



# CENTRE FOR THE INDEPENDENCE OF JUDGES AND LAWYERS

CENTRE POUR L'INDEPENDANCE DES MAGISTRATS ET DES AVOCATS

CENTRO PARA LA INDEPENDENCIA DE JUECES Y ABOGADOS

مرکز إستقلال القضاة وألحامین

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## THE MADRID PRINCIPLES

on the

### Relationship between the Media and Judicial Independence

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## THE MADRID PRINCIPLES

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#### Introduction

A group of 40 distinguished legal experts and media representatives, convened by the International Commission of Jurists (ICJ), its Centre for the Independence of Judges and Lawyers (CIJL), and the Spanish Committee of UNICEF, met in Madrid, Spain, between 18 - 20 January 1994. The objectives of the meeting were

- to examine the relationship between the media and judicial independence as guaranteed by the 1985 UN Basic Principles on the Independence of Judiciary;
- to formulate principles addressing the relationship between freedom of the expression and judicial independence.

The participants came from Australia, Austria, Brazil, Bulgaria, Croatia, France, Germany, Ghana, India, Jordan, Netherlands, Norway, Palestine, Poland, Portugal, Senegal, Slovakia, Spain, Sri Lanka, Sweden, Switzerland and the United Kingdom.

The following are the Principles:

**THE MADRID PRINCIPLES**  
**on the**  
**Relationship between the Media and Judicial Independence**

Preamble

- Freedom of the media, which is an integral part of freedom of expression, is essential in a democratic society governed by the Rule of Law. It is the responsibility of judges to recognise and give effect to freedom of the media by applying a basic presumption in their favour and by permitting only such restrictions on freedom of the media as are authorised by the International Covenant on Civil and Political Rights ("International Covenant") and are specified in precise laws.
- The media have an obligation to respect the rights of individuals, protected by the International Covenant, and the independence of the judiciary.
- These principles are drafted as minimum standards and may not be used to detract from existing higher standards of protection of the freedom of expression.

The Basic Principle

1. Freedom of expression <sup>1</sup> (including freedom of the media) constitutes one of the essential foundations of every society which claims to be democratic. It is the function and right of the media to gather and convey information to the public and to comment on the administration of justice, including cases before, during and after trial, without violating the presumption of innocence.
2. This principle can only be departed from in the circumstances envisaged in the International Covenant on Civil and Political Rights, as interpreted by the 1984 Siracusa Principles on the Limitation and Derogation Provisions in the International

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<sup>1</sup> As defined by article 19 of the ICCPR (see Document 1 attached).

Covenant on Civil and Political Rights (U.N. Document E/CN.4/1984/4).

3. The right to comment on the administration of justice shall not be subject to any special restrictions.

#### Scope of the Basic Principle

4. The Basic Principle does not exclude the preservation by law of secrecy during the investigation of crime even where investigation forms part of the judicial process. Secrecy in such circumstances must be regarded as being mainly for the benefit of persons who are suspected or accused and to preserve the presumption of innocence. It shall not restrict the right of any such person to communicate to the press information about the investigation or the circumstances being investigated.

5. The Basic Principle does not exclude the holding *in camera* of proceedings intended to achieve conciliation or settlement of private causes.

6. The Basic Principle does not require a right to broadcast live or recorded court proceedings. Where this is permitted, the Basic Principle shall remain applicable.

#### Restrictions

7. Any restriction of the Basic Principle must be strictly prescribed by law. Where any such law confers a discretion or power, that discretion or power must be exercised only by a judge.

8. Where a judge has a power to restrict the Basic Principle and is contemplating the exercise of that power, the media (as well as any other person affected) shall have the right to be heard for the purpose of objecting to the exercise of that power and, if exercised, a right of appeal.

9. Laws may authorise restrictions of the Basic Principle to the extent necessary in a democratic society for the protection of

minors and of members of other groups in need of special protection.

10. Laws may restrict the Basic Principle in relation to criminal proceedings in the interest of the administration of justice to the extent necessary in a democratic society

(a) for the prevention of serious prejudice to a defendant;

(b) for the prevention of serious harm to or improper pressure being placed upon a witness, a member of a jury, or a victim.

