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### How to address current threats to journalism? The role of the Council of Europe in protecting journalists and other media actors

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**Publication date**

2013

**Document Version**

Final published version

[Link to publication](#)

**Citation for published version (APA):**

McGonagle, T. (2013). *How to address current threats to journalism? The role of the Council of Europe in protecting journalists and other media actors*. (MCM; No. (2013)009). Republic of Serbia, Ministry of Culture and Information.

[http://www.coe.int/t/dghl/standardsetting/media/Belgrade2013/How%20to%20address%20current%20threats%20to%20journalism%20-%20MCM\(2013\)009\\_en\\_Report\\_McGonagle.pdf](http://www.coe.int/t/dghl/standardsetting/media/Belgrade2013/How%20to%20address%20current%20threats%20to%20journalism%20-%20MCM(2013)009_en_Report_McGonagle.pdf)

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MCM(2013)009

## **How to address current threats to journalism?: The role of the Council of Europe in protecting journalists and other media actors**

### **EXPERT PAPER**

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The opinions expressed in this work are the responsibility of the author and do not necessarily reflect the official policy of the Council of Europe



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## Introduction<sup>1</sup>

Journalists and other media actors play a number of roles that are vital for democratic society: they inform the public about matters of societal interest, comment on them and hold public authorities and other powerful forces up to scrutiny. These roles explain why they are often referred to as public watchdogs. An interference with their right to impart information or ideas has obvious societal repercussions as there is simultaneously an interference with the public's right to receive information or ideas. By the same token, whenever journalists, other media actors, their family members, close friends or associates are murdered, tortured, attacked, abducted, detained, threatened, harassed or intimidated on account of their professional activities – and instances of these offences are regrettably frequent – a similar societal dimension opens up.<sup>2</sup> The violations of individual rights – to life, liberty, security of the person and not to be subjected to torture or cruel, inhuman or degrading treatment – also have consequences for the right to freedom of expression. Attacks on, and intimidation of, journalists and other media actors inevitably have a very chilling effect on freedom of expression. The chill factor is all the more piercing when the prevalence of attacks and intimidation is compounded by a culture of legal impunity for their perpetrators.

Legal and political responses to the above issues will feature centrally in this paper. More specifically, the paper will consider the role of Council of Europe as a regional body in the concerted international efforts to enhance the protection of journalists and other media actors, in particular the implementation of the United Nations Plan of Action on the Safety of Journalists and the Issue of Impunity (hereafter: UN Plan of Action). It will do so in the context of an examination of some of the broader challenges of (re-)definition and (re-)orientation faced by a journalistic/media sector that is increasingly dynamic, diversified and diffuse.

### *Structural considerations*

The paper will begin by setting out the international law backdrop to the UN Plan of Action. It will explain how the interplay of international treaty-based standards and other institutional and political dynamics have ensured powerful traction for the UN Plan of Action. The paper will then proceed with a more detailed focus on how relevant bodies of the Council of Europe engage with the problems and issues addressed by the UN Plan of Action. Particular attention will be paid to the protection afforded to (the

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<sup>1</sup> The author is grateful to Nanette Schumacher, a research intern at IViR, for her helpful assistance with an initial literature search. This paper draws, in places, on Tarlach McGonagle, “User-generated Content and Audiovisual News: The Ups and Downs of an Uncertain Relationship”, in Susanne Nikoltchev, Ed., *Open Journalism*, IRIS plus 2013-2 (Strasbourg, European Audiovisual Observatory, 2013).

<sup>2</sup> For a very insightful overview and analysis of relevant issues, see: Dunja Mijatović, “Protection of journalists from violence”, in *Human rights and a changing media landscape* (Strasbourg, Council of Europe Publishing, 2011), pp. 21-45.

freedom of expression of) journalists and other media actors by the European Convention on Human Rights (hereafter: ECHR) and the case-law of the European Court of Human Rights. The translation of the ECHR's principles of protection into other standard-setting work by the Council of Europe will constitute another important focus. The section devoted to the Council of Europe will explore three main themes: roles and forms of journalism and public debate in democratic society; revisiting rights, duties and responsibilities in the digital age, and new regulatory and policy challenges and directions.

### *Terminological considerations*

Throughout this paper, the term, journalism, will be used as a shorthand way of referring to an increasingly diverse range of contributions to public debate, comprising a professional and largely institutionalized core, but also stretching to cover alternative forms of journalism located at – and even beyond – the periphery of traditional understandings of the term. Journalism has always known different variants and different goals and its differentiated character is being accentuated further as more and more actors participate in an increasingly noisy public debate.<sup>3</sup>

This is a pragmatic approach, from a legal point of view. Many of the journalistic or media freedoms that have been recognised and legally enshrined over the years are not contingent on definitions of either journalists or journalism. Instead, they should be seen as freedoms that are instrumental to the realization of the public watchdog role traditionally played by journalists and the media in democratic society. Whereas public watchdog functions were predominantly fulfilled by journalists and the media in the past, they are now increasingly being fulfilled by other media and non-media actors.

### *The international legal framework*

The international legal framework governing the UN Plan of Action is an amalgam of human rights law and humanitarian law and it is supplemented by a further amalgam - of political texts and initiatives.<sup>4</sup> The most salient features of each amalgam will now be dealt with in turn.

## **1.1 International human rights law**

The international human rights treaty with the greatest relevance for the protection of journalists and other media actors and the fight against impunity is the International

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<sup>3</sup> See generally on this point, Denis McQuail, *Journalism and Society* (London, etc., SAGE Publications Ltd., 2013), pp. 92 et seq.

<sup>4</sup> For a comprehensive and up-to-date overview of UN standards and initiatives (including those by UNESCO), see: “The Safety of Journalists”, Report of the Office of the United Nations High Commissioner for Human Rights, Doc. No. A/HRC/24/23, 1 July 2013. It is beyond the scope of this paper to give details of the full spread of relevant UN activities.

Covenant on Civil and Political Rights (ICCPR). Other treaties are, however, also relevant, depending on how the safety of journalists is violated. They include the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Convention for the Protection of All Persons from Enforced Disappearance. The focus here will be on the ICCPR.

### 1.1.1 *The International Covenant on Civil and Political Rights*

Under Article 2(1) of the ICCPR,<sup>5</sup> each State Party must “respect” and “ensure” to all individuals subject to its jurisdiction the rights recognised in the Covenant in a non-discriminatory manner. The obligation undertaken by States Parties is therefore twofold. First, “to respect” all of the rights recognised in the ICCPR entails an obligation of non-interference. Second, “to ensure” those rights is a more far-reaching undertaking and, according to one leading commentator, it “implies an affirmative obligation by the state to take whatever measures are necessary to enable individuals to enjoy or exercise the rights guaranteed in the Covenant, including the removal of governmental and possibly also some private obstacles to the enjoyment of these rights”.<sup>6</sup> The reading of affirmative State obligations into Article 2, ICCPR, is borne out by subsequent paragraphs of the Article and the interpretive clarifications offered, *inter alia*, by the UN Human Rights Committee’s General Comment No. 31 – “The Nature of the General Legal Obligation Imposed on States Parties to the Covenant”.<sup>7</sup>

Article 2(2) requires States “to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant”. This requirement is “unqualified and of immediate effect”.<sup>8</sup> In addition, pursuant to Article 2(3), States “must ensure that individuals also have accessible and effective remedies to vindicate those rights”.<sup>9</sup>

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<sup>5</sup> It reads: “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.

<sup>6</sup> Thomas Buergenthal, “To Respect and Ensure: State Obligations and Permissible Derogations”, in Louis Henkin, Ed., *The International Bill of Rights* (1981), pp. 72-91, at 77. Buergenthal also notes that such affirmative obligations could include “providing some access to places and media for public assembly or expression” – *ibid.*

<sup>7</sup> Human Rights Committee, General Comment No. 31 [80] – “The Nature of the General Legal Obligations Imposed on States Parties to the Covenant”, 29 March 2004.

<sup>8</sup> *Ibid.*, para. 14.

<sup>9</sup> General Comment No. 31, *op. cit.*, para. 15.

These affirmative or positive obligations, which bind all State bodies (and sometimes also semi-State bodies), can also imply an obligation on States to protect individuals against arbitrary or unlawful interference with their rights by third parties (i.e., non-State actors). This has the effect of extending the reach of State obligations horizontally into the sphere of interpersonal relations. The nature of the obligations can vary, but includes prohibiting violations of human rights by private parties; developing legislative and other measures to give effect to such prohibitions, and conducting (independent and) effective investigations into certain types of violations.<sup>10</sup>

From the point of view of the right to freedom of expression, it is very important that all of the substantive rights safeguarded by the ICCPR imply negative and positive State obligations in this manner. “Promoting the safety of journalists and fighting impunity”, for instance, require affirmative State action in order to ensure various human rights that intersect with journalists’ right to freedom of expression, such as: the right to life (Article 6); the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (Article 7); the right to liberty and security of person (including the right not to be subjected to arbitrary arrest or detention) (Article 9), and the right to liberty of movement (including the right to leave a country) (Article 12).<sup>11</sup> Similarly, affirmative State measures are needed to tackle “some of the root causes of violence against journalists and of impunity”, such as corruption and organized crime.<sup>12</sup>

Attacks on journalists and other media actors violate the above-mentioned rights and the right to freedom of expression, although the Human Rights Committee has not always found cumulative violations of rights in relevant cases.<sup>13</sup> In its General Comment No. 34, the Human Rights Committee is unequivocal in its condemnation of attacks on journalists and other media actors and the incompatibility of such attacks with the right to freedom of expression:

“States parties should put in place effective measures to protect against attacks aimed at silencing those exercising their right to freedom of expression. Paragraph 3 may never be invoked as a justification for the muzzling of any advocacy of multi-party democracy, democratic tenets and human rights. Nor, under any circumstance, can an attack on a person, because of the exercise of his or her freedom of opinion or expression, including such forms of attack as arbitrary arrest, torture, threats to life and killing, be

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<sup>10</sup> Human Rights Committee, General Comment No. 16 – Doc. No. A/43/40, 28 September 1988, para. 1. See also paras. 6 and 9; Human Rights Committee, General Comment No. 34 – Article 19: Freedoms of opinion and expression, Doc. No. CCPR/C/GC/34, 12 September 2011, para. 7.

