

Principles of Oversight and Accountability For Security Services in a Constitutional Democracy

Introductory Note

By Kate Martin and Andrzej Rzeplinski

The 1990's saw remarkable transformations throughout the world, as the Cold War ended and democracy took hold where there had been only authoritarianism. In both established democracies and countries building democratic institutions, citizens now face the question of what to do about secret intelligence services. How can we establish democratic security services, which will serve the national interest and will not threaten the rule of law, human rights or democracy itself?

The problem arises from the unavoidable conflict between the requirement that democratic government operate openly and publicly and the fact that any intelligence or security service charged with protecting the national security, must, by definition, operate to some degree in secret. Moreover, there is a long history in both established democracies, as well as authoritarian regimes, of states justifying violations of human rights and democratic principles as necessary to protect national security. Given the necessary requirement of secrecy and the history of abuses carried out under the cloak of secrecy, it is essential to establish limits on the authority and methods of such secret services in order to provide the greatest possible degree of oversight and accountability to protect the rule of law and human rights, while still allowing for effective intelligence-gathering.

The following Principles outline the legal protections necessary to ensure that secret intelligence services do not threaten democracy or human rights and to prevent claims of national security from running roughshod over individual liberties.

The Principles are based on international law and standards relating to the protection of human rights and civil liberties applicable to all democratic states. Drawing from evolving state law and practice, the Principles are written to be useful and intelligible for reviewing the domestic laws of all democracies. They serve as a guide to evaluating the current state of the law in any particular country and to constructing a legal framework to protect human rights when national security interests are at stake. They outline the minimum protections for human rights and democracy that need to be incorporated in the laws of all countries.

The Principles outline the basic institutional structures necessary to ensure legitimacy and accountability of secret intelligence services:

- 1) effective judicial remedies;
- 2) separation of powers to provide checks and balances, such as legislative oversight of secret activities by services reporting to the executive branch; and
- 3) an active journalist and NGO sector.

Secondly, the Principles address freedom of expression including:

- 1) the affirmative right of access to government information;
- 2) necessary limits on government power to impose penalties for disclosure or publication of government information; and
- 3) protections for individual political expression, association and participation in the political life of the country.

While there has been much work done on transparency and openness in general, these Principles offer more specific solutions about how to limit national security exceptions to freedom of expression.

Finally, the Principles outline standards for when a government may collect information about its own citizens, through wiretapping or other forms of surveillance, and standards for protection of other rights, including the right to a fair trial.

In particular, Principles 1 through 4 articulate the fundamental balance underlying all the succeeding Principles that must be struck between the claims of the state in pursuit of national security and protection of human rights and civil liberties. That balance assumes that there is no inherent conflict between national security and human rights, because in the end, the well being of a country is best served by protecting human rights. Principles 5 through 12 are statements of “constitutional principles” explaining that basic human rights apply and democratic institutions must be respected even when national security interests are at stake. For example, Principles 5 and 6 specify that protections for freedom of expression extend to discussions and information about national security issues. Principles 13 and 14 outline how a democracy must decide on the proper tasks of and limits on the authority of secret intelligence agencies: there must be public debate and public law publicly adopted. The remaining Principles outline more specific rules of the type that would usually be incorporated into laws. Principles 15 through 22 specifically address how the claims of secrecy can be reconciled with protection for freedom of expression and the right of access to information. Principles 24 and 25 address protections against the state abusing its authority to gather information on its own citizens. Principles 26 and 27 address the use of secret national security information in both criminal and civil judicial proceedings; and Principle 28 addresses the protection of the rights of state employees who are granted access to secret information.

These Principles outline what laws are necessary to ensure accountability of secret intelligence services and do not address, except by implication, the political and institutional factors that are also required. For example, in addition to good laws, an effective and independent judiciary is obviously necessary to provide individuals with effective remedies against abuses. At the same time, dissemination of these Principles will help to achieve one of the key political conditions necessary for accountability: informed public debate and involvement about the role of the security services. What should the secret intelligence agencies do; what kinds of methods should they be allowed to use; what should be the limitations on their authority; and what kinds of procedures are necessary to prevent and detect abuses by the services? In a democracy, unlike a dictatorship where fear reigns, perhaps the greatest obstacle

to accountability is the notion that questions about intelligence agencies must be left to professionals, because they are either too technical or too difficult to be decided democratically through public discussion and public law-making. These Principles demonstrate the contrary.

