

**FREEDOM OF EXPRESSION  
AND NATIONAL SECURITY:  
BALANCING FOR PROTECTION<sup>1</sup>**

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**Introduction**

The aftermath of 9/11 saw the adoption of anti-terrorism laws and policies throughout the world, many of which resulted in restrictions to freedom of expression. In 2015, the rise of Daesh, responsible for terrorist attacks in Iraq, Syria, France, Turkey and Tunisia to mention a few, has led governments to adopt additional measures, including the promulgation of state of emergency, and new anti-terrorism and surveillance laws.

Courts and Judges have had to rule over an increasing number of cases of people charged with various speech-related offences on the ground of counter-terrorism and national security, such as incitement to violence or glorification of terrorism.

Historically, national security and counter-terrorism have been frequently invoked by Governments to justify excessive curtailment of the right to freedom of expression and other rights. Such an abuse is facilitated by the difficult relationship and tension between national security and human rights protection. The Judicial Sector should play a key role in addressing and resolving this tension<sup>2</sup>. It does so through a balancing exercise between national security and the protection of human rights, including freedom of expression.

**Over time, a set of general principles has emerged that should guide Courts in approaching national security cases:**

1. Some human rights, defined under article 4 of the ICCPR, can never be suspended, including during state of emergency (See Section I.1 below)

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<sup>1</sup> This analysis benefitted greatly from the training manual developed by Media Legal Defense Initiative, **Training Manual on international and comparative media law and freedom of expression**, London, December 2014

<sup>2</sup> There are many examples throughout the world of the Judicial sector refusing to accept unquestioningly emergency or other legislation justified by reference to the threat from terrorism.

# Global Freedom of Expression

## COLUMBIA UNIVERSITY

2. Other rights may be restricted under the conditions set out by international human rights law. Freedom of Expression may be restricted under the conditions defined by article 19 (3); the **fundamental test is that of proportionality** (See Section I.2)
3. “When an individual’s rights are violated as a result of the misuse or abuse of national security or counter-terrorism powers, the individual should have access to an effective remedy, which may, depending on the damage suffered, include compensation. This approach is consistent with article 2(3) of the ICCPR, which provides that a person has a right to an effective remedy if his or her human rights are violated”<sup>3</sup>.
4. Those charged with national security offences must have their guilt or innocence determined in the judicial arena; not by politicians, public opinion or the Media.

### **Lord Chancellor of the United Kingdom, Lord Falconer, observed in 2006:**

“...Courts are not conducting the fight against terrorism. Nor are they deciding the measures to be used. The level of threat, and the extent to which exceptional measures are required, are for the executive, or the legislature. The questions the courts in the UK ask are: **first, do these measures infringe any individual's fundamental human rights; second if they do, is there a justification for the infringement; and third, is the infringement the minimum necessary to protect our democracy?**”<sup>4</sup>

“Giving the courts the power to ask these questions is essential to give effect to democratic values and to ensure the human rights compatibility of counter-terrorism measures”<sup>5</sup>.

As this manual highlights, restrictions to freedom of expression on the ground of national security must fulfill a number of criteria to meet international standards and best practices, and be legitimate.

## **I - International Standards and Interpretation**

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<sup>3</sup> The Hon John Von Doussa QC, President Human Rights and Equal Opportunity Commission, International Conference on Terrorism, Human Security and Development: Human Rights Perspectives, City University of Hong Kong, 16-17 October 2007,

<sup>4</sup> RT Hon Lord Falconer of Thoroton - Lord Chancellor and Secretary of State for Constitutional Affairs, ‘The role of judges in a modern democracy’, the Magna Cart Lecture, Sydney, 13 September 2006, cited by The Hon John Von Doussa QC, Op.cit.

<sup>5</sup> The Hon John Von Doussa QC, Op. cit.

The right to freedom of expression is not absolute. It may be restricted in the context of a State of Emergency under conditions defined by Article 4 of the ICCPR and the Siracusa Principles.

Outside such extraordinary situations, the right to freedom of expression may be restricted under narrow conditions highlighted in article 19 and article 20 of the ICCPR.

### **I.1. State of Emergency and Limitations to Freedom of Expression (ICCPR – Article 4)**<sup>6</sup>

International human rights law recognizes that sometimes it is necessary to limit individual rights to protect national security or respond to situations of public emergency. However, such an emergency cannot be used to suspend some rights, which cannot be suspended in any circumstances. They include the freedom of thought, the right to life and the right to be free from torture or cruel inhuman and degrading treatment.

Under Article 4 of the ICCPR, in a “state of public emergency which threatens the life of the nation”, a state “may take measures derogating from their obligations under the Covenant to the extent strictly required by the exigencies of the situation”. Freedom of Expression may be one of the freedoms, which may be affected in that way.

To invoke Article 4, two fundamental conditions must be met:

1. The situation must *genuinely amount to a public emergency which threatens the life of the nation*, and
2. The State party must have *officially proclaimed a state of emergency*.

States must also provide “careful justification for not only their decision to proclaim a state of emergency, but also for any specific measures based on such a proclamation”.

Any derogation to the right to freedom of expression are unlawful unless they are in accordance with these rules and interpretive principles.

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<sup>6</sup> See as well MLDI, Op. Cit., December 2014

### Public Emergencies and Fair trial<sup>7</sup>

“While the right to a fair trial is not listed as a non-derogable provision in article 4(2) of the ICCPR, the United Nations Human Rights Committee has stated that the fundamental requirements of fair trial must not be abrogated in any circumstances<sup>8</sup>.

The importance of the right to a fair trial in the context of counter-terrorism proceedings was reinforced in *Hamden v Rumsfeld* where the United States Supreme Court held that right of an accused to ‘be present for his trial and privy to the evidence against him, absent disruptive conduct or consent’ is ‘indisputably part of customary international law’<sup>9</sup>.”