<sup>11</sup> UN Plan of Action, para. 1.6.

<sup>12</sup> Ibid.

<sup>13</sup> For a brief overview of divergent approaches by the Committee in its earlier case-law, see: Manfred Nowak, *U.N. Covenant on Civil and Political Rights – CCPR Commentary* (2nd revised edition) (Kehl, N.P. Engel, 2005), p. 450. For a more detailed and more recent overview, see: Carmen Draghici and Lorna Woods, Initiative on Impunity and the Rule of Law Research, *Legal Instruments Study*, A Policy Research and Advocacy Project of the Centre for Law, Justice and Journalism (CLJJ) at City University London, and the Centre for Freedom of the Media (CFOM) at the University of Sheffield, 2011, pp. 8-43, at pp. 15-16.



compatible with article 19. Journalists are frequently subjected to such threats, intimidation and attacks because of their activities. So too are persons who engage in the gathering and analysis of information on the human rights situation and who publish human rights-related reports, including judges and lawyers. All such attacks should be vigorously investigated in a timely fashion, and the perpetrators prosecuted, and the victims, or, in the case of killings, their representatives, be in receipt of appropriate forms of redress.”<sup>14</sup>

### 1.1.2 Article 19, ICCPR

The right to freedom of expression and its core elements are enshrined in Article 19, ICCPR. It fleshes out the key principles articulated in Article 19 of the Universal Declaration of Human Rights<sup>15</sup> as follows:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
  - (a) For respect of the rights or reputations of others;
  - (b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 19, ICCPR must be read in conjunction with Article 20, ICCPR, which prohibits propaganda for war, as well as advocacy of different types of hatred “that constitutes incitement to discrimination, hostility or violence”.<sup>16</sup> As such, Article 20 is widely regarded as providing for further restriction of the right to freedom of expression.<sup>17</sup>

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<sup>14</sup> [Footnotes omitted] Para. 23.

<sup>15</sup> Article 19 of the Universal Declaration of Human Rights reads: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers”.

<sup>16</sup> Article 20, ICCPR reads:

- “1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”.

<sup>17</sup> Karl Josef Partsch, “Freedom of Conscience and Expression, and Political Freedoms”, in Louis Henkin, Ed., *The International Bill of Rights: The Covenant on Civil and Political Rights* (New York, Columbia University Press, 1981), pp. 209-245, at 227; Manfred Nowak, *U.N. Covenant on Civil and Political Rights – CCPR Commentary* (2<sup>nd</sup> revised edition), *op. cit.*, p. 477; Human Rights Committee General Comments No.11 and No. 34. For more detailed discussion, see: Tarlach McGonagle, *Minority Rights, Freedom of Expression and of the Media: Dynamics and Dilemmas* (Antwerp, Intersentia, 2011), pp. 274-276.

The Human Rights Committee's General Comment No. 34 sets out the principles and parameters of the Committee's engagement with the right to freedom of expression over the years. It also provides a modernized articulation of the Committee's understanding of freedom of expression and the place of the media in contemporary society.<sup>18</sup> The General Comment thus affirms that the scope of the protection guaranteed by Article 19 covers all forms and means of expression and communication, both off- and online;<sup>19</sup> any restrictions on freedom of expression in respect of specific online actors, eg. Internet Service Providers, blogs or search engines, must be compatible with Article 19(3).<sup>20</sup> Moreover, States "should take all necessary steps to foster the independence of these new media and to ensure access of individuals thereto".<sup>21</sup>

The General Comment recognizes that "free, uncensored and unhindered press or other media" as "essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights" and can constitute "one of the cornerstones of a democratic society".<sup>22</sup> It is therefore necessary that "a free press and other media [are] able to comment on public issues without censorship or restraint and to inform public opinion" and that the public has a corresponding right to receive such information and commentary.<sup>23</sup> These references to "press and/or other media" are firmly grounded in a commitment to fostering participation in public debate and public affairs.<sup>24</sup>

The General Comment understands "journalism" in a broad way, seeing it as "a function shared by a wide range of actors, including professional full-time reporters and analysts, as well as bloggers and others who engage in forms of self-publication in print, on the internet or elsewhere".<sup>25</sup> It recognises not only the importance of substantive freedoms for journalists and others, but also a range of functional freedoms, which are derived from a more general right to freedom of expression and are essential for the specific function of commenting on public issues and informing public opinion. These functional

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<sup>18</sup> The Committee's previous General Comment on freedom of expression (No. 10) was adopted in 1983.

<sup>19</sup> See, for example, General Comment No. 34, *op. cit.*, paras. 12, 15, 43-45.

<sup>20</sup> *Ibid.*, para. 43.

<sup>21</sup> *Ibid.*, para. 15.

<sup>22</sup> *Ibid.*, para. 13.

<sup>23</sup> *Ibid.* See also, para. 20.

<sup>24</sup> This point is made forcefully in para. 25 of the Human Rights Committee's General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Article 25), 12 July 1996.

<sup>25</sup> General Comment No. 34, *op. cit.*, para. 44.

freedoms include freedom of movement – abroad, to and within conflict zones, sites of national disasters and locations where there are allegations of human rights abuses.<sup>26</sup> They also include the “limited journalistic privilege not to disclose information sources”.<sup>27</sup> Finally, it is worth noting that the General Comment is also very forthright in its assertion that Article 19 entails positive obligations for States Parties, which require them, *inter alia*, “to ensure that persons are protected from any acts by private persons or entities that would impair the enjoyment of the freedoms of opinion and expression to the extent that these Covenant rights are amenable to application between private persons or entities”.<sup>28</sup>

In sum, Article 19 creates a bulwark of protection for the right to freedom of expression and it recognises the particular importance for society of the public watchdog roles played by journalists (which it understands in a broad sense of the term) and other media actors. Read in the context of the ICCPR as a whole, Article 19 intersects with a number of other articles, such as those guaranteeing the right to life and freedom from torture, cruel, inhuman or degrading treatment, so as to provide a strong legal basis for the protection of journalists and the fight against impunity for the perpetrators of crimes against journalists.

## 1.2 International humanitarian law

The relationship between human rights law and humanitarian law becomes most evident in context of armed conflict; then, “human rights law applies as the *lex generalis* while international humanitarian law applies as the *lex specialis*”.<sup>29</sup> The most important pillars of international humanitarian law applicable in situations of armed conflict are the four Geneva Conventions of 1949<sup>30</sup> and their three Additional Protocols.<sup>31</sup> Only two

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<sup>26</sup> *Ibid.*, para. 45.

<sup>27</sup> *Ibid.*

<sup>28</sup> [Footnotes omitted] Para. 7.

<sup>29</sup> Christof Heyns and Sharath Srinivasan, “Protecting the Right to Life of Journalists: The Need for a Higher Level of Engagement”, 35 *Human Rights Quarterly* (No. 2, May 2013), pp. 304-332, at 324.

<sup>30</sup> I. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; II. Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; III. Geneva Convention relative to the Treatment of Prisoners of War; IV. Geneva Convention relative to the Protection of Civilian Persons in Time of War, all adopted on 12 August 1949.

<sup>31</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), both adopted on 8 June 1977; Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), adopted on 8 December 2005.

provisions deal squarely with the protection of journalists in situations of armed conflict.

First, Article 4A(4) of the Third Geneva Convention relative to the Treatment of Prisoners of War states that war correspondents (or “embedded journalists” to use more modern parlance<sup>32</sup>) are entitled to prisoner-of-war status when they fall into the hands of the enemy and are therefore entitled to be humanely treated, etc.<sup>33</sup>

Article 79 of the First Additional Protocol is entitled ‘Measures of protection for journalists’. Article 79(1) states that “Journalists engaged in dangerous professional missions in areas of armed conflict shall be considered as civilians” within the meaning of the term set out in the Protocol. Article 79(2) adds: “They shall be protected as such under the Conventions and this Protocol, provided that they take no action adversely affecting their status as civilians, and without prejudice to the right of war correspondents accredited to the armed forces to the status provided for in Article 4A(4) of the Third Convention”. The reasons for including a provision focusing specifically on journalists are explained in the Commentary to the Additional Protocol as follows:

“The circumstances of armed conflict expose journalists exercising their profession in such a situation to dangers which often exceed the level of danger normally encountered by civilians. In some cases the risks are even similar to the dangers encountered by members of the armed forces, although they do not belong to the armed forces. Therefore special rules are required for journalists who are imperilled by their professional duties in the context of armed conflict”.<sup>34</sup>

The Commentary also stresses that Article 79 is “a rule of international ‘humanitarian’ law” that “purports to protect journalists engaged on dangerous missions from the harmful effects of armed conflict”.<sup>35</sup> As such, it asserts, “neither the right to seek information nor the right to obtain information are at issue in this provision”.<sup>36</sup> This stipulation suggests that the protection given is, at best, indirectly related to the functions being carried out by the journalist. The link is indirect because the protection is premised on the civilian status of the individuals in question, and engaging in journalism does not deprive individuals of their status as civilians. Although specific to

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<sup>32</sup> Carmen Draghici and Lorna Woods, Initiative on Impunity and the Rule of Law Research, *Legal Instruments Study, op. cit.*, p. 17; Christof Heyns and Sharath Srinivasan, “Protecting the Right to Life of Journalists: The Need for a Higher Level of Engagement”, *op. cit.*, p. 325.

<sup>33</sup> The most relevant part of Article 4A(4) reads: “Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany”.

<sup>34</sup> Commentary to Additional Protocol I, para. 3245.

<sup>35</sup> *Ibid.*, para. 3246.

<sup>36</sup> *Ibid.*

international humanitarian law, it is interesting to compare this approach to the more integrated approach taken by the Human Rights Committee (see above) and the European Court of Human Rights (see below).

