

To the  
United Nations  
Special Rapporteur on the Promotion and  
Protection of the Right to Freedom of  
Opinion and Expression

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## **Request for Inquiry into Treason Investigation Against Journalists in Germany**

**Datum:**  
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This letter respectfully requests the United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression to inquire and intervene in the unfounded and disproportionate criminal investigation for treason against two German journalists. The journalists had published excerpts of documents regarding the German authorities' plans for increased and secret Internet surveillance.

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As far as we understand the facts, the investigation constitutes a clear attempt to interfere with legitimate and necessary journalistic work designed to enhance public debate on questions of security, Internet policy and the right to privacy in Germany. They provide a worrying example of intimidation of the media and of whistle-blowers.

In our view, an intervention from the Special Rapporteur would be an important reminder to the Government of Germany as to its international obligations in this field.

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We are writing in our capacity as directors and staff members of Humboldt University's Internet Law Clinic. The clinic specializes in legal issues concerning Internet and the law and closely collaborates with a number of national and international NGOs and other partners. You can find us online at [www.hlci.de](http://www.hlci.de).<sup>1</sup>

### **1. The Facts**

The following description of the case is based on media reports from the last few days. Many aspects of the case are still unclear, and several pieces of information appear to be contradictory:

Up until very recently, two German journalists, Markus Beckedahl und Andre Meister, were under investigation for alleged treason. The investigation was lead by the German Prosecutor General of the Federal Court of Justice. It was initiated because of two

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articles by Mr. Meister which had been published on netzpolitik.org. Mr. Beckedahl is netzpolitik.org's editor-in-chief.

Netzpolitik.org is a leading journalistic platform on all aspects of Internet and security policy. It plays an instrumental role for public debate concerning government accountability, and—in particular—the role of security services in shaping and controlling Internet-based communications. Over the past few years, it published numerous articles on the surveillance of telecommunications and on the German Parliament's Committee of Inquiry on NSA's communication surveillance. For its work, netzpolitik.org was, among other things, awarded Best International Blog by Reporters without Borders' Freedom Blog Awards for best blogs defending freedom of expression<sup>2</sup> as well as the Grimme Online Award SPEZIAL,<sup>3</sup> one of the most prestigious German awards for outstanding journalism.

As part of their continuous reporting on ongoing and planned Internet surveillance, netzpolitik.org published, on February 25, 2015<sup>4</sup> and April 15, 2015<sup>5</sup> respectively, articles disclosing parts of three classified documents. They concerned the Bundesamt für Verfassungsschutz' (Federal Office for the Protection of the Constitution, Germany's internal intelligence service, hereinafter: BfV,) budget for massively increased surveillance activities. Parts of the information revealed in the articles had already been published by other news outlets.<sup>6</sup> There is contradictory information as to the degree of the documents' confidentiality. A number of sources report that all documents were classified as "VS-VERTRAULICH" (Classified document – confidential), the second lowest of four confidentiality classes used by the German government. According to the BfV, however, two of the documents were labeled GEHEIM (secret), one step up in terms of confidentiality.<sup>7</sup> In any event, the documents only contained general information and did not provide any operative details. Of the documents allegedly classified GEHEIM, netzpolitik.org published but excerpts of the prefaces.<sup>8</sup> After publication, one of the articles was discussed in the German Parliament. There, a representative of the Ministry of the Interior openly elaborated on the matter.<sup>9</sup> Evidently, the need for secrecy was low; the publications did not affect any major interests of national security. To the contrary: The documents provided important general information on the German government's plans for its surveillance program, a topic of utmost relevance for any democratic society as well as the fundamental and human rights of its citizens.<sup>10</sup> Thus, there can be no doubt that the journalists at netzpolitik.org were pursuing an important journalistic function when they publicized the articles and documents.

<sup>2</sup> <http://www.dw.com/en/german-blog-wins-freedom-award/a-1617166-0>.

<sup>3</sup> <http://www.grimme-institut.de/html/index.php?id=1908-c12846>.

<sup>4</sup> <https://netzpolitik.org/2015/geheimer-geldregen-verfassungsschutz-arbeitet-an-massendatenauswertung-von-internetinhalten/>.

<sup>5</sup> <https://netzpolitik.org/2015/geheime-referatsgruppe-wir-praesentieren-die-neue-verfassungsschutz-einheit-zum-ausbau-der-internet-ueberwachung/#EFI-Konzept>. An English version of the article is available at <https://netzpolitik.org/2015/secret-department-we-present-the-new-german-domestic-secret-service-unit-to-extend-internet-surveillance/>.

