**Application no. 50376/09 -- *Gîrleanu v. Romania***

**WRITTEN COMMENTS OF THE OPEN SOCIETY JUSTICE INITIATIVE AND THE INTERNATIONAL COMMISSION OF JURISTS**

Pursuant to leave granted on 17 September 2013 by the President of the Chamber, acting under Article 44 § 2 of the Rules of the Court, the Open Society Justice Initiative and the International Commission of Jurists submit these written comments on issues presented by this case.

## INTRODUCTION

1. The role of journalists and others who perform a public watchdog function is fundamental in a democratic society. Restrictions on their access to and disclosure in the public interest of information, including classified government information, must be examined with especially careful scrutiny. The primary, or exclusive, responsibility to protect the confidentiality of government information, when confidentiality is justified, lies with the State, and not with the journalist or others entitled to the same protections.

2. In a line of cases, including the Grand Chamber decision in *Sanoma v. the Netherlands*, this Court has applied "special scrutiny" and identified a high presumption of improper interference with Article 10 where a State acts with the intent or effect of obtaining disclosure of a journalist's source.[1] In two recent decisions, *Guja v. Moldova* and *Bucur v. Romania*, this Court also recognized that sanctions must be limited – and are in some cases impermissible – for public servants who disclose information in the public interest, including classified information.[2] Yet, until now, the Court has not fully articulated the circumstances in which restrictions on a journalist's possession or disclosure of government information received through unauthorised channels would be a permissible interference with Article 10 rights, or how States should be limited in the imposition of such restrictions.

3. Restrictions on the journalist's right to possess or disclose information related to national security undermine the journalist's ability to exercise her professional obligations, and threaten the public's ability to exercise effective oversight of policymaking related to national security. Such restrictions may chill the journalist's amenability to receiving or disclosing information, and a source's willingness to provide it. They are also inconsistent with this Court's holdings in *Guja* and *Bucur*: if a public servant has a right, and in some cases a duty, to disclose otherwise confidential government information in the public interest, but the recipient can be sanctioned for receiving that information, this right cannot be exercised effectively.

4. This case concerns a challenge to sanctions imposed on a journalist under Article 19 of Romania's Act No. 51/1991 on national security. This provision stipulates that the actual or attempted "collecting and transfer of information of a secret or confidential nature, by any means, outside of the legal framework" constitutes a criminal offence punishable by two to seven years imprisonment. Romania's 2002 Law on Classification identifies public servants as the only parties whose responsibility may be engaged for the protection of classified information. However, neither Act No. 51/1991 on national security nor Romania's criminal code make any distinction between public servants and private persons in establishing criminal sanctions for unauthorised possession or disclosure of information.

5. Without expressing a position on the merits, the interveners make three central points:

   - *I. Journalists may not be sanctioned for the disclosure of governmental information absent exceptional circumstances.* Journalists and other similarly protected persons may not be sanctioned for the disclosure in the public interest of government information, including classified information, if acting in good faith. They may only be sanctioned if they have committed a crime not predicated upon the mere possession or disclosure of information.

[1] *See Sanoma v. The Netherlands*, ECtHR (GC), Judgment of 14 September 2010, at para. 51.
[2] *Guja v. Moldova*, ECtHR (GC), Judgment of 12 February 2008. *Bucur v. Romania*, ECtHR, Judgment of 8 January 2013.

- *II. Governments may not restrict possession of information by journalists*. The possession of government information by journalists and other similarly protected persons is protected from government restriction at least to the same extent that disclosure would be so protected. Consistent with their professional responsibilities, journalists must be permitted to retain information, even if it is not deemed in the public interest or ultimately disclosed.
- *III. Even minor or threatened penalties can have chilling effects on freedom of expression.*

## I. JOURNALISTS MAY NOT BE SANCTIONED FOR THE DISCLOSURE OF GOVERNMENTAL INFORMATION ABSENT EXCEPTIONAL CIRCUMSTANCES

6. Journalists and others who perform a vital public watchdog function enjoy the freedom to express themselves without limitation or sanction where acting in good faith and the information disclosed is in the public interest. The interveners submit that: (A) The fundamental role of journalists and other public watchdogs requires that any restrictions on their freedom to receive and impart information be subjected to "careful scrutiny"; (B) Journalists and other similarly protected persons, where acting in good faith, may not be sanctioned for the disclosure of government information in the public interest absent the commission by the journalist of a separate crime not constituted by the receipt or disclosure of the information; (C) General laws which sanction unauthorised possession or disclosure without adequate safeguards to protect journalists, or laws or State practices that target journalists specifically with sanctions, tend to run afoul of the requirements advanced by this Court for Article 10 compliance.

### A. The "Vital" Role of Public Watchdogs Requires the Most Careful Scrutiny for Restrictions on their Freedom of Expression

7. The fundamental role of the media in facilitating democratic oversight is shared by other public watchdogs who, as a result, benefit from careful scrutiny on restrictions of Article 10 rights.

