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ADDITIONAL NOTES
ON THE PROTECTION OF STATE INFORMATION BILL
SUBMITTED TO THE NCOP
BY THE SA JEWISH BOARD OF DEPUTIES

These additional notes supplement the original opinion sent to the NCOP in February 2012,

[1] In my 15 Feb opinion on the POSIB I did not refer to the availability of the public interest defence in terms of the European Convention of Human Rights. States within Europe which have accepted the Convention are bound by the Convention. Our Courts have often referred to the European Convention of Human Rights as guidance in interpreting our Constitutional Rights.

[2] Article 10 of the Convention provides as follows:
'(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the Judiciary.'

[3] The public interest defence has in several cases been raised by defendants before the European Court of Human Rights. It was, e.g. successfully raised in Jersild v Denmark where it was held that the applicant, a journalist who was convicted of an offence in Denmark, was entitled to produce an item which was broadcast and which included hate speech by a rightist group, the Greenjackets, against immigrants from Africa. The broadcast was justified by the public interest. The Court states as follows:

“The Court reiterates that freedom of expression constitutes one of the essential foundations of a democratic society and that the safeguards to be afforded to the press are of particular importance … Whilst the press must not overstep the bounds set, inter alia, in the interest of "the protection of the reputation or rights of others", it is nevertheless incumbent on it to impart information and ideas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog."

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Although formulated primarily with regard to the print media, these principles doubtless apply also to the audiovisual media."

[Hereunder I have substantially copied parts of the Human Rights Handbook No 2, which deals with Freedom of Expression and the European Convention on Human Rights. It can be found on the internet by way of google. I have copied the part which deals with National Security]

[4] In England the planned publication of extracts by the Observer and Guardian of the book Spycatcher, which revealed alleged unlawful activities by the British intelligence service was stopped by a Court Order. The matter was taken to the European Court of Human Rights. It was inter alia argued by the British Government that the information to which the author, a retired agent, had access was confidential. Had the information been published the intelligence service, its agents and third parties would have suffered huge damages following the identification of agents, relationships with allied countries, organizations and people. In regard to prior constraints the European Court stated the following:

"…the dangers inherent in prior restrictions are such that they call for the most careful scrutiny on the part of the Court. This is especially so as far as the Press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest."
The European Court held that the prior restriction was well founded at that moment. However, when the book was published in the USA, the confidential nature of the information was lost. Under the circumstances there was not "sufficient" need to maintain the injunctions.

[5] In Vereniging Weekblad Bluf! the European Court in 1995 also dealt with the conflict between national security and freedom of expression. In 1987 the publisher obtained a periodic report of the Dutch internal secret service. The report, dated 1981, was marked "confidential" and contained information relevant to the Dutch Secret Service. The report referred to the Dutch Communist Party and anti-nuclear movements; it mentioned the Arabic League plan to set up an office in The Hague. It gave information on the activities of the Polish, Romanian and Czechoslovakian secret services in the Netherlands.
The editor of the magazine announced the publication of the report, together with a comment, as a supplement to the issue of 29 April. The same day, the chief of the Dutch internal secret services sent a letter to the public prosecutor's office, stating that the dissemination of the report would amount to a criminal offence. With regard to the secret character of the information in the report, he observed that "although … the various contributions taken separately do not (or do not any longer) contain any State secrets, they do – taken together and read in conjunction – amount to information whose confidentiality is necessary in the interests of the State or its allies. This is because the juxtaposition of the facts gives an overview, in the various sectors of interests, of the information available to the security service's activities and methods of operation."

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As a result, prior to the printing and distribution of the magazine, Bluf!'s premises were searched following an order of the investigating judge. The entire print-run of Bluf!'s 29 April issue was confiscated. During that night, unknown to the authorities, the staff of Bluf! reprinted the issue, and about 2 500 copies were distributed the next day in Amsterdam. The authorities did not stop the distribution. The investigating judge closed the investigation against the staff of Bluf! without any criminal charge being brought. In the meantime, the association asked for the return of the confiscated copies, but its application was denied. In March 1988, at the request of the public prosecutor, the Dutch courts decided that all copies of that Bluf! issue be withdrawn from public circulation.