The term “journalist” is not defined and, according to the commentary to the Additional Protocol, it should be understood in the broad,<sup>37</sup> ordinary sense of the word.<sup>38</sup> The Commentary notes that “although the etymology calls to mind correspondents and reporters writing for a daily newspaper, the present use of the word covers a much wider circle of people working for the press and other media”.<sup>39</sup> It suggests that the definition contained in draft Article 2(a) of the International Convention for the Protection of Journalists engaged in Dangerous Missions in Areas of Armed Conflict<sup>40</sup> could serve as a guide for the interpretation of Article 79, thus meaning “any correspondent, reporter, photographer, and their technical film, radio and television assistants who are ordinarily engaged in any of these activities as their principal occupation [...]”.

### 1.3 Non-treaty-based mechanisms

The foregoing outlines the international treaty law framework within which the UN Plan of Action was elaborated. In the penumbra of those treaties, various institutional and political mechanisms further shape and advance the ‘safety of journalists and the issue of impunity’ agenda within the UN. A particularly important impetus came in the form of UN Security Council Resolution 1738 (2006), which *inter alia*:

*Emphasizes* the responsibility of States to comply with the relevant obligations under international law to end impunity and to prosecute those responsible for serious violations of international humanitarian law;

*Urges* all parties involved in situations of armed conflict to respect the professional independence and the rights of journalists, media professionals and associated personnel as civilians.<sup>41</sup>

This Resolution has also led to the adoption of annual reports by the UN Secretary General on these topics, thereby ensuring their continued political prominence.

For the most part, relevant non-treaty mechanisms do not (usually) lead to legally-binding outcomes, but they are (usually) politically authoritative and influential.<sup>42</sup> The

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<sup>37</sup> *Ibid.*, para. 3261.

<sup>38</sup> *Ibid.*, para. 3260.

<sup>39</sup> *Ibid.*

<sup>40</sup> [Footnote per original] Document of the United Nations A/10147 of 1 August 1975, Annex I.

<sup>41</sup> [Emphasis per original] United Nations Security Council Resolution 1738 (2006), Doc. No. S/RES/1738(2006), 23 December 2006, paras. 7 and 8.

Plan of Action mentions, in this connection, the UN Human Rights Council<sup>43</sup> and a number of Special Rapporteurs (SRs) operating under its auspices: the SR on the promotion and protection of the right to freedom of opinion and expression;<sup>44</sup> the SR on extra-judicial, summary or arbitrary executions; the SR on violence against women, its causes and consequences; the SR on torture and other cruel, inhuman or degrading treatment or punishment.<sup>45</sup> The Working Group on enforced or involuntary disappearances and the Working Group on arbitrary detention are also mentioned.<sup>46</sup>

## **1.4 The UN Plan of Action on the Safety of Journalists and the Issue of Impunity**

### *1.4.1 Background*

The UN Plan of Action on the Safety of Journalists and the Issue of Impunity is the outcome of a process initiated by the Intergovernmental Council of the International Programme for the Development of Communication (IPDC) in 2010. The IPDC is a multilateral UN forum that aims to mobilize the international community to discuss and promote media development in developing countries. It has a central role in monitoring the follow-up to the killings condemned by UNESCO's Director General and it has adopted a number of Reports and Decisions on the topic.

The Plan of Action was prepared during the first UN Inter-Agency Meeting on the Safety of Journalists and the Issue of Impunity in September 2011 and it was endorsed by the UN Chief Executives Board in April 2012. With a view to the operationalisation of the Plan of Action, an Implementation Strategy has been devised for 2013-2014.

### *1.4.2 Essence*

The key objective of the Plan of Action is to work "toward the creation of a free and safe environment for journalists and media workers in both conflict and non-conflict situations, with a view to strengthening peace, democracy and development worldwide".<sup>47</sup> This points up the relevance of human rights and humanitarian law

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<sup>42</sup> For an overview of the most relevant instruments, see: Carmen Draghici and Lorna Woods, Initiative on Impunity and the Rule of Law Research, *Legal Instruments Study, op. cit.*, pp. 8-43, esp. at pp. 16-17.

<sup>43</sup> For a recent example of its engagement with relevant issues, see: Human Rights Council Resolution on the safety of journalists, Doc. No. A/HRC/24/L13, 20 September 2013.

<sup>44</sup> See, for example, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, Doc. No. A/HRC/20/17, 4 June 2012.

<sup>45</sup> UN Plan of Action, para. 1.9.

<sup>46</sup> Ibid.

<sup>47</sup> Para. 4.1.

provisions governing the protection of journalists and their right to freedom of expression. It also emphasizes the instrumentality of journalists' freedom and safety for peace, democracy and development. The underlying justification for the Plan of Action is to "uphold the fundamental right of freedom of expression and, in so doing, to ensure that citizens are well informed and actively participate in society at large".<sup>48</sup>

The underlying principles of the Plan of Action are set out in Section 3:

- 3.1. Joint action in the spirit of enhancing system-wide efficiency and coherence;
- 3.2. Building on the strengths of different agencies to foster synergies and to avoid duplication;
- 3.3. A results-based approach, prioritizing actions and interventions for maximum impact;
- 3.4. A human rights-based approach;
- 3.5. A gender-sensitive approach;
- 3.6. A disability-sensitive approach;
- 3.7. Incorporation of the safety of journalists and the struggle against impunity into the United Nation's broader developmental objectives;
- 3.8. Implementation of the principles of the February 2005 Paris Declaration on Aid Effectiveness (ownership, alignment, harmonisation, results and mutual accountability);
- 3.9. Strategic partnerships beyond the UN system, harnessing the initiatives of various international, regional and local organizations dedicated to the safety of journalists and media workers;
- 3.10. A context-sensitive, multi-disciplinary approach to the root causes of threats to journalists and impunity;
- 3.11. Robust mechanisms (indicators) for monitoring and evaluating the impact of interventions and strategies reflecting the UN's core values.

## **1.5 Synopsis**

It can be seen from the foregoing that the UN Plan of Action is firmly grounded in international human rights law and international humanitarian law. The political vitality and urgency of the issues addressed in the UN Plan of Action have been taken up across the board at the UN, notably by the Security Council, the Human Rights Council

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<sup>48</sup> Para. 2.1.

(including various Special Rapporteurs, in particular the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression), and the IPDC. The legal grounding and political traction are a formidable alliance, but further implementation and operationalisation are required.<sup>49</sup> That is why the Plan of Action envisages, not only heightened coordination of relevant activities within the UN, but also outreach to, and concerted collaboration with, a variety of external stakeholders: other international and regional intergovernmental organizations, States authorities, civil society actors, etc.

The next section of this paper will examine how the Council of Europe engages with the issues addressed in the UN Plan of Action.

## **2. The Council of Europe framework**

The Council of Europe has developed an elaborate system for the protection of freedom of expression. The system strives to operationalise abstract theories of freedom of expression and turn them into a right to freedom of expression that is meaningful and effective in practice. The system could be described as creating an “enabling environment” for freedom of expression, including as exercised by journalists and other media actors.<sup>50</sup>

The system (visualized below) comprises treaty law and case-law; political and policy-making standards (hereafter: standard-setting texts), and State reporting/monitoring mechanisms. It is the interplay between each of these components that ultimately shapes the contours of the right to freedom of expression in practice. The word “interplay” is important here because the relationship between legally-binding standards and political standard-setting texts is not one-directional. Standard-setting texts ought to be grounded in the European Convention on Human Rights and the case-law of the European Court of Human Rights, but they can also influence the development of that case-law.

As standard-setting texts tend to focus on particular (human rights) issues or (emerging) situations with democratic or human rights implications, they can serve to supplement existing treaty provisions. They can do so by providing a level of detail lacking in treaty provisions or by anticipating new issues not yet dealt with in treaty provisions or case-law. It is noteworthy that judgments of the European Court of Human

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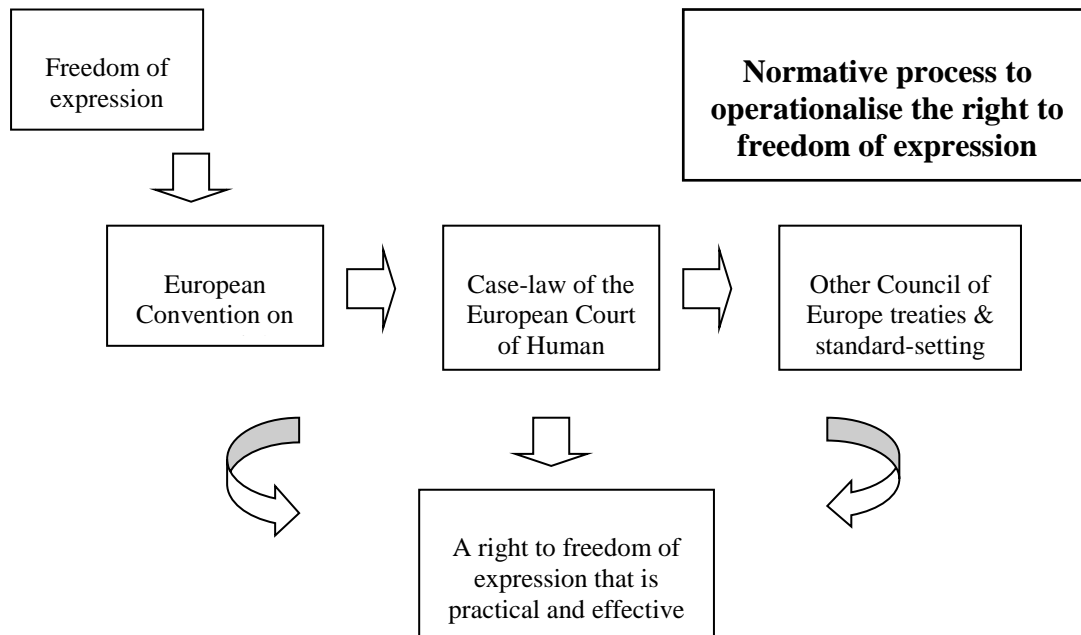
<sup>49</sup> See generally, Christof Heyns and Sharath Srinivasan, “Protecting the Right to Life of Journalists: The Need for a Higher Level of Engagement”, *op. cit.*

<sup>50</sup> For a comprehensive exploration of the concept, see, Peter Krug & Monroe E. Price, “The Enabling Environment for Free and Independent Media: Contribution to Transparent and Accountable Governance”, The USAID Office of Democracy and Governance Occasional Paper Series, January 2002, Doc. No. PN-ACM-006, and more recently and succinctly, Monroe Price & Peter Krug, “The Enabling Environment For Free and Independent Media” in Mark Harvey, Ed., *Media Matters: Perspectives on Advancing Governance & Development from the Global Forum for Media Development* (Beijing, Internews Europe, 2007), pp. 94-101.



