

Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the situation of human rights defenders and the Special Rapporteur on the independence of judges and lawyers

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Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; Special Rapporteur on the situation of human rights defenders and Special Rapporteur on the independence of judges and lawyers, pursuant to Human Rights Council resolutions 25/2, 25/18 and 26/7.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the **draft law "Gesetz zur Ausland-Ausland-Fernmeldeaufklärung des Bundesnachrichtendienstes," presented by the Government on 28 June 2016, which would, if enacted, amend Germany's existing regulations on the surveillance of communications between non-German citizens.** The draft law raises concerns about undue restrictions to the exercise of the right to freedom of expression as guaranteed under international human rights law, in particular as exercised by journalists and lawyers.

According to the information received:

On 28 June 2016, the Government proposed a draft law on the Federal Intelligence Service (Bundesnachrichtendienst, BND).

On 8 July 2016, the draft law passed its first reading in Parliament. The second reading of the draft law will take place in the parliamentary session from 17 to 21 October. The final reading, including the final vote, is expected to be held later this year.

The draft law contains amendments to the following existing laws: 1) The law on the Federal Intelligence Service (BND-Gesetz); 2) the law on Telecommunications (Telekommunikationsgesetz).

The draft law amends existing regulations concerning the surveillance of communications between non-German citizens that take place outside Germany, when the interception takes place within Germany.

First, the draft law authorizes the bulk surveillance of non-German citizens and institutions.

Second, it establishes additional procedures on surveillance that targets particular non-German EU citizens and institutions.

We would like to bring the attention of your Excellency's Government to the following aspects of the draft law:

General provisions on mass surveillance of non-German citizens and institutions

The draft law permits the Federal Intelligence Service (BND) to collect and process, within Germany, the communications and associated data of non-German citizens without specifying an individual target or associated personal identifier. According to the new section 6(1) of the BND-Gesetz, such collection is permitted only if the communication has taken place outside Germany, and if one of the following conditions are met: the information must be required: 1) to recognize and neutralize threats to Germany's internal and external security; 2) to protect the capacity of Germany to act; or 3) to obtain significant findings concerning foreign and security policy issues. The nature and scope of foreign and security policy issues that can form a valid basis for such collection are determined by the Federal Chancellery, the Federal Foreign Office, the Federal Ministry of the Interior, the Federal Ministry of Defence, the Federal Ministry for Economic Affairs and Energy, and the Federal Ministry for Economic Cooperation and Development.

The draft law also establishes a monitoring committee known as the "Unabhängiges Gremium", which comprises a prosecutor of the office of the Federal Public Prosecutor General, and two judges of the Federal High Court of Justice, appointed by the federal government, which must be notified by the Federal Chancellery before the BND conducts any mass surveillance activity described above. The committee is required to meet four times a year.

Additional procedures governing surveillance targeting non-German European Union (EU) citizens and institutions

The draft law permits the BND to collect and process, within Germany, the communications and associated data of non-German EU citizens and institutions using search terms that identify individual targets. Such collection is permitted only if the communication has taken place outside of Germany, and if one of the following conditions are met:

First, such collection is permitted if conducted in order to obtain information concerning the threat of an armed attack against Germany, the perpetration of international terror attacks on Germany, the international spread and sale of military-grade weapons and related goods, programs and technologies, the unauthorized shipment of narcotics, money counterfeiting that impairs the monetary stability of the Euro-currency zone, money laundering, the smuggling of foreign persons, or international attacks on IT-systems of major significance.

Second, such collection is permitted if conducted in order to obtain information as defined by section 6(1) of the amended BND-Gesetz (see above), provided that this information concerns exclusively non-EU States and is of particular significance for Germany.

Finally, such collection is permitted if conducted to investigate a suspicion that a person intends to commit, is currently committing or has committed an offence listed in section 3, paragraph 1, of the Artikel 10-Gesetz, such as crimes against the peace of nations; certain acts endangering the democratic state under the rule of law; treason and certain acts endangering external national security; certain acts against the national defense; certain acts, endangering the safety of North Atlantic Treaty Organization forces based in Germany; the forming of a criminal or terrorist organizations; and murder, manslaughter, arson, data tampering, computer sabotage and other offences, if they are directed against the free democratic order, the existence or security of the German federation or a German state.

The Federal Chancellery must notify the Unabhängiges Gremium if the BND conducts any of the collection activities described above. The BND must halt any activity that the committee deems to violate the legal criteria specified above. However, there is no requirement of notifying the Unabhängiges Gremium about targeted surveillance of EU citizens. The Unabhängiges Gremium is solely authorized to conduct random checks of the legal compliance of such surveillance practice.

