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LETTER FROM THE EDITOR

Dear Readers,

Welcome to the latest issue of IJCSL! I hope you are enjoying whatever season it is in your hemisphere. Here it is a typical hazy, hot, and humid July, but we have suffered in the cold and windy storms of South Africa earlier this very month.

In this issue we bring you a Special Section on Laws for CSOs in Sub-Saharan Africa, which is described in more detail in my Introduction on page 7.

In addition, we feature two interesting articles. The first of these, *Speaking of Terror: A survey of the effects of counter-terrorism legislation on freedom of the media in Europe,* was written by David Banisar. He is director of the Freedom of Information Project of Privacy International in London. He is also a Non-Resident Fellow at the Center for Internet and Society at Stanford Law School and a Visiting Research Fellow at the School of Law, University of Leeds. Previously he was a Research Fellow at the Kennedy School of Government at Harvard University and a co-founder and Policy Director of the Electronic Privacy Information Center in Washington, DC.

The article was originally published by the Council of Europe's Media and Information Society Division on the occasion of the First Council of Europe's Conference of Ministers responsible for Media and Communication Services, and we are grateful to the Council of Europe and the author for permission to republish it here. The article contains a very important indictment of the ways in which the anti-terrorism legislation and regulations/guidelines adopted in Europe has had a detrimental impact on freedom of expression in the region, and it develops and documents that thesis quite soundly in its analysis of events and court cases in the European Court of Human Rights.

The second, *The Anatomy of Corruption in China: A Political Economy Perspective,* was written by Miron Mushkat and Roda Mushkat. Miron Mushkat is Adjunct Professor of Economics and Finance, Syracuse University Hong Kong Program; Roda Mushkat is Professor of Law and Director of the Centre for International and Public Law, Brunel Law School, Brunel University, Honorary Professor, Faculty of Law, University of Hong Kong, and Visiting Professor, Kadoorie Institute, University of Hong Kong.

The Mushkats' article discusses theoretical and practical implications of corruption in China and the ways in which it has a detrimental impact on citizens and civil society. For example, they suggest that "indirect [costs of corruption] are thought to be equally vast (the latter include credibility erosion, damage to public health, educational reversals, efficiency losses, environmental degradation, poor morale, social instability and waste)." In order to re-conceptualize ways to manage corruption, they suggest that an economic perspective on the problem will assist in coping with it.

While these are diverse issues, we hope that our readers will enjoy the opportunity to delve into some complex areas of concern to civil society on three continents and in various contexts. These articles add to the growing diversity of scope presented by this Journal.

I would like to add that with this issue we bid a fond farewell to Patrick McCormally, our former Managing Editor, and wish him good luck on the new legal career on which he is embarked. We welcome Cadence Moore, former Associate Editor, to the Managing Editor assignment and look forward to working with her during the coming academic year.

Happy reading!

Karla W. Simon
Editor-in-Chief
Professor of Law
Catholic University of America

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IJCSL EDITORIAL POLICY

July 2009

Dear Reader,

CONTENT – The IJCSL publishes articles on a variety of topics, seeking to provide a venue for an international readership to learn about and express opinions on developments in law affecting civil society. These topics and the array of opinions on them are complex and sometimes controversial. The opinions expressed herein do not necessarily reflect the views of the IJCSL or its editorial staff.

STYLE – The IJCSL publishes articles by contributors from around the world. Therefore, the IJCSL uses a flexible editorial policy regarding questions of style. Articles submitted by persons for whom the English language is native are edited based on the author's original syntax and spelling. Articles submitted by persons for whom the English language is not native are edited according to American English style.

Occasionally, the IJCSL publishes articles in languages other than English. In those instances, articles are published as submitted and the IJCSL provides and English-language summary.

QUESTIONS & COMMENTS – The IJCSL welcomes readers' questions and comments on items it publishes. If you have a question or comment, please contact:

Karla W. Simon, Editor-in-Chief simon@cua.edu
Cadence Moore, Managing Editor Cadence.Moore@gmail.com

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We look forward to hearing from you, and thank you for your interest in the IJCSL.

Sincerely,

The IJCSL Editorial Staff and Editorial Board

PLEASE CITE AS

7 INT'L J. CIV. SOC. L. 3 *at* http://www.iccsl.org/pubs/09-07_IJCSL.pdf

SPECIAL SECTION ON LAWS FOR CSOS IN SUB-SAHARAN AFRICA

BY KARLA W. SIMON,
EDITOR-IN-CHIEF

This special section highlights both some of the more successful recent developments in the laws affecting civil society organizations in Sub-Saharan Africa and some of the less successful ones. As readers familiar with the issues will know, there has been a spate of undesirable developments in this field in recent years. For example, the new Societies and Charities Proclamation Law in Ethiopia, adopted in 2009, has been severely criticized by Amnesty International. In fact, recent developments regarding CSOs in Ethiopia, discussed in the August 2009 IJCSl-Newsletter, bear out the problems with the legislation.

The proposed changes in the PVO Act in Zimbabwe, which were enacted but never implemented in 2004, were the subject of critical comments by ICCSL. More recently, the Zimbabwean government has proposed that all trusts and societies, currently permitted to be registered under different legislation, be subject to the provisions of the PVO Act. This has been strongly resisted by CSOs in the country.

Developments in two other countries are featured here. One of the countries is South Africa, where the legislative environment is at present relatively benign. The other is Uganda, where the CSO sector is struggling with the government to allow it to have more space to operate freely. Our Special Section contains three articles. The first of these, by the staff of the Department of Trade and Industry's registration staff, describes the registration regime for Section 21 companies in South Africa and how it will be changed when the new (2008) legislation for non-profit companies is fully operational.

The second article is by Ricardo Wyngaard, a South African lawyer in private practice specializing in NPO legal issues, who recounts the current state of the legislation affecting CSOs, the history behind the some of the changes, and actual and potential problems facing the sector as it seeks to achieve real freedom of action as well as access to funding. He points out, for example, the lack of funding from the National Lotteries Board as well as potential problems for CSOs resulting from anti-terrorism legislation.

The third article is by Arthur Larok and Job Kiija, lawyers and civil society activists in Uganda. Their piece looks specifically at the NGO Act, 2006, its attendant NGO Regulations, 2008 and the draft NGO Policy 2008, which it asserts reflect serious inconsistencies and are essentially restrictive of the citizens' right to participate in their country's development processes. The paper was produced as Briefing Paper for the Uganda National NGO Forum and is used in its campaign for a less restrictive legal environment for civil society.

Contrasting the legal regimes for CSOs in South Africa and Uganda, one can see that a government's attitude toward the role of CSOs in society can make a real difference in legislative and policy outcomes. One hopes, therefore, that the Ugandan government will take on board some of the lessons learned in South Africa during the Aga Khan Foundation sponsored Study Tour.

NON-PROFIT ORGANIZATIONS IN SOUTH AFRICA: A DISCUSSION DOCUMENT

BY COMPANIES AND INTELLECTUAL PROPERTY REGISTRATION OFFICE[1]

I. INTRODUCTION

Non-profit organisations or non-governmental organisations (hereinafter referred to as NPO's, have been recognised under South African Law for more than a century. In the last couple of decades, however, their scope of activity has broadened considerably and their role in society has now become very important.

NPO's in South Africa, as is also the case internationally, are institutions that conduct their affairs for the purpose of assisting other individuals, groups, or causes rather than garnering profits for themselves. NPO's are very diverse in their activities and cover many fields of interest — the promotion of charity, religion, health, science, literature, education, social welfare, wildlife protection, the arts, sports, community interests and even the interests of workers and professions.

All NGO's are faced with the decision of whether or not to incorporate. There are many benefits associated with incorporating. Perhaps the greatest advantage of all is the possibility of being exempted from paying income tax – there is no automatic exemption but qualifying institutions may apply for exemption. Some of the others advantages are the ability to legally solicit funds, separate juristic personality of the NPO, limited personal liability for its members, continued corporate existence beyond the involvement of original founders and increased public recognition.

II. INCORPORATION UNDER THE COMPANIES ACT, 1973

Two basic types of companies can be formed under the Companies Act, 1973, namely a company having a share capital and a company not having a share capital but with the liability of its members limited by its memorandum of association in a guarantee clause. This type of company is then termed a company limited by guarantee. It is under this type of company that a NPO may be incorporated as the so-called "section 21 company" or "incorporated association not for gain". A NPO, therefore, can be incorporated as a company limited by guarantee and is known under the Companies Act as an association incorporated under section 21 or an association not for gain.

At least seven persons associated for a lawful purpose are required for the formation and incorporation of a company limited by guarantee and consequently also for a company incorporated under section 21.

[1] This document was prepared by the Companies and Intellectual Property Registration Office (CIPRO) for presentation to the East Africa delegation, sponsored by the Aga Khan Foundation, July 8, 2009

Further statutory requirements are –

- The company must have as its main objective the promotion of religion, arts, sciences, education, charity, recreation, or any other cultural or social activity or communal or group interest;
- It must apply its profits (if any) or other income in promoting that main object;
- It must prohibit the payment of any dividend to its members; and
- In order to comply, its memorandum must contain the following provisions:
    - The income and property of the association when derived shall be applied solely towards the promotion of its main object, and no portion thereof shall be paid or transferred, directly or indirectly, by way of dividend, bonus, or otherwise howsoever, to the members of the association or to its holding company or subsidiary (but a proviso may be included that that nothing shall prevent the payment in good faith of reasonable remuneration to any officer or servant of the association or to any member thereof for any services actually rendered to the association);
    - Upon its winding up, deregistration or dissolution, the assets of the association remaining after the satisfaction of all its liabilities shall be given or transferred to some other association or institution having objects similar to its main object, to be determined by the members of the association at or before the time of its dissolution or, failing such determination, by the court.

All companies limited by guarantee, including associations incorporated under section 21, are deemed to be public companies for purposes of the Companies Act. Associations incorporated under section 21 are therefore obliged to lodge their annual financial statements with the Registrar of Companies. The main consideration of incorporation is the corporate status with the concomitant benefits of limited liability and perpetual succession but as stated earlier it does not afford automatic income tax advantages – it can, however, be obtained upon application.

In order to prevent the prohibition on the distribution of profits and assets of the association from being sidestepped, a section 21 company is not allowed to convert into any other form of company.

III. Additional or Alternative Registration under the Nonprofit Organisations Act, 1997

In addition to incorporation under the Companies Act NPO's may also register under the Nonprofit Organisations Act, 1997. The Act provides a voluntary registration facility for any organisation that is not for profit and is not part of government. The following organisations can apply for registration:

- Non- Governmental Organisations;
- Community Based Organisations;
- Faith Based Organisations;
- Organisations that have registered as Section 21 Companies under the Companies Act, 1973;
- Trusts that have registered with Master of the High Court under the Trust Property Control Act, 1988; and
- Any other Voluntary Association that is not-for-profit.

The Primary Purpose of this Act is to encourage and support organisations in a wide range of work they do by:

- Creating an enabling environment for NPO's to flourish;

- Establishing an administrative and regulatory framework within which NPO's can conduct their affairs;
- Setting and maintaining adequate standards of governance, accountability and transparency;
- Creating an environment within which the public may have access to information concerning registered NPO's.

The more important benefits of registering under this Act are –

- The improvement of the credibility of the sector because NPOs can account to a public office;
- Bringing organisations into a formal system;
- Assistance in finding ways of getting benefits like tax incentives and funding opportunities.

IV. REGULATORY ENVIRONMENT FOR NPO'S

The only regulatory provisions under the Companies Act relate to the duty to maintain relevant company information and to lodge annual financial statements and annual returns. The main purpose is to ensure that relevant information regarding section 21 companies and maintained and kept up to date. Although the Companies Act provide for powers of inspection of the affairs of companies, it is seldom used and if used it is only retro-actively to investigate cases of serious transgressions and fraud. Otherwise there is minimal intervention in the private affairs of companies.

The Nonprofit Organisations Act on the other hand is aimed solely and directly at NPO's and entities registered thereunder are subject to some regulation. This regulation takes mainly the form of disclosure of financial statements and the lodgement of detailed annual reports that must disclose prescribed information of the NPO and its activities during the year under review to the Directorate of Nonprofit Organisations at the Department of Social Development. Codes of good practice have also been prescribed by the Directorate.

In addition to the above the Directorate also administers a system of financial awards/subsidies for certain programmes and services provided by NPO's.

V. REGISTRATION OF FOREIGN NPO'S IN SOUTH AFRICA

Foreign NPO's are obliged to register under the Companies Act as soon as they have established a place of business in South Africa. This registration takes place under section 322 of the Act, which provides for the registration of external companies. An alternative registration under section 21A may also be considered.

The basic requirement of section 322 is that a company or other association of persons, incorporated outside the Republic, which has established a place of business in the Republic, must within 21 days after such establishment register with the Registrar a copy of its constitution together with other prescribed documents. It is important to note that this registration does not create a new legal entity but only recognises the registration in the foreign jurisdiction and consequently the entity retains its character as registered in its country of origin. After registration Chapter VIII of the Act applies to such entity and the South African courts also have jurisdiction over it.

Section 21A, on the other hand, provides for the incorporation under section 21 of a branch of a company or other association of persons, incorporated outside the Republic, as well as an association of

persons which is not incorporated but has its head office in a foreign country. In this case an entirely new juristic person is created and all the property, rights and obligations of the company or association in the Republic will upon incorporation be transferred to and vest in and be binding upon the company so incorporated. Such a company will not be regarded as an external company and all the provisions of the Act applicable to section 21 companies will also be applicable to such company. The transfer of assets from the foreign entity to the new company will not attract any transfer or stamp duty and any licence, exemption, permit or authority held in the Republic by the foreign company will be deemed to be held by the company so incorporated.

The latter form of registration has up till now not been followed extensively but possible tax advantages have brought new interest in this form of registration.

VI. DISSOLUTION OF NPO'S AND LIABILITY OF MEMBERS/DIRECTORS

The winding up of all NPO's that have juristic personality is done under the provisions of the Companies Act under supervision of the Master of the High Court.

The liability of members and directors of a section 21 company is limited to the extent of the guarantee provided for in the memorandum. The court may, however, in certain cases declare that a director or other person be personally liable for all or any debts of the company – this may happen where such persons were found to have conducted the business of the company recklessly or with intent to defraud creditors of the company (see sections 423 and 424 of the Act).

VII. NEW COMPANIES ACT, 2008

A comprehensive company law review program started 2004.

The new Companies Bill was passed in 2008 and will become into operation during 2010. The new Act deals with non-profit companies separately in section 10 and Schedule 1.

The new provisions will retain the basic principles of NPO's but minor legislative changes will take place:

- Objects must now be promoting public benefit or cultural, social,
- Communal or group interests
- Three or more founder members will be required
- Expression NPC (Non Profit Company) must form part of the name
- Board must have a minimum of 3 directors
- Foreign non-profit companies may register as external non-profit companies

APPENDIX A

SCHEDULE 1 OF COMPANIES ACT, 2008

PROVISIONS CONCERNING NON-PROFIT COMPANIES

OBJECTS AND POLICIES

1. (1) The Memorandum of Incorporation of a non-profit company must—
(a) set out at least one object of the company, *and* each such object must be either—
(i) a public benefit object; or
(ii) an object relating to one or more cultural or social activities, or communal or group interests; and
(b) be consistent with the principles set out in subitems (2) to (9).

(2) A non-profit company—
(a) must apply all of its assets and income, however derived, to advance its stated objects, as set out in its Memorandum of Incorporation; and
(b) subject to paragraph *(a)*, may—
(i) acquire and hold securities issued by a profit company; or
(ii) directly or indirectly, alone or with any other person, carry on any business, trade or undertaking consistent with or ancillary to its stated objects.

(3) A non-profit company must not, directly or indirectly, pay any portion of its income or transfer any of its assets, regardless whether the income or asset was derived, to any person who is or was an incorporator of the company, or who is a member or director, or person appointing a director, of the company, except—
(a) as reasonable—
(i) remuneration for goods delivered or services rendered to, or at the direction of, the company; or
(ii) payment of, or reimbursement for, expenses incurred to advance a stated object of the company;
(b) as a payment of an amount due and payable by the company in terms of a *bona fide* agreement between the company and that person or another;
(c) as a payment in respect of any rights of that person, to the extent that such rights are administered by the company in order to advance a stated object of the company; or
(d) in respect of any legal obligation binding on the company.

(4) Despite any provision in any law or agreement to the contrary, upon the winding-up or dissolution of a non-profit company—
(a) no past or present member or director of that company, or person appointing a director of that company, is entitled to any part of the net value of the company after its obligations and liabilities have been satisfied; and
(b) the entire net value of the company must be distributed to one or more

non-profit companies, external non-profit companies carrying on activities within the Republic, voluntary associations or non-profit trusts—

(i) having objects similar to its main object; and

(ii) as determined—

(aa) in terms of the company's Memorandum of Incorporation;

(bb) by its members, if any, or its directors, at or immediately before the time of its dissolution; or

(cc) by the court, if the Memorandum of Incorporation, or the members or directors fail to make such a determination.

(5) The Commission may apply to the court, on behalf of a non-profit company, for a determination contemplated in subitem (4)*(b)*(ii)*(cc)* if the non-profit company has—

(a) no remaining members or directors; and

(b) failed to—

(i) make a determination contemplated in subitem (4)*(b)*(ii)*(bb)*; or

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(ii) apply to the court for such a determination.

(6) Incorporation as a non-profit company in terms of this Act, or registration as an external non-profit company in terms of this Act, and compliance by either with the provisions of this Act does not necessarily qualify that non-profit company, or external non-profit company, for any particular status, category, classification or treatment in terms of the Income Tax Act, 1962 (Act No. 58 of 1962), or any other legislation, except to the extent that any such legislation provides otherwise.

(7) Each voting member of a non-profit company has at least one vote.

(8) The vote of each member of a non-profit company is of equal value to the vote of each other voting member on any matter to be determined by vote of the members, except to the extent that the company's Memorandum of Incorporation provides otherwise.

(9) If a non-profit company has members, the requirement in section 24(4) to maintain a securities register must be read as requiring the company to maintain a membership register.

FUNDAMENTAL TRANSACTIONS

2. (1) A non-profit company may not—

(a) amalgamate or merge with, or convert to, a profit company; or

(b) dispose of any part of its assets, undertaking or business to a profit company, other than for fair value, except to the extent that such a disposition of an asset occurs in the ordinary course of the activities of the non-profit company.

(2) If a non-profit company has voting members, any proposal to—

(a) dispose of all or the greater party of its assets or undertaking; or

(b) amalgamate or merge with another non-profit company,

must be submitted to the voting members for approval, in a manner comparable to that required of profit companies in accordance with sections 112 and 113, respectively.

(3) Sections 115 and 116, read with the changes required by the context, apply with respect to the approval of a proposal contemplated in subitem (2).

INCORPORATORS OF NON-PROFIT COMPANY

3. The incorporators of a non-profit company are its—
(a) first directors; and
(b) its first members, if its Memorandum of Incorporation provides for it to have members.

MEMBERS

4. (1) A non-profit company is not required to have members, but its Memorandum of Incorporation may provide for it to do so.

(2) If the Memorandum of Incorporation of a non-profit company provides for the company to have members, it—
(a) must not restrict or regulate, or provide for any restriction or regulation of, that membership in any manner that amounts to unfair discrimination in terms of section 9 of the Constitution;
(b) must not presume the membership of any person, regard a person to be a member, or provide for the automatic or *ex officio* membership of any person, on any basis other than life-time membership awarded to a person—
(i) for service to the company or to the public benefit objects set out in the company's Memorandum of Incorporation; and
(ii) with that person's consent;
(c) may allow for membership to be held by juristic persons, including profit companies;
(d) may provide for no more than two classes of members, that is voting and non-voting members, respectively; and
(e) must set out—
(i) the qualifications for membership;
(ii) the process for applying for membership;
(iii) any initial or periodic cost of membership in any class;
(iv) the rights and obligations, if any, of membership in any class; and
(v) the grounds on which membership may, or will, be suspended or lost.

DIRECTORS

5. (1) If a non-profit company has members, the Memorandum of Incorporation must—
(a) set out the basis on which the members choose the directors of the company; and
(b) if any directors are to be elected by the voting members, provide for the election each year of at least one-third of those elected directors.

(2) If a non-profit company has no members, the Memorandum of Incorporation must set out the basis on which directors are to be appointed by its board, or other persons.

(3) A non-profit company must not provide a loan to, secure a debt or obligation of, or otherwise provide direct or indirect financial assistance to, a director of the company or of a related or inter-related company, or to a person related to any such director.

(4) Subitem (3) does not prohibit a transaction if it—

(a) is in the ordinary course of the company's business and for fair value;

(b) constitutes an accountable advance to meet—

(i) legal expenses in relation to a matter concerning the company; or

(ii) anticipated expenses to be incurred by the person on behalf of the company;

(c) is to defray the person's expenses for removal at the company's request; or

(d) is in terms of an employee benefit scheme generally available to all employees or a specific class of employee

THE SOUTH AFRICAN NON-PROFIT SECTOR: BRIEF PERSPECTIVE ON CURRENT SITUATION AND DEVELOPMENTS SINCE 1994

BY RICARDO WYNGAARD[1]

I. FREEDOM OF ASSOCIATION

South Africa has adopted the major treaties that deal with the right to freedom of association. This right is also enshrined in the South African Constitution.

A. AFRICAN CHARTER ON HUMAN AND PEOPLE'S RIGHTS OF 1981

The African Charter on Human and People's Rights provides for the following:

Article 10:

1. *Every individual shall have the right to free association provided that he abides by the law.*
2. *Subject to the obligation of solidarity provided for in Article 29 no one may be compelled to join an association.*[2]

B. SOUTH AFRICAN CONSTITUTION

Clause 18 of the South African Constitution provides for the protection of the right to freely associate. This clause must be read in conjunction with clause 36 which provide for the limitation of the rights contained in the Bill of Rights. It must also be read in line with other rights protected in the Bill of Rights.

Clause 18 – Freedom of Association:

Everyone has the right to freedom of association.

The Limitations Clause reads as follows.

Clause 36 - Limitation of rights:

36. (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including

a. the nature of the right;
b. the importance of the purpose of the limitation;
c. the nature and extent of the limitation;

[1] Ricardo Wyngaard is a South African lawyer and his practice, Ricardo Wyngaard Attorneys, concentrates on nonprofit law and governance. He can be reached at Ricardo@nonprofitlawyer.com.

d. the relation between the limitation and its purpose; and
e. less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights

The Constitutional Court adopted a flexible approach toward the interpretation of the Limitations Clause in the matter of *Christian Education South Africa v. the Minister of Education.* It quoted an earlier ruling with approval;

> *In essence, the Court must engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list. As a general rule, the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be. Ultimately, the question is one of degree to be assessed in the concrete legislative and social setting of the measure, paying due regard to the means which are realistically available in our country at this stage, but without losing sight of the ultimate values to be protected . . . Each particular infringement of a right has different implications in an open and democratic society based on dignity, equality and freedom. There can accordingly be no absolute standard for determining reasonableness.*[3]

The court found that a limitation must be justified in relation to the purpose, importance and effect which results in the limitation. The availability of less restrictive means should also be taken into account.

II. LEGAL STRUCTURES AVAILABLE TO NON-PROFIT ORGANISATIONS

Non-profit organisations can be established through three forms of legal entities in South Africa namely voluntary associations, non-profit trusts and non-profit companies (section 21 companies).

A. VOLUNTARY ASSOCIATIONS

A voluntary association is in essence an agreement between three or more people to achieve a common object which cannot be the making of profits as its main object. It is a popular option amongst smaller and informal community-based initiatives. It is regulated by common law and not statute. The voluntary association is not required to be registered with a public office in order for it to exist.

The voluntary association must meet three requirements in order to have legal personality, namely:

- Have perpetual succession,
- Be able to hold property distinct from its members, and
- Stipulate that no member has any rights by reason of his membership to the property of the voluntary association.

B. NON-PROFIT TRUSTS

A trust is established in terms of the Trust Property Control Act, of 1988. In essence, a trust is established when ownership of property is transferred (by written agreement, testamentary writing, or court order) to another party, to be administered for the benefit of certain persons or the achievement of a particular goal.

[3] S v Manamela and Another (Director-General of Justice Intervening) 2000 (5) BCLR 491 (CC) at paras 32 and 33.

The Master of the High Court oversees the appointment of trustees and the proper performance of their duties with respect to the trust property, common law and the Trust Property Control Act.

The Trust Property Control Act requires that the first trustees must lodge the trust deed with the Master of the High Court. Trustees can only act in their capacity as trustees after having been authorised in writing by the Master.

C. SECTION 21 COMPANIES

The Companies Act of 1973 provides for the incorporation of a non-profit company under section 21. The non-profit company must have at least seven members and two directors who can be part of the seven members. A Section 21 Company must register with the Registrar of Companies. The registration process is complex and the Section 21 Company must comply with a number of procedural requirements. Section 21 Companies may be established for the promotion of religion, the arts, sciences, education, charity, recreation, any other cultural or social activity, or communal or group interests.

A new Companies Act of 2008 has been signed by the President of South Africa, but it is not yet in operation. It can only become in operation after April 2010.

III. REGISTRATION WITH THE NPO DIRECTORATE

The Non-Profit Organisations Act (the NPO Act) provides for a voluntary registration facility for non-profit organisations. Voluntary Associations, non-profit trusts and section 21 companies established for a "public purpose" can apply for registration in terms of the NPO Act.

A. OBJECTS OF THE ACT

Section 2 of the Act lists the objects of the Act as being *to encourage and support NPOs in their contribution to meeting the diverse needs of the population of the Republic*. In pursuing this broad objective, the Act lists five specific objectives. Probably the most important being *the creation of an enabling environment in which NPOs can flourish*. The others are:

- *establishing an administrative and regulatory framework within which nonprofit organisations can conduct their affairs;*
- *encouraging nonprofit organisations to maintain adequate standards of governance, transparency and accountability and to improve those standards;*
- *creating an environment within which the public may have access to information concerning registered nonprofit organisations; and*
- *promoting a spirit of co-operation and shared responsibility within government, donors and amongst other interested persons in their dealings with nonprofit organisations.*

The Act is made up of five chapters. Two substantive chapters are dealing respectively with the creation of an enabling environment and the registration of NPOs under the Act. Chapter 2 of the Act is entitled *CREATION OF AN ENABLING ENVIRONMENT* whilst Chapter 3 is entitled *REGISTRATION OF NONPROFIT ORGANIZATIONS.*

B. CREATION OF AN ENABLING ENVIRONMENT

Chapter 2 of the Act provides for the following ways of creating an enabling environment for nonprofit organisations:

- Defining the State's responsibility to NPOs,
- Establishing a Directorate for NPOs,
- Designating a Director for NPOs,
- Appointing of Arbitrators and an Arbitration Tribunal, and
- Appointing an Advisory or Technical Committee.