The courts relied on the need to protect the national security and argued that the unsupervised possession of those materials was contrary to the law and to the public interest. The association complained to the Strasbourg institutions, claiming that the Dutch authorities violated its right under Article 10 of the Convention. The government stated that the interference with the applicant's freedom of expression was legitimately grounded by the need to protect "national security", arguing as follows: individuals or groups posing a threat to national security could have discovered, by reading the report, whether and to what extent the Dutch secret service was aware of their subversive activities; the way in which the information had been presented could have also give them an insight into the secret service's methods and activities; these potential enemies could use the information to the detriment of national security.

Examining whether the interference – the seizure and withdrawal from circulation – was "necessary in a democratic society" for the protection of "national security", the Court held: It is open to question whether the information in the report was sufficiently sensitive to justify preventing its distribution. The document in question was six years old. … the head of the security service [had] himself admitted that in 1987 the various items of information, taken separately, were no longer State secrets. Lastly, the report was marked simply "Confidential", which represents a low degree of secrecy. […] The withdrawal from circulation … must be considered in the light of the events as a whole. After the newspaper had been seized, the publishers reprinted a large number of copies and sold them in the streets of Amsterdam, which were very crowded. Consequently, the information in question had already been widely distributed when the journal was withdrawn from circulation. […] In this latter connection, the Court points out that it has already held that it was unnecessary to prevent the disclosure of certain information seeing that it had already been made public or had ceased to be confidential. […] the information in question was made accessible to a large number of people, who were able in turn to communicate it to others. Furthermore, the events were commented on by the media. That being so, the protection of the information as a State secret was no longer justified and the withdrawal of issue No. 267 of Bluf! no longer appeared necessary to achieve the legitimate aim pursued. […] In short, as the measure was not necessary in a democratic society, there has been a breach of Article 10.

[6] The judgments in Observer and Guardian and Bluf! provide for at least two important principles. The first principle states that once in the public arena, information on national security may not be prohibited, withdrawn, or the authors of dissemination punished. The second principle institutes a prohibition on the states to unconditionally define as classified

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all information in the area of national security and, consequently, to establish a prior limitation on the access to such information. Certain information may indeed be classified where there are serious reasons to believe that its release into the public arena will pose a threat to national security. Moreover, the classified status of information must be limited in time, and the need for maintaining this status must be periodically verified. The interest of the public in knowing certain information should also be considered in the process of classifying or declassifying information related to the national security.

[7] Therefore, legislation prohibiting in absolute and unconditional terms the dissemination of all information in the area of national security, eliminating the public control over the intelligence services' activities, would constitute a breach of Article 10 as not being "necessary in a democratic society". Where faced with legislation providing for general and unconditional prohibition of dissemination of all information in the area of national security, the national courts must reject such a claim, be it criminal or civil. Courts must allow the press, acting on the benefit of the public, to exercise its freedom to identify the malfunctions, illegalities or other wrongs within the intelligence system. The rules developed by the European Court in the instances where Freedom of expression conflicted with the interest of defending the national security are the guidelines to be followed at national level. Even where a domestic legal system does not explicitly provide for the "necessity" test, the proportionality principle, and the public interest argument, the national courts must take account of them in their legal thinking and develop the balancing test which would answer the "necessity" question.

[8] In Sürek and Özdemir v Turkey (1999) the applicants were convicted by the national courts to six months' imprisonment and a fine each, on the charge of disseminating separatist propaganda. In addition, the printed copies were seized. The applicants published two interviews with a senior figure in the PKK, who condemned the policies of the Turkish authorities in the south-east, which he described as being aimed at driving the Kurds out of their territory and destroying their resistance. He also claimed that the war on behalf of the Kurdish people will continue "until there is only one single individual left on our side." The applicants also published a joint statement issued by four organisations which, like the PKK, were illegal under Turkish law, which plead in favour of recognising the right of the Kurdish people to self-determination and the withdrawal of the Turkish army from Kurdistan.

The Court first referred to the criticism of the government – as practised by the publication – and held that the limits of permissible criticism are wider with regard to the government than in relation to a private citizen or even a politician. Further, the Court noted that the fact that the interviews were given by a leading member of a proscribed organisation and that they contained hard criticism of official state policy and communicated a one-sided view of the situation and responsibility for disturbances in south-east Turkey cannot justify in itself an interference with the applicants' freedom of expression. In the Court's view, the interviews had a newsworthy content which allowed the public both to have an insight into the psychology of those who are the driving force behind the opposition to official policy in south-east Turkey and to assess the stakes involved in the conflict.
The Court further held that domestic authorities failed to have sufficient regard to the public's right to be informed of a different perspective on the situation in south-east Turkey,

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irrespective of how unpalatable that perspective may be for them. Concluding, the Court found that the reasons given by the domestic courts to convict the applicants although relevant, cannot be sufficient for justifying the interferences with their right to freedom of expression.