11. Where a restriction of the Basic Principle is sought on the grounds of national security <sup>2</sup>, this should not jeopardise the rights of the parties, including the rights of the defence. The defence and the media shall have the right, to the greatest extent possible, to know the grounds on which the restriction is sought (subject, if necessary, to a duty of confidentiality if the restriction is imposed) and shall have the right to contest this restriction.

12. In civil proceedings, restrictions of the Basic Principle may be imposed if authorised by law to the extent necessary in a democratic society to prevent serious harm to the legitimate interests of a private party.

13. No restriction shall be imposed in an arbitrary or discriminatory manner.

14. No restriction shall be imposed except strictly to the minimum extent and for the minimum time necessary to achieve its purpose, and no restriction shall be imposed if a more limited restriction would be likely to achieve that purpose. The burden of proof shall rest on the party requesting the restriction. Moreover, the order to restrict shall be subject to review by a judge.

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<sup>2</sup> For the proper scope of the term "national security", see sections 29-32 of the Siracusa Principles attached as Document 2.

ANNEXStrategies for Implementation

1. Judges should receive guidance in dealing with the Press. Judges should be encouraged to assist the Press by providing summaries of long or complex judgements of matters of public interest and by other appropriate measures.

2. Judges shall not be forbidden to answer questions from the Press relating to the administration of justice, though reasonable guidelines as to dealing with such questions may be formulated by the judiciary, which may regulate discussion of identifiable proceedings.

3. The balance between independence of the judiciary, freedom of the press and respect of the rights of the individual - particularly of minors and other persons in need of special protection - is difficult to achieve. Consequently, it is indispensable that one or more of the following measures are placed at the disposal of affected persons or groups: legal recourse, press council, Ombudsman for the press, with the understanding that such circumstances can be avoided to a large extent by establishing a Code of Ethics for the media which should be elaborated by the profession itself.

## Participants \* \*\*

Dalmo de Abreu Dallari **	Professor of Law, São Paulo, Brazil
Perfecto Andrés Ibañez	Judge; Board Member, Asociación pro Derechos Humanos de España, Spain; Member, Advisory Board of the Centre for the Independence of Judges and Lawyers (CIJL)
Maria Antonova	Member, Bulgarian Bar Association and Bulgarian Union of Jurists
Narcisa Becirevic	Senior Legal Adviser, Human Rights Desk, Ministry of Foreign Affairs, Croatia
P. N. Bhagwati	Former Chief Justice of India; Chairman, Advisory Board of the Centre for the Independence of Judges and Lawyers (CIJL)
Francisca Cobos Gil	Vice-President, Asociación pro Derechos Humanos de España, Spain
Adama Dieng	Secretary-General, International Commission of Jurists (ICJ), Geneva, Switzerland
Eliane Dupré	Secretary-General, Ordre des Avocats du Barreau de la Seine-Saint-Denis, Paris, France
Desmond Fernando **	Barrister, Sri Lanka; President, International Bar Association
José Antonio Gimbernat Ordeig	President, Asociación pro Derechos Humanos de España, Spain
Sir William Goodhart *	Barrister; Queen's Counsellor; United Kingdom
Lennart Groll *	Judge, Stockholm Court of Appeal; ICJ Vice-President; former press Ombudsman in Sweden
Louis Joinet	Judge, Court of Cassation, France; U.N. Special Rapporteur on Independence of the Judiciary
Zdravka Kalaydjieva	Project Director, Bulgarian Lawyers for Human Rights
Asma Khader **	Advocate, Jordan
Michael D. Kirby **	President, N.S.W. Court of Appeal, Australia; Chairman, ICJ Executive Committee
Kofi Kumado **	Senior Lecturer in Law, University of Ghana; Chairman of the Media Commission
Daniel Marchand *	Professor of Social Law, Conservatoire national des arts et métiers; France
Norman S. Marsh	ICJ Honorary Member; former Secretary-General of the ICJ; former Director, British Institute of International & Comparative Law, United Kingdom

