

Module 9

**NATIONAL
SECURITY**

*Summary Modules on
Litigating Digital Rights
and Freedom of
Expression Online*

**MEDIA
DEFENCE**



Published by Media Defence: www.mediadefence.org
This module was prepared with the assistance of ALT Advisory: <https://altadvisory.africa/>

December 2020

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MODULE 9

NATIONAL SECURITY

- "National security" is one of the most common justifications offered by states for limiting freedom of expression by journalists, bloggers, and media organs. However, it has the potential to be relied upon to quell dissent and cover up state abuses.
- National security legislation can have wide-reaching implications for media freedom and can be used to avoid constitutional checks and balances.
- The Johannesburg and the Tshwane Principles, alongside the Siracusa Principles, provide guidance on the extent of the national security limitation in relation to media freedom although they only constitute non-binding international law.
- Recent instances of terrorism have caused international decision-makers to seek to better define terrorist activities in order to ensure that justifiable limitations of fundamental rights relating to terrorism are properly prescribed by law.
- Prior restraint, even on the grounds of national security, is unlikely to succeed in a legal challenge as a result of the precedent set by the United States Supreme Court in the *Pentagon Papers* case.

INTRODUCTION¹

"National security" is one of the most common justifications offered by states for limiting freedom of expression by journalists, bloggers, and media organs. It is a legitimate restriction on fundamental rights and freedoms in the International Covenant on Civil and Political Rights ([ICCPR](#))² and the African Charter on Human and Peoples' Rights ([ACHPR](#)),³ provided it is not misused. While the ACHPR does not contain an explicit national security limitation on freedom of expression, article 9 does state that it is to be exercised "within the law" and article 29(3) states that an individual has a general duty "not to compromise the security of the State whose national or resident he is."⁴

¹ This module should be read in conjunction with Richard Carver 'Training Manual on International and Comparative Media and Freedom of Expression Law at pp 76-86 (accessible here: <https://www.mediadefence.org/resources/mldi-manual-on-freedom-of-expression-law/>)

² International Covenant on Civil and Political Rights (1966) at articles 19, 21 and 22 (accessible at: <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>).

³ African Charter on Human and Peoples' Rights (ACHPR), at articles 3, 11, 12, 27 (1981) (accessible at: <https://au.int/en/treaties/african-charter-human-and-peoples-rights>).

⁴ *Id.*

It is therefore a matter of debate how the legitimacy of a limitation on freedom of expression on grounds of national security should be assessed. Exceptionally, the right to freedom of expression can be partly or wholly suspended — a process known as *derogation* — because of a grave, imminent security threat. However, the national security limitation also has the potential to be relied upon to quell dissent and cover up state abuses.

This module examines how the derogation process is treated under international and regional human rights law.

THE DEROGATION PROCESS UNDER INTERNATIONAL AND REGIONAL HUMAN RIGHTS TREATIES

Most of the key human rights instruments allow a temporary derogation from certain human rights obligations in situations of national emergency. For example, article 4 of the ICCPR states:

"In a 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."⁵

Article 4 then proceeds to list a number of articles that may not be derogated from, even in times of public emergency. These include the rights not to be enslaved or tortured, and the right to freedom of opinion. It does not, however, include article 19, the right to freedom of expression.

The United Nations Human Rights Committee ([UNHRCttee](#)) has devoted two of its General Comments to explaining, in detail, the meaning of article 4 and the procedure and scope of derogation. The more recent of these, General Comment No. 29, can be taken as an authoritative interpretation of derogation during states of emergency. There are a number of key points to note, which can be applied equally to other human rights treaties that provide for derogation:

- The state of emergency must be publicly proclaimed according to domestic legal requirements, and should also be accompanied by notification to other State Parties and (via the UN Secretary General or other body that serves as the technical secretariat of the treaty), explaining why it is necessary.⁶
- The situation leading to derogation must be "a public emergency which threatens the life of the nation."⁷ In terms of General Comment No. 29, the threshold of threatening "the life of the nation" is a high one, and the UNHRCttee has been highly critical of

⁵ ICCPR above n 2 at article 4.