### 1.2. Limitations to Freedom of Expression on the basis of National Security in the ICCPR

The International Covenant on Civil and Political Rights (ICCPR) allows certain restrictions to fundamental rights and freedoms, including freedom of expression, on the condition that these restrictions be specified by law, serve a legitimate aim (respect of the rights and reputations of others, protection of national security or of public order, or of public morals or health) and are necessary in a democratic society.

#### **1.2.1. Article 19, ICCPR**

Article 19 does not identify the speech that may be restricted. Instead, it identifies the conditions under which a speech may be legitimately restricted. Under the so-called three part test, freedom of expression may be legitimately restricted provided (See Annex One):

- The restriction is provided by law,
- The grounds for the restriction are specific: (a) *For respect of the rights or reputations of others;* (b) *For the protection of national security or of public order (ordre public), or of public health or morals.*
- The restriction is necessary to a democratic society and proportionate.

### The proportionality Test

The fundamental litmus test that must be met is the proportionality test. The Court is required to consider whether the restriction is the ‘least restrictive means’ for achieving the relevant purpose, in this case: protecting the public from an act of violence, terrorism or similar.”

<sup>7</sup> This was developed by The Hon John Von Doussa QC, President Human Rights and Equal Opportunity Commission, Op.cit.

<https://www.humanrights.gov.au/news/speeches/incorporating-human-rights-principles-national-security-measures#endnote6>

<sup>8</sup> Human Rights Committee, *General Comment No. 29: States of Emergency (Article 4)*, 31 August 2001, 16., quoted in Von Doussa, Op.cit.

<sup>9</sup> *Hamdan v Rumsfeld*, 126 S.Ct 2749 (2006), quoted in Von Doussa, Op.cit



# Global Freedom of Expression

## COLUMBIA UNIVERSITY

National security is one of the permissible grounds for limitation of the right to freedom of expression.<sup>10</sup>

The Syracuse Principles on the Limitations and Derogation Provisions in the International Covenant on Civil and Political Rights (ICCPR), adopted by the UN Economic and Social Council in 1985, require that the scope of a limitation referred to in the Covenant shall not be interpreted in such a way as to jeopardize the essence of the right concerned. They 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."*<sup>11</sup>

In **General Comment 34**, the Human Rights Committee (HRC) has interpreted Article 19 and offered a number of pertinent analyses regarding national security.

**First**, with regard to the legal bases for a restriction on the basis of national security, the HRC insists that *"it is not compatible with paragraph 3, for instance, to invoke such laws to suppress or withhold from the public information of legitimate public interest that does not harm national security or to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information..."*<sup>12</sup>

Similarly, the Siracusa Principles 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."<sup>13</sup> They also insist that *"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"*<sup>14</sup>.

**Second**, the HRC requires that a State invoking national security to restrict freedom of expression party *"demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat."*<sup>15</sup>

**Third**, the HRC warns against the risks of abusing national security:

*"It is normally incompatible with paragraph 3 to restrict the freedom of journalists and*

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<sup>10</sup> Article 10(2) of the European Convention for Human Rights and Article 13(2)(b) of the African Charter for People's and Human Rights also includes national security as legitimate grounds to restrict freedom of expression. *"The African Charter has distinct wording, mentioning "security" twice, in Article 27(2) requiring rights to be exercised with regard to "collective security" and in Article 29(3), which sets out a duty not "to compromise the security of the State."* In MLDI, 2015 Training Manual

<sup>11</sup> United Nations Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc. No. E/CN.4/1985/4, Annex (1985), Principle 29.

<sup>12</sup> Human Rights Committee, General Comment 34, Geneva, 11-29 July 2011, Par.30

<http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>

<sup>13</sup> Siracua Principles, Op.cit., Principle 30.

<sup>14</sup> Ibid, Principle 31

<sup>15</sup> General Comment 34, Par.35



# Global Freedom of Expression

## COLUMBIA UNIVERSITY

*others who seek to exercise their freedom of expression (such as persons who wish to travel to human rights-related meetings) to travel outside the State party, to restrict the entry into the State party of foreign journalists to those from specified countries or to restrict freedom of movement of journalists and human rights investigators within the State party (including to conflict-affected locations, the sites of natural disasters and locations where there are allegations of human rights abuses). States parties should recognize and respect that element of the right of freedom of expression that embraces the limited journalistic privilege not to disclose information sources.<sup>16</sup>*

**Fourth**, the HRC considered the extent to which terrorism and counter-terrorism may constitute legitimate grounds for restricting freedom of expression. It concluded that:

*“Such offences as “encouragement of terrorism” and “extremist activity” as well as offences of “praising”, “glorifying”, or “justifying” terrorism, should be clearly defined to ensure that they do not lead to unnecessary or disproportionate interference with freedom of expression. Excessive restrictions on access to information must also be avoided. The media plays a crucial role in informing the public about acts of terrorism and its capacity to operate should not be unduly restricted. In this regard, journalists should not be penalized for carrying out their legitimate activities.”<sup>17</sup>*

### **I.2.2 Article 20, ICCPE**

Article 19 allows state parties to restrict speech (provided the above conditions are met) but does not require them to do so. Article 20, on the other hand, prohibits certain expression altogether. The article places an obligation upon governments to prohibit by law “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.”

### **Compatibility of article 19 and article 20**

The Human Rights Committee has stated in General Comment 34 that “Articles 19 and 20 are compatible with and complement each other... As such, a limitation that is justified on the basis of article 20 must also comply with article 19, paragraph 3<sup>18</sup>.”

This means that any restrictions related to the prohibition of incitement to violence or hostility must meet the three-part test.

