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Joan Fitzpatrick and Stephen Bowen**
editors

Secrecy and Liberty: National Security, Freedom of Expression and Access to Information

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SECRECY AND LIBERTY: NATIONAL SECURITY, FREEDOM OF EXPRESSION AND ACCESS TO INFORMATION

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FREEDOM OF EXPRESSION AND
ACCESS TO INFORMATION

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FOREWORD

This study on secrecy and liberty arose out of an international gathering of experts which took place in South Africa in late 1995. Jointly convened by ARTICLE 19, the International Centre Against Censorship, and the Centre for Applied Legal Studies (CALS) at the University of the Witwatersrand, the gathering was a highly significant one. After three days of intensive debate, it resulted in the Johannesburg Principles on National Security, Freedom of Expression and Access to Information, a new and compelling set of standards for safeguarding the public's right to know in one of the most contentious of contexts foreseen under international law. The Principles have since been recommended to governments by the United Nations' Special Rapporteur on freedom of opinion and expression as providing "guidance for protecting adequately the right to freedom of opinion, expression and information".

ARTICLE 19 and CALS convened the South Africa conference in order to address one of the most sensitive questions of international law affecting freedom of expression - to what extent may governments withhold information from public disclosure and prohibit expression for reasons of national security. Both organizations had become concerned in the course of their respective work, internationally and in apartheid South Africa, that governments were exploiting the imprecision of international law on this question in order to withhold information that should properly be in the public domain, to deter investigative journalism and to stifle political opposition. A main purpose of the conference, therefore, was to examine the development of international law on this issue taking into account the findings reached by national courts and the international treaty bodies when dealing with relevant cases. Such findings, it was expected, and the reasons adduced in their support, would provide an important resource for charting the most appropriate standards to be followed by governments when balancing the interests of national security against the vitally important right to freedom of expression.

There can be no doubt, of course, that governments are permitted under international law to legislate for the protection of state secrets. The International Covenant on Civil and Political Rights specifically identifies the protection of national security as a legitimate ground for restricting freedom of expression and access to information, and this is echoed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and other regional human rights instruments. Nor is it difficult to imagine the sort of contexts - for example, an imminent threat of foreign military aggression or invasion - to which such restrictions on individual rights were clearly intended to apply. In practice, however, as this volume underlines, many governments have found it useful to define the concept of national or state security much more broadly. By doing so, they have been able to justify prohibiting discussion of, or withholding information about, matters which would prove inconvenient or politically damaging if placed in the public domain. *Raison d'etat*, indeed, has often been the notional shield behind which those wielding power have sought to conceal their actions from the less powerful in whose name they rule and to whom they are theoretically accountable. Nor has this merely been a practice of tyrannies and dictatorships: governments in longstanding

democracies have also tended all too easily to sacrifice their citizens' rights to freedom of expression on the widely framed altar of national security.

This report seeks to restore that balance and to do so, unashamedly, in favor of freedom of expression and the public's right to know. It argues strongly that governments have a heavy obligation to promote and protect these key rights, and that any restriction of those rights should only occur in the narrowest and clearest circumstances, and according to law. It is not enough for governments simply to contend that national security will be jeopardized as grounds for censorship: to be legitimate any such restriction must be capable of justification against more precise criteria such as those already available within emerging international human rights law. It is to this end that the Johannesburg Principles are devoted.

Frances D'Souza, Executive Director

ARTICLE 19

April 1998

INTRODUCTION

The tension between national security and freedom of expression and information is both acute and multifaceted. Stifling of dissent and secretiveness are the hallmarks of repression. Free voicing of diverse political opinions and "sunshine" policies exposing governmental operations to public and media scrutiny, conversely, are indicators of a vigorously effective democracy.

At the same time, armed conflict and espionage pose significant security threats that may justifiably result in restrictions upon the free flow of information. National security concerns will be heightened when the state undergoes a state of emergency, and free expression rights will frequently be among those subjected to derogation or increased restriction. However, the tendency of governing elites to confuse "the life of the nation" with "the survival of the regime" creates a grave risk that derogations and limitations on expression and information rights will be excessive. A proper balance between secrecy and liberty cannot be struck without review of executive and legislative measures by an independent national judiciary, supplemented by the oversight and monitoring activities of international human rights bodies, non-governmental organizations and a vigilant press.