<sup>6</sup> See the various links to other websites in the abovementioned articles by netzpolitik.org.

<sup>7</sup> See the criminal complaints of the BfV, available at <https://netzpolitik.org/wp-upload/Anzeige-1-S-1.jpg> and <https://netzpolitik.org/wp-upload/Anzeige-2-S-1.jpg>.

<sup>8</sup> See BfV's criminal complaints, available at <https://netzpolitik.org/wp-upload/Anzeige-1-S-1.jpg> and <https://netzpolitik.org/wp-upload/Anzeige-2-S-1.jpg>.

<sup>9</sup> The written question of MP Ströbele and the government's answers are available at <http://dbtg.tv/fvid/4693478> and in writing at <http://dipbt.bundestag.de/dip21/btp/18/18090.pdf> – P.8555, p. 27-8.

<sup>10</sup> Several recent UN documents have pointed out that Internet surveillance has far-reaching and severe implications for human rights and democracy, see the Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, A/HRC/23/40, stating that "[c]ommunications surveillance should be regarded as a highly intrusive act that potentially interferes with the rights to freedom of expression and privacy and threatens the foundations of a democratic society", and the Resolution of the General Assembly 68/167 on the right to privacy in the digital age, adopted by the General Assembly on 18 December 2013, stressing that the exercise of the right to privacy, according to which no one shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, "is important for the realization of the right to freedom of expression and to hold opinions without interference, and is one of the foundations of a democratic society".

And yet, it was because of these publications that German authorities instituted criminal investigations for treason against Markus Beckedahl and Andre Meister. Suggesting that the leaking and publication of the abovementioned documents constituted criminal acts, the BfV filed two criminal complaints.<sup>11</sup> Formally, the complaints were directed against "unknown suspects". However, they make specific reference to Mr. Beckedahl and Mr. Meister. The documents were forwarded to the Public Prosecutor General of the Federal Court of Justice, a special office for the prosecution of major crimes against national security. After receiving the documents, the Public Prosecutor General asked the BfV for an assessment of whether the documents published by netzpolitik.org constituted state secrets,<sup>12</sup> one of the key elements of the crime of treason. Unsurprisingly, the BfV, the very office that had originally filed complaints in the case,<sup>13</sup> apparently answered in the affirmative.<sup>14</sup> The legal assessment is not known to the public.<sup>15</sup> The same is true for another legal opinion which the Public Prosecutor General claims to have requested and received from a neutral expert and which allegedly confirms the BfV's assessment. Not even the name of that expert has been revealed to the public.<sup>16</sup>

On May 13, 2015, the Public Prosecutor General commenced a formal investigation for treason against Mr. Beckedahl and Mr. Meister. Under sec. 94 para 1 of the German Criminal Code,<sup>17</sup> treason is punishable by between one year and lifetime imprisonment. As such, it is a felony under the German classification of crimes and offenses<sup>18</sup>. That makes it significantly harder to obtain probation and parole.<sup>19</sup>

The start of a formal investigation has far-reaching consequences for the suspect. From this moment on, the suspect's right to privacy is severely restricted. In the case of alleged treason, one of the most serious crimes against national security, the prosecution has particularly extensive powers. Available measures include the interception of communications without knowledge of the individual (§ 100a StPO) as well as residential and non-residential surveillance (§§100c-100f StPO).

Given the very low likelihood that the prosecution would find probable cause to go to trial, it seems as if the German authorities attempted to fabricate an opportunity to monitor and intercept the journalists' communications with the hopes of identifying their sources and finding out more about the work and contacts of netzpolitik.org.<sup>20</sup> In this context, it is noteworthy that under the current draft for a data retention law,<sup>21</sup>

<sup>11</sup> The BfV's criminal complaints are available at <https://netzpolitik.org/wp-upload/Anzeige-1-S-1.jpg> and <https://netzpolitik.org/wp-upload/Anzeige-2-S-1.jpg>.

<sup>12</sup> According to sec. 93 para 1 of the German Criminal Code, state secrets are "facts, objects or knowledge which are only accessible to a limited category of persons and must be kept secret from foreign powers in order to avert a danger of serious prejudice to the external security of the Federal Republic of Germany." The prejudice must not only be serious but also concrete and specific. Risks that are merely abstract or vague do not qualify as serious prejudices within the meaning of sec. 93 and 94.