⁶ United Nations Human Rights Council, 'General Comment No. 29, states of emergency (article 4)' at para. 2 (2001) (accessible at: <https://digitallibrary.un.org/record/451555?ln=en>).

⁷ *Id.*

derogations that have taken place in situations that appear to fall short of the article 4 requirements.⁸

- The UNHRCtte emphasises the importance of the principle that derogations should be limited "to the extent strictly required by the exigencies of the situation."⁹ Even in instances when derogation may be warranted, there should only be derogation from those rights that are strictly required and only to the extent necessary.

The ACHPR, on the other hand, does not contain a clause explicitly permitting derogation during a public emergency. However, many states who are nevertheless party to the ACHPR have adopted constitutions or legislative measures that do contain derogation clauses, contrary to the position of the ACHPR and the African Commission.¹⁰ For example, article 24 of the Bill of Rights in the Constitution of Kenya states that:

"A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom."

However, the High Court of Kenya decided that "protecting national security carries with it the obligation on the State not to derogate from the rights and fundamental freedoms guaranteed in the Constitution."¹¹

The absence of a derogation clause in the ACHPR has caused controversy amongst legal scholars, some of whom argue that a derogation clause provides important protections against state abuse of freedoms during a public emergency,¹² while others claim its omission has enabled the positive development of human rights norms in Africa.¹³

LIMITING MEDIA FREEDOM ON GROUNDS OF NATIONAL SECURITY

Despite the above provisions in international law that allow the exercise of the right to freedom of expression to be limited on grounds of national security, provided that this is explicitly provided by law and that the restriction is necessary and proportional in an open and democratic society, in practice, national security is one of the most problematic areas of interference with media freedom.

One difficulty is the tendency on the part of many governments to assume that it is legitimate to curb all public discussion on national security issues. Yet, according to international standards, expressions may only be lawfully restricted if they threaten actual damage to national security.

⁸ *Id* at para. 3.

⁹ *Id* at para. 4.

¹⁰ Abdi Jibril Ali, 'Derogation from Constitutional Rights and Its Implication Under the African Charter on Human and Peoples' Rights' *Law, Democracy & Development*, Vol. 17 (2013) (accessible at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2399789).

¹¹ Kenya Court of Appeal, Petition 628 of 2014 (2015) (accessible at: <http://kenyalaw.org/caselaw/cases/view/106083/>).

¹² Melkamu Aboma Tolera, 'Absence of a derogation clause under the African Charter and thsse position of the African Commission' (2013) (accessible at: <https://heinonline.org/HOL/LandingPage?handle=hein.journals/bahirdjl4&div=14&id=&page=>).

¹³ Jibril Ali above at n10.

In South Africa, the Protection of State Information Bill (known as the Secrecy Bill) was ardently opposed by media and civil society for many years for likely having “a chilling effect on the media and [probably stopping] many whistleblowers from leaking sensitive or embarrassing information to the media.”¹⁴ Constitutional scholar Pierre de Vos, argued that although this was a side effect of the Bill, its real intent was to:¹⁵

“[Shield] the various intelligence agencies and structures from too much scrutiny and [ensure] that the ordinary constitutional checks and balances that apply to other organs of state that exercise public power would not apply to the intelligence services.”

The Secrecy Bill is an example of how national security legislation can both unintentionally or intentionally stifle media freedom. Likewise, Kenya’s anti-terrorism regime, including most notably the 2018 Prevention of Terrorism Amendment Bill, have been criticised for undermining human rights in an effort to protect national security.¹⁶

The Johannesburg Principles

In 1995, a group of international experts drew up the Johannesburg Principles on Freedom of Expression and National Security.¹⁷ Although non-binding, these principles are frequently cited (notably by the UN Special Rapporteur on freedom of 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 information, in ensuring accountability in the realm of national security.