Reconciliation of these tensions, with a strong emphasis upon preservation of fundamental freedoms and genuine democracy, was the objective of the drafters of the Johannesburg Principles on National Security, Freedom of Expression and Access to Information, convened in October 1995 by Article 19, the International Centre Against Censorship. The Johannesburg Principles explicate the dimensions of the freedoms of expression and opinion, the right of access to information, and the scope of permissible limitations on these rights based upon grounds of national security. The Principles further address important structural and procedural protections that may hamper the misuse of state security laws for improper and antidemocratic purposes.

The Commentary by Sandra Coliver elaborates upon the Principles and traces their roots in progressive interpretations of both international and national standards, noting where the Principles reflect an existing consensus and the points at which they attempt to elicit a more rights-regarding approach. Moreover, she explains the potential of the Principles as a guide both to governments and to inter-governmental bodies seeking to reconcile the inevitable tensions between national security and free expression.

Following this distillation and analysis of the general normative framework, we examine the approaches taken by competent inter-governmental bodies in monitoring state compliance with free expression standards, where their limitation on grounds of national security is in question. Here we find valuable cross-fertilization among UN and regional bodies, while also noting distinct regional challenges posed by security regulations. One can discern the emergence of an analytical framework emphasizing that restrictions on expression and information must be prescribed by law; must have both the purpose and effect of protecting a genuine national security interest; and must be proportional, meaning that they are

necessary in a democratic society and adopt the least restrictive means to protect the asserted national security objective.

Elizabeth Evatt describes the experience of the Human Rights Committee in applying Article 19 of the International Covenant on Civil and Political Rights, as well as the Committee's consideration of the national security grounds for restriction of other rights protected by the Covenant. Paul Mahoney and Lawrence Early analyze the influential jurisprudence of the European Commission on Human Rights and the European Court of Human Rights under Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. They also describe the broader role of the Council of Europe in the fields of expression and information, noting the challenges faced by the Council in absorbing its new members from Eastern and Central Europe, whose traditions of reconciling expression and security differ significantly from those of the Western European democracies.

Viviana Krsticevic, José Miguel Vivanco, Juan Méndez and Drew Porter explore the challenge posed by the all-consuming "national security" ideology of autocratic Latin American states during the 1970s and 1980s that ruthlessly suppressed dissent under an expansive concept of necessity. They note the ways in which expression and information have continued to be restricted during the redemocratization process, with the asserted objective of post-crisis national reconciliation. Further, they explore specific Western Hemisphere problems such as "desacato" laws penalizing insult to high officials, analyzing the response of the human rights organs of the Organization of American States under the especially protective standards of the American Convention on Human Rights. Claude Welch examines the challenges faced by the African Commission on Human and People's Rights in implementing the less explicit standards of the African Charter under daunting resource and logistical limits, as well as the evolution of national security concepts between the eras of colonization, decolonization and contemporary armed conflict and political instability. Welch also notes the importance of NGOs as monitors of respect for expressive rights. The European Union poses an interesting contrasting model, as Andrew Nicol notes its modest efforts to promote access to information, while consciously maintaining a fairly low profile in the promotion of fundamental human rights and grappling with its own set of tensions between conformity to EU standards and the national security interests of its member states.

In a series of country studies, we display the tremendous diversity of conceptions of national security, the variety of penal measures states have adopted to stamp out allegedly subversive or dangerous speech, the treatment of journalistic freedoms, the relative openness or closure of government files to public scrutiny, and the central role of an independent and depoliticized judiciary as a check upon obsessive concern over dissent and criticism of government policy. Among the states profiled are those facing significant and persistent threats of international armed conflict, such as Israel and South Korea. Ruth Gavison and Kyo Ho Youm cogently examine legislative and judicial developments in Israel and South Korea relating to

the regulation of speech, the maintenance or gradual flourishing of democracy, and the definition of a role for a critical and free press, in contexts where government must also cope with significant (but sometimes overbroadly defined) external security threats.