The state's responsibility is set out in section 3 and reads:

> ***State's responsibility to nonprofit organizations***
> *Within the limits prescribed by law, every organ of state must determine and co-ordinate the implementation of its policies and measures in a manner designed to promote, support and enhance the capacity of nonprofit organisations to perform their functions.*

The practical implementation of this section has not fully taken effect. Not all government departments are aware of their obligation in terms of section 3.

Section 4 of the NPO Act provides for the establishment of a Directorate for Nonprofit Organisations. The Directorate comprises of members appointed in the discretion of the Minister of Social Development. The Act lists the functions of the Directorate, including:

a. Facilitating the process for developing and implementing policy;
b. Determining and implementing programs, including programs—
  i. to support nonprofit organisations in their endeavour to register; and
  ii. to ensure that the standard of governance within nonprofit organizations
  iii. is maintained and improved;
c. Liaising with other organs of state and interested parties; and
d. Facilitating the development and implementation of multi-sectoral and multi-disciplinary programs.

C. REGISTRATION OF NONPROFIT ORGANISATIONS

Section 12 of the NPO Act lays down a number of prescribed conditions that must be complied with in order for a non-profit organisation to be registered in terms of the NPO Act. Registered organisations must submit narrative and financial reports to the Directorate.A register of all registered non-profit organisations non-profit organisations is maintained by the Non-profit Organisations Directorate and is open to the public. All documentation lodged with the Directorate, such as the founding documents, financial and narrative reports of the organisations are available for public inspection. Written copies can be requested at a cost or the documents must physically be inspected at the offices of the Directorate in Pretoria. These documents are not yet electronically available.

The historical development of this legislation is important in that it reflects the aims of the legislation, which have only been partially carried forward. The Development Resources Centre commissioned the Independent Study into an Enabling Environment for the non-profit sector (the study) in South Africa in 1992. The study focused on four general policy & legal issues, namely: civil society and fundamental freedoms; establishment, registration and administration; fundraising and taxation. The study was divided

into three phases, i.e.: research, analysis and consultation; action taking by the sector and advocating and for policy and legislative changes.

The problems that were identified by NPOs at that stage included: an unsatisfactory relationship with government, a hostile funding framework, lack of skilled management resources, registration and administration difficulties, lack of networking & information sharing and the need for comparative information.

The study played a key role in the development of policy and legislation affecting the non-profit sector in South Africa. The Department of Welfare published its Draft White Paper for Social Welfare during 1997. The policy emphasised the need to reform legislation and policy in relation to the non-profit sector. The notorious Fundraising Act of 1978 was one of the key pieces of legislation that was scrapped – except for certain parts dealing with disaster funding. The Fundraising Act targeted those organisations that opposed the apartheid government. The abolishment took effect in terms of the provisions of the Nonprofit Organisations Act of 1997 (the NPO Act).

The NPO Act came into operation during September 1998. This Act gave a clear expression of the South African government's intended relationship with the non-profit sector. The main objects of this Act are, amongst other, to encourage and support nonprofit organisations in their contribution to meeting the diverse needs of the population of South Africa by creating an environment in which nonprofit organisations can flourish; and establishing an administrative and regulatory framework within which nonprofit organisations can conduct their affairs. Today there are close to 60 000 organisations registered with the Directorate for Nonprofit Organisations.

IV. TAXATION OF NON-PROFIT ORGANISATIONS

Although the NPO Act was aimed at creating a more enabling environment for nonprofit organisations it did not directly address the funding challenges experienced by NPOs. This was done through other legislation. Non-profit organisations can access a number of benefits in terms of the Income Tax Act. These benefits can significantly contribute towards the financial sustainability of a non-profit organisation.

South Africa's newfound democracy in 1994 came with new challenges for the nonprofit sector as donor-funding to nonprofit organisations progressively decreased. The South African government commissioned the Katz Commission to investigate and report on tax issues affecting nonprofit organisations. The findings of the 9th Interim Report of the Katz Commission of Inquiry released during 1999 resulted in a tax campaign initiated by the South African NGO Coalition (SANGOCO), the South African Grantmakers' Association (SAGA), and the Charities Aid Foundation of Southern Africa.

A new tax dispensation for nonprofits came into operation during July 2001 and it changed the face of corporate social responsibility (CSR) in South Africa. Non-profit organisations can access a number of benefits in terms of the Income Tax Act. These benefits can significantly contribute towards the financial sustainability of a non-profit organisation (NPO). The arbitrary and archaic system of granting tax exemption to only certain organisations was replaced with a more objective set of criteria based upon the concept of public benefit.

A. THE MAIN TAX BENEFITS FOR NPOS AT PRESENT

The main benefits available to NPOs are:

- Being fully exempted from paying income tax if it carries on no or limited trading activities. And being partially exempted from paying income tax in situations where its trading income exceed the limitations contained in Section 10 (1) (cN).
- Being able to receive donor deductible contributions. Only approved PBOs with status in terms of section 18A can issue receipts to their donors for donations received which will allow the donors to make deductions from their taxable income.
- Accessing other tax benefits that are dependant on the organisation's PBO status. These include exemptions from transfer duty, estate duty, capital gains tax, donations tax, skills development levy and dividends tax.

To access the main tax benefits, NPOs must become approved PBOs. An organisation's approval as a PBO is the main gateway to access the benefits listed above.

B. OBTAINING PBO APPROVAL

Section 30 provides that the Commissioner for the South African Revenue Service (SARS) can only approve PBOs that comply with the requirements listed in that section. In order to become an approved PBO, an organisation must be a non-profit organisation in the form of:

- A Section 21 Company
- A Trust, or
- An Association of Persons.

And it must carry on one or more public benefit activities (PBAs) list in Part I of the Ninth Schedule to the Income Tax Act.

V. REPORTING REQUIREMENTS FOR NON-PROFIT ORGANISATIONS

Each of the regulatory authorities imposes a number of different reporting requirements on non-profit organisations.

In terms of the Trust Property Control Act, trustees are not obliged to regularly submit audited financial statements. They must, at the written request of the Master account for their administration and disposal of trust property. The trust deed of a trust will however normally specify that books and records must be kept or that audited financial statements must be prepared.

A non-profit company is obliged to prepare annual audited financial statements, and the directors of the company have a duty to present the financial statements to the members of the company at the annual general meeting. The Companies Act also requires that an annual report must be prepared and presented at the annual general meeting.

Organisations registered in terms of the NPO Act must provide the Director of Non-profit Organisations with the following information:

- A narrative report of its activities in the prescribed form together with its financial statements and the accounting officer's report as required in terms of the Act, within nine months after the end of its financial year.

- The names and physical, business and residential addresses of its office-bearers within one month after any appointment or election of its office-bearers even if their appointment or election did not result in any changes to its office-bearers.
- A physical address in the Republic for the service of documents to be received from the Directorate of Non-profit Organisations.

If the organisation still fails to submit the necessary reports or submits false information, the Director can cancel the registration of the organisation.

An organisation approved as a PBO with SARS must submit annual income tax returns.

VI. OTHER SUPPORT FOR THE SECTOR ESTABLISHED BY LEGISLATION

Two further pieces of legislation made funding available to non-profit organisations, namely: the Lotteries Act and the National Development Agency Act. The primary objective of the National Development Agency Act is to contribute towards the eradication of poverty and its causes by granting funds to civil society organisations for the purposes of carrying out of projects aimed at meeting development needs of poor communities and strengthening the institutional capacity of other civil society organisations involved in direct service provision to poor communities.

The Act established the National Development Agency with the mandate of acting as a key conduit for funding from the South African government, foreign governments and other national and international donors for development work to be carried out by civil society organisations and contributing towards building the capacity of civil society organisations to enable them to carry out development work effectively and granting monies to civil society organisations.

The Lotteries Act makes provision for the operation of a national lottery. The proceeds of the lottery sales are divided up amongst; prizes, retailer commission, cost of operations and good causes. The Act established the National Lotteries Board and the National Lotteries Distribution Trust Fund (NLDTF). The Lotteries is responsible to administer the NLDTF. The Act also makes provision for the appointment of distribution agencies that are responsible for distributing the monies allocated for good causes.

Most of key pieces of legislation affecting the non-profit sector have been in operation for about ten years. The effective implementation of these laws remains questionable. For example, an impact assessment commissioned by the Department of Social Development, published in January 2005, found that: “the resources and implementation capacity of the NPO Act is severely lacking”. Lotteries funding has been an ongoing subject of controversy since it came into operation and the National Development Agency has been struggling to set an example of good governance with the fraudulent misappropriation of over R8.7million by one of its staff members due to weaknesses in the control environment.

The South African non-profit sector will soon have to revisit an important debate which sparked widespread controversy during the 1990s. The debate revolved around the question whether NPOs should be compelled to register in terms of the NPO Act. A report published recently has made important recommendations which will require South Africa to revisit this issue. The report was published by the Financial Action Task Force and the Eastern Southern Africa Anti-Money Laundering Group and is entitled: Mutual Evaluation Report - Anti-Money Laundering and Combating the Financing of Terrorism (the report).

The report reviews, amongst other, the exposure of NPOs to risks involving terrorist financing and the adequacy of South African laws and regulations in dealing with this. It concludes that South Africa has not properly considered the potential risks of terrorist financing posed within the non-profit sector and it has failed to conduct any outreach programme to protect the non-profit sector against terrorist financing abuse. Recommendations to tackle this include:

- Legislation should make provision for mandatory registration of NPOs.
- Enforcement powers under the NPO legislation should provide for the power to sanction office-bearers, impose fines and freeze accounts of NPOs for violation of oversight measures.
- NPOs should maintain information on the identity of board members for a period of at least five years.

The risk of terrorist financing is no doubt an important issue, but it is questionable that compulsory registration is a proper and ideal solution in the South African context. The motivation for compulsory registration is captured as follows in the report:

> "The voluntary requirement for the registration of NPOs under the NPO Act undermines the transparency and accountability in the way that NPOs collect and transmit funds in South Africa and creates a loophole that increases the risk of abuse of unregistered NPOs by terrorist financiers."

It remains questionable whether voluntary registration automatically increases the risk of abuse of unregistered NPOs. An unregistered NPO will only be able to open a bank account if it complies with the verification procedures laid down in the Financial Intelligence Centre Act (FICA). Without a bank account an unregistered NPO will find it difficult to ''collect and transmit funds'. FICA places an obligation on banks to report any suspicious transactions to the financial intelligence centre. No loophole is accordingly created through voluntary registration process.

Compulsory registration, in terms of the NPO Act, would not significantly reduce the risk of terrorist financing. Compulsory registration would however pose more significant risks for the independence of the non-profit sector. South Africa's own history has shown how compulsory registration under the notorious Fundraising Act was used as an instrument to target more progressive organisations.

Some of the recommendations contained in the report are also unmindful of the capacity constraints within the NPO Directorate as reflected through the Impact Assessment of the NPO Act.

Although there has been some attempt by the Department of Social Development to increase the resources for the implementation of the NPO Act, it remains insufficient. The NPO Directorate is still struggling with a backlog of applications for registration. More than ten years after the NPO Act has come into operation the South African nonprofit sector is faced with the haunting question whether NPO registration should become compulsory. This question is presented by voices outside the borders of South Africa.

A more appropriate question to consider at this time is: What can be done to give more meaningful effect of the noble objectives contained in the NPO Act

WHEN THE MOTIVE IS WRONG…: AN EXAMINATION OF KEY CONCERNS NGOS HAVE WITH THE LEGAL, REGULATORY AND POLICY REGIME IN UGANDA

BY ARTHUR LAROK AND JOB KIIJA[1]

I. INTRODUCTION

The Non Governmental Organization (NGO) fraternity in Uganda is deeply concerned that the legal and regulatory framework for NGO operations in the country, represented by the NGO Act, 2006, its attendant NGO Regulations, 2008 and the draft NGO Policy 2008 reflect serious inconsistencies and are essentially restrictive of the citizens' right to participate in their country's development processes. The extent to which this will translate into serious repression to NGO work in practice will depend on the degree to which the Government will perceive NGO work a stumbling block to the promotion of its treasured interests as a sitting government. From an analysis of the wider political trends in this country: the state of Opposition Political Parties and their relations with the government; the loud and clear warnings to the media and other independent socio-cultural configurations to toe the official line, it would **not** be foolhardy to suggest that for as long as NGOs continue to position themselves to claim their rightful role in the democratization process, they should expect less cordial relations with the state. The wider political environment remains essentially unsupportive of autonomous, vibrant and politically relevant civil society organizations.[2]

This briefing paper has been written to provide concise information that is essential for policy makers and other citizens to understand the historical background, issues and contentions NGOs have about the NGO Act and the Regulations supposed to guide its implementation. The paper also focuses on the opportunities provided in the draft NGO Policy of 2008 - a ***relatively*** more progressive policy framework compared to the NGO Act, 2006 and NGO Regulations, 2008.

II. HISTORY AND CURRENT STATUS OF THE NGO ACT, REGULATIONS AND POLICY

A. STATUS AT A GLANCE

Instrument	Status	Comment
The NGO Act	• Enacted by Parliament on 7 April 2006 • Assented to by the President on 25 May 06	• Practically there is no chance that the NGO Act can be reviewed unless it goes through another amendment process. • It is unlikely that government can do this in the short run.

[1] The authors work for the Uganda National NGO Forum, an independent and inclusive national platform for NGOs in Uganda providing a space for NGOs to reflect and act collectively in influencing governance and development processes in Uganda. For further information write to av.larok@ngoforum.or.ug

[2] See Larok (2009): Engaging with the state – a political analysis of the NGO legal regime and options for the future

The NGO Regulations	• Completed by the Ministry of Internal Affairs in 2008 • The text is being printed and will be laid before Parliament in 2009	• There is little real meaning of hoping to influence the NGO Regulations when the problem is actually with the NGO Act itself. • 'Being laid' before Parliament is only for information and does not mean there is a chance for revision.
The NGO Policy	• The NGO Policy remains in draft form and it is expected to be presented for discussion and possible approval by Cabinet in 2009. • Cabinet Memo was drafted and submitted by ministry of Internal Affairs to the Secretary to Cabinet in December 2008.	• There are three possible outcomes: a. The draft NGO Policy is debated and passed as is by the Cabinet. b. That the draft NGO Policy is debated by Cabinet and brought 'to speak' the language of the NGO Act and Regulations c. That the NGO Policy suffers the fate of similar attempts in the past – the likelihood of it not getting into cabinet and it being stayed indefinitely.

B. FROM THE NGO BILL 2001 TO THE NGO ACT, 2006: ISSUES AND CONTENTIONS

Between 1999 and 2006, as the government initiated a process to amend the 1989 NGO Statute, NGOs engaged with the process in an attempt to influence the deliberations in Parliament and Ministry of Internal Affairs in favour of a new legislation with more enabling provisions than the 1989 NGO Statute. Despite major concerns raised and submissions made by the NGO fraternity in several meetings and memos to the Committee on Defense and Internal Affairs in Parliament (including a comprehensive Alternative Bill developed in 2004), NGO concerns were not considered in any meaningful way.[3] After over 5 years on the shelves of Parliament, the NGO Registration (Amendment) Bill 2001 was passed by Parliament on 7 April 2006. The NGO fraternity petitioned the President not to assent to the Act as passed by Parliament, but on 25 May 2006, the President assented to it. The key concerns the NGO Sector has over the NGO Act, 2006 are summarized below:

1. **The entire NGO Act is premised on a very narrow definition and understanding of NGOs, what they do and cannot do.** Article 1 (e) defines an NGO as 'an organization established to provide voluntary services, including religious, educational, literary, scientific, social or charitable services, to the community or any part of it'.

   It is not by accident that the NGO Act is silent on the broader governance, policy and human rights and therefore political dimensions of NGO work. For as long as such a narrow understanding remains the defining feature of NGO operating parameters by law, the state can, as and when it deems necessary invoke the law to curtail democracy, governance and human rights work of NGOs.

2. **The NGO Act is premised on an overbearing intent by the state to control the activities of NGOs and therefore provides for unfettered administrative discretion to the NGO Board and Minister of Internal Affairs to do so.** Article (2) states that '… upon registration, the Board shall issue a certificate of registration to the organization, subject to such conditions or directions generally as it may think fit to insert in the certificate and particularly relating to: a) the operation of the organization; b) where the organization may carry out its activities; c) staffing of the organization'.

[3] See NGO Forum and Deniva (2006): The Narrowing Space for NGO Operations in Uganda: An analysis of the implications of the 2006 NGO Act.

If the state can exercise jurisdiction over operational issues for NGOs, including internal staffing issues, the geographical operating scope of NGOs, clearly NGOs cease to be autonomous civic organizations as provided for in the Constitution of the Republic of Uganda. Instead they simply become conformists unable to take full charge of their own activities, independently engage with the state and challenge socio-economic and political injustices.

3. **The NGO Act, 2006 sets a wrong precedent and prior requirement for NGO formation and registration.** Article 2 (4) states that 'an organization shall not be registered under this Act if the objectives of the Organization as specified in its constitution are in contravention of the law. It effectively prescribes what is permissible or not for an NGO on the basis of a contentious law in the first place. Article 2 (5) states that 'an organization which: (a)contravenes any provisions of this Act; (b) operates contrary to the conditions or directions specified in its permit, (c) carries out any activity without a valid permit or certificate of incorporation, commits an offence and is liable for conviction'.

4. **The NGO Act, 2006 under the dual liability provision unduly implicates NGO staff over and above what is acceptable in international law and even standard company law in Uganda.** Article 2 (6) states that; 'where an organization commits an offence under sub section (5), any director or officer of the organization whose act or omission gave rise to the offence also commits an offence and is liable on conviction'.

   As observed elsewhere,[4] 'these provisions ignore the standard company law practice where officers or directors of a company are protected under the "corporate veil" and the veil can only be lifted in exceptional circumstances such as in cases of fraud. In short, while the law attempts to apply company law concepts such as annual permit requirements to NGOs, it also tries to apply other legal requirements that go beyond what applies to companies'.

5. **The NGO Act, 2006 does not recognize the important role, knowledge and expertise NGOs can make to their governance and so does not provide for NGO representation on the NGO Board**. Article 4(1) defines who sits on the NGO Board and in addition to representatives from the Ministries of: Internal Affairs; Justice and Constitutional Affairs; Local Government; Health; Agriculture, Animal Industry and Fisheries; Gender and Social Development; Education and Sports; Office of the Prime Minister; representatives from Security Agencies including the Internal Security Organization (ISO) and the External Security Organization (ESO). The article also provides for 3 Members selected from the Public – all to be appointed by the Minister of Internal Affairs.

   NGOs have been opposed to ISO and ESO sitting on the NGO Board and have in the past advocated for an equitable representation of NGOs and Government on the Board. As it is, the NGO Board is undemocratically constituted, lacks deeper understanding of NGO work and is unlikely to serve the interests of the NGO sector. The claim that the 3 members from the public represent NGOs is far-fetched because, first they are appointed by the Minister; and, second, there is no guarantee that those appointed will include an NGO official. Even if an NGO official was appointed to the Board, this would not constitute democratic representation.

6. **The NGO Act, 2006 does not make any provisions for recourse to justice if an NGO feels aggrieved.** Instead it vests close to arbitrary power in the office of the Minister of Internal Affairs. Article 9 states that; 'a person aggrieved by the decision of the board … may within three months of the date he or she is notified of the decision appeal to the Minister'.

[4] See NGO Forum and Deniva (2006): The Narrowing Space for NGO Operations in Uganda: An analysis of the implications of the NGO Registration (Amendment) Act, 2006

Beyond the Minister of Internal Affairs there is no other provision for appeal within the NGO Act, 2006. This makes the Minister of Internal Affairs, the all-powerful and final jury for any injustice against an aggrieved NGO. This provision therefore negates the principle of justice and fair dealing.

7. **The NGO Act, 2006 does not provide adequate commitment by government to strengthen the capacity of the NGO Board to carry out its functions efficiently and effectively. Under the new legal regime the Board will remain a 'ghost' agency in the Ministry of Internal Affairs with no capacity to provide support services to an ever growing NGO sector.** Article 6 (1) states that 'the board shall have a secretariat in the Ministry responsible for internal affairs which shall be headed by a secretary whose office shall be a public office within the ministry'.

   Quite strangely an earlier suggestion in the NGO Registration (Amendment) Bill 2001 to elevate the NGO Board to a Department Status under a Commissioner fell through. If the NGO Board lacks capacity to service a diverse and growing NGO sector, it will remain ineffective. This may also show that the government lacks interest in supporting the prospect of a flourishing NGO sector.

C. THE NGO REGULATIONS: ISSUES AND CONTENTIONS

As required by law, the Ministry of Internal Affairs is expected to develop Regulations to facilitate the implementation of the NGO Act 2006. Given an already repressive NGO Act, it would be simplistic to expect Regulations that speak otherwise. However, despite a promise that the process to develop the NGO Regulations would be participatory and consultative, the Ministry of Internal Affairs in 2007 developed regulations which confirm all the repressive aspects of the NGO Act, 2006, but in some cases go even further to introduce more repressive provisions than the NGO Act itself.[5] The following are some of the overbearing provisions of the NGO Regulations 2008.

1. **Excessive red tape in the process of registering an NGO and inherently constraining provisions at registration.** Regulation 5 (1) states that 'an application for registration … shall be accompanied by: a specification of the area of intended operation of the organization; field of operation e.g. health, education etc; a chart showing the structure of the organization; a work plan and budget for the first year of operation of the organization; in the case of a local organization, a written recommendation to the board by two sureties, a written recommendation by the chairperson of the executive committee of the sub county council and the RDC of the area where the organization intends to operate, among others.

   The above requirements and conditions make it extremely tedious and time-consuming to register an NGO in Uganda. Furthermore, they impose limitations with regard to the geographical and content scope of an NGO, more especially where an NGO is required to inform and get permission to expand or change its operational location.

2. **The Regulations almost criminalize NGO contact with the rural population. They compel NGOs to cooperate with government in their work, even when this may be practically impossible in some instances!** Regulation 13 states that 'an organization shall, in carrying out its operations … not make any direct contact with the people in their area of operation in Uganda unless it has given seven days notice in writing of its intention to do so to the local councils and Resident District Commissioners of the area, it shall co-operate with the local councils in the area and the relevant district committees, not engage in any act which is prejudicial to the security of Uganda or

[5] See NGO Forum Note (2007): From bad to Worse – A review of the draft NGO Regulations, 2007

any part of it, restrict its operations to the area of Uganda in respect of which it is permitted to operate; hold itself responsible for all acts of its members and employees done in the course of their employment'.

This provision in the law is one of the most arbitrary and its implementation will tantamount to creating a 'police' state. While NGOs appreciate the value and principle of cooperation and collaboration with the state in undertaking their work, the notion requiring NGOs to always cooperate with the government as presented in the NGO Regulations is problematic. In some cases NGOs directly challenge the authority or practices of state officials e.g. anti corruption and human rights work, environmental lobby and engagement, etc. The provision to restrict NGO operations to the areas provided for in their permit essentially prevents NGOs from expanding and spreading the benefits of their good work to more Ugandans.

3. **The Regulations confer unfettered administrative powers to the NGO Board to dissolve and or deregister an NGO.** Regulation 17 (3) states that 'an organization may dissolve by order of the Board if the Board has reason to believe that the registered organization has not commenced its activities within twelve months from the time of registration or without justifiable cause for any reason has ceased to exist after that or it is proved to be defrauding the public or its members or both, or it has violated the terms and conditions attached to its permit or operated in contravention of the provisions of the Act; or for any other reason the Board considers necessary in the public interest'.

   While some of the terms for dissolution are reasonable, the excessive power and jurisdiction of the Board and the manner with which it can dissolve an NGO without any meaningful opportunity for appeal is a major cause of concern. However, there are also very vague concepts such as 'public interest' which are open to selective interpretation in the face of lack of consensus on what public interest really is. The Board's 'reason to believe …' could also pass as public interest.

4. **The NGO Regulations, while acknowledging the QuAM contain provisions which, collectively read, may tantamount to the state attempting to hijack the QuAM agenda.** Regulation 19 (1) states that, two or more organizations may form a self regulating body, (2) adds that 'a self regulatory body shall be registered with the Board and an application for registration for such a body shall be accompanied by: (a) the resolution of each of the organizations forming the body stating willingness to be part of the self regulating body; (b) the code of conduct of the self regulatory body; (c) any other information that the Board may reasonably require …'

   The above provisions represent a covert desire to misrepresent the intentions of the NGO Quality Assurance Certification Mechanism (QuAM), its administration and management. The QuAM is conceived as an internal NGO instrument for self regulation and it is voluntary. The mechanism for its administration is a small secretariat resident in one legally registered NGO and QuAM Council. There is therefore no legal basis for the QuAM to get registered by the Board, as if it were an NGO.

NGOs raised the above and other serious concerns and petitioned the Minister of Internal Affairs to reconsider the Regulations. In a meeting between representatives of NGOs and the Minister of Internal Affairs and his team, as well as the NGO Board held on 15 January 2008, the minister confirmed that he had recalled the Regulations to allow consultations with the NGO fraternity. Consequently, he ordered the setting up of a Government-NGO Committee to review the NGO Regulations and develop consensus on their final text.

Three meetings of this Joint took place with no consensus on anything fundamental. In a letter to the Permanent Secretary, NGOs registered their disappointment with the final NGO Regulations produced

after the Joint Committee meetings. However, in his response on 5 December 2008, the Permanent Secretary made the following observations, among others:

1. That the Joint Government-NGO Committee had discussed all contentious issues and reached an agreement, and that 'government is therefore satisfied that all NGO concerns which are in the interest of the Nation[6] are adequately addressed … ;

2. That the Regulations are not cast in stone and if there are other outstanding issues that NGOs want the Government to consider; established procedures can be used.

D. THE NGO POLICY

In a completely reverse logic and rationale, in 2007, the Government of Uganda, under the auspices of the Office of the Prime Minister (OPM) initiated a process to develop a national policy for NGOs - something that NGOs demanded as early as 1998 and requested that it precedes the discussions that led to the enactment of the NGO Act, 2006. This process was relatively more open, consultative and participatory. As a result of this participation, the draft NGO Policy, its weaknesses, not withstanding espouses a ***relatively*** more progressive policy context than the NGO Act and Regulations. The progressive aspects include:

1. An acknowledgement of the dual role of NGOs in contrast to the NGO Act. On page 6, the policy states, 'government fully acknowledges and recognizes the key role NGOs play in improving accountability of public institutions … and promoting the demand for public services by society generally and marginalized groups'.

