BACKGROUND PAPER 2

on

CONTENT RESTRICTIONS

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1. INTRODUCTION

Background Paper 1 looked at ways in which States *indirectly* limit freedom of expression, by regulating the main channels through which the right is exercised, the mass media. In this Chapter, we discuss *direct* regulation of expression – the prohibition of categories of statements based on their content or impact, such as hate speech, defamation or obscenity.

The three-part test described in section 1.3 of Background Paper 1 provides the standards by which to assess whether or not a content restriction is compatible with international law. To briefly recapitulate, limitations on freedom of expression must: 1) be provided by law, in sufficiently clear terms to make it foreseeable whether or not statements are permissible; 2) be directed at one of the following goals: ensuring respect of the rights or reputations of others, or protecting national security, public order, public health or public morals; and 3) be strictly necessary for the achievement of that goal, including that no suitable alternative measure exists which would be less harmful to freedom of expression.

These criteria are not always easy to apply. Especially when the exercise of free expression clashes with the reputation or privacy of others or threatens the safety of the nation, legislators face a difficult exercise of drawing lines; is a restriction necessary and how far should it go? As James Madison, who framed the US Constitution's protection of freedom of expression, wrote, it is often prudent to permit some abuse of freedom of expression in order to ensure that legitimate use of the right is not discouraged:

> Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press. It … is better to leave a few of its noxious branches to their luxuriant growth than, by pruning them away, to injure the vigour of those yielding the proper fruits.[1]

This Background Paper provides an overview of the international standards which have been developed to guide the balancing act between free speech and other important private and societal interests. We begin, however, by looking at the question of prior, as opposed to subsequent, application of restrictions.

2. PRIOR CENSORSHIP

Prior censorship – that is to say, a system in which the authorities may prevent the distribution of a publication or the transmission of a programme - poses special dangers to freedom of expression. If the authorities are able to suppress publications and programmes which nobody has seen, it becomes impossible for others to verify whether the suppression was indeed justified; it is a question of time before such an unchecked power is abused to prevent criticism of government. One partial solution is to make the authorities' decision subject to court appeal. But this creates a different problem; control by the authorities of the timing of the flow of information is a considerable power. Challenging a decision to censor information will be an expensive and slow process, which many may not even use.

Because of the risk of abuse compared to sanctions after the fact, the *American Convention on Human Rights* prohibits prior censorship altogether, except to protect children. Article 13(2) of the ACHR states:

[1] Quoted in *Near v. Minnesota*, 283 U.S. 697, p. 718 (1931).

> The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship …

Systems of prior restraint whereby publications or broadcasts must be submitted to a censorship body for clearance before being distributed can never be justified, and have for some time now been unknown among democracies.[2] This should be contrasted with the situation where a private person or public body hears about an upcoming publication or broadcast, and applies to a court for an injunction against it. Courts have been reluctant to rule out prior restraints of this kind categorically, mainly because the damage done by a publication or broadcast may not in all cases be reparable through subsequent sanctions. This dilemma was posed starkly in one American case, after a magazine, *The Progressive*, had attempted to publish an article explaining in some detail how to construct a hydrogen bomb. The author and publisher argued that they were merely synthesising publicly available documents, with the purpose of raising awareness of the threat of nuclear weapons. The District Judge held:

> A mistake in ruling against The Progressive [will] curtail defendants' [right to freedom of expression] in a drastic and substantial fashion. [But a] mistake in ruling against the United States could pave the way for thermonuclear annihilation for us all. In that event, our right to life is extinguished and the right to publish becomes moot.[3]

The case did not reach the US Supreme Court. In other disputes, however, the Supreme Court has repeatedly stated the following position: "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."[4]

International bodies have echoed this point of view. In a report on the Republic of Korea, the UN Special Rapporteur on Freedom of Opinion and Expression stated that "any system of prior restraint on freedom of expression carries with it a heavy presumption of invalidity under international human rights law."[5] The European Court of Human Rights ruled that "the dangers inherent in prior restraints are such that they call for the most careful scrutiny".[6]

The position in international law can be summarised as follows. Although the right to freedom of expression does not require an absolute ban on prior censorship, this should be a highly exceptional measure, taken only when a publication or broadcast threatens grave harm, such as loss of life or serious harm to health, safety or the environment. Moreover, a system whereby news media content must be officially cleared before it can be released would be unacceptable; its harm to freedom of expression would plainly far outweigh the benefit to its goals.

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[2] Prior censorship of films and videos, however, is still practised in many countries. See, for example, *Wingrove v. United Kingdom*, 25 November 1996, Application No. 17419/90, in which prior restraints on videos in the UK were upheld by the European Court of Human Rights.
[3] *United States v. Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis. 1979).
[4] For example, *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58 (1963).
[5] *Report on the mission to the Republic of Korea of the Special Rapporteur on Freedom of Opinion and Expression*, UN Doc. E/CN.4/1996/39/Add.1, p. 8.
[6] *Observer and Guardian v. the United Kingdom*, 24 October 1991, Application No. 13585/88 (European Court of Human Rights), para. 60.

3. DEFAMATION

All countries offer their subjects protection against defamatory statements – that is, unwarranted written or spoken attacks on an individual's reputation. There is little dispute that defamation laws can serve a legitimate purpose; indeed, the three-part test under international law recognises protecting "respect of the rights or reputations of others" as a valid grounds for restricting freedom of expression.

At the same time, in many countries, defamation laws are so broad and are used so aggressively as to pose a serious obstacle to the open debate which underpins democracy. Public figures and political bodies frequently launch criminal and civil defamation suits against critical journalists and opposition politicians, aiming to silence them through ostensibly legal means. Even when such suits are unsuccessful, the financial and emotional costs they exact can persuade the defendants and others to withdraw from their openly critical positions. As a result, instances of misgovernment and corruption are no longer challenged and corrected, leading to a less prosperous, contented and internationally respected society.