### **Definition of key terms:**

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<sup>16</sup> General Comment 34, Par. 45

<sup>17</sup> General Comment 34, Par. 46

<sup>18</sup> General Comment 34 (op. cit), par. 50-51



# Global Freedom of Expression

## COLUMBIA UNIVERSITY

On the basis of its extensive review of the jurisprudence, the human rights NGO ARTICLE 19 offers the following definitions of the key terms<sup>19</sup>:

- “*Violence* shall be understood as the intentional use of physical force or power against another person, or against a group or community that either results in or has a high likelihood of resulting in injury, death, psychological harm, mal development, or deprivation<sup>20</sup>
- “*Hostility* implies a manifested action – it is not just a state of mind, but it implies a state of mind, which is acted upon. In this case, hostility can be defined as the manifestation of hatred – that is the manifestation of “intense and irrational emotions of opprobrium, enmity and detestation towards the target group.”<sup>21</sup>”

### ***Incitement and Hate Speech***

Under international human rights law, incitement to some forms of violence may be prohibited not only under **article 20 of the ICCPR** but also under the **1948 Genocide Convention**. Both forms of incitement to violence are linked to the existence of “hatred” and as such fall usually within the sociological category of so-called “hate speech”, which is also prohibited by Article 4 of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination and by Article 19 of the ICCPR.

In 2005, the UN Security Council adopted United Nations **Security Council resolution 1624 (2005)**, which requires states to prohibit incitement to commit a terrorist act (article 1). The UNSC Resolution delinks incitement from hatred.

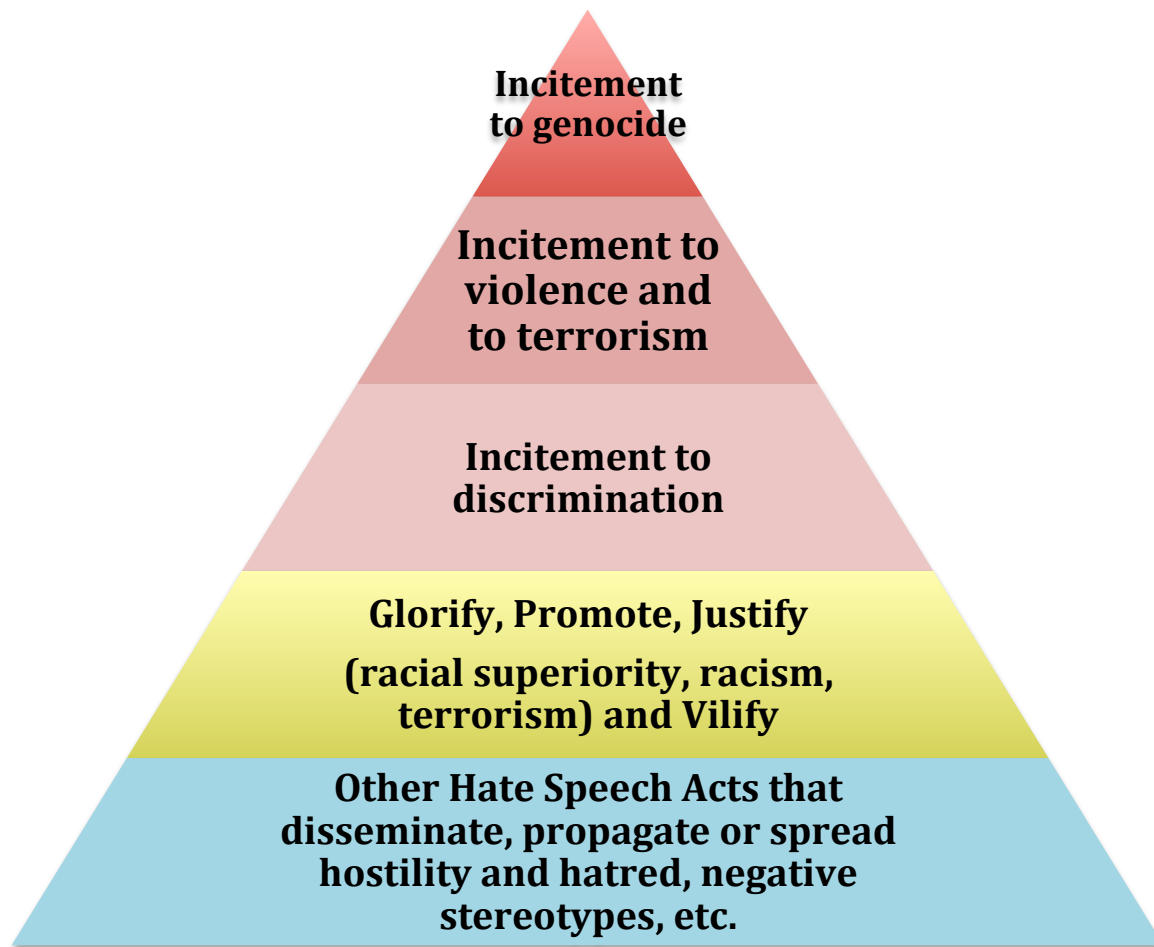
The figure below offers a typology of speech that should or may be legitimately restricted because they convey some forms of “hatred” and are meant to violate or negate the rights of others (including their rights to life), national security, and more generally the rights and values conveyed by the UDHR.

