

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

## **INTRODUCTION**

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.

## **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 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. 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;

(b) the restriction imposed is the least restrictive means possible for protecting that

interest; and

- (c) the restriction is compatible with democratic principles.

**Principle 2:** Legitimate National Security Interest

- (a) A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable 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.
- (b) In particular, a restriction sought to be justified on the ground of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including, for example, 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.

**Principle 3:** States of Emergency

In time of public emergency which threatens the life of the country and the existence of which is officially and lawfully proclaimed in accordance with both national and international law, a state may impose restrictions on freedom of expression and information but only to the extent strictly required by the exigencies of the situation and only when and for so long as they are not inconsistent with the government's other obligations under international law.

**Principle 4:** Prohibition of Discrimination

In no case may a restriction on freedom of expression or information, including on the ground of national security, involve discrimination based on race, colour, sex, language, religion, political or other opinion, national or social origin, nationality, property, birth or other status.

**II. RESTRICTIONS ON FREEDOM OF EXPRESSION**

**Principle 5: Protection of Opinion**

No one may be subjected to any sort of restraint, disadvantage or sanction because of his or her opinions or beliefs.

**Principle 6: Expression That May Threaten National Security**

Subject to Principles 15 and 16, 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.

**Principle 7: Protected Expression**

- (a) Subject to Principles 15 and 16, the peaceful exercise of the right to freedom of expression shall not be considered a threat to national security or subjected to any restrictions or penalties. Expression which shall not constitute a threat to national security includes, but is not limited to, expression that:
  - (i) advocates non-violent change of government policy or the government itself;
  - (ii) constitutes criticism of, or insult to, the nation, the state or its symbols, the government, its agencies, or public officials, or a foreign nation, state or its symbols, government, agencies or public officials;
  - (iii) constitutes objection, or advocacy of objection, on grounds of religion, conscience or belief, to military conscription or service, a particular conflict, or the threat or use of force to settle international disputes;
  - (iv) is directed at communicating information about alleged violations of international human rights standards or international humanitarian law.

- (b) No one may be punished for criticizing or insulting the nation, the state or its symbols, the government, its agencies, or public officials, or a foreign nation, state or its symbols, government, agency or public official unless the criticism or insult was intended and likely to incite imminent violence.

**Principle 8: Mere Publicity of Activities That May Threaten National Security**

Expression may not be prevented or punished merely because it transmits information issued by or about an organization that a government has declared threatens national security or a related interest.

**Principle 9: Use of a Minority or Other Language**

Expression, whether written or oral, can never be prohibited on the ground that it is in a particular language, especially the language of a national minority.

**Principle 10: Unlawful Interference With Expression by Third Parties**

Governments are obliged to take reasonable measures to prevent private groups or individuals from interfering unlawfully with the peaceful exercise of freedom of expression, even where the expression is critical of the government or its policies. In particular, governments are obliged to condemn unlawful actions aimed at silencing freedom of expression, and to investigate and bring to justice those responsible.

### **III. RESTRICTIONS ON FREEDOM OF INFORMATION**

**Principle 11: General Rule on Access to Information**

Everyone has the right to obtain information from public authorities, including information relating to national security. No restriction on this right may be imposed on the ground of national security 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.

**Principle 12: Narrow Designation of Security Exemption**

A state may not categorically deny access to all information related to national security, but must designate in law only those specific and narrow categories of information that

it is necessary to withhold in order to protect a legitimate national security interest.

**Principle 13: Public Interest in Disclosure**

In all laws and decisions concerning the right to obtain information, the public interest in knowing the information shall be a primary consideration.

**Principle 14: Right to Independent Review of Denial of Information**

The state is obliged to adopt appropriate measures to give effect to the right to obtain information. These measures shall require the authorities, if they deny a request for information, to specify their reasons for doing so in writing and as soon as reasonably possible; and shall provide for a right of review of the merits and the validity of the denial by an independent authority, including some form of judicial review of the legality of the denial. The reviewing authority must have the right to examine the information withheld.

**Principle 15: General Rule on Disclosure of Secret Information**

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, or (2) the public interest in knowing the information outweighs the harm from disclosure.

**Principle 16: Information Obtained Through Public Service**

No person may be subjected to any detriment on national security grounds for disclosing information that he or she learned by virtue of government service if the public interest in knowing the information outweighs the harm from disclosure.

**Principle 17: Information in the Public Domain**

Once information has been made generally available, by whatever means, whether or not lawful, any justification for trying to stop further publication will be overridden by the public's right to know.

**Principle 18: Protection of Journalists' Sources**

Protection of national security may not be used as a reason to compel a journalist to reveal a confidential source.

