



MCM(2013)012
[CDMSI(2013)Misc3]

**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**

REPORT

Philip Leach

Professor of Human Rights Law
Middlesex University, London

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

Table of contents

- Introduction 5**

- (i) The rights protected by the European Convention on Human Rights and their permissible restrictions..... 5

- (ii) Positive Obligations under the European Convention on Human Rights..... 6

- (iii) Journalists and the right to freedom of expression: general principles..... 6

- (iv) The safety of journalists..... 10
 - The duty to protect life..... 10*
 - The duty to investigate fatalities 11*
 - The prohibition of torture and ill-treatment..... 12*

- (v) Support for investigative journalism 14
 - Hampering journalists’ work..... 14*
 - Access to information 14*
 - Protection of journalists’ sources..... 17*

- (vi) The prevention of intimidation of journalists by the misuse of law 20
 - Defamation and other criminal or civil proceedings..... 20*
 - Anti-terrorism measures 24*

Introduction

1. I have been asked by the Council of Europe Steering Committee on Media and Information Society (CDMSI) for a paper setting out the principles that can be drawn from the case-law of the European Court of Human Rights (“the Court”) relating to the protection and safety of journalists and journalism. I understand that the overall objective of the CDMSI is to establish a declaration of principles and to draft an in-depth recommendation to member states which includes the positive obligations upon states in respect of journalists.¹

2. This paper principally considers the following issues:

- the safety of journalists
- support for investigative journalism
- the prevention of intimidation of journalists by the misuse of law

(i) The rights protected by the European Convention on Human Rights and their permissible restrictions

3. The following substantive Convention rights are considered in this paper, to the extent that they have a bearing on the question of the protection and safety of journalists and journalism: Article 2 (the right to life); Article 3 (the prohibition of torture and inhuman and degrading treatment and punishment); Article 5 (the right to liberty); Article 6 (the right to a fair hearing); Article 7 (no punishment without law), Article 8 (the right to respect for private and family life, home and correspondence); Article 9 (the right to freedom of thought, conscience and religion), Article 10 (the right to freedom of expression), Article 11 (the right to freedom of assembly and association) and Article 13 (the right to an effective remedy).

4. In general terms, where restrictions on rights under the Convention are imposed, they will be subject to three tests:

- a) a test of legality;² and
- b) a test as to whether a legitimate aim was being pursued;³ and
- c) a test of proportionality.⁴

¹ See: CDMSI(2012)011Rev, Protection of journalists/journalism - Paper agreed by the Bureau of the CDMSI, Steering Committee on Media and Information Society (CDMSI), 11/10/2012. Available at: [http://www.coe.int/t/dghl/standardsetting/media/CDMSI/CDMSI\(2012\)011Rev_en%20.asp#TopOfPage](http://www.coe.int/t/dghl/standardsetting/media/CDMSI/CDMSI(2012)011Rev_en%20.asp#TopOfPage). I am very grateful to Awaz Raof for her invaluable research assistance in the preparation of this paper.

² For example, Article 10(2) requires any interference with the right to freedom of expression to be “prescribed by law”.

³ Article 10(2), for example, requires any interference with the right to freedom of expression to be in pursuit of one of the following: in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health of 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. In addition, Article 18 of the Convention prevents the restrictions permitted under the Convention from being used for ulterior purposes: “The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purposes other than those for which they have been prescribed”. See *Gusinsky v Russia* (No. 70276/01, 19.5.04) and *Lutsenko v Ukraine* ((No. 6492/11, 3.7.12) which establish that arbitrary measures imposed for political reasons are unacceptable to the Court. The relevant test was set out in *Lutsenko*: “an applicant alleging that his rights and freedoms were limited for an improper reason must convincingly show that the real aim of the authorities was not the same as that proclaimed (or as can be reasonably inferred from the context)” (para. 106).