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<sup>19</sup> ARTICLE 19, Prohibiting Incitement to discrimination, violence and hostility, Policy Brief, 2012

<sup>20</sup> ARTICLE 19, 2012, p.19

<sup>21</sup> Ibid



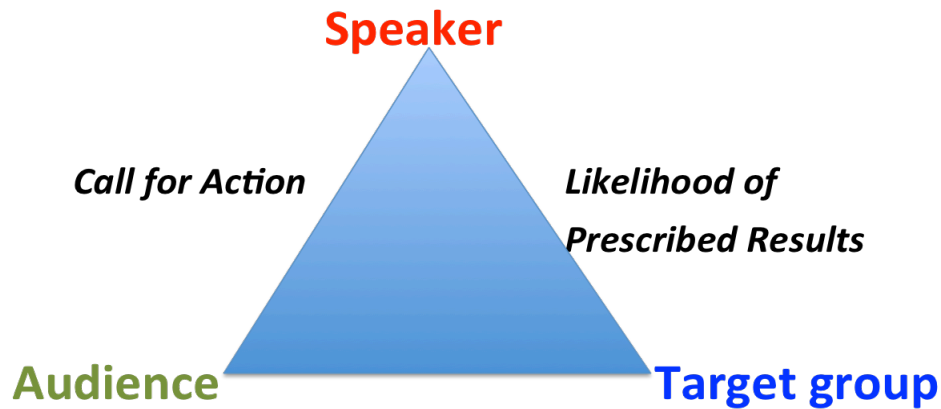
*Figure 1: Incitement and Hate Speech Typology*<sup>22</sup>

Under international human rights law, Incitement speech thus constitutes a particularly egregious form of expressions, which are specifically named and defined and singled out for a specific intervention by the state. This is so because of the so-called “triangle of hatred”: Incitement speech necessitates the existence of an audience ready to act against a target group. Jeroen Temperman represented the triangle and the various forces or factors involved as below:<sup>23</sup>

<sup>22</sup> Different versions of this typology and the other two figures have been presented at various conferences throughout 2014 and 2015 and with groups and scholars working on freedom of expression and Hate Speech, most notable, colleagues involved in a Project by the UN Office for the prevention of Genocide related to the role of religious leaders in presenting and responding to incitement to violence.

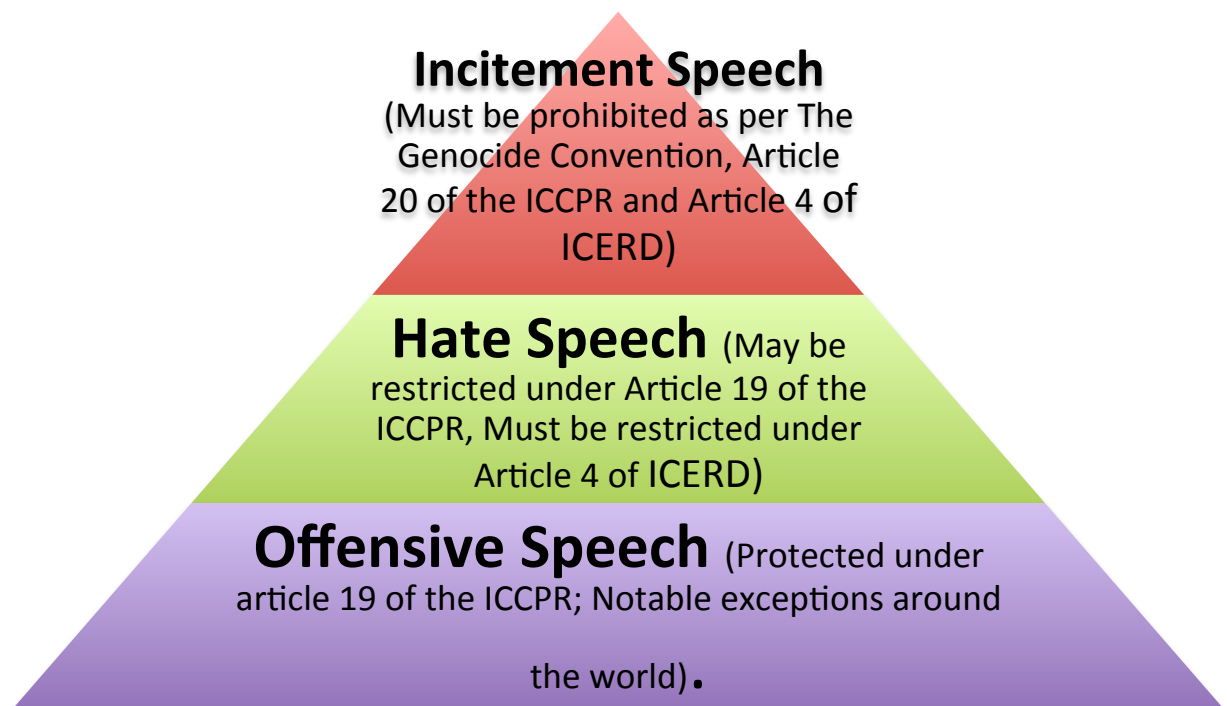
<sup>23</sup> Based on Jeroen Temperman, “Blasphemy versus Incitement – An International Law perspective” in: Christopher Beneke, Christopher Grenda and David Nash (eds.), *Profane: Sacrilegious Expression in a Multicultural Age* (University of California Press, 2014), pp. 401–425.





*Figure 2: Incitement and The Triangle of Hatred*

Altogether, one may therefore distinguish between three types of Speech which may impact on national security but which are the object of different approaches under international human rights law:



*Figure 3: Incitement and Hate Speech Under International Human Rights Law*



# Global Freedom of Expression

## COLUMBIA UNIVERSITY

### ***Determining whether Incitement has occurred***

Incitement requires a set of active players – a speaker seeking to provoke a reaction, and an active listener (or several) who may be willing to act on the instructions. Incitement causes someone to *act* in a certain way – usually criminal<sup>24</sup>. There is nothing passive about the situation.

In order to conclude that incitement has taken place, courts must find:

1. The **intent** of the Speaker to incite
2. The **likelihood** of violence to take place and
3. A **causal link** between the Speaker's intention and violence.

To assess and determine whether incitement has taken place, ARTICLE 19 has suggested that Courts and other actors should review the following elements, on the basis of an extensive review of the jurisprudence around the world<sup>25</sup>. These factors were further adopted by the Rabat Plan of Action<sup>26</sup>, a UN-led process to unpack article 20 of the ICCPR.

