary to ensure:

- a) Respect for the rights or reputations of others; or
- b) The protection of national security, public order, or public health or morals.”

However, many argue that national security interests are precisely the type of issue where it may be necessary to step in and prevent publication. There is little point (as in *Spycatcher*) in stepping in to stop publication of material that is already in the public domain. (Though the other lesson from *Spycatcher*, of course, was that the publication did no harm anyway.)

This was precisely the question that the United States Supreme Court confronted in *New York Times Co v United States* – better known as the “Pentagon Papers” case. The government sought prior restraint on publication of a large stash of documents – 47 volumes of them – labelled “top secret” and leaked from the Department of Defense. The documents detailed the decision-making leading to its involvement in the Vietnam war and the government sought to prevent publication because of alleged damage to national security and relations with other countries.

In a brief judgment rejecting the request for prior restraint, the Court drew on earlier judgments to note that prior restraint can only be allowed in extreme circumstances: “Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity” ... The Government “thus carries a heavy burden of showing justification for the imposition of such a restraint.”²⁴⁴

Individual opinions by the judges elaborated on this reasoning. Justice Hugo Black argued:

“To find that the President has ‘inherent power’ to halt the publication of news ... would wipe out the First Amendment and destroy the fundamental liberty and security of the very people the Government hopes to make ‘secure’ ... The word ‘security’ is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment. The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security.”

While less categorical than Justice Black’s reasoning, the ECtHR has also consistently warned of the danger in prior restraint, including in national security cases:

“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.”²⁴⁵

²⁴⁴ United States Supreme Court: *New York Times Co v United States (Pentagon Papers case)* 403 US 713 (1971).

²⁴⁵ ECtHR: *The Observer and Guardian v United Kingdom* *supra* note 213.

Some of the same issues arose in the case of *Vereniging Weekblad Bluf! v Netherlands*.²⁴⁶ The magazine in question had got hold of an internal report by the internal security service which showed the extent of the security service's monitoring of the Communist Party and the anti-nuclear movement. The special issue of the magazine containing details of the report was seized. However, the offset plates were not and the magazine simply reprinted its issue. Later a court order was obtained banning the issue from circulation.

The ECtHR in this case found – as with *Spycatcher* – that the court order withdrawing the magazine from circulation was not a necessary interference with freedom of expression, since the information in the issue was already publicly known. (The Court also questioned whether the contents were genuinely secret.) However, it rejected the argument from the magazine that freedom of expression rights would in all instances prevent a state from seizing and withdrawing material from circulation: national authorities have to be able to take necessary steps to prevent disclosure of secrets when this is truly necessary for national security.

²⁴⁶ ECtHR: *Vereniging Weekblad Bluf! v Netherlands* Application No 16616/90 (1995).