<sup>13</sup> The second criminal complaint as well as the legal assessment for the Public Prosecutor General may even have been written by the same person. Both are signed by a Mr. Müller. As to the assessment, see <http://www.sueddeutsche.de/politik/unfreiwillig-komisch-herr-mueller-vom-verfassungsschutz-1.2595802>.

<sup>14</sup> See <http://www.sueddeutsche.de/politik/unfreiwillig-komisch-herr-mueller-vom-verfassungsschutz-1.2595802>.

<sup>15</sup> However, the article referred to in the preceding footnote and written by two journalists with access to the assessment conveys a first impression of the weakness of the BfV's line of reasoning.

<sup>16</sup> As of now, the prosecutorial file is secret. Not even the suspects' lawyers have been granted access.

<sup>17</sup> An English version of the Criminal Code is available at [http://www.gesetze-im-internet.de/englisch\\_stgb/](http://www.gesetze-im-internet.de/englisch_stgb/).

<sup>18</sup> "Felonies are unlawful acts punishable by a minimum sentence of one year's imprisonment" (sec. 12 para 1 German Criminal Code) while misdemeanours are "unlawful acts punishable by a lesser minimum term of imprisonment or by fine" (sec. 12 para 2 German Criminal Code).

<sup>19</sup> See sec. 56 of the German Criminal Code.

<sup>20</sup> In a press release issued on August 2, 2015, the Public Prosecutor General informs that he instructed the police and his office to momentarily refrain from taking any measures against the journalists. The document is available at <https://www.generalbundesanwalt.de/de/showpress.php?newsid=559>.

<sup>21</sup> The bill („Entwurf eines Gesetzes zur Einführung einer Speicherpflicht und einer Höchstspeicherfrist für Verkehrsdaten") is currently being debated in the German Parliament. The draft is available at

telecommunication providers would collect and retain journalists' communication data. Under certain circumstances, especially where journalists do not have the right to refuse to give evidence, German authorities would be allowed to access that data. Technically, they would be able to do so in other cases as well. If the bill became law, the risk of discovery for any sources and whistle-blowers would rise significantly.

At the end of July 2015, the Public Prosecutor General informed Mr. Beckedahl and Mr. Meister of the ongoing investigation.<sup>22</sup> This led to a public outcry in Germany. Many national and international journalists and other members of the media expressed their support for the two journalists.<sup>23</sup> Relevant politicians largely denied responsibility, although it appears that both the Federal Ministries of Justice and of the Interior as well as the Coordinator for the Intelligence Services at the Federal Chancellery had been informed very early on, and that they did not take decisive steps to halt the investigations. However, after publicly criticizing the Federal Minister of Justice for interfering with his investigation, the Public Prosecutor General was dismissed. Finally, and at least partially due to increasing public pressure, the new acting Public Prosecutor General ended the investigation on August 10, 2015. The precise chain of events and (political) responsibilities do, however, remain unclear. Moreover, the investigations appear to be part of a general trend in Germany to interfere with legitimate journalistic activities.

## 2. Violation of the Right to Freedom of Opinion and Expression

2.1. The above investigation raises serious concerns as to the observance of the right to freedom of opinion and expression. This is especially true for journalists who work on sensitive issues relating to national security and the right to privacy which are highly relevant for a democratic society. The mere fact that a treason investigation was started may have a severe chilling effect on the work of netzpolitik.org and on media in general, thereby severely affecting free expression:

First, knowing that treason investigations are under way or could be initiated affects the ability of the media in general and netzpolitik.org in particular to investigate sensitive issues both now and in the future. Journalists may refrain from addressing critical government-related questions for fear of becoming the target of serious criminal investigations and possibly even convictions. The intimidating effect is particularly strong because treason is a felony; this affects the chances to obtain probation and parole.

Second, the possibility that the state may initiate criminal proceedings puts the essential relationship between journalists and their sources at risk. Whistle-blowers and other sources will be much less likely to contact netzpolitik.org and other media if they have to fear that the journalists will not be able to protect them because their communications are intercepted.<sup>24</sup>

Third, a treason investigation has a strong psychological effect. Traditionally, treason is regarded as particularly dishonorable since it implies that the suspect betrayed society and acted against its core interests. For journalists whose work consists of uncovering serious societal and governmental problems, including unlawful behavior by the authorities, it is not acceptable to be discredited in such a way.

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[http://www.bmju.de/SharedDocs/Downloads/DE/pdfs/Gesetze/RegE\\_Hoehchstspeicherfrist.pdf?\\_\\_blob=publicationFile](http://www.bmju.de/SharedDocs/Downloads/DE/pdfs/Gesetze/RegE_Hoehchstspeicherfrist.pdf?__blob=publicationFile).