(ii) Positive Obligations under the European Convention on Human Rights

5. It is fundamental to the European system of human rights protection that although the primary object of many provisions of the European Convention on Human Rights (“the Convention”) is to protect the individual against arbitrary interference by public authorities, there may also be additional positive obligations which are considered to be inherent to the effective respect of the rights concerned. This means that in certain circumstances the state is under an obligation to prevent Convention violations being committed by individuals (or other non-state entities) against other individuals. This principle applies in the field of freedom of expression, and to the protection of journalists:

The Court recalls the key importance of freedom of expression as one of the preconditions for a functioning democracy. 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...⁵

For example,

while setting up an efficient system to protect authors and journalists, States should create an environment which allows full participation in open debates, enabling everyone to express their opinions and ideas without fear, even if they are contrary to those defended by authorities or by an important share of public opinion or even if they shock or offend them⁶.

(iii) Journalists and the right to freedom of expression: general principles

6. The Court has consistently underlined the importance of the right to freedom of speech as one of the essential foundations of a democratic society, acknowledging in particular the “pre-eminent role” which the media plays: a vital role in a democracy in providing information and as a “public watchdog”. The media has a duty to impart information and ideas of public interest, without overstepping certain bounds, and this duty is mirrored by the public’s right to receive such information.⁷ Article 10 is applicable

not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb.⁸

7. A free media may act as a counter-balance to the secrecy of the state:

Press freedom assumes even greater importance in circumstances in which State activities and decisions escape democratic or judicial scrutiny on account of their confidential or secret nature.⁹

⁴ For example, Article 10(2) only permits restrictions that are “necessary in a democratic society”.

⁵ *Özgür Gündem v Turkey*, No. 23144/93, 16.3.00, paras. 43 & 46.

⁶ *Dink v Turkey*, Nos. 2668/07, 6102/08, 30079/08, 7072/09 & 7124/09, 14.9.10, para. 137 (non-official translation).

⁷ See, e.g., *Lingens v Austria*, No. 9815/82, Series A, No. 103, 8.7.86, para. 41; *Observer and Guardian v UK*, Series A no. 216, 26.11.91, para. 59; *The Sunday Times v UK* (no. 2), Series A no. 217, 26.11.91, para. 50; *Jersild v Denmark*, No. 15890/8, Series A, No. 298, 23.9.94, para. 31; *Cumpănă and Mazăre v Romania*, No. 33748, 17.12.04, para. 93; *Dammann v Switzerland*, No. 77551/01, 25.4.06, para. 57; *Kobenter and Standard Verlags GmbH v Austria*, No. 60899/00, 2.11.06, para. 31; *July and Sarl Libération v France*, No. 20893/03, 14.2.08, para. 76; *Fatullayev v Azerbaijan*, No. 40984/07, 22.4.10, para. 88; *Najafli v Azerbaijan*, No. 2594/07, 2.10.12, para. 66.

⁸ See, e.g. *Handyside v UK*, Series A no. 24, 7.12.76, para. 49; *Ekin Association v France*, No. 39288/98, 17.7.01, para. 56.

8. Freedom of political debate is considered by the Court to be at the very core of the concept of a democratic society and the freedom of the press provides the public with one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders.¹⁰ Therefore, “very strong reasons” will be required to justify restrictions on political speech.¹¹ Although politicians are entitled to protect their reputations, the limits of acceptable criticism are wider in relation to a politician than a private individual.¹² A politician

inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must display a greater degree of tolerance, especially when he himself makes public statements that are susceptible of criticism.¹³

9. Nevertheless,

politicians should be given an opportunity to defend themselves when they consider that publications about them are erroneous and capable of misleading public opinion...in such cases a fair balance between the privileged position of the press, exercising its freedom of expression, and a politician’s right to protect his or her reputation is called for.¹⁴

10. As for public officials and civil servants:

it may be necessary to protect public servants from offensive, abusive and defamatory attacks which are calculated to affect them in the performance of their duties and to damage public confidence in them and the office they hold.¹⁵

11. The limits of permissible criticism are wider still in relation to the government, which must be subject to the close scrutiny of the press and public.¹⁶

12. The Court acknowledges the difference between statements of fact¹⁷ and value judgements (as is reflected in the defamation laws of a number of Council of Europe

⁹ *Stoll v Switzerland*, No. 69698/01, 10.12.07, para. 110.

¹⁰ See, e.g., *Oberschlick v Austria*, No. 11662/85, Series A, No. 204, 23.5.91, para. 58.