A number of international standards relating to defamation law have been developed[7] which aim to ensure that reputations can be adequately protected without causing undue harm to freedom of expression. These are discussed below.

3.1. Criminal defamation

In the laws of Nepal, defamation is defined both as a civil tort and a criminal offence. In other words, a person can either be sued for compensation by the affected person or be criminally prosecuted by the State for making an allegedly defamatory statement.

Criminal defamation laws are especially problematic from the point of view of free expression. They can lead to the imposition of harsh sanctions, such as a prison sentence or a hefty fine. Even if they are applied with moderation, criminal defamation laws still cast a long shadow: the possibility of being arrested by the police, held in detention and subjected to a criminal trial will be in the back of the mind of a journalist when he or she is deciding whether to expose, for example, a case of high-level corruption. This is not to say that defamation should not be discouraged; but in accordance with the necessity test, the means used to discourage it should be carefully targeted, to prevent the dampening of legitimate criticism.

International bodies such as the UN have recognised the threat posed by criminal defamation laws and have recommended that they should be abolished. The UN, OSCE and OAS special mandates on freedom of expression have stated, for example: "Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws."[8] The UN Human Rights Committee has several times expressed its concern over the misuse of criminal

[7] ARTICLE 19 has synthesised the key standards into one publication, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation* (London, 2000), which has received significant endorsement, including from the OAS, UN and OSCE Special Mandates. To access this document, visit http://www.article19.org/publications/law/standard-setting.html.

[8] Joint Declaration of 10 December 2002. To access this document, visit http://www.article19.org/publications/law/intergovernmental-materials.html.

defamation laws in concrete cases, recommending a thorough reform in countries as wide-ranging as Azerbaijan,[9] Norway[10] and Cameroon.[11]

By contrast, the European Court of Human Rights has declined to rule that criminal defamation laws are by definition a violation of the right to freedom of expression. At the same time, it has never upheld a prison sentence or other serious sanctions applied under such a law. In *Castells v. Spain*, the Court held:

> [T]he 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.[12]

An important factor in the Court's decision was the volatile situation obtaining in Spain at the time of the applicant's conviction for libel. Castells had published an article suggesting that the government was behind the killings of separatist Basque dissident; the purpose of his conviction had been to safeguard public order as much as to protect the government's reputation. The Court found that States are permitted "to adopt, in their capacity as guarantors of public order, measures, even of a criminal law nature, intended to react appropriately and without excess to defamatory accusations devoid of foundation or formulated in bad faith."[13] It may be noted that the Court stressed the role of the criminal law in guaranteeing public order; this is quite a different interest than protecting reputations.

ARTICLE 19 argues that all criminal defamation laws breach the guarantee of freedom of expression.[14] However, in recognition of the fact that many countries do have criminal defamation laws which are unlikely to be repealed in the very near future, it has suggested interim measures to attenuate their impact until they are abolished:

> i. no-one should be convicted for criminal defamation unless the party claiming to be defamed proves, beyond a reasonable doubt, the presence of all the elements of the offence, as set out below;
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> ii. the offence of criminal defamation shall not be made out unless it has been proven that the impugned statements are false, that they were made with actual knowledge of falsity, or recklessness as to whether or not they were false, and that they were made with a specific intention to cause harm to the party claiming to be defamed;
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> iii. public authorities, including police and public prosecutors, should take no part in the initiation or prosecution of criminal defamation cases, regardless of the status of the party claiming to have been defamed, even if he or she is a senior public official;
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> iv. prison sentences, suspended prison sentences, suspension of the right to express oneself through any particular form of media, or to practise journalism or any other profession, excessive fines and other harsh criminal penalties should never be available as a sanction for breach of defamation laws, no matter how egregious or blatant the defamatory statement.[15]

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9 *Concluding observations of the Human Rights Committee: Azerbaijan*, UN Doc. CCPR/CO/73/AZE, 12 November 2001.

10 *Concluding Observations of the Human Rights Committee: Norway,* UN Doc. CCPR/C/79/Add.112, 1 November 1999.

11 *Concluding observations of the Human Rights Committee: Cameroon*, UN Doc. CPR/C/79/Add.116, 4 November 1999.

12 *Castells v. Spain*, 23 April 1992, Application No. 11798 (European Court of Human Rights), para. 46.

13 *Id*.

14 See note 7, Principle 4(a).

15 *Id.*, Principle 4(b).

3.2. Civil defamation

Because they do not involve the State's criminal justice machinery, civil defamation laws may exert less of a chilling effect on freedom of expression than their criminal counterparts. This will only be the case, however, if the law is formulated in a way which insulates it against abuse by the government, ensures that those sued for defamation are able to mount a proper defence, and sets reasonable limits to the amount of compensation that may be awarded.

3.2.1. Public bodies and public officials

Vigorous debate about the functioning of public officials and the government lies at the heart of democracy. To ensure that this debate is pursued freely, uninhibited by fear of litigation, international courts have consistently held that public bodies and officials should tolerate a wider degree of criticism than ordinary citizens.

3.2.1.1. Public bodies

Several established democracies do not allow public bodies to sue for defamation under any circumstances, both because of the danger to freedom of expression and because public bodies are not seen as having a "reputation" entitled to protection. As abstract entities without a profit motive, they lack an emotional or financial interest in preventing damage to their good name. Moreover, it is improper for government to spend public money on defamation suits to defend its own reputation.