1. **Context:** is there a history of violence, discrimination, censorship particularly targeting specific groups?
2. **The Speaker:** does he/she have influence? Hold position of power and authority? Can he/she influence the audience?
3. **The Speech:** is there a direct call for the audience to act in a certain way? Is it provocative? Inflammatory? Coded?
4. **The Medium used:** Is it public? Frequent? Massive in its outreach? (a single leaflet vs mass media)
5. **The Audience:** How large is it? How responsive is it to the speech/speaker? Does it have the means to act on the speech act (e.g. Was the audience able to commit acts of discrimination, violence or hostility?) Was the speech reasonably understood by its audience as a call to acts of discrimination, violence or hostility?

### ***Abuse of international standards: the notion of inciting hatred against the regime***

A number of countries criminalize “Incitement of hatred against the regime,” a “crime” usually linked to national security concerns.

The criminalization of incitement to “hatred against the regime” is problematic from an international law point of view. Since the provisions restrict the right to freedom of expression, it should still meet the thresholds contained within Articles 19 and 20 of the ICCPR; namely that they must be “provided by law”, meet legitimate aim expressly

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<sup>24</sup> There is discussion as to whether incitement also causes someone one to “think” in a certain way.

<sup>25</sup> ARTICLE 19, Op.Cit, Policy Brief, 2012

<sup>26</sup> Rabat Plan of Action on the prohibition of the advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, OHCHR, 2012,

enumerated in Article 19 paragraph 3, and be proportionate to the protected aims.

The term “hatred against the regime” is unclear and broad in scope. It can thus be arbitrarily interpreted, is opened to abuse and may be used to restrict legitimate expression including critique of the government. The lack of clarity poses a threat to legitimate criticism of the government, which is a foundation of democratic society.

The restriction is also not mandated under international law. It is to be contrasted with the kind of incitement prohibited by Article 20, which establishes a link between incitement and hatred on national, ethnic or religious grounds. The restrictions it imposes on freedom of expression are neither necessary nor proportionate under international human rights law.

### **I.3. Further elaboration and clarification: The Johannesburg Principles**

In 1995, a group of experts in international law, national security, and human rights met to unpack and clarify the relationship between national security and freedom of expression. Of their discusses emerges the Johannesburg Principles, 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<sup>27</sup>.

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.

The Principles provide that a restriction is not legitimate unless its purpose and effect is:

*"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."*<sup>28</sup>

The key test for restrictions on freedom of expression in the name of national security is set out in Principle 6, which subject to other principles, prohibits restrictions on expression unless:

- **The expression is intended to incite imminent violence;**
- **It is likely to incite such violence; and**
- **There is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.**

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<sup>27</sup> Johannesburg principle on National Security, Freedom of Expression and Access to Information, ARTICLE 19, November 1996

<sup>28</sup> *Johannesburg Principles*, Principle 2(a).

# Global Freedom of Expression

## COLUMBIA UNIVERSITY

Principles 7-9 set out a number of specific examples of expression that shall not be considered a threat to national security, including: *“to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest.”*<sup>29</sup>

Principle 15(1) states that “no person may be punished on national security grounds for disclosure of information if (1) the disclosure does not actually harm and is not likely to harm a legitimate national security interest”.

### **Terrorism and Counter-Terrorism**

In 2005, the UN Security Council has adopted Resolution 1624 which calls upon all States to adopt such measures as may be necessary and appropriate and in accordance with their obligations under international law to:

- (a) Prohibit by law incitement to commit a terrorist act or acts;
- (b) Prevent such conduct;
- (c) Deny safe haven to any persons with respect to whom there is credible and relevant information giving serious reasons for considering that they have been guilty of such conduct.

**The main problem with legal restrictions on incitement to terrorism is the absence of an internationally-recognized definition of terrorism in international law.**

According to a Human Rights Watch 2012 report, more than 140 countries have passed counterterrorism laws since the attacks of 11 September 2001. Human Rights Watch reviewed 130 of those laws and found that all contained one or more provisions that opened the door to abuse.<sup>30</sup> Amongst the eight elements most likely to be abused, two were directly related to freedom of expression:

- Restrictions on funding and other material support to terrorism and terrorist organizations; and,
- Limitations on expression or assembly that ostensibly encourage, incite, justify, or lend support to terrorism.

For instance, nearly 100 counterterrorism provisions reviewed by Human Rights Watch define material support for terrorism as a crime. Of those, 32 required neither knowledge nor intent that the support could result in a terrorism-related offense – recklessness was sufficient.<sup>31</sup>

Hence, Russia adopted, in 2002, a law ‘On Counteracting Extremist Activity’ which was further amended in 2007 to provide for ‘an expansion of the definition of extremism, to include “hatred or hostility towards any social group” – with no definition of “social group” and punishable with

<sup>29</sup> Principle 2(b)

<sup>30</sup> Human Rights Watch, ‘In the Name of Security: Counterterrorism Laws Worldwide since September 11’ (2012), available at <<https://www.hrw.org/report/2012/06/29/name-security/counterterrorism-laws-worldwide-september-11>>.

<sup>31</sup> *Ibid.*, p.38



# Global Freedom of Expression

## COLUMBIA UNIVERSITY

imprisonment for up to five years; and new regulations on the distribution of the “extremist materials” included in a “federal list”, to be compiled by the authorities – punishable with administrative arrest and confiscation of said materials’.<sup>32</sup>

## II - JURISPRUDENCE<sup>33</sup>

### On a Free Press and National Security

#### ***New York Times Co. v. United States*, better known as the "Pentagon Papers" case<sup>34</sup>**

President Richard Nixon had claimed executive authority to force the *New York Times* to suspend publication of classified information in its possession. The question before the court was whether the constitutional freedom of the press, guaranteed by the First Amendment, was subordinate to a claimed need of the executive branch of government to maintain the secrecy of information. The Supreme Court ruled that the First Amendment did protect the right of the *New York Times* to print the materials.