Rights refer, for example, to the Committee of Ministers’ standard-setting texts in an increasingly systematic and structured way – typically in a section of judgments entitled, “Relevant International Instruments”.<sup>51</sup> In the same vein, these standard-setting texts can facilitate the interpretation of existing treaties by applying general principles to concrete situations or interpreting principles in a way that is in tune with the times.

**Figure 1: Freedom of expression – from theory to practice.**



## 2.1 The European Convention on Human Rights (ECHR)

### 2.1.1 Article 10, ECHR

Article 10, ECHR is the centrepiece of the Council of Europe’s system for the protection of the right to freedom of expression. It reads:

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

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<sup>51</sup> For example, Recommendation No. R (97)20 of the Committee of Ministers to member states on ‘hate speech’, 30 October 1997, is cited in the European Court of Human Rights’ judgments in *Gündüz v. Turkey*, no. 35071/97, § 22, ECHR 2003-XI and *Féret v. Belgium*, no. 15615/07, § 44 and 72, 16 July 2009.

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.

Article 10(1) sets out the right to freedom of expression as a compound right comprising three distinct components: the freedom to hold opinions and to receive and impart information and ideas. Article 10(1) also countenances the possibility for States to regulate the audiovisual media by means of licensing schemes.

Article 10(2) then proceeds to trammel the core right set out in the preceding paragraph. It does so by enumerating a number of grounds, based on which the right *may* legitimately be restricted, *provided that* the restrictions are *prescribed by law* and are *necessary in a democratic society*. It justifies this approach by linking the permissibility of restrictions on the right to the existence of *duties* and *responsibilities* which govern its exercise. Whereas the right to freedom of expression is regarded as being subject to general duties and responsibilities, the European Court of Human Rights sometimes refers to the specific duties or responsibilities pertaining to specific professions, eg. journalism, politics, education, military service, etc. In light of the casuistic nature of the Court's jurisprudence on duties and responsibilities and in light of its ongoing efforts to apply its free expression principles to the Internet (see further, below), it is only a matter of time before it begins to proffer indications of the content of Internet actors' duties and responsibilities in respect of freedom of expression.

The European Court of Human Rights has developed a standard test to determine whether Article 10, ECHR, has been violated. Put simply, whenever it has been established that there has been an interference with the right to freedom of expression, that interference must first of all be prescribed by law (i.e., it must be adequately accessible and reasonably foreseeable in its consequences). Second, it must pursue a legitimate aim (i.e., correspond to one of the aims set out in Article 10(2)). Third, it must be necessary in a democratic society (i.e., correspond to a "pressing social need") and be proportionate to the legitimate aim(s) pursued.

Under the margin of appreciation doctrine, which has an important influence on how the ECHR is interpreted at national level, States are given a certain amount of discretion in how they regulate expression.<sup>52</sup> The extent of this discretion, which is subject to supervision by the European Court of Human Rights, varies depending on the nature of the expression in question. Whereas States only have a narrow margin of appreciation in respect of political expression, they enjoy a wider margin of appreciation in respect of public morals, decency and religion. This is usually explained by the absence of a European consensus on whether/how such matters should be regulated. When exercising its supervisory function, the European Court of Human Rights does not take the place of the national authorities, but reviews the decisions taken by the national

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<sup>52</sup> Initially developed in the Court's case-law (see, in particular: *Handyside v. the United Kingdom*, 7 December 1976, §§ 47-50, Series A no. 24), a reference to the doctrine will be enshrined in the Preamble to the ECHR as soon as the Convention's Amending Protocol No. 15 enters into force.

authorities pursuant to their margin of appreciation under Article 10, ECHR. Thus, the Court looks at the expression complained of in the broader circumstances of the case and determines whether the reasons given by the national authorities for the restriction and how they implemented it are “relevant and sufficient” in the context of the interpretation of the Convention. Lastly, it is also worth noting that the “national margin of appreciation is circumscribed by the interest of democratic society in enabling the press to exercise its vital role of ‘public watchdog’”.<sup>53</sup>

Besides the margin of appreciation doctrine, three other interpretive principles espoused by the Court are of particular relevance for the right to freedom of expression: the practical and effective doctrine; the living instrument doctrine and the positive obligations doctrine. According to the practical and effective doctrine, all rights guaranteed by the ECHR must be “practical and effective” and not merely “theoretical or illusory”.<sup>54</sup> Under the “living instrument” doctrine,<sup>55</sup> the ECHR is regarded as a “living instrument” which “must be interpreted in the light of present-day conditions”.<sup>56</sup> This doctrine seeks to ensure that the Convention evolves with the times and does not become static or outdated. For the purposes of this paper, the positive obligations doctrine requires somewhat lengthier explanation, which will be provided in the next sub-section.

### *2.1.2 Positive State obligations in respect of freedom of expression and other Convention rights*

The essence of the positive obligations doctrine is that in order for States to ensure that everyone can exercise all of the rights enshrined in the ECHR in a practical and effective manner, the typical stance of non-interference (or negative obligation) by State authorities will often not suffice. Article 1, ECHR, obliges States Parties to the Convention to “secure to everyone within their jurisdiction the rights and freedoms” set out in the Convention. The obligation to “secure” these rights is unequivocal and necessarily involves ensuring that the rights in question are not “theoretical or illusory”, but “practical and effective” (see above). Against this backdrop and based on an analysis of the Court’s relevant case-law, it has been observed that “various forms of positive obligations have been imposed upon different governmental bodies in order to secure a

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<sup>53</sup> *Chauvy and Others v. France*, no. 64915/01, § 67, ECHR 2004-VI.

<sup>54</sup> *Airey v. Ireland*, 9 October 1979, § 24, Series A no. 32.

<sup>55</sup> For an overview of the historical development of the “living instrument” doctrine by the European Court of Human Rights, see: Alastair Mowbray, “The Creativity of the European Court of Human Rights”, *Human Rights Law Review* 5: 1 (2005), 57-79.

<sup>56</sup> *Tyler v. the United Kingdom*, 25 April 1978, § 31, Series A no. 26; *Matthews v. the United Kingdom* [GC], no. 24833/94, § 39, ECHR 1999-I.

realistic guarantee of Convention rights and freedoms”.<sup>57</sup> What exactly a “realistic guarantee” entails is best determined on a case-by-case basis, although certain trends can tentatively be identified per Convention article. A recurrent principle in the court’s relevant case-law is that the positive measures that States are required to take in order to ensure rights may even extend into the sphere of private relations.

As in the context of the ICCPR, a number of autonomous rights are potentially implicated in issues surrounding the safety of journalists and other media actors and the fight against impunity. Typically, they include: the right to life (Article 2); prohibition of torture (Article 3); right to liberty and security (Article 5); right to a fair trial (Article 6) and no punishment without law (Article 7). The Court has read positive State obligations into these rights. They have been very helpfully grouped and summarised by Philip Leach under the following headings: the duty to protect life; the duty to investigate fatalities, and the prohibition to prevent torture and ill-treatment.<sup>58</sup> A right to an effective remedy (Article 13) applies whenever any of the Convention’s substantive rights are violated. States are also under a positive obligation to carry out effective, independent and prompt investigations into alleged unlawful killings or ill-treatment, either by State or non-State actors. States’ positive obligations therefore include both preventive and investigative dimensions.<sup>59</sup>

In its judgment in *Gongadze v. Ukraine*, the Court essentialises the nature of the (positive) obligation on States as regards the protection of the right to life:

The Court reiterates that the first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction. This involves a primary duty on the State to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person, backed up by law enforcement machinery for the prevention, suppression and punishment of breaches of such provisions. It also extends, in appropriate circumstances, to a positive obligation on the authorities to take preventive operational measures to protect an individual or individuals whose lives are at risk from the criminal acts of another individual.<sup>60</sup>

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<sup>57</sup> Alastair Mowbray, “The Creativity of the European Court of Human Rights”, *Human Rights Law Review* 5: 1 (2005), 57-79, at 78.

<sup>58</sup> Philip Leach, “The principles which can be drawn from the case-law of the European Court of Human Rights relating to the protection and safety of journalists and journalism”, Paper for the Council of Europe’s Steering Committee on Media and Information Society (CDMSI), Doc. No. CDMSI(2013)Misc3, 13 February 2013, esp. pp. 8-11.

<sup>59</sup> D.J. Harris, M. O’Boyle, E.P. Bates & C.M. Buckley, *Harris, O’Boyle & Warbrick: Law of the European Convention on Human Rights* (Second edition) (Oxford, Oxford University Press, 2009), p. 107.

<sup>60</sup> *Gongadze v. Ukraine*, no. 34056/02, § 164, ECHR 2005-XI.

Not all claims of threats to life will necessitate preventive operational measures by States: “it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party, and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk”.<sup>61</sup> Such a scenario arose in *Dink v. Turkey* and the Court found that the State authorities’ failure to prevent the murder of the journalist constituted a violation of Article 2.<sup>62</sup> Various vulnerabilities of individual journalists (eg. gender, membership of an ethnic or other minority group, the fact of reporting on sensitive political religious or societal topics or on criminal activities, etc.) can also be relevant considerations when determining whether there is an obligation on States to take preventive operational measures.

