

D. Miguel Ángel Moratinos Cuyaubé  
Spanish Minister of Foreign Affairs  
OSCE Chairman in Office

29 March 2007

Dear Minister

**Re: Freedom of Expression Concerns in Western Europe**

In January, my colleague Luitgard Hammerer met you in Vienna during your meeting with NGOs on the occasion of the launch of the Spanish Chairmanship of the OSCE. In the intervention she made at that time, she mentioned that ARTICLE 19, Global Campaign for Free Expression, has a number of concerns regarding freedom of expression not only in Eastern Europe but also in Western Europe. You expressed an interest in receiving a short written briefing from us on these concerns. Please accept this letter, which contains a summary of our key concerns, as that briefing. I hope that you will be able to use your current position as OSCE Chairman in Office to raise these concerns with OSCE participating states.

**1. Antiquated defamation legislation**

Many OSCE countries continue to face problems achieving an appropriate balance between the protection of reputation and the right to freedom of expression. In 2005, for example, out of a total of six freedom of expression cases decided by the European Court of Human Rights (ECtHR) involving Western European States, the vast majority, five in total, involved defamation laws and the Court found a violation of freedom of expression in four of these five.

The most pressing problems with defamation laws in Western Europe are as follows:

Defamation is still treated as a crime in the vast majority of Western European countries,<sup>1</sup> punishable by a fine and usually even imprisonment.<sup>2</sup> Most of these provisions date back to the 19<sup>th</sup> century or earlier. In some countries, they are rarely applied but remain on the books.<sup>3</sup> The trend towards decriminalisation visible in younger democracies – such as Bosnia and Herzegovina, Ukraine, Georgia, Ghana, Togo and the Central African Republic – has not yet been picked up in Western Europe.

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<sup>1</sup> The only exception is Cyprus.

<sup>2</sup> This is particularly serious in the Netherlands – according to official figures from the Dutch government, 1 January 2002 and 30 June 2004 (published by the OSCE Representative on Freedom of the Media), 104 people were incarcerated for defamation, libel and insult. Journalists have also been imprisoned in Belgium, Denmark, Finland, Italy, Malta, Norway and Switzerland.

<sup>3</sup> For example, the United Kingdom, where there has not been a successful prosecution for three decades.

Article 19 of the Universal Declaration of Human Rights:

'Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers'



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In most Western European countries,<sup>4</sup> defamation laws continue to shield public figures, the State, government bodies and official symbols from criticism, despite the clear position of the ECtHR that public figures and bodies should tolerate *more*, not less criticism than ordinary people.<sup>5</sup> For example, the Austrian penal code still prohibits “publicly disparaging the Austrian State or its national symbols”,<sup>6</sup> the Italian criminal code contains a long list of provisions on offences to the President, Republic, Armed Forces, State emblems, and others,<sup>7</sup> whereas in the Netherlands, “insult to the King” is forbidden.<sup>8</sup> While many of these laws are rarely if ever applied, they may be arbitrarily revived.<sup>9</sup> They are also used to justify provisions in other countries which do pose a serious threat to freedom of expression. For example, the infamous Article 301 of the Turkish Penal Code, which prohibits “denigration of Turkishness or the organs of the State”, is often defended by reference to similar provisions in Western European laws. This is the article that was used to try the recently murdered writer Hrant Dink, Orhan Pamuk and many others, often for discussing the Armenian genocide of 1915.

Excessive damages in civil defamation cases are also problematic in some countries. For instance, in November 2006 in Ireland, businessman Denis O’Brien was awarded €750,000 following a false accusation of corruption by the *Irish Mirror* in 1998, despite the fact that the newspaper responsible for the publication had conceded the story was wrong. O’Brien had previously been awarded a sum of €320,000, a verdict that was overturned by the Supreme Court, which had found this amount to be “disproportionately high.”<sup>10</sup> O’Brien is one of the 10 richest Irishmen and is in many ways a public figure who, according to the case law of the European Court of Human Rights, has to display a high degree of tolerance towards criticism. Similarly, the United Kingdom is notorious for its claimant-friendly libel laws and exorbitant damages. The ‘chilling effect’ this exercises on freedom of expression is illustrated, among others, by the fact that US publisher Random House decided not to publish two best-selling books in the UK – *House of Bush, House of Saud: The Secret Relationship between the world's two most powerful families*, by Craig Unger, and *While America Slept: the Failure to Prevent 9/11*, by investigative journalist Gerald Posner – out of fear for the costs of fighting libel cases in British courts.<sup>11</sup>

## **2. Ill-conceived measures against terrorism**

Recent years have seen the adoption of laws in Western Europe containing vague and wide definitions of “terrorism” which could be used to stifle legitimate political and social protest.