8. This Court has long recognized the central role of the journalist as a "vital public watchdog."[3] The public's knowledge of state activities, including in the security sector, is required for democratic oversight.[4] The public's right to government information, and the journalist's right to receive and disseminate it, derives in part from the fact that the state holds a significant part of the public information that the public requires.[5] The role of the journalist includes informing the public on matters of public interest, which is "indispensable for democratic life."[6]

9. Civil society organisations, and others who monitor government performance, have a similar role to play in effectuating the free flow of information and ideas, and are thus entitled to the same protections as journalists.[7] In *Vides Aizsardzības Klubs v. Latvia*, for example, this Court found that an organisation focused on environmental protection exercised a "watchdog" role "essential for a democratic society … [and] similar to the role of the press": "to execute its tasks, an association must be able to disclose facts of interest to the public, to give them an assessment and thereby contribute to the transparency of the activities of public authorities."[8]

10. The requirement that restrictions on freedom of expression be necessary and proportionate to the interest justifying the restriction demands that restrictions on the freedom to receive and impart information for journalists and other public watchdogs be limited to where there is an overriding requirement in the public interest, or a "pressing social need," and where there are

[3] *De Telegraaf v. the Netherlands*, ECtHR, Judgment of 22 November 2012, at para. 125, citing various cases since 1985.
[4] PACE, Resolution 1838 (2011) on the abuse of state secrecy and national security, adopted 6 October 2011, para. 8.
[5] PACE, Resolution 1551 (2007) on fair trial issues in criminal cases concerning espionage or divulging State secrets, at para. 2.
[6] PACE, Resolution 1003 (1993) on the ethics of journalism, at para. 17. *Observer and Guardian v. the United Kingdom*, ECtHR (GC), Judgment of 26 November 1991, at para. 59(b).
[7] *See, e.g.*, *Társaság a Szabadságjogkért v. Hungary*, ECtHR, Judgment of 14 April 2009, at para. 27 ("association involved in human rights litigation … as a social 'watchdog'"). *Riolo v. Italy*, ECtHR, Judgment of 17 July 2008, at para. 63 (political scientist published in the media). *Vides Aizsardzības Klubs v. Latvia*, ECtHR, Judgment of 27 May 2004, at para. 42.
[8] *Vides Aizsardzības Klubs v. Latvia*, ECtHR, Judgment of 27 May 2004, at para. 42 (unofficial translation; in original: "pour mener sa tâche à bien, une association doit pouvoir divulguer des faits de nature à intéresser le public, à leur donner une appréciation et contribuer ainsi à la transparence des activités des autorités publiques").

circumstances of a sufficiently vital and serious nature.[9] As this Court has stated: the "most careful scrutiny … is called for when … the measures taken or sanctions imposed by the national authority are capable of discouraging the participation of the press in debates over matters of legitimate public concern."[10]

### B. Journalists Have the Right to Disclose Government Information in the Public Interest Without Fear of Sanction

11. Journalists and other similarly protected persons, if acting in good faith, may only in extraordinary circumstances be sanctioned for the unauthorised disclosure in the public interest of government information. Such extraordinary circumstances are limited to situations where the journalist is convicted of committing a crime not constituted by the mere possession or disclosure of the information (such as, for example, fraud or assault).

12. This section outlines (1) the limited scope of sanctions for the disclosure, by journalists and other watchdogs, of information in the public interest; including (2) where the information is classified or withheld on national security grounds and (3) where the disclosure of the information does not necessarily concern wrongdoing. This section further (4) elaborates that the source of the information is not determinative to the availability of permissible restrictions. Finally, it (5) describes the emerging European consensus for the limitation on sanctions available to journalists and watchdogs for such public interest disclosures.

#### 1. Limited Sanctions for the Disclosure of Information in the Public Interest

13. As this Court affirmed, in *De Telegraaf v. The Netherlands*, "Article 10 protects a journalist's right – and duty – to impart information on matters of public interest provided that he is acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism."[11] Placing the onus on the State to keep confidential information secret recognises both the needs of legitimate secrecy and the high public interest in robust watchdogs.

14. A set of Global Principles on National Security and the Right to Information (the "Tshwane Principles"), adopted on 12 June 2013, provide support for limiting the use of sanctions against journalists who disclose government information. The Tshwane Principles were endorsed by the Parliamentary Assembly of the Council of Europe (PACE) on 2 October 2013; as well as the UN Rapporteur on the protection and promotion of human rights while countering terrorism, and the special rapporteurs on freedom of expression and the media of the UN, Organisation for Security and Co-operation in Europe (OSCE), the African Commission on Human and Peoples' Rights (ACHPR), and the Organisation of American States (OAS).[12] Tshwane Principle 47, reflecting guidance from international instruments and good law and practice, states that "[a] person who is not a public servant may not be sanctioned for the … disclosure to the public of classified information." Further, the Principles advise that a person who is not a public servant may not "be subject to charges for conspiracy or other crimes based on the fact of having sought and obtained the information" if intended for public disclosure.[13]