<sup>22</sup> <https://netzpolitik.org/2015/verdacht-des-landesverrats-generalbundesanwalt-ermittelt-doch-auch-gegen-uns-nicht-nur-unsere-quellen/>.

<sup>23</sup> See <http://www.netzpolitik.us>.

<sup>24</sup> According to a press release issued on August 2, 2015, the Public Prosecutor General had instructed investigators to momentarily refrain from taking any measures against the journalists (see <https://www.generalbundesanwalt.de/de/showpress.php?newsid=559>). However, as the prosecutorial file is still secret, it cannot be verified whether or not this instruction actually existed and, if so, to what extent it was observed. In any event, such an instruction could only mildly mitigate the violation of the journalists' freedom of expression: First, it has no statutory basis and safeguards and could thus have been taken back at any time, in particular by a new Public Prosecutor General. Second, the mere possibility that measures may be initiated at any time obviously intimidates journalists and sources alike.

2.2. The publications obviously did not constitute treason. Numerous legal experts came to that conclusion.<sup>25</sup> Even members of government openly acknowledged that.<sup>26</sup> It is therefore very likely that the real goal of the investigation was to interfere with legitimate journalistic work in order to expose sources, and to intimidate journalists and whistle-blowers so that they would refrain from publishing sensitive material in the future.

Not only did the documents reveal no state secrets, as the new acting Public Prosecutor General confirmed this week.<sup>27</sup> None of the other elements of the crime of treason was met in the present case. Sec. 94 para 1 lit. b) of the German Criminal Code requires that a publication is made "in order to prejudice the Federal Republic of Germany or to benefit a foreign power". Mr. Beckedahl and Mr. Meister clearly aimed to foster public discussion on the limits of lawful and proportionate surveillance of online activities by the German government. It would be very far-stretched to claim that they intended to prejudice Germany or to benefit a foreign power. Furthermore, the publication did not create a "danger of serious prejudice to the external security" for Germany, as required by sec. 94 para. 1. Such a danger would have to be specific and close to becoming a reality. None of this appears even remotely possible in the present case.

2.3. The proceedings appear to be part of a general trend to interfere with legitimate journalistic activities.<sup>28</sup>

For example, the current bill on data retention, which is being debated in the German Parliament right now, includes a provision that would, under certain circumstances, criminalize the receipt and publication of illegally obtained information.<sup>29</sup> The provision could also apply to journalists that receive classified information from sources within government. The receipt of such information would be a prosecutable offense and would carry "a sentence of up to three years or a fine." The current bill's exception for professional journalists, introduced in part due to public pressure,<sup>30</sup> only covers the receipt of information for use in a concrete publication.<sup>31</sup> The receipt of information for other purposes, such as the assessment of its importance, the credibility of its source or the collection as part of a greater research project, is not privileged. This will significantly impact the work of (investigative) journalists and might make it impossible for them to cooperate with whistle-blowers at all.<sup>32</sup> Ulrich Schellenberg, president of the German Bar Association, therefore concludes that "[t]he risks pertaining to the work of a journalist will clearly be greater. ... The German government is massively increasing its surveillance measures while going even further to protect its own secrets."<sup>33</sup>

<sup>25</sup> See only <http://www.internet-law.de/2015/07/ist-das-landesverrat.html>; <http://blog.beck.de/2015/08/01/ermittlungen-des-gba-wegen-landesverrats-schlag-ins-wasser?page=1>; <http://www.eaid-berlin.de/?p=730>, <http://blog.wawzyniak.de/landesverrat/>; <http://rsw.beck.de/aktuell/meldung/medienrechtler-haelt-vorwurf-des-landesverrats-gegen-netzpolitikorg-fuer-zweifelhaft>; <https://netzpolitik.org/2015/landesverrat-warum-der-vorwurf-rechtlich-nicht-zu-halten-ist/>.

<sup>26</sup> See only <http://www.zeit.de/digital/internet/2015-07/netzpolitik-ermittlungen-journalisten-innenministerium-maassen>.

<sup>27</sup> <http://www.generalbundesanwalt.de/de/showpress.php?newsid=561>.

<sup>28</sup> See only <http://www.spiegel.de/international/germany/berlin-goes-after-journalists-to-protect-state-secrets-a-1047265.html>.