The United Kingdom provides a good example. The last ten years have seen the introduction of ever stricter laws, with a broader definition of what constitutes ‘terrorism’. A particular problem has been the banning, in the 2006 Terrorism Act, of not just direct

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<sup>4</sup> Austria, Belgium, Denmark, France, Germany, Greece, Iceland, Italy, Luxemburg, the Netherland, Norway, Spain, Switzerland and the United Kingdom.

<sup>5</sup> See, for example, *Lingens v. Austria*, 24 June 1986, Application No. 9815/82 (European Court of Human Rights), para. 42.

<sup>6</sup> Strafgesetzbuch, Art. 248.

<sup>7</sup> Codice penale, Arts. 270 and 290-99.

<sup>8</sup> Wetboek van Strafrecht, Art. 111.

<sup>9</sup> This happened recently in France, when the King of Morocco promoted charges based on a criminal code prohibition on insulting foreign heads of States. France was found by the European Court to have violated the right to freedom of expression as a result of the ensuing conviction by French courts. See *Colombani v. France*, 25 June 2002, Application No. 51279/99.

<sup>10</sup> See [http://www.finfacts.com/irelandbusinessnews/publish/article\\_10008203.shtml](http://www.finfacts.com/irelandbusinessnews/publish/article_10008203.shtml).

<sup>11</sup> See <http://www.ifex.org/en/content/view/full/61063/>. The current ‘practical ceiling’ in the United Kingdom amounts to 200,000 GBP (€292,500). The United Kingdom’s awards were found disproportionate by the European Court in the case *Tolstoy Miloslavsky v. United Kingdom*, 13 July 1995, Application No. 18139/91, in which £1,500,000 in damages were awarded to the plaintiff.

incitement to terrorism but also of anything that can be interpreted as “indirect encouragement” or “other inducement” of terrorism, including in some circumstances glorification. This inhibits valid discussion and has a detrimental effect on community relations. It is fundamental to the guarantee of freedom of expression that any restriction for the purpose of national security, including preventing terrorism, is closely linked to preventing *imminent* violence.

In 2005-2006, the British media recorded the following incidents of the use of this law to curtail rights:

the detention of more than 600 people during the 2005 Labour Party conference including, famously, the detention of an 82 year old activist who had earlier been evicted from the conference for heckling Jack Straw;<sup>12</sup>

- the arrest of a pedestrian for walking along a cycle path in Dundee;<sup>13</sup>
- the stopping and searching of an 11 year old girl who participated in a peaceful protest at an RAF base;<sup>14</sup>
- the detention of trainspotters at Motherwell, Reading, Slough and Croydon railway stations;<sup>15</sup>
- the detention of an 80 year old RAF veteran who carried a placard and wore a t-shirt with “anti-Blair info”;<sup>16</sup> and
- the detention of a 21 year old student for taking pictures of the M3 motorway for a web-design company.<sup>17</sup>

Anti-terror legislation from Denmark, Spain and France also criminalise justification of glorification of terrorism. In mid-March 2007, 39 States had signed the Council of Europe Convention on the Prevention of Terrorism,<sup>18</sup> and six had ratified it. The Convention is due to come into force in 1 June 2007, and requires States to criminalise ‘provocation’ of terrorism, defined as ‘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*’ [italics added].<sup>19</sup> This wording is excessively broad: international standards limit restrictions to free expression on the grounds of national security when there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence. This principle has been endorsed by the UN Special Rapporteur on Freedom of

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<sup>12</sup> As reported in *The Scotsman*, 3 October 2005.

<sup>13</sup> As reported in *The Times*, 17 October 2005.