While the Principles outline the outer limits in which an intelligence agency can operate without becoming a threat to democracy or human rights, they do not answer the question as to how any individual country should organize its intelligence services or what level of resources should be devoted to intelligence gathering. Many questions about how most effectively to gather information for government policy-makers who must make decisions on national defense or foreign policy matters do not raise human rights or civil liberties issues and thus are outside the scope of these Principles. Indeed the Principles do not answer whether secret intelligence agencies are necessary or desirable in any particular country; whether, for example, an intelligence agency would be more effective than the police in dealing with international drug smuggling. At the same time, the Principles do address the role of “internal security” agencies by outlining the limits that must be imposed on when a state may secretly gather information on its own citizens in order to prevent serious human rights violations.

Finally, a note about the term “national security” as it is used in the Principles. The term is used in most international human rights covenants, although it does not appear in some important constitutional provisions, like the First Amendment to the United States Constitution, which protects freedom of speech. It is used here in the traditional sense of referring to matters of military defense or foreign policy. This is consistent with proposed international law definitions of national security as protecting the existence of a country or its territorial integrity against the use of force or the threat of force.¹ While the term is used in many different ways -- it may include much broader concepts of economic or political security, and “national security doctrine” has a particular historical meaning in Latin America -- those broader meanings are not meant to be incorporated in the statement of Principles in this document.

We hope these Principles will prove useful in increasing public awareness of the problem of the intelligence services, setting guiding norms for domestic laws, and establishing a framework for international institutions to consider these issues.

About the Authors

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¹ See for example, the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, no. 29, U.N. Doc. E/CN.4/1985/4, Annex, par 30 (1985) and the Johannesburg Principles on National Security, Freedom of Expression and Access to Information.

The Project on Security Services aims to promote greater oversight and accountability of secret security services in new democracies in Eastern and Central Europe and Russia. It also works to ensure that international agreements concerning the activities of intelligence agencies and security services respect basic human rights and civil liberties. The Project includes partners from 14 countries, including non-governmental human rights and legal organizations, lawyers and scholars. An international Advisory Board of scholars, former government officials, human rights lawyers and activists guides policy for the Project. The following Principles of Oversight and Accountability are the work of all members of the Project.

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July 1997

SECURITY SERVICES IN A CONSTITUTIONAL DEMOCRACY: PRINCIPLES OF OVERSIGHT AND ACCOUNTABILITY

PREAMBLE

National security is important for the prosperity of any society, but in constitutional democracies, national security is a means to make possible the enjoyment of public peace and individual rights.

Some of the most serious violations of human rights and fundamental freedoms are justified by states as necessary to protect national security. Indeed, the security services played a central role in the former communist regimes; their activities were conducted in secret, they were not held publicly accountable and they were at least partly responsible for the economic, social, and moral crises in Russia and the Eastern European countries. Even in democratic societies, the security services have often violated individual rights.

The following principles of oversight and accountability should govern secret services in open and democratic societies.

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These principles represent norms to which open societies should aspire, drafted from the perspective of an open society and civil liberties. They are not a description of existing laws.

PRINCIPLES

A. National Security and Human Rights/Civil Liberties

Principle 1: Protection of National Security.

National security can be, and therefore shall be, adequately protected without jeopardizing the rule of law, democracy or human rights.

Principle 2: National Security and Human Rights.

National security may not be used as a justification for restricting fundamental human rights such as freedom of conscience, the right to be free from torture, from prior censorship,

from summary execution or freedom from imprisonment without judicial due process of law and other such fundamental rights recognized in international covenants.

Even in emergencies, fundamental rights may not be suspended.¹

Principle 3: Restrictions in the Name of National Security.

No restriction of human rights or civil liberties may be imposed on the grounds of national security unless the state can demonstrate that the restriction is prescribed by statute and is necessary in a democratic society to protect a legitimate national security interest. The state shall have the burden of demonstrating the validity of the restriction in a court of law.

A restriction of human rights or civil liberties justified on the grounds of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country's existence against the use or threat of force, to protect its territorial integrity against the use or threat of force, to protect its capacity to respond to the use or threat of force, or to protect the personal safety of its highest government officials.

The requirement that any restriction be prescribed by law and necessary in a democratic society is included in the European Convention of Human Rights.