15. The UN Human Rights Committee declared unambiguously that the prosecution of "journalists, human rights defenders and others … for having disseminated … information of legitimate public interest that does not harm national security" violates Article 19(3) of the International

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[9] *De Telegraaf v. The Netherlands*, ECtHR, Judgment of 22 November 2012, at para. 123. UNHRC, General Comment No. 34 on Article 19, UN Doc. CCPR/C/GC/34, 12 September 2011, at paras. 22, 25, 29, 30, 33-35.
[10] *Stoll v. Switzerland*, ECHR (GC), Judgment of 10 December 2007, at para. 106.
[11] *De Telegraaf v. The Netherlands*, ECtHR, Judgment of 22 November 2012, at para. 126.
[12] Global Principles on National Security and the Right to Information (the "Tshwane Principles"), 2013, available at http://www.opensocietyfoundations.org/publications/global-principles-national-security-and-freedom-information-tshwane-principles. Endorsed by the PACE and relevant Special Rapporteurs: PACE, Recommendation 2024(2013), para. 1.3, adopted 2 October 2013. PACE, Resolution 1954 (2013), adopted 2 October 2013, paras. 7-9. Open Society Justice Initiative, Press Release: New Principles Address the Balance between National Security and the Public's Right to Know, 12 June 2013, at http://www.opensocietyfoundations.org/press-releases/new-principles-address-balance-between-national-security-and-publics-right-know. The interveners were among the entities involved in drafting the Tshwane Principles.
[13] Tshwane Principles, note 12, above, at Principle 47.

Covenant on Civil and Political Rights.[14] In considering the UK Official Secrets Act, the Committee expressed specific concern about the law "frustrat[ing] former employees of the Crown from bringing into the public domain issues of genuine public concern, and … prevent[ing] journalists from publishing such matters."[15]

16. In a 2007 Resolution on espionage and divulging State secrets, the PACE asserted that "the State's legitimate interest in protecting official secrets must not become a pretext to unduly restrict the freedom of expression and of information." The PACE called on States and this Court "to find an appropriate balance between the State interest in preserving official secrecy on the one hand, and freedom of expression and of the free flow of information on scientific matters, and society's interest in exposing abuses of power on the other hand." [16]

17. This Court, in *Stoll v. Switzerland*, declined to hold in absolute terms that only those with authorised access to information may be subjected to sanction for its unauthorised disclosure.[17] Nonetheless, *Stoll* applies primarily to recognize the obligation on a journalist to exercise sound journalistic ethics and act in good faith.[18] This Court might thus consider, consistently with *Stoll*, that if a journalist is "acting in good faith," and discloses information in the public interest, the State may not sanction the journalist for her possession or disclosure alone.

2. Applicability to Information Classified or Withheld on National Security Grounds

18. Although the state may impose necessary and proportionate restrictions on the right to information on the ground of national security in certain circumstances,[19] the strong presumption protecting the disclosure by journalists and other watchdogs of government-held information also applies to classified or national security related information.[20]

19. Indeed, in our submission, public access to government information concerning the security sector is notably important because of the discretion that authorities of the executive typically exercise in this area; the sector's great powers, including to wage war and counterterrorism operations, conduct surveillance, detain and interrogate persons; and its oversight of significant public funds. The undue deference to arguments concerning national security secrecy can contribute to human rights violations, corruption, waste and abuses, with accountability hampered by secrecy.[21] The Court has recognized that "[p]ress freedom assumes even greater importance in circumstances in which State activities and decisions escape democratic or judicial scrutiny on account of their confidential or secret nature."[22]

20. The UN Special Rapporteur on the right to freedom of opinion and expression, in a statement joined by the UN Rapporteur on the protection and promotion of human rights while countering terrorism, expressed concern over the United Kingdom's short-term detention and interrogation of the partner of a journalist with travel sponsored by a media outlet:

> "Under no circumstances, journalists, members of the media, or civil society organizations who have access to classified information on an alleged violation of human rights should be subjected to intimidation and subsequent punishment … The protection of national security secrets must never be used as an excuse to intimidate the press into silence and backing off from its crucial work in the clarification of human rights violations."[23]

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[14] UNHRC, General Comment No. 34 on Article 19, UN Doc. CCPR/C/GC/34, 12 September 2011, at para. 30. *See also* Concluding observations on the Russian Federation (CCPR/CO/79/RUS), 1 December 2003, para. 22.
[15] UNHRC, Concluding Observations on United Kingdom (CCPR/CO/73/UK), 6 December 2001, at para. 21.
[16] PACE, Resolution 1551 (2007), 19 April 2007, paras. 1, 9.
[17] *Stoll v. Switzerland*, ECtHR (GC), Judgment of 10 December 2007, at paras. 58-59.
[18] *Ibid.*, at para. 103.
[19] *De Telegraaf v. The Netherlands*, ECtHR, Judgment of 22 November 2012, at paras. 123-24. PACE, Resolution 1954 (2013), adopted 2 October 2013, para. 3.
[20] UNHRC, General Comment No. 34 on Article 19, UN Doc. CCPR/C/GC/34, 12 September 2011, at paras. 3, 30.
[21] PACE, Resolution 1507 (2006), Alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member states, at para. 19.5.
[22] *Stoll v. Switzerland*, ECtHR (GC), Judgment of 10 December 2007, at para. 110. *See also Observer and Guardian v. the United Kingdom*, ECtHR (GC), Judgment of 26 November 1991, at para. 59(b).
[23] Office of the High Commissioner for Human Rights, UK: "National security concerns must never justify intimidating journalists into silence," warn UN experts (Frank LaRue and Ben Emmerson), 4 September 2013.