¹¹ See, e.g., *Fatullayev v Azerbaijan*, No. 40984/07, 22.4.10, para. 117.

¹² See, e.g., *Lingens v Austria*, No. 9815/82, Series A, No. 103, 8.7.86; *Feldek v Slovakia*, No. 29032/95, 12.7.01; *Lindon, Otchakovsky-Laurens and July v France*, Nos. 21279/02 & 36448/02, 22.10.07, para. 56 (Jean-Marie Le Pen had “exposed himself to harsh criticism and must therefore display a particularly high degree of tolerance”); *Lepojiræ v Serbia*, No. 13909/05, 6.11.07. The extent of the “public figure status” of the persons concerned will be an important factor in deciding whether comment is in the public interest or not: see, e.g., *Tammer v Estonia*, No. 41205/98, 6.2.01, para. 67. Whether the person is actually known to the public is of lesser importance; what counts is whether the person has entered “the public arena”: *Krone Verlag GmbH v Austria*, No. 34315/96, 26.2.02, para. 37. See also *Hrico v Slovakia*, No. 49418/99, 20.7.04; *Lombardo and others v Malta*, No. 7333/06, 24.4.07.

¹³ *Oberschlick v Austria*, N° 11662/85, 23.05.1991, para. 59. See also *Lopes Gomes Da Silva v Portugal*, No. 37698/97, 28.9.00, paras. 32–7; *Lindon, Otchakovsky-Laurens and July v France*, Nos. 21279/02 and 36448/02, 22.10.07, para. 56. Similar considerations apply to elected officials – see, e.g., *Jucha and Źak v Poland*, No. 19127/06, 23.10.12, para. 40.

¹⁴ See, e.g., *Ziemiński v Poland*, No. 46712/06, 24.7.12, para. 50.

¹⁵ *Marin Kostov v Bulgaria*, N° 13801/07, 24.07.2012, para. 4. Civil servants are considered to be subject to wider limits of acceptable criticism than private individuals, but they do not “knowingly lay themselves open to close scrutiny of their every word and deed to the extent politicians do” – see, e.g., *Mengi v Turkey*, Nos. 13471/05 & 38787/07, 27.11.12, para. 53.

¹⁶ See, e.g., *Castells v Spain*, No. 11798/85, Series A, No. 236, 23.4.92, para. 46. This includes “government officials” – see, e.g., *OOO Ivpress and Others v Russia*, Nos. 33501/04, 38608/04, 35258/05 & 35618/05, 22.1.13, para. 70.

¹⁷ As in *Pedersen and Baadsgaard v Denmark*, No. 49017/99, 17.12.04. In *Salov v Ukraine*, No. 65518/01, 6.9.05 (para. 112), the Court characterised the statement in question as a “false statement of fact”.

states) and the impossibility of proving the latter.¹⁸ There must, however, be a sufficient factual basis for any such value judgement.¹⁹ The Court has also stated that it is not, in principle, incompatible with Article 10 to place on the defendant in libel proceedings the burden of proving to the civil standard the truth of defamatory statements (although the defendant must be allowed a realistic opportunity to do so).²⁰ In relation to criminal defamation proceedings, it is also not incompatible with the Convention *per se* to require defendants to prove to a reasonable standard that the allegations made by them were substantially true.²¹

13. Where the media reports on information which is already in the public domain, the extent to which there is a need to preserve confidentiality may be reduced, although restrictions on reproducing information that has already entered the public domain may be justified.²²

14. The Court has acknowledged that the potency of the internet as a medium may be as powerful as the print media.²³

15. The protections afforded by the Convention to the *professional* media may be extended to other individuals or organisations (including NGOs) because of their contribution to informed public debate:

the function of the press includes the creation of forums for public debate. However, the realisation of this function is not limited to the media or professional journalists.²⁴

16. The exercise of media freedom (including in relation to matters of serious public concern) involves “duties and responsibilities”, in particular where it may affect the reputation of private individuals.²⁵ The Court has emphasised that the “safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith in order to provide accurate

¹⁸ See, e.g., *Jerusalem v Austria*, No. 26958/95, 27.2.01, para. 42; *Feldek v Slovakia*, No. 29032/95, 12.7.01, paras. 76 and 85; *Karman v Russia*, No. 29372/02, 14.12.06, para. 41. As regards a number of Council of Europe states, the Court has noted a structural deficiency in that the domestic law makes no distinction between value judgements and statements of fact – see, e.g. *Ukrainian Media Group v Ukraine*, No. 72713/01, 29.3.05; *Gorelishvili v Georgia*, No. 12979/04, 5.6.07; *OOO Ivpress and Others v Russia*, Nos. 33501/04, 38608/04, 35258/05 & 35618/05, 22.1.13, para. 72.