In the United States, "no court of last resort … has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence."[16] The Indian Supreme Court has held that "the Government, local authority and other organs and institutions exercising power" are not entitled to sue for defamation.[17]

Other countries have extended this prohibition to State-owned companies. The Zimbabwean Supreme Court threw out a claim by the Post and Telecommunications Company,[18] following an example set by the South African Supreme Court of Appeal, *Die Spoorbond v. South African Railways*,[19] in which that Court ruled that the national railway could not sue a newspaper for defamation.

The European Court of Human Rights has not imposed a blanket ban on defamation claims by public bodies, but has held that the "limits of permissible criticism are wider with regard to the Government than in relation to a private citizen, or even a politician."[20] The UN Human Rights Committee and the OSCE Parliamentary Assembly have recommended the abolition of laws criminalising defamation of the State.[21]

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[16] *New York Times v. Sullivan*, 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964), quoting *City of Chicago v. Tribune Co*., 307 Ill. 595, 601, 139 N. E. 86, 88 (1923).

[17] *Rajagopal v. State of Tamil Nadu*, 6 S.C.C. 632 (1994).

[18] *Posts and Telecommunications Corporation v. Modus Publications (Private) Ltd.* (1997), Judgment No S.C. 199/97.

[19] *Die Spoorbond v South African Railways*, 1946 AD 999.

[20] See, for example, *Incal v. Turkey*, 9 June 1998, Application No. 22678/93 (European Court of Human Rights), para 54.

[21] See, for example, *Concluding observations of the Human Rights Committee: Mexico*, 27 July 1999, UN Doc. No. CCPR/C/79/Add.109, para. 14; Warsaw Declaration of the OSCE Parliamentary Assembly, 8 July 1997, para. 140.

3.2.1.2. Public officials

Public officials occupy an intermediary position: they are subject to a wider margin of criticism than ordinary members of the public but, in contrast to public bodies, they are entitled to sue when defamed in their private capacity. In general, the more senior the public servant, the more criticism he or she may be expected to tolerate, with politicians at the top of the scale.

In the leading case of *Lingens v. Austria*, the European Court of Human Rights explained the rationale for permitting harsh criticism of public officials. The case revolved around the conviction for criminal defamation of a journalist who had published two articles in which he accused the Austrian Chancellor, Bruno Kreisky, of protecting former Nazi SS officers for political reasons. Observing that it is detrimental to democracy to allow politicians to sue the media in defamation as a way of suppressing criticism, the Court held:

> The limits of acceptable criticism are … wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance.[22]

This reasoning has been followed by other human rights bodies.[23]

In a case with a comparable fact pattern, the European Court confirmed that politicians must tolerate harsh words as well as harsh criticism. After Jörg Heider, leader of the Austrian Freedom Party, had delivered a speech praising Austrian soldiers who had fought in the Wehrmacht and SS during the Second World War, a newspaper ran an article under the title "P.S.: 'idiot,' not 'Nazi'." The Court found that the use of the word 'idiot' to describe Heider did not overstep the boundaries of what should be permissible in a democracy.[24]

In other cases, the Court made it clear that the wider margin of criticism applies to all public officials, not only politicians.[25]

3.2.2. Defences

A strong system of legal defences which can be invoked against a defamation claim is essential if defamation laws are not unreasonably to restrict the free flow of information and ideas. The five defences noted below – drawn from international and comparative jurisprudence – are of particular importance.

3.2.2.1. Defence of the truth - burden of proof

Proof of truth should be a complete defence to an allegation of defamation.[26] The law of defamation should serve to protect individuals against *unwarranted* attacks on their reputation, rather than to protect their honour regardless of whether their good reputation is

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[22] *Lingens v. Austria*, 24 June 1986, Application No. 9815/82 (European Court of Human Rights), para. 42.

[23] See, for example, *Canese v. Paraguay*, 31 August 2004, Series C 111 (Inter-American Court of Human Rights) and *Bodrožić v. Serbia and Montenegro*, 23 January 2006, Communication No. 1180/2003, UN Doc. CCPR/C/85/D/1180/2003, para. 7.2 (UN Human Rights Committee0.

[24] See, for example, *Oberschlick v. Austria (No.2)*, 1 July 1997, Application No. 20834/92, para. 35. See also *Dichand and others v. Austria*, 25 February 2002, Application No. 29271/95 (European Court of Human Rights).

[25] See, for example, *Thoma v. Luxembourg*, 29 March 2001, Application No. 38432/97, para. 47.

[26] *Castells v. Spain*, note 12.

deserved. At the same time, an individual confronted with truthful revelations about his or her private life may have a separate claim for invasion of privacy (see section 6 below).

In ordinary cases, it is reasonable to expect the defendant to demonstrate the truthfulness of the statement. However, in cases involving matters of public interest, such as a claim by a public official, the burden of proof should be reversed and the plaintiff required to demonstrate the falsehood of the statement. The importance of enabling debate on matters of public interest justifies placing a heavier burden on the plaintiff. As the US Supreme Court stated: "Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so."[27] Instead, it should be sufficient to show that the statement was correct in its essential elements.

3.2.2.2. Statements of opinion vs. statements of fact

No one should be found liable for a statement of opinion, that is, a statement which cannot be shown to be true or false or which is clearly not intended as a statement of fact (for example because it is rhetoric, satire or simply a joke).[28] An opinion cannot be considered an *unwarranted* attack on someone's reputation, since it can by definition not be proven true or false.[29] Furthermore, it may be noted that international law provides absolute protection to the holding of opinions. It is not for the authorities to determine whether or not a subjective viewpoint should be deemed appropriate.