**Principle 19: Access to Restricted Areas**

Any restriction on the free flow of information may not be of such a nature as to thwart the purposes of human rights and humanitarian law. In particular, governments may not prevent journalists or representatives of intergovernmental or non-governmental organizations with a mandate to monitor adherence to human rights or humanitarian standards from entering areas where there are reasonable grounds to believe that violations of human rights or humanitarian law are being, or have been, committed. Governments may not exclude journalists or representatives of such organizations from areas that are experiencing violence or armed conflict except where their presence would pose a clear risk to the safety of others.

**IV. RULE OF LAW AND OTHER MATTERS**

**Principle 20: General Rule of Law Protections**

Any person accused of a security-related crime involving expression or information is entitled to all of the rule of law protections that are part of international law. These include, but are not limited to, the following rights:

- (a) the right to be presumed innocent;
- (b) the right not to be arbitrarily detained;
- (c) the right to be informed promptly in a language the person can understand of the charges and the supporting evidence against him or her;
- (d) the right to prompt access to counsel of choice;
- (e) the right to a trial within a reasonable time;
- (f) the right to have adequate time to prepare his or her defence;
- (g) the right to a fair and public trial by an independent and impartial court or tribunal;
- (h) the right to examine prosecution witnesses;
- (i) the right not to have evidence introduced at trial unless it has been disclosed to the accused and he or she has had an opportunity to rebut it; and
- (j) the right to appeal to an independent court or tribunal with power to review the decision on law and facts and set it aside.



**Principle 21: Remedies**

All remedies, including special ones, such as habeas corpus or amparo, shall be available to persons charged with security-related crimes, including during public emergencies which threaten the life of the country, as defined in Principle 3.

**Principle 22: Right to Trial by an Independent Tribunal**

- (a) At the option of the accused, a criminal prosecution of a security-related crime should be tried by a jury where that institution exists or else by judges who are genuinely independent. The trial of persons accused of security-related crimes by judges without security of tenure constitutes a prima facie violation of the right to be tried by an independent tribunal.
- (b) In no case may a civilian be tried for a security-related crime by a military court or tribunal.
- (c) In no case may a civilian or member of the military be tried by an ad hoc or specially constituted national court or tribunal.

**Principle 23: Prior Censorship**

Expression shall not be subject to prior censorship in the interest of protecting national security, except in time of public emergency which threatens the life of the country under the conditions stated in Principle 3.

**Principle 24: Disproportionate Punishments**

A person, media outlet, political or other organization may not be subject to such sanctions, restraints or penalties for a security-related crime involving freedom of expression or information that are disproportionate to the seriousness of the actual crime.

**Principle 25: Relation of These Principles to Other Standards**

Nothing in these Principles may be interpreted as restricting or limiting any human rights or freedoms recognized in international, regional or national law or standards.



# 《約翰奈斯堡原則》

序文

與會者在草擬以下原則時：

考慮根據《聯合國憲章》宣告的原則，對人類家庭成員的固有尊嚴及其平等不移的權利作出承認，乃是世界自由、正義與和平的基礎。

確信為使人類不致迫不得已鋌而走險，對暴政和壓迫進行反叛，有必要使人權受法治的保護。

重申他們相信表達及資訊自由，是對民主社會所需及對其進步和福祉以及其他人權及基本自由的享有不可或缺的原素。

考慮《世界人權宣言》、《公民及政治權利公約》、《聯合國兒童公約》、《聯合國司法獨立基本原則》、《非洲人民及人權約章》、《美洲人權公約》以及《歐洲人權公約》內有關條文。

強烈地察覺部份對人權和基本自由最嚴重的侵犯，是基於政府當局以有需要保護國家安全為理由。

緊記如要令人民能夠監察政府及充份參與民主社會，有必要讓他們可以索取政府所持有的資料。

期望促進世界廣泛承認，以維護國家安全為理由而對表達和資訊自由施加限制的範疇有限，從而勸阻政府假借國家安全為理由，將不正當的限制施加於這些自由上。

認同這些自由，需經制定狹義並準確地擬定，及確保符合法治的基本需求的法律而得到法律保護。重申應由獨立的法院給予這些自由司法保障。

同意以下原則，並建議由本國、區域性及國際性組織，逐步促進落實這些建議。

## I. 基本原則

### 原則 1：意見、發表和資訊的自由

- (a) 人人有保持意見不受干預的權利。
- (b) 人人有發表自由的權利；此種權利包括以語言、文字或出版物、藝術或自己選擇之其他方式，不分國界，尋求、接受及傳播各種消息及思想自由。
- (c) 段落(b)所述之權利可受國際法中一些特定理由限制，包括保障國家安全。
- (d) 除非政府能證明該等限制是法律所規定，以及是一個民主社會為保障合理的國家安全利益所必須的，否則發表或資訊自由不得以國家安全為理由受到限制。而政府有責任舉証該等限制的合法性。

