

**Mandate of the Special Rapporteur on the promotion and protection of the right to freedom of
opinion and expression**

REFERENCE: AL
DEU 1/2015:

25 September 2015

Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression pursuant to Human Rights Council resolution 25/2.

In this connection, I would like to bring to the attention of your Excellency's Government information I have received concerning the investigation of **two journalists, Mr. Markus Beckedahl and Mr. André Meister, on charges of treason, following the publication of confidential documents relating to internet surveillance by the German Government.**

According to the information received:

On 25 February 2015 and 15 April 2015 respectively, "Netzpolitik.org", a leading digital rights blog in Germany, published two articles relating to internet surveillance by the German Government.

The first article reportedly provided details of the Government's plans to collect and monitor a substantial amount of internet data, including social media data, as well as the budget for this programme. The second report allegedly described the German secret service's plans to establish a new internet surveillance department dedicated to improving and extending the Government's mass surveillance capabilities.

On 25 March 2015 and 16 April 2015 respectively, two separate criminal complaints were brought to the attention of the State Protection Department of the State Office of Criminal Investigation of Berlin (“LKA”) by the German national security service (“BfV”). These complaints were reportedly directed against “unknown suspects”, although Mr. Beckedahl and Mr. Meister were named as the journalists responsible for the publication of the articles. No additional details regarding the number or identity of people who had permission to access these documents or any meaningful analysis of the alleged breaches of confidentiality were reportedly contained therein.

The Netzpolitik blog was reportedly aware at this time that complaints existed against the journalists; however, it appears that it had no knowledge that the journalists were considered suspects in the case and not witnesses. The LKA subsequently submitted the case to the Prosecutor General, whose office deals with threats to the State and public security, including terrorism, extremism, and espionage by foreign intelligence services.

On 21 April 2015, an officer of the Prosecutor General notified the State Secretary of the Federal Ministry of Justice (“BMJV”) and the Head of the Department of Criminal Law at the BMJV about the case for the first time and the Minister of Justice reportedly received notice soon afterwards. The State Secretary reportedly emphasized the sensitivity of such proceedings and called for a careful assessment with regards to the freedom of the press.

On 13 May 2015, the Prosecutor General requested the Federal Office of Criminal Investigation (“BKA”) to initiate a formal investigation into the actions of Mr. Meister and Mr. Beckedahl and whether they had broken the law by writing about Government plans for internet surveillance.

According to sections 94-95 of the German Criminal Code, the leaking of state secrets to a foreign power, or one of its intermediaries, or otherwise allowing a state secret to become known to the public with the intention of damaging the Federal Republic or benefitting a foreign power, may be considered as treason, and punishable with a sentence of between 5 years and life imprisonment. The BMJV was informed

about the opening of the investigation on 13 May 2015 and the Minister of Justice received notice soon afterwards.

In early June 2015, the BMJV reportedly notified the Public Prosecutor of its doubts regarding the merits of the charges against the two journalists. The precise content of the notice is not publically known.

On 16-17 July 2015, the Prosecutor General reportedly informed the BMJV that the two journalists should be notified that they were the subject of an investigation and that an external expert had been asked to assess the information that had been leaked. It was not however until 24 July 2015 that a notice to the accused journalists was sent.

According to information in a letter from the BMJV to the Legal Committee of the German Parliament, “On 29 July 2015, the State Secretary of the BMJV met the Prosecutor General in Karlsruhe. On this occasion, she pointed out the importance of this matter, in particular with regard to the freedom of press.” This meeting reportedly took place five days after the Prosecutor General had sent notice of the investigation to the journalists and it was not until 30 July 2015 that the journalists received this actual notification and published it.

Upon the investigation into the journalists being made public by Netzpolitik at the end of July, the head of the BfV, Mr. Hans-Georg Maassen, reportedly stated that it was essential to take a stand against publishing confidential or secret material, to safeguard his office’s ability to fight extremism and terrorism.

Netzpolitik claimed it had reported on issues of mass surveillance as it was necessary to start a social debate. It further stated that “these investigations are an attack on the freedom of press and an unacceptable attempt to intimidate against sources and whistleblowers concerning a topic which about the public would be furthermore duped.”

In early August 2015, the Minister of Justice expressed his doubts in a statement as to whether the journalists had the intention to harm Germany or to benefit a foreign power through the publication of the

documents. Shortly afterwards, the Prosecutor General held a press conference in which he claimed that the intervention by the Minister of Justice was unlawful.

On 5 August 2015, the Prosecutor General was suspended. In addition, on 10 August 2015, after considerable public criticism, federal prosecutors announced that they had withdrawn the charges against the two journalists. However, further investigations are allegedly being conducted by local prosecutors into the unidentified source who originally passed information regarding the German Government's plans on internet surveillance to the journalists.

The conclusions of an internal BMJV opinion, reportedly made accessible to members of the Judiciary Committee and the Committee of the Interior on 19 August 2015, averred that no state secrets had been revealed.