Justice Hugo Black wrote an opinion that elaborated on the absolute superiority of the First Amendment:

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<sup>32</sup> ARTICLE 19, ‘Amendments to Extremist Legislation further restricts freedom of expression’ (19 July 2007), available at <<https://www.article19.org/data/files/pdfs/press/russia-foe-violations-pr.pdf>>.

<sup>33</sup> Many decisions listed below were included in MLDI, December 2015, Op.Cit

<sup>34</sup> [https://en.wikipedia.org/wiki/New\\_York\\_Times\\_Co.\\_v.\\_United\\_States](https://en.wikipedia.org/wiki/New_York_Times_Co._v._United_States)

# Global Freedom of Expression

## COLUMBIA UNIVERSITY

*"Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell. ... [W]e are asked to hold that ... the Executive Branch, the Congress, and the Judiciary can make laws ... abridging freedom of the press in the name of 'national security.' ... To find that the President has 'inherent power' to halt the publication of news ... would... destroy the fundamental liberty and security of the very people the Government hopes to make 'secure.' ... The word 'security' is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment. The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security..."<sup>[7]</sup>"*

### Test of Necessity and Proportionality

#### ***European Court for Human Rights, Okcuoğlu v. Turkey***<sup>35</sup>

Mr. Okcuoglu participated in a round table discussion.<sup>36</sup> His comments were later published in an article entitled "The past and present of the Kurdish problem." He was imprisoned for these comments and later required to pay a fine, under a law protecting national security and preventing public disorder.

The European Court found that the interference by a public authority with the applicant's right to freedom of expression was prescribed by law, and pursued a legitimate aim, namely the protection of the national security and territorial integrity of the State, and the prevention of disorder and crime.

However, the European Court did not find that the interference was necessary and proportionate.

To determine if the restrictions were necessary, the Court looked at the words used and the context. It noted the "sensitivity of the security situation in south-east Turkey" and the government's fear that the comments would "exacerbate the serious disturbances."

The Court decided that the interference was disproportionate to the aims being pursued for the following reasons:

- The applicant's comments made during a roundtable debate were published in a periodical of low circulation "thereby significantly reducing their potential impact on 'national security', 'public order', or 'territorial integrity'."<sup>37</sup>
- While some comments were negative to those of Turkish origin, they did not amount to incitement to engage in violence, armed resistance or uprising; and

<sup>35</sup> 8 July 1999, Application No. 24246/94 (European Court of Human Rights) Summary from ARTICLE 19:

<https://www.article19.org/resources.php/resource/2610/en/okcuoglu-v.-turkey>

<sup>36</sup> ECtHR, *Okcuoğlu v. Turkey*, Application No. 24246/94 (1999).

<sup>37</sup> *Id.*

# Global Freedom of Expression

## COLUMBIA UNIVERSITY

- His conviction was too severe for the aims being pursued.

### ***European Court for Human Rights, The Observer and Guardian v. the United Kingdom***<sup>38</sup>

A former member of the British Security Service wrote his memoirs "Spycatcher" and made arrangements for their publication in Australia, without obtaining the authorisation of the Security Service. He asserted that until the late 1970s, the Security Service had been engaged in unlawful activities, including the bugging and burgling of friendly embassies. Proceedings were instituted in the English courts and interim injunctions obtained restraining any further publication of the kind in question pending the substantive trial of the action in Australia. Subsequently, it was announced that Spycatcher would be published in the United States. Another newspaper obtained a copy of the manuscript from the US publishers and started serialisation. The British Government instituted contempt of court proceedings against that newspaper

The Court first restated its major principles:

- a. Freedom of expression constitutes one of the essential foundations of a democratic society; subject to [legitimate restrictions] it is applicable not only to "information" or "ideas" that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Freedom of expression ... is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.
- b. These principles are of particular importance as far as the press is concerned. Whilst it must not overstep the bounds set, inter alia, in the "interests of national security" or for "maintaining the authority of the judiciary", it is nevertheless incumbent on it to impart information and ideas on matters of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog".

The Court stressed that any form of prior restraint, such as the injunction in question, should be submitted to the strictest scrutiny:

1. The dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court. This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest. (para. 60)
2. During the first period, before Spycatcher had been published in the US, the applicants had published two articles, which touched upon allegations in Spycatcher of wrongdoing by the Security Service. Injunctions had been granted on the grounds that the Attorney

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<sup>38</sup> ECtHR, *Observer and Guardian v. the United Kingdom*, Application No. 13585/88 (1991). Summary done by ARTICLE 19 in: <https://www.article19.org/resources.php/resource/3110/en/echr:-the-observer-and-guardian-v.-the-united-kingdom>

# Global Freedom of Expression

## COLUMBIA UNIVERSITY

General was seeking a permanent ban on the publication of Spycatcher; to refuse interlocutory injunctions would effectively destroy the substance of the actions and, with it, the claim to protect national security. These were "relevant" reasons both in terms of protecting national security and of maintaining the authority of the judiciary, and as regards this period the injunction could be justified as "necessary in a democratic society".

3. As regards the second period, after Spycatcher had been published in the US, the Court observed that the Attorney General's case underwent a metamorphosis. On 14 July 1987 Spycatcher was published in the United States, meaning that the contents of the book ceased to be a matter of speculation and that their confidentiality was destroyed. The continuation of the injunctions after July 1987 prevented the newspapers from exercising their right and duty to purvey information, already available, on a matter of legitimate public concern. Therefore, after 30 July 1987 the interference complained of was no longer "necessary in a democratic society".