Principle 4: Resolution of Conflicts Between National Security and Civil Liberties and Human Rights.

(I) If fundamental rights are not at stake, there shall be balance between civil liberties principles and national security claims when they are competing interests.

(ii) A reasonable balancing of national security and civil liberties concerns can be reached only if there is a presumption of openness in public authorities.

(iii) The principle of sufficiency must be respected; the state shall use the means which, while sufficient to the task, are least restrictive of the activities of individuals and least intrusive of their rights.

(iv) There must be independent judicial review of whether the appropriate balance has been struck.

¹ The text in italics is commentary about the Principles.

Even in an emergency, restrictions on derogable rights may only be imposed to the extent and for the period of time strictly required by the exigencies of the situation.

B. Constitutional Principles Relating to National Security and Human Rights/Civil Liberties

Principle 5: Freedom of Expression.

There shall be protection for freedom of speech and freedom of the press as they relate to national security issues, including:

- prohibitions on prior restraints against publication or speech; and
- limits on when the state can penalize public disclosure of official secrets.

Prior restraint mean orders by judicial or other state bodies banning the publication of specific material, it does not mean laws making it a crime to have published specific material.

Principle 6: Right of Access to State Information.

Everyone has the right to obtain information from public authorities, including information relating to national security matters.

Principle 7: Right to Privacy.

The right to private life shall be respected, even when the state asserts that national security interests are at stake.

Principle 8: Freedom of Movement.

The right to freedom of movement shall be respected, even when the state asserts that national security interests are at stake. In particular, no person shall be denied the right to travel outside his or her country.

Principle 9: Rights to Fair Trial and Due Process.

There shall be protections for the right to a fair trial and due process rights even when national security considerations are at stake.

Principle 10: Judicial Remedies for Violations of Individual Rights.

Individuals have the right to effective judicial remedies for violations of law by the secret services, which shall include the right to information about such violations.

Principle 11: Institutional Checks and Balances: Legislative Oversight.

In order to assure separation of powers, the secret services which are housed in the executive branch must be accountable to the legislative branch, which must in turn be guaranteed access to information, a role in the appointment of the heads of such services and budgetary controls sufficient to exercise effective control.

Principle 12: Ombudsman.

In countries where an ombudsman has been created, he or she should be empowered to inquire into violations of human rights by the secret services and to inform the public of the results of such inquiry.

C. Establishing the Role and Authority of the Security Services

Principle 13: Secret Services Must Be Authorized by Statute, Which Statute Shall be Public.

Each secret agency shall be established by statute, which should specify the limits of the agency's powers, its methods of operation and the means by which it will be held accountable.

The fact of existence of every security agency shall be publicly disclosed and the head of each agency shall be publicly identified.

Each operation or activity by a security agency shall be authorized by a specific individual, whose name shall appear on a written authorization.

There must be clear written rules governing the agencies' activities and the responsibilities of the heads of each agency.

While the identities of employees, other than the heads of the agencies, usually may be kept secret from the public, the internal records of the agencies shall show who authorized every activity.

Principle 14: The Role of Secret Services Must Be Openly Decided.

Legislative representatives and other interested citizens shall have the right to participate in decision-making on the issues of what should be the tasks and objectives of the services and what are legitimate means, which may be employed by them.

While the identity or details of certain sources and methods may be kept secret, the objectives and methods of the secret services must be publicly decided.

D. Freedom of Expression and Access to State Information in the National Security Context

Principle 15: Securing the Right of Access to State Information.

The state has an affirmative obligation to provide information, which shall be recognized and effectively enforced in order to implement the people's right to know, subject only to limited exceptions necessary to prevent specific identifiable national security harms.

The people's right to know what their government is doing is the cornerstone of constitutional democracy.

Any exceptions to this broad principle must meet the requirements outlined below.

Principle 16: Right of Access to Information about Security Services.

No state agency may be exempted from public accountability because doing so would close the door on public debate about how the national security should be protected.

Secret state institutions pose grave dangers to constitutional democracies because accountability requires the greatest possible degree of openness. At the same time, individual nations face real threats and state actions necessary to protect the national security must sometimes be carried out in secret in order to be effective. Thus, there can be room in a democracy for state institutions, which operate to some degree in secret in order to protect and advance specific national security objectives. In order for such secret

services not to threaten civil society, they must be subject to the rule of law and public accountability, as are all other state institutions.