Surveillance of foreign journalists and lawyers

The draft law does not include any exemption or protection for the communications and personal data of non-German journalists or lawyers. In particular, the communications of these journalists, including communications with their sources, are not protected. The communications between these lawyers and their clients are also not protected.

We express concern that the draft law would pose a threat to the exercise of the right to freedom of expression guaranteed under article 19 of the International Covenant on Civil and Political Rights (ICCPR), ratified by Germany on 17 December 1973. We recall that this right applies to “everyone” and 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 [the individual’s] choice.”

Restrictions on the right to freedom of expression must satisfy the requirements of article 19(3): That is, any restriction must be “provided by law,” and necessary for “respect of the rights or reputations of others” or “for the protection of national security or of public order (ordre public), or of public health or morals.” We note that permissible restrictions on the Internet are the same as those offline (A/HRC/17/27).

In addition, Article 17(1) of the ICCPR 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. Article 17 and 19 of the ICCPR are closely connected, as the right to privacy is often understood as an essential requirement for the realization of the right to freedom of expression (A/RES/68/167, A/HRC/27/37, A/HRC/23/40, A/HRC/29/32).

Against these standards, we would like to raise the following particular issues of concern:

- i) Vague and overbroad conditions for the collection and processing of data.

We are concerned that the conditions specified for data collection and processing under the draft law are neither “provided by law” nor “necessary” under article 19(3) of the ICCPR.

Under the requirement of legality, it is not enough that restrictions on freedom of expression are formally enacted as domestic laws and regulations. Instead, restrictions must also be sufficiently clear, accessible and predictable (CCPR/C/GC/34). With regards to surveillance, individuals must be able to “look to the law and ascertain who is authorized to conduct data surveillance and under what circumstances” (A/HRC/27/37).

While surveillance measures and other restrictions on freedom of expression may be established to protect national security and public order, they must be “necessary” to protect such objectives, and not simply useful, reasonable or desirable. The requirement of necessity “also implies an assessment of the proportionality” of those restrictions. A proportionality assessment ensures that restrictions “target a specific objective and [do] not unduly intrude upon other rights of targeted persons.” The ensuing “interference with third parties’ rights must [also] be limited and justified in the light of the interest supported by the intrusion” (A/HRC/29/32). Finally, the restriction must be “the least intrusive instrument amongst those which might achieve the desired result” (CCPR/C/GC/34).

The purposes for which data collection and processing may be conducted under the draft law are vaguely formulated and therefore potentially overbroad. For example, there is no guidance on the nature, scope and degree of severity of the security threats or issues that would trigger the bulk or targeted collection activities authorized under the draft law. Instead, the ministries identified by the draft law appear to exercise largely unfettered discretion over such determinations. This combination of ambiguity and discretion creates a significant risk that the BND will collect and analyze sensitive and personal information belonging to or concerning non-German citizens and institutions not suspected of any crime or wrongdoing.

The provisions on bulk data collection also raise concern that they do not comply with the requirements of necessity and proportionality. Mass or bulk surveillance

programs may contravene these requirements “even if they serve a legitimate aim and have been adopted on the basis of an accessible legal regime. In other words, it will not be enough that the measures are targeted to find certain needles in a haystack; the proper measure is the impact of the measures on the haystack, relative to the harm threatened; namely, whether the measure is necessary and proportionate” (A/HRC/27/37).

In terms of surveillance of individuals we would like to refer to Human Rights Council Resolution 22/6, which urges States to ensure that measures to preserve national security are in compliance with their obligations under international law and do not hinder the work and safety of individuals, groups and organs of society engaged in promoting and defending human rights (OP 10). Laws affecting anyone defending human rights, also journalists and lawyers, must be “clearly defined, determinable and non-retroactive” (OP 11).

ii) Adverse impact on journalism and legal representation.

We are also particularly concerned that the draft law will unduly restrict the right to freedom of expression of journalists and lawyers – professions that are essential safeguards of access to information and rule of law. We express concern that this lack of protection is not only damaging to these professionals, but also to the general public’s right to seek, receive and impart information.

The Special Rapporteur on freedom of expression has emphasized that, with regards to the surveillance of journalists, “a high burden should be imposed in the context of journalists and others gathering and disseminating information”. In particular, measures to “circumvent the confidentiality of sources of journalists, such as secret surveillance or metadata analysis, must be authorized by judicial authorities according to clear and narrow legal rules” (A/70/361).