2. It observes that 'there is need to harmonize more effectively all government policies and regulations in order to provide an enabling environment for the operations of NGO players in a liberalized and democratic society'.

3. The draft policy on page 7 observes that 'ultimately a stronger NGO sector should contribute to the institutionalization of a culture of civic inclusiveness and participation as well as mutual accountability by all stakeholders in the important processes that affect the lives of citizens at different levels.

4. The vision espoused in the NGO policy (page 13) is progressive and supportive of the transformational role and potential that the NGO sector has. It reads 'the vision of the NGO policy is a vibrant and accountable NGO sector enabling citizens' advancement and self transformation'.

5. The guiding principles and values (page 13) espoused in the draft NGO Policy include: respect for fundamental human rights and freedoms with regard to social, cultural and religious beliefs…; freedoms of association and independence of individuals and NGOs…; the right of NGOs to autonomy, self governance and self regulation, etc.

6. One of the 7 objectives of the draft NGO Policy provides a specific reference to the possibility of legal reform. Objective (iii) on page 14 states, '…provide for legal, policy and procedural changes that will allow NGOs to effectively contribute to national and district development planning in a harmonized way'.

[6] This suggests that NGO Legitimate Concerns about the NGO Regulations are not in the interest of the nation

The draft NGO Policy is not the perfect document though. Its main weakness is that it lacks robust empirical information about the value and contribution of NGOs to Uganda's development processes. The other problems with the draft NGO policy include:

1. The observation and interlinked implication that because the NGO sector is donor dependent, there has been an inevitable influence of foreign interests in Uganda's governance processes. The policy, however, neither substantiates whether foreign interest is always negative, neither that does it reflect the reality that over 30% of the national budget of government (of which close to 80% of the development budget especially to Local Government) is donor funded.

2. The draft policy, on page 13, states that 'some NGOs have been involved in politics by taking sides and generally unlawful activities'. It does not substantiate. This narrow conception that politics is a privilege of politicians is fronted by the unscrupulous and selfish who seek to protect their private interests by sacrificing the benefits of participation by the majority. Politics in its classical usage is a process to determine who gets what, when, why, how much, etc. In other words politics is about resource distribution - a perfectly noble process for NGOs to participate in. An objective discussion of 'partisanship' is probably the caveat required[7].

3. The unfettered and multilayered administrative structure for monitoring NGO operations was re-introduced (see pages 17-18 and pages 29-30) after prior consensus during the consultative process and in the June Validation meeting that they were not necessary.

4. Finally, the draft NGO Policy (page 20) misrepresents the Quality Assurance Certification Mechanism (QuAM) - a self regulatory instrument that NGOs voluntarily subscribe to. It requires the sanctioning by government by way of registering the QuAM with the NGO Board before it is operationalised. This is complete misrepresentation of the QuAM logic and is potentially dangerous and harmful to its chances of succeeding.

If the NGO Policy was passed, it could act as a basis for challenging some very retrogressive aspects of the NGO Act and Regulations. However the passage of the draft NGO Policy will not be sufficient to reverse the entrenched belief and control attitude that the present regime possesses. NGOs and other actors who believe in democracy and civic freedoms will need to pursue a more strategic and long term agenda beyond legislative reform.

III. Conclusion and Way Forward

In this brief, we have highlighted the history of the advocacy work for a fairer NGO legal and regulatory regime in Uganda over the last 8 years. We have shown that despite fundamental concerns raised by NGOs, the present legal and regulatory regime remains restrictive and ill-willed both on paper and in intent. Two key lessons from the processes recounted above need to be re-emphasized:

1. There is a limit as to how much Civil Society, and in particular NGOs, can influence the legal and regulatory instruments concerning their operating environment through negotiations with the government as we have done so far.

[7] See 'CSOs and Politics: A Niche for Civil Society in the revived multiparty system in Uganda'

2. It is very clear that, in matters of the NGO operating environment, our success or failure is invariably linked to the character of the state we are dealing with.[8] It is not only NGOs that face such restrictive legislation; the media, political parties and other like actors who oppose 'politically' crucial state policy directly or indirectly suffer a similar fate.

Since it appears to be the express intention of the state to have restrictive NGO legislation which can be invoked as and when deemed necessary, it is unlikely that the state will positively respond to 'soft' advocacy demands for legal reform, at least in the short term. This means that, looking ahead, NGOs need to broaden and diversify their strategies. It is thus pertinent that we conclude this brief with suggestions, some of which are already being considered by the NGO community.

A. DIVERSIFYING STRATEGIES

It is important that NGOs adopt a multi-pronged approach that combines elements of continued 'diplomatic' approaches and dialogue with the state in order to keep an open line of communication. This dialogue approach should also be deployed with and through other stakeholders that have better proximity and possibly leverage over the state. This work agenda should focus on consolidating the gains made with regard to the NGO Policy and lobbying for its passage. Dialogue and negotiation should run hand in hand with a firmer challenging stance. NGOs should consider a long-standing option of challenging the NGO Act in the Courts of Law. A preliminary legal opinion done by HURINET in 2007 established sound grounds to challenge the NGO Act in the Constitutional Court, as several of its provisions fall short of the constitutional guarantees for freedom of association, civic autonomy and a democratic society.

Finally, the NGO fraternity needs to popularize the advocacy work for a fairer NGO legal regime beyond Kampala and the peri-urban-based constituency of NGOs and reach out to the grassroots and even direct 'beneficiaries' of NGO works. Unless this work is rooted in a larger social base, it will always remain an elitist struggle.

B. PRIORITIZING AND FAST TRACKING THE SELF ORGANIZATION AGENDA

NGOs need to embrace the internal cleansing and self organization instrument the QuAM so that the few NGOs that tarnish the collective image of the sector can be isolated. More importantly, however, strong institutions of NGOs cannot be realized unless all NGOs become internally democratic and publicly accountable. The QuAM provides a useful process to achieve this agenda.

C. EMPIRICALLY DOCUMENTING THE VALUE OF THE NGO SECTOR TO UGANDA'S DEVELOPMENT

NGOs need to seriously embark on documentation of their work so as to provide the necessary empirical information and fill knowledge gaps concerning their work and its value addition to Uganda's development aspirations. Some of the statements by high-ranking government officials and the provisions in the NGO legislation are in part a manifestation of acute lack of understanding of the worth of the NGO sector. The Uganda National NGO Forum has already embarked on this exercise and,with its partners, will undertake a comprehensive and methodologically robust national NGO sector survey to document the value and worth of the NGO sector's work to the health and wealth of Uganda as a nation.

[8] See detailed paper Arthur Larok (2008) - 'Engaging with the state: A political analysis of the legal and regulatory regime for NGO operations in Uganda'

D. Locating All the Above Within the Broader Struggle for Democracy and Good Governance in Uganda

Finally, all the above strategies must be placed within the bigger political context within which the NGO legislation and other legislations with undemocratic tendencies such as the Police Act, the Anti terrorism Act, various Media Laws, the Political Parties and Organisation's Act and others are located. NGOs should seek alliances with other pro-democracy groups because NGOs in Uganda cannot achieve their agenda of building autonomous and independent organizations and become credible and strong actors in civil society unless they seek such autonomy within the context of the autonomy of other civil and political society actors.

Notes

1. The **NGO Act, 2006**
2. The **NGO Regulations, 2008**
3. National NGO Forum (2008) From Bad to Worse - A Critical Appraisal of the draft NGO Regulations
4. NGO Forum and Deniva (2006): A Narrowing Space for NGO Operations in Uganda - An analysis of the implications of the NGO Registration (Amendment) Act, 2006.
5. Larok, A. (2009) Engaging with the State - A Political Analysis of the NGO Legal Environment and Ideas for the future.
6. Larok, A. (2006) Can the State provide leadership in developing a favorable operating environment for NGOs? Presented at an EU-CSCBP Big Bang Workshop, June 08.
7. **The NGO Policy, 2008**
8. Various Letters from the Ministry of Internal Affairs and Office of the Prime Minister in response to NGO concerns about the NGO Regulations and NGO Policy.
9. The **NGO Quality Assurance Certification Mechanism (QuAM), 2006.**
10. The **Alternative NGO Registration (Amendment) Bill, 2004**

SPEAKING OF TERROR: A SURVEY OF THE EFFECTS OF COUNTER-TERRORISM LEGISLATION ON FREEDOM OF THE MEDIA IN EUROPE[1]

BY DAVID BANISAR[2]

I. CONTENTS

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[1] This article was originally published by the Council of Europe's Media and Information Society Division on the occasion of the First Council of Europe's Conference of Ministers responsible for Media and Communication Services.

[2] David Banisar is Director of the Freedom of Information Project of Privacy International in London. He is also a Non-Resident Fellow at the Center for Internet and Society at Stanford Law School and a Visiting Research Fellow at the School of Law, University of Leeds. Previously he was a Research Fellow at the Kennedy School of Government at Harvard University and a co-founder and Policy Director of the Electronic Privacy Information Center in Washington, DC. He has also served as an advisor and consultant to numerous organisations including the UN Development Programme, Representative on Freedom of the Media for the Organization for Security and Co-operation in Europe, the Organization for Economic Cooperation and Development, Justice Canada, the Open Society Institute, Article XIX and Consumers International. He has worked in the field of information policy for seventeen years and is the author of books, studies, and articles on freedom of information, freedom of expression, media policy, whistleblowing, communications security, and privacy.

X. Appendix

Guidelines of the Committee of Ministers of the Council of Europe on protecting freedom of expression and information in times of crisis
Declaration on freedom of expression and information in the media in the context of the fight against terrorism

II. Executive Summary

The effects of anti-terrorism legislation and efforts since 2001 has raised new challenges for the media's ability to collect and disseminate information. Nearly all European nations have adopted new laws in that period.

The role of international bodies including the Council of Europe and the European Union (EU) has been more negative than positive with the adoption of many international agreements that either ignore or only pay scant attention to fundamental human rights and the importance of a free media. The role of European institutions such as the EU and the Council of Europe have resulted in greater adoption and harmonisation of these laws than most other regions.

Freedom of expression has been especially challenged by the adoption of new laws on prohibiting speech that is considered "extremist" or supporting of terrorism. These new laws in many jurisdictions are used to suppress political and controversial speech. Web sites are often taken down or blocked.

Access to information laws have been widely accepted and adopted across the Council of Europe. However, state secret and national security laws are regularly being used against journalists and their sources. There are also growing, mostly unregulated, limits on photography.

Protection of journalists' sources is also widely recognised both in national laws and in decisions of the European Court of Human Rights (ECtHR). However, these protections are often undermined by governments seeking to identify officials who provide information. Newsrooms are often searched.

New anti-terrorism laws are giving authorities wide powers to conduct surveillance. Sources protections and journalists rights are often undermined by the use of these laws. Other new laws are making it easier to conduct surveillance by imposing technical and administrative requirements on keeping information.

III. Introduction

Since 2001, nearly all European countries have revised their legislation and policies relating to fighting terrorism. New laws have been adopted; old laws have been revised; policies and practices have been changed. Most of these revisions have expended the powers of governments to fight terrorism and other crime. Controls on these powers are often insufficient.

This is not a European only phenomenon and problem. Nations around the globe have adopted anti-terrorism legislation in response to the attacks.

This report will focus on some of the changes that affect the ability of the media to collect and disseminate information. The issues reviewed will be examined through the lens of two important instruments on media freedom issued by the Council of Europe Committee of Ministers:

In 2005 the Committee of Ministers of the Council of Europe issued a "Declaration on freedom of expression and information in the media in the context of the fight against terrorism".[3] The Declaration called on member states to respect media rights and to not unnecessarily introduce new restrictions on freedom of expression and information; to not treat journalists' reporting of terrorism as supporting of it; to ensure access to information, scenes of acts, and judicial proceedings; to protect their sources; and not to pressure them.

In 2007 the Ministers issued further guidelines on "protecting freedom of expression in times of crisis", including terrorist attacks.[4] The guidelines remind governments of their obligations to ensure that journalists have access to information; that sources and information gathered should not be revealed or seized; that public access to information should not be limited; and that "vague terms" such as incitement should not be used to limit freedom of expression and should be clearly defined.

These two instruments set out a baseline that Council of Europe member states should be following. It is the finding of this study that those guidelines have not been respected by all nations. Journalists have been increasingly placed under pressure in many jurisdictions with detentions, shutting down of newspapers, and prosecutions.

New laws designed to protection national security from terrorism and other threats limit journalists' ability to access information. There have also been increased procedural powers to obtain information through surveillance, searches, demands for disclosure and other means At the same time, the laws are used to prosecute journalists for obtaining information from sources and justify surveillance to identify the sources so that journalists can be prosecuted under secrets acts for violating their duties to keep information secret.

Too often, these are used for political rather than public safety reasons. As UN Secretary General Kofi Annan said in 2003, "we are seeing an increasing use of what I call the 'T-word' – terrorism – to demonise political opponents, to throttle freedom of speech and the press, and to delegitimise legitimate political grievances."[5]

Information for this report was gathered from a variety of public sources including reviewing of available laws and case-law, government reports submitted to the Council of Europe Committee of Experts on Terrorism (CODEXTER), the United Nations (UN) Counter-Terrorism Committee (CTC), the UN Human Rights Committee, the Representative on Freedom of the Media of the Organization for Security and Co-operation in Europe (OSCE), and the European Union, as well as reports and analyses produced by the above intergovernmental organisations, along with materials from academics, human rights groups, media organisations and other organisations. This is only a brief snapshot of current trends and thus, it is to be expected that there are gaps in the document based on a lack of available information.

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[3] *Declaration on freedom of expression and information in the media in the context of the fight against terrorism*, adopted by the Committee of Ministers on 2 March 2005 at the 917th meeting of the Ministers' Deputies.
[4] *Guidelines of the Committee of Ministers of the Council of Europe on protecting freedom of expression and information in times of crisis*, adopted by the Committee of Ministers on 26 September 2007 at the 1005th meeting of the Ministers' Deputies.
[5] Kofi Annan, Statement to the 20 January Security Council ministerial meeting on terrorism, 20 January 2003.

Future work could enhance and clarify the situation by conducting detailed country surveys or audits which focus on the issues covered by the study.

Thanks to Yaman Akdeniz, Heather Brooke, Gus Hosein, and Peter Noorlander for their comments and the many journalists, academics and other who provided information.

IV. EFFECTS OF INTERNATIONAL BODIES ON COUNCIL OF EUROPE MEMBER STATES

The initiatives of international bodies in developing international instruments relating to terrorism has been a significant driver in the adoption of anti-terrorism laws in Council of Europe member states. Often, these efforts require that states adopt far ranging laws to fight terrorism while paying little attention to human rights concerns. In some areas, such as surveillance and extremism speech, many member states have gone further than the legal requirements and adopted national legislation which seriously challenges human rights.

This section reviews some of the key instruments that have been adopted by the United Nations, Council of Europe and European Union that affect freedom of expression and freedom of information.

A. UNITED NATIONS

The resolutions and the implementation committee of the Security Council have been long criticised by human rights groups, academics, state governments and even UN officials for focusing on adopting legislation and paying little or no attention to the human rights effects of the legislation, ignoring obvious human rights concerns and failing to raise the issue with member states.[6]

Specific concerns have been raised over freedom of expression. In December 2001 17 Special Rapporteurs from the UN Human Rights Commission including those on free expression, torture, protection of children, and migrants issued a statement expressing concern about the effects of the terrorism laws on the media and other groups:

> We express our deep concern over the adoption or contemplation of anti-terrorist and national security legislation and other measures that may infringe upon the enjoyment for all of human rights and fundamental freedoms. We deplore human rights violations and measures that have particularly targeted groups such as human rights defenders, migrants, asylum-seekers and refugees, religious and ethnic minorities, political activists and the media.[7]

The United Nations was the first international body to propose new measures following the attacks in September 2001. On 28 September 2001 the United Nations Security Council adopted Security Council Resolution 1373.[8] The resolution calls on member nations to take measures to fight terrorism including adopting laws on financing or support and sharing information. Article 5 declares that "knowingly […]

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[6]See Human Rights Watch, *Hear No Evil, See No Evil: The U.N. Security Council's approach to Human Rights Violations in the Global Counter-terrorism Effort*, August 10, 2004.Available at http://www.hrw.org/backgrounder/un/2004/un0804/.

[7]UN High Commissioner for Human Rights, Human Rights Day: Independent Experts remind states of obligation to uphold fundamental freedoms, 10 December 2001.Available at http://www2.essex.ac.uk/human_rights_centre/rth/docs/IE.doc.

[8]United Nations, Resolution 1373 (2001), adopted by the Security Council at its 4385th meeting, 28 September 2001.Available at http://daccessdds.un.org/doc/UNDOC/GEN/N01/557/43/PDF/N0155743.pdf.

inciting terrorist acts are also contrary to the purposes and principles of the United Nations." A committee was set up to promote and evaluate each nation's efforts.

In September 2005, following the London bombings, the Security Council issued a non-binding resolution proposed by UK Prime Minister Tony Blair which expanded the restrictions on speech.[9] The resolution condemns incitement and repudiates justification or glorification (apologia). It calls on states to adopt measures to "prohibit by law incitement to commit a terrorist act or acts", "prevent such conduct" and "deny safe haven" to those believed to have done so. It also calls for states to improve border controls and take measures to counter incitement and "prevent subversion of educational, cultural and religious institutions." In response to some of the previous criticisms, the resolution notes that the measures must comply with states' obligations under international law, "in particular international human rights law" and refers to Article 19 of the UN Declaration on Human Rights in the recitations.

More recently, the UN has been paying more attention to the subject by issuing additional resolutions on human rights and terrorism and creating a special Special Rapporteur on the Promotion and Protection of Human Rights While Countering Terrorism. The Human Rights Commission adopted resolutions in 2004 and 2005 voiced concerns about the use of counter-terrorism laws to limit free expression. The Commission called on nations to "refrain from using counter-terrorism as a pretext to restrict the right to freedom of opinion and expression in ways which are contrary to their obligations under international law".[10] The United Nations Global Counter-Terrorism Strategy adopted by Member States in September 2006 also calls for a recognition of human rights.[11]

These efforts have increased the recognition of protection of human rights in the context of the fight against terrorism. However, many observers still remain concerned that an imbalance remains with the human rights protections limited to mostly general or declaratory statements while legal obligations which affect human rights are more specifically set out.[12]

B. COUNCIL OF EUROPE

The Council of Europe has adopted numerous conventions, resolutions and documents on terrorism and related matters over the years.[13] This includes two declarations on protecting freedom of information and freedom of expression in the fight on terrorism mentioned in the first section,[14] and a recommendation on the use of surveillance techniques in anti-terrorism.[15]

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[9]United Nations Security Council, Resolution 1624 (2005), 14 September 2005.Available at http://daccessdds.un.org/doc/UNDOC/GEN/N05/510/52/PDF/N0551052.pdf.However, some observers have noted that it is troubling to have an mechanism on a non-binding resolution. See Bianchi, "Security Council's Anti-terror Resolutions and their Implementation by member states", Jo*urnal of International Criminal Justice 4* (2006), 1044-1073.

[10]See e.g. UN, Commission on Human Rights Resolution: 2004/42 *The right to freedom of opinion and expression*, Human Rights Resolution 2005/38.

[11]General Assembly resolution 60/288 of 20 September 2006 on "Global Counter-Terrorism Strategy".

[12]General Assembly resolution 60/158 of 16 December 2005 on the "Protection of human rights and fundamental freedoms while countering terrorism", See Foot, "The United Nations, Counter Terrorism, and Human Rights: Institutional Adaption and Embedded Ideas", *Human Rights Quarterly* 29 (2007), 489-514.

[13]See Council of Europe, Committee of Experts on Terrorism, http://www.coe.int/t/e/legal_affairs/legal_co-operation/fight_against_terrorism/

[14]*Declaration on freedom of expression and information in the media in the context of the fight against terrorism* (2005); *Guidelines on protecting freedom of expression and information in times of crisis* (2008).

[15]Recommendation Rec (2005) 10 of the Committee of Ministers to member states on "special investigation techniques" in relation to serious crimes including acts of terrorism.

An important aspect of all of its work is the necessity for conventions to be compatible with the European Convention on Human Rights (ECHR) and its strong protections of freedom of expression and other human rights.

The European Court of Human Rights (ECtHR) has issued hundreds of decisions on freedom of expression, including a number relating to free expression and terrorism.[16] For speech to be limited, it must fall under one of the exemptions in Article 10(2) which includes national security and public safety. The restriction must be prescribed by law and give people clear guidance about what is prohibited. Finally, the restriction must be "necessary in a democratic society" which requires a "pressing social need". In areas relating to "political speech or on debate on questions of public interest" the court has found that "there is little scope…for restrictions".[17]

1. Convention on the Prevention of Terrorism (2005)

Following the September 2001 attacks, the Council of Europe created a working group to review its anti-terrorism legislation and began work on the convention in 2003. It opened the instrument for signature in May 2005 and it entered into force in June 2007. The Convention has now been signed by 28 countries and ratified by 15.[18]

The scope of the convention is relatively narrow, focusing mostly on new crimes for public provocation, recruitment and providing training for terrorism. There are also sections on providing assistance for victims.[19]

The Convention goes further than other anti-terrorism treaties and bans not just incitement but also "public provocation" when it "causes a danger" that a terrorism incident "may be committed". Article 5 on Public provocation to commit a terrorist offence states:

> 1. For the purposes of this Convention, "public provocation to commit a terrorist offence" means the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of a terrorist offence, where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed.
> 2. Each Party shall adopt such measures as may be necessary to establish public provocation to commit a terrorist offence, as defined in paragraph 1, when committed unlawfully and intentionally, as a criminal offence under its domestic law.

The convention also includes important protections. Article 12 requires that the adoption and implementation of the convention by nations "are carried out while respecting human rights obligations, in particular the right to freedom of expression, freedom of association and freedom of religion" under the ICCPR, ECHR and other international treaties. The laws must also be "subject to the principle of proportionality, with respect to the legitimate aims pursued and to their necessity in a democratic society, and should exclude any form of arbitrariness or discriminatory or racist treatment."

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[16]For an extensive overview, see Council of Europe, *Freedom of Expression in Europe: Case-law concerning Article 10 of the European Convention on Human Rights*, Human rights files, No. 18, 2007. See e.g. *Jersild v. Denmark*, App 15890/89, *Gerger v. Turkey*, App 24919/94; *Ceylan v. Turkey*, App 23556/94; *Sener v. Turkey*, App 26680/95; *Surek v. Turkey*, App 24122/94.
[17]*Sener v. Turkey*, App 26680/95.
[18]Council of Europe *Convention on the Prevention of Terrorism*, CETS No.: 196, Chart of Signatures and Ratifications.
[19]For an overview review of the text and history of the convention, see Hunt, "The Council of Europe Convention on the Prevention of Terrorism", *European Law Review,* Vol. 12, No. 4 (2006).

The Convention also excludes the defence of "political offences". Under Article 20, extradition and mutual legal assistance cannot be refused "on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives."

There are concerns that the Convention will be expansively used by some national governments to justify severe restrictions on free expression. Some, such as Russia, which already has controversial laws on extremism, have actively embraced it while adopting legislation that is significantly more far reaching.[20] The Council of Europe review of national laws said that it expected the implementation of the law "will, inevitably and undoubtedly" lead to challenges under the ECHR.[21]

2. Cybercrime Convention and Optional Protocol on Xenophobia and Racism

In 1997 the Council of Europe formed a Committee of Experts on Crime in Cyber-space (PC-CY). The convention text was finalised in September 2001.[22] After the terrorist attacks on the United States, the convention was positioned as a means of combating terrorism. A signing ceremony took place in November 2001 where it was signed by 30 countries. The convention came into force on 7 January 2004.

The convention has three parts. Part I proposes the criminalisation of online activities such as data and system interference, the circumvention of copyright, the distribution of child pornography, and computer fraud. Part II requires ratifying states to pass laws to increase their domestic surveillance capabilities to cater for new technologies. This includes the power to intercept Internet communications, gain access to traffic data in real-time or through preservation orders to ISPs, and access to data. The final part of the treaty requires all states to co-operate in criminal investigations.

Overall, parts II and III have been the most controversial. Part II of the convention calls for an expansion of technological means to facilitate interception but does not include substantive limitations on its scope or use. This has led to the justification of adopting acts in member states with very broad laws (see below, *Wiretapping and surveillance of journalists*, page 61) which has profound effects on freedom of expression. This was especially a concern since the convention was intended to be open to non-Council of Europe -signatories who were not subject to ECHR protections of human rights. In Part III, civil society campaigners expressed concern over the lack of requirement of dual criminality, believing that it could lead to misuse of cybercrime laws to limit media and criticism by baseless changes. In October 2004, two UK servers for *Indymedia*, an independent media organisation, were seized at the request of US authorities on behalf of Swiss and Italian authorities.[23]

In addition to the convention, an optional protocol on Xenophobia and Hate Speech was introduced in 2002.[24] The protocol prohibits the dissemination of racist speech including threats and insults and denial and justification of genocide. There have been many calls to use this protocol expansively to ban incitement and glorification related information.[25]

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[20]Mikhail Kamynin, the Spokesman of Russia's Ministry of Foreign Affairs, Answers Questions from Interfax News Agency Regarding Deposition by Russian Minister of Foreign Affairs Sergey Lavrov with Council of Europe Secretary General Terry Davis of Russia's Instrument of Ratification of the Council of Europe Convention on the Prevention of Terrorism, 19 May 2006.
[21]Cited in Hand, supra.
[22]Council of Europe Convention on Cybercrime, Treaty No. 185.
[23]See *EFF Indymedia* pages at http://www.eff.org/Censorship/Indymedia/.
[24]*Additional Protocol to the Convention on cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems*, ETS 189.
[25]See Council of Europe Parliamentary Assembly, Recommendation 1706 (2005) "Media and Terrorism".