21. In 2004, the three international rapporteurs on freedom of expression (for the UN, the OSCE and the OAS) issued a Joint Declaration on Access to Information and Security Legislation. They "stress[ed] the need for informational 'safety valves' such as protection of whistleblowers and protection for the media and other actors who disclose information in the public interest":

> "Other individuals [who are not public authorities or their staff], including journalists and civil society representatives, should never be subject to liability for publishing or further disseminating this information, regardless of whether or not it has been leaked to them, unless they committed fraud or another crime to obtain the information. Criminal law provisions that don't restrict liability for the dissemination of State secrets to those who are officially entitled to handle those secrets should be repealed or amended." [24]

3. Scope of the Public Interest Extends to More than Just Wrongdoing

22. The right of the public to information, and of the media to disseminate it, is heightened where the information concerns wrongdoing, "including [by] members of the secret services."[25] Further, the right of the public to information is inviolable where it concerns gross human rights violations or serious violations of international humanitarian law.[26] The PACE has recognised that the media and the public are appropriate recipients of unauthorised government disclosures of information concerning wrongdoing—"where internal channels either do not exist, have not functioned properly or could reasonably be expected not to function properly given the nature of the problem raised."[27] Public scrutiny safeguards against abuse by public officials and ensures democratic participation and oversight of policymaking, including in sectors where other checks and safeguards may not be present or effective.

23. However, the limitation on permissible sanctions for the disclosure of government information applies to broader matters of public interest than just information concerning wrongdoing. For instance, in *Vides Aizsardzības Klubs v. Latvia*, this Court upheld the right of an organisation, acting as a "watchdog," to disclose without sanction factual information about the role of individual public figures in executing governmental decisions in an important public sector.[28] In *Goodwin v. United Kingdom*, the impugned information was acknowledged by the applicant as "newsworthy even though it did not reveal matters of vital public interest," let alone wrongdoing. The Court nonetheless upheld the journalist's right not to reveal a source, and held that the fine imposed on the journalist was unnecessary in a democratic society.[29]

24. The PACE has identified various grounds – aside from where there is demonstrated wrongdoing – constituting an "overriding public interest" compelling disclosure despite an otherwise "legitimate exception" to access to information. These grounds include where the information would "make an important contribution to an ongoing public debate; promote public participation in political debate; … improve accountability for the running of public affairs in general and the use of public funds in particular; [and] benefit public health or safety."[30]

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[24] Joint Declaration of the International Mechanisms for Promoting Freedom of Expression [of the UN, OSCE, OAS, and ACHPR], 6 December 2004, p. 3. *See also* Joint Declaration of the International Mechanisms for Promoting Freedom of Expression [of the UN, OSCE, OAS, and ACHPR], 20 December 2006. Joint Statement of the UN and IACommHR Special Rapporteurs, 21 December 2010, para. 3.
[25] PACE, Resolution 1838 (2011) on the abuse of state secrecy and national security, adopted 6 October 2011, para. 8.
[26] OHCHR, *Study on the Right to the Truth*, 8 February 2006, para. 59. *See Association 21 December 1989 v. Romania*, ECtHR, 24 May 2011, para. 194. *Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity*, Resolution 2005/81, UN Doc. E/CN.4/2005/102/Add.l, 8 February 2005, Principles 2, 16.
[27] PACE, Resolution 1729, adopted 29 April 2010, at Arts. 6.1.2, 6.2.3. At least seven European countries (Albania, France, Germany, the Netherlands, Romania, Serbia and the UK) provide as a defence or mitigating circumstance the attempted or actual use of internal channels prior to public disclosure. Amanda Jacobsen, *National Security and the Right to Information in Europe*, 2013 (survey of the University of Copenhagen, in collaboration with the Open Society Justice Initiative), p. 49.
[28] *Vides Aizsardzības Klubs v. Latvia*, ECtHR, Judgment of 27 May 2004, at paras. 42, 45, 49.
[29] *Goodwin v. United Kingdom*, ECtHR (GC), Judgment of 27 March 1996, at para. 37, 45-46.
[30] PACE, Resolution 1954 (2013), adopted 2 October 2013, para. 9.5.

25. Public disclosures can serve as an important check on the "pervasive over-classification" of government-held information found in the State practice of various jurisdictions.[31] Generally expansive secrecy also compels, for the necessary and proportionate prong to be met, that the scope of permissible sanctions be more limited: the unauthorised possession or disclosure of improperly classified information may not be subject to sanction.[32]

4. Source of the Information Not Determinative

26. The right to disseminate information of public interest is not subject to limitation on the basis of the source, and applies in respect of information directly or indirectly from government sources.