I am pleased to learn that the investigation of Mr. Beckedahl and Mr. Meister on charges of treason has been halted and the charges against them withdrawn. This investigation raised serious concerns that it was in direct response to their work as journalists investigating online surveillance by the authorities and the legitimate exercise of their rights to freedom of opinion and expression, as enshrined in articles 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

The use of criminal proceedings appeared aimed at silencing Mr. Beckedahl and Mr. Meister and preventing the dissemination of opinions and ideas that could be considered critical of the Government or its policies. Mass surveillance by any Government is undoubtedly a matter of deep public concern and legal proceedings should not be deployed to stifle the right to impart such information.

Even with the cessation of proceedings, I remain concerned at the possibility the charges brought against Mr. Beckedahl and Mr. Meister may have a significant "chilling effect" on other journalists and whistleblowers who report on or provide critical information on sensitive issues in Germany. Furthermore, I am concerned at reports of ongoing investigations into and also the welfare of the unnamed source who originally provided Mr. Mr. Beckedahl and Mr. Meister with information regarding State plans for internet surveillance.

I would like to emphasize that, with regards to disclosure of sensitive information, any exceptions to the right of freedom of expression should be narrowly defined and clearly provided by law and be necessary and proportionate to achieve one or more of the legitimate objectives of protecting the rights or reputations of others, national security, public order, or public health and morals.

Furthermore, with respect to protection of sources, any restrictions to confidentiality privileges must be genuinely exceptional and subject to the highest standards, implemented by judicial authorities only. Authorities compelling the revelation of sources should demonstrate that reasonable alternative measures to the disclosure do not exist or have been exhausted and that the legitimate interest in the disclosure clearly outweighs the public interest in the non-disclosure. These should be limited to investigations of the most serious crimes or the protection of the life of other individuals.

In connection with the above alleged facts and concerns, please refer to the **Reference to international law Annex** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

It is my responsibility, under the mandate provided to me by the Human Rights Council, to seek to clarify all cases brought to my attention. I would therefore be grateful for your observations on the following matters:

1. Please provide any additional information and any comment you may have on the above-mentioned allegations, including whether the facts summarized above are accurate.
2. Please provide information regarding the legal grounds for the indictment of Mr. Beckedahl and Mr. Meister on charges of treason; why the subsequent investigation into their activities was conducted for almost three months before they were officially notified; and indicate how these measures are in conformity with international human rights instruments, norms, and standards, in particular those ratified by Germany.
3. Please provide information on what measures have been taken in order to safeguard the freedom of the press and to protect whistleblowers in Germany who report on issues relating to mass surveillance national security and law enforcement.

I would appreciate receiving a response within 60 days.

I take this opportunity to urge your Excellency's Government to take immediate steps to revise the respective provisions in the Criminal Code relating to treason and establish the protection of confidentiality of sources of journalists as well as others who may engage in the dissemination of information of public interest.

Your Excellency's Government's response will be made available in a report to be presented to the Human Rights Council for its consideration.

Please accept, Excellency, the assurances of my highest consideration.

David Kaye
Special Rapporteur on the promotion and protection of the right to freedom of opinion
and expression

Annex
Reference to international human rights law

Article 19 of the International Covenant on Civil and Political Rights (ICCPR), ratified by Germany on 17 December 1973, provides that "[e]veryone 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."

Article 17 ICCPR also provides for the rights of individuals to be protected, *inter alia*, against arbitrary or unlawful interference with their privacy and correspondence and provides that "everyone has the right to the protection of the law against such interference or attacks."

In paragraph 30 of its General Comment No. 34 on the right to freedom of opinion and expression, the Committee has stated that "extreme care must be taken by States parties to ensure that treason laws and similar provisions relating to national security, whether described as official secrets or ... otherwise are ... applied in a manner that conforms to the strict requirements of paragraph 3 [of article 19 ICCPR]." Such laws should not be used to "suppress or withhold from the public information of legitimate public interest that does not harm national security or to prosecute journalists ... or others, for having disseminated such information" (CCPR/C/GC/34).

Similarly, in paragraph 38 of the same General Comment, the Committee has stated that, in circumstances of public debate concerning public institutions, the value placed by the Covenant upon uninhibited expression is particularly high. Thus, the mere fact that forms of expression are considered to be offending is not sufficient to justify the imposition of penalties. The General Comment has established that "the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty."

In paragraph 60 of his report analyzing the implications of States' surveillance of communications on the exercise of the human rights to privacy and to freedom of opinion and expression (A/HRC/23/40), the previous Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has noted that "the use of an amorphous concept of national security to justify invasive limitations on the enjoyment of human rights is of serious concern." He has stated that "the concept is broadly defined and is thus vulnerable to manipulation by the State as a means of justifying actions that target vulnerable groups such as human rights defenders, journalists or activists. It also acts to warrant often unnecessary secrecy around investigations or law enforcement activities, undermining the principles of transparency and accountability."