Important linkage between these rights and the right to freedom of expression has been established in various cases involving attacks on, threats to, and intimidation and harassment of journalists.<sup>63</sup> For instance, in *Özgür Gündem v. Turkey*, taking as its starting point, “the key importance of freedom of expression as one of the preconditions for a functioning democracy”, the Court recognised that:

Genuine, effective exercise of this freedom does not depend merely on the State's duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals [...]. In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which is inherent throughout the Convention.<sup>64</sup>

This recognition amounts to an important statement of principle, even if the Court immediately goes on to concede:

The scope of this obligation will inevitably vary, having regard to the diversity of situations obtaining in Contracting States, the difficulties involved in policing modern societies and the choices which must be made in terms of priorities and resources. Nor must such an obligation be interpreted in such a way as to impose an impossible or disproportionate burden on the authorities [...].<sup>65</sup>

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<sup>61</sup> *Kılıç v. Turkey*, no. 22492/93, §§ 62-63, ECHR 2000-III; *Gongadze v. Ukraine*, *op. cit.*, § 165.

<sup>62</sup> *Dink v. Turkey*, nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, 14 September 2010.

<sup>63</sup> See further in this connection, European Court of Human Rights Research Division, *Positive obligations on member States under Article 10 to protect journalists and prevent impunity*, Research report, December 2011.

<sup>64</sup> *Özgür Gündem v. Turkey*, no. 23144/93, § 43, ECHR 2000-III.

<sup>65</sup> *Ibid.*

Perhaps the most far-reaching positive obligation in relation to freedom of expression to be identified by the Court to date concerns the enablement of freedom of expression in a very broad sense. In *Dink v. Turkey*, the Court stated that States are required to create a favourable environment for participation in public debate for everyone and to enable the expression of ideas and opinions without fear.<sup>66</sup> This finding essentially affirms that States have an obligation to create an enabling environment for freedom of expression. It bridges protective and promotional obligations and it contains great potential for further development, including in respect of online communication.

## **2.2 Roles and forms of journalism and public debate in democratic society**

The offences described in the previous sub-section have aptly been classed as “crimes against freedom of expression” by the International Mechanisms for Promoting Freedom of Expression.<sup>67</sup> The system of freedom of expression – or enabling environment for freedom of expression – elaborated by the Council of Europe seeks to prevent and eradicate these crimes, as well as impunity for their perpetrators. It prioritises the taking of firm legal and political action against the crimes and their perpetrators alike.

The system also aims to prevent other sorts of threats to freedom of expression, in particular for journalists and other media actors, such as legal restraints on freedom of expression, including restrictive legislation and the restrictive application of (restrictive) legislation. Key areas in which these legal restraints arise have been neatly grouped by Aidan White under the following headings: “access to information and people’s right to know”; “defamation” (especially criminal defamation); “the right to privacy”; “protection of sources in the context of state security” (including in the context of counter-terrorism measures<sup>68</sup>), and “hate speech”.<sup>69</sup> In its endeavours to counter all of these threats to freedom of expression, the European Court of Human Rights (and indeed other bodies of the Council of Europe) has tended to recognise particular,

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<sup>66</sup> *Dink v. Turkey*, op. cit., § 137.

<sup>67</sup> The United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples’ Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, Joint Declaration on Crimes against Freedom of Expression, 4 May 2012.

<sup>68</sup> See, specifically on this point, Peter Noorlander, “Fighting words – the war on terror and media freedom”, in Merris Amos, Jackie Harrison and Lorna Woods, Eds., *Freedom of Expression and the Media* (Leiden, etc., Martinus Nijhoff Publishers, 2012), pp. 215-236; David Banisar, *Speaking of terror: A survey of the effects of counter-terrorism legislation on freedom of the media in Europe* (Strasbourg, Council of Europe, 2008).

<sup>69</sup> Aidan White, “Ethical journalism and human rights”, in *Human rights and a changing media landscape*, op. cit., pp. 47-75, at 55-67.

functionally-relevant freedoms for journalists and other media actors, which will be the focus of the next sub-sections.

### 2.2.1 *Enhanced levels of freedom of expression for journalists and the media*

The instrumental importance of journalists and the media for enhancing public debate in democratic society has been stressed repeatedly by the Court. The media can make important contributions to public debate by (widely) disseminating information and ideas and thereby contributing to opinion-forming processes within society. As the Court consistently acknowledges, this is particularly true of the audiovisual media because of their reach and impact. The Court has traditionally regarded the audiovisual media as more pervasive than the print media and now considers the Internet to be a medium with “no less powerful an effect than the print media”.<sup>70</sup> The media can also make important contributions to public debate by serving as fora for discussion and debate.<sup>71</sup> This is especially true of new media technologies which have considerable potential for high levels of individual and group participation in society.<sup>72</sup>

Furthermore, the role of “public watchdog” is very often ascribed to journalists and the media in a democratic society. In other words, they should monitor the activities of governmental authorities vigilantly and publicise any wrongdoing on their part. In respect of information about governmental activities, but also more broadly in respect of matters of public interest generally, the Court has held time and again that: “Not only do the media have the task of imparting such information and ideas: the public also has a right to receive them”.<sup>73</sup>

In light of the important democratic functions which journalists and the media can fulfil, the case-law of the Court tends to acknowledge an enhanced level of freedom of expression for journalists and other media actors (as opposed to ordinary individuals). The same approach is taken in relevant standard-setting texts adopted by the Council of Europe’s Committee of Ministers and Parliamentary Assembly as well.<sup>74</sup> It is important to dwell on the enhanced level of freedom of expression for media and journalists

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<sup>70</sup> *Fatullayev v. Azerbaijan*, no. 40984/07, § 95, 22 April 2010.

<sup>71</sup> *Társaság a Szabadságjogokért v. Hungary*, no. 37374/05, § 27, 14 April 2009.

<sup>72</sup> *Ahmet Yildirim v. Turkey*, no. 3111/10, § 49, ECHR 2012.

<sup>73</sup> *The Sunday Times v. the United Kingdom*, (no. 1), 26 April 1979, § 65, Series A no. 30.

<sup>74</sup> See generally: Susanne Nikoltchev and Tarlach McGonagle, Eds., *Freedom of Expression and the Media: Standard-setting by the Council of Europe, (I) Committee of Ministers - IRIS Themes* (Strasbourg, European Audiovisual Observatory, 2011), available at: [www.obs.coe.int/oea\\_publ/legal/ebook\\_committeeministers-coe.pdf.en](http://www.obs.coe.int/oea_publ/legal/ebook_committeeministers-coe.pdf.en); Susanne Nikoltchev and Tarlach McGonagle, Eds., *Freedom of Expression and the Media: Standard-setting by the Council of Europe, (II) Parliamentary Assembly - IRIS Themes* (Strasbourg, European Audiovisual Observatory, 2011), available at: [www.obs.coe.int/oea\\_publ/legal/ebook\\_ParliamentaryAssembly.pdf.en](http://www.obs.coe.int/oea_publ/legal/ebook_ParliamentaryAssembly.pdf.en)

because insofar as new (online) media actors fulfil the democratic functions ascribed to journalists and the media, a plausible case can be made for them to also benefit from – at least some functionally relevant aspects of – that enhanced freedom.

The enhanced freedom comprises legal recognition and protection of specific journalistic practices and realities involved in both pre-publication and publication activities. Concerning the former, protection of confidential sources is obviously of crucial importance,<sup>75</sup> as is protection against searches of professional workplaces and private domiciles and against seizure of materials.<sup>76</sup> The same is true of protection against physical violence and intimidation.<sup>77</sup> The importance of the protection of pre-publication procedures and processes for the gathering and selection of material, such as research and enquiry, has also been recognised.<sup>78</sup> Indeed, interferences with those processes can pose such a serious threat to the right to freedom of expression that they demand the highest levels of scrutiny by the Court.<sup>79</sup> The pre-publication processes are increasingly contingent on the ability to access the Internet. Blocking a group of websites entails a risk of “collateral censorship” and as such a measure would amount to prior censorship, it would also require the highest levels of scrutiny by the Court.<sup>80</sup>

Concerning activities relating to publication and dissemination, journalists and the media have a wide freedom (indeed, the task) to report and comment on matters of public interest.<sup>81</sup> Article 10 ECHR, protects “not only the substance of ideas and information, but also the form in which they are conveyed”, which means that the right to freedom of expression also includes editorial and presentational autonomy for media professionals.<sup>82</sup> As the European Court of Human Rights famously held in its *Jersild* judgment, it is not for the courts “to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists”.<sup>83</sup> Editorial and

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<sup>75</sup> *Goodwin v. the United Kingdom*, 27 March 1996, Reports of Judgments and Decisions 1996-II; *Voskuil v. the Netherlands*, no. 64752/01, 22 November 2007; *Tillack v. Belgium*, no. 20477/05, 27 November 2007; *Sanoma Uitgevers B.V. v. the Netherlands [GC]*, no. 38224/03, 14 September 2010.

<sup>76</sup> *De Haes and Gijssels v. Belgium*, 24 February 1997, Reports of Judgments and Decisions 1997-I; *Ernst and Others v. Belgium*, no. 33400/96, 15 July 2003; *Roemen and Schmit v. Luxembourg*, no. 51772/99, ECHR 2003-IV.

<sup>77</sup> *Özgür Gündem v. Turkey*, *op. cit.*

<sup>78</sup> *Dammann v. Switzerland*, no. 77551/01, § 52, 25 April 2006.

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ahmet Yildirim v. Turkey*, *op. cit.*, §§ 47-55, esp. 47 and 52.

<sup>81</sup> *Thorgeir Thorgeirson v. Iceland*, 25 June 1992, Series A no. 239; *Bergens Tidende and Others v. Norway*, no. 26132/95, ECHR 2000-IV.