#### 原則 1.1：法律所規定

- (a) 任何對言論及資訊的限制必須為法律所規定的。該等法律必須是易於尋找、清晰、並狹義地制定，及準確，能讓每個人可預見什麼行為是非法的。
- (b) 法律應提供足夠保障，防止該等限制被濫用，包括由獨立的法庭或審裁體，以迅速、全面及具效率的司法程序，監察該等限制的合法性。

#### 原則 1.2：保障合理的國家安全利益

任何政府提出以國家安全為理由，對意見、發表或資訊自由施加的限制，其真正目的和明顯效果都應是保障一項合理的國家安全利益。

#### 原則 1.3：一個民主社會所必須的

為確立一項因保障合理的國家安全利益，而施加於發表或資訊自由的限制，政府須證明：

- a) 有關的發表或資訊對一項合理的國家安全利益構成嚴重威脅；
- b) 該等限制是對因保障該等利益而言，所施加的最低程度限制；

c) 該等限制是符合民主原則的。

## **原則 2：合理的國家安全利益**

(a) 除非其真正目的及明顯效果是維護國本或領土完整，免受武力或武力威脅侵害、或免致其對武力或武力威脅的反應能力受侵害，無論該等威脅是否外在的，如軍事威脅；還是內在的，如煽動以武力推翻政府，否則一項提出以國家安全為理由的限制措施，不能被視為合理；

(b) 一項提出以國家安全為理由的限制措施，如果其真正目的及明顯效果是與維護國家安全無關的，尤要被視為不合理：如用以維護政府免受尷尬或防止政府的錯誤被揭發；或用以隱瞞與公共機構運作有關的資料；或用以鞏固某種主張；或用以鎮壓工潮。

## **原則 3：緊急狀態**

如當局正式及合法的根據本國法及國際法宣佈緊急狀態，而該緊急狀態危及國本，得在此種危急情勢絕對必要之限度及時限之內，可向言論發表及資訊自由施加限制，但不能違背政府在國際法上的肩負的其他義務。

## **原則 4：禁止歧視**

任何一項對發表或資訊自由的限制，包括因國家安全為理由所施加的，均不能因種族、膚色、性別、語言、宗教、政見或其他主張、民族本源或社會階級、國籍、財產、出生或其他身份，而作出歧視。

## **II. 有關發表自由的限制**

### **原則 5：意見的保護**

任何人不應因其所持的意見或信念，而受限制、損害或制裁。

### **原則 6：對國家安全構成威脅的發表**

在符合原則 15 及 16 規定下，惟有只在政府能證明：

- (a) 該發表意圖煽動即將發生的暴力；及
- (b) 該發表是有可能煽動該等暴力；及
- (c) 該發表與該等暴力的可能出現或發生之間，是存在直接及即時的關係的；一項發表才可因國家安全為理由而遭懲罰。

#### **原則 7：受保障的發表**

a) 在符合原則 15 及 16 規定下，和平地行使發表自由，不能被視為對國家安全構成威脅；或受制於任何限制或懲罰。不會對國家安全構成威脅的發表包括但不限於以下：

- (i) 宣揚以非暴力手段改變政府政策或轉換政府；
  - (ii) 對民族、國家或其象徵、政府、其代理人或政府官員或外國民族、其政府、其象徵、其代理人或其政府官員構成批評或屈辱；
  - (iii) 以宗教、良知或信念為理由，構成反對或宣揚反對徵兵或兵役、某一項衝突或使用〔或威脅使用〕武力解決國際爭端，
  - (iv) 旨在發佈一些有關違反國際人權標準或國際人道主義法律的行為的資訊。
- b) 任何人不得因批評或侮辱民族、國家或其象徵、政府、其代理人或政府官員或外國民族、其政府、其象徵、其代理人或其政府官員而受懲罰，除非該等批評或侮辱是意圖或有可能煽動即將發生的暴力。

#### **原則 8：純為宣傳可構成威脅國家安全的活動**

一項發表不能純因其資訊是由一個已被政府宣告為威脅國家安全或有關利益的組織所發佈；或該等資訊是與一個已被政府宣告為威脅國家安全或有關利益的組織有關的，而遭受禁止或懲罰。

#### **原則 9：採用少數或其他語言**

無論是文字或口頭發表，不得因它是某一種語言而被禁止，尤其若該等語言是一種國內的少數民族的語言。

### **原則 10：第三者非法干預表達自由**

政府有責任以合理措施，防止私人組織或個人因和平行使發表自由，而遭非法干預，就算該等發表是批評政府或其政策。政府有責任譴責任何旨在壓止和平表達自由的非法行動；以及調查誰應負責並提交他們接受審判。

