Parliamentary Assembly
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Resolution 1551 (2007)[1]

Fair trial issues in criminal cases concerning espionage or divulging state secrets

Parliamentary Assembly

1. The Parliamentary Assembly finds that the state's legitimate interest in protecting official secrets must not become a pretext to unduly restrict the freedom of expression and of information, international scientific co-operation and the work of lawyers and other defenders of human rights.

2. It recalls the importance of freedom of expression and of information in a democratic society, in which it must be possible to freely expose corruption, human rights violations, environmental destruction and other abuses of authority.

3. Scientific progress critically depends on the free flow of information among scientists, who must be able to co-operate internationally and participate in the scientific process without fear of prosecution.

4. Lawyers and other defenders of human rights must also be able to perform their indispensable role in establishing the truth and holding perpetrators of human rights violations to account without the threat of criminal prosecution.

5. The Assembly notes that legislation on official secrecy in many Council of Europe member states is rather vague or otherwise overly broad in that it could be construed in such a way as to cover a wide range of legitimate activities of journalists, scientists, lawyers or other human rights defenders.

6. At the same time, prosecutions for breach of state secrecy are very rare in most Council of Europe member and observer states and generally lead to light sentences, if any. Mr Shayler, a British former secret agent who had published details of his work, was handed a partly suspended sentence of six months, whereas a German court in July 2006 dismissed altogether the indictment against Mr Schirra, a journalist who had published information from leaked Bundesnachrichtendienst (BND – German secret service) files. For its part, the European Court of Human Rights found "disproportionate" an injunction against the publication in the United Kingdom of newspaper articles reporting on the contents of a book (Spycatcher) that allegedly contained secret information, as the book was readily available abroad.

7. By contrast, a series of high profile espionage cases against scientists, journalists and lawyers in the Russian Federation have caused much hardship to the individuals concerned and their families and have had a chilling effect on other members of these professional groups. The climate of "spy mania" fuelled by these cases and controversial statements of senior government representatives are obstacles to the healthy development of civil society in this country.

8. The Assembly is also concerned that the United States administration as well as German, Swiss and Italian authorities have recently threatened, or even attempted to prosecute, media editors, journalists or other whistle-blowers for alleged breaches of official secrecy, in particular in the context of recent reports on unlawful CIA activities (see Resolution 1507 (2006) and Recommendation 1754 (2006) on alleged secret detention and unlawful inter-state transfers of detainees involving Council of Europe member states) and other secret service scandals.

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1. Assembly debate on 19 April 2007 (17th Sitting) (see Doc. 11031, report of the Committee on Legal Affairs and Human Rights, rapporteur: Mr Pourgourides). Text adopted by the Assembly on 19 April 2007 (17th Sitting).

9. It calls on the judicial authorities of all countries concerned and on the European Court of Human Rights to find an appropriate balance between the state interest in preserving official secrecy on the one hand, and freedom of expression and of the free flow of information on scientific matters, and society's interest in exposing abuses of power on the other hand.

10. The Assembly notes that criminal trials for breaches of state secrecy are particularly sensitive and prone to abuse for political purposes. It therefore considers the following principles as vital for all those concerned in order to ensure fairness in such trials:

10.1. information that is already in the public domain cannot be considered as a state secret, and divulging such information cannot be punished as espionage, even if the person concerned collects, sums up, analyses or comments on such information. The same applies to participation in international scientific co-operation, and to the exposure of corruption, human rights violations, environmental destruction or other abuses of public authority (whistle-blowing);

10.2. legislation on official secrecy, including lists of secret items serving as a basis for criminal prosecution must be clear and, above all, public. Secret decrees establishing criminal liability cannot be considered compatible with the Council of Europe's legal standards and should be abolished in all member states;

10.3. secret service bodies, whose role is to protect official secrets and who are typically victims of any breaches, must not also be given the task of carrying out criminal investigations and prosecutions against alleged perpetrators of such breaches. The Assembly regrets that the Russian Federation has still not fulfilled its accession commitment to change the law on the Federal Security Service (FSB) in this respect (see Resolution 1455 (2005) on the honouring of obligations and commitments by the Russian Federation, paragraph 13.x.a);

10.4. trials should be speedy, and long periods of pre-trial detention should be avoided;

10.5. courts should be vigilant in ensuring a fair trial, with particular attention to the principle of equality of arms between the prosecution and the defence, in particular:

10.5.1. the defence should be adequately represented in the selection of experts advising the court on the secret nature of relevant information;

10.5.2. experts should have a high level of professional competence and should be independent from the secret services;

10.5.3. the defence should be allowed to question the experts before the jury and challenge their testimony through experts named by the defence, including experts from other jurisdictions;

10.6. proceedings should be as open and transparent as possible, in order to boost public confidence in their fairness; at the very least, the judgments must be made public;

10.7. furthermore, civilians should not, as a general rule, be tried by military courts; and it must be underscored that all trials must be conducted in courts and tribunals that are competent, independent and impartial in proceedings that meet international standards of fairness;

10.8. changes of judges and juries should be permitted only in very exceptional and well-defined circumstances, and explained fully in order to avoid the impression of "forum shopping" or lack of independence of the courts;

10.9. the question of whether the information that was divulged is already in the public domain should always be a question of fact to be decided by the jury and, upon an affirmative answer by the jury, the judge must in all cases direct an acquittal.

11. The Assembly finds that in a number of high profile espionage cases in the Russian Federation, including those of Mr Sutyagin and of Mr Danilov, there are strong indications that the abovementioned principles (paragraph 10) were not respected, and notes that the prison sentences handed down (fourteen and fifteen years respectively) are in any case out of line with the practice of other Council of Europe member states, in particular:

11.1. as in the earlier cases of Mr Nikitin, Mr Pasko (see Resolution 1354 (2003) on the conviction of Grigory Pasko) and Mr Moiseyev, the proceedings against Mr Sutyagin and Mr Danilov took many years, which the defendants spent mostly in detention, while the FSB carried out criminal investigations;

11.2. judges and juries were changed repeatedly, without adequate reasons being provided;

11.3. the defence was unable to question the experts advising on the secret nature of the information concerned before the jury;

11.4. some of the experts appear to have lacked the necessary independence;

11.5. the proceedings lacked openness; in the Danilov case, even the judgment itself was secret. In several cases, the courts appear to have relied on a secret decree (No. 055-96) as a basis for imposing criminal sanctions.

12. The Assembly warmly welcomes the statement of the Public Chamber of the Russian Federation dated 30 June 2006, recognising the inappropriateness of the existing legislation on state secrecy and regretting the negative impact of its harsh application on the morale of the scientific community.

13. The Assembly invites the international scientific community to establish a typology of accepted practices for international scientific co-operation relating to potentially sensitive information.

14. It urges all member states to refrain from prosecuting any scientists who engage in such accepted practices, and to rehabilitate all those who have been sanctioned for engaging in such practices.

15. The Assembly appeals in particular to the competent bodies of the Russian Federation to use all available legal means to set Mr Sutyagin, Mr Danilov and Mr Trepashkin free without further delay, and in the meantime to provide them with adequate medical care.