3.2.2.3. Defence of 'reasonable publication'

Even where a statement of fact on a matter of public concern has been shown to be false, defamation defendants should benefit from a defence of 'reasonable publication'. This defence applies, as its name suggests, if it was reasonable for a person in the position of the defendant to have disseminated the material in the manner and form he or she did. A rule of this type is necessary to protect the ability of the media to carry out their task of informing the public effectively. When an important news story is developing, journalists cannot always wait until they are completely sure that every fact made available to them is correct before publishing or broadcasting the story. Even the best journalists make honest mistakes; to leave them open to punishment for every false allegation would make their work very risky and so discourage them from providing the public with timely information. A more appropriate balance between the right to freedom of expression and reputations is to protect those who have acted reasonably and taken whatever steps were reasonably possible to check their facts, while allowing plaintiffs to sue those who have not. For the media, acting in accordance with accepted professional standards (for example, those defined in a code of conduct) should normally satisfy the reasonableness test.[30]

3.2.2.4. Absolute and qualified privileges

There are certain forums in which the ability to speak freely is so vital that statements made there should never lead to liability for defamation. Such an absolute privilege should apply, for example, to statements made during judicial proceedings, statements before elected bodies

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27 *New York Times Co. v. Sullivan*, 376 US 254, 279 (1964).

28 See, for example, *Oberschlick v. Austria (No. 1)*, 23 May 1991, Application No. 11662/85 (European Court of Human Rights), para. 63.

29 *Unabhängige Initiative Informationsvielfalt v. Austria*, 26 February 2002, Application No. 28525/95 (European Court of Human Rights), para. 39.

30 For example, *Bladet Tromsø and Stensaas v. Norway*, 20 May 1999, Application No. 21980/93 (European Court of Human Rights), para. 65.

and fair and accurate reports on such statements.[31] Certain other types of statements should enjoy a qualified privilege; that is, they should be exempt from liability unless they can be shown to have been made with malice. This latter category should include statements which the speaker is under a legal, moral or social duty to make, such as reporting a suspected crime to the police. In such cases, the public interest in the statements being made is deemed to outweigh any private reputation interest in suppressing the statements.

3.2.2.5. Words of others

Finally, journalists should not be held liable for reporting or reproducing the statements of others, so long as these statements have news value and the journalist refrains from endorsing them. The European Court has underlined the need for such an exemption:

> Punishment of a journalist for assisting in the dissemination of statements made by another person…would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so.
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> …
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> A general requirement for journalists systematically and formally to distance themselves from the content of a quotation that might insult or provoke others or damage their reputation is not reconcilable with the press' role of providing information on current events, opinions and ideas.[32]

The applicant in this case was a radio journalist who had been found liable after quoting from a newspaper article which alleged that of all the forestry officials in Luxembourg only one was not corrupt. The Court, in finding that the applicant's right to free expression had been unjustly infringed, also took into account that the applicant had consistently taken the precaution of mentioning that he was beginning a quotation and of citing the author, and that in addition he had described the entire article as "strongly worded". He had also asked a third party, a woodlands owner, whether he thought that the allegations were true.

3.2.3. Remedies

Like any restriction on freedom of expression, sanctions for defamatory statements must be 'necessary', that is, they should be proportionate so that their footprint on the right does not go beyond what is needed. It is the responsibility of the authorities to establish a regime of remedies for defamatory statements which, while redressing the harm to reputation, does not exert a chilling effect on legitimate statements. Traditionally, the ordinary remedy for defamation has been financial compensation, but in several countries a culture of excessive awards has had a negative effect on the free flow of information. A variety of less intrusive but still effective alternative remedies exist, such as a court order to issue an apology or correction, or to publish the judgment finding the statements to be defamatory. Such alternative remedies are more speech-friendly and should be prioritised. Where monetary awards are necessary to redress financial harm, the law should specify clear criteria for determining the size of awards.

As noted in section 3.1 above, international bodies have taken a very dim view of imprisonment as a sanction for defamation. The European Court of Human Rights has never upheld a sentence of imprisonment. In its 1998 annual resolution, the UN Commission on

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[31] See, for example, *A v. the United Kingdom*, 17 December 2002, Application No. 35373/97 (European Court of Human Rights).

[32] See note 25, paras. 62-64.

Human Rights expressed its concern at "the extensive occurrence of detention, long-term detention ... persecution and harassment, including through the abuse of legal provisions on criminal libel … directed at persons who exercise the right to freedom of opinion and expression."[33]

4. NATIONAL SECURITY

Under international law, the State is burdened with the duty to serve as the guarantor of human rights; indeed, one could see this as one aspect of States' *raison d'être*. It is only logical that when a situation arises which threatens the continued existence of the State, and thereby of the human rights of the entire population, international law permits certain proportionate measures to counter that threat. This includes restrictions on freedom of expression, such as a prohibition on divulging troop movements, revealing military encryption codes or inciting desertion. All the international instruments which guarantee the right to freedom of expression also recognise national security as a legitimate ground for limiting that right.

National security has, however, along with defamation, long been one of the preferred legal tools by which governments around the world, including democratic ones, illegitimately suppress the free flow of information and ideas. Very often, national security restrictions are impermissibly vague or respond to statements which pose only a hypothetical risk of harm, making them ideal instruments of abuse to prevent the airing of unpopular ideas or criticism of government.

To combat these problems, increasingly rigorous international standards have been developed to judge whether restrictions based on national security comply with the three-part test.