C. THE EUROPEAN UNION

The European Union (EU) role in developing anti-terrorism policy has often been considered more controversial than other international bodies. There are likely three reasons for this: One is the more expansive requirements that many of the instruments adopted have favoured compared to those adopted by the Council of Europe. A second factor is the mandatory nature of the instruments which can be enforced by infringement proceedings or cases brought to the European Court of Justice (ECJ). Finally, the process under which various instruments have been adopted has generally been non-transparent. The European Union has been extremely active under the 3rd Pillar (Justice and Home Affairs) in the promoting of enhanced law enforcement powers to fight crime and terrorism which is not subject to the same controls and Parliamentary oversight as other areas of EU activity.

A few weeks after the September 11 attacks, The EU Council proposed the adoption on a framework decision on terrorism to introduce EU-wide definitions of terrorism and criminal sanctions. The Framework decision defines terrorist offences and requires that EU member states criminalise inciting terrorism offences.[26] The Framework Decision was finally adopted in June 2002.[27]

The Decision was strongly criticised for potentially criminalising protests at meetings such as the G-8.[28] It only included a limited recognition of human rights while not imposing any substantive limits on countries. Declaration 10 stated that "Nothing in this Framework Decision may be interpreted as being intended to reduce or restrict fundamental rights or freedoms such as the right to strike, freedom of assembly, of association or of expression" while Article 1(2) noted that the decision "shall not have the effect of altering the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union."

In 2006 the European Commission began examining amending the Framework Decision "in order to devise effective solutions towards fighting terrorist propaganda though various media". The Commission determined that EU and national legislation needed enhancement.[29] It considered that the Framework Decision "appears to be outdated" and because of the Council of Europe and UN efforts in the field, the EU needed to catch up.

The amendment generally adopts the Council of Europe convention provisions on public provocation, recruitment and training. It defines public provocation as:

> the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of one of the offences listed in Article 1(1)(a) to (h), where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed;[30]

The amendment has been strongly criticised for lacking the protections on human rights incorporated into Article 12 of the Council of Europe Convention (see above).[31] The original version introduced by the

[26]Article 4(1) of the Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism.
[27]Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism.
[28]Bunyan, "The war on freedom and democracy", *Statewatch*, September 2002.
[29]European Commission, Staff Working Document, Accompanying document to the Proposal for a Council Framework Decision amending Framework Decision 2002/475/JHA on combating terrorism: Impact Assessment, SEC(2007)1424, 11 November 2007.
[30]Council Framework Decision amending Framework Decision 2002/475/JHA on combating terrorism.
[31]See European Parliament, *Draft Report on the proposal for a Council Framework Decision amending Framework Decision 2002/475/JHA on combating terrorism*, 15 May 2008; Statement by Dick Marty, member of the Parliamentary Assembly of the Council of Europe, addressing the Committee on Civil Liberties, Justice and Home

Commission had no protections and the EU was generally resistant to recognise any problems. The Eurojust representative defended the approach in one hearing stating that "judges and prosecutors will always obey the rule of law and respect the human rights imperatives" so no additional protections were required while a French Senator said "we must stick to general formulations and trust the judge".[32]

The amendment was approved by the Commission in November 2007 and approved by the Council of the EU in April 2008. A revised version was issued by the Council in July 2008.[33] The criticisms led to the adoption of the new section on freedom of expression. It currently states:

> This Framework Decision shall not have the effect of requiring member states to take measures in contradiction to fundamental principles relating to freedom of expression, in particular freedom of the press and the freedom of expression in other media as they result from constitutional traditions or rules governing the rights and responsibilities of, and the procedural guarantees for, the press or other media where these rules relate to the determination or limitation of liability.

However, this still raises problems as many of the protections are only non-binding declarations and it only focuses on traditional media issues while ignoring freedom of association and free speech in the religious context.[34]

The European Parliament voted overwhelmingly in September 2008 to revise the draft to remove references to "provocation" and replace them with "incitement" and include new protections on freedom of expression, association, private communications and specifically protect public debate on "sensitive political questions, including terrorism".[35] The response of the Council and the Commission to the amendments is pending as of the writing of this report.

1. Data Retention

The EU has also been active in the promotion of enhanced surveillance capabilities by member states. The most controversial has been in the area of data retention which requires that member states adopt laws to routinely monitor the Internet and telephone use of all users without a need to find that they are engaged in any illegal activities.

In 2002 the EU introduced amendments to the pending Directive on Privacy and Electronic Communications to allow member states to adopt measures to require that logs of telecommunications activities including tele-phone, mobile, location data and internet usage be kept for certain periods of time

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Affairs of the European Parliament in Brussels, 7 April 2008. Also see *Summary of the Round Table European and National Parliaments*, European Parliament, 7 April 2008; Statement of Amnesty International, *More Protection, Not Less*, 8 April 2008; International Commission of Jurists, *Briefing Paper: Amendment to the Framework Decision on Combating Terrorism – Provocation to Commit a Terrorist Offence*.

[32]Statement of Michele Coninsx, Chair of the Terrorism Team at Eurojust; Statement of Pierre Fauchon. European Parliament, Summary of the Round Table European and National Parliaments – Public provocation to commit terrorist offences, Exchange of views on the revision of Framework Decision 2002/475/JHA on combating terrorism, 7 April 2008.

[33]Council Framework Decision amending Framework Decision 2002/475/JHA on combating terrorism, Document 8807/08, 18 July 2008.

[34]Email communication from *Statewatch*, September 2008.

[35]European Parliament legislative resolution of 23 September 2008 on the proposal for a Council Framework Decision amending Framework Decision 2002/475/JHA on combating terrorism (COM(2007)0650 – C6-0466/2007 – 2007/0236(CNS)).

even in the absence of a belief that the users are engaged in criminal activities.[36] Previously, under a 1997 Directive, the data was required to be eliminated as soon as the need for it was done.

In 2006 the European Union adopted the Directive on Data Retention that requires telecommunications providers to automatically collect and retain all information on all users' activities.[37] The Directive requires member states to require communications providers to retain communications data for a period of between 6 months and 2 years. Member states had until September 2007 to transpose the requirements of the Directive into national laws and until March of 2009 for internet data. The Directive is currently being challenged by the Irish government in the European Court of Justice. A coalition of civil liberties groups have asked the court to find it incompatible with Article 8 and Article 10 protections under the ECHR.[38]

V. LIMITS ON ACCESS AND GATHERING INFORMATION

New efforts on counter-terrorism by member states also resulted in new limits on the ability of journalists to gather information. However, at the same time, other pressures have lead to greater openness by governments.

On the positive side, laws mandating the right of individuals to demand information from governments have spread across the Council of Europe member states in the past decade. Today, only a handful of countries have not adopted comprehensive laws on access to information and a Council of Europe working group is nearly complete with developing the world's first international treaty on the subject.

At the same time, laws on state secrets and criminal codes are also widespread and allow for restrictions in access to information in the name of national security. The scope of these laws have been expending in many nations. There have been an increasing number of cases in the past seven years of these laws being used to prosecute journalists and whistle-blowers.

There is also a growing development in limits on public photography and access to proceedings.

A. ACCESS TO INFORMATION LAWS

1. Relevant Standards of the Council of Europe

Access to information is recognised as a human right in Article 10 of the European Convention on Human Rights and has been widely taken on as an administrative tool across the member states of the Council of Europe. Nearly all countries have adopted national legislation and a majority have adopted it as a constitutional right. All but a handful of (41 out of 47) Council of Europe member states have adopted

[36]Directive 2002/58/EC of the European Parliament and of the Council Concerning the Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector.
[37]Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC.
[38]See Submission concerning the action brought on 6 July 2006 Ireland v Council of the European Union, European Parliament. Case C-301/06, 8 April 2008. Available at http://www.statewatch.org/news/2008/apr/eu-datret-ecj-brief.pdf.

national laws on access to information.[39] These range from the world's first act in Sweden and Finland in 1766 to "the former Yugoslav Republic of Macedonia", which adopted a law in 2006.

Thus far, the European Court of Human Rights has only found in favour of a limited right of access to information under Article 8 (personal privacy) when the information is necessary to protect the requestor's personal or family life. [40] The Court has also regularly found in favour of a right of access by individuals under Article 8 to their own information held by government bodies including those created by intelligence services.[41]

The efforts of the Council of Europe have been of particular importance in promoting access to information (ATI) laws. The Council of Europe Parliamentary Assembly first issued a resolution in 1979 recognising the importance of access and calling on the Committee of Ministers to recommend that member countries adopt ATI laws.[42] In 1981, the Committee of Ministers set out general principles implementing a right of access that member countries were recommended to adopt.[43]

In 2002 the Committee of Ministers issued detailed guidelines for member countries on developing access laws.[44] The recommendations have a number of exemptions that would apply in cases relating to anti-terrorism:

> Member states may limit the right of access to official documents. Limitations should be set down precisely in law, be necessary in a democratic society and be proportionate to the aim of protecting national security, defence and international relations or public safety; or the prevention, investigation and prosecution of criminal activities;

However, the recommendations also provide that information should be released if there is an "overriding public interest" in the release of the information, even if it would cause harm.

Currently, the Council of Europe is in the process of adapting the guidelines into the first international treaty on access to information. The treaty adopts the above language.[45]

2. Recent Trends

Development in the area of access to information laws has generally been positive in the past seven years. Concern about terrorism has not stopped member states from adopting Freedom of Information (FOI) laws. In that time frame, a number of Council of Europe member states have adopted laws.[46] On their face, these laws appear as open as laws adopted previously. In many cases, the laws include important

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[39]The only states without national access to information laws are Andorra, Cyprus, Luxembourg, Malta, Monaco and San Marino. A number of other states' laws are considered less than effective including Greece, Italy and Spain.
[40]*Guerra and Others v. Italy*, 26 EHRR 357 (1998).
[41]*Rotaru v. Romania*, Application No. 28341/95, [2000] ECHR 192; *Segerstedt-Wiberg and Others v. Sweden.* Application No. 62332/00; *Turek v. Slovakia*, Application No. 57986/00 [2006] ECHR 138.
[42]Council of Europe, Recommendation 854 (1979) on the disclosure of government documents and on freedom of information.
[43]Recommendation No. R (81) 19 on the access to information held by public authorities.
[44]Council of Europe, Recommendation Rec(2002)2 of the Committee of Ministers to member states on access to official documents, 2002. Available at http://www.coe.int/T/E/Human_rights/rec(2002)2_eng.pdf.
[45]See Council of Europe, Steering Committee for Human Rights (CDDH), *Draft Convention of the Council of Europe on Access to Official Documents and Draft Explanatory Report*, CDDH(2008)008 Add. III Bil., 3 April 2008.
[46]Armenia (2003), Croatia (2003), Turkey (2003), Serbia (2004), Switzerland (2004), Germany (2005), Montenegro (2005), Azerbaijan (2005) and "the Former Yugoslav Republic of Macedonia" (2006).

provisions such as public interest tests that make documents, including those relating to national security, more available than older laws.

A review of laws adopted after 2001 does not find that there is an increased secrecy in the definition of state secrets. Indeed, as with the 2002 Council of Europe Recommendation and draft convention, the trend towards more limited state secrets exemptions in FOI appears to be continuing.

In addition, many countries have amended their laws to improve access. In Norway, an entirely new act was adopted in 2007 which gives broader access to information. In Greece, amendments to the law clarified that all persons were able to ask for information, not just those with a personal interest. Hungary adopted several amendments to improve the use of the law in fighting corruption and extending it to electronic records and system. Other countries including Latvia and France adopted amendments as part of implementing an EU Directive on the reuse of information to improve their access.

Only a few legislative efforts which might have a negative effect on existing access rights have been identified:

- In Ireland, the Freedom of Information Act 1998 was amended in 2003 to remove the requirement that harm must be shown before information can be withheld for defence or national security reasons.[47] However, the police force (Garda Síochána) which also functions as an intelligence service has still not been included in the FOI.
- A provision in the pending UK Counter-terrorism bill would allow for public and media access to coroner's inquests to be restricted when "the Secretary of State has certified that the inquest will involve the consideration of material that should not be made public in the interests of national security, the relationship between the United Kingdom and another country, or otherwise in the public interest."[48]

It is possible, and perhaps likely, that the effects may be more subtle. In the Netherlands, there have been no legislative changes to the Government Information (Public Access) Act (Wet Openbaarheid van Bestuur or WOB) relating to national security or anti-terrorism. However, experts report that there are more subtle difficulties in obtaining some documents that were available before.[49] For example, risk maps to evaluate environmental hazards were taken off the Internet in 2006.[50]

There are some reported incidents on additional secrecy:

- In Sweden, local authorities classified the plans for the new house of the Prime Minister, claiming security.[51]
- In the UK, documents relating to potential fire hazards at a nuclear power plant are being withheld.[52]
- In Switzerland, a parliamentary committee is investigating why documents relating to an investigation into nuclear smuggling to Libya were shredded by the government.[53]

[47]Freedom of Information (Amendment) Act 2003, No. 9 of 2003.
[48]Counter-terrorism Bill 2008 §77, See UK Parliament, Counter-Terrorism Bill Explanatory Notes.
[49]E-mail communication from Roger Vleugels, 1 September 2008.
[50]C. Basta et al., Risk-maps informing land-use planning processes: A survey on the Netherlands and the United Kingdom recent developments, Journal of Hazardous Materials 145 (2007) 241–249.
[51]"Plans for PM's house to be kept secret", *The Local*, 29 April 2005.
[52]"Nuclear fire hazard kept secret for fear of aiding terrorists", *The Sunday Herald*, 26 September 2008.
[53]"Swiss to investigate shredding of files in nuclear smuggling case", *The Associated Press*, 27 May 2008.

So far, counter-terrorism efforts do not appear to have significantly affected the general right of access to information of European citizens as has happened in the United States.[54] It is likely that given its long history of freedom of information, the US has a more established system of access and users who expect access than most Council of Europe countries, which have only relatively recently adopted laws. Another possible factor is that the exemptions in access laws for national security and separate state secrets laws (see following section) are far broader in most European countries and thus there is not a perception by government officials that this needed to be changed in a significant way.

Another possible factor is that, unlike in areas relating to freedom of expression, there have not been significant international efforts to limit access to information and anti-terrorism legislation has generally not directly limited access. Whereas a number of international instruments on counter-terrorism action specifically try to describe with limits to freedom of expression, there have not been similar instruments that include limits to freedom of information in the counter-terrorism context.

B. State Secrets Legislation

All Council of Europe member states have legislation on the protection of national security-related secrets. In most countries, the protections are found in the criminal codes and prohibit the unauthorised disclosure of information that is determined by officials to be secret for national security reasons including relating to terrorism. Many countries, especially in Central and Eastern Europe, have adopted more detailed laws which set out categories of information that is eligible for protection and procedures for its protection and access.

1. Relevant Standards of the Council of Europe

The European Court of Human Rights has decided on the liability of journalists for obtaining and publishing secret information in several cases. Generally it has ruled that Article 10 of the ECHR does not exempt journalists from liability for violating criminal law. However, the Court has more recently noted that "greatest care" needs to be taken when determining the need to punish journalists who publish material in breach of confidentiality when doing so in the public interest.[55] In 2006 the Court ruled that the conviction of a journalist for making a routine inquiry to obtain non-sensitive but confidential information from an official was excessive.[56]

However, in 2007 the Grand Chamber of the Court overruled a ECtHR panel decision and ruled that there was no violation of Article 10 in a case where a journalist who had published sensationalised excerpts of an inflammatory memorandum from the Swiss Ambassador on the negotiations over assets of Holocaust victims.[57]

In other jurisdictions outside the Council of Europe member states with similar legislation, there has been a recognition of the problems of the broad scopes of the laws.[58]

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[54]See e.g. Government Secrecy: Decisions without Democracy, Openthegovernment.org, 2007, at http://www.openthegovernment.org/govtsecrecy.pdf; Reporters Committee for Freedom of the Press, *Homefront Confidential: How the War on Terrorism Affects Access to Information and the Public's Right to Know,* 6th Edition, October 2005.

[55]*Dupuis and Others v. France*, Application No. 1914/02.

[56]*Dammann v. Switzerland*, Application No. 77551/01, 25 April 2006.

[57]*Stoll v. Switzerland*, Application No. 69698/01, 10 December 2007.

[58]In Canada, the Ontario Court of Justice ruled in October 2006 that the Security of Information Act which is based on the UK Official Secrets Act was overbroad and disproportionate because it failed to define what was an official secret. Canada (Attorney General) v. O'Neill, 2004 CanLII 41197 (ON S.C.), (2004), 192 C.C.C. (3d) 255.

A 2006 review by the Council of Europe's Parliamentary Assembly found many national laws were problematic due to their broad scope and lack of limitations:[59]

> The Assembly notes that legislation on official secrecy in many Council of Europe member states is rather vague or otherwise overly broad in that it could be construed in such a way as to cover a wide range of legitimate activities of journalists, scientists, lawyers or other human rights defenders.[60]

In 2007 the Assembly called on member states to amend their laws to ensure that secrecy was not excessive and prone to abuse:

> 1.1.1. examine existing legislation on official secrecy and amend it in such a way as to replace vague and overly broad provisions with specific and clear provisions, thus eliminating any risks of abuse or unwarranted prosecutions;
> 1.1.2. apply legislation on official secrecy in a manner that is compatible with freedom of speech and information, with accepted practices for international scientific co--operation and the work of lawyers and other defenders of human rights;
> 1.2. look into ways and means of enhancing the protection of whistle-blowers and journalists, who expose corruption, human rights violations, environmental destruction or other abuses of public authority, in all Council of Europe member states;[61]

2. Recent Trends

There has been a significant trend in the increased use of state secret laws to penalise whistle-blowers and journalists who publish information of public interest. A review in 2007 by the Organization for Security and Co-operation in Europe (OSCE) found that nearly half of its 56 participating States imposed legal liability for journalists who obtained or published classified information.[62] The study found dozens of cases in recent time where journalists were prosecuted for publishing secrets.

Many of these cases have related to the current debates on anti-terrorism with journalists publishing articles of public interest based on leaked classified documents:

- In Denmark, two journalists and the editor of *Berlingske Tidende* were prosecuted under the Criminal Code in November 2006 after publishing material leaked from the Defence Ministry revealing that there were doubts over the existence of weapons of mass destruction in Iraq before the invasion, which the government of Denmark supported. The court found they had acted in the public interest in publishing the information and acquitted them.
- In Croatia, journalist Zalko Peratovic was detained and his house searched in October 2007 for violating state secrets after publishing a story on war crimes on his blog. *TV Nova* station was also raided. The raid was criticised by President Stjepan Mesic. The Parliamentary Council for the Control of Secret Services found that he and five other journalists' rights had been violated when

[59]Fair trial issues in criminal cases concerning espionage or divulging state secrets, Report. Committee on Legal Affairs and Human Rights Rapporteur: Mr Christos Pourgourides, Cyprus, Group of the European People's Party. Doc. 11031. 25 September 2006. Also See e.g. Parliamentary Assembly Resolution 1354 (2003) Conviction of Grigory Pasko.
[60]Resolution 1551 (2007) *Fair trial issues in criminal cases concerning espionage or divulging state secrets.*
[61]Recommendation 1792 (2007) *Fair trial issues in criminal cases concerning espionage or divulging state secrets.*
[62]OSCE Representative on Freedom of the Media, Access to information by the media in the OSCE region: trends and recommendations: Summary of preliminary results of the survey, 30 April 2007.

previously the intelligence agency briefed the president and the media that he was working with foreign intelligence agencies.[63]

- In Bulgaria, website *opasnite.net* was shut down by the State Agency for National Security (SANS) in September 2008 for allegedly posting classified information about corruption. A journalist was detained for a day. Another journalist who was reportedly associated with the site was severely beaten by four men a few weeks later.
- In Romania, six journalists were questioned and two were arrested in February 2006 for receiving classified information on military forces in Iraq and Afghanistan from a former soldier. The journalists did not publish the information and handed over the information to the government. The Supreme Court ordered the release of one journalist after she had been detained for two days.
- In the UK, Neil Garrett of *ITV News* was arrested in October 2005 and detained several other times under the Official Secrets Act after publishing internal police information on the mistaken shooting of Jean Charles de Menezes in a counter--terrorism operation. The story revealed that in an effort to deflect criticism, the police had misled the public about de Menezes' actions before he was shot. Police were forced to pay extensive damages after they searched the office and home of the Northern Ireland editor of the *Sunday Times* in 2003 after he published a book that contained transcripts of phone calls intercepted by the security services illegally. The Police Ombudsman described the raid as "poorly led and … an unprofessional operation". In November 2005, the government threatened to charge several newspapers with violating the Act if they published stories based on a leaked transcript of conversations between PM Tony Blair and President George Bush about bombing *Al Jazeera* television.
- In Germany, prosecutors announced in June 2007 that they had opened investigations against 17 journalists for violating state secrets after publishing stories on a Parliamentary investigation of the Germany intelligence agency's role in CIA anti-terror efforts. All of the cases were dropped in December 2007. Police raided the offices of the magazine *Cicero* in 2005 and charged the editor with violating state secrets. The Constitutional Court ruled in February 2007 that the police search and seizure was unconstitutional.[64]
- In Switzerland, three *Sonntags Blick* reporters were prosecuted in 2007 under the military penal code for publishing an Egyptian government fax confirming the existence of EU-based secret prisons run by the US government. The journalists were acquitted by a military court in April 2007.

There has also been an increase in new laws on state secrets in Central and Eastern Europe. New members of EU and the North Atlantic Treaty Organization (NATO) have adopted these laws on protection of classified information as a condition for joining the organisations.[65] This has led to conflicts with access to information laws where nations have adopted provisions not required by the international agreements.[66]

- In the Czech Republic, the Parliament approved amendments to the law on classified information in 2008 to restrict access to all unclassified NATO and EU sourced information. The government said it adopted the bill due to EU requirements.[67]
- In Moldova, the government proposed a draft Law on State Secret in 2008 that would allow officials to classify information as "Restricted" if the official finds that the release "cannot be in the

[63]OSCE Mission to Croatia, News in Brief, 5-18 April 2006.
[64]1 BvR 538/06; 1 BvR 2045/06, 27 February 2007.
[65]See NATO, *Security within the North Atlantic Treaty Organisation* (NATO), Document C-M(2002)49, 17 June 2002. This document was kept non-public for several years by both NATO and national governments while being cited to justify new state secrets acts.
[66]See Roberts, "NATO, secrecy, and the right to information", *East European Constitutional Review*, 11.4/12.1 (Fall 2002/Winter 2003).
[67]"Czechs to toughen access to NATO, EU documents", *Czech News Agency*, 16 January 2008.

favour of the interests and/or security" of the country. Information under that category can be classified for 5 years.

- In Bulgaria, the 2002 Law for the Protection of Classified Information revoked the 1997 Access to Documents of the Former State Security Service Act and Former Intelligence Service of the General Staff Act.
- In Albania, the government proposed amending the existing Law on State Secret in 2006 to include a new "Restricted" category when "unauthorised exposure may damage the normal state activity and the interests or effectiveness of the state institutions."[68] The amendment was eventually limited to only national security cases.
- In Croatia, the Information Security Act adopted in 2007 sets no limits on the duration that state secrets can be classified.[69]

Efforts to expand secrecy laws are not just limited to Central and Eastern European (CEE) countries. Proposals have also been heard in a number of West European countries. The record again has been mixed, with a tension between civil society and intelligence services leading to both increases and decreases in secrecy:

- In the UK, following a series of leaks, the government proposed extending the Official Secrets Act to make it easier to successfully prosecute whistle-blowers.[70] However, this was considered extremely controversial and thus far no public proposals have been introduced.
- In France, a decree was issued in 2003 that broadly classified all information about nuclear power including transport and safety as classified defence information. After protests, it was withdrawn and replaced in 2004.[71] A new law on nuclear transparency was adopted in 2005.[72] In May 2006, a spokesman for an environmental group was arrested for possessing a document on power plant safety.
- In Italy, following a series of scandals involving the secret services, a new law adopted in 2007 on secret service and intelligence limits the imposition of state secrets to 15 years (with possibility of renewal for another 15) and its application to information on terrorism that contravenes constitutional order.[73]

C. LIMITS ON PHOTOGRAPHY

In many countries, there is increased scrutiny and restrictions on photography, both by professionals and amateurs. Most of these efforts appear to be done without legal authority and include the detaining and assaults of journalists who are taking photos of notable events, such as public protests, the forced deletion of their photographs, or the seizure of photographs for use in prosecutions.[74]

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[68]Decision on Proposing a Draft Law "On Some Changes and Amendments to Law No. 8457", dated 11 February1999, "On Information Classified as "State Secret", 26 April 2006.
[69]Act on Information Security, *Official Gazette* 79/2007.
[70]Intelligence and Security Committee Annual Report 2005–2006.
[71]Arrêté du 26 janvier 2004 relatif à la protection du secret de la défense nationale dans le domaine de la protection et du contrôle des matières nucléaires pris pour l'application du décret n° 98-608 du 17 juillet 1998 relatif à la protection des secrets de la défense nationale, J.O. 24 du 29 janvier 2004
[72]Act 2006-686 of 13 June 2006 on Transparency and Security in the Nuclear Field. See Marc Léger and Laetitia Grammatico, "Nuclear Transparency and Safety Act: What Changes for French Nuclear Law?", *Nuclear Law Bulletin* No. 77 (2006).
[73]Legge 3 agosto 2007, n. 124 "Sistema di informazione per la sicurezza della Repubblicae nuova disciplina del segreto", *Gazzetta Ufficiale* n. 187 del 13 agosto 2007.
[74]The European Federation of Journalists is currently conducting a survey of its national members to better evaluate the current trends and problems.

- In the UK, there are no legal restrictions on the photography in public spaces. However, there are widespread reports that police are challenging photographers in public places and at public events and deleting photographs claiming terrorism restrictions.[75] It is also being imposed in private spaces such as shopping malls, which are prohibiting people from taking casual shots.[76] The Home Secretary has acknowledged that there is no legal basis for the stops but has allowed local police to continue to do it.[77]
- In Azerbaijan, journalist Afgan Mukhtarli taking photographs of a protest outside the Russian embassy was detained in August 2008. Police demanded a written explanation from him on why he was there.[78]
- In Montenegro, police detained journalists and seized cameras in October 2008 during a public protest.[79] The cameras were returned later with the photographs deleted.
- In Russia, a number of reporters were arrested during the G-8 meeting in 2006. Two student photographers were detained for several days before being expelled. A reporter with *Focus* was detained and had his photographs deleted by police after taking a picture of 4 of the G-8 delegates.[80]
- In Spain, authorities seized the cameras of Dutch photographer Joel Van Houdt who was investigating illegal immigration in the Canary Islands. He is being forced to testify in a legal case.[81]

Some restrictions may be in place in existing state secrets and espionage statutes. In Switzerland, in 2003, the government charged the editor of *Sonntags Blick* under the Military Code for publishing photos of an underground bunker.[82] He was convicted in 2004 and sentenced to 10 days jail but the decision was annulled in 2006 by the highest military court.[83] In Greece, 14 "plane spotters" from the UK and the Netherlands who travelled to a public air show and took photos of military planes were arrested and spent several months in jail. They were charged as spies and convicted. An appeals court overturned their case in 2002.[84] A number of journalists were detained in 2004 for photographing a port.[85]

There are also increased restrictions on photography in airports. In France, photography in certain areas is prohibited by a 2005 decree.[86] In London, photographers were banned from Heathrow airport during a terror alert.[87]

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[75]"Police: We were wrong to stop Christmas lights photographer", *Amateur Photographer Magazine*, 5 December 2007; "Injured photographer wins settlement, costs and apology from Met Police", *Editorial Photographers*, 25 February 2008; "Birmingham police officer 'forced press photographer to delete images'", *Editorial Photographers*, 2 March 2008.

