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STATEMENT

WikiLeaks and Internet Disclosures

The current debate around WikiLeaks highlights the potential of the internet to make previously secret information of public interest widely available. ARTICLE 19 calls for governments to improve their regimes for public access to information, refrain from punishing WikiLeaks and other sites that are releasing information in the public interest, and to protect and encourage whistleblowers.

ARTICLE 19 welcomes the use of the internet by new and established organisations as a mechanism to expand and democratise the availability of sources of information. We believe that this represents a powerful extension of the media's role to receive information from confidential sources and make it available to the public.

The recent debate around WikiLeaks and the disclosure of secret US government documents related to the Afghan War Diary and Baghdad airstrike video underscores the need for strong legal rights to be in place in all countries for the public to seek, receive and impart information as guaranteed by the Universal Declaration of Human Rights and other international, regional and national human rights instruments. This includes recognition of the right to information, protection of whistleblowers, and facilitating the media's ability to obtain and publish information without barriers.

It should be recognised that WikiLeaks is not the only site on the Internet that provides a forum for whistleblowers. Other sites, including Cryptome.com and FAS.org, have provided an important public service making information of this type available for many years.

ARTICLE 19 believes that the Johannesburg Principles on National Security, Freedom of Expression and Access to Information, developed by a group of experts and endorsed by the UN Human Rights Commission, is a proper starting point for evaluating concerns related to national security information in the Wikileaks debate. Moreover, we identified the following issues that must be considered in ensuring that the public's rights under international law are respected:

1. Ensuring the Public's Right to Information

It is well established that the right of the public to information held by government bodies is essential in ensuring democracy. Over 90 countries have adopted laws that guarantee that right and it has been recognised in international agreements including the UN Convention against Corruption, the UNECE Convention on Access to Information, Public Participation, and Access to Justice in Environmental Matters,

and by many international bodies including the UN, Council of Europe, African Union and the Organisation for American States.

However, while there has been a significant increase in laws and other instruments guaranteeing the public's right to information around the world in recent years, access to information is still inadequate in many countries, even those such as the United States with its long history of right to information. This is particularly a problem in the area of information classified as 'state secrets'.

Under international law, governments must show that any restrictions on access to information are prescribed by law and necessary in a democratic society to protect a national security interest. Limits on access to information should only apply to information that governments can demonstrate would cause a specific and articulated harm.

The rules should not be used to hide other interests. Indeed, the existing US rules on secrecy prohibit classifying information about crimes and as a means to prevent embarrassment. Those rules are ignored far too often.

A number of military logs in the Afghan War Diary and the Baghdad airstrike video footage appear to demonstrate attacks on civilians by coalition forces which might amount to violation of the Fourth Geneva Convention. Full official disclosure of information about the allegations of ill treatment of civilians by the coalition forces in Afghanistan and Iraq would allow light to be shed on what has occurred. It would also enable a transparent and fair judicial review. Hence, the Baghdad video and much of the material in the Afghanistan War Diary should have been subject to mandatory disclosure under access to information laws in the respective countries of coalition governments, where, again, the overall public interest should trump secrecy exceptions.

2. Prosecution of Web Sites for Releasing National Security Information

There has been considerable discussion about the possible prosecution of WikiLeaks founder Julian Assange and other WikiLeaks activists under state secrets or espionage legislation in the United States or other countries. ARTICLE 19 believes that this would be an improper use of these laws and urges all governments to refrain from taking this step.

The statements of defence and state officials, calling for or warning of prosecution, might amount to censorship of media at a time and on issues – the war in Iraq and Afghanistan – where transparency and the public right to know should govern the government's relationships with the media and the public.

Moreover, it is a well established principle that public authorities bear sole responsibility for protecting the confidentiality of official information. Other persons and entities, including WikiLeaks and journalists, should never be subject to liability for publishing leaked information, unless it was obtained through fraud or another crime.

3. Protection of Whistleblowers

ARTICLE 19 also believes that those who provide information to WikiLeaks should not be prosecuted if there is a strong public interest in the release of the information.

Officials who act as whistleblowers and release information in the public interest without authorisation should not be prosecuted for releasing information that reveals crimes, abuses, mismanagement and other important issues in the public interest. Although we recognise that civil servants may legitimately be placed under obligations of secrecy, these should be limited by their obligation to serve the overall public interest. Anyone disclosing classified information should benefit from a public interest defence whereby, even if disclosure of the information would cause harm to a protected interest, no liability should ensue if the benefits of disclosure outweigh the harm. Instead, there should be strong legal protections and structures to facilitate disclosure.

Countries should adopt comprehensive whistleblowing laws which apply to the public and private sector and apply in national security cases. Secrets laws should recognise that whistleblowers should be protected from prosecution and should include public interest exemptions for revealing information such as human rights abuses and corruption.

Countries should also enact laws based on international standards protecting journalists from revealing their confidential sources and materials and those laws should apply to every person who is engaged in the business of making information available to the public.

4. Ethical Obligations of New Media

ARTICLE 19 believes that new media – including WikiLeaks and similar sites, should follow good ethical practices to ensure that the information made available is accurate, fairly presented and does not substantially harm other persons. While such ethical codes have not yet been developed for new media, we believe that existing journalistic codes provide a useful basis from which to begin.

Sites such as WikiLeaks should also recognise that technical protections to protect the anonymity of sources only have limited effectiveness. If the whistleblower is identified through other means, they can face serious employment and legal sanctions and even physical danger.

ARTICLE 19 is not qualified to take a position on whether the release of all of the Afghan documents by WikiLeaks was appropriate in these terms. To date, no credible information has been made public that links the release of the information to the harm of any individual.

Recommendations:

ARTICLE 19 therefore recommends:

- The governments of coalition forces and other states should refrain from criminal investigation and prosecution of WikiLeaks activists for the publishing of the materials on Iraq and Afghanistan as well as their sources
- All states should adopt and properly implement right to information laws which recognise the public interest in disclosure of information. Restrictions on access for national security reasons should be strictly limited
- All states should adopt comprehensive whistleblower-protection laws
- State Secrets Acts should only apply to those public officials and others who have agreed to be subject to them. Journalists and publishers should not be liable under these laws for disclosing information of public interest. The laws should also include public interest defences for protecting whistleblowers
- Internet sites should follow good ethical practices in their reporting activities.

NOTES TO EDITORS:

- For more information, please contact David Banisar, Senior Legal Counsel, ARTICLE 19, at banisar@article19.org, +44 207 324 2500
- The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Freedom of Expression and Access to Information are available at <http://www.article19.org/pdfs/standards/joburgprinciples.pdf>
- ARTICLE 19 is an independent human rights organisation that works around the world to protect and promote the right to freedom of expression. It takes its name from Article 19 of the Universal Declaration of Human Rights, which guarantees free speech.