<sup>14</sup> Widely reported, including in *The SundayTimes*, 18 December 2005.

<sup>15</sup> As reported in *The Scotsman*, 9 February 2006.

<sup>16</sup> As reported in *The Sunday Times*, 18 December 2005.

<sup>17</sup> As reported in *This is Hampshire*, 20 October 2005.

<sup>18</sup> [Convention on the Prevention of Terrorism, Warsaw, 16 May 2005, due to enter into force on 1 June 2007. <http://conventions.coe.int/Treaty/en/Treaties/Html/196.htm>.](http://conventions.coe.int/Treaty/en/Treaties/Html/196.htm)

<sup>19</sup> Article 5, on ‘Public provocation to commit a terrorist offence’.

Opinion and Expression,<sup>20</sup> as well as by the European Court of Human Rights<sup>21</sup> and many national courts.<sup>22</sup>

### **3. Weak freedom of information laws**

Many Western European States have much weaker legal guarantees of the public's right to access information held by public bodies than the younger democracies of Eastern Europe. Examples of countries with particularly poor legislation in this field are Austria,<sup>23</sup> Spain<sup>24</sup> and Italy.<sup>25</sup> These countries also have no public interest override. A 2006 empirical survey by the Open Society Justice Initiative found that authorities in Armenia, Bulgaria and Romania significantly outperformed France and Spain in providing information.<sup>26</sup>

In the United Kingdom, freedom of information legislation entered into force only in 2005 and it remains to be seen how effective it will be. Unfortunately, its future is already under threat from two proposed amendments, one exempting the correspondence of MPs from disclosure and another making it much easier for public bodies to refuse complex requests on the basis that they are unduly costly.

In Cyprus, Malta, Luxemburg and Lichtenstein there is still no freedom of information legislation.

### **3. Problematic blasphemy laws and overbroad hate speech legislation**

Many Western European States have laws on the books which offer overbroad protection to religious or other groups at the expense of freedom of expression. France, for example, has repeatedly been reprimanded by international courts for provisions in its 1881 *Loi sur la liberté de la presse* which protect religious groups from insult and prohibit challenging the conclusions of the Nuremberg Tribunal.<sup>27</sup>

We identify three groups of such laws: blasphemy laws, which prohibit the mockery or denial of a religion; 'denial laws', which prohibit contesting the occurrence of a historical event, usually genocide; and hate speech laws, which protect individuals against statements which attack them on national, religious or racial grounds.

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<sup>20</sup> See UN Doc E/CN.4/1996/39, 1996, para. 154. See UN Doc. E/CN.4/1996/53, 1996, Preamble, for a statement on this by the UN Commission on Human Rights.

<sup>21</sup> See *Karatas v. Turkey*, 8 July 1999, Application No. 23168/94, paras. 50-52.

<sup>22</sup> See, for example, *Athukoral v. AG*, 5 May 1997, SD Nos. 1-15/97 (Supreme Court of Sri Lanka) and *Secretary of State for the Home Department v. Rehman* [2001] UKHL 47 (United Kingdom House of Lords).

<sup>23</sup> Pursuant to Article 20(3) of the Constitution, the authorities cannot release information relation to public security, defence, international relations or economic/financial interests of the government. For more information, see David Banisar, *Freedom of Information around the World. A Global Survey of Access to Government Information Laws*. <http://www.privacyinternational.org/foi/foisurvey2006.pdf>

<sup>24</sup> There are blanket bans on information on, for example, national defence and security. There are several laws that classify information. According to a 2005 survey by Sutentia and the Open Society Institute, the majority of information requests remain unanswered or are answered incorrectly.

<sup>25</sup> Italian legislation mandates that information requesters must have a 'legal interest' to be granted information, meaning 'a personal concrete interest to safeguard in legally relevant situations'. Large categories of information including national defence and international relations are excluded from public scrutiny.

<sup>26</sup> *Transparency and Silence: A Survey of Access to Information Laws and Practices in 14 Countries*, OSI, September 2006, available online at:

[http://www.soros.org/resources/articles\\_publications/publications/transparency\\_20060928](http://www.soros.org/resources/articles_publications/publications/transparency_20060928).

