



**Organization for Security and Co-operation in Europe
The Representative on Freedom of the Media
Freimut Duve**

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Statement under Current Issues

Mr. Chairman, Ladies and Gentlemen,

In response to last week's questions addressed to me in comments by the US Representative, I would like to raise several issues here that I did not have the time to raise last Thursday. They are related to balancing national security concerns with freedom of expression in some of our participating States.

United Kingdom: for example, the Regulation of Investigatory Powers Act authorises the Home Secretary to issue warrants for the interception of communications and requires Communications Service Providers to provide a reasonable interception capability in their networks. In June 2002, the Home Office announced that the list of government agencies allowed under the act to intercept web traffic and mobile location information without a warrant was being extended to over 1,000 different government departments including local authorities, health, environmental, trade and many other agencies. In addition, the British Broadcasting Act grants power to the authorities to prohibit broadcasting of certain material. The UK Freedom of Information Act from 2001 does not provide for access to information where this is "required for the purpose of safeguarding national security," and also provides for a ministerial override. Under the Official Secrets Act journalists and whistleblowers run the risk of prosecution for reporting on what the government may consider to threaten national security.

Germany: on 12 March 2003 the Constitutional Court upheld the right of law enforcement agencies to monitor the phones of journalists in cases of "serious" crimes. The Court ruled that telecommunication surveillance did not violate Articles 10 and 19 of the Constitution - which guarantee confidentiality of information - when a journalist is suspected of using telecommunication equipment to contact a criminal. It falls to the investigating judge to decide on a case-by-case basis whether the requirements of press freedom should be allowed to prevail over the fight against crime.

France: the Supreme Court confirmed in 2001 the existence of a new crime for journalists of being in possession of material violating the confidentiality of a preliminary legal investigation. According to *Reporters sans frontières*, in September 2001 journalist and photographer Jean-Pierre Rey, a specialist in Corsican affairs, was held for almost the legal maximum of four days by the National Anti-Terrorist Service (DNAT) for lengthy interrogation under the unspoken but real threat that he could be charged.

There are two ways of limiting freedom of expression under the pretext of national security:

First, by imposing restrictions on statements that may undermine national security and, second, in limiting the right to freedom of information in relation to national security, often

very broadly defined. Both forms of restrictions are present in the legislation of almost all OSCE participating States and may be open to abuse. This risk is especially high given the enthusiasm with which governments are pursuing the fight against terrorist criminals and the temptation to overlook the need to carefully assess any proposed restrictions against the importance of freedom of expression.

Let me quote here the Director General of UNESCO Koichiro Matsuura, who recently said that “Perhaps my gravest concern is that much freedom of expression and media freedom may be sacrificed hastily, even voluntarily, on the altar of security. Anxieties induced by terrorist threats may lead to laws and regulations which may undermine the very rights and freedoms that the anti-terrorist campaign is supposed to defend.”

These are just some initial thoughts that I wanted to share with you. I may plan in the not too distant future to take a closer look at this problem with a view of assessing legislation related to national security and a country’s commitment to freedom of expression.

Attached is a paper prepared by the freedom of expression NGO *ARTICLE 19* on national security and freedom of expression that I support in principle.

Thank you.

National security and international law

Ensuring the free flow of information is of supreme importance in a democratic society, but there is a recognition that the right to free expression is not absolute. National security is one area where restrictions may be placed on freedom of expression. However, governments across the world are well-known for invoking national security to cover a huge range of issues and information which they would rather not see in the public domain.

For this reason, the highest international standards dictate that any restrictions on free speech invoked on the grounds on national security must meet stringent criteria. International and national jurisprudence, as well as the clear language of a number of treaties, requires that any restrictions meet the following three-part test, as set out by the European Court for Human Rights and other courts:

1. The first requirement is that the restriction be prescribed by law. The idea of lawfulness which flows from this encompasses several distinct components. It means, first, that the restriction must be set clearly in law, for example, in the statutes enacted by Parliament, through the common law articulated by judges, in secondary legislation, or in professional rules.

Second, the restriction must be articulated with sufficient precision to meet the tests of legal certainty and foreseeability; it is important for citizens and the press to be able to understand their obligations and predict when a certain disclosure is likely to be unlawful. Laws which are excessively vague or which allow for excessive discretion in their application fail to protect individuals against arbitrary interference and do not constitute adequate safeguards against abuse. They “exert an unacceptable chilling effect on freedom of expression as citizens steer well clear of the potential zone of application to avoid censure.”

2. A restriction on freedom of expression must be genuinely directed towards achieving one of the legitimate aims specified in the treaties. If an individual’s freedom of expression is to be curtailed in the interests of national security, the restrictions imposed must actually protect national security. Restrictions that prevent the public from learning of illegality and wrongdoing from whistleblowers in our state institutions fail this part of the test.

3. Even where a restriction can satisfy the first and second criteria, it will be a legitimate limitation on the right to free expression only if it is necessary in a democratic society. This criterion will be met only where the restriction fulfils a pressing social need. The notion of necessity requires, in addition, the key element of proportionality. Where national security does require that freedom of expression be curtailed, the restrictions imposed must impair that right as little as possible, or at least not to an extent disproportionate with the importance of the legitimate aim being pursued.

In the area of national security, more precise standards in this regard have been set out in the *Johannesburg Principles on National Security, Freedom of Expression and Access to*

*Information.*¹ These Principles have been widely endorsed by a wide range of NGOs and individuals. For example, the UN Special Rapporteur has recommended that they be endorsed by the UN Commission on Human Rights.² The following excerpts from the Johannesburg Principles are relevant to the assessment of whether a particular restriction on freedom of expression meets the test for restrictions articulated above:

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.

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 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 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.

ARTICLE 19

¹ ARTICLE 19 (London: ARTICLE 19, 1996).

² See Annual Report on *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1996/39, 22 March 1996, para. 155.