[76]"Couple banned for life from shopping centre and branded 'terrorists' – for taking photos of their grandchildren", *The Daily Mail*, 2 January 2008.

[77]"Home Secretary green lights restrictions on photography", *British Journal of Photography*, 2 July 2008.

[78]"Police briefly detain, demand written explanation from journalist for taking photographs near Russian embassy", *IFEX Alert*, 11 August 2008.

[79]IPI/SEEMO Expresses Concern over Hostile Media Environment in Montenegro, IFEX Alert, 1 October 2008.

[80]International Press Institute, 2006 World Press Freedom Review: Russia (2007).

[81]"Dutch journalist's photographs seized, he is ordered to testify in human smuggling case", *IFEX Alert*, 11 September 2008.

[82]Communiqué de presse, Procédure engagée pour violation de secrets militaries, Département Fédéral de la Défense, de la Protection de la Population et des Sports, 21 août 2003.

[83]"Jugement contre un rédacteur du «SonntagsBlick» annulé", *DDPS Information aux medias*, 30 mars 2006.

[84]"Greek Appeals Court Overturns Conviction of 14 Plane Spotters", *New York Times*, November 2002.

[85]"Two Mexican journalists and their interpreter detained and manhandled by coast guard", *IFEX Alert*, 5 August 2004.

[86]Arrêté préfectoral n° 05-4979 du 7 novembre 2005 modifié relatif à la police sur l'Aéroport Charles de Gaulle.

[87]"Photographers hit by clampdown on Heathrow pictures", *Press Gazette*, 18 August 2006.

VI. LIMITS ON FREEDOM OF EXPRESSION

The right to free expression faces significant challenges due to new counter-terrorism efforts. The most significant challenge is from the creation of new crimes for speech that is seen to encourage, either directly or indirectly, terrorism. Restrictions have expanded from existing prohibitions on incitement to much broader and less defined areas such as glorification or "apology" for terrorism. Some countries have adopted broad prohibitions on other speech critical of national institutions and symbols. Internet-based speech has also been affected with attempts to block or remove websites with controversial material.

Political commentary and debate on major issues of the day, such as discrimination against certain ethnic or political groups, autonomy and other issues, is being treated as supporting of terrorism and is banned. Newspapers are shut down, journalists are detained, searches, arrested and tried, and web sites are blocked.

The efforts towards new broader restrictions on speech have mostly been initiated by countries where there are existing, often violent, controversies over territorial issues. Following the events of 11 September and the bombings in London and Madrid, the restrictions have been extending region-wide. They are driven by international instruments by the Council of Europe, EU and UN.

1. Relevant Council of Europe Standards

The Committee of Ministers in their 2007 guidelines on protecting freedom of expression and information in times of crisis recommended that:

> Member states should not use vague terms when imposing restrictions of freedom of expression and information in times of crisis. Incitement to violence and public disorder should be adequately and clearly defined.[88]

The European Convention on Human Rights provides for strong protections on freedom of expression under Article 10 while allowing states to protect national security. However, many of the new national laws appear to be in violation of the requirements of the ECHR by stretching the allowable justifications permitted by the European Court of Human Rights. National security and the fight against terrorism are often invoked to justify repression of protected speech.

The Court has heard numerous cases relating to freedom of expression and national security/anti-terrorism. The case-law of the ECtHR on incitement is not entirely straightforward. The Court has found that incitement can be prohibited under Article 10 in limited circumstances, which are highly context based. The Court attempts to determine if the intent of the speaker was to incite violence based on a number of factors. These include the method of communication, the language used for both the contested speech and previous statements, the size of the audience, and the position and background of the speaker.[89] Within this context, the Court has ruled that purely political speech is protected unless there is a compelling reason for restricting it.[90] However, in October 2008 the Court ruled a fine imposed for a cartoon published a few days after the 11 September attacks which appeared to support it was not a

[88]Committee of Ministers, *Guidelines of the Committee of Ministers on protecting freedom of expression and information in times of crisis*, §19.
[89]For a detailed review of the case-law, see OSCE, Countering Terrorism, Protecting Human Rights (2007).
[90]*Sener v. Turkey*, Application No. 26680/95.

violation of Article 10 in part because of the short time from the incident made it more likely it would provoke violence.[91]

The ECtHR has also generally found that journalists should not be found responsible for reporting the words of others in a responsible way. In a 1994 case, the Court said that: "The punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so."[92]

2. Speech Crimes: Incitement, Glorification, Apologia, and Beyond

There is an increasing trend by member states to criminalise speech which could be considered to be supporting of terrorism. As discussed in Section II, international instruments developed by the Council of Europe, EU and UN have pushed member states towards adopting these limitations.

The most common crime prohibited and perhaps the least controversial on its face is incitement. Incitement is typically defined as the direct promotion of criminal acts with the intent of inspiring another person, who may not be known to the speaker, to commit the act. Incitement has been long banned by member states as a general criminal law. The instruments have encouraged member states to adopt specific incitement provisions relating to terrorism.[93]

A review by the Council of Europe in 2004 found that all member states had laws on incitement as part of their criminal codes and a handful had specific provisions on incitement of terrorism.

Many of the laws do not require the actual crime to have been attempted or committed. In Belgium, the Criminal Code was amended by an anti-terrorism act in 2003 to include incitement. It now states:

> Any person who, either by views expressed in meetings or public places or by writings, printed matter, images or emblems of any kind displayed, distributed, sold or put on sale or public view, directly provoked others to commit the crime or offence, without prejudice to the penalties imposed by law on authors of provocations to commit crimes or offences, even if such provocations were not acted upon.[94]

As shown by the ECtHR case-law discussed above, even the more narrowly defined incitement laws have raised questions when applied to media. There are a number of cases, which might therefore raise concern:

- In Azerbaijan, opposition editor Eynulla Fatullayev was convicted of inciting terrorism and sentenced for 8 ½ years for an article opposing Azerbaijan's support of US policies relating to Iran. He was previously imprisoned for criminal libel.
- In Austria, Danish cartoonist Jan Egesborg was arrested and had his materials seized for putting up posters in the Vienna underground which criticised Russian President Putin on the death of Russian journalists by prominently placing the words "shoot" and "Putin" on the poster.

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[91] *Leroy v. France*, Application No. 36109/03, 2 October 2008.
[92] *Jersild v. Denmark*, Judgment of 23 September 1994, Series A No. 298.
[93] Council of Europe CODEXTER Committee, "Apologie du Terrorisme" and "Incitement to Terrorism": Analytical Report, CODEXTER (2004) 04 rev, 24 June 2004.
[94] § 66. See UN Security Council, Letter dated 23 September 2006 from the Chairman of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council, Document S/2006/762, 25 September 2006.

More controversial is the adoption of laws on "glorification", "apology" or "public promotion" of terrorism. Since the adoption of the Council of Europe Convention on the Prevention of Terrorism, a number of additional member states have adopted glorification laws including Andorra, Lithuania, Russia and the UK.

Of primary concern is the problem of defining what is to be prohibited. The Convention appears to take a narrow approach in prohibiting "public provocation" which is defined as "the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of a terrorist offence, where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed." However, while developing the Convention, the CODEXTER committee focused on glorification and apologia which it defined as the "public expression of praise, support or justification of terrorists and/or terrorist acts"[95] and that discussion has continued. The Explanatory Memorandum suggests that "such a provision could cover the dissemination of messages praising the perpetrator of an attack, the denigration of victims, calls for funding for terrorist organisations or other similar behaviour which could constitute indirect provocation to terrorist violence."[96]

As noted by the Council of Europe working group when developing the Convention, "it is to be expected that the introduction in member states of the Council of Europe of specific anti-terrorism legislation along these lines will, inevitably and undoubtedly, give rise to complaints under the ECHR".[97] A number of jurisdictions have used the latitude given to countries under the Convention to adopt broad, vaguely defined laws which can be used to seriously limit speech of those opposed to government policies.

In Russia, the 2006 anti-terror law criminalises as a terrorist activity the "popularisation of terrorist ideas, dissemination of materials or information urging terrorist activities, substantiating or justifying the necessity of the exercise of such activity."[98] Organisations, including media organisations, that are found liable under the act can be liquidated. A second 2006 law that implements the Council of Europe Convention amended the mass media laws to prohibit "distributing materials, containing public appeals to exercising terrorist activity, or justifying terrorism publicly, other extremist materials". The law also prohibits journalists from discussing counter-terrorism operations.[99] A third law also adopted in 2006 extends the definition of extremism to include "Public defamation of the person, deputy public office, the Russian Federation or public office, subject of the Russian Federation, in the performance of their duties or in connection with their performance".[100] There have been numerous cases brought against newspapers, commentators, artists, civil society organisations and others under these laws.[101]

The UK Anti-Terrorism Act 2006 prohibits the direct or indirect encouragement of terrorism. The section states:

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[95]Council of Europe CODEXTER Committee, "Apologie du Terrorisme" and "Incitement to Terrorism": Analytical Report, CODEXTER (2004) 04 rev, 24 June 2004.
[96]§95.
[97]Council of Europe CODEXTER Committee, "Apologie du Terrorisme" and "Incitement to Terrorism": Analytical Report, §7.3.
[98]Federal Law No. 35-Fz of March 6, 2006 on Counteraction Against Terrorism.
[99]Federal Law No. 153-FZ of 27 July 2006 on amending some legislative acts of the Russian Federation in connection with the adoption of the federal law on ratification of the Council of Europe Convention on the Prevention of Terrorism and the federal law on countering terrorism.
[100]Federal Law No. 148-FZ of 27 July 2006 amending Articles 1 and 15 of the federal law "On Countering Extremist Activity".
[101]See e.g. Alexander Verkhovsky, Anti-extremist Legislation and Its Enforcement, SOVA Centre, July 2008.

> For the purposes of this section, the statements that are likely to be understood by members of the public as indirectly encouraging the commission or preparation of acts of terrorism or Convention offences include every statement which:
> (a) glorifies the commission or preparation (whether in the past, in the future or generally) of such acts or offences; and
> (b) is a statement from which those members of the public could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated by them in existing circumstances.[102]

Concerns have been raised over its application to historical events such as Irish independence or the anti-Apartheid campaigns of the 1970s and 1980s as well as current debates over terrorism. The UN Human Rights Committee in 2008 called for the revision of the law because of its vagueness:

> The Committee notes with concern that the offence of "encouragement of terrorism" has been defined in section 1 of the Terrorism Act 2006 in broad and vague terms. In particular, a person can commit the offence even when he or she did not intend members of the public to be directly or indirectly encouraged by his or her statement to commit acts of terrorism, but where his or her statement was understood by some members of the public as encouragement to commit such acts.[103]

In France, the 1881 Law on Freedom of the Press prohibits the advocacy of terrorism by means of "speeches, shouts or threats proffered in public places or meetings, or by written words, printed matter, drawings, engravings, paintings, emblems, pictures or any other written, spoken or pictorial aid, sold or distributed, offered for sale or displayed in public places or meetings, either by posters or notices displayed for public view, or by any means of electronic communication".[104]

Some countries have more general prohibitions on supporting criminal violations. In Germany, the Criminal Code states that whoever "publicly, in a meeting or through dissemination of writings…and in a manner that is capable of disturbing the public peace, approves of one of the unlawful acts named….after it has been committed or attempted in a punishable manner" can be imprisoned for up to three years.[105] In Poland, the Criminal Code penalises any person who "publicly praises the commission of an offence."[106]

Some countries have adopted provisions that go beyond incitement and glorification to insults of victims of terrorism. In Spain, the Criminal Code was amended in 2000 to prohibit glorification but also "the commission of acts tending to discredit, demean or humiliate the victims of terrorist offences or their families".[107] Punk band *Soziedad Alkoholika* was charged with glorification and degradation of victims in 2006 for publishing songs which criticised the police. The Supreme Court ruled in 2007 that their lyrics did not glorify terrorism or degrade victims and the criticism was protected.[108]

In Lithuania, the 2004 amendments to the Criminal code now punish "Any person who by public oral or written statements or using mass media encouraged or incited an act of terror or other crimes related to terrorism or despised the victims of terror."[109]

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[102]Terrorism Act 2006, §1.
[103]UN Human Rights Committee, Concluding Observations of the Human Rights Committee, Ninety-third session CCPR/C/GBR/CO/6, 21 July 2008.
[104]Loi du 29 juillet 1881 sur la liberté de la presse, Lois n° 637. §§23,24.
[105]Criminal Code §140(2).
[106]Criminal Code §255(3).
[107]Criminal Code, §578, added by Organic Law No. 7/2000 of 22 December.
[108]Sentencia Tribunal Supremo núm. 656/2007 (Sala de lo Penal, Sección 1), de 17 julio 2007.
[109]No. IX-2570, 2004-11-11, Žin., 2004, No. 171-6318 (2004-11-26). See Committee of Experts on Terrorism (CODEXTER) Cyberterrorism – The Use of the Internet for Terrorist Purposes: Lithuania, September 2007.

Many countries also protect national symbols. In Turkey, the Terrorism Act and the Criminal Code have provisions to punish anyone who "publicly humiliates" the Turkish Flag or the Turkish National Hymn",[110] "discouraging people from joining the Armed forces"[111] or denigrating the memory of founder of the modern Turkish state, Ataturk. A new section was adopted in the 2006 Anti-terrorism Act which prohibits publication of propaganda such as quoting or discussing the policies of groups such as the PKK. Journalist Cengiz Kapmaz was convicted and sentenced for 10 months under the new section on disseminating propaganda in September 2008. Popular singer Bulent Ersoy is currently being prosecuted for violating the provision on discouraging people from serving in the armed forces.[112]

A provision on "denigrating Turkishness" was amended to limit its application and lower penalties in 2008.[113] Until its amendment, it was used against authors such as Nobel Laureate Orhan Pamuk, scholars and others who raise controversial issues such as Kurdish and Armenian relations.[114] However, there are reports that the revised section is still being applied in a controversial manner.[115]

The UN Special Rapporter has expressed concern over the broadness of the laws and its application, noting "elements both in the Anti-Terror Act and in the Penal Code which may put severe limitations on the legitimate expression of opinions critical of the Government or State institutions, on the forming of organisations for legitimate purposes, and on the freedom of peaceful assembly."[116]

In France, the 2003 internal security law prohibits the insult of the flag or the national anthem at a public event.[117] It was adopted after the national anthem was booed by foreign supporters at a football match attended by President Chirac.[118]

Laws relating to prohibitions on racist speech have also been broadened in some countries. A review by the Council of Europe Venice Commission in 2007 found that nearly all Council of Europe member states had adopted laws prohibiting incitement to hatred on racial, national and religious grounds.[119]

While the concept is widely supported, some have been used in cases which raise significant free expression concerns:

- Police asked the Crown Prosecution Service and broadcast regulator Ofcom to investigate if Channel 4 had incited hate by broadcasting the "Undercover Mosque" show revealing that several preachers were encouraging violence and discrimination against non-Muslims. Both found that there was no legal violation and the police were forced to apologise and pay £100 000 damages to Channel 4 in 2008.
- In the Netherlands, cartoonist Gregorious Neskschot was arrested and detained for over a day in May 2008 after a complaint about cartoons published in 2005. The arrest led to an emergency

[110]Article 300.
[111]Article 318.
[112]"Turkish singer defiant in court", *BBC News*, 24 September 2008.
[113]Article 301.
[114]See Human Rights Watch, *Ongoing Restrictions on Freedom of Expression*, April 13, 2007.
[115]"Publisher convicted of insulting Turkey", *The Guardian*, 20 June 2008.
[116]Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism Addendum: Mission to Turkey, A/HRC/4/26/Add.2, 16 November 2006.
[117]Loi n°2003-239 du 18 mars 2003 pour la sécurité intérieure. Incorporated as Code penal § 433-5-1.
[118]"French face jail for insulting the flag", *The Times*, 15 February 2003.
[119]Venice Commission, Preliminary report on the national legislation in Europe concerning blasphemy, religious insults and inciting religious hatred, Study 406/2006, CDL-AD(2007)006, March 2007.

debate in Parliament.[120] The hearing revealed that the Ministry of Justice had set up a secret special inter-departmental cartoon working group to look into possible action to be taken in cases of unrest.

- In Russia, government prosecutors found that an episode of American cartoon *South Park* was a violation of the extremism law for inciting racial hatred in September 2008 and recommended that the license of 2X2, the broadcaster be withdrawn.[121] The license was renewed and the channel has appealed the extremism decision to court but has taken 12 shows including *South Park* and *The Simpsons* off the air.

3. Possession of Terrorist Materials

Countries are also increasingly adopting laws that prohibit the possession of terrorist materials. The danger with this kind of law is that it can also apply to journalists or scholars who collect the information to better understand the mind-set of the terrorists.

In the United Kingdom the Terrorism Act 2000 prohibits the possession of information that would be useful to commit a terrorist act. The Court of Appeals ruled in 2008 that the law required that the information must not just encourage terrorism but must provide practical assistance.[122]

The Court of Appeals in 2008 also threw out the case of the "lyrical terrorist" who had written provocative poems and slipped them to people at Heathrow Airport. She was charged with having terrorist manuals on her hard drive but the case was dropped after the police admitted that they could not prove that she had the intent to commit acts.[123] In 2008 two researchers at Nottingham University were arrested after one downloaded an al-Qaida training manual for his thesis.[124] He was detained for 6 days and released. The other is now in jail facing deportation from the UK.

In Ireland the Offences against the State Act 1939 prohibits the possession of "any treasonable document, seditious document, or incriminating document in his possession or on any lands or premises owned or occupied by him or under his control."[125] Journalists are required to turn it over the Garda upon request or face prosecution. Four BBC reporters were detained under Section 30 of the Act in 2008 while they were investigating members of the Provisional IRA. They were later released without charge.

In Cyprus, the draft anti-terrorism bill will also make the possession of seditious documents a terrorist offence.[126]

4. Effects on Internet Speech

In the past decade, the effect of the Internet on media and freedom of expression has been dramatic. Most newspapers and other media outlets have Internet sites which make information available. New media organisations that are only Internet-based have sprung up. New forms of media such as blogging and social networks allow millions to publish information quickly and at low or no cost.

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[120]"Emergency Debate on Arrest of Cartoonist", *NIS News*, 21 May 2008.
[121]"Moscow prosecutors say South Park cartoons could incite hatred", *RIA Novosti.* 8 September 2008.
[122]R v K [2008] All ER (D) 188 (Feb).
[123]R v Malik [2008] All ER (D) 201 (Jun).
[124] Student researching al-Qaida tactics held for six days", *The Guardian*, 24 May 2008.
[125]Offences Against the State Act 1939, §12.
[126]European Commission, Commission Staff Working Document. Annex to the Report from the Commission based on Article 11 of the Council Framework Decision of 13 June 2002 on combating terrorism (COM(681) final), 6 November 2007.

A. Relevant Council of Europe Standards

In March 2008 the Committee of Ministers of the Council of Europe adopted Recommendation CM/Rec (2008) 6 to member states on measures to promote the respect for freedom of expression and information with regard to Internet filters. In the guidelines appended to the Recommendation, the Committee of Ministers states that member states should:

> i. refrain from filtering Internet content in electronic communications networks operated by public actors for reasons other than those laid down in Article 10, paragraph 2, of the European Convention on Human Rights, as interpreted by the European Court of Human Rights;
> ii. guarantee that nationwide general blocking or filtering measures are only introduced by the state if the conditions of Article 10, paragraph 2, of the European Convention on Human Rights are fulfilled. Such action by the state should only be taken if the filtering concerns specific and clearly identifiable content, a competent national authority has taken a decision on its illegality and the decision can be reviewed by an independent and impartial tribunal or regulatory body, in accordance with the requirements of Article 6 of the European Convention on Human Rights;[127]

Counter-terrorism efforts have also affected access to Internet-based information sources. There is grave concern in many countries about the use of the Internet for "cyber-terrorism" – attacks on Internet sites such as government and corporate sites, networks and critical infrastructure such as power plants that are connected online, and also the use of the Internet by terrorists to recruit, plan acts, and send out propaganda. The response to these concerns has been increased efforts by authorities to limit access to their sites. This can be either the shutting down of sites if they are within the jurisdiction of the country or another country that will support their efforts or setting up technical measures to block access from users inside the country.

The EU in 2007 launched a programme called the "Check the Web" to increase the monitoring Islamist web sites across the EU, co--ordinated by Europol.[128] The proposal called for a co-ordinated review and actions on the sites noting that "numerous Internet sites in a wide variety of languages must be monitored, evaluated and, if necessary, blocked or closed down."[129] Thus far, very little information on the programme has been released about how many sites have been identified and blocked or shut down.

In Turkey, a law on Internet crimes was adopted in 2007 that allows the blocking of websites by a court order if the content in question is hosted in Turkey.[130] Additionally, the law enables the Telecommunications Communication Presidency to issue administrative orders to block access to websites which are hosted outside the Turkish jurisdiction. As of August 2008, 853 websites including major international sites with millions of users including YouTube, Geocities, dailymotion, and Wordpress have been blocked recently for violations of the laws on terrorism, insulting Turkishness, defamation, and other crimes listed in Article 8 of Law No. 5651. 241 of the 853 websites are blocked by court orders, while the majority (612) are blocked by administrative orders issued by the Presidency.[131]

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[127]Recommendation CM/Rec (2008) 6 of the Committee of Ministers to member states on measures to promote the respect for freedom of expression and information with regard to Internet filters.
[128]Council of the EU, Council Conclusions on cooperation to combat terrorist use of the Internet "Check the Web", Document 8457/07 ENFOPOL 66, 19 April 2007.
[129]Council of the EU, Proposals of the German Delegation regarding EU co-operation to prevent terrorist use of the Internet ("Check the Web"), 9496/06 ENFOPOL 9 JAI 261, 18 May 2006.
[130]Law of 5651 on Regulation of Internet Publications and Combating Crimes Committed through such Publication, 4 May 2007.
[131]See generally Akdeniz, Y., & Altiparmak, K., *Restricted Access: A Critical Assessment of Internet Content Regulation and Censorship in Turkey*, IHOP: Ankara, October 2008, available through http://www.cyber-rights.org.tr.

In Russia, a bill is pending which would extend the laws on mass media to nearly all Internet sites and subject them to stricter regulations. Current extremism laws are already used against Internet-based sites. According to the government, over 1 000 sites were banned in 2007.[132] *ingushetiya.ru* was banned by a court in May 2008 for extremism. Magomed Yevloyev, the owner of the site, was shot dead in a police car in September 2008.

In the UK, the Terrorism Act 2006 requires Internet providers to remove materials that promote or glorify terrorism. Providers are not liable if "upon obtaining actual knowledge that the information was unlawfully terrorism-related, the service provider expeditiously removed the information or disabled access to it."[133] Home Secretary Jacqui Smith announced in January 2008 that she was meeting with Internet Service Providers to develop a plan to block sites promoting terrorism.[134]

In France, the French government announced in June 2008 that they had reached an agreement with Internet Service Providers to block sites that contain terrorist, racist and pornographic content by 2009.[135] Individuals are encouraged to submit sites for blocking.[136]

Blocking systems that have been created for other reasons have been proposed to extend to terrorism material. In Finland, a law adopted in 2006[137] that was supposed to only cover child pornography has already been used to block a site that was critical of the government body that is in charge of it and has been proposed to be extended.[138] In Norway, a system that blocks access to sites accused of possessing child pornography was set up by ISP Telnor in 2004. In 2007, a government commission (Datakrimutvalget) proposed extending the blocking more materials including terrorism materials. The proposal was rejected by the government.

VII. PROTECTION OF JOURNALISTS' SOURCES AND MATERIAL

It is well established that journalists' sources are crucial to freedom of expression. Journalists are often given information with the expectation that they will not identify the source who could be fired, arrested or harmed if their roles are revealed. The information given has been kept from the public as it is often classified, sensitive, private or embarrassing.

Journalists also collect information by interviewing a variety of people for information, making notes, recording, and taking photographs or video. Generally it is understood by all involved that the journalists are independent parties who are attempting to inform the public about issues that are of a public interest, not acting on behalf of police or other government agencies.

Nearly all Council of Europe member states have explicit legal recognition of the right of journalists to protect their sources which is underpinned by decisions of the European Court of Human Rights.

