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***“Freedom of expression and democracy in the digital age  
- Opportunities, rights, responsibilities”***

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Ministers and Secretaries of State,  
Ladies and Gentlemen,

Violence and intimidation against journalists, prosecution for lawful speech, judicial harassment and surveillance of those reporting, but also pluralism, diversity and quality of the media: the issues we will be discussing today and tomorrow are not new issues, and these challenges to media freedom are likely to continue to affect media actors also in the future. However, in the digital age, new challenges are already looming ahead and deserve our attention.

Among these, restrictions to media freedom on grounds of national security emerge as a particularly serious one, as we have seen following the recent disclosure of the US and UK mass surveillance programmes. The US intelligence agency, NSA, and its British counterpart, GCHQ, target encryption techniques that are used by Internet services such as Google, Facebook and Yahoo, making them vulnerable to surveillance. States, of course, have a duty to ensure security within their borders, and in doing so they can undertake the secret surveillance of individuals who can pose a threat. But if they do not do this properly, they risk undermining or even destroying the same democracy they are purporting to defend. To stem this risk, states and private companies must develop surveillance policies that respect human rights. Spying on individuals on a massive scale, without strict legal rules and democratic oversight, can have adverse effects on freedom of expression by provoking a chilling effect on investigative journalists and activists who might fear exposing their sources.

We will thus have to continue to ensure that media freedom applies to the new, digital environment where bloggers, activists and ordinary citizens have joined journalists in reporting in the public interest. To this end, we must first of all ensure that individuals can access content on the Internet, without undue limitations.

*Access to the Internet*

In contemporary media landscape, journalists and others expressing themselves in the public interest cannot be protected effectively unless care is taken to protect the Internet itself as a an open space for the exercise of the right to receive and impart information. Maintaining an open Internet, without undue restrictions by the authorities (or the private industry), is therefore an important dimension of my work on freedom of

expression. However, in a number of cases, member states have prevented access to certain content, through measures such as blocking and filtering.

The Strasbourg Court provides an invaluable bulwark to efforts to counter this state of affairs. In its first case on Internet blocking in December 2012 (*Yildirim v. Turkey*), the Court found a violation of Article 10 (freedom of expression) of the European Convention on Human Rights. It found notably that measures restricting access to Internet content must be based on a law that is precise enough and that offers sufficient opportunities for judicial review. In addition, domestic courts must examine whether the blocking measure is necessary, and in particular whether it is targeted enough so as to impact only on the specific content that requires blocking.

This stresses the important role of domestic courts in implementing the Court's case-law, a role which has been limited in this area thus far. In my view, judges in the vast majority of the member states are often unprepared when it comes to dealing with Internet content. There is a need to bring about legal training on what Internet implies for human rights.

#### *Restrictions on fundamental freedoms online*

No artificial distinctions should be made between the exercise of freedom of expression online and offline.

Certainly, the Internet present specific characteristics that should be taken into account when assessing the legitimacy of restrictions to freedom of expression. For instance: the potentially universal accessibility of the Internet by everyone as a publisher; and its ability to support new, democratic public spaces for debate (so-called virtual public square value of the Internet).

While the European region is for the most part free from practices such as arbitrary blocking and filtering, I am concerned by recent developments aimed at restricting the exercise of fundamental freedoms online.

The targeting of social media users who use the Internet to call for or organise protests is for instance a worrying trend. I have addressed this issue in my recent work on Azerbaijan, Spain and Turkey.

In Azerbaijan, I have expressed concern at the numerous arrests and prosecutions of online activists, and the monitoring of online activities or the tracking of user data by security agencies. I have called upon the authorities to cease practices of targeting social media users who express critical opinions of the authorities, and to refrain from restricting or controlling Internet access and information available via the web by legislative and technical means.