### ***European Court for Human Rights, Vereniging Weekblad Bluf! v. Netherlands.*<sup>39</sup>**

The magazine had got hold of an internal report by the internal security service (BVD). It showed the extent of the BVD's monitoring of the Communist Party and the anti-nuclear movement. The special issue of the magazine containing details of the report was seized. However, the offset plates were not and the magazine simply reprinted its issue. Later a court order was obtained banning the issue from circulation.

The Strasbourg Court found that the court order withdrawing the magazine from circulation was not a necessary interference with Article 10, since the information in the issue was already publicly known. (The Court also questioned whether the contents were genuinely secret.) However, it rejected the argument from the magazine that Article 10 would in all instances prevent a state from seizing and withdrawing material from circulation. National authorities have to be able to take steps to prevent disclosure of secrets when this is truly necessary for national security.

### ***European Court for Human Rights, Guja v Moldova (Whistleblower)***

The European Court for Human Rights considered a freedom of expression claim by a civil servant who was dismissed from his employment after having disclosed to the media two classified letters that were sent to Prosecutor General's Office and which revealed political corruption.

The Court found a violation of Article 10. It determines that civil servants enjoy the right to freedom of expression and that, in considering the proportionality of any interference with that right, it is essential to take into account the public interest involved in disclosing the information. The Court found that public interest could be sufficiently strong as to override civil servants duty of confidence, even in information that was classified as secret. The interest, which the public may have in particular information, can sometimes be so strong as to override

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<sup>39</sup> ECtHR, *Vereniging Weekblad Bluf! v. the Netherlands*, Application No. 16616/90 (1995).





# Global Freedom of Expression

## COLUMBIA UNIVERSITY

even a legally imposed duty of confidence...

### ***Human Rights Committee, Mukong v. Cameroon***<sup>40</sup>

Albert Mukong was a journalist and author who had spoken publicly, criticizing the president and Government.<sup>41</sup> He was arrested twice under a law that criminalized statements "intoxicat[ing] national or international public opinion."

The government justified the arrests to the Committee on national security grounds. The Committee disagreed. Laws of this breadth that "muzzled advocacy of multi-party democracy, democratic tenets and human rights" could not be necessary.<sup>42</sup>

The Government had indirectly justified its actions on grounds of national security and/or public order, by arguing that the author's right to freedom of expression was exercised without regard to the country's political context and continued struggle for unity.

The Committee decided that it was not necessary to safeguard an alleged vulnerable state of national unity by subjecting the author to arrest, continued detention and treatment in violation of article 7. It further considers that the 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. In the circumstances of the author's case, the Committee concludes that there has been a violation of article 19 of the Covenant.

## **Other Cases**

### **High Court of Bombay, India, Marathe v. The State of Maharashtra**<sup>43</sup>

A political cartoonist published several cartoons online that allegedly defamed India's Parliament, the Constitution and spread hatred against the government. He was charged with the offense of sedition under Section 124A of the Indian Penal Code. The law provides: "Whoever, by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards the Government established by law in India, shall be punished with imprisonment for life, to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine."

The charges were dropped but the possibility of invoking Section 124A to restrict free speech remained open. A public interest petition sought the High Court of Bombay to examine the legality of Section 124A as applied to free speech and to prevent its arbitrary invocation.

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<sup>40</sup> MLDI, 2015, Op.Cit.

<sup>41</sup> UNHRC, *Womah Mukong v. Cameroon*, Communication No. 458/1991, UN Doc. No. CCPR/C/51/D/458/1991 (1994).

<sup>42</sup> *Id.*, par. 9.7.

<sup>43</sup> See: *Marathe v State of Maharashtra*, <https://globalfreedomofexpression.columbia.edu/cases/marathe-v-the-state-of-maharashtra/>



# Global Freedom of Expression

## COLUMBIA UNIVERSITY

In its ruling, the High Court highlighted that only expression that excite hatred or contempt against the government, having the tendency of creating public disorder through actual violence or incitement to violence are punishable under Section 124A. Relying on precedent, the Court explained that the law's scope includes "any written or spoken words, etc., which have implicit in them the idea of subverting [g]overnment by violent means, which are compendiously included in the term 'revolution', . . ."

The court explained that the cartoon in question was devoid of any wit, sarcasm, or humor, and that by itself was not reason enough to encroach on the cartoonist's right "to express his indignation against corruption in the political system in strong terms or visual representations ... when there is no allegation of incitement to violence or the tendency or the intention to create public disorder."

### **Norway, Appeal Court, 2015<sup>44</sup>**

A Norwegian man was charged with public incitement to murder with terrorist intent for, amongst other things, the following comments on a news story about hostages killed by Islamists in Algeria: *"May Allah reward our brothers with the biggest and best [of] paradise and expel the enemies of Islam from our country and destroy them"*.

The Appeal Court dismissed charges of public incitement to murder with terrorist intent and of glorification of terrorism. The Appeal Court found that the legal uncertainty created by the vagueness of the law had to benefit the defendant and interpreted "incitement" as requiring a "degree of concretization" and "strength" to be met, very much in keeping with the UN recommendation related to article 20 of the ICCPR.<sup>45</sup>

'The Court also confirmed previous Supreme Court case law determining that no one should risk criminal liability for expressions based on inferred interpretation rather than explicit statements. Accordingly, the Court found that the statements in question constituted "mere" glorification of already committed terrorist acts, rather than "incitement" to commit new ones and thus acquitted the defendant (who was also acquitted for racist hate speech but convicted for threats in relation to a number of other statements)'.<sup>46</sup>

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<sup>44</sup> Case 14-049903AST-BORG/01 14-174730AST-BORG/01, Court Supreme, Norvege, November 2015, <https://www.domstol.no/globalassets/upload/borg/internett/forside-nyheter/14-049903ast-borg-trusler-mm.pdf>

<sup>45</sup> See Rabat Plan of Action, available at <[http://www.un.org/en/preventgenocide/adviser/pdf/Rabat\\_draft\\_outcome.pdf](http://www.un.org/en/preventgenocide/adviser/pdf/Rabat_draft_outcome.pdf)>. On this plan and for a comprehensive analysis of Article 20(2) ICCPR, see Jeroen Temperman, *Religious Hatred and International Law: The Prohibition of Incitement to Violence or Discrimination* (Cambridge: Cambridge University Press, 2016), developing the requirement of a 'triangle of incitement'.