¹⁹ See, e.g., *De Haes and Gijssels v Belgium*, No. 19983/92, 24.2.97, para. 47; *Scharsach and News Verlagsgesellschaft v Austria*, No. 39394/98, 13.11.03, para. 39; *Cumpănă and Mazăre v Romania*, No. 33748, 17.12.04, paras. 98-102.

²⁰ See, e.g., *McVicar v UK*, No. 46311/99, 9.5.02, paras. 83-87; *Steel and Morris v UK*, No. 68416/01, 15.2.05, paras. 93-95.

²¹ See, e.g., *Rumyana Ivanova v Bulgaria*, No. 36207/03, 14.2.08, paras. 39 & 68; *Makarenko v Russia*, No. 5962/03, 22.12.09, para. 156; *Rukaj v Greece*, No. 2179/08, dec. 21.1.10; *Kasabova v. Bulgaria*, No. 22385/03, 19.4.11, paras. 58-62.

²² See, e.g., *Editions Plon v. France*, No. 58148/00, 18.5.04, para. 53; *Observer and Guardian v UK*, No. 13585/88, 26.11.91, paras. 68-69; *Aleksey Ovchinnikov v Russia*, No. 24061/04, 16.12.10, paras. 49-50.

²³ *Fatullayev v Azerbaijan*, No. 40984/07, 22.4.10, para. 95.

²⁴ *Társaság a Szabadságjogokért v Hungary*, No. 37374/05, 14.4.09, para. 27. In *Fatullayev v Azerbaijan* (No. 40984/07, 22.4.10, para. 95) the Court could not decide, as regards various postings on an internet forum, whether the applicant had been writing as a journalist or whether he was expressing his personal opinions “as an ordinary citizen in the course of an Internet debate”. Nevertheless, his criminal conviction and imprisonment were found to violate Article 10.

²⁵ See, e.g., *Bladet Tromsø and Stensaas v Norway*, No. 21980/93, para. 65; *Selistö v Finland*, No. 56767/00, 16.11.04, para. 54; *Flux v Moldova* (No. 6), No. 22824/04, 29.7.08, para. 26. See also *A v Norway*, No. 28070/06, 9.4.09 (publication in newspaper articles of information in which the applicant could be perceived as a prime suspect in a murder case—violation of Article 8). The Court also acknowledges commercial reputational interests, although there are differences between that and an individual’s reputation because the former are considered to be devoid of a moral dimension – see, e.g., *Uj v Hungary*, No. 23954/10, 19.7.11, para. 22.

and reliable information in accordance with the ethics of journalism”.²⁶ Such ethical 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.²⁷

17. Journalists are permitted “a degree of exaggeration, or even provocation”,²⁸ but unnecessarily offensive language may not be protected:²⁹

offensive language may fall outside the protection of freedom of expression if it amounts to wanton denigration, for example where the sole intent of the offensive statement is to insult.³⁰

The Court has also found that “style constitutes part of communication as a form of expression” and is therefore protected under Article 10, together with the content of the expression.³¹

18. As regards religious opinions and beliefs, the Court has held that journalists’ duties and responsibilities may include an obligation to avoid as far as possible “expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs”³²

19. In assessing the duties and responsibilities of journalists, the Court recognises that the audio-visual media often have a much more immediate and powerful effect than the print media.³³

20. The right to freedom of expression under the Convention is not an absolute right. Article 10 may not be invoked in a manner which is contrary to Article 17 of the Convention, which prevents a person deriving from the Convention a right to do something which is aimed at destroying any of the Convention rights. On that basis, applications have been rejected, for example, from a journalist who had been convicted of publishing pamphlets advocating the reinstatement of national socialism and racial discrimination,³⁴ from the author of a book who had been prosecuted and convicted for disputing the existence of crimes against humanity, public defamation of the Jewish

²⁶ See, e.g. *Standard Verlagsgesellschaft mbH (No. 2) v Austria*, No. 37464/02, 22.2.07, para. 38.