27. Where a restriction on the public's right to information is legitimate, a government employer may expect a public servant to protect confidential information from disclosure.[33] Yet the duties of "loyalty, reserve and discretion" which restrain the public servant from disclosing certain confidential information are not absolute.[34] The strong public interest in the dissemination of certain government information limits the permissible restrictions on the disclosure of such information by public servants.[35]

28. Further, even where a public servant may have an obligation to safeguard the confidentiality of certain information, this duty is not transferable to a journalist who receives such information. These duties have little bearing on the journalist, and in fact, the duties are in direct conflict with the duties that define journalistic professional ethics—the ethical dissemination of information rather than its withholding.[36] This Court has thus recognised "little scope … for restrictions on debate on questions of public interest," reasoning that "the acts or omissions of government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the media and public opinion."[37] In this regard, the protections recognised for public servants disclosing information in the public interest, including those who disclose information publicly, are ineffectual without at least as strong protections for those who would receive their information.

29. Further, the source's motive is not decisive,[38] and is sometimes neither relevant nor even discernible by the journalist.[39]

5. An Emerging European Consensus

30. There is an emerging European consensus distinguishing the sanctions that can be applied to journalists, and in some cases other members of the public, compared with those available for public servants, for the public disclosure of information of public interest. Public servants are subject to reasonable and qualified obligations of confidentiality to which members of the public are not. Among the members of the public, journalists and other similarly protected persons with a special responsibility to act as public watchdogs, can only be sanctioned for disclosing government information in extraordinary circumstances.

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[31] Tshwane Principles, see note 12, above, at Principle 47, Note. *See also* Dick Marty, Abuse of state secrecy and national security, Report of Rapporteur to the PACE, 7 September 2011. Testimony of Thomas Blanton, National Security Archive, before the Subcommittee on National Security, Emerging Threats, and International Relations, Committee on Government Reform, U.S. House of Representatives, 2 March 2005, at http://www.gwu.edu/~nsarchiv/news/20050302/index.htm.

[32] *See* PACE, Resolution 1838 (2011) on abuse of state secrecy and national security, adopted 6 October 2011, para. 9. Dick Marty, Abuse of state secrecy and national security, Report of Rapporteur to the PACE, 7 September 2011, paras. 5, 45.

[33] *Guja v. Moldova*, ECtHR (GC), Judgment of 12 February 2008, at paras. 70-71.

[34] *Ibid.*, at para. 72. *Grigoriades v. Greece*, ECtHR (GC), Judgment of 25 November 1997, at para. 45.

[35] *Bucur v. Romania*, ECtHR, Judgment of 8 January 2013, at paras. 115, 120. *See also* UNHRC, General Comment No. 34 on Article 19, UN Doc. CCPR/C/GC/34, 12 September 2011, at para. 30. UN Convention Against Corruption, adopted 31 October 2003, entry into force 14 December 2005 (167 State parties), Arts. 32-33.

[36] Resolution on Journalistic Freedoms and Human Rights, adopted at the 4th European Ministerial Conference on Mass Media Policy (Prague, 7-8 December 1994), Principles 3, 6-8, cited in *Goodwin v. United Kingdom*, ECtHR (GC), Judgment of 27 March 1996, at para. 39.

[37] *Guja v. Moldova*, ECtHR (GC), Judgment of 12 February 2008, at paras. 72, 74. *See also Palamara-Iribarne v. Chile*, IACtHR, Judgment of 22 November 2005, at para. 88.

[38] *Financial Times v. United Kingdom*, ECtHR, Judgment of 15 December 2009, at para. 63

[39] *Goodwin v. United Kingdom*, ECtHR (GC), Judgment of 27 March 1996, at paras. 44-46.

31. States increasingly distinguish between the offences or penalties available for the unauthorised disclosure of information by members of the public on the one hand, and public servants on the other. For instance, in Germany, the criminal law was amended in 2012 to release journalists from the risk of being charged with aiding and abetting the "violation of official secrets" for disclosing classified information.[40] If the unauthorised disclosure does not amount to treason or espionage, and is not in wartime, several countries – including Moldova, the Russian Federation and Slovenia – limit criminal responsibility for unauthorised disclosures only to public servants.[41] Many other countries provide separate or heightened offences for public servants who disclose information to which private persons, including the media, are not subject.[42] Irrespective of whether or not the sanctions contemplated on public servants are rights compliant under these laws, it is clear that these States have made a clear distinction between public servants and others making disclosures, including journalists and public watchdogs.