<sup>82</sup> *Oberschlick v. Austria (no. 1)*, 23 May 1991, § 57, Series A no. 204.



presentational freedom may even include recourse to “a degree of exaggeration, or even provocation”.<sup>84</sup>

These can be seen as functional freedoms that are derived from a more generic right to freedom of expression. As the right to freedom of expression – like all rights guaranteed by the European Convention on Human Rights – must be “practical and effective” and not merely “theoretical or illusory”, it is essential that the right be interpreted in a way that is informed by contextual specificities. Put more simply, in order for journalists’ right to freedom of expression to be effective in practice, the European Court of Human Rights needs to interpret it in a way that is informed by the realities of the journalistic/media sector, such as the perishability of news<sup>85</sup> and the impact of deadline-driven pressures on news-gathering practices,<sup>86</sup> threats to and violence against journalists, designed to muzzle them, etc. Insofar as non-journalistic actors fulfil similar functions to those of journalists or media professionals, it can be argued that they should also benefit, *mutatis mutandis*, from the freedoms enjoyed by their professional counterparts.

Together, these freedoms help to safeguard the operational autonomy necessary for the fulfillment of journalistic tasks in democratic society. The enjoyment of these freedoms is, however, coupled with the expectation of adherence to professional ethics and codes of conduct. Typically, such codes include provisions about accuracy, fairness, avoidance of stereotypes, etc. This prompts the thorny question of whether non-journalists or those outside of the professional media sector, can be expected to adhere to similar ethical standards and values as their professionally-trained counterparts.

### 2.2.2 Functional freedoms for a broader range of actors

As explained above, journalistic and media freedom can be seen as a corollary of the right to freedom of expression because of the public watchdog role ascribed to the press. Increasingly, however, that freedom is predicated on the provision of a forum for public debate. The ability of the media to take on such a role is facilitated by the increasingly interactive design of online media. This has led to trends that are sometimes referred to as “mutualized”, hybrid or open journalism,<sup>87</sup> i.e., forms of journalism that incorporate or otherwise employ user-generated content in different ways. They typically include

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<sup>83</sup> *Jersild v. Denmark*, 23 September 1994, § 31, Series A no. 298.

<sup>84</sup> *Prager and Oberschlick v. Austria*, 26 April 1995, § 38, Series A no. 313.

<sup>85</sup> *Observer & Guardian v. the United Kingdom*, 26 November 1991, § 60, Series A no. 216; *Sanoma Uitgevers B.V. v. the Netherlands* [GC], *op. cit.*, § 70.

<sup>86</sup> *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 68, ECHR 1999-III; *Colombani and Others v. France*, no. 51279/99, § 65, ECHR 2002-V.

<sup>87</sup> Alan Rusbridger, ‘The splintering of the fourth estate’, *The Guardian*, 19 November 2010.

the crowdsourcing of stories and various forms of collaboration with citizen journalists and the public at large.

The primacy of robust public debate in democratic society has also led to another crucial development in the case law of the European Court of Human Rights, *viz.* the realisation that a broad range of actors can make viable contributions to public debate. In the past, because of their dominant position in the communications sector, the media were effectively the gate-keepers or moderators of public debate. Technological advances have reduced the erstwhile influence/control of the media and made it possible for a greater range and diversity of actors to participate meaningfully in public debate.<sup>88</sup> The Court's appreciation of the importance of individual contributions to public debate is clear from its judgment in *Steel & Morris v. the United Kingdom*, when it held that:

"[I]n a democratic society even small and informal campaign groups [...] must be able to carry on their activities effectively and [...] there exists a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest [...]."<sup>89</sup>

Against this backdrop, new pedigrees of public watchdog have emerged and are continuing to emerge: non-governmental organizations (NGOs), whistle-blowers and bloggers, to give a few topical examples.<sup>90</sup> The Court has in recent times repeatedly recognised that "when a non-governmental organisation is involved in matters of public interest [...] it is exercising a role as a public watchdog of similar importance to that of the press",<sup>91</sup> thereby entitling it to "similar Convention protection to that afforded to the press".<sup>92</sup> The Court also introduced the term "social" watchdog;<sup>93</sup> it remains to be seen whether this terminological shift will also acquire substantive significance in future case-law. The Court's recognition of the value of NGOs' contribution to public debate<sup>94</sup> and ability to play the role of public or social watchdog is not surprising. There are

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<sup>88</sup> See generally: Karol Jakubowicz, A new notion of media?: Media and media-like content and activities on new communications services (Strasbourg, Council of Europe, April 2009).

<sup>89</sup> *Steel & Morris v. the United Kingdom*, no. 68416/01, § 89, ECHR 2005-II.

<sup>90</sup> See further, Matthias Traimer, Discussion paper on possible modifications of the 'public watchdog' term in the new media environment, Doc. No. CDMSI(2012)Misc1Rev, 30 January 2012.

<sup>91</sup> *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, § 103, 22 April 2013; *Youth Initiative for Human Rights v. Serbia*, no. 48135/06, § 20, 25 June 2013.

<sup>92</sup> *Társaság a Szabadságjogokért v. Hungary*, no. 37374/05, § 27, 14 April 2009; *Youth Initiative for Human Rights v. Serbia*, *op. cit.*, § 20.

<sup>93</sup> *Társaság a Szabadságjogokért v. Hungary*, *op. cit.*, § 36.

<sup>94</sup> *Vides Aizsardzības Klubs v. Latvia*, no. 57829/00, 27 May 2004; *Társaság a Szabadságjogokért v. Hungary*, *op. cit.*; *Kenedi v. Hungary*, no. 31475/05, 26 May 2009.

numerous similarities between NGOs and journalists or media, after all. NGOs, especially the better-resourced ones, invest in increasingly professional(ised) media and information strategies, often employing (former) journalists for that purpose. Human rights NGOs, in particular, often conduct, and publish the outcomes of, fact-finding missions in ways similar to investigative journalism.<sup>95</sup>

Whistle-blowers – individuals whom, acting in good faith and for reasons of principle and/or conscience, (illegally) disclose confidential information because of its overriding public-interest value - are quintessential public watchdogs. The importance of their contributions to public debate have been resoundingly demonstrated by the revelations of Edward Snowden over the past months. The so-called “Snowden effect” has forced online privacy onto international and national political agendas and triggered unprecedented levels of public debate on relevant issues. Whistle-blowing websites – most famously *WikiLeaks*, but including other initiatives, like *Publeaks* (<https://www.publeaks.nl/>), a recent collaborative initiative by several Dutch media organisations, facilitate the practice of secure, anonymous whistle-blowing. The importance of whistle-blowers’ contributions to public debate has already been recognised by the Court<sup>96</sup> and in other standard-setting work by the Council of Europe<sup>97</sup> and that recognition is likely to develop further in the future.<sup>98</sup>

A burgeoning blogosphere is nowadays the source of myriad contributions to public debate. Of course, not all blogs have the ambition to contribute to public debate. Many blogs are personal in character and as such target personal networks and communities of interest. It is important, therefore, not to lump all blogs together without distinguishing between them. Even within the range of blogs that do contribute to public debate more specific typologies can be useful to further specify the nature of their contribution to news-making, for example, the distinction between media blogs, journalist blogs, audience blogs and citizen blogs.<sup>99</sup> The sub-category, “public

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<sup>95</sup> Natalie Fenton, “NGOs, New Media and the Mainstream News: News from Everywhere”, in Natalie Fenton, Ed., *New Media, Old News: Journalism & Democracy in the Digital Age* (London, etc., SAGE Publications Ltd., 2010), pp. 153-168.

<sup>96</sup> See, for example: *Guja v. Moldova* [GC], no. 14277/04, ECHR 2008; *Heinisch v. Germany*, no. 28274/08, ECHR 2011 (extracts).

<sup>97</sup> PACE Recommendation 1916 (2010), Protection of ‘whistle-blowers’ and PACE Resolution 1729 (2010), Protection of ‘whistle-blowers’, both adopted on 29 April 2010.

<sup>98</sup> See further: Anna Austin, “Whistleblowers: the new watchdogs?”, in Josep Casadevall, Egbert Myjer, Michael O’Boyle & Anna Austin, Eds., *Freedom of Expression: Essays in honour of Nicolas Bratza* (Oisterwijk, The Netherlands, Wolf Legal Publishers, 2012), pp. 421-433, and more broadly, Yochai Benkler, “A Free Irresponsible Press: Wikileaks and the Battle over the Soul of the Networked Fourth Estate”, 46 *Harvard Civil Rights-Civil Liberties Law Review* (2011), 311-397. See also the ongoing work of the Bureau of the European Committee on Legal Co-operation on protecting whistleblowers.

<sup>99</sup> David Domingo and Ari Heinonen, “Weblogs and Journalism: A Typology to Explore the Blurring Boundaries”, 29 *Nordicom Review* 2008-1, pp. 3-15, at pp. 7 *et seq.* For further insightful commentary, see

watchblog”, has even been put forward to denote blogs that take on the public watchdog role.<sup>100</sup> Although the Court has not yet explicitly recognised the value of bloggers’ contributions to public debate (including those of micro-bloggers such as Twitter-users), such a step would be very much in keeping with the Court’s earlier finding in its *Steel & Morris* judgment (cited above).

The upshot of these developments is that there is increased and more nuanced legal recognition of the paramountcy of public debate; with renewed emphasis on the democratic societal context as opposed to the profession of the person. It represents a shift from an occupational/professional approach to a more purposive/functional one. This widens the notion of public debate considerably and appropriately.

In its Recommendation No. R (2000) 7 to member states on the right of journalists not to disclose their sources of information, the Committee of Ministers of the Council of Europe defined “journalist” as: “any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication”. This definition of journalist reflects a model of journalism that dominated in the past. It clearly grates with the Committee of Ministers’ current approaches to new media and evolving nature of journalism, as outlined in its Recommendation on a new notion of media.<sup>101</sup> The current approach recognises that a growing number and diversity of actors are contributing to journalism in different ways.