In 2013, a group of civil society organisations from across the globe — including many who were involved in the drafting of the Johannesburg Principles — published an updated version known as the ‘Tshwane Principles.’¹⁸ The Tshwane Principles state that:¹⁹

¹⁴ Pierre de Vos, ‘Secrecy Bill less about media freedom, more about national security state,’ on Constitutionally Speaking (2012) (accessible at: <https://constitutionallyspeaking.co.za/secrecy-bill-less-about-media-freedom-more-about-national-security-state/>).

¹⁵ *Ibid.*

¹⁶ Freedom House, ‘Kenya’s Antiterrorism Strategy Should Prioritize Human Rights, Rule of Law’ (2018) (accessible at: https://freedomhouse.org/sites/default/files/2020-02/Final_PolicyBriefKenya_11_14_18.pdf).

¹⁷ Article 19: Global Campaign for Free Expression, ‘The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Freedom of Expression and Access to Information,’ (1996) (accessible at: <https://www.article19.org/wp-content/uploads/2018/02/joburg-principles.pdf>).

¹⁸ Open Society Justice Initiative, ‘Understanding the Global Principles on National Security and the Right to Information’ (2013) (accessible at: <https://fas.org/sgp/library/tshwane-und.pdf>).

¹⁹ Open Society Justice Initiative, ‘The Tshwane Principles on National Security and the Right to Information: An Overview in 15 Points’ (accessible at: <https://www.justiceinitiative.org/publications/tshwane-principles-national-security-and-right-information-overview-15-points#:~:text=Related%20Work-,The%20Tshwane%20Principles%20on%20National%20Security%20and%20the%20Right%20to,and%20national%20law%20and%20practices>).

- Governments may legitimately withhold information in some narrowly defined areas, such as defence plans, weapons development, and the operations and sources used by intelligence services.
- Information about serious human rights violations may not be classified or withheld.
- People who disclose wrongdoing or other information of public interest (whistleblowers and the media) should be protected from any type of retaliation, provided they acted in good faith and followed applicable procedures.
- Disclosure requirements apply to all public entities, including the security sector and intelligence authorities.

Although the principles do not constitute binding international law, they were developed with wide consultation and have broad consensus; for example, they have been welcomed by all three of the special experts on freedom of expression — for the [UN](#), the Organisation of American States ([OAS](#)), and the African Union ([AU](#)), as well as the Organisation for Security and Cooperation in Europe's ([OSCE](#)) expert on freedom of the media.²⁰

THE SCOPE OF NATIONAL SECURITY

"Freedom of expression" and "national security" are very often seen as principles or interests that are inevitably opposed to each other. Governments often invoke national security as a rationale for violating freedom of expression, particularly media freedom. 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. In South Africa, for example, media revelations about abuse in the police and military led to some reforms that arguably make for improved national security.²¹

The Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR ([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."²² 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."

The UN Special Rapporteur on Freedom of Expression has repeatedly limited the scope of a national security limitation in similar terms. For example:

²⁰ Open Society Justice Initiative above n 18.

²¹ Katie Trippe, 'Pandemic policing: South Africa's most vulnerable face a sharp increase in police-related brutality' for Atlantic Council, (2020) (accessible at: <https://www.atlanticcouncil.org/blogs/africasource/pandemic-policing-south-africas-most-vulnerable-face-a-sharp-increase-in-police-related-brutality/>).

²² United Nations Economic and Social Council, 'Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights,' Principle 29 (1985) (accessible at: <https://www.icj.org/wp-content/uploads/1984/07/Siracusa-principles-ICCPR-legal-submission-1985-eng.pdf>).

"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."²³

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."²⁴

TERRORISM

Since the terror 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 objects 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."²⁵

Defining terrorism

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 the criminalisation of particular acts, such as hijacking aircraft, without using the term terrorism. Later treaties, such as the International Convention for the Suppression of Financing of Terrorism,²⁶ do offer a definition, although this has no binding character beyond signatories to the treaty.