32. Even where laws criminalise disclosure by journalists, they are rarely if ever prosecuted for such offences. Even more rarely do such prosecutions result in convictions.[43] In the first ever Danish prosecution of journalists for the unauthorised publication of classified information, a criminal court in 2006 unanimously acquitted two journalists who had published information questioning the presence of weapons of mass destruction in Iraq. The court found that the public interest justified the disclosures, even though the courts had previously convicted the intelligence officer who provided the journalists with the information.[44]

33. Other national laws prohibit sanctions for the disclosure of government information where the public interest in the disclosure outweighs the harm.[45] This Court has ruled that for public servants who disclose government information – despite duties of reserve and discretion not shared by journalists – actual harm caused by an unauthorised disclosure must be considered in determining whether a restriction on the right to freedom of expression and information is necessary.[46] The standard for the limitation of sanctions on journalists and public watchdogs is necessarily higher, considering that they are not State officials.

### C. General Laws Which Sanction Journalists Must Have Safeguards, and Will Raise Heightened Concerns if They Target Journalists

34. The interveners submit that, to comply with Article 10, general laws which sanction unauthorised possession or disclosure must have adequate safeguards to protect media freedom. Otherwise, such laws are liable to be abused. Laws which target journalists in the language of their provisions, or in practice, raise heightened concerns.

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[40] Criminal Code (Germany), Section 353(b)(3)(a).

[41] Criminal Code (Moldova), 2009, Art. 344 ("…disclosure of information that constitutes a state secret by a person to whom such information was entrusted or that became known in connection with his/her official position or professional duties … shall be punished …"). Criminal Code (Russian Federation), 1996 (as of 29 June 2013), Art. 283(1), (2) ("Disclosure of information comprising a state secret, by a person to whom it has been entrusted or to whom it has become known through his office or work … shall be punishable…"). Criminal Code (Slovenia), 2008, (as of 14 June 2012), Arts. 260(1) ("An official or any other person who, in non-compliance with his duties to protect classified information, communicates or conveys information designated as classified information to another person, or otherwise provides him with access to such information or with the possibility of collecting such information in order to convey the same to an unauthorised person, shall be sentenced…"). Outside of Europe, this is true in Brazil, Chile, Colombia, and Mexico, among other countries.

[42] *Some offences only for public servants*: Albania, Argentina, Belgium, Canada, Czech Republic, Denmark, France, Guatemala, Nigeria, Panama, Paraguay, Poland, Serbia, Sweden, Turkey, United Kingdom, United States, Uruguay. *Less severe penalties for private persons as compared to public servants*: Albania, Argentina, Belgium, Bolivia, Czech Republic, Denmark, Ecuador, France, Germany, Hungary, Norway, Panama, Paraguay, Romania, Serbia, Sweden.

[43] Of 20 European countries surveyed, none convicted members of the media for the disclosure of classified information over the past two decades. Amanda Jacobsen, *National Security and the Right to Information in Europe*, 2013, pp. 43-44.

[44] *Denmark v. Larsen*, Copenhagen City Court, Case No. SS 24.13764/2006, 4 December 2006. *See* Reporters without Borders, *Three Berlingske Tidende Journalists Acquitted of State Security Charges*, 4 December 2006.

[45] At least nine European states – Czech Republic, Germany, Italy, Moldova, the Netherlands, Norway, Romania, Spain, and Sweden – require the government to prove either actual or probable harm resulting from disclosure in order for any penalty to be imposed; and an additional three countries – Denmark, France and Hungary – allow the lack of harm to be raised as a defence or mitigating circumstance. Several other countries similarly require proof of actual or likely harm.

[46] *See Guja v. Moldova*, ECtHR (GC), Judgment of 12 February 2008, at para. 76. *Bucur v. Romania*, ECtHR, Judgment of 8 January 2013, at paras. 114-15.

35. General laws must adequately protect the rights of journalists.[47] As this Court said in *Goodwin v. United Kingdom*, "safeguards afforded to the press are of particular importance."[48] Without adequate safeguards, prosecution, or the threat of prosecution, for unauthorised disclosure, conspiracy, or other crimes may be abused in order to compel journalists and other similarly protected persons to reveal their sources or in other ways to chill investigative reporting. The law need not have an intent to chill journalistic expression, or even single out journalists for sanction, for an Article 10 violation to exist. As this Court stated in *Selis v. Finland*, when "measures taken by the national authorities are capable of discouraging the press from disseminating information on matters of legitimate public concern, careful scrutiny of the proportionality of the measures ... is called for."[49]

36. In a decision concerning the unauthorised disclosure of national security information to a journalist, the Superior Court of Ontario struck down a portion of Canada's Security of Information Act as overbroad and unnecessary. The Court held that criminalising the receipt and communication of certain government information, absent protections for journalists, "restrict[ed] the free flow of government information" and violated freedom of expression.[50]

37. There is a close relationship between source protection and the limitation of sanctions on journalists who receive information from undisclosed sources. This is in part due to the public interest in receiving information from anonymous sources.[51] The line of cases underscoring the strong presumption of source protection counsel a similarly strong presumption against the sanction of journalists for receipt or disclosure of government information.[52] This Court has generally found violations where State conduct has had the intent or effect of risking the disclosure of the source, or information which might reveal the source, as do sanctions on journalists for possession or public interest disclosures.[53]

