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Treaties and their effects on freedom of information and expression in the case of national security infringement in regard to another member state

Question:

Do international treaties, cooperation agreements and alliances such as NATO, Schengen or Interpol limit or effect freedoms of information and expression in any way in order to protect the national security of a third country?

Short Answer:

There are no limitations or effects on the freedom of the press originating from the above named treaties. These treaties do not contain any regulations regarding measures of one member state, in case of a danger for national security of another state. Contrary, some treaties contain national security exceptions, which allow the member states to deny either the application of some particular provisions or of the whole agreement.

Discussion:

1. General considerations

There is no accepted definition of the term *national security*. Discussing this term, we have to take account of the national interests of the country concerned. Until now, the connection of treaties to national security has mainly been examined in terms of the

question if all treaties contain an implicit national security exception. First, international law does not contain a national security exception.¹ If a specific treaty does not contain an explicit national security exception, it neither contains an implicit national security exception.² Even if such an exception is part of the treaty (e.g. Art. 72 Rome Statute of the International Criminal Court), there are no legal consequences regarding the laws of the member states. On the contrary, it gives member states the possibility not to apply the treaty if its own national security is affected. Consequently, such exceptions do not have any effects on national sovereign rights.

2. North Atlantic Treaty (NATO)

The North Atlantic Treaty contains one provision dealing with national security. Pursuant to Art. 4 of the said agreement the parties will consult each other in cases the national security is endangered. Beyond that, the treaty does not entitle a party to take further measures. The national law will therefore not be influenced by that provision. Art. 5 represents the central provision of the treaty: An armed attack against one or more of the parties shall be considered an attack against them all. The further regulations settle regulations relating to the accedence of another state or the dismissal of a member. The treaty gives the parties the obligation for collective defence after an armed attack. In particular, there are no indications that it may have any effects on freedom of the press.

Furthermore, there is no explicit national security exception in the treaty. However, even if it contained such an exception this would have no influence on national sovereign law as mentioned above. Thus, the legislative regime of a member state which protects and strengthens modern freedom of expression cannot be undermined by the North Atlantic Treaty.

3. INTERPOL

The International Criminal Police Organization- Interpol- has been founded to strengthen cooperation in order to combat international related crimes.

According to Art. 2 Sec. 1 of the Interpol Constitution, Interpol aims to ensure and promote mutual assistance between all criminal police authorities within the limits of the laws existing in the different countries. The said Constitution does in no matter contain powers to take measures against a member state. On contrary, it is aimed at

443. ¹ *Rose-Ackerman/Billa*, *Treaties and National Security*, *International Law and Politics* 2008, Vol. 40:437,

² *Rose-Ackerman/Billa*, *Treaties and National Security Exceptions*, *Yale Law School* 2007, available under: www.transparency.org/content/download/16757/225643.

achieving its goals respecting the national laws of its member states. Neither the organization itself nor any other member state could proceed against national law of a sovereign member. The national freedom of information and expression will therefore not be influenced by the provisions covered in the Interpol Constitution.

4. The Schengen Agreement

The Schengen Agreement signed in 1985 is an agreement on the gradual abolition of checks at the common borders of the member states. It contains regulations about measurements aimed at creating a common area of security and justice following the abolition of common border checks. Specifically speaking, the agreement covers harmonizing provisions on the entry into and short stays in the Schengen area by non-EU-citizens, asylum matters, cooperation on combating cross-border drugs-related crime, police and judicial cooperation.

In cases of danger to the national security of a member state the treaty pursuant to its Art. 2 Sec. 2 entitles the party concerned to reintroduce national border controls for a limited period of time. The prior consultation of the other member states is a mandatory requirement. Only in cases in which national security issues require immediate actions the necessary measures can be enforced without such a prior consultation. These necessary measures must also be within the subject matter of the agreement. Even in the case a national law had influence on the national security of a third party the Schengen Agreement itself would not entitle to measures affecting the national law of the concerned party. Therefore, the national freedom of information and expression cannot be undermined by the Schengen Agreement as its subject matter is not concerned.

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