Many states, as well as entities such as the European Union, additionally define terrorism with reference to certain organisations "listed" as terrorist entities. This may hold particular dangers for the media in reporting the opinions and activities of such organisations. The United Nations Special Rapporteur (UNSR) on counter-terrorism and human rights has offered

²³ UN Special Rapporteur on Freedom of Expression, '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,' (1995) (accessible at:

<https://www.ohchr.org/en/issues/freedomopinion/pages/annual.aspx>).

²⁴ Johannesburg Principles above no. 17 at Principle 2(a).

²⁵ UN Security Council, Resolution 1624 of 2005, (2005) (accessible at:

<http://unscr.com/en/resolutions/1624>).

²⁶ International Convention for the Suppression of Financing of Terrorism, article 2(1) (1999)

a definition of terrorism, based upon best practices worldwide, which focuses on the act of terror rather than the perpetrator:²⁷

“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.”

Sometimes expression on its own is deemed a threat to national security — and these situations are addressed under incitement. For more detail on incitement, see Module 6 of this series on Hate speech.

Terrorism and internet shutdowns

[General Comment No. 34](#) on the ICCPR states that the media plays an important role in informing the public about acts of terrorism, and it should be able to perform its legitimate functions and duties without hindrance.²⁸ While governments may argue that internet shutdowns are necessary to ban the spread of news about terrorist attacks to prevent panic or copycat attacks, the UNSR on freedom of expression has instead found that maintaining connectivity may mitigate public safety concerns and help restore public order.²⁹

At a minimum, if there is to be a limitation of access to the internet, there should be transparency regarding the laws, policies and practices relied upon, clear definitions of terms such as ‘national security’ and ‘terrorism’, and independent and impartial oversight being exercised.

²⁷ UN Special Rapporteur on the promotion and protection of human rights while countering terrorism, ‘Statement by the Special Rapporteur on the promotion and protection of human rights while countering terrorism at the International Seminar Terrorism and human rights standards: Santiago de Chile, Chile’ (2011) (accessible at:

<https://newsarchive.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11737&LangID=E>).

²⁸ UN Human Rights Council, ‘General Comment no. 34 at para 46 (2011) (accessible at <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>).

²⁹ UN Human Rights Council, ‘2017 Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression’ at para. 14 (2017) (accessible at: <https://www.undocs.org/A/HRC/35/22>).

PRESCRIBED BY LAW

If national security is to be used to limit freedom of expression, the restriction must not only address a legitimate national security interest but must also be prescribed by law. The exact meaning of this has been an issue in several national security-related cases.

In *Chavunduka and Choto v. Minister of Home Affairs & Attorney General*, the Zimbabwe Supreme Court considered the case of two journalists who had been charged with publishing false news on the strength of an article reporting that an attempted military coup had taken place. The Court found that false news was protected by the constitutional guarantee of freedom of expression stating that "[p]lainly embraced and underscoring the essential nature of freedom of expression are statements, opinions and beliefs regarded by the majority as false."³⁰

The offence of publishing false news in the Zimbabwean criminal code was vague and over-inclusive. It included statements that "might be likely" to cause "fear, alarm or despondency" — without any requirement to demonstrate that they actually did so. In any event, as the Court pointed out: "almost anything that is newsworthy is likely to cause, to some degree at least, in a section of the public or a single person, one or other of these subjective emotions."³¹

The word "false" was vague, since it included any statement that was inaccurate, as well as a deliberate lie. The law did not require it to be proved that the defendant knew the statement was false. The Court then went on to find the provision unconstitutional on necessity grounds as well.

NECESSARY IN A DEMOCRATIC SOCIETY

Most cases involving national security restrictions tend to be decided based on necessity. One area where restrictions may fall down is if they are overbroad. This was the issue in the before the UNHRC in the case of *Mukong v Cameroon*. Albert Mukong was a journalist and author who had spoken publicly, criticising the president and Government of Cameroon.³² He was arrested twice under a law that criminalised statements "intoxicat[ing] national or international public opinion."