38. Even where unrelated to source disclosure, the imposition of sanctions on journalists for disclosure of information in the public interest will generally fall afoul of the protections required pursuant to Article 10. As elaborated in *Stoll*: criminal sanctions against a journalist "for disclosing information considered to be confidential or secret may discourage those working in the media from informing the public on matters of public interest," thereby undermining their "vital role as 'public watchdog' and the ability of the press to provide accurate and reliable information."[54]

39. Where sanctions, in law or practice, are particularly *targeted* at journalists, in contradistinction to generalized laws or policies that may inadvertently jeopardize the protection of journalist sources, the risk is particularly significant.[55]

40. The imposition of sanctions without independent judicial oversight raises additional concerns. As this Court stated in *Sanoma*, "[i]n matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the

[47] *De Telegraaf v. The Netherlands*, ECtHR, Judgment of 22 November 2012, at para. 90 (law providing a basis for the restriction "must be compatible with the rule of law, which means that it must provide a measure of legal protection against arbitrary interference by public authorities with the rights safeguarded").
[48] *Goodwin v. United Kingdom*, ECtHR (GC), Judgment of 27 March 1996, at para. 39.
[49] *Selisto v. Finland*, ECtHR, Judgment of 16 November 2004, at para. 95.
[50] *O'Neill v. Canada (Att'y Gen.)*, Ontario Sup. Ct. J., 82 O.R. 3d 241, 2006, at para. 163. Canadian security forces alleged in a search warrant that the journalist had violated the law's provisions prohibiting the unauthorized receipt and retention of information. The Superior Court of Ontario is Canada's largest superior trial court with more than 240 federally-appointed full-time judges serving nearly 13 million people.
[51] Peter Omtzigt, Rapporteur, The protection of "whistle-blowers", Report for the Parliamentary Assembly of the Council of Europe Committee on Legal Affairs and Human Rights 14 September 2009, Doc. 12006, para. 33.
[52] *See Sanoma v. The Netherlands*, ECtHR (GC), Judgment of 14 September 2010, at para. 50. *Tillack v. Belgium*, ECtHR, Judgment of 27 November 2007, at para. 65 (source protection not "mere privilege to be granted or taken away").
[53] *See, e.g., De Telegraaf v. the Netherlands*, ECtHR, Judgment of 22 November 2012, at para. 86.
[54] *Stoll v. Switzerland*, ECtHR (GC), Judgment of 10 December 2007, at para. 110.
[55] *De Telegraaf v. The Netherlands*, ECtHR, Judgment of 22 November 2012, at paras. 96-97, comparing facts with *Weber and Saravia v. Germany*, ECtHR, Judgment of 29 June 2006.

Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power." [56]

## II. THE POSSESSION OF INFORMATION BY JOURNALISTS IS PROTECTED

41. Generally, no private person should be subject to sanction for mere possession of government information. This proscription applies with greater force in the case of journalists and other similarly protected persons given the public interest nature of their work. Journalists and other public watchdogs may not be sanctioned for the mere possession of government information, including classified or national security related information, unless they have committed a crime not predicated upon the possession or disclosure of the information, or have a specific intent to cause serious harm to a legitimate public interest, within the meaning of Article 10.

42. The possession of information is protected from government restriction at least to the extent that disclosure would be so protected. It cannot be the law that a journalist who receives information which the state does not want disseminated will be unprotected absent dissemination.

43. The PACE-endorsed Tshwane Principles, cited above, proscribe the imposition of sanctions for the receipt or possession of classified information by members of the public.[57] Possession by a public watchdog, especially where there is no specific intent to harm national security or disclose information directly to a foreign state or hostile non-state actor, does not merit criminal penalty or other sanctions. This principle applies to information classified or withheld on national security grounds.[58]

44. Seeking information is the foundation of the profession of journalists and other public watchdogs. Thus, journalists and others similarly protected, in particular, must be permitted to retain information without fear of sanction, even if the information is not subsequently deemed by the journalist or public watchdog to be in the public interest or disclosed, as part of their professional responsibilities. While not every piece of information provided to a journalist or public watchdog will be of public interest, they must be permitted to receive and possess such information precisely so that they can examine and analyse it, and determine what is of sufficient public interest.[59]

45. There is growing support in international and national law and practice disfavouring sanctions for unauthorised possession, including in the area of national security. For instance, where there is no espionage,[60] demonstration of intent to harm, or actual harm, the laws of Albania, Moldova, and Poland provide no punishment for the unauthorised possession of classified information by members of the public *or* public servants, despite clear penalties for the unauthorised disclosure of such information.[61] In other states – including the Czech Republic, Germany, the Russian Federation, Serbia, and Slovenia – the offence of unauthorised possession requires that the offender was a public servant, had an intent to disclose, used unlawful means, or caused harm.[62] An analysis by the first intervener of laws in Latin America