<sup>27</sup> See, for example, *Faurisson v. France*, 8 November 1986, Communication No. 550/1993, UN Doc. CCPR/C/58/D/550/1993 (UN Human Rights Committee); *Lehideux and Isorni v. France*, 23 September 1998, Application No. 24662/94 (European Court of Human Rights); and *Giniewski v. France*, 31 January 2006, Application No. 64016/00 (European Court of Human Rights).

## *Blasphemy*

Many free speech advocates, including ARTICLE 19, consider blasphemy laws to be unjustifiable *per se*, because they provide religious beliefs with a special immunity not afforded to other sorts of beliefs, for example those based on a secular worldview. Blasphemy laws still exist in most Western European countries<sup>28</sup> but have been repealed in Sweden and Spain. In most other countries, application of these laws is rare; in Denmark, for example, the last case was in 1938. The continued existence of these laws can, however, give rise to tensions when religious groups call for their application. In the late 1980s, British Muslims called for the prosecution of Salman Rushdie for the alleged blasphemy in the *Satanic Verses*, but were unsuccessful, in part because British blasphemy law protects only the Anglican faith. More recently, Danish Muslims have litigated, again unsuccessfully, in an attempt to force prosecution over the cartoons of the Prophet Mohammed.

## *Denial laws*

There are currently five Western European States which prohibit denial of the Holocaust: Austria, Belgium, France, Germany and Switzerland. German Federal Justice Minister Brigitte Zypries has announced Germany's intention to push for an EU-wide ban on denying the Holocaust and other genocides during its EU presidency.

ARTICLE 19 does not believe that this type of law is an appropriate or effective way to combat racism. Freedom of expression is an important part of a democratic State's strategy for eradicating bigotry and enlightening citizens. In the words of the European Court of Human Rights, free speech extends to statements which "shock, offend or disturb";<sup>29</sup> the truth should be established through vigorous debate, not through legislative act. The few prosecutions of Holocaust deniers to date have done more to give discredited historians a media spotlight, thereby augmenting their status as dissenters from the *status quo*, than to address the very real problem of racism.

Another problem with denial laws is their potential to proliferate. In October 2006, a draft law prohibiting the denial of the 1915 Armenian genocide was adopted by the French National Assembly. This will no doubt prompt other groups which have been wronged in the past to demand similar legislative bans. Writing history through legislation opens a Pandora's box.

## *Hate speech laws*

Hate speech laws can be a legitimate way of combating racism, insofar as they protect vulnerable groups from objective harm, such as incitement to hostility, discrimination or violence. A problem in some Western European States is that hate speech laws go beyond this and prohibit statements which are merely subjectively perceived as offensive. For example, Article 13-1 of France's above-mentioned *Loi sur la liberté de la presse* prohibits, amongst others, 'attacks against honour' by reason of ethnicity, nationality, race or religion. A provision like this could be used to stifle criticism of, for example, a religious conviction, even if that criticism reflected a sincerely held view and was not motivated by hatred.

All of the positions articulated above find significant support in international law and standards. Of particular relevance here is the fact that the Office of the Special Representative on the Freedom of Media of the OSCE has spoken out on all of them in his various statements.

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<sup>28</sup> Austria, Belgium, Denmark, Finland, Germany, Greece, Ireland, Italy, Malta, Netherlands, United Kingdom.

<sup>29</sup> See *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/72, para. 49 (European Court of Human Rights).

ARTICLE 19 recommends that, as a priority, the OSCE urge all participating states:

- to repeal all criminal defamation laws and protect reputations only through the civil law;
- to ensure that anti-terror legislation is carefully and narrowly drafted so as not to undermine the right to freedom of expression;
- to enact and implement effective freedom of information laws, in line with best international standards; and
- to ensure that their legislative framework for protecting minorities does not unduly restrict freedom of expression.

ARTICLE 19 would be happy to continue a dialogue with the OSCE on these issues and to provide any assistance we can to further the recommendations above.

Yours truly,

A handwritten signature in black ink, appearing to read 'A. Callamard', with a long horizontal flourish extending to the right.

Dr. Agnès Callamard

Executive Director