<sup>29</sup> The Bill would introduce a sec. 202d into the German Criminal Code. It would prohibit, *inter alia*, to receive or publish information which was not available to the public before if that information was obtained by another person through an illegal act and received or published for economic gain or in order to prejudice another person. See [http://www.bmjv.de/SharedDocs/Downloads/DE/pdfs/Gesetze/RegE\\_Hoehchstspeicherfrist.pdf?\\_\\_blob=publicationFile](http://www.bmjv.de/SharedDocs/Downloads/DE/pdfs/Gesetze/RegE_Hoehchstspeicherfrist.pdf?__blob=publicationFile), p. 20.

<sup>30</sup> If the bill entered into force, the privilege would become sec. 202d para 3 no. 2 of the German Criminal Code.

<sup>31</sup> See the official explanation of the bill as introduced by the German government, [http://www.bmjv.de/SharedDocs/Downloads/DE/pdfs/Gesetze/RegE\\_Hoehchstspeicherfrist.pdf?\\_\\_blob=publicationFile](http://www.bmjv.de/SharedDocs/Downloads/DE/pdfs/Gesetze/RegE_Hoehchstspeicherfrist.pdf?__blob=publicationFile), p. 57.

<sup>32</sup> Non-professional journalists, such as many bloggers, and whistle-blower platforms may be affected even more severely, as the privilege does not apply to them, see <http://www.internet-strafrecht.com/gesetzentwurf-zur-strafbarkeit-der-datenhehlerei-der-missverstandene-entwurf/internet-strafrecht/internetstrafrecht/>.

<sup>33</sup> <http://www.spiegel.de/international/germany/berlin-goes-after-journalists-to-protect-state-secrets-a-1047265.html>.

In this context, we would also like to point to recent attempts by members of the Federal Ministry of Defense to use the intelligence service of the German armed forces (Militärischer Abschirmdienst, MAD) as a platform for launching investigations against journalists who reported on severe technical defects of newly acquired guns made by the company Heckler & Koch. Fortunately, the MAD did not pursue this matter. After her office was informed of the incident, the Federal Minister of Defense took three months to retire the head of the relevant department within the ministry—she only did so after the media had brought the case to public attention. Another member of the same department, also instrumental in pushing for the MAD's involvement, still remains in his position and continues to work closely with representatives of the arms industry.<sup>34</sup>

2.4. The investigations against Mr. Beckedahl and Mr. Meister constitutes a severe violation of their right to freely express their opinion as journalists as guaranteed by Article 19 of the ICCPR.<sup>35</sup> The norm has particular weight as the freedom of the press is "essential in any society to ensure freedom of opinion".<sup>36</sup>

### 3. Request

In light of the facts and circumstances outlined above, it is evident that Mr. Beckedahl and Mr. Meister are subjected to treatment that is contrary to basic principles of international human rights law. By starting treason investigations, German authorities probably attempted to use the means of criminal law in order to interfere with legitimate journalistic work and to intimidate the journalists and their sources. They also probably intended to deter future journalistic investigations into security measures by the German government and its allies.

Accordingly, the signatories respectfully request the Special Rapporteur to intervene by sending an Allegation Letter to the German Authorities about this case in which he emphasizes Germany's obligations under international Human Rights Law regarding the right to freedom of opinion and expression, and in particular the freedom of press. We believe such a letter will send an important signal to the highest levels of the German Government that this matter is being monitored by the United Nations and its Special Procedures mechanisms. We also respectfully request that the Special Rapporteur ask the German government how similar abuses of criminal law will be prevented in the future. Finally, we respectfully request the Special Rapporteur to express his concern about any criminalization of journalists that use leaked information, which may become possible if the draft German data retention law enters into force, and ask the German government how these concerns shall be addressed.

We remain at your disposal for any questions you might have.

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Sven Asmussen

<sup>34</sup> For more information on the matter, see <http://www.spiegel.de/politik/deutschland/g36-geheimdienst-mad-sollte-journalisten-ausspaehen-a-1032454.html>; <https://netzp politik.org/2015/militaerischer-abschirmdienst-wir-veroeffentlichen-wie-der-militaergeheimdienst-gegen-journalisten-vorgehen-sollte/>; <http://www.zeit.de/politik/deutschland/2015-05/mad-sollte-whistleblower-und-journalisten-ausspaehen>; <http://www.zeit.de/politik/deutschland/2015-05/g-36-gewehr-heckler-koch-verteidigungsministerium-von-der-leyen>.

<sup>35</sup> Ratified by Germany in 1973.

<sup>36</sup> General Comment 34 to Article 19.