4.1. Defining 'national security'

No clear definition of what constitutes 'national security' has emerged from international jurisprudence. The UN Human Rights Committee has at least made it clear that suppression of democratic discourse and human rights cannot be justified on the grounds of national security:

> [T]he legitimate objective of safeguarding and indeed strengthening national unity under difficult political circumstances cannot be achieved by attempting to muzzle advocacy of multi-party democracy, democratic tenets and human rights; in this regard, the question of deciding which measures might meet the "necessity" test in such situations does not arise.[34]

The U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities has attempted to clarify the meaning of 'national security' in its *Siracusa Principles*.[35] Principle B(iv) defines when a restriction can be said to serve national security:

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[33] UN Commission on Human Rights, Resolution 1998/42, 17 April 1998, UN Doc. E/CN.4/RES/1998/42. See also Resolution 2005/38, 19April 2005, UN Doc. E/CN.4/2005/L.10/Add.11.

[34] *Mukong v. Cameroon*, Communication No. 458/1991, 21 July 1994, UN Doc. CCPR/C/51/D/458/1991, para. 9.7.

[35] *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*, Annex, UN Doc E/CN.4/1984/4 (1984). Available for download at http://www1.umn.edu/humanrts/instree/siracusaprinciples.html.

> 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.
>
> National security cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order.
>
> National security cannot be used as a pretext for imposing vague or arbitrary limitations and may only be invoked when there exists adequate safeguards and effective remedies against abuse….

According to this definition, restrictions on the basis of national security are only justifiable if they address a threat to the "existence of the nation or its territorial integrity or political independence," as distinct from localised violence and ordinary criminal activities.

4.2. Necessity of restrictions in the service of national security

International and domestic courts have tended to examine national security claims under the 'necessity' test (see section 1.3.4 of Background Paper 1). Two key principles that follow from their decisions, as well as from other international sources, are that statements may only be prohibited if 1) they were made with *intent* to cause harm to national security, and 2) there is a *clear nexus* between the statement and the likelihood of this harm occurring.

4.2.1. Intent requirement

The requirement of intent seeks to draw a line between legitimate political debate on matters of national security and incitement to illegal action. The right to freedom of expression covers all kinds of ideas, including separatist or revolutionary sentiments (see section 1.2.3 of Background Paper 1). Individuals should be permitted to introduce any views they hold into the marketplace of ideas and promote them through peaceful means, so that others can form their own opinion about them. On the other hand, when the speaker intends to spur others on to concrete acts against national security, it might justifiably be considered 'necessary' to limit his or her freedom of expression.

The *Johannesburg Principles on National Security, Freedom of Expression and Access to Information*, developed in 1995 by a group of around 36 experts and now considered an important source of authority, state in Principle 6:

> [E]xpression 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; [36]
>
> […]

Domestic courts have also imposed a requirement of intent. In India, the Supreme Court set aside a detention order for an individual who had called for a "Gujarat type of agitation," by which he referred to a protest against price increases in the west of India that had turned violent, and eventually caused the dissolution of the State legislature. The Court emphasised the need to not confuse "what happened in fact and what was *intended* to happen" (emphasis added), concluding that the various interpretations could be given to Bahadur's statement, and

[36] *Johannesburg Principles on National Security, Freedom of Expression and Access to Information*, 1 October 1995, UN Doc. E/CN.4/1996/39 (1996), Principle 6. Available online at http://www.article19.org/pdfs/standards/joburgprinciples.pdf.

that he had not necessarily intended for violence to occur.[37] Similarly, the US Supreme Court has often stressed that the State may prohibit advocacy of the use of force only "where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[38]

The intent requirement further serves to shield speakers from responsibility for unintended responses on the part of their listeners. A speaker who makes comments with grossly reckless disregard for their consequences can, however, be considered to possess the requisite intent.

4.2.2. Nexus requirement

The second requirement – that there be a clear nexus between the statement and the likelihood of harm occurring – serves to emphasis that States should not take a 'better safe than sorry'-approach to restricting freedom of expression. Granting governments the discretion to restrict expression based on an unsure or remote risk of harm would create a great opportunity for abuse, and endanger democratic debate about some of the most important and contentious political issues. Moreover, national security can benefit from a situation where individuals with controversial and radical opinions are permitted to express themselves within the framework of the law.

The nexus requirement is a consistent feature of the decisions rendered by the European Court of Human Rights and other international courts in national security cases. Whether a clear nexus exists between the prohibited expression and the occurrence of violence depends, necessarily, on the specific circumstances of each case. For example, in *Karataş v. Turkey*,[39] the European Court took note of the "the sensitivity of the security situation in south-east Turkey" and the "need for the authorities to be alert to acts capable of fuelling additional violence." Nevertheless, it found that poetry which was arguably intended to incite violent acts should have been permitted, because it was unlikely to have that effect in practice:

> The work in issue contained poems which, through the frequent use of pathos and metaphors, called for self-sacrifice for "Kurdistan" and included some particularly aggressive passages directed at the Turkish authorities. Taken literally, the poems might be construed as inciting readers to hatred, revolt and the use of violence. In deciding whether they in fact did so, it must nevertheless be borne in mind that the medium used by the applicant was poetry, a form of artistic expression that appeals to only a minority of readers.
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> …
>
> [E]ven though some of the passages from the poems seem very aggressive in tone and to call for the use of violence, the Court considers that the fact that they were artistic in nature and of limited impact made them less a call to an uprising than an expression of deep distress in the face of a difficult political situation.[40]

The UN Human Rights Committee also requires a close nexus between a prohibited expression and the occurrence of actual harm. The case of *Keun-Tae Kim v. Republic of Korea* concerned a founding member of the National Coalition for Democratic Movement, who had distributed and read out documents to an audience of 4000, criticising the government and its foreign allies and appealing for reunification with North Korea (the DPRK). He was found guilty of offences under the National Security Law for having

[37] *Ram Bahadur v. State of Bihar*, [1975] AIR 223; [1975] SCR (2) 732, 738.
[38] *Brandenburg v.* Ohio, 395 U.S. 444 at 447 (1969).
[39] 8 July 1999, Application No. 23168/94 (European Court of Human Rights).
[40] *Id.,* paras. 49-52.