The developed Western democracies, such as France, Germany, Norway, the United States and the United Kingdom, have been preoccupied by the risk of espionage, enacting many broad-reaching measures that are frequently applied by deferential judiciaries under diluted procedural standards, while also battling internal enemies with a range of questionable measures punishing sedition or aggressive speech and placing impediments in the path of an inquiring press. Roger Errera reviews developments in French law and practice, finding a trend toward increased accessibility to government information and greater precision in penal laws affecting expression. Ulrich Karpen explains the approach of the German courts, which apply a balancing test strongly favoring free expression as vital to the maintenance of democracy and, consequently, to the genuine protection of national security, while permitting modest limitations on journalists and others engaged in expressive activities. Nils Petter Gleditsch provides a detailed analysis of state secrecy in Norway during the Cold War, noting that national security is likely to recede from prominence in discussions of the role of the media in society, as public attention turns to issues such as privacy and socially divisive speech. Laurence Lustgarten critiques the doctrine of sedition in the United Kingdom, the problematic role of the British judiciary in the protection of expression and the weak tradition of access to information, including the lack of protection for "whistleblowers". Paul Hoffman and Kate Martin provide a detailed guide to statutory and case law in the United States, regarding both freedom of expression and access to information, explaining the central importance of the First Amendment, the influence of the Freedom of Information Act and the vital role of independent judicial review.

In Central Europe, control of the media has emerged as a prime strategy of the regimes taking power in the aftermath of the Cold War in Albania and the Federal Republic of Yugoslavia. Louise Krabbe examines in detail the struggle for journalistic freedom and access to information in Albania. Branislav Milinkovic describes Slobodan Milosevic's manipulation of the mass media to inflame Serb nationalistic fervor, fueling the conflict in Bosnia-Herzegovina and tensions in Kosovo and the Sandzak, and the failure of the judiciary to check severe constraints upon expression.

In Turkey, a tradition of authoritarian rule and an overarching commitment to a secular and unified national identity have resulted in severe repression of Kurdish and Islamist activists. Kerim Yildiz describes the national security and anti-terrorist laws, the role of the National Security Council and state security courts, and a pattern of punitive measures against politicians, activists and journalists. Egypt also has experienced significant internal unrest as well as international armed conflict, resulting in an elaborate array of security measures restricting expression and information, analyzed by Nagad Al-Boray.

In addition to South Korea, four other Asian states are profiled (China, Hong Kong, India and Japan), presenting a variety of interesting contrasts. Sofia Woodman and Yu Ping examine the role of the Chinese Communist Party in defining state security, the range of legislative measures that suppress dissent and control the media, restrictions on access to official information, the gradual substitution of "endangering state security" for "counterrevolution" as the premise for punishing expressive activity, recent procedural developments toward greater legal formality and the Government's strategy of discouraging dissent by means of targeted prosecutions of prominent critics of its policies. Yash Ghai and Jennifer Van Dale describe efforts to entrench basic liberties in the Hong Kong Special Administrative Region, in a context of Chinese concerns that Hong Kong might become the locus of dissent and against an historical background of substantial restrictions on expression during the colonial era. K.S. Venkateswaran traces the jurisprudence of the Indian judiciary concerning the national security and public order exceptions to India's constitutional protection of free expression, noting the impact of derogations during states of emergency and sensitivity to the threat posed by regional separatist movements. Lawrence Beer argues that the demilitarization of post-War Japan has produced a new and potentially influential reinterpretation of the concept of national security, which is conducive to unfettered expression.

Two states (Chile and South Africa) offer case studies in the evolution of security-based restrictions on expression and information during the transition from non-democratic to democratic rule. Cecilia Medina and Felipe Gonzalez note how the expansive doctrine of "national security" held by the military regime focused repression on perceived internal enemies, the impact of the state of emergency, the lingering effects of restrictive legislation, the continued influence wielded by the military and the reluctance of the Chilean courts to scrutinize national security and public order justifications asserted by the Government. Gilbert Marcus describes South Africa's apartheid security policy and its pervasive web of censorship, expansive secrecy laws and state controlled media, and also examines the impact of South Africa's extended state of emergency. He analyzes the 1994 Constitution and its present and potential effects upon South Africa's entrenched culture of secrecy, and notes how the work of the Truth and Reconciliation Commission may bring to light covert actions by the security forces of the apartheid regime.

Through presentation of the Johannesburg Principles, the Commentary, critiques of inter-governmental bodies and these country studies, we have attempted to offer a framework for striking a proper balance between legitimate concerns for peace and security and the fundamental, but not unlimited, rights of free expression and access to information.