At the same time, the ECtHR and many national laws authorise the overriding of this protection for investigating serious crimes, such as terrorism. Some countries have also adopted new anti-terrorism or

[132] "Russian police actively engaged in closing extremist websites", *Interfax* (via *BBC Monitoring*), 7 May 2008.
[133] See Electronic Commerce Directive (Terrorism Act 2006) Regulations 2007.
[134] "Smith targets internet extremism", *BBC News*, 17 January 2008.
[135] "France to blacklist Web sites", *Associated Press*, 10 June 2008.
[136] See Signaler un site faisant l'apologie du terrorism.Available at http://www.interieur.gouv.fr/sections/contact/police/terrorisme.
[137] Laki lapsipornografian levittämisen estotoimista 1.12.2006/1068.
[138] See EFFI, Finnish Internet censorship, February 2008.Available at http://www.effi.org/blog/kai-2008-02-18.html.

crime laws which give broad powers to authorities to obtain documents or information from all persons.[139]

Even in the presence of the strong protections of the ECHR, Council of Europe normative texts and national laws, there have been many cases in member states where journalists have been detained and newspapers searched to identify sources. Broad security laws have often been used against journalists to force them to disclosure their sources. The following are a few security-related cases in recent years:

- In the UK, Manchester police used powers under the Terrorism Act 2000 to demand that journalists from the *Sunday Times*, *BBC*, *CBS* and other news outlets give all information about a former terrorist that they had interviewed. Author Shiv Malik was required to disclose copies of his notebooks after a court reduced the amount of information he was required to disclose.
- In France, journalist Guillaume Dasquie was detained for two days in December 2007 after he published an article in *Le Monde* that quoted from French intelligence documents indicating that they were aware of plans to hijack planes prior to the 9/11 attacks. The authorities demanded that he disclose the identity of sources or face charges of violating state secrets law.
- In Turkey, weekly *Nokta* was raided and had its equipment searched and journalists questioned in 2007 after it published materials about plans for a military coup and stories about military blacklisting of journalists.[140] The magazine was shut down by its owners afterwards and the editor was prosecuted for libel while two others were charged with inciting disrespect against the military.
- In the Netherlands, journalists Bart Mos and Joost de Haas from the newspaper *De Telegraaf* were imprisoned in November 2006 after refusing to testify in court about the source of intelligence dossiers on a criminal that they published. They were released by a higher court after two days detainment.[141]
- In Russia, the offices of *Permsky Obozrevatel* newspaper and homes of its journalists in Perm were searched several times in 2006 and 2007, on various charges including that they were violating the state secrets law.
- In Italy, police searched the offices of *La Repubblica* and the *Piccolo* newspapers and two journalists' homes and seized files following stories about Italy's role in the 2003 kidnapping of Egyptian cleric Osama Moustafa Hassan Nas. In 2002 and 2004, police and anti--terrorism officials raided the offices and homes of journalists who were investigating police and anti-terrorism abuses at the 2001 G-8 meeting in Genoa.
- In Germany, echoing a similar case in the 1960s that led to major reforms and improvements in press freedom, *Cicero* magazine and a journalist's home were raided and searched in 2004 after it published an article quoting a federal criminal police document on an al-Qadida leader. The Constitutional Court ruled in February 2007 that searches of a newsroom violated the Constitutional protections on freedom of the press.[142] The Court found that the mere publication of a state secret without other evidence is not sufficient to accuse the journalist of violating state secrets protections and that a search to identify a source is not constitutionally permissible.

1. Relevant Council of Europe Standards

The ECtHR has decided in numerous cases that the protection of sources is a crucial part of freedom of expression. The Court has found that "Protection of journalistic sources is one of the basic conditions for press freedom… such a measure cannot be compatible with Article 10 of the Convention unless it is

[139]A discussion on the role of electronic surveillance and its effects on journalists sources is in the following section.
[140]"*Nokta* magazine raided by police", *Turkish Daily News*, 14 April 2007.
[141]"Dutch court releases 2 reporters jailed for refusing to reveal their sources", *International Herald Tribune*, 30 November 2006.
[142]Decision BvR 538/06; 1 BvR 2045/06, 27 February 2007.

justified by an overriding requirement in the public interest."[143] Any restrictions on protection of sources "call for the most careful scrutiny by the Court". These protections also extended to searches of journalists' offices and homes to discover the source of information to a story which violated both Article 10 and the journalist's Article 8 right of privacy.[144] It also found that imprisoning journalists to force them to disclose their sources is a violation of Article 10.[145]

In 1994 the European Ministerial Conference on Mass Media Policy called for recognition of sources noting that it "enables journalism to contribute to the maintenance and development of genuine democracy".[146] In 2000 the Council of Europe's Committee of Ministers adopted a Recommendation with detailed principles on protection of sources that all member states should incorporate into national law.[147] It describes the principles as "common European minimum standards concerning the right of journalists not to disclose their sources of information." The guidelines recommend that nations authorise disclosure only "if circumstances are of a sufficiently vital and serious nature."

The explanatory memorandum to the Recommendation lists the circumstances where the disclosure is necessary as 'the protection of human life', 'the prevention of major crime', or 'the defence in the course of legal proceedings of a person who is accused or convicted of having committed a serious crime'. Major crime is defined as "murder, manslaughter, severe bodily injury, crimes against national security, or serious organised crime".

The Council of Europe has given special recognition to the need for protection of sources in conflicts and other dangerous circumstances. In 1996 the Committee of Ministers called on member states to ensure the confidentiality of sources in "situations of conflict and tension".[148] The Council of Europe reaffirmed the need for protection in these situations in 2005 with a declaration which called upon member states not to undermine protection of sources in the name of fighting terrorism, noting that "the fight against terrorism does not allow the authorities to circumvent this right by going beyond what is permitted by [Article 10 of the ECHR and Recommendation R (2000) 7]".[149]

The Committee of Ministers in September 2007 issued "Guidelines on protecting freedom of expression and information in times of crisis" which recommended that member states adopt the 2000(7) recommendations into law and practice and further recommended that:

> With a view, *inter alia*, to ensuring their safety, media professionals should not be required by law-enforcement agencies to hand over information or material (for example, notes, photographs,

[143] *Goodwin v. the United Kingdom*, Application No. 17488/90 [1996] ECHR 16 (27 March 1996).
[144] *Roemen and Schmit v. Luxembourg*, Application No. 51772/99 [2003] ECHR 102 (25 February 2003); *Ernst and Others v. Belgium*, Application No. 33400/96 [2003] ECHR 359 (15 July 2003).
[145] *Voskuil v. the Netherlands*, Application No. 64752/01 (22 November 2007).
[146] 4th European Ministerial Conference on Mass Media Policy, The Media in a Democratic Society, Prague, December 1994, Resolution No. 2 Journalistic Freedoms and Human Rights. DH-MM (2000) 004, 4 September 2000.
[147] Recommendation No. R (2000) 7 of the Committee of Ministers to member states on the right of journalists not to disclose their sources of information.
[148] Committee of Ministers Recommendation No. R (96) 4 on the Protection of Journalists in Situations of Conflict and Tension, 3 May 1996.
[149] *Declaration on freedom of expression and information in the media in the context of the fight against terrorism*, 2 March 2005.

audio and video recordings) gathered in the context of covering crisis situations nor should such material be liable to seizure for use in legal proceedings.[150]

2. Council of Europe Member States Protections

The vast majority of countries in Europe have adopted some form of protection of sources legislation. Over 40 countries have adopted a provision in their criminal or civil codes, media laws or other laws while others recognise it in their case-law.[151]

There has been a steady trend towards adoption of protections into law following the cases in the European Court of Human Rights. In the past few years, new laws have been adopted in many countries including Belgium, Georgia, Luxembourg, Monaco, Switzerland, and Turkey.

Most laws have limitations on information that is classified as national security related.

- In Belgium, the protections can be overridden by a judge in cases relating to terrorism or serious threats to the physical integrity of a person, if the information is of crucial importance and cannot be obtained any other way.[152]
- In Luxembourg, under the 2004 Law on the Freedom of Expression in the Media, journalists can be forced to disclose a source where it involves the prevention of crimes against individuals, drug trafficking, money laundering, terrorism or state security.[153]
- In the UK, the protection of sources can be overridden if it is "established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime."[154]
- In France, a new sources bill pending before the Parliament would require disclosure of information in "exceptional cases, if the nature and seriousness of the crime or offence to which it relates as well as the necessity of investigations warranted [this]."[155]

New anti-terrorism laws in several of the member states give authorities broad powers to demand information from any person with very little procedural protections compared to traditional search and seizure powers under the criminal law.

In the UK, the Terrorism Act 2000 gives authorities broad powers to demand journalistic materials in terrorism investigations if there are reasonable grounds for believing that "the materials is likely to be of substantial value…in a terrorism investigation" and if it is "in the public interest" that access should be given because of "the benefit likely to accrue".[156] The request must be approved by a circuit judge.

The law has been used a number of times to demand materials from journalists who investigated or interviewed terror suspects.[157] In 2008 the Court of Justice ruled that an author could be forced to give up

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[150] *Guidelines of the Committee of Ministers of the Council of Europe on protecting freedom of expression and information in times of crisis*, adopted by the Committee of Ministers on 26 September 2007 at the 1005th meeting of the Ministers' Deputies.
[151] See OSCE, Access to Information by the Media in the OSCE Region, April 2007.
[152] Loi du 7 avril 2005 relative á la protection des sources journalistiques.
[153] Loi du 8 juin 2004 sur la liberté d'expression dans les medias, §7.
[154] Contempt of Court Act 1981, §10.
[155] Projet de loi relatif à la protection du secret des sources des journalistes, n° 735, déposé le 12 mars 2008.See http://www.assemblee-nationale.fr/13/dossiers/protection_secret_sources_journalistes.asp.
[156] Terrorism Act 2000, Schedule 5, §6.
[157] "See BBC refuses to hand over Islamist tape", *The Observer*, 25 September 2005; Stephen Whittle, "Journalists as citizens", *British Journalism Review*, Vol. 16, No. 4, 2005, pages 54-57.

copies of materials gathered directly from the suspect but did not have to give up materials gathered from other sources.[158]

In France, a 2003 law on criminality brought in to fight serious crime and terrorism requires that journalists hand over documents or face significant fines.[159]

In Germany, the pending "Law on the prevention of threats of international terrorism" will substantially limit the protection of sources. It is being strongly opposed by the journalist, newspaper, magazine and broadcaster associations.[160]

Some jurisdictions also have imposed duties on individuals, including journalists, to proactively disclose information about security related threats. Some of these laws have been used against journalists.

- The UK Terrorism Act creates a criminal violation for not revealing information about an act of terrorism.[161] In the *Malik* case, the government refused to immunise the author while forcing him to disclose the information, thus potentially subjecting him to prosecution for violation of the law for not handing over his notes. The Court refused to hear the argument.
- In Russia, journalist Yelena Masyuk from *NTV* was threatened with a violation of the criminal code provisions on failure to report a crime and reporting a fugitive after she interviewed Chechen leader Shamil Basayev in 1995.[162]

In Hungary, if a source discloses a state secret to a journalist, the journalist must inform the authorities or face criminal penalties themselves.[163]

VIII. WIRETAPPING AND SURVEILLANCE OF JOURNALISTS

Laws, policies and technologies relating to interception of communications and other forms of telecommunications surveillance have undergone substantial changes since 2001. Countries have increasingly been adopting laws that give them broad powers to conduct surveillance. Generally, the laws do not contain specific limits on the use of the powers against the media. The result of these changes has been an increase in the use of surveillance against journalists for both national security and non-national security related reasons.

This area is of strong interest to journalists. Sources are less likely to come forward if they believe that they can be identified or located through their telecommunications. In some cases, governments have attempted to manipulate news coverage when they have inside information on pending stories.

The surveillance is usually conducted in secret so journalists are not aware of the intrusion and it cannot be challenged or limited. Claims by governments that these intrusions are necessary for national

[158]Shiv Malik v. Manchester Crown Court (1), Chief Constable of Greater Manchester Police (2) [2008] EWHC 1362 (Admin).
[159]Loi n° 2004-204 du 9 mars 2004, Loi portant adaptation de la justice aux évolutions de la criminalité, JO n° 59 du 10 mars 2004.
[160]See Joint Statement on a draft law on prevention of threats of international Terrorism by the Bundeskriminalamt (BKA Law), 11 September 2008.
[161]Terrorism Act 2000, §§19, 38B.
[162]Human Rights Watch, World Report 1996.
[163]Criminal Code, §223.

security often make it difficult for there to be any public examination or oversight of the information that is being collected and the legitimacy of the collection.

Throughout Council of Europe member states, there is a worrying trend in the use of both authorised and unauthorised electronic surveillance to monitor journalists by governments and private parties to track their activities and identify their sources. Most of these cases are unrelated to countering terrorism but are authorised under the broad powers of national laws or even done illegally, in order to identify who a journalist has received information from.

- In Germany, a parliamentary report released in 2006 revealed that the Federal Intelligence Agency (BND) had been illegally spying on journalists, including placing spies in newsrooms for over a decade to identify sources and monitor what newspapers were working on. The BND was ordered to stop spying on journalists. However, less than a year later, the BND was revealed to have spied on journalists in 2006 and 2007 who were writing stories on Afghanistan.[164]
- In Belgium, the mobile phone of journalist Anne de Graaf from *De Morgen* was monitored for two months in 2004 to identify her sources after she wrote a story about a meeting to discuss anti-terrorism threats in Antwerp. The Court of First Instance ruled in 2007 that the interception was illegal because it was insufficient grounds to conduct surveillance to identify her source and awarded her 500 euros.[165]
- In the Netherlands, the government monitored the telephones of journalists from the newspaper *De Telegraaf* who had received and published classified information that revealed that a criminal kingpin was obtaining confidential information from police and intelligence agencies while still in jail. The tap was approved by the Supreme Court in September 2008 and is now being appealed to the European Court of Human Rights. In November 2007 a government department admitted that it had used the password of a former employee to access the computer system of news agency *GPD* to identify what stories were going to be run.[166]
- In Denmark, police monitored the telephones of journalist Stig Matthiessen from *Jyllands-Posten* after he began investigating the existence of a "death list" but refused to identify his sources.[167] The taps were later found by a court to be unlawful.
- In the Czech Republic, two journalists in 2006 were among the many persons wiretapped in a bid to reveal who had leaked classified information about organised crime connections with the civil service.[168]

1. Relevant Council of Europe Decisions

The limits on interception of communications flow from international, regional and national protections on human rights. Of primary importance is Article 8 of the European Convention on Human Rights on the right to private life. In addition, there is some recognition of the importance of Article 10. The European Court of Human Rights has long recognised that interception of communications is a violation of Article 8 for all citizens.[169]

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[164]"German Spies Caught Reading Journalist's e-mails", *Deutsche Welle*, 21 April 2008.
[165]"L'Etat belge condamné pour une écoute sur une journaliste", *L'Express*, 13 July 2007.
[166]"Dutch Government Admits Spying on News Agency", *Spiegel Online*, 7 November 2007.
[167]"Police tap journalist's phone", *The Copenhagen Post*, 6 September 2002.
[168]"Czech police monitor ten people in high posts in 2006", *Prague Daily Monitor*, 28 March 2007.
[169]See *Klass and Others v. Germany* – 5029/71 [1978] ECHR 4 (6 September 1978); *Malone v. the United Kingdom*, Application No. 8691/79 [1984] ECHR 10 (2 August 1984); *Halford v. the United Kingdom*, Application No. 20605/92 [1997] ECHR 32 (25 June 1997); *Amann v. Switzerland*, Application No. 27798/95 [2000] ECHR 88 (16 February 2000).

The ECtHR requires that member states that wish to intercept communications must adopt laws that are "particularly precise" in the types of conditions that interference with Article 8 will be conducted. It has established a set of minimum safeguards relating to the categories of crimes, duration of taps, precautions on communication of the information and circumstances on deletion. The law must also ensure that there are "adequate and effective safeguards against abuse".

The balancing between investigating and fighting terrorism with intrusive techniques and privacy and other rights was discussed in the first ECtHR case from 1978 on wiretapping in a terrorist investigation. The court said that countries were given a wide margin of applicability in the use of the techniques but also said:

> The Court stresses that this does not mean that the Contracting States enjoy an unlimited discretion to subject persons within their jurisdiction to secret surveillance. The Court, being aware of the danger such a law poses of undermining or even destroying democracy on the ground of defending it, affirms that the Contracting States may not, in the name of the struggle against espionage and terrorism, adopt whatever measures they deem appropriate.[170]

In the past two years, the Court has heard a number of cases on interception powers relating to national security and terrorism.[171] In two of the cases, the court found that the laws did not provide sufficient safeguards and thus the laws violated Article 8. In one of the cases, the ECtHR recognised that interception of communications could violate Article 10 rights to freedom of expression, especially if they were used to identify a journalist's sources.[172] It concluded that for the intrusion to be justified, the monitoring needed to be limited, not done for the purpose of identifying sources, and subject to strict safeguards and oversight.

The 2000 Council of Europe Recommendation on protection of sources proposes strict limits on the use of surveillance on journalists.[173] Principle 6 states that "interception orders or actions concerning communication or correspondence of journalists or their employers" should not be applied if "their purpose is to circumvent the right of journalists, under the terms of these principles, not to disclose information identifying a source" and any of these techniques has been used, that the "measures should be taken to prevent the subsequent use of this information as evidence before courts".

However, only a few countries have adopted legislation that specifically limits the use of surveillance to identify sources or other protected materials from journalists. The Belgian law on protection of journalists' sources only allows detection or investigative methods when it is authorised by a judge under the same limits as forcing the disclosure of a source.[174] In Austria, "Employees of media services" are protected under the media law from interception of their communications in the course of their work.[175] In Georgia, it is a criminal offence to intercept journalists communications for the purpose of violating professional secrets.[176] In France, a pending bill on sources would extend protections to "indirect attacks".

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[170] *Klass and Others v. Germany*, Application No. 5029/71 [1978] ECHR 4 (6 September 1978).
[171] *The Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria*, Application No. 62540/00, 28 June 2007; *Liberty and Others v. the United Kingdom*, Application No. 58243/00, 1 July 2008.
[172] *Weber and Saravia v. Germany*, Application No. 54934/00, 29 June 2006.
[173] Recommendation No. R (2000) 7 of the Committee of Ministers to member states on the right of journalists not to disclose their sources of information.
[174] Loi relative a la protection des sources journalistes, §5.
[175] Federal Act dated 12 June 1981 on the Press and other Publication Media (Media Act)§ 31(3). See Response of Austrian Government to OSCE, Access to information by the media in the OSCE region, 30 April 2007.
[176] Response of Georgian Young Lawyers' Association in OSCE, Access to Information by the Media in the OSCE Region: Country Reports, 30 April 2007.

2. Increased Powers for Interception and Investigation

All Council of Europe member states allow the use of electronic surveillance to investigate serious crime. Typically, the countries require that an independent court or magistrate approve a request to investigate a serious crime. Often, interceptions for national security purposes such as terrorism investigations are subject to less requirements and oversight. The laws must as a minimum follow the protections as set out by the European Court of Human Rights.

The interception of journalists communications by governments for national security and other reasons is not a new issue that has only emerged in the recent years. During the Cold War, monitoring of communications for national security and other reasons was widespread even in governments with strong respect for human rights.[177] Following revelations of abuses in many countries, new laws were adopted which took into account human rights concerns and the requirements of the evolving case-law of the ECtHR.

Following the 2001 terrorist attacks, many Council of Europe countries have adopted new laws or expand the use of old laws to monitor communications. These laws expand surveillance in a number of ways:

1) extending the range of crimes that interception is authorised for;
2) relaxing legal limitations on approving and conducting surveillance including allowing for warrantless interception in some cases;
3) authorising the use of invasive techniques such as Trojan horse and remote keystroke monitoring to be used;
4) greater demands for identification of users of telecommunications services.

Some of the recent legislation adopted to extend interception:

- In Sweden, a 2008 law authorises the National Defence Radio Establishment (Försvarets Radioanstalt – FRA) to monitor without a court order all telecommunications that cross the borders of the country via cable or wireless.[178] The agency would be able to data mine the communications. This will have a significant effect because due to the nature of modern telecommunications networks, a significant proportion of domestic communications crosses national borders and will be subject to interception. Following massive public protests, amendments are currently being considered.
- In Russia, a 2006 anti-terrorism law allows authorities in an anti-terrorist operation to "exercise control over telephone communications and over other information transmitted over telecommunication channels, as well as searching in electric communication channels and in postal mailing for the purpose of detecting information concerning the circumstances of committing an act of terrorism and the persons who have prepared and committed it, as well as for the purpose of preventing other terrorist acts".[179] An amendment in 2007 extends the justification for interception to "moderately serious crimes" which includes extremism offences.[180]

[177]See e.g. Report of the Lund Commission, Norway. 1995-1996, available at http://www.stortinget.no; *Kennedy and Arnold v. Ireland*, 1987 I.R. 587.
[178]Proposition 2006/07:63.
[179]Federal Law No. 35-Z "On Counteraction of Terrorism" (2006), §11(4).
[180]Federal Law No. 211-FZ of 24 July 2007 "On amending some legislative acts of the Russian Federation in connection with improving public administration in the area of counter-extremism" §3(2).

- In the Netherlands, the Intelligence and Security Services Act adopted in 2003 gives the intelligence services broad powers to intercept wireless communications that cross the border and retain them.[181] The Act allows the use of "special powers" such as interception against people who, while not the subject of investigations, are related to the target. Dutch courts and the internal oversight body have approved the use of this measure against journalists to identify the source of leaked documents.[182]
- The Slovenian Intelligence and Security Agency Act was amended in 2003 to allow for interception for terrorist, organised crime and also disclosure of state secrets to foreigners.[183] It requires telecommunications providers to "provide conditions to enforce special judicially-approved forms of data acquisition."
- In Germany, the G-10 Law allows warrantless automated wiretaps of international communications by the Intelligence Service (BND) for purposes of preventing terrorism. The Federal Constitutional Court ruled in 1999 that it did not have enough protections and violated the rights of privacy and free speech. It was amended in 2001 to include better supervision and was upheld by the ECtHR in 2007.[184] However, as the cases above show, there are serious questions about the adequacy of the supervision in practice.

Authorities are also increasing their abilities to break into target computers to install special monitoring software. In Germany, the state of North-Rhine Westfalia adopted a law allowing for remote searches and computer spyware in 2006. The Federal Constitutional Court found the law unconstitutional in 2008.[185] The anti-terror bill currently being considered at the German federal level would allow for government agents to use spyware and remote surveillance in criminal investigations.[186] In Denmark the "Anti-Terror Package" introduced in October 2001 and approved in June 2002 gave law enforcement the power to secretly install snooping software on the computers of criminal suspects.[187] The software will record keystroke data and transmit it electronically to the law enforcement agency.

3. Increasing Technical Abilities to Intercept

Another important trend is the increasing legal requirements to ensure that all telecommunications equipment is designed to facilitate interception of communications. These require that technical capabilities for interception be built into telecommunications equipment. The requirements originally only applied to telephones, but now are being extended to Internet and other new technologies.

Under the new capabilities, the process is now typically automated. In some jurisdictions, the interception is solely under the control of government officials who install "black boxes" in telephone providers systems to allow for access. In others, the systems are designed into the system by the manufacturer by companies such as Siemens and Ericsson.[188]

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[181]Act of 7 February 2002, providing for rules relating to the intelligence and security services and amendment of several acts (Intelligence and Security Services Act 2002), as amended by the Act of 2 November 2006 (Bulletin of Acts, Orders and Decrees 2006, 574)§25 *et seq.*
[182]See Supervisory Committee on the Intelligence and Security Services, Report On the investigation by the AIVD into the leaking of state secrets, CTIVD No. 10, 15 November 2006.
[183]Law 126/2003.
[184]*Weber and Saravia v. Germany*, Application No. 54934/00, 29 June 2006.
[185]Zitierung: BVerfG, 1 BvR 370/07 vom 27.2.2008, Absatz-Nr. (1-333).
[186]See Joint Statement on a draft law on prevention of threats of international Terrorism by the Bundeskriminalamt (BKA Law), 11 September 2008.
[187]Act No. 378. 6 June 2002.
[188]See e.g. "Snoop software makes surveillance a cinch", *New Scientist*, 23 August 2008.

The trend began long before the 2001 attacks. In the United States, the Communications Assistance for Law Enforcement Act (CALEA) was adopted in 1994.[189] Following its adoption, US officials met with their European counterparts and the EU Council and secretly adopted a framework recommendation in 1995.[190]

The Council of Europe Cybercrime Convention, which was approved in 2001, incorporated these proposals, and requires that countries adopt laws to authorise the interception of content and traffic data and ensure that communications providers adopt technical means to ensure surveillance.[191] The Convention has now been ratified by 24 countries.

Many states have adopted laws to implement these regulations. In the UK, the Regulation of Investigatory Powers Act 2000 (RIPA) adopted in 2000 requires public Communications Service Providers to provide a "reasonable" interception capability in their networks.[192] In Belgium, a law adopted in December 2001 bans telecommunications providers from giving anonymous communications.[193] The Slovenian Electronic Communications Act adopted in 2004 requires that "Operators shall be obliged at their own expense to ensure adequate equipment and appropriate interfaces enabling lawful interception of communications in their networks".[194]

In other countries, government controlled systems are installed at the communications providers' office to conduct surveillance. In Russia, the government in 1998 began to require that all ISPs install devices that are directly connected to government offices to allow monitoring.[195] A similar system was set up in Ukraine in 2002 under an order from the State Committee on Communications.[196] The order was declared to be unlawful in 2005 but reportedly is still in operation.

The automated nature of the systems raises concerns about the interceptions of communications approved and executed without adequate oversight. Traditionally, when a wiretap was to be conducted, it was necessary to provide a written authorisation to a third party, such as the telecommunications provider. If automated systems bypass that process, it will be able to conduct unsanctioned surveillance. As the number of legal and illegal intercepts continues to rise, checks are crucial to ensure that abuses do not occur.

The new surveillance capabilities may also make it easier for unauthorised persons to intercept communications. In Greece, it was discovered in 2006 that unknown persons had broken the security of cell phone operator Vodafone and used the built-in surveillance capabilities of the Ericsson equipment to tap the communications of over 100 prominent people including Prime Minister Costas Karamanlis and several journalists.[197] Several investigations have not been able to identify who conducted the intercepts. In Italy, the transcripts of widespread illegal taps and surveillance of journalists, sports figures and politicians were leaked to the press in 2006.[198]

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[189]See EPIC Wiretap Pages, http://epic.org/privacy/wiretap/.
[190]Council Resolution of 17 January 1995 on the lawful interception of telecommunications, OJ C 329 of 4 November 1996.
[191]§21, 22.
[192]UK Regulation of Investigatory Powers Act 2000. (c. 23).
[193]"Surfer anonymement devient illégal en Belgique", *Droit & Technologie*, 18 Mars 2002.
[194]Electronic Communications Act, §107.
[195]System of Operative Investigative Activities (SORM), Order No. 47 in March 27, 1999, Order No. 130, in July 25, 2000. See Privacy and Human Rights 2006: Russia (EPIC 2007).
[196]Order No. 122, 17 June 2002. See Ukraine Helsinki Committee, Human Rights in Ukraine – 2007, 2008.
[197]"Vassilis Prevelakis and Diomidis Spinellis, The Athens Affair", *IEEE Spectrum*, July 2007.
[198]"Justice minister seeks information about wiretapping at Telecom Italia amid scandal", *International Herald Tribune*, 23 September 2006.

4. Increased Collection and Use of Telecommunication Records

Related to the surveillance of communications is the increased collection of transactional information by telecommunications companies. These records can be used by authorities to gather a detailed record of the activities of journalists including who their sources are. The records are also often the target of law enforcement who use them to identify the identity or location of sources, even in non-serious cases.