distributed materials which coincided with the views of an 'anti-State organisation,' namely the DPRK. The HRC found it was,

> not clear how the (undefined) 'benefit' that might arise for the DPRK from the publication of views similar to their own created a risk to national security, nor is it clear what was the nature and extent of any such risk. There is no indication that the courts, at any level, addressed those questions or considered whether the contents of the speech or the documents had any additional effect upon the audience or readers such as to threaten public security, the protection of which would justify restriction within the terms of the Covenant as being necessary.[41]

The *Johannesburg Principles* summarise the 'intent' and 'nexus' requirements as follows:

> Subject to Principles 15 and 16 [which further limit restrictions], 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; and
>
> (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.[42]

4.3. Emergency derogations

It is recognised in international law that during acute emergencies, States may be unable to perform the careful balancing act normally required to justify a restriction on freedom of expression. Article 4 of the *International Covenant on Civil and Political Rights* (ICCPR) allows States Parties to temporarily suspend some of their obligations under the Covenant, including Article 19:

> 1. 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.
>
> …
>
> 3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

Article 4 places a number of conditions on the imposition of emergency derogations. To summarise the main points:

- Derogations may only be made in times of emergency which "threaten the life of the nation";
- Derogations must be officially proclaimed;

[41] *Keun-Tae Kim v. Korea*, Communication No 574/1994, UN Doc. CCPR/C/64/D/574/1994 (4 January 1999), para 12.4.
[42] See note 36.

- Derogations may only limit rights to the extent strictly required and may never be applied in a discriminatory way;
- States imposing derogations must inform other States Parties through the UN Secretary-General of the rights to be limited and the reasons for such limitation; and
- Derogating States must inform other States Parties of the termination of any derogations.

The case-law of the UN Human Rights Committee indicates a great reluctance to recognise the legitimacy of states of emergency which are declared in peacetime.[43] As the HRC noted in its General Comment on Article 4:

> If States parties consider invoking Article 4 in other situations than an armed conflict, they should carefully consider the justification and why such a measure is necessary and legitimate in the circumstances.[44]

The HRC also stressed that the application of emergency laws derogating from rights must be of an exceptional nature and limited in time.[45]

5. HATE SPEECH

Hate speech – the advocacy of hatred based on nationality, race or religion – occupies an exceptional position in international law. Generally speaking, the right to freedom of expression extends to unpopular ideas and statements which "shock, offend or disturb."[46] Nevertheless, a number of human rights treaties, including the ICCPR, not only permit States to prohibit hate speech but actually require them to do so.

The inherent dignity and equality of every individual is the foundational axiom of international human rights. It is, therefore, perhaps not surprising that international law condemns statements which deny the equality of all human beings. Article 20(2) of the ICCPR requires States to prohibit hate speech:

> Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

There is little debate internationally that restrictions on hate speech can be justified. Nevertheless, Article 20(2) has proven highly controversial and is variously criticised as being overly restrictive of free speech or as not going far enough in the categories of hatred it covers. Article 20(2) does not require States to prohibit all negative statements towards national groups, races or religions but, as soon as a statement "constitutes incitement to discrimination, hostility or violence," it must be banned. Some States, notably the USA, have

[43] See, for example, *Ramirez v. Uruguay*, Communication No. R. 1/4, UN Doc. Supp. No. 40 (A/34/40) at 121, UN Doc. CCPR/C/OP/1 at 49 (13 February 1977), *Silva v. Uruguay*, Communication No. 4/1977, UN Doc. CCPR/C/.12/D/34/1978 (23 July 1980) and *Montejo v. Colombia*, Communication No. 64/1979, UN Doc. CCPR/C/OP/1 at 127 (24 March 1982).
[44] General Comment No. 29: States of Emergency (Article 4), 24 July 2001, UN Doc. CCPR/C/21/Rev.1/Add.11, para. 3.
[45] *Id.*, para. 2.
[46] See, for example, *Otto-Preminger-Institut v. Austria*, 20 September 1994, Application No. 13470/87 (European Court of Human Rights), para. 49.

taken the view that only incitement which is intended to cause *imminent violence* justifies restricting such a fundamental right. One important motivation underlying this position is the fear that a broader ban on inciting "discrimination or hostility" will be abused by governments or will discourage citizens from engaging in legitimate democratic debate, for example on questions regarding religion and minorities.

The UN Human Rights Committee has stated that there is no contradiction between that the duty to adopt domestic legislation under Article 20(2) and the right to freedom of expression:

> In the opinion of the Committee, these required prohibitions are fully compatible with the right of freedom of expression as contained in article 19, the exercise of which carries with it special duties and responsibilities.[47]

At the same time, the HRC has stressed that "restrictions on expression which may fall within the scope of article 20 must also be permissible under article 19, paragraph 3, which lays down requirements for determining whether restrictions on expression are permissible."[48] In other words, domestic laws adopted pursuant to Article 20(2) must, like all restrictions on freedom of expression, meet the three-part test.

Besides the ICCPR, a number of other international instruments have a bearing on hate speech. Of particular relevance is the *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD), to which Nepal acceded in 1971. Article 4 of CERD goes substantially further than Article 20(2) of the ICCPR and requires States Parties, among other things, to "declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred [and] incitement to racial discrimination." In contrast to the ICCPR, CERD requires the prohibition of racist speech even if it does not constitute incitement to discrimination, hostility or violence.