In my report on Spain published last month, I expressed concerns about a bill that aims to amend the Criminal Code, reportedly in reaction to the demonstrations that took place in 2011 and 2012. This bill includes in particular the criminalisation of the dissemination by any means of messages or orders inciting disturbance of public order or supporting "the decision of disturbing public order". The latter draft provision seems to relate to the convocation of demonstrations through social media. The vague nature of this provision, and in particular of the notion of disturbance of public order, might in fact lead to sanctioning declarations and opinions expressed prior to public disturbances, which would be incompatible with international standards on freedom of expression and the case law of the Strasbourg Court.

In Turkey, from the start of the events surrounding the Gezi park, the demonstrators relied very heavily on social media, in particular Twitter and Facebook, and government representatives repeatedly made statements targeting the social media. Around 30 persons were reportedly arrested on the basis of their tweets urging people to demonstrate in Izmir and subsequently released. In June, the Minister of the Interior expressed the government's view that there should be specific legislative regulation of social media considering the serious problems they cause. Fortunately, however, during my visit to Turkey last July, I was informed by the Minister of Justice that no such regulation was on the government's agenda.

Another issue relates to the criminalisation of online defamation. The recent extension of criminal defamation provisions to online content in Azerbaijan is one clear example. I understand that these provisions were used for the first time by an Azerbaijani Court on 14 August 2013 – unfortunately this is bound to further chill freedom of expression in the country.

The problem, however, existed before Internet: the Strasbourg Court has constantly repeated that the imposition of a prison sentence has a chilling effect on the exercise of journalistic freedom. Defamation is better dealt with through civil sanctions, although these sanctions must also be strictly proportionate. While the decriminalisation of defamation has been a long-standing recommendation of the Council of Europe, the development of Internet offers an opportunity to call on once more states which have not done so yet to decriminalise defamation. In the Internet age, it becomes increasingly difficult to protect citizens' freedom of expression while defamation laws differ as much as they do at present between member states.

This is in fact part of a broader issue: the so-called "libel tourism". It has been stressed that the risk of forum shopping in cases of defamation has been exacerbated as a consequence of increased globalisation and the persistent accessibility of content and archives on the Internet. In its Declaration on "Libel Tourism" adopted on 4 July 2012, the Committee of Ministers of the Council of Europe referred to libel tourism as an issue of growing concern for Council of Europe member States as it challenges a number of essential rights protected by the European Convention. Given the wide variety of defamation standards, court practices, freedom of speech standards and a readiness of courts to accept jurisdiction in libel cases, it is often impossible to predict where a defamation/libel claim will be filed. This is especially true for web-based publications. The Committee of Ministers therefore recommended that the prevention of libel tourism should be part of the reform of the legislation on defamation in member States in order to ensure better protection of the freedom of expression and information within a system that strikes a balance between competing human rights.

#### *Role of the private sector*

The role of the private industry in this context also needs to be considered. The main concern expressed by many Internet freedom and human rights experts in this field is a tendency among states to give free rein to private Internet companies and operators to regulate the Internet (self-regulation), as regards in particular access to content, but also privacy and data protection.

This raises the question of whether, and if so how, companies controlling the Internet, or activity on the Internet, should in some way be bound to comply with international human rights standards. A related question is whether, and if so when, States have a "positive obligation" to protect their citizens and everyone within their jurisdiction from measures by private entities that impinge on the rights of those persons.

It is my intention to look at questions of legal certainty on the Internet more in details and to bring further in focus the State's primary responsibility in guaranteeing the full exercise of fundamental rights and freedoms on the Internet.

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New challenges will appear and we have to be prepared to face them.

What states should primarily do is to uphold existing, applicable human rights standards. Proportionality and judicial oversight appear as two particularly key principles that should be systematically applied when looking at issues such as restricting access of specific individuals to the Internet and carrying out surveillance on their Internet activities.

But no matter how the media landscape evolves, one thing will not change: the role that media freedom plays as one of the essential foundations of a democratic society.