### **2.3 Revisiting rights, duties and responsibilities in the digital age**

As stated in Article 10(2), ECHR, the exercise of the right to freedom of expression “carries with it duties and responsibilities”. The scope of those “duties and responsibilities” varies, depending on the “situation” of the person exercising the right to freedom of expression and on the “technical means” used.<sup>102</sup> The Court’s case-law dealing with this phrase is rather casuistic, but distinctions tend to be made between different professional occupations.

When the Court considers the duties and responsibilities of journalists or other media actors, it routinely recalls the important role of the press/media in democratic society. In light of that role and although the press “must not overstep certain bounds, in particular in respect of the reputation and rights of others and the need to prevent the

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Karol Jakubowicz, *A new notion of media?: Media and media-like content and activities on new communications services*, *op. cit.*, pp. 21 *et seq.*

<sup>100</sup> Michiel Oosterveld and Manon Oostveen, “Van public watchdog naar public watchblog: het EHRM en journalistieke weblogs”, *Mediaforum* 2013-6, pp. 146-153.

<sup>101</sup> Recommendation CM/Rec(2011)7 of the Committee of Ministers to member states on a new notion of media, 21 September 2011.

<sup>102</sup> *Fressoz and Roire v. France* [GC], no. 29183/95, § 52, ECHR 1999-I.

disclosure of confidential information, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest”.<sup>103</sup>

The Court has also stated that “in essence”, Article 10:

leaves it for journalists to decide whether or not it is necessary to reproduce such documents to ensure credibility. It protects journalists’ right to divulge information on issues of general interest provided that they are acting in good faith and on an accurate factual basis and provide “reliable and precise” information in accordance with the ethics of journalism.<sup>104</sup>

On the other hand, though, and notwithstanding the importance of that role, the Court has “stressed” that: “journalists cannot, in principle, be released from their duty to obey the ordinary criminal law on the basis that Article 10 affords them protection”.<sup>105</sup> It has also stressed that:

the “duties and responsibilities” which accompany the exercise of the right to freedom of expression by media professionals assume special significance in situations of conflict and tension. Particular caution is called for when consideration is being given to the publication of the views of representatives of organisations which resort to violence against the State lest the media become a vehicle for the dissemination of hate speech and the promotion of violence. [...] <sup>106</sup>

In recent years, the Court has been placing increasing emphasis on adherence to journalistic ethics and codes of practice, which is sometimes summarised as “responsible journalism”.<sup>107</sup> It has explained its approach as follows:

These considerations play a particularly important role nowadays, given the influence wielded by the media in contemporary society: not only do they inform, they can also suggest by the way in which they present the information how it is to be assessed. In a world in which the individual is confronted with vast quantities of information circulated via traditional and electronic media and involving an ever-growing number of players, monitoring compliance with journalistic ethics takes on added importance.<sup>108</sup>

However, the heavy emphasis on ethical practices has been roundly criticised for tipping an already precarious balance away from freedom of expression towards

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<sup>103</sup> De Haes and Gijssels v. Belgium, op. cit., § 37.

<sup>104</sup> Fressoz & Roire, op. cit., § 54.

<sup>105</sup> Fressoz & Roire, op. cit., § 52.

<sup>106</sup> *Sürek and Özdemir v. Turkey* [GC], nos. 23927/94 and 24277/94, § 63, 8 July 1999; *Sürek v. Turkey (no. 4)* [GC], no. 24762/94, § 60, 8 July 1999 and *Erdoğan and İnce v. Turkey* [GC], nos. 25067/94 and 25068/94, § 54, ECHR 1999-IV.

<sup>107</sup> Dirk Voorhoof, “Het Europese ‘First Amendment’ - De Straatsburgse jurisprudentie over artikel 10 EVRM: 2004-2009 (deel 2)”, 22 *Mediaforum* 2010-6, pp. 186-201, at pp. 194-195.

<sup>108</sup> *Stoll v. Switzerland* [GC], no. 69698/01, § 104, ECHR 2007-V.

responsibility. This criticism has come from within the Court in the form of trenchant dissenting opinions,<sup>109</sup> and also from leading academic commentators.<sup>110</sup> The essence of the criticism is that the conflation of legal and ethical issues is confusing and inappropriate, not least because it can result in journalistic practices assuming greater importance than the public's right to receive information and the media's right to impart it.

While responsibility and espousal of journalism driven by ethical values<sup>111</sup> are clearly a legitimate trade-off for the enhanced freedom enjoyed by journalists, undue emphasis on that responsibility can have a "chilling effect" on the right to freedom of expression.<sup>112</sup> If, for example, the same expectations of responsibility were to be extended to the growing range of actors contributing to public debate or performing public watchdog functions, it could serve as a disincentive to exercise their freedom of expression.

## 2.4 New regulatory and policy challenges and directions

The Council of Europe faces (at least) two major regulatory and policy challenges at the moment. Both of them are of direct relevance for the protection and expressive freedoms of journalists and other media actors. The first concerns the applicability of the principles distilled from its existing body of standards on freedom of expression, journalism and the media to a reconfigured media ecosystem. Those principles need to be applied faithfully and consistently, but also adaptively. Increased care is required in this regard in the context of the Council of Europe's continued engagement with new notions of media.

In his keynote speech at the 1<sup>st</sup> Council of Europe Conference of Ministers responsible for Media and New Communication Services in 2009,<sup>113</sup> Karol Jakubowicz challenged the Council of Europe and its Member States to develop a modern and comprehensive

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<sup>109</sup> *Ibid.*; *Guja v. Moldova*, Judgment of the European Court of Human Rights of 12 February 2008; *Flux v. Moldova* (no. 6), no. 22824/04, 29 July 2008.

<sup>110</sup> See generally (and in particular the papers by Dirk Voorhoof, Mario Oetheimer and Gavin Millar): *The European Protection of Freedom of Expression: Reflections on Some Recent Restrictive Trends*, Seminar at the European Court of Human Rights, Strasbourg, 10 October 2008; website: [www-ircm.u-strasbg.fr/seminaire\\_oct2008/index.htm](http://www-ircm.u-strasbg.fr/seminaire_oct2008/index.htm)

<sup>111</sup> See Aidan White, "Ethical journalism and human rights", in *Human rights and a changing media landscape*, *op. cit.*, pp. 47-75.

<sup>112</sup> *Barthold v. Germany*, 25 March 1985, Series A no. 90; *Goodwin v. the United Kingdom*, *op. cit.*

<sup>113</sup> *A new notion of media?*, 28-29 May 2009, Reykjavik, Iceland.

policy for digital and legacy media.<sup>114</sup> He urged policy-makers to look more closely at the proliferation of new types of media, how they operate and the context in which they operate, as well as their relationship to freedom of expression. This great challenge for the Council of Europe is by no means unique to the Council of Europe. It is shared by regulators and policy-makers at all levels, and also by academics. The challenge is to move on from the traditional “mass communication paradigm” built on the “one-to-many pattern”.<sup>115</sup> That is because, as Nick Couldry has observed, “[a] deeper transformation is under way that challenges the ontology on which the mass communication paradigm was based”.<sup>116</sup> The transformation involves the blurring of previously distinct boundaries between production and consumption of media; professionalism and amateurism and the huge variety in types of media, media services and media content.

Notwithstanding the adoption by the Committee of Ministers (CM) of a Recommendation on a new notion of media, as part of the roll-out from Reykjavik, the gauntlet thrown down by Jakubowicz remains in full view. The Council of Europe must ensure that the translation of its existing corpus of standards on freedom of expression, journalistic and media freedom into standards that are fit-for-purpose in an online context does not lead to either an inflation or a devaluation of those standards. It is therefore imperative that any attempt to apply key principles set out in those standards to the present media ecosystem is both scrupulous and systematic. While the Recommendation on a new notion of media explores a wide array of issues, the principles governing those issues have not been traced from relevant case-law and/or standard-setting work by various bodies of the Council of Europe in a meticulous, explicit and targeted fashion. It is of capital importance for the credibility and continued relevance of these standards that their origins guide their evolution and that there is transparency about the process.

The second major challenge that the Council of Europe is currently facing concerns the need to ensure greater effectiveness in the uptake of the aforementioned principles, and in particular in the implementation of Article 10 of the European Convention on Human

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<sup>114</sup> Republished in Karol Jakubowicz, *Media revolution in Europe: ahead of the curve* (Strasbourg, Council of Europe Publishing, 2011), pp. 15-19. See also his paper for the Reykjavik Conference: ‘A new notion of media? Media and media-like content and activities on new communication services’, republished in *ibid.*, pp. 177-245.

<sup>115</sup> Nick Couldry, “Does ‘the Media’ Have a Future?”, 24 *European Journal of Communication* (No. 4, 2009), pp. 437-449, at 437-438. See also in this connection: Jan van Cuilenburg and Denis McQuail, “Media Policy Paradigm Shifts: Towards a New Communications Policy Paradigm”, 18 *European Journal of Communication* (No. 2, 2003), pp. 181-207.

<sup>116</sup> *Ibid.*, p. 438.

Rights. To this end, the CM adopted a Declaration on measures to promote the respect of Article 10 on 13 January 2010.<sup>117</sup>

The Declaration notes that the European Court of Human Rights is the enforcement mechanism for (Article 10 of) the Convention and that this mechanism is supplemented by: (i) the procedure for the execution of the Court's judgments, which is supervised by the CM, and (ii) general standard-setting work by the Council of Europe in this area. It recognises the importance of strengthening the implementation of relevant standards in "law and practice" at the national level, a task which requires "the active support, engagement and co-operation" of all Member States.

It also acknowledges and welcomes the "action taken by other institutions, such as the Organisation [*sic*] for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, as well as civil society organisations".

The CM "welcomes the proposals" made by the Steering Committee on the Media and New Communication Services (CDMC) aimed at improving the promotion, by various organs of the Council of Europe, of respect of Article 10 in Member States. The Declaration, however, only provides summary details of the CDMC's proposals and fails to indicate that the proposals are described more expansively in Appendix IV of the CDMC's 11<sup>th</sup> Meeting Report. The main proposals are listed in the Meeting Report as follows: enhanced information collection; enhanced coordination; enhanced technical follow-up (expert assistance); enhanced political follow-up, and evaluation (by the Secretary General of the Council of Europe) (see Appendix I to this paper).