The effect of Article 4 appears to be tempered a bit by its opening paragraph, which states that in adopting measures to implement its provisions, States should have "due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention," which include freedom of expression. Inevitably, however, these two requirements – to prohibit all racist speech and to respect the right to freedom of expression as recognised under international law – are considered by many to be in direct contradiction with one another. The international community is divided on the issue: several States Parties to CERD – including Australia, Austria, Belgium, France, Italy, Malta, Monaco, Switzerland, the United Kingdom and the United States – have entered reservations to Article 4 or declared that they will interpret it in a particular way.

In a 2001 Joint Statement, the UN, OSCE and OAS special mandates on the right to freedom of expression set out a number of conditions which hate speech laws should respect:

- no one should be penalised for statements which are true;
- no one should be penalised for the dissemination of hate speech unless it has been shown that they did so with the intention of inciting discrimination, hostility or violence;
- the right of journalists to decide how best to communicate information and ideas to the public should be respected, particularly when they are reporting on racism and intolerance;
- no one should be subject to prior censorship; and

[47] General Comment No. 11: Prohibition of Propaganda for War and Inciting National, Racial or Religious Hatred (Article 20), 29 July 1983, U.N. Doc. HRI/GEN/1/Rev.6 at 133, para. 2.
[48] *Ross v. Canada*, Communication No. 736/1997, 1 May 1996, UN Doc. CCPR/C/70/D/736/1997, para 10.6.

- any imposition of sanctions by courts should be in strict conformity with the principle of proportionality.[49]

These provide a good basis for assessing the legitimacy of any particular hate speech law.

6. PRIVACY

It is well recognised in international law that every individual is entitled to a certain amount of immunity from invasion of his or her private space. Article 17(1) of the ICCPR states:

> No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

The right to privacy is primarily directed at the authorities: absent a weighty justification, they may not, for example, undertake a house search, intercept someone's communications or disclose private facts. But it is not only the State which presents a danger to the privacy of citizens: particularly in countries where the media are free and must continually compete with one another for market share, increasingly unscrupulous means are often employed in the hunt for a best-selling story, and celebrities and others thrust into the public eye find themselves under constant surveillance by photographers armed with telezoom lens cameras.

Defamation laws provide only partial protection against aggressive reporting techniques. As will be recalled from section 3, the purpose of a well-crafted defamation law is to provide a remedy against *false* statements which cause damage to a *reputation*. News stories gained through intrusion into someone's private life may of course be true, and even when they are fabrications, they need not necessarily be harmful to the subject's reputation. The European Court of Human Rights has stated that States may be required to adopt legislation specifically protecting individuals from invasion of their privacy by fellow citizens:

> The Court reiterates that although the object of Article 8 [on the right to privacy] is essentially that of protecting the individual against arbitrary interference by the public authorities … there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.[50]

The applicant in that case was Princess Caroline of Monaco, who complained that she was constantly harassed by the tabloid press, which published photos of her going about her ordinary daily activities. The domestic courts in Germany had only allowed the Princess to prevent the publication of photos taken in secluded places, out of the public eye. The ECHR held that in the age of telezoom lenses, "the criterion of spatial isolation … is in reality too vague and difficult for the person concerned to determine in advance".[51]

Privacy laws signal, by definition, a decision to limit the right to freedom of expression in favour of another human right, the right to a private life. Neither of the two rights is hierarchically superior to the other, and which one will prevail in a given situation should depend on the circumstances of the case. In *Von Hannover v. Germany*, the ECHR identified

[49] Joint Statement of 27 February 2001. This document can be downloaded at http://tinyurl.com/alg7l.
[50] *Von Hannover v. Germany,* 24 June 2004, Application No. 59320/00 (European Court of Human Rights), para. 57.
[51] *Id.,* para. 75.

a number of factors to be taken into account. It attached the greatest weight to whether the material in dispute related to a matter of legitimate public concern:

> [T]he decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published photos and articles make to a debate of general interest.[52]

Permitting governments to decide what matters fall within the "general interest" is clearly not without risks. On one view, any subject which is capable of drawing the attention of a large section of the public should be considered a "debate of general interest." But the ECHR rejects the theory that 'everything of interest to the public is in the public interest':

> [T]he Court considers that the publication of the photos and articles … of which the sole purpose [is] to satisfy the curiosity of a particular readership regarding the details of the applicant's private life, cannot be deemed to contribute to any debate of general interest to society despite the applicant being known to the public.[53]

The private life of public figures may sometimes be off-limits to the media. Politicians, however, occupy a special position: facts which have a significant bearing on their ability to govern the country or suitability for public office, such as their physical or mental health, are clearly of legitimate concern to the public, even if they would normally fall within the private sphere. Moreover, by choosing a profession where success depends on public opinion, they have knowingly and willing laid themselves open to scrutiny by the media. The European Court of Human Rights confirmed that, as with defamatory statements (see section 3.2.1), politicians must display more tolerance towards media intrusion in their private lives than ordinary citizens:

> The Court considers that a fundamental distinction needs to be made between reporting facts – even controversial ones – capable of contributing to a debate in a democratic society relating to politicians in the exercise of their functions, for example, and reporting details of the private life of an individual who … does not exercise official functions. While in the former case the press exercises its vital role of "watchdog" in a democracy by contributing to "impart[ing] information and ideas on matters of public interest" … it does not do so in the latter case…
>
> [T]he public has a right to be informed, which is an essential right in a democratic society that, in certain special circumstances, can even extend to aspects of the private life of public figures, particularly where politicians are concerned…[54]

7. FALSE NEWS

A number of countries around the world prohibit the dissemination of false information, even if it is not defamatory in nature. Sometimes, the ban is formulated as a specific duty for journalists to report truthfully or to avoid one-sided, distorted or alarmist stories. Such 'false news' provisions are very rare in the more established democracies and have been ruled unconstitutional in some.