The government justified the arrests to the UN Committee on national security grounds. The Committee disagreed, finding that laws of this breadth that "muzzled advocacy of multiparty democracy, democratic tenets and human rights" could not be necessary.³³

The African Commission on Human and Peoples' Rights (*ACHPR*) has taken similar positions. In *Constitutional Rights Project and Civil Liberties Organisation v Nigeria*, opponents of the annulment of the 1993 presidential elections, including journalists, had been arrested and

³⁰ Supreme Court of Zimbabwe, Civil Application No. 156/99 (2000) (accessible at: <https://globalfreedomofexpression.columbia.edu/cases/chavunduka-v-minister-home-affairs/>).

³¹ *Id.*

³² United Nations Human Rights Commission, Communication No. 458/1991 (1994) (accessible at: <http://hrlibrary.umn.edu/undocs/html/vws458.htm>).

³³ *Id.* at para 9.7.

publications were seized and banned.³⁴ The African 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 is necessary. Courts have also insisted that there must be a close nexus between the restricted expression and actual damage to national security or public order.

In *CORD v Republic of Kenya*, the Kenya High 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.”³⁵

PRIOR RESTRAINT IN NATIONAL SECURITY CASES

There is a general presumption in international law against prior restraint of freedom of expression as unnecessary and disproportionate, on the grounds that it has a chilling effect on the enjoyment of the right to freedom of expression. Principle 23 of the Johannesburg Principles provides that: “[e]xpression shall not be subject to prior censorship in the interest of protecting national security, except in time of public emergency which threatens the life of the country.”³⁶ It is notable that this principle explicitly acknowledges that in cases of national security interests, there may be a strong argument for the need to step in to stop the dissemination of information prior to publication.

In a landmark judgment in June 2020, the Economic Community of West African States (ECOWAS) Court of Justice ruled that the September 2017 internet shutdown ordered by the Togolese government during ongoing protests in that country was illegal and an affront to the applicants’ right to freedom of expression.³⁷

This was also the question that the United States Supreme Court confronted in *New York Times Co. v United States*³⁸ — 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.

³⁴ African Commission on Human and Peoples’ Rights, Communication No. 102/93 (1998) (accessible at: <https://africanlii.org/afu/judgment/african-commission-human-and-peoples-rights/1998/2>).

³⁵ High Court of Kenya, *Petition no.628 of 2014* (2015) (accessible at: <http://kenyalaw.org/caselaw/cases/view/106083/>).

³⁶ Johannesburg Principles, above at no.17.

³⁷ Economic Community of West African States Community Court of Justice, *Suit no. ECW/CCJ/APP/61/18* (2020) (accessible at: https://www.accessnow.org/cms/assets/uploads/2020/07/ECOWAS_Togo_Judgement_2020.pdf).

³⁸ United States Supreme Court, *Case 403 US 713* (1971) (accessible at: <https://www.law.cornell.edu/supremecourt/text/403/713>).

The documents detailed the decision-making leading to the United States' 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."³⁹

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

"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" ⁴⁰

National security is also frequently relied upon as a reason for justifying an interference with access to the internet, which is seen as a form of prior restraint. While this may, in appropriate circumstances, be a legitimate aim, it also has the potential to be relied upon to quell dissent and cover up state abuses. (For more on this, see Module 3 of this series on access to the internet.)

The covert nature of many national security laws, policies and practices, as well as the refusal by states to disclose complete information about the national security threat, tends to exacerbate this concern.

CONCLUSION

National security remains one of the most common justifications offered by states for limiting freedom of expression by journalists, bloggers, and media organs. However, it has the potential to be used to quell dissent and cover up state abuses. Increasingly, courts are limiting the scope of application of national security laws as they are often vague and drafted to circumvent constitutional checks and balances. Activists, lawyers, and members of the media should, however, remain vigilant and test all national security-related laws for compliance with international law, including the Tshwane and Siracusa Principles.

³⁹ *Id.*

⁴⁰ *Id.*