



Toward a Media Regulatory Reform in Middle East and North Africa: Workshop on Criminal Restrictions on Media Content

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Background Paper: National Security and Terrorism

Protecting national security is among the most important tasks of the State. But while there may be legitimate reasons to limit speech to this end, protection from terrorism and other national security threats are very commonly cited as justifications for illegitimate crackdowns on freedom of expression. In times of conflict, freedom of expression and the right to information must be vigorously defended as bulwarks against oppressive government. As Benjamin Franklin once famously said “People willing to trade their freedom for temporary security deserve neither and will lose both.”

All restrictions on freedom of expression should pass the three-part test found in Article 19(3) of the *International Covenant on Civil and Political Rights* (ICCPR). This requires restrictions to be clearly spelled out in law, to aim to protect a legitimate goal (in this case national security), and to be necessary to protect that goal, including because no suitable alternative measures exist which would be less intrusive and the restriction is proportionate to the benefit attained.

Clearly spelled out in law includes requirements for accessibility and foreseeability, in order to give people a reasonable opportunity to understand the limits of what may be said or done. It is important that laws should not be overly vague, since these will be prone to abuse and can have a “chilling effect” on legitimate discourse by pushing people to steer far clear of the line of acceptable conduct.

In this regard, it is also important to clearly define what national security is and is not. Although international courts have been fairly deferential to States’ definitions of what constitutes a threat, there are natural limits to this category. Restrictions should be grounded in a real threat to the State’s existence, territorial integrity or political independence. Ordinary criminal activities should not be included within this rubric, and nor should localised violence.

It is also critical that any measures limiting speech actually target the protection of national security, rather than merely using this as an excuse to limit critical speech. It is legitimate to debate issues relating to national security and a clear distinction should be drawn between this and incitement to illegal action. As part of this distinction, it is vital that journalists should be allowed to do their job. The law

should not confuse a journalist reporting on an enemy, even doing so sympathetically, with collaborating or offering assistance to these forces. Without engagement by the media threats can be magnified, dehumanising the enemy and making it more difficult to resolve conflicts.

There are two key ingredients to determining whether speech can legitimately be proscribed, as spelled out in the 1995 *Johannesburg Principles*. The first is that the statement should be made with the intent to cause harm to national security. Criticism, even aggressive criticism, should be allowed so long as the speaker does not intend to incite lawlessness or violence. Speakers should generally be shielded from unintended consequences of their actions, though remarks made with a grossly negligent attitude to their potential consequences may meet the standard of intent.

The second ingredient is a clear and close nexus between the statement and a harm which has taken place or is likely to occur. Even speech intended to incite violence should not be prohibited if its chance of succeeding is low. Actions to prohibit speech on national security grounds should not be taken where the risk of actual harm is remote, in terms of either time or causality, so as to avoid such restrictions being abused and to protect the space to debate matters of public interest regarding security issues. Ultimately, open debate and a healthy regard for human rights will enhance the security of the State by building public trust.

In times of genuine emergency, international law recognises that States may need to take exceptional measures, including in the area of restrictions on freedom of expression. However, in line with Article 4 of the ICCPR, there are strict conditions for the suspension of human rights obligations, which must only be made in times of emergency which “threaten the life of the nation”. Derogations from the obligations spelled out in the ICCPR must also be officially proclaimed and must be limited to the extent strictly required and may never be applied in a discriminatory way. The ICCPR also requires States seeking to invoke Article 4 to inform the UN Secretary-General immediately of the rights to be limited and the reasons for the limitation, and to provide notification of the termination of the derogation.