[9] Equally, in Özgür Gündem the Court found that convictions for separatist propaganda, which were justified by the Turkish Government on the grounds of protecting national security and preventing crime and disorder, were contrary to Article 10:
the use of the term "Kurdistan" in a context which implies that it should be, or is, separate from the territory of Turkey, and the claims by persons to exercise authority on behalf of that entity may be highly provocative to the authorities.

After referring to the right of the public to be informed on other views than those of the State and the majority of the population, the Court stated that while several of the articles were highly critical of the authorities and attributed on lawful conduct to the security forced, sometimes in colourful and pejorative terms, the Court nonetheless finds that they cannot be reasonably regarded as advocating or inciting the use of violence. (Ozgur Gundem v Turkey 2000)

[10] By contrast, in Sürek v Turkey (1999), the Court found that the grounds of protecting national security and territorial integrity were proportional with the restriction upon freedom of expression due to the capacity of the article to incite violence in south-east Turkey:
Indeed, the message which is communicated to the reader is that recourse to violence is a necessary and justified measure of self-defence in the face of the aggressor.

The difference from the other cases lies in the capacity of the article to steer violence and in the possibility that such violence occur, both elements both elements being determined by the Court on the basis of the concrete circumstances of each case.

"National security" along with "public safety" and "rights of others" were seen as overriding the interest of protecting freedom of expression in cases where the expression sanctioned by the domestic authorities was aimed at the destruction of the rights set forth in the Convention.

[11] In Kühnen v Germany (1998) the applicant was leading an organisation whose aim was to bring the National Socialist Party (prohibited in Germany) back into the political scene. Mr Kühnen disseminated publications encouraging the fight for a socialist and independent Greater Germany. He wrote that his organisation was in favour of "German unity, social justice, racial pride, community of the people and camaraderie" and against "capitalism, communism, Zionism, estrangement by means of masses of foreign workers, destruction of the environment". He also wrote: "whoever serves this aim can act, whoever obstructs will be fought against and eventually eliminated". Mr Kühnen was sentenced to prison by the German Courts.

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The difference from the other cases stays in the capacity of the impugned article to steer violence and in the possibility that such violence occur, both elements being determined by the Court on the basis of the concrete circumstances of each case. National security" along with "public safety" and "rights of others" were seen as overriding the interest of protecting freedom of expression in cases where the applicant has advocated national socialism aimed at impairing the basic order of freedom and democracy, and that his speech ran counter to one of the basic values expressed in the Preamble to the Convention: the fundamental freedoms enshrined in the Convention "are best maintained … by an effective political democracy". In addition, the Commission found that the applicant's speech contained elements of racial and religious discrimination. Consequently, the Commission held that the applicant was seeking to use the freedom of expression for promoting conduct contrary to the text and spirit of the Convention as well as contrary to Article 17 which prohibits the abuse of rights. Concluding, the Commission found that the interference with the exercise of the applicant's freedom of expression was "necessary in a democratic society".

[12] A similar decision was taken in the case of D.I. v. Germany, where the applicant (an historian) denied the existence of the gas chambers in Auschwitz, stating that they were fakes built up in the first post-war days, and that the German tax payers paid about 16 billion DM for fakes. The applicant was fined in the national courts. Before the Commission, the government justified this penalty by the interests of protecting the "national security and territorial integrity", "the reputation and rights of others" and for the "prevention of disorder and crime". Applying the proportionality principle, the Commission held that "the public interests in the prevention of crime and disorder in the German population due to insulting behaviour against Jews, and similar offences, and the requirements of protecting their reputation and rights, outweigh, in a democratic society, the applicant's freedom to impart publications denying the existence of the gassing of Jews under the Nazi regime. In Honsik (1995) and Ochensberger (1994) where the applicants also denied the existence of the Holocaust and incited racial hatred the Commission reached similar conclusions.

[13]"National security" versus freedom of expression was examined by the Court in relation to military secrets. In the Hadjianastassiou case (1992) an officer was convicted to a five-month suspended prison sentence for having disclosed classified military information to a private company in exchange for payment. The information concerned a specific weapon and the corresponding technical knowledge, and in the government's view, the disclosure was capable of causing considerable damage to national security. After holding that military information is not excluded from Article 10's protection, the Court found the conviction to be "necessary in a democratic society" for protecting the "national security" and held:

the disclosure of the State's interest in a given weapon and that of the corresponding technical knowledge, which may give some indication of the state of progress in its manufacture, are capable of causing considerable damage to national security. […] Nor does the evidence disclose the lack of a reasonable relation- ship of proportionality between the means employed and the legitimate aim pursued.