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\* Member of the ICJ

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José A. Martín Pallín	Judge, Supreme Court, Madrid; Board Member, Asociación pro Derechos Humanos de España, Spain
Jean-Gaston Moore	Advocate; Director, Gazette du Palais, Paris; President, ICJ National Section in France
Caterina Nägeli	Lawyer; Member, ICJ National Section in Switzerland
Fali S. Nariman **	Advocate; President, Indian Bar Association; former Solicitor-General of India
Andrew Nicol	Barrister, United Kingdom
Natasa Nikitinova	Legal Adviser, International Law Department, Ministry of Justice, Slovakia
Lech Paprzycki	Board Member, ICJ National Section in Poland
Antonio Payan Martins	Vice-President, ICJ National Section in Portugal
Wolfgang Peukert	Secretary-General, ICJ National Section in Germany; Head of Unit, European Commission of Human Rights, Council of Europe, Strasbourg
Mona Rishmawi	Director, Centre for the Independence of Judges and Lawyers, Geneva, Switzerland
Jacqueline Rochette	Secretary-General, ICJ National Section in France
David Rose	Journalist, <i>The Observer</i> , United Kingdom
Joaquín Ruiz-Giménez *	President of the ICJ; President, Spanish Committee of UNICEF; former Ombudsman of Spain
Rainer von Schilling	Chairman, National Committee of the International Press Institute, Germany
Harald Schwarz	Secretary-General, ICJ National Section in Austria
Oyvind Smukkestad	Judge; Board Member, Norwegian Association of Judges
Frank Stekete	Member, ICJ National Section in the Netherlands
J.J. (Anjo) Tempelman	Press Contacts Advisor (for the Judiciary), Nederlandse Vereniging voor Rechtspraak, Netherlands
Christian Tomuschat **	Professor of International Law, University of Bonn, Germany; Member, U.N. International Law Commission
Britta Wagner	Secretary-General, Constitutional Court, Vienna; Board Member, ICJ National Section in Austria
Giordano Zeli	Advocate; former Judge; Board Member, ICJ National Section in Switzerland

Document 1

EXTRACTS from

**INTERNATIONAL COVENANT ON  
CIVIL AND POLITICAL RIGHTS \***

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*Article 7*

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

...

*Article 9*

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

...

*Article 10*

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject

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\* Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200 A (XXI) of 16 December 1966. Entered into force on 23 March 1976 in accordance with article 49.

to separate treatment appropriate to their status as unconvicted persons;

- (b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

#### *Article 11*

No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

...

#### *Article 14*

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the Parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes of the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

- (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
- (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
- (c) To be tried without undue delay;
- (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require,

and without payment by him in any such case if he does not have sufficient means to pay for it;

- (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
- (g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

#### *Article 15*

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by the community of nations.

...

#### *Article 19*

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include 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 choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(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.

...

*Article 26*

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

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Document 2

EXTRACTS from

**THE SIRACUSA PRINCIPLES**  
**on the Limitation and Derogation Provisions in the**  
**International Covenant**  
**on Civil and Political Rights \***

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**I. Limitation Clauses****A. General Interpretative Principles Relating to the  
Justification of Limitations \*\***

1. No limitations or grounds for applying them to rights guaranteed by the Covenant are permitted other than those contained in the terms of the Covenant itself.
2. The scope of a limitation referred to in the covenant shall not be interpreted so as to jeopardise the essence of the right concerned.
3. All limitation clauses shall be interpreted strictly and in favour of the rights at issue.
4. All limitations shall be interpreted in the light and context of the particular right concerned.
5. All limitations on a right recognised by the Covenant shall be provided for by law and be compatible with the objects and purposes of the Covenant.
6. No limitation referred to in the Covenant shall be applied for any purpose other than that for which it has been prescribed.
7. No limitation shall be applied in an arbitrary manner.
8. Every limitation imposed shall be subject to the possibility of challenge to and remedy against its abusive application.
9. No limitation on a right recognised by the Covenant shall discriminate contrary to Article 2, paragraph 1.
10. Whenever a limitation is required in the terms of the Covenant to be "necessary", this term implies that the limitation:

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\* UN Document E/CN.4/1984/4, reprinted in *ICJ Review* N° 36 (June 1986), pp. 47-56

\*\* The term "limitations" in these principles includes the term "restrictions" as used in the International Covenant on Civil and Political Rights.

- (a) is based on one of the grounds justifying limitations recognised by the relevant article of the Covenant,
- (b) responds to a pressing public or social need,
- (c) pursues a legitimate aim, and
- (d) is proportionate to that aim.

Any assessment as to the necessity of a limitation shall be made on objective considerations.

11. In applying a limitation, a state shall use no more restrictive means than are required for the achievement of the purpose of the limitation.