In 2003 the Irish police demanded access to phone records of journalists after they published stories that a minister's son had been assaulted.[199] The Gardaí said that they needed the information to discover if someone had violated the Official Secrets Act in disclosing the information to the media. The technique was described as believed to now be "standard practice" when information was leaked to the media. The 2005 Criminal Justice (Terrorist Offences) Act extended the right of access to phone records. In 2007 the Data Protection Commissioner estimated that there were 10 000 records accessed in 2006.[200]

- In France, judicial authorities in Brest obtained the phone records of journalist Hervé Chambonnière in December 2007 after he published a story on a judicial investigation and refused to identify his sources.
- In the UK in 2006, police in Suffolk obtained the phone records of a journalist from the *East Anglian Evening Star* when he telephoned the police to inquiry about a "cold case" to discover the source of his information.
- In Andorra, at the request of police, a judge ordered the release of phone records of two journalists from *Diario de Andorra* in May 2006 to investigate who had provided information to them. The Tribunal Superior de Justícia d'Andorra ruled in June 2007 that the journalists' privacy had been invaded.
- In Germany, the Constitutional Court in 2003 authorised the obtaining of mobile phone records of journalists who were in communication with wanted criminals.[201] The Court found that the protection of sources laws did not apply to documents held by third parties such as telecommunications providers.

This information is also being used by private organisations against journalists. In Germany, Deutsche Telekom was discovered in 2008 to be monitoring the records of journalists and board members to identify who was providing information to journalists.[202] In Finland, the five employees of telecommunications company Sonera were convicted in 2005 of illegally obtaining the phone records of two journalists from *Helsingin Sanomat* and employees of the Sonera to discover who was the source of a leak.[203]

Technological advances have substantially increased the amount of information that is available about a person's activities. Internet usage can create a "digital mirror personality" which reveals significant details about a users professional and personal life and activities including their email contacts, social networks and web searches and browsing. Mobile telephones provide detailed records about a user's

[199] "Gardaí probe media sources on McDowell's son", *The Independent*, 23 July 2003.
[200] *Irish Daily Mail*, June 6, 2008.
[201] Marion Albers and Stefanie Witzke, "The End of the 'Woodward and Bernstein' Era? The German Constitutional Court and Journalist – Privacy on Mobile Phones", *German Law Journal*, Vol. 04 No. 07, 2003.
[202] "Did Deutsche Telekom Spy on Journalists and Board Members?", *Spiegel Online*, 26 May 2008.
[203] "Five get suspended sentences in Sonera telephone record case", *Helsingin Sanomat*, 30 May 2005.

location. This transactional data is increasingly being kept on all users for both commercial and national security reasons. It is often subject to lesser protections than interceptions.

A recent trend which has greatly accelerated since the attacks is the requirement by governments asking telecommunications providers to automatically collect and retain all information on all users' activities including details about e-mails sent and received, web sites visited, and instant messages. Mobile telephone companies are required to collect information on calls and messages sent and received including the location of the person when they make calls.

While the subject had been discussed for a few years prior, only a few countries had adopted requirements because of concerns over privacy and cost. The Council of Europe discussed and rejected including it in the Convention on Cyber-crime.

Following the 11 September attacks, countries began to quickly adopt the requirements. In the UK, the Anti-terrorism, Crime and Security Act (ATCS) adopted December 2001 allowed the Home Secretary to issue a code of practice for the "voluntary" retention of communications data by communications providers for the purpose of protecting national security or preventing or detecting crime that relates to national security.[204] Most communications providers began to retain data. In Denmark, the 2002 "Anti-Terror Package" required the retention of communications data for up to 2 years. The 2002 Spanish law on e-commerce required that traffic data be kept for 12 months.[205] In Ireland, the 2005 Criminal Justice (Terrorist Offences) Act requires that telecommunications providers retain data for three years.

This requirement will shortly be mandatory EU-wide. The 2006 EU Directive on Data Retention requires all EU member states to adopt rules on data retention and to allow for collecting and holding information for up to two years.[206] To date, over a dozen countries in Europe have fully implemented the Directive. In the UK, consultation is currently pending that would require that all traffic data including internet usage and mobile location data be kept for one year.[207] The government is now reportedly considering proposals for creating a national database of all communications data.[208] In Germany, data retention requirements were adopted in 2007 requiring that data be retained for six months.[209] Following a challenge filed by 30 000 citizens, the Federal Constitutional Court in March 2008 issued a preliminary ruling that the data retention law is unconstitutional in giving too much access which should only be limited to serious crimes when no other means of obtaining the information is available.[210]

5. Increased Requirements for Identification of Mobile and Internet Users

Relating to the issue of retention and use of telecommunications records are requirements for telecommunications providers that only provide for occasional communications services to identify their users and keep records of their activities. These include pre-paid mobile phones and cyber cafes. Journalists often use these services to keep in touch with their sources while not leaving records that can be monitored.

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[204]Anti-terrorism, Crime and Security Act 2001.
[205]Ley 34/2002 de servicio de la sociedad de la información y de comercio electronico of 11 July 2002, §12.
[206]See Section IV for details.
[207]Home Office, A consultation paper – Transposition of Directive 2006/24/EC, August 2008. See also The Data Retention (EC Directive) Regulations 2007, SI 2007 No. 2199, 26th July 2007.(telephone line information).
[208]"'Big Brother' database for phones and e-mails", *The Times*, 20 May 2008.
[209]Act establishing new telecommunications surveillance and other covert investigative measures and to implement the Directive 2006/24/EC (BGBl I 2007, p. 3198 ff).
[210]BVerfG, 1 BvR 256/08 vom 11.3.2008, Absatz-Nr. (1-188).

The EU Council issued a conclusion in 2003 that recommended that member states "consider a set of appropriate requirements for tracing the use of prepaid card technology".[211] A review in 2006 found that a few member states had adopted requirements. The requirements were often ignored or easily bypassed.[212]

- In Switzerland, the wiretap law was amended in June 2004 to require registration of pre-pay phones after which 140 000 phones were disabled.[213]
- In Italy, a decree approved in 2005 required that providers of telecommunications obtain biographical information about their users before allowing them to use their services.[214]
- The Irish government announced in 2007 that it was planning to create a mandatory regime of phone registration to fight drug crime.[215]
- The UK government is planning to require passports or ID cards to get a mobile phone as part of the Communications Data Bill.[216]

These identification requirements have been extended in a few jurisdictions to cybercafes. In a number of Council of Europe member states, governments have imposed new requirements for the monitoring and identification of users of cyber cafes.

- In Italy, the 2005 decree also requires that all cyber cafes obtain biographical information about their users.
- In France, the 2006 anti-terrorism act requires that cyber cafes, bars and others that offer Internet access to retain data on their users activities and allows the police to obtain the information without a court order for terrorism investigations.[217]
- In Bulgaria, the local authority in the city of Plovdiv issued an order in 2004 requiring that all cyber cafes keep the social security numbers of users, along with their activity records.[218]

These rules are likely to have a chilling effect not just on journalists but on any users that wish to access public or legal, but controversial materials.

IX. CONCLUSION

The last seven years have seen many policy and legislative changes which have serious effects on the abilities of journalists to gather and disseminate information. Terrorism is often used as a talisman to justify stifling dissenting voices in the way that calling someone a communist or capitalist were used during the Cold War.

In too many cases, the legislation and policies adopted are disproportionate and appear to be used in abusive ways not to protect public safety and the nation but rather the political interests of governments.

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[211] See Council conclusions on the tracing of the use of prepaid mobile telephone cards, in order to facilitate criminal investigations 7808/03 ENFOPOL 21 OC 130; EU wants identification system for users of prepaid telephone cards, Telepolis, 19 May 2002.

[212] See Centre for Policy Research on Science and Technology, Privacy Rights and Prepaid Communication Services, March 2006; Gordon A. Gow and Jennifer Parisi, "Pursuing the Anonymous User: Privacy Rights and Mandatory Registration of Prepaid Mobile Phones", 28 *Bulletin of Science Technology Society*, 2008.

[213] "130 000 Prepaid GSMs Disconnected In Switzerland", *EDRI-gram*, 14 December 2004.

[214] Testo Coordinato del Decreto-Legge 27 luglio 2005,

[215] "Mobiles registry to aid anti-drugs drive", *The Independent*, 23 July 2007.

[216] "Passports will be needed to buy mobile phones", *The Sunday Times*, 19 October 2008.

[217] Loi n° 2006-64 du 23 janvier 2006 relative à la lutte contre le terrorisme et portant dispositions diverses relatives à la sécurité et aux contrôles frontaliers, §5.

[218] Bulgaria: Privacy and Human Rights 2006 (EPIC 2007).

Newspapers have been shut down, journalists arrested and jailed, newsrooms searched and spied on and web sites shut down or blocked. Even historically human rights friendly nations have been adopting excessive and disproportionate legislation.

The international bodies have developed unbalanced instruments that do not adequately ensure that human rights are protected. In part, that is because some of the worst national governments are the strongest supporters of expansive international instruments to justify their domestic abuses. The Commission and Council of the European Union have been especially deficient in ensuring that human rights are respected in their proposals relating to anti-terrorism and communications privacy. The Council of Europe's efforts on anti-terrorism and cyber-crime are not noteworthy for inclusion of human rights concerns either. The organisation's long-standing reputation as a champion of human rights is challenged by these efforts.

The role of the national courts and the European Court of Human Rights have been unsatisfactory. The national courts have not universally recognised the requirements of the European Convention on Human Rights. The European Court case-law on incitements and publication of secrets has been inconsistent and does not easily set boundaries that countries should follow. Cases take nearly a decade to be decided and remedies are not adequate to ensure the problems will not occur again.

There are some positive trends. Nearly all member states now have legal recognition of the rights of any citizen to demand information from government bodies. Almost all also recognise the fundamental rights of journalists to protect their sources. However, these have also regularly being undermined by security legislation which allows government officials broad discretion to act in the name of fighting terrorism.

The Council of Europe should take leadership of a pro-human rights effort to ensure that national governments and international bodies are respecting human rights. New instruments that promote journalists' rights should be developed while existing ones should be strengthened or revised.

X. APPENDIX

GUIDELINES OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON PROTECTING FREEDOM OF EXPRESSION AND INFORMATION IN TIMES OF CRISIS

*(*Adopted by the Committee of Ministers on 26 September 2007 at the 1005th meeting of the Ministers' Deputies*)*

Preamble

The Committee of Ministers,

1. Emphasising that freedom of expression and information and freedom of the media are crucial for the functioning of a truly democratic society;
2. Reaffirming that Article 10 of the European Convention on Human Rights (ETS No. 5) and the relevant case-law of the European Court of Human Rights remain the fundamental standards concerning the exercise of the right to freedom of expression and information;
3. Deeply concerned by the fact that crisis situations, such as wars and terrorist attacks, are still wide spread and threaten seriously human life and liberty, and the fact that governments, concerned about the survival of society may be tempted to impose undue restrictions on the exercise of this right;
4. Condemning the killings and other attacks on media professionals and recalling its Recommendation No. R (96) 4 on the protection of journalists in situations of conflict and tension;
5. Recalling Resolution No. 1 on freedom of expression and information in times of crisis adopted by the Ministers of states participating in the 7th European Ministerial Conference on Mass Media Policy (Kyiv, 10-11 March 2005);
6. Having taken note of Resolution 1535 (2007) and Recommendation 1783 (2007) of the Parliamentary Assembly of the Council of Europe on threats to the lives and freedom of expression of journalists;
7. Welcoming Resolution 1738 (2006) of the Security Council of the United Nations condemning attacks on media professionals in conflict situations and recognising the urgency and necessity of taking action for the protection of these professionals;
8. Underlining that dialogue and co-operation between governments, media professionals and civil society can contribute to the efforts to guarantee freedom of expression and information in times of crisis;
9. Convinced not only that media coverage can be crucial in times of crisis by providing accurate, timely and comprehensive information, but also that media professionals can make a positive contribution to the prevention or resolution of certain crisis situations by adhering to the highest professional standards and by fostering a culture of tolerance and understanding between different groups in society,
10. Adopts, as an extension and complement to the "Guidelines on human rights and the fight against terrorism" adopted on 11 July 2002, the following guidelines and invites member states to ensure that they are widely disseminated and observed by all relevant authorities.

I. Definitions

1. As used in these guidelines,

- the term "crisis" includes, but is not limited to, wars, terrorist attacks, natural and man-made disasters, i.e. situations in which freedom of expression and information is threatened (for example, by limiting it for security reasons);
- the term "media professionals" covers all those engaged in the collection, processing and dissemination of information intended for the media. The term includes also cameramen and photographers, as well as support staff such as drivers and interpreters.

II. Working conditions of media professionals in crisis situations

Personal safety

2. Member states should assure to the maximum possible extent the safety of media professionals – both national and foreign. The need to guarantee the safety, however, should not be used by member states as a pretext to limit unnecessarily the rights of media professionals such as their freedom of movement and access to information.
3. Competent authorities should investigate promptly and thoroughly the killings and other attacks on media professionals. Where applicable, the perpetrators should be brought to justice under a transparent and rapid procedure.
4. Member states should require from military and civilian agencies in charge of managing crisis situations to take practical steps to promote understanding and communication with media professionals covering such situations.
5. Journalism schools, professional associations and media are encouraged to provide as appropriate general and specialised safety training for media professionals.
6. Employers should strive for the best possible protection of their media staff on dangerous missions, including by providing training, safety equipment and practical counselling. They should also offer them adequate insurance in respect of risks to the physical integrity. International organisations of journalists might consider facilitating the establishment of an insurance system for freelance media professionals covering crisis situations.
7. Media professionals who are expelled from zones with restricted access for disobeying national and international law, inciting violence or hatred in the content of their news or spreading propaganda of warring parties should be accompanied by military forces to a neutral, secure region or a country or embassy.

Freedom of movement and access to information

8. Member states should guarantee freedom of movement and access to information to media professionals in times of crisis. In order to accomplish this task, authorities in charge of managing crisis situations should allow media professionals accredited by their media organisations access to crisis areas.
9. Where appropriate, accreditation systems for media professionals covering crisis situations should be used in accordance with Principle 11 of the Appendix to Recommendation No. R (96) 4 of the Committee of Ministers to member states on the protection of journalists in situations of conflict and tension.
10. If required by national law, accreditation should be given to all media professionals without discrimination according to clear and fast procedures free of bureaucratic obstacles.
11. Military and civilian authorities in charge of managing crisis situations should provide regular information to all media professionals covering the events through briefings, press conferences, press tours or other appropriate means. If possible, the authorities should set up a secure information centre with appropriate equipment for the media professionals.

12. The competent authorities in member states should provide information to all media professionals on an equal basis and without discrimination. Embedded journalists should not get more privileged access to information than the rest except for the advantage naturally due to their attachment to military units.

III. Protection of journalists' sources of information and journalistic material

13. Member states should protect the right of journalists not to disclose their sources of information in accordance with Recommendation No. R (2000) 7 of the Committee of Ministers on the same subject. Member states should implement in their domestic law and practice, as a minimum, the principles appended to this recommendation.
14. With a view, *inter alia*, to ensuring their safety, media professionals should not be required by law-enforcement agencies to hand over information or material (for example, notes, photographs, audio and video recordings) gathered in the context of covering crisis situations nor should such material be liable to seizure for use in legal proceedings. Any exceptions to this principle should be strictly in conformity with Article 10 of the European Convention on Human Rights and the relevant case-law of European Court of Human Rights.

IV. Guarantees against misuse of defamation legislation

15. Member states should not misuse in crisis situations libel and defamation legislation and thus limit freedom of expression. In particular, member states should not intimidate media professionals by law suits or disproportionate sanctions in libel and defamation proceedings.
16. The relevant authorities should not use otherwise legitimate aims as a pretext to bring libel and defamation suits against media professionals and thus interfere with their freedom of expression.

V. Guarantees against undue limitations on freedom of expression and information and manipulation of public opinion

17. Member states should not restrict the public's access to information in times of crisis beyond the limitations allowed by Article 10 of the European Convention on Human Rights and interpreted in the case-law of the European Court of Human Rights.
18. Member states should always bear in mind that free access to information can help to effectively resolve the crisis and expose abuses that may occur. In response to the legitimate need for information in situations of great public concern, the authorities should guarantee to the public free access to information, including through the media.
19. Member states should not use vague terms when imposing restrictions of freedom of expression and information in times of crisis. Incitement to violence and public disorder should be adequately and clearly defined.
20. International and national courts should always weigh the public's legitimate need for essential information against the need to protect the integrity of court proceedings.
21. Member states should constantly strive to maintain a favourable environment, in line with the Council of Europe standards, for the functioning of independent and professional media, notably in crisis situations. In this respect, special efforts should be made to support the role of public service media as a reliable source of information and a factor for social integration and understanding between the different groups of society.

22. Member states should consider criminal or administrative liability for public officials who try to manipulate, including through the media, public opinion exploiting its special vulnerability in times of crisis.

VII. Responsibilities of media professionals

23. Media professionals need to adhere, especially in times of crisis, to the highest professional and ethical standards, having regard to their special responsibility in crisis situations to make available to the public timely, factual, accurate and comprehensive information while being attentive to the rights of other people, their special sensitivities and their possible feeling of uncertainty and fear.
24. If a system of embedded journalists needs to be maintained and journalists choose to make use of it, they are advised to make this clear in their reports and to point out the source of their information.
25. Self-regulation as the most appropriate mechanism for ensuring that media professionals perform in a responsible and professional way needs to be made more effective in times of crisis. In this regard, co¬operation between self-regulatory bodies is encouraged at both the regional and the European levels. Member states, professional organisations of journalists, other relevant non-governmental organisations and the media are invited to facilitate such co-operation and provide further assistance where appropriate.
26. Media professionals are invited to take into consideration in their work Recommendation No. R (97) 21 of the Committee of Ministers to member states on the media and the promotion of a culture of tolerance and to apply as a minimum the professional practices outlined in the appendix to this recommendation.

VIII. Dialogue and co-operation

27. National governments, media organisations, national or international governmental and non--governmental organisations should strive to ensure the protection of freedom of expression and information in times of crisis through dialogue and co-operation.
28. At the national level, relevant stakeholders such as governmental bodies, regulatory authorities, non-governmental organisations and the media including owners, publishers and editors might consider the establishment of voluntary fora to facilitate, through dialogue, the exercise of the right to freedom of expression and information in times of crisis.
29. Media professionals themselves are encouraged, directly or through their representative organisations, to engage in a constructive dialogue with the authorities in situations of crisis.
30. Non-governmental organisations and in particular specialised watchdog organisations are invited to contribute to the safeguarding of freedom of expression and information in times of crisis in various ways, such as:
    - maintaining help lines for consultation and for reporting harassment of journalists and other alleged violations of the right to freedom of expression and information;
    - offering support, including in appropriate cases free legal assistance, to media professionals facing, as a result of their work, lawsuits or problems with the public authorities;
    - co-operating with the Council of Europe and other relevant organisations to facilitate exchange of information and to effectively monitor possible violations.
31. Governmental and non-governmental donor institutions are strongly encouraged to include media development and media assistance as part of their strategies for conflict prevention, conflict resolution and post-conflict reconstruction.

DECLARATION ON FREEDOM OF EXPRESSION AND INFORMATION IN THE MEDIA IN THE CONTEXT OF THE FIGHT AGAINST TERRORISM

*(*Adopted by the Committee of Ministers on 2 March 2005 at the 917th meeting of the Ministers' Deputies*)*

The Committee of Ministers of the Council of Europe,

Considering that the aim of the Council of Europe is to achieve a greater unity between its members for the purpose of safeguarding and promoting the ideals and principles which are their common heritage;

Considering the dramatic effect of terrorism on the full enjoyment of human rights, in particular the right to life, its threat to democracy, its aim notably to destabilise legitimately constituted governments and to undermine pluralistic civil society and its challenge to the ideals of everyone to live free from fear;

Unequivocally condemning all acts of terrorism as criminal and unjustifiable, wherever and by whomever committed;

Noting that every state has the duty to protect human rights and fundamental freedoms of all persons;

Recalling its firm attachment to the principles of freedom of expression and information as a basic element of democratic and pluralist society and a prerequisite for the progress of society and for the development of human beings, as underlined in the case-law of the European Court of Human Rights under Article 10 of the European Convention on Human Rights as well as in the Committee of Ministers' Declaration on the freedom of expression and information of 1982;

Considering that the free and unhindered dissemination of information and ideas is one of the most effective means of promoting understanding and tolerance, which can help prevent or combat terrorism;

Recalling that states cannot adopt measures which would impose restrictions on freedom of expression and information going beyond what is permitted by Article 10 of the European Convention on Human Rights, unless under the strict conditions laid down in Article 15 of the Convention;

Recalling furthermore that in their fight against terrorism, states must take care not to adopt measures that are contrary to human rights and fundamental freedoms, including the freedom of expression, which is one of the very pillars of the democratic societies that terrorists seek to destroy;

Noting the value which self-regulatory measures taken by the media may have in the particular context of the fight against terrorism;

Recalling Article 10 of the European Convention on Human Rights, the Committee of Ministers' Declarations on the freedom of expression and information adopted on 29 April 1982, on the protection of journalists in situations of conflict and tension adopted on 3 May 1996, and its Recommendations No. R (97) 20 on hate speech, No. R (97) 21 on the media and the promotion of a culture of tolerance, No. R (2000) 7 on the right of journalists not to disclose their sources of information and Rec(2003)13 on the provision of information through the media in relation to criminal proceedings;

Bearing in mind the Resolutions and Recommendations of the Parliamentary Assembly on terrorism;

Recalling the Guidelines on Human Rights and the Fight against Terrorism which it adopted on 11 July 2002,

Calls on public authorities in member states:

- not to introduce any new restrictions on freedom of expression and information in the media unless strictly necessary and proportionate in a democratic society and after examining carefully whether existing laws or other measures are not already sufficient;
- to refrain from adopting measures equating media reporting on terrorism with support for terrorism
- to ensure access by journalists to information regularly updated, in particular by appointing spokespersons and organising press conferences, in accordance with national legislation;
- to provide appropriate information to the media with due respect for the principle of the presumption of innocence and the right to respect for private life;
- to refrain from creating obstacles for media professionals in having access to scenes of terrorist acts that are not imposed by the need to protect the safety of victims of terrorism or of law enforcement forces involved in an ongoing anti-terrorist operation, of the investigation or the effectiveness of safety or security measures; in all cases where the authorities decide to restrict such access, they should explain the reasons for the restriction and its duration should be proportionate to the circumstances and a person authorised by the authorities should provide information to journalists until the restriction has been lifted;
- to guarantee the right of the media to know the charges brought by the judicial authorities against persons who are the subject of anti-terrorist judicial proceedings, as well as the right to follow these proceedings and to report on them, in accordance with national legislation and with due respect for the presumption of innocence and for private life; these rights may only be restricted when prescribed by law where their exercise is likely to prejudice the secrecy of investigations and police inquiries or to delay or impede the outcome of the proceedings and without prejudice to the exceptions mentioned in Article 6 paragraph 1 of the European Convention on Human Rights;
- to guarantee the right of the media to report on the enforcement of sentences, without prejudice to the right to respect for private life;
- to respect, in accordance with Article 10 of the European Convention on Human Rights and with Recommendation No. R (2000) 7, the right of journalists not to disclose their sources of information; the fight against terrorism does not allow the authorities to circumvent this right by going beyond what is permitted by these texts;
- to respect strictly the editorial independence of the media, and accordingly, to refrain from any kind of pressure on them;
- to encourage the training of journalists and other media professionals regarding their protection and safety and to take, where appropriate and, if circumstances permit, with their agreement, measures to protect journalists or other media professionals who are threatened by terrorists;

Invites the media and journalists to consider the following suggestions:

- to bear in mind their particular responsibilities in the context of terrorism in order not to contribute to the aims of terrorists; they should, in particular, take care not to add to the feeling of fear that terrorist acts can create, and not to offer a platform to terrorists by giving them disproportionate attention;
- to adopt self-regulatory measures, where they do not exist, or adapt existing measures so that they can effectively respond to ethical issues raised by media reporting on terrorism, and implement them;
- to refrain from any self-censorship, the effect of which would be to deprive the public of information necessary for the formation of its opinion;

- to bear in mind the significant role which they can play in preventing "hate speech" and incitement to violence, as well as in promoting mutual understanding;
- to be aware of the risk that the media and journalists can unintentionally serve as a vehicle for the expression of racist or xenophobic feelings or hatred;
- to refrain from jeopardising the safety of persons and the conduct of antiterrorist operations or judicial investigations of terrorism through the information they disseminate;
- to respect the dignity, the safety and the anonymity of victims of terrorist acts and of their families, as well as their right to respect for private life, as guaranteed by Article 8 of the European Convention on Human Rights;
- to respect the right to the presumption of innocence of persons who are prosecuted in the context of the fight against terrorism;
- to bear in mind the importance of distinguishing between suspected or convicted terrorists and the group (national, ethnic, religious or ideological) to which they belong or to which they claim to subscribe;
- to assess the way in which they inform the public of questions concerning terrorism, in particular by consulting the public, by analytical broadcasts, articles and colloquies, and to inform the public of the results of this assessment;
- to set up training courses, in collaboration with their professional organisations, for journalists and other media professionals who report on terrorism, on their safety and the historical, cultural, religious and geopolitical context of the scenes they cover, and to invite journalists to follow these courses.

The Committee of Ministers agrees to monitor, within the framework of the existing procedures, the initiatives taken by governments of member states aiming at reinforcing measures, in particular in the legal field, to fight terrorism as far as they could affect the freedom of the media, and invites the Parliamentary Assembly to do alike.

THE ANATOMY OF CORRUPTION IN CHINA: A POLITICAL ECONOMY PERSPECTIVE

BY MIRON MUSHKAT[1] AND RODA MUSHKAT[2]

I. ABSTRACT

Corrupt acts are believed to be disturbingly common in Chinese society and may have become increasingly so during the reform era because of greater opportunities available to seek material advantage and growing socio-cultural fluidity. Given the magnitude of the problem and its policy implications, it has been subject to a wide-ranging academic examination. Economically-oriented research however has not evolved in a manner commensurate with the challenge the country faces on this front. There is arguably a need to broaden and deepen the effort involved, in a flexible but systematic fashion.