Joan Fitzpatrick
May 1998

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THE JOHANNESBURG PRINCIPLES ON NATIONAL SECURITY, FREEDOM OF EXPRESSION AND ACCESS TO INFORMATION

These Principles were adopted on 1 October 1995 by a group of experts in international law, national security, and human rights convened by ARTICLE 19, the International Centre Against Censorship, in collaboration with the Centre for Applied Legal Studies of the University of the Witwatersrand, in Johannesburg.

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

These Principles acknowledge the enduring applicability of the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights and the Paris Minimum Standards of Human Rights Norms In a State of Emergency.¹

PREAMBLE

The participants involved in drafting the present Principles:

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world;

Convinced that it is essential, if people are not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law;

Reaffirming their belief that freedom of expression and freedom of information are vital to a democratic society and are essential for its progress and welfare and for the enjoyment of other human rights and fundamental freedoms;

Taking into account relevant provisions of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the UN Convention on the Rights of the Child, the UN Basic Principles on the Independence

¹ The Siracusa Principles were adopted in May 1984 by a group of experts convened by the International Commission of Jurists, the International Association of Penal Law, the American Association for the International Commission of Jurists, the Urban Morgan Institute for Human Rights, and the International Institute of Higher Studies in Criminal Sciences. The Paris Minimum Standards were adopted in April 1984 by a group of experts under the auspices of the International Law Association.

of the Judiciary, the African Charter on Human and Peoples' Rights, the American Convention on Human Rights and the European Convention on Human Rights;

Keenly aware that some of the most serious violations of human rights and fundamental freedoms are justified by governments as necessary to protect national security;

Bearing in mind that it is imperative, if people are to be able to monitor the conduct of their government and to participate fully in a democratic society, that they have access to government-held information;

Desiring to promote a clear recognition of the limited scope of restrictions on freedom of expression and freedom of information that may be imposed in the interest of national security, so as to discourage governments from using the pretext of national security to place unjustified restrictions on the exercise of these freedoms;

Recognizing the necessity for legal protection of these freedoms by the enactment of laws drawn narrowly and with precision, and which ensure the essential requirements of the rule of law; and

Reiterating the need for judicial protection of these freedoms by independent courts;

Agree upon the following Principles, and recommend that appropriate bodies at the national, regional and international levels undertake steps to promote their widespread dissemination, acceptance and implementation:

I. GENERAL PRINCIPLES

Principle 1: Freedom of Opinion, Expression and Information

- (a) Everyone has the right to hold opinions without interference.
- (b) Everyone has the right to freedom of expression, which includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his or her choice.
- (c) The exercise of the rights provided for in paragraph (b) may be subject to restrictions on specific grounds, as established in international law, including for the protection of national security.

- (d) No restriction on freedom of expression or information on the ground of national security may be imposed unless the government can demonstrate that the restriction is prescribed by law and is necessary in a democratic society to protect a legitimate national security interest.² The burden of demonstrating the validity of the restriction rests with the government.

Principle 1.1: Prescribed by Law

- (a) Any restriction on expression or information must be prescribed by law. The law must be accessible, unambiguous, drawn narrowly and with precision so as to enable individuals to foresee whether a particular action is unlawful.
- (b) The law should provide for adequate safeguards against abuse, including prompt, full and effective judicial scrutiny of the validity of the restriction by an independent court or tribunal.

Principle 1.2: Protection of a Legitimate National Security Interest

Any restriction on expression or information that a government seeks to justify on grounds of national security must have the genuine purpose and demonstrable effect of protecting a legitimate national security interest.

Principle 1.3: Necessary in a Democratic Society

To establish that a restriction on freedom of expression or information is necessary to protect a legitimate national security interest, a government must demonstrate that:

- (a) the expression or information at issue poses a serious threat to a legitimate national security interest;

² For the purposes of these Principles, a democratic society is one which has a government that is genuinely accountable to an entity or organ distinct from itself; genuine, periodic elections by universal and equal suffrage held by secret ballot that guarantee the free expression of the will of the electors; political groups that are free to organize in opposition to the government in office; and effective legal guarantees of fundamental rights enforced by an independent judiciary. This formulation is based on a definition of constitutionalism provided by Professor S A de Smith in *The Commonwealth and its Constitution* (London: Stevens & Sons, 1964), 106, augmented by reference to Article 25 of the International Covenant on Civil and Political Rights.