## **III. 對資訊自由的限制**

### **原則 11：使用資訊的基本原則**

任何人有權從公共機構索取資料，包括與國家安全有關的資料。不得以國家安全為理由提出限制，除非政府能證明該等限制是法律所規定的以及是一個民主社會為保障合理的國家安全利益所必須的。

### **原則 12：對國家安全豁免的狹義釐定**

一個國家不能一概而論的拒絕他人索取有關國家安全的資料，但可在法律上釐定一些特定及狹義的為保障合理的國家安全利益，而需拒給的資料類別。

### **原則 13：因公眾利益而作出披露**

任何與獲取資料權有關的法律和決定，公眾知情權必須是首要的考慮因素。

### **原則 14：因索取資料被拒，有權要求獨立覆核**

國家有責任提供合理措施，以體現獲得資訊的權利。此等措施要求有關機構，在拒絕索取資料的要求後，儘快以書面提出否決原因；並需就有關否決的法律依據和有效性，提供由獨立機構覆核的權利，包括就否決的合法性提供一些形式的司法覆核。負責覆核的機構有權檢視被保留資料的內容。

### **原則 15：披露保密資料的基本原則**

任何人不應因披露資料，而以國家安全為理由受懲罰，如果 1)

有關披露並不構成實在的損害，亦不構成損害一項合理的國家安全利益；或 2) 公眾知情權凌駕因披露有關資料而招致的危害。

#### **原則 16：從公共服務獲悉的資料**

如果公眾知情權凌駕因披露資料而招致的危害，任何人不應因披露一些其在政府服務時獲悉的資料，而以國家安全為理由受損害。

#### **原則 17：公眾範疇內的資料**

當資料一旦被公開〔不論是什麼形式、無論是否合法〕，任何嘗試阻止進一步發佈的理由均被公眾知情權所凌駕。

#### **原則 18：保障新聞從業員的消息來源**

保證國家安全並不是一個強制新聞從業員透露保密消息來源的理由。

#### **原則 19：到臨禁區**

任何對資訊流通的限制皆不能具抑制人權或人道法律的性質。尤其是任何政府不可阻撓記者及受命監察有否遵守人權或人道標準的跨政府或非政府組織的代表，在有合理理由相信人權或人道法律正在或已經被違反的情況下進入一些地區。政府不能驅逐記者或該等組織的成員離開一些正發生暴力或軍事衝突的地區，除非這些人員的存在，對其他人的安全構成明顯的威脅。

### **IV. 法律及其他事項**

#### **原則 20：法律保障的基本原則**

任何人被控與安全有關，而涉及言論表達或資訊的罪行，均獲國際法所包含的法治保障，其中包括但不限於享有以下權利：

- (a) 無罪假定；
- (b) 不被無理拘禁；
- (c) 迅即以其通曉的語言，告之所控的罪行及有關證據；
- (d) 與其選任的辯護人見面；



- (e) 在合理的時間內受審；
- (f) 給予充份之時間，準備答辯；
- (g) 受獨立公正之法庭公正公開審問；
- (h) 有權盤問控方證人；
- (i) 除非將證據向他披露，並令他有機會作出反辯，否則此等證據不能作為審訊時呈堂；
- (j) 向一個獨立覆核裁決的法律和事實、並有權擱置裁決的法庭或審裁體提出上訴。

### **原則 21：補救**

任何補救措施，如特定的補救措施(如人身保護令)，應給予被控以安全有關罪行的人，並適用於原則 3 所界定威脅國本的緊急狀態情況。

### **原則 22：被獨立審裁體審問的權利**

(a) 在被告人選擇下，與安全有關的刑事檢控，應在設有陪審員的機構(若有該等機構)進行審問或由一個真正獨立的法官審問。如果被控與安全有關罪行的人，被一名不是終身委任的法官審問，則可被視為表面上牴觸被獨立審裁體審問的權利。

(b) 任何情況下，被控與安全有關罪行的人，不可被交予軍事法庭審問。

(b) 任何情況下，被控與安全有關罪行的人，不可被交予一個臨時成立或特別籌組的國內法庭或審裁體審問。

### **原則 23：事前檢查**

除非如原則 3 所述，當局在危及國本時，宣佈緊急狀態，否則言論表達不能因保護國家安全為理由，而受制於事前檢查。

### **原則 24：不相稱的刑罰**

任何人、媒體、政治或其他類別組織，不可因為與安全有關的罪行涉及言論表達及資訊，而受到與切實罪行嚴重性不相稱的刑罰。

**原則 25：** 以下原則與其他人權標準的關係

以上原則不得被解釋為限制任何國際性、區域性或本國法律所賦與的人權和自由。