II. INTRODUCTION

Assessments of corruption in developing countries are not necessarily unambiguously negative. Functionalists, in particular, tend to view it as a phenomenon which is an inevitable feature of structural transformation, or a product of a clash between indigenous values and the norms associated with modern society. They posit that corruption reflects deeply-rooted realities and that, had it not surfaced, its role would have been taken by another factor, potentially with more disruptive consequences. Contrary to the prevailing wisdom, this might impinge on the pace of development and even its fundamental character.[3]

The functionalist viewpoint has not receded into the academic periphery, but it remains controversial and is not currently deemed to be part of the analytical mainstream.[4] While not entirely overlooked, it has not permeated on a significant scale the scholarly literature on corruption in China. In this particular context, there has been an inclination, which has become more pronounced over time, to de-emphasize the supposedly essential functions played by it in transitional settings and focus on the negative spillovers. That has typified the approach of both local researchers and those based elsewhere.[5]

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[1] Adjunct Professor of Economics and Finance, Syracuse University Hong Kong Program

[2] Professor of Law and Director of the Centre for International and Public Law, Brunel Law School, Brunel University; Honorary Professor, Faculty of Law, University of Hong Kong; and Visiting Professor, Kadoorie Institute, University of Hong Kong.

[3] See Gerald E. Caiden and Naomi J. Caiden, 'Administrative Corruption' 37 *Public Administration Review* 301-309 (1977).

[4] See M. Shahid Alam, 'Anatomy of Corruption: An Approach to the Political Economy of Development' 48 *American Journal of Economics and Sociology* 441-456 (1989).

[5] See Michael Johnston and Yufan Hao, 'China's Surge of Corruption' 6 *Journal of Democracy* 80-94 (1993); Hilton Root, 'Corruption in China: Has It Become Systematic?' 36 *Asian Survey* 741-757 (1996); Minxin Pei, 'Will China Become Another Indonesia?' 116 *Foreign Policy* 94-110 (1999); Andrew Wedeman, 'The Intensification of Corruption in China' 180 *China Quarterly* 895-921 (2004); Minxin Pei, *Corruption Threatens China's Future* (Washington: Carnegie Endowment for International Peace, 2007).

The reason largely lies in the scope of the problem, its seemingly relentless escalation and distinctly deleterious implications. Although the Chinese government has introduced numerous laws, rules and directives aimed at eradicating corruption, it has spread unabated because of apparently flawed design, haphazard implementation, structural impediments and sheer force of countervailing pressures. Given this backdrop, functionalist ideas have not been embraced earnestly and virtually all analysts who have explored the subject have opted to address corruption as a form of social malaise that necessitates remedial action.[6]

The difficulties have been concentrated in industries with extensive public sector involvement such as financial services, government procurement, infrastructure and real estate. The absence of effective competition, poor transparency and limited accountability have rendered them high-risk areas of economic activity susceptible to bribery, fraud, kickbacks and theft. The direct costs of corruption in these and other industries are believed to be enormous and the indirect ones are thought to be equally vast (the latter include credibility erosion, damage to public health, educational reversals, efficiency losses, environmental degradation, poor morale, social instability and waste).[7]

In an open economy, this pattern is not merely a domestic concern. Foreign interests are also affected through various channels. Competing with local firms poses a challenge because of external and internal constraints to which transnational entities are inevitably subject and due to lower familiarity with the socio-cultural setting. In this context, corruption acts as a source of general business uncertainty, undermining corporate strategy and business performance. Moreover, and rather interestingly, it exposes foreign operators to a host of potential liabilities (e.g., of the environmental, financial and human rights variety).[8]

In light of the magnitude of the problem, its deep-rooted nature, the persistent deterioration experienced on that front, domestic and international ramifications of the issue, and policy drift, corruption in China has not been deprived of academic attention. Scholars have been examining it broadly and systematically. The work they have conducted has grown increasingly sophisticated in terms of its empirical and conceptual underpinnings. The purpose of this paper is to examine how their insights may be enhanced by incorporating more explicitly a political economy element into the substantial but not all-encompassing body of knowledge which they have generated.

III. OVERVIEW

The methodical study of corruption in contemporary Chinese society has been pursued since the early phases of the post-1978 reform era, initially by researchers based in countries with a well-established tradition of social inquiry rather than China itself. From the outset, the work undertaken had substantial empirical and conceptual dimensions, with a tilt towards the former because of the need to provide a solid factual foundation before engaging in theoretical exploration. Conducting fieldwork was not a practical option during the experimental stages of the reform process, but a considerable amount of data was extracted from sources such as the media.

The information-gathering effort was centred on the phenomenology of corruption: its forms, those responsible for corrupt acts and its spatial distribution. In addition to types of corruption encountered elsewhere and those commonly found in centrally-planned economies, corrupt acts prevalent exclusively or on a particularly large-scale in China were identified (e.g., the false model or corruption underlying

[6] See *ibid.*
[7] See *ibid.*
[8] See *ibid.*

emulation campaigns featuring 'model persons,' 'model units' and the like).[9] The level of cadres involved in various corrupt acts (e.g., national, provincial, district, municipal, county, commune, military, state enterprise and state factory) was also pinpointed and the forms of corruption were traced to the regional (provincial/municipal) level.[10]

The genesis of corrupt acts was addressed as well, albeit tentatively. The focus was principally on system characteristics conducive to corruption such as a blurred distinction between the public and private domains, bureaucratism, centralization, demographic factors (e.g., ageing of cadres and institutions), fusion of party and state organs, ideological disenchantment, lack of functional differentiation, limited transparency, monopolistic structures, patron-client networks, poor accountability, socio-economic imbalances (e.g., severe scarcity of consumer goods in an environment long characterized by low living standards/poverty) and widespread cultural pressures (manifesting themselves in a 'culture of corruption').[11]

Another side of the picture which attracted attention was the potential for policy action designed to enhance the effectiveness of relevant social control mechanisms and containing/eradicating corruption. There was an acknowledgement that appropriate strategies ought to be directed at the causes of the problem, or that they should reflect squarely the genesis of corrupt acts. There was also a recognition of the fact that causes were interrelated (i.e., constituted a system) and that it would not be productive to address them in isolation (rather, the ultimate goal ought to be to break the system of corruption). A holistic approach, rather than a fragmented one, was thus advocated.[12]

The early reform era work did not necessarily lay a foundation for subsequent studies on the subject, but the latter have often explored it within a broadly similar framework. Phenomenology, genesis and policy management have continued to occupy scholars, although more selectively, with more resources channelled towards specific aspects of corruption and responses thereto than others. This shift has been partly due to better access to data sources and accumulation of theoretical insights. In such circumstances, breadth has to some extent given way to depth, with well-defined issues dissected in an elaborate fashion and less emphasis placed on combining the individual segments into a coherent whole.

Another influence on the evolution of the research agenda has been the rapid change in socio-economic conditions witnessed following the launch of the liberalization drive in the late 1970s. The institutional environment has grown in complexity and has become increasingly fluid. Tracking the movement of the entire system, as distinct from its key components, in a structurally differentiated and highly dynamic setting has proved to be a challenging undertaking. Indeed, sustaining this activity in a consistent manner over time would have in all likelihood turned out to be an unrealistic objective. The broad themes and concerns have thus remained basically intact, but micro-style work has tended to loom larger than its macro-type counterpart.

An example of a study conducted in the middle phase of the reform era was one focusing exclusively on bureaucratic corruption. It examined in detail and methodically a range of corrupt acts (phenomenology), their origins (genesis) and possible remedies. It was less comprehensive than those undertaken in the early 1980s, but the subject was examined in a more intensive fashion. The inferential

[9] See Alan P.L. Liu, 'The Politics of Corruption in the People's Republic of China' 77 *American Political Science Review* 602-623 (1983); C.S. Ostergaard, 'Explaining China's Recent Corruption: Patterns, Remedies and Counter Strategies at the Local Level' 1 *Corruption and Reform* 209-213 (1986).
[10] See *ibid*.
[11] See *ibid*.
[12] See *ibid*.

process bore the hallmarks of bottom-up, as distinct from top-down, reasoning and was supported by empirical evidence generated through case studies (albeit not ones based on fieldwork, which was not commonly relied upon at that juncture).[13]

The scholars involved in research on corruption during this period were predominantly political scientists and sociologists. The perspective adopted by the former was generally similar to that of the latter and it would be appropriate to portray them as political sociologists. That said, certain distinctions could be observed. Notably, sociologists tended to venture into anthropological territory, employing concepts and methods rarely encountered in political science (and, most characteristically, operating at a level--grassroots/decidedly micro--seldom seen in typical political science contexts).[14]

Economic issues were not overlooked. One which attracted considerable attention was the relationship between marketization, or the simultaneous expansion of the private sector and shrinkage of its public sector counterpart, and the incidence of corruption. Data were marshalled to demonstrate that in a mixed economy setting corrupt acts do not necessarily become a thing of the past and, indeed, manifest themselves in new and revamped institutional domains (e.g., banking, entrepreneurial initiative, international transactions, real estate, stock market and tax administration).[15] However, such material was not presented within an analytically underpinned economic framework.

An interesting feature of the work undertaken during the middle phase of the reform era was its elastic nature. The phenomenology, genesis and management of corruption were conceptualized in dynamic terms rather than static ones. That is, its manifestations, causes and the policy responses thereto were viewed as period specific and subject to reformulation in light of changing socio-economic circumstances. This was a reflection of the marked structural shifts experienced by China in the course of a rapid transition from a centralized to a decentralized institutional configuration and the unique problems encountered during each phase of the process (particularly in an environment where the uneasy coexistence of a powerful party/state bureaucracy and growing private initiative provided ample incentives and opportunities for corrupt practices).[16]

Another characteristic of the studies conducted during this phase of the reform era was the attempt to grapple systematically with the effects of corruption (as distinct from its causes). This was a wide-ranging effort encompassing economic, political and social spheres of activity. The conclusions were couched in predominantly negative/non-functionalist terms (i.e., corrupt practices were regarded as impeding economic, political and social development; moreover, they were seen as aggravating the sense of alienation prevailing at the grassroots, creating a crisis of legitimacy, eroding moral standards, potentially destabilizing the regime and sapping community cohesion).[17]

The transition from the middle to the mature phase of the reform era was accompanied by substantial theoretical deepening. On the phenomenological side, this entailed a careful reconceptualization of corruption. An operational definition was offered extending beyond corrupt acts involving material benefits such as backdoor deals, bribery and embezzlement (e.g., nepotism, patronage and statistical

[13] See Sonny S.H. Lo, 'Public Administration and Bureaucratic Corruption' in David C.B. Teather and Herbert S. Yee (eds), *China in Transition: Issues and Policies* (Basingstoke: St. Martin's Press, 1999), pp. 47-68.
[14] See Jean-Louis Rocca, 'Corruption and its Shadow: An Anthropological View of Corruption in China' 130 *China Quarterly* 402-416 (1992).
[15] See Ting Gong, 'Forms and Characteristics of China's Corruption in the 1990s: Change with Continuity' 30 *Communist and Post-Communist Studies* 277-288 (1997).
[16] See Zengke He, 'Corruption and Anti-Corruption in Reform China' 33 *Communist and Post-Communist Studies* 243-270 (2000).
[17] See *Ibid*.

falsification). It was grounded in the notion of a deviation of the perpetrator's conduct from prescribed norms, legal or organizational, and the pursuit of private gain (i.e., dubious practices such as bureaucratism, detachment from the masses, and excessive directives and meetings would hence not meet the relevant criteria).[18] Thus:

> 'Instead of applying an ambiguously defined concept of corruption, I propose a broad conceptualization of official deviance (italics), which refers to all forms of behaviour that deviate from prescribed norms of a regime, in which individuals or groups exploit the formal organization instead of working for it, and in which personal roles take precedence over organizational roles. The behaviour itself, as conducted by public agents, may not be for private purposes. Official deviance so defined includes both corrupt conduct and non-corrupt misconduct.'[19]

The genesis of corruption was also explored during that period in a theoretically innovative fashion. A notable example was the recourse to explanations rooted in organizational dynamics, coupled with a diminishing reliance on traditional-style political and socio-cultural insights. The former focus in a multi-dimensional manner on the relationship between organizational attributes and corrupt practices. They have their origins in post-Weberian organizational theories, but this has not been the sole factor shaping their evolution and, consequently, application in various institutional (including authoritarian/quasi-authoritarian) contexts.[20]

The mature phase of the reform era has featured in-depth, theoretically-inspired and methodologically-sophisticated studies addressing specific dimensions of corruption (phenomenology, genesis and policy management).[21] New issues have been systematically explored (e.g., collective corruption involving collusion, often on a large scale, between government officials and private agents).[22]

The expanding research agenda has been extended to encompass the examination of the situational (principally political) forces impinging on the social construction (i.e., conceptualization) of corrupt practices and efforts to curtail them, a subject not addressed previously.[23] However, the conceptual inputs have emanated almost exclusively from political science and sociology (including anthropology and organizational studies), with limited contribution from other academic disciplines, whose members have receded into the background.

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[18] See Xiaobo Lu, Cadres and Corruption italics (Pal Alto: Stanford University Press, 2000) pp. 10-14.
[19] See *ibid.*, p.12.
[20] See *Ibid*., pp. 20-29. Similar themes are pursued by another author, albeit with less emphasis on achieving a high degree of theoretical cohesion, in a book published earlier: Ting Gong, *The Politics of Corruption in Contemporary China: An Analysis of Policy Outcomes* (Westport: Praeger, 1994). See also: Xiaobo Lu, 'From Rank-Seeking to Rent-Seeking: Changing Administrative
Ethos and Corruption in Reform China' 32 *Crime, Law and Social Change* 347-370 (1999); Xiaobo Lu, 'Booty Socialism, Bureaupreneurs and the State in Transition: Organizational Corruption in China' 32 *Comparative Politics* 273-295.
[21] For example see Andrew Wedeman, 'The Intensification of Corruption in China' 180 *China Quarterly* 898-921 (2004); Andrew Wedeman, 'Anticorruption Campaigns and the Intensification of Corruption in China' 14 *Journal of Contemporary China* 93-116 (2005); Yong Guo, 'Corruption in Transitional China: An Empirical Analysis' 194 *China Quarterly* 349-364 (2008).
[22] See Ting Gong, 'Dangerous Collusion: Corruption as a Collective Venture in Contemporary China' 35 *Communist and Post-Communist Studies* 85-103 (2002).
[23] See Yan Sun, 'The Politics of Conceptualizing Corruption in Reform China' 35 *Crime, Law and Social Change* 245-270 (2001).

IV. RE-INCORPORATING AN ECONOMIC VIEWPOINT

Political scientists and sociologists analyzing corruption in China have by no means overlooked the economy as an arena where the phenomenon manifests itself, a source of relevant influences and a key element in the policy response function geared towards reducing the incidence of corrupt practices. They have nevertheless not adopted a distinct economic framework for this purpose, whether comprehensive or selective in nature. Rather, the economy has been regarded by them as one of the sub-systems (such as the polity and society) whose functioning merits serious attention on the part of students of corruption, but not necessarily on theoretical and methodological terms other than their own.

An illuminating book, published during the middle phase of the reform era, is not atypical in this respect. It is entitled *The Political Economy of Corruption in China* and to date it remains the only substantial survey formally devoted to the relationship between the economic setting and corrupt practices. The book provides ample political/socio-political insights across a wide thematic spectrum (exploring the meaning of corruption, its social context, socialist mode of corruption, parabola of corruption, dynamics of corruption and future prospects).[24]

As the title suggests, the economy is not relegated to the periphery. It is an integral part of the picture. One cannot describe, explain and prescribe without employing it as a salient reference point. At the same time, the analytical structure rests firmly on a political/socio-political foundation. It is solid and appropriate but not sufficiently broad and focused to furnish a genuine economic/politico-economic perspective. Economic realities are duly reflected in the elaborate account offered, yet there is no consistent reliance on economic logic.[25]

This observation does not apply to work undertaken during the mature phase of the reform era albeit, with one exception, on a modest scale and selectively. That which is most technically oriented posits that Chinese society is divided into three groups: a core of top policy makers, a substantial number of lower-level (but senior) party members and government officials (including the princelings or children of high-ranking cadres) and ordinary people (street-level bureaucrats fall into this category).[26]

Members of the first group seek to maximize political power (an objective referred to euphemistically as 'maintaining social stability'). The second, and privileged, layer of the social hierarchy aims at capturing as large a share of the economic pie as possible and enhance its position in society. Members of the third group, whose performance is adversely affected by corruption, constitute society's productive force, but they are powerless to influence policy outcomes. It is possible to show, within a game-theoretical framework, how this structural configuration impinges on corrupt practices and economic activities.[27]

That particular study has paved the way for a technical/mathematical model-driven analysis of privilege as a source of corruption in China. The granting of advantages to the second layer has led to an accumulation of vast power and seizure of the wealth generated by ordinary members of the community. It is argued that the explicit and implicit (whereby benefits obtained by economic agents exceed their contribution to society) forms of corruption that are encountered in this type of an environment can best

[24] See Julia Kwong, *The Political Economy of Corruption* (Armonk: Sharpe, 1997).
[25] See *ibid*.
[26] See Shuntian Yao, 'Corruption and the Anti-Corruption Movement: The Modelling and Analysis of the Situation in China' 36 *Australian Economic Papers* 156-165 (1997).
[27] See *ibid*.

be addressed through political decentralization/democratization (i.e., dismantling of political monopolies).[28]

The concept of monopoly features prominently in this type of research. Distinction is drawn in such a context between three forms of institutional dominance: market monopoly (acquired via competitive channels by delivering superior performance), natural monopoly (stemming from cost advantages normally reflecting economies of scale/scope) and administrative monopoly (a product of regulatory policies designed to promote interests of the government and its affiliated enterprises). The administrative variant has been extensively relied upon as an economic/organizational vehicle in contemporary China.[29]

Administrative monopoly is found at the sectoral and regional levels. Sector monopoly is the result of policies adopted by central government organs or specific sector-focused departments in order to exclude or restrict market access by other players operating or seeking to operate in the same segment of the economy and prevent competition detrimental to their interests. Regional monopoly is established by local governments who erect market barriers by employing their administrative power. It may curb the flow of goods (finished, intermediate and raw materials) from outside and/or curtail the inflow.[30]

Such practices are assumed to beget rent seeking, which is equated with corruption by economists, although the two phenomena do not overlap fully (the former term refers strictly to activities using scarce resources to capture an artificially created transfer through the political process that is in excess of one a competitive marketplace would allow but less than the costs it imposes on other parties). Rent creation by the government falls into three categories: unintentional, passive and active.[31]

The unintentional variant is the product of regulation of the economy by the government that is motivated by good intention but is not informed by an awareness of its potentially adverse impact. Passive rent creation occurs when the government, in the face of pressure from private interests, confers advantages on particular sectors and enterprises (at any level of spatial organization). The pressure may translate into influence and even culminate in state capture by the private interests in question. In an active mode, the government consciously employs regulatory instruments to provide benefits to sectors and enterprises with which it is connected.[32]

Economists have explored in detail the relationship between administrative monopoly and the various forms of rent creation in China. They have also endeavoured to quantify the losses resulting from this structural configuration. It is interesting to note that, in this particular context, active rent creation, via state-owned enterprises (albeit not exclusively so), has been especially common. Full-scale marketization is advocated as an appropriate policy response in such circumstances, although it does not necessarily preclude the passive type of rent creation (including state capture rather than merely influence).[33]

A broader approach has been adopted by the author of the second of the two books addressing the economic dimensions of corruption in China. Corrupt practices are traced in this context to general factors reflecting underlying socio-political conditions. One is the presence of an opportunity (e.g., extensive government regulation, institutional fragility and legal ambiguities). The other is the presence of

[28] See Shuntian Yao, 'Privilege and Corruption: The Problems of China's Socialist Market Economy' 61 *American Journal of Economics and Sociology* 279-299 (2002).
[29] See Yong Guo and Angang Hu, 'The Administrative Monopoly in China's Economic Transition' 37 *Communist and Post-Communist Studies* 265-280 (2004).
[30] See *ibid.*
[31] See *ibid.*
[32] See *ibid*.
[33] See *ibid*.

motivation (e.g., absence of moral sanctions, erosion of values and material deprivation). Both factors exert strong influence in post-socialist economies, particularly ones undergoing reform.[34]

Marketization thus breeds corruption to the extent (i.e., if it is incomplete) that it provides a raft of opportunities to players in the politico-economic arena and gives rise to motivation to capitalize on such opportunities. The difficulties are compounded by the limited attention typically accorded by policy makers in such circumstances to state building, or the creation of capacity conducive to effective governance. The problem has manifested itself acutely in post-socialist Russia, but institutional fluidity has been a feature of the transition from central planning to a mixed economy in China as well.[35]

It is apparent that the number of contributions on the subject from economically-oriented researchers has been relatively modest and that they have been sporadic in nature. A book was produced in the mid-1990s and one a decade or so later. A few articles have also been written focusing on specific aspects of corruption, but they are not analytically connected in any meaningful way. There is thus no clear sense of theoretical continuity and cohesion (which is more palpable in the work of organizational, political and socio-cultural theorists). This is somewhat surprising because the economy has been a source of powerful impulses during the reform era.

The definition of corruption varies from one economic study to another and so does the set of concepts employed (e.g., accountability, discretionary powers, monopoly, privilege, rent seeking, regulations and rules). The framework for addressing phenomenology, genesis and policy management, to the extent that one may be readily discerned, displays similar characteristics. The examination of the consequences of corrupt practices (e.g., black market/underground economy, consumption patterns, foreign trade, government budget, income distribution, investment activities, price stability and social justice) is also incomplete.

Economists are inevitably drawn to genesis/explanation and are less inclined to focus on phenomenology/description (policy management and consequences attract more attention than the latter but not as much as the former). The corollary is that priority may have to be accorded to developing/embracing an analytical perspective that is neither excessively narrow (i.e., extends beyond administrative monopoly, for example) nor overly broad in nature (such as the macroscopic viewpoint adopted in the two books referred to earlier, as distinct from the articles). The well-known Klitgaard equation may arguably serve as a useful starting point in this respect (C=R+D-A; where C stands for corruption, R for economic rent, D for discretionary powers and A for accountability).[36]

The formula should be applied in a constructive but not uncritical fashion (i.e., as a starting point). The potential difficulties here lie in the notion of rent-seeking which may reflect an ideological bias against government intervention in the economy and a belief in the unqualified superiority of private markets. The social waste supposedly always engendered by the former is juxtaposed with the efficiency

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[34] See Yan Sun, *Corruption and Market in Contemporary China* (Ithaca: Cornell University Press, 2004).
[35] See *ibid*. italics See also Steven Solnick, 'The Breakdown of Hierarchies in the Soviet Union and China' 48 *World Politics* 209-238 (1996); Yan Sun, 'Reform, State and Post-Communist Corruption: Is Corruption Less Destructive in China than in Russia?' 32 *Comparative Politics* 1-20 (1999); Xueliang Ding, 'The Illicit Stripping of Chinese State Firms' 43 *China Journal* 1-28 (2000); Xueliang Ding, 'Informal Privatization through Internationalization: The Rise of Nomenklature Capitalism in China's Offshore Business' 30 *British Journal of Political Science* 121-146 (2000); Xueliang Ding, 'Systematic Irregularity and Spontaneous Property Transformation in the Chinese Financial System' 163 *China Quarterly* 655-676 (2000); Feng Chen, 'Subsistence Crisis, Managerial Corruption and Labour Protests in China' 44 *China Journal* 41-63 (2000); Elizabeth A. Quade, 'The Logic of Anticorruption Enforcement Campaigns in Contemporary China' 16 *Journal of Contemporary China* 65-77 (2007).
[36] See Robert Klitgaard, *Controlling Corruption* (Berkeley: California University Press, 1988).

invariably displayed by the latter. It is thus essential not to adhere rigidly to the position that state failure is pervasive and market failure non-existent.[37]

Nor should rent-seeking be treated as a homogeneous category. For example, a distinction may be drawn between rent scrapping, where rents accrue to the state office, and dividend collecting, where they flow to the private sector. In the latter case, they constitute predominantly a share of private profits.[38] By the same token, rent creation may be the product of competitive processes geared towards securing generalizable policy benefits (lobbying) or non-competitive ones aimed at obtaining particularistic privileges (bribery).[39]

Such differences may have substantial economic consequences. For instance, decentralized structures are likely to beget independent monopoly in the corruption process, encouraging fragmented rent-seeking and a higher degree of dissipation of rents. By contrast, centralized structures tend to produce joint monopoly, leading to a lower degree of rent creation, relatively more modest rent dissipation, and potentially less detrimental outcomes from a broad developmental perspective.[40]

The preoccupation with monopoly and its alternatives may have also resulted in scant attention being accorded to other relevant economic concepts. The principal-agent model is a notable case in point. Its theoretical efficacy was demonstrated by scholars exploring the genesis of corruption in late Imperial China. They generated empirical evidence showing that the ability of rulers/principals to monitor and sanction the activities of government officials/agents may be a crucial determinant of the incidence and type of corrupt practices witnessed in bureaucratic settings.[41] The corollary presumably is that the political economy of corruption is a multi-dimensional phenomenon and needs to dissected as such.

V. CONCLUSION

The consensus among academic observers and policy analysts is that corruption in China is deeply-entrenched and widespread. Further, the host of strategies employed to eradicate -- or, more realistically, curtail -- it notwithstanding, the prevailing view is that the problem is escalating. Against this backdrop, extensive research has been conducted with a view to enhancing the understanding of the phenomenology, genesis and policy management of corruption. Rather surprisingly, the economic dimension has receded from the limelight and contributions from that source have generally been fragmented. This trend should ideally be reversed and the work undertaken ought to be consolidated within an appropriately broad analytical framework.

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[37] See Sun, *Corruption and Market in Contemporary China*.
[38] See Andrew Wedeman, 'Looters, Rent-scrappers and Dividend Collectors: Corruption and Growth in Zaire, South Korea and the Philippines' 31 *Journal of Developing Areas* 457-478 (1997).
[39] See Paul Hutchcroft, 'The Politics of Privilege: Assessing the Impact of Rents, Corruption and Clientilism on Third World Development' 45 *Political Studies* 639-658 (1997).
[40] See Andrei Schleifer and Robert Vishny, 'Corruption' 108 *Quarterly Journal of Economics* 599-617 (1993); Kevin Murphy, Andrei Shleifer and Robert Vishny, 'Why is Rent Seeking so Costly to Growth? 83 *American Economic Review* 409-413 (1993).
[41] See Edgar Kiser and Xiaoxi Tong, 'Determinants of the Amount and Type of Corruption in State Fiscal Bureaucracies: An Analysis of Late Imperial China' 25 *Comparative Political Studies* 300-331 (1992).