Principle 17: Judicial Enforcement of the Right to Information.

There shall be independent judicial review of state decisions to withhold information on national security grounds

Principle 18: Public Interest in Disclosure.

In all laws and decisions concerning the right to obtain or disclose state information, the public interest in knowing the information shall be a primary consideration.

Principle 19: Narrow Designation of Official Secrets.

A state may not categorically designate all information related to national security as official secrets, but shall designate in law only those specific and narrow categories of information that it is necessary to withhold in order to protect a legitimate national security interest.

Any classification system shall permit classification only of publicly and specifically enumerated categories of information whose disclosure would cause identifiable harm to the national security which is not outweighed by the public interest in knowing the information.

A state may not designate information as official secrets, unless the information is exclusively in the possession or control of the state at the time of designation.

There shall be clear notice, such as written markings, that information is classified.

Principle 20: Public Interest in Disclosure.

Public disclosure of official secrets by people who are not state employees may not be made a criminal act.

The designation of official secrets shall meet the requirements outlined above.

A state, of course, may punish espionage, the intentional direct transmission of official secrets to foreign powers.

Principle 21: Protected Expression.

No one may be subject to surveillance or punished for criticizing or insulting the state, official policies or actions, or state officials, unless the criticism or insult was intended to and was likely to incite imminent violence.

Principle 22: Access to Areas of Violence.

A state may not prevent journalists or representatives of non-governmental organizations from entering areas where there are reasonable grounds to believe that there are violations of human rights or humanitarian law. A state may not exclude journalists or non-governmental organizations from areas that are experiencing violence or armed conflict except when their presence would pose a clear risk to the safety of others.

Principle 23: Protection of Journalists' Sources.

Protection of national security may not be used as a reason to compel a journalist to reveal a confidential source.

This principle does not address other justifications for compelling disclosure of journalists' sources, for example to prevent commission of a crime.

E. Protection of Other Individual Rights in the National Security Context

Principle 24: Restrictions on Surveillance and Information Collection.

There shall be clear legal restrictions on state surveillance of individuals and organizations, including;

(i) restrictions on the collection and maintenance of personal data and other information on private individuals and organizations engaged in speech or lawful political activity and restrictions on collecting information about lawful speech, political activity or religion when collecting information about illegal activities of organizations or individuals; and

(ii) prohibitions against state agencies disrupting or interfering with the political activities of individuals or organizations.

Principle 25: Security Services and Surveillance.

The security services may not investigate or place under surveillance citizens or residents, unless there is reason to believe that the individual has committed or is about to commit criminal activity on behalf of a foreign power, consisting of espionage or terrorism.

All searches or seizures, including electronic surveillance, must be approved in advance by a judge or an official executing the judicial power.

Criminal investigations, including arrests, searches, seizures, and electronic surveillance should be conducted by law enforcement agencies, not by the security services.

The activities of the security services, unlike the activities of the law enforcement agencies, should not be directed against a country's own citizens, lawful permanent residents, refugees, or persons entitled to political asylum, unless there is a reasonable basis to believe that the individual is engaged in espionage, sabotage or terrorism on behalf of a foreign power.

Even then, the rules governing criminal investigations should apply to such activities when there is a reasonable possibility that the state will seek to prosecute the individual for such crimes.

Moreover, the statutes and rules governing wiretapping, all forms of electronic surveillance and other surveillance and physical searches shall protect any person within the country, any citizen while abroad, and any other person outside the country against whom the state intends to bring criminal charges.

Principle 26: Fair Trial.

Even when official secrets or classified information are involved, criminal defendants have the right: to see all relevant information that the state has; to confront and cross-examine witnesses; to a public trial; and not to be tried by a military court if they are civilians.

Principle 27: Due Process Rights.

Civil litigants have the right to relevant and necessary information in civil proceedings against the state or officials for violation of their rights and in immigration proceedings, even when official secrets or classified information are involved.

Principle 28: Rights of State Employees.

While the secret services may collect relevant information about the trustworthiness of an individual who requires access to classified information as a part of his or her state-sponsored job, the privacy and due process and other rights of such individuals shall be observed, including informing the individual in advance that such information is going to be collected and securing his or her consent.

The secret services may not put such individuals under “protective” surveillance without their explicit written permission and may not deny access for refusal to grant such permission.

July 1997