No international court has yet considered the legitimacy of false news provisions as such under international law, although the Inter-American Court of Human Rights stated in general terms that:

[52] *Id.*, para. 76.
[53] *Id.*, para. 64.
[54] *Id.*, paras. 63-64.

> A system that controls the right of expression in the name of a supposed guarantee of the correctness and truthfulness of the information that society receives can be the source of great abuse and, ultimately, violates the right to information that this same society has.[55]

Statements by some UN bodies concerned with human rights make it clear that false news provisions are inconsistent with the guarantee of freedom of expression, particularly if they are enforced through the criminal law. Commenting on the domestic legal system of Cameroon, the UN Human Rights Committee stated that "the prosecution and punishment of journalists for the crime of publication of false news merely on the ground, without more, that the news was false, [is a] clear violation of Article 19 of the Covenant."[56]

On other occasions, the Committee has reiterated that false news provisions "unduly limit the exercise of freedom of opinion and expression."[57] It has taken this position even with respect to laws which only prohibit the dissemination of false news which causes a threat of public unrest. In 2000, the UN Special Rapporteur made a statement on the unacceptability of imprisonment under false news provisions, saying:

> In the case of offences such as … publishing or broadcasting "false" or "alarmist" information, prison terms are both reprehensible and out of proportion to the harm suffered by the victim. In all such cases, imprisonment as punishment for the peaceful expression of an opinion constitutes a serious violation of human rights.[58]

What is the objection to false news provisions? Reporting in a truthful and balanced way is, of course, an important professional goal for journalists, especially those that work for public service broadcasters and are expected to serve the interests of society as a whole. But writing this goal into law presents several unacceptable dangers.

First, false news laws can have a serious chilling effect on the work of reporters. In situations of rapidly developing news, or where different sources contradict each other, facts may be difficult to check. Given that reporters' reputations depend on the quality of the information they provide, they naturally have a strong incentive only to share news which they are fairly confident is correct, and to warn their audience if a certain fact cannot be verified. If, however, journalists have the sword of a false news law hanging over their head, they might simply decide not to report news that they are not completely certain of at all, for fear of ending up in jail. As a result, citizens will be deprived of potentially vital information on current developments.

Second, facts and opinions are not always easily separated. In many cases, opinions are expressed through superficially false statements, such as sarcastic, satirical, hyperbolic or comical remarks. For example, someone who describes someone else as a 'gangster' is not necessarily accusing the other of being involved in unlawful activities. A ban on false news can thus easily become a ban on opinions not favoured by the authorities, endangering the free confrontation between different points of view which lies at the heart of democracy. This concern was highlighted by Canada's Supreme Court in a case in which it struck down a false news provision as contrary to the constitutional guarantee of freedom of expression. The

[55] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 November 1985, Series A. No. 5, para. 77.
[56] *Concluding Observations of the Human Rights Committee: Cameroon*, CCPR/C/79/Add.116, 4 November 1999, para. 24.
[57] See, for example, *Annual General Assembly Report of the Human Rights Committee*, UN Doc. A/50/40, 3 October 1995, para. 89*; Concluding Observations of the Human Rights Committee: Mauritius*, UN Doc. CCPR/C/79/Add.60, 4 April 1996, para. 19.
[58] *Annual Report to the UN Commission on Human Rights, Promotion and protection of the right to freedom of opinion and expression*, 18 January 2000, UN Doc. E/CN.4/2000/63, para. 205.

Court stated: "The reality is that when the matter is one on which the majority of the public has settled views, opinions may, for all practical purposes, be treated as an expression of a 'false fact.'"[59]

Third, false news provisions fail to recognise that it is often far from clear what the 'truth' on a particular matter is. As such, false news provisions are almost by definition impermissibly vague and, therefore, violate the first part of the three-part test for restrictions on freedom of expression (see section 1.3.2 of Background Paper 1). Moreover, even if a particular truth is well-established, it may not always remain that way. As G.B. Shaw wrote: "New opinions often appear first as jokes and fancies, then as blasphemies and treason, then as questions open to discussion, and finally as established truths." This historic observation should give governments cause to reflect before penalising certain information or ideas as 'false'.

Lastly, the practice of States which still have false news provisions on the books shows the great potential for their abuse. A cogent example is the case of Lim Guan Eng, deputy leader of the opposition DAP party in Malaysia. In 1995, Lim raised concerns about the statutory rape of a 15-year old girl allegedly committed by the Chief Minister of the State of Malacca. The girl had been sentenced to 3 years 'protective custody' in a home for wayward girls, while the Chief Minister himself was not prosecuted. Lim questioned why the girl had been 'imprisoned'. The Malaysian courts found that this inaccurate description of the legal nature of the girl's detention, which was protective custody rather than imprisonment, constituted false news, and Lim was sentenced to 18 months in jail.[60]

Mindful of the risks of false news provisions, several domestic courts have ruled such provisions to be unconstitutional, including in Antigua and Barbuda, Canada, Uganda and Zimbabwe.[61]

[59] *R. v. Zündel* , [1992] 2 SCR 731, p. 749.
[60] *See* 'Malaysia: The trial of opposition parliamentarian Lim Guan Eng', Amnesty International (3 March 1997), http://web.amnesty.org/library/index/ENGASA280031997
[61] *Hector v. Attorney-General of Antigua and Barbuda*, [1990] 2 AC 312 (Judicial Committee of the Privy Council); *R. v. Zündel*, note 59; *Onyango-Obbo and Mwenda v. the Attorney General of Uganda*, Constitutional Appeal No. 2 of 2002 (11 February 2004); *Chavunduka and Choto v. Minister of Home Affairs & Attorney General of Zimbabwe*, 22 May 2000, Judgment No. S.C. 36/2000 (Supreme Court of Zimbabwe).