The Declaration's call for "improved collection and sharing of information and enhanced co-ordination" across the Council of Europe is prefaced by a roll-call of the various "bodies and institutions" which "are able, within their respective mandates, to contribute to the protection and promotion of freedom of expression and information and of freedom of the media". It names the Committee of Ministers, the Parliamentary Assembly, the Secretary General, the Commissioner for Human Rights and "other bodies" as all being "active in this area". The significant relevant work being conducted in the context of (for example) the Framework Convention for the Protection of National Minorities, the European Charter for Regional or Minority Languages or the activities of the European Commission against Racism and Intolerance (ECRI), is presumably covered by the reference to "other bodies". The failure to provide more extensive references to ongoing work within the Council of Europe was perhaps evidence in itself of the need for greater in-house coordination.

All in all, the text of the Declaration is laconic and the level of its ambition appears limited. Its titular aim – "to promote the respect of Article 10" is not nearly as far-reaching as "to ensure the effective implementation of Article 10" would have been, for instance. Nevertheless, follow-up action to the Declaration, as detailed in the report on

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<sup>117</sup> Declaration of the Committee of Ministers on measures to promote the respect of Article 10 of the European Convention on Human Rights, 13 January 2010.



the topic by the Secretary General of the Council of Europe,<sup>118</sup> indicates some progress and promise. Organisational adjustments have been geared towards better coordination, but inadequate personnel and financial resources remain constant concerns. Coordination within the Council of Europe appears to have been enhanced by the establishment of the Task Force on Freedom of Expression and the Media in 2012. Cooperation activities, with States and other organisations, remain strong. It is encouraging that the Conclusion to the Secretary General's report gives an emphatic political commitment to the cause of advancing freedom of expression.

## Conclusions and recommendations

The Secretary General of the Council of Europe concluded his report on the Implementation of the Declaration of the Committee of Ministers on measures to promote the respect of Article 10 of the European Convention on Human Rights as follows:

Political backing and resolve must match the magnitude of the challenge and the importance of freedom of expression both in human rights terms and as a *sine qua non* for democracy.

This conclusion represents an emphatic pledge to ensure that the Council of Europe's system for the protection of freedom of expression will be fortified by strong political support. Such support necessarily begins with *a level of resource allocation to relevant mechanisms that is reflective of the prioritization accorded to strengthening freedom of expression in the Council of Europe's activities.*

Various divisions and mechanisms of the Council of Europe are already conducting sterling work to ensure the effective implementation of the Council of Europe's standards on freedom of expression, but the time has perhaps come to find *a new institutional champion of freedom of expression.* Ideally, this would be a specialized mandate enjoying *high-level political status - a Commissioner for Freedom of Expression,* for instance.

In keeping with the Committee of Ministers' 2010 Declaration and follow-up to the same, an in-house focal point is desirable in order to coordinate and guide the Council of Europe's various activities relating to freedom of expression. As this important role is currently fulfilled by the Task Force on Freedom of Expression and Media, established by the Secretary General in 2012, one of the duties of the proposed specialized mandate could be to act as director of the Task Force. This could serve to increase the visibility of the Task Force and its work.

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<sup>118</sup> Report by the Secretary General, Implementation of the Declaration of the Committee of Ministers on measures to promote the respect of Article 10 of the European Convention on Human rights, Doc. No. CM(2013)29 rev. 3 April 2013.

The issue of visibility would also be relevant to the mandate as a whole. A strong public profile and an express mandate to work closely with all relevant stake-holders would be crucial for developing the credibility of the office. Synergic working relationships could be developed with the four existing IGO specialized mandates on freedom of expression and/or the media and ensure that the Council of Europe's standards help to inform the regular collaborative initiatives taken by the specialized mandates. Insofar as Council of Europe Member States overlap with the Participating States of the OSCE, it would be particularly important to ensure complementarity – not duplication – with the excellent work already being done with the OSCE Representative on Freedom of the Media in this field.

The remit of the office should be broad and include the possibility of “*silent diplomacy*” in response to warning signals regarding deteriorating levels of protection for freedom of expression. The remit should also allow for *public stances, criticizing* and *condemning* violations of the right to freedom of expression and threats to the safety and protection of journalists and other media actors. As custodian of the Council of Europe's standards on freedom of expression, the specialized mandate would be able to adopt authoritative political stances on violations of freedom of expression. The custodian role would also enable the specialized mandate to *advise* States authorities on the content of relevant standards and resultant State obligations and commitments. The custodian role would also enable the specialized mandate to *advocate* better fulfilment of States' negative and positive legal obligations and increased uptake of their political commitments.

Pending the establishment of a specialized mandate, or should its establishment not prove feasible or desirable, all relevant bodies of the Council of Europe should *continue to build on their current efforts to give effect to the CM's 2010 Declaration and adequate, multi-annual funding should be secured for that purpose*. In-house coordination efforts should pay particular attention to the need to *consolidate and synchronize existing legal and political standards*. The maintenance and promotion of a clear and consistent set of standards confers authority on stances taken by Council of Europe officials or bodies, whether behind-the-scenes or in public, against impunity for violence and threats against journalists and other media actors.

## Appendix I

Steering Committee on the Media and New Communication Services - Report 11<sup>th</sup> Meeting (20-23 October 2009) - CDMC(2009)025 - Appendix IV<sup>119</sup>

**Proposals for enhancing the means available to the Council of Europe to promote respect of freedom of expression and media freedoms in the member States prepared during the consultation meeting on the subject (to be considered together with the draft Declaration on measures to promote the respect of Article 10 of the European Convention on Human Rights)**

Member States' respect of freedom of expression, media freedoms and access to information (Article 10 ECHR) is crucial for the realisation of the core objectives of the Council of Europe which are to promote and protect human rights, pluralist democracy and the rule of law. The CDMC is therefore of the opinion that promoting compliance with Article 10 ECHR should be regarded as a priority area of action for the Council of Europe and benefit from appropriate budgetary resources. Having examined the current situation and existing structures, the CDMC has arrived at the following conclusions and proposals for enhancing the means available to the Council of Europe to promote respect of freedom of expression and media freedoms in the member States:

Enhanced information collection: it would be important to designate a dedicated focal point (small unit) within the Secretariat where information about relevant developments would be collected from various sources, including Council of Europe bodies and organs, international organisations as well as civil society and other stakeholders. Such a focal point could also play an important role in sharing such information both with relevant services of the Council of Europe (Private Office of the Secretary General, Office of the Commissioner for Human Rights; secretariats of the Committee of Ministers and of the Parliamentary Assembly, different services of the Directorate General of Human Rights and Legal Affairs, etc) and with other international organisations, in particular the OSCE Representative on Freedom of the Media.

2. Enhanced coordination: it would be important for the relevant services of the Council of Europe (brought together in a liaison group) to exchange information regularly about any actions initiated, dialogue established and their follow-up. It is understood that this would be without prejudice to the independence of action of any of the bodies or institutions involved. The objective is not coordination in any formal way, but ensuring that, in appropriate cases, at least one organ of the Council of Europe takes up the issue and initiates action and that all actors involved are aware of action being taken. Where applicable and appropriate, exchange of information and coordination should also concern the arrangement and outcome of technical and political follow-up as outlined below. It would be desirable to associate in this liaison group the relevant services of

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<sup>119</sup> Available at: [http://www.coe.int/t/dghl/standardsetting/media/CDMC/CDMC\(2009\)025\\_en.asp#TopOfPage](http://www.coe.int/t/dghl/standardsetting/media/CDMC/CDMC(2009)025_en.asp#TopOfPage)

the Council of Europe mentioned in the previous paragraph, for example by designating a contact person in each of the relevant offices and secretariats. Appropriate liaison with the office of the OSCE Representative should be ensured. The liaison group could be asked to provide, as and where appropriate, regular information on issues raised, activities undertaken and good practices identified. This could be done, for example, by the creation of a dedicated website. In addition, annual reports could be prepared for the Secretary General in view of their presentation in his annual statements to the Committee of Ministers and the Parliamentary Assembly. As these reports may be a possible source of inspiration for future intergovernmental work they would also be brought to the attention of the CDMC for consideration or possible action within its mandate.

3. Enhanced technical follow-up (expert assistance): it would be important that, whenever a Council of Europe body (whether it be the Secretary General, the Commissioner for Human Rights, the Parliamentary Assembly or the Committee of Ministers) draws a member state's attention to a specific question of respect of Article 10 ECHR, the Council of Europe has the necessary resources to provide the country with prompt assistance in finding a solution compatible with Council of Europe standards. In order to be effective, such expert assistance should be rapid, sustainable, based on independent expertise, dialogue with the national authorities and stakeholders and sharing of good practice. It could take (a combination of) various forms (expert opinions on draft legislation, policy advice, dialogue/round table meetings between national experts and Council of Europe experts, etc). In accordance with current working methods of the Directorate of Cooperation, it would seem advisable to use a pool of high-level media experts with various specialisations from which a tailor-made selection is made in each case depending on the specific issue at hand. The existing Council of Europe's cooperation programmes are not sufficiently flexible to ensure funding in all cases. Given the priority of action with regard to issues related to freedom of expression, the CDMC is of the opinion that sufficient funding should be allocated to finance such targeted cooperation activities as much as possible from the ordinary budget of the Council of Europe. In addition, member States should be invited to make voluntary contributions. The Human Rights Trust Fund as well as other sources might also be asked to consider funding possibilities. In any event, funding arrangements should offer adequate flexibility to allow for rapid availability of resources as and when needed.

4. Enhanced political follow-up: in case of reluctance to cooperate with the Council of Europe or if the dialogue does not lead to a satisfactory solution, it will be important for the relevant bodies of the Council of Europe, each within the scope of their competences, to take any further action deemed appropriate.

5. Evaluation: the Secretary General could be invited to present an evaluation on the implementation of the above proposals after a period of three years.