²⁷ *Stoll v Switzerland*, No. 69698/01, 10.12.07, para. 104.

²⁸ *Prager and Oberschlick v Austria*, No. 15974/90, 26.4.95, para. 38; *Lopes Gomes Da Silva v Portugal*, No. 37698/97, 28.9.00, para. 34.

²⁹ *Tammer v Estonia*, No. 41205/98, 6.2.01, para. 67.

³⁰ *Mengi v Turkey*, Nos. 13471/05 & 38787/07, 27.11.12, para. 58. However, the Court held that the use of vulgar phrases in itself is not decisive, as it may serve merely “stylistic purposes”.

³¹ *Tuşalp v Turkey*, No. 32131/08, 21.2.12, para. 48.

³² See, e.g., *Otto-Preminger-Institut v Austria*, Series A No. 295-A, 20.9.94, para. 49; *Wingrove v UK*, No. 17419/90, 25.11.96, para. 52; *Gündüz v Turkey*, No. 35071/97, 4.12.03, para. 37; *Giniewski v France*, No. 64016/00, 31.1.06, para. 43.

³³ See, e.g., *Jersild v Denmark*, No. 15890/8, Series A, No. 298, 23.9.94, para. 31.

³⁴ *Kuhnen v Germany* (1988) 56 DR 205.

community, and incitement to discrimination and racial hatred,³⁵ and from a newspaper publisher who had been convicted of inciting hatred towards the Jewish people.³⁶ In contrast, the Government's reliance on Article 17 was dismissed in *Leroy v France*³⁷ which concerned convictions for condoning terrorism as a result of a newspaper cartoonist's sketch of the attack on the twin towers of the World Trade Centre on 11 September 2001, together with a parody of an advertising slogan: "We have all dreamt of it. Hamas did it". On the facts, the Court found that the underlying message which the applicants had sought to convey was not the negation of fundamental rights, and it could not be interpreted as an unequivocal attempt to justify terrorist acts.³⁸

(iv) The safety of journalists

21. If the state is aware of threats or intimidation perpetrated against journalists or media organisations, the state may be under a duty to take protective measures and to carry out an effective investigation into such allegations.³⁹ These principles are explained further in this section.

The duty to protect life

22. Article 2 of the Convention (the right to life) incorporates both a proscription against the intentional and unlawful taking of life, and a positive obligation on the authorities to take appropriate steps to safeguard life. The obligation to safeguard life has two primary elements:

- (i) a 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; and
- (ii) in certain circumstances, 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.⁴⁰

23. The positive obligation to take preventive measures will arise if it is 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

³⁵ *Garaudy v France*, No. 65831/01, dec. 7.7.03.

³⁶ *Ivanov v Russia*, No. 35222/04, dec. 20.2.07.

³⁷ No. 36109/03, 2.10.08. As regards Article 17 there was a similar outcome in *Fatullayev v Azerbaijan*, No. 40984/07, 22.4.10, para. 81.

³⁸ On the merits the Court found no violation of Article 10 because the applicant's conviction and fine were not found to be disproportionate measures in the circumstances.

³⁹ *Özgür Gündem v. Turkey*, No. 23144/93, 16.3.00, para. 41. In that case the Court found that over a two year period there had been numerous incidents of violence, including killings, assaults and arson attacks, involving the *Özgür Gündem* newspaper and journalists, distributors and others associated with it (including newsagents).

⁴⁰ See, e.g., *Gongadze v Ukraine*, No. 34056/02, 8.11.05, para. 164.

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...⁴¹

24. In assessing the authorities' knowledge of any such risk to life, the Court may take into account the extent to which bodies such as prosecutors ought to have been aware of the vulnerable position which journalists may be in *vis-à-vis* those in power (including, for example, journalists covering politically sensitive topics).⁴² The Court may also take account of the authorities