<sup>46</sup> Jack Mchangama, 'Drawing the line between free speech and online radicalisation', in *Open Democracy* (3 July 2015), available at <<https://www.opendemocracy.net/digitaliberties/jacob-mchangama/where-do-you-draw-line-between-free-speech-and-promotion-of-terroris>>.

### **The risk associated with superficial review: The Prosecutor General of Moscow v. the Russian Consumer Rights Protection Society, 2015<sup>47</sup>**

The Russian Consumer Right Protection Society published a travel note on Crimea following complaints by some Russian travelers that they had difficulties obtaining Schengen visas after entering Crimea from the Russian border.

The note advised travelers that it is best to enter Crimea from the Ukrainian border and to follow Ukrainian laws when traveling in the region. In the note, Crimea was referenced as a territory considered to be occupied by Russia.

The Moscow Prosecutor General requested the page to be banned and the website to be fined for violating the Russian Criminal Code, Article 280.1, "Public incitement of acts to undermine the territorial sovereignty of Russia."

The Prosecutor General argued that by using the terms "occupied territory" and "occupation of the peninsula" implied that Crimea is a Ukrainian territory temporarily occupied by Russia and that Russian citizens should abide by Ukrainian law when visiting it. Thus, this reference undermined the territorial integrity and sovereignty of Russia and called for extremist activities. A memorandum from Russia's information supervisory body alleged that the travel note attempted to incite mass riots, extremist activities, and participation in unlawful public activities.

The Russian court found the government's arguments valid and upheld the page's ban and a fine to the NGO.

### **ANNEX ONE: THE THREE-PART TEST<sup>48</sup>**

In General Comment 34, the Human Rights Committee (HRC) reviewed the HRC jurisprudence and communication to date and elaborated on all elements of the three-part test.

**First, the restriction must be provided by law.** This involves the following:

- The restriction must have a basis in written law. This may include laws of parliamentary privilege<sup>49</sup> and laws of contempt of court<sup>50</sup>. However, it does not include traditional, religious or other such customary law<sup>51</sup>

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<sup>47</sup> See: The Case of the Russian Consumer Rights Protection Agency  
<https://globalfreedomofexpression.columbia.edu/cases/case-of-russian-consumer-rights-protection-societys-extremist-statement/>

<sup>48</sup> Extract from Agnes Callamard, A Typology of Hate and Incitement Speech, 2016, forthcoming

<sup>49</sup> See communication No. 633/95, Gauthier v. Canada.

<sup>50</sup> See communication No. 1373/2005, Dissanayake v. Sri Lanka, Views adopted on 22 July 2008.

<sup>51</sup> See general comment No. 32.

# Global Freedom of Expression

## COLUMBIA UNIVERSITY

- The law must be clearly and precisely formulated to enable an individual to regulate his or her conduct accordingly<sup>52</sup> and
- The law must be made accessible to the public.
- It cannot confer upon government (this includes rulers of any kind, and parliaments) “unfettered discretion”<sup>53</sup>
- It must be compatible with all the provisions of the ICCPR<sup>54</sup>
- It cannot violate the non-discrimination provisions
- It cannot provide for penalties that are incompatible with the ICCPR, such as corporal punishments<sup>55</sup>.

**Second, the grounds for the restriction are specific:** *(a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.* The HRC determined that:

- Restrictions are not allowed on grounds not specified in paragraph 3
- With regard to national security, “It is not compatible with paragraph 3, for instance, to invoke such laws to suppress or withhold from the public information of legitimate public interest that does not harm national security or to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information.”

Third, the restrictions must be “**necessary**.” The HRC has interpreted the necessity test to require that the restrictions conform to a number of conditions, including those related to their **proportionality**:

- Restrictions must serve a legitimate purpose (one of the aforementioned grounds)
- They must not be overbroad
- They must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated.
- They must be appropriate to achieve their protective function;
- They must be the least intrusive instrument amongst those which might achieve their protective function.

In addition, General Comment 34 also states that

- “The principle of proportionality must also take account of the form of expression at issue as well as the means of its dissemination. For instance, the value placed by the Covenant upon uninhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in the public and political domain.”<sup>56</sup>
- The principle of proportionality has to be respected not only in the law that frames the

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<sup>52</sup> See communication No. 578/1994, *de Groot v. The Netherlands*, Views adopted on 14 July 1995.

<sup>53</sup> General Comment No.27

<sup>54</sup> See communication No. 488/1992, *Toonen v. Australia*, Views adopted on 30 March 1994.

<sup>55</sup> General comment No. 20, Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40), annex VI, sect. A.

<sup>56</sup> See communication No. 1180/2003, *Bodrozic v. Serbia and Montenegro*, Views adopted on 31 October 2005.

# Global Freedom of Expression

## COLUMBIA UNIVERSITY

- restrictions but also by the administrative and judicial authorities in applying the law<sup>57</sup>”
- A State party, in any given case, must demonstrate in specific fashion the precise nature of the threat to any of the enumerated grounds listed in paragraph 3 that has caused it to restrict freedom of expression, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.

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<sup>57</sup> General comment No. 27, para. 14. See also Communications No. 1128/2002, *Marques v. Angola*; No. 1157/2003, *Coleman v. Australia*.