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[56] *Sanoma v. the Netherlands*, ECtHR (GC), Judgment of 14 September 2010, at para. 82.
[57] Tshwane Principles, see note 12 above, at Principle 47.
[58] *See Turek v. Slovakia*, ECtHR, Judgment of 14 February 2006, at para. 115. *See also* UNHRC, General Comment No. 34 on Article 19, UN Doc. CCPR/C/GC/34, 12 September 2011, para. 30.
[59] International Federation of Journalists, Status of journalists and journalism ethics: IFJ Principles, 5 May 2003, Principle 1.7 ("the law should not interfere in matters which are the proper responsibility of working journalists: namely, the preparation, selection and transmission of information").
[60] Espionage or related offences should require specific intent to harm national security. *See* UNHRC, General Comment No. 34 on Article 19, UN Doc. CCPR/C/GC/34, 12 September 2011, at para. 30.
[61] Criminal Code (Albania), 2011, Arts. 213, 214, 294, 295. *See also* Law No. 8457, on information classified "state secret" (Albania), 1999 (as amended 2006 & 2012), Art. 214 (only an offence if information was procured with intent to hand over to a foreign power). Criminal Code (Moldova), 2009. Criminal Code (Poland), 1997 (as of 1 June 2012), Arts. 265(1) (no penalty for possession but penalty for "use").
[62] Serbia limits the offence to public "officials." Criminal Code (Serbia), 2005, Art. 389(1). Germany requires a finding of an intent to disclose ("treasonous espionage"), and Slovenia an intent to use. Criminal Code (Germany), 1998 (as of 2 October 2009), Sec. 96. Criminal Code (Slovenia), 2008, (as of 14 June 2012), Art. 260(2). In the Russian Federation, unauthorised possession can only be proven if the offender used "theft, fraud, blackmail, coercion, threats of violence or other unlawful means." Criminal Code (Russia), 1996 (as of 29 June 2013), Art. 283.1(1), (2). In the Czech Republic, possession by private persons is an offence only upon proof of intent to disclose, or if "substantial damage or some other

found no possession offence, for anyone, in numerous countries, including Bolivia, Brazil, Chile, Colombia, Mexico, and Uruguay, and a requirement of an intent to harm for the offence of possession in Paraguay.

## III. EVEN MINOR OR THREATENED PENALTIES CAN HAVE CHILLING EFFECTS ON FREEDOM OF EXPRESSION

46. The right to freedom of expression, including the constituent rights to receive and impart information, requires that any penalties, in law and practice, for the receipt, possession or public disclosure of information, be necessary in a democratic society and strictly proportionate.

47. This Court has found that even minor sanctions may produce a "chilling effect" on the freedom of expression, and be impermissible under Article 10. In *Nikula v. Finland*, concerning a penalty imposed on defence counsel, this Court found "even a relatively light criminal penalty or an obligation to pay compensation" – here 750.8 euros in Finland – to be an undesirable constraint on the applicant's freedom of expression.[63] In *Brasilier v. France*, concerning defamation by one candidate of another during an election campaign, the Court ruled that symbolic damages of a single franc constituted an excessive interference with the applicant's freedom of expression as it could have a deterrent effect.[64]

48. Brief periods of detention, and the threat of arrest or prosecution, even where there is no eventual arrest or prosecution, may also constitute improper, unnecessary or disproportionate interference on freedom of expression.[65]

## CONCLUSION

49. The interveners submit that sanctions for unauthorised possession or disclosure of information by journalists and other similarly protected persons seriously impinge on their Article 10 right to receive and impart information, and must be available in only exceptional circumstances. This follows, and is consistent with, this Court's recognition of the strong presumption for the protection of journalistic sources and the limitation of sanctions for public servants who disclose information in the public interest.

50. The State is primarily, or exclusively, responsible for the protection of government information, and journalists and other similarly protected persons may be subject to sanctions for possession or disclosure in the public interest of information, including where classified, only in exceptional circumstances due to the commission of crimes not predicated upon the fact of possession or disclosure. Moreover, this limitation on permissible sanction applies regardless of the source of the information, or the motive of the source; and laws of general applicability which sanction unauthorised possession or disclosure of government information must include safeguards for protections of the rights of journalists to receive and disseminate information of public interest. Finally, even relatively minor penalties—including brief periods of detention or monetary fines—and the threats of such penalties, may constitute an Article 10 violation.

James Goldston, Executive Director
Emilou MacLean, Legal Officer
Open Society Justice Initiative

Ian Seiderman, Legal and Policy Director
International Commission of Jurists

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particularly serious consequence" results or the possession is for personal gain. Criminal Code (Czech Republic), 2009 (as of 2012), Art. 317(2)(c).

[63] *Nikula v. Finland*, ECtHR, Judgment of 21 March 2002, at paras. 17, 47, 50, 54, 55, 59.

[64] *Brasilier v. France*, ECtHR, Judgment of 11 April 2006, at paras. 8–14, 22, 43, 52.

[65] *See Sanoma v. the Netherlands*, ECtHR (GC), Judgment of 14 September 2010, at paras. 70, 72 ("This threat … was plainly a credible one; the Court must take it as seriously as it would have taken the authorities' actions had the threat been carried out.").