12. The burden of justifying a limitation upon a right guaranteed under the Covenant lies with the state.

13. The requirement expressed in Article 12 of the Covenant, that any restrictions be consistent with other rights recognised in the Covenant, is implicit in limitations to the other rights recognised in the Covenant.

14. The limitation clauses of the Covenant shall not be interpreted to restrict the exercise of any human rights protected to a greater extent by other international obligations binding upon the state.

## B. Interpretative Principles Relating to Specific Limitation Clauses

### *i. "prescribed by law"*

15. No limitation on the exercise of human rights shall be made unless provided for by national law of general application which is consistent with the Covenant and is in force at the time the limitation is applied.

16. Laws imposing limitations on the exercise of human rights shall not be arbitrary or unreasonable.

17. Legal rules limiting the exercise of human rights shall be clear and accessible to everyone.

18. Adequate safeguards and effective remedies shall be provided by law against illegal or abusive imposition or application of limitations on human rights.

### *ii. "in a democratic society"*

19. The expression "in a democratic society" shall be interpreted as imposing a further restriction on the limitation clauses it qualifies.

20. The burden is upon a state imposing limitations so qualified to demonstrate that the limitations do not impair the democratic functioning of the society.

21. While there is no single model of a democratic society, a society which recognises and respects the human rights set forth in the United Nations Charter and the Universal Declaration of Human Rights may be viewed as meeting this definition.

*iii. "public order (ordre public)"*

22. The expression "public order (ordre public)" as used in the Covenant may be defined as the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded. Respect for human rights is part of public order (ordre public).

23. Public Order (ordre public) shall be interpreted in the context of the purpose of the particular human right which is limited on this ground.

24. State organs or agents responsible for the maintenance of public order (ordre public) shall be subject to controls in the exercise of their power through the parliament, courts, or other competent independent bodies.

*iv. "public health"*

25. Public health may be invoked as a ground for limiting certain rights in order to allow a state to take measures dealing with a serious threat to the health of the population or individual members of the population. These measures must be specifically aimed at preventing disease or injury or providing care for the sick and injured.

26. Due regard shall be had to the international health regulations of the World Health Organisation.

*v. "public morals"*

27. Since public morality varies over time and from one culture to another, a state which invokes public morality as a ground for restricting human rights, while enjoying a certain margin of discretion, shall demonstrate that the limitation in question is essential to the maintenance of respect for fundamental values of the community.

28. The margin of discretion left to states does not apply to the rule of non-discrimination as defined in the Covenant.

*vi. "national security"*

29. National security may be invoked to justify measures limiting certain rights only when they are taken to protect the existence of the nation or its territorial integrity or political independence against force or threat of force.

30. National security cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order.

31. National security cannot be used as a pretext for imposing vague or arbitrary limitations and may only be invoked when there exist adequate safeguards and effective remedies against abuse.

32. The systematic violation of human rights undermines true national security and may jeopardise international peace and security. A state responsible for such violation shall not invoke national security as a justification for measures aimed at suppressing opposition to such violation or at perpetrating repressive practices against its population.

*vii. "public safety"*

33. Public safety means protection against danger to the safety of persons, to their life or physical integrity, or serious damage to their property.

34. The need to protect public safety can justify limitations provided by law. It cannot be used for imposing vague or arbitrary limitations and may only be invoked when there exist adequate safeguards and effective remedies against abuse.

*viii. "rights and freedoms of others" or the "rights or reputations of others"*

35. The scope of the rights and freedoms of others that may act as a limitation upon rights in the Covenant extends beyond the rights and freedoms recognised in the Covenant.

36. When a conflict exists between a right protected in the Covenant and one which is not, recognition and consideration should be given to the fact that the Covenant seeks to protect the most fundamental rights and freedoms. In this context especial weight should be afforded to rights not subject to limitations in the Covenant.

37. A limitation to a human right based upon the reputation of others shall not be used to protect the state and its officials from public opinion or criticism.

*ix. "restrictions on public trial"*

38. All trials shall be public unless the Court determines in accordance with the law that:

- (a) the press or the public should be excluded from all or part of a trial on the basis of specific findings announced in open courts showing that the interest of the private lives of the parties or their families or of juveniles so requires; or
- (b) the exclusion is strictly necessary to avoid publicity prejudicial to the fairness of the trial or endangering public morals, public order (*ordre public*), or national security in a democratic society.

...