The Hadjianastassiou judgment sends two important messages to the national courts. Firstly, that not all the military information is swept away from the public arena. Secondly,

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the Court held once again that it is for the national courts to establish in each particular case whether the respective information did pose a real and serious danger to the national security. Such an assessment based on the proportionality principle is the answer to the question whether or not an expression making public military information should or should not be prohibited or sanctioned. [end of material from Handbook]

[14] From the above it is clear that the approach of the European Court on Human Rights is that state security must be defined narrowly to be Constitutionally valid. This approach accords with the approach of our Constitutional Court where "overbroad" legislation has been found to be invalid. It is also clear from the above judgments that a realistic approach must be followed. The material must have a potential to indeed prejudice national security if published. Material should also not be classified for too long periods.

[15] I have recently made contact with several experts within the European Union. Jon Wessel Aas, a prominent media lawyer from Norway, recorded how he had won the case for an editor who had, in spite of an interdict not to publish, nevertheless published. The Supreme Court held that where there was a possibility that the injunction may be overturned by the European Court of Human Rights, a prosecution may not be proceeded with in Norway. For details see http://www.uhuru.biz/?p=19

[16] The following message from Daphne Koene (Press Council Netherlands) is also informative:
"A couple of years ago there was an interesting case about two journalists from the Dutch newspaper De Telegraaf, who had published a series of articles based on documents from the AIVD, the General Intelligence and Security Service of the Netherlands. (AIVD = Algemene Inlichtingen- en Veiligheidsdienst). The prosecution decided not to prosecute. In article of October 4th, 2006, published on a website for lawyers was mentioned the following: "Telegraaf-journalists are not prosecuted for AIVD publication."

On the basis of the results of the criminal (sub) research in the AIVD-case the prosecution in the court of Breda decided not to prosecute the Telegraaf-journalists Joost de Haas and Bart Mos. The prosecution believes that a limited part of the publications is punishable, but it will not prosecute because the disclosure in this particular case did not cause damage to national security.

After checking the facts with the case law of the European Court of Human Rights the public prosecutor concluded that with respect to this limited part of the publications the general interest of freedom of information does not prevail not national security. The published information from the documents and the context in which it was placed could make it possible to trace the identity of sources of the AIVD. This is seen as undermining the state security and deemed punishable.

The journalists were equipped with state secret AIVD documents and as from January 21, 2006 they have written articles in De Telegraaf based on those documents. From the documents it appeared that the AIVD considered the drug and arms dealer Mink K. as the most dangerous criminal in the Netherlands due to his corrupt contacts in the organisation

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of the criminal investigation." (see http://www.mr-online.nl/nieuws/juridisch-nieuws/telegraaf-journalisten-niet-vervolgd-voor-aivd-publicatie.html)

[17] Although I have indicated that the mere fact that the Director of Prosecutions is, in accordance with the POSIB, authorised to decide whether to prosecute or not does not save the Bill from unconstitutionality, the above information illustrates that in practice a realistic approach is followed by the European Court of Human Rights. One can also glean this from the approach in Norway, conveyed by Jon Wessel-Aas.

[18] From the above I conclude as follows: There should not be a fear from Parliament's side of the public interest defence. It is a very limited defence and comparable (if not identical) to the defence of necessity in criminal law. Necessity is defined as follows by Snyman Criminal Law:" "A person acts in necessity, and her act is accordingly lawful, if she acts in protection of her or somebody else's life, bodily integrity, property or other legally recognised interest which is endangered a threat of harm which has commenced or is imminent and which cannot be averted in another way, provided that the person is not legally compelled to endure the danger and that the interest protected by the protective act is not out of proportion to the interest infringed by the act. It is immaterial whether the threat or harm takes the form of compulsion by a human being or emanates from a non-human agency such as force of circumstance."

This definition could readily be adapted to circumstances where facts concerning corruption or abuse are surreptitiously classified as top secret – despite the existence of the Review Board. No court will convict a person who publishes these facts. Of course, the benefit to the public must not be out of proportion to the damage caused to state security by the publication. The experience within Europe supports this approach.

J. e. s. van Rooyen

Kobus van Rooyen SC

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