The lack of protection for foreign journalists under the draft law potentially enables the BND to collect their data by using search terms specifically targeting such journalists. It would also be possible for the BND to search for the communications of select foreign journalists that have been inadvertently collected in bulk. The draft law therefore raises serious concern that foreign journalists and their sources will be vulnerable to unnecessary and disproportionate surveillance. This in turn threatens their right - and that of the public generally - to seek, receive and impart information.

The draft law also does not exempt lawyers’ communications with their clients from the surveillance activities it authorizes. This lack of protection potentially compromises communications protected under attorney-client confidentiality laws and may create a chilling effect on attorney-client relationships, hindering effective legal representation.

In this regard, we would like to refer to the Basic Principles on the Role of Lawyers, adopted at the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Havana, Cuba, 27 August-7 September 1990), and in

particular to Principle 22, which requires State to recognise and respect that “all communications and consultations between lawyers and their clients within their professional relationship are confidential.” The term “consultation” should be interpreted broadly so as to include face-to-face meeting with clients as well as other types of remote communication, e.g. telephone conversations or email exchanges.

iii) Discriminatory scope of the right to freedom of expression.

The comparatively weak protections for non-German citizens under the draft law create concern that Germany’s surveillance activities will have an unduly disproportionate impact on their right to freedom of expression.

The right to freedom of expression protected under article 19 of the ICCPR applies to “everyone,” and does not distinguish between nationals and non-nationals. It also applies “regardless of frontiers.” This “transboundary scope” guarantees individuals “the right to receive information from, and transmit information and ideas of all kinds to, *places beyond their borders*” (A/HRC/29/32, emphasis added). Furthermore, as stated by the Human Rights Committee, laws that limit the right to freedom of expression must not only comply with the strict requirements of article 19(3), but must also themselves be compatible with the provisions, aims and objectives of the Covenant, including the non-discrimination provisions of the Covenant (CCPR/C/GC/34).

The draft law provides weaker protection for non-German citizens against unnecessary and disproportionate surveillance in at least two ways. First, communications sent and received by non-Germans outside Germany are afforded less protection than those sent or received inside Germany. Second, communications sent or received by non-German non-EU citizens and institutions are afforded less protection than those by non-German EU citizens.

In this regard, we refer to General Comment 31, in which the Human Rights Committee highlights that the enjoyment of the rights guaranteed in the ICCPR are not limited to citizens of States parties but “must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party” (CCPR/C/21/Rev.1/Add.13).

iv) Lack of adequate independent judicial oversight and other safeguards.

Concern is expressed that the establishment of the Unabhängiges Gremium under the draft law does not provide an adequate safeguard for the right to freedom of expression. Restrictions on this right must be applied by a body that is independent of political, commercial or unwarranted influences in a manner that is neither arbitrary nor discriminatory, and with adequate safeguards against abuse in order to avoid loose interpretation and selective application (A/HRC/23/40).

As underlined by the Special Rapporteur, “legislation must stipulate that State surveillance of communication must only occur under the most exceptional circumstances and exclusively under the supervision of an independent judicial authority. Safeguards must be articulated in law relating to the nature, scope and duration of the possible measures, the grounds required for ordering them, the authorities competent to authorize, carry out and supervise them, and the kind of remedy provided by the national law” (A/HRC/23/40).

We express concern that oversight of the proposed mass surveillance under the draft law is inadequate. A three-member administrative committee that is only required to meet four times a year may not have sufficient staff or resources to oversee mass surveillance operations that are, by their very definition, extensive in scope. Moreover, we express concern that the draft law provides that all three members of the monitoring committee are from or appointed by the executive branch, which weakens the appearance of the Committee’s independence and impartiality.

v) Lack of legal regime governing surveillance outside of Germany.

We note that the draft law does not pertain to surveillance measures against non-Germans that are conducted in their entirety outside Germany. For such measures, German law provides no safeguards. We express concern about the lack of any adequate legal regime governing the powers of the BND to conduct mass and targeted surveillance of non-Germans outside Germany.

It is our responsibility under the mandate provided to us by the Human Rights Council to seek to clarify all cases brought to our attention. Therefore, we would welcome any additional information or clarification from your Excellency’s Government with respect to this draft law and on measures taken to ensure that its provisions comply with Germany’s obligations under international human rights law, particularly with regard to the right to freedom of opinion and expression. We would also welcome the opportunity to discuss the draft law in more detail with your Excellency’s Government at your convenience.

Finally, we would like to inform your Excellency’s Government that this communication will be made available to the public and posted on the website page of the mandate of the Special Rapporteur on the right to freedom of expression: (<http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/LegislationAndPolicy.aspx>).

Your Excellency’s Government’s response will also be made available on the same website as well as in a report to be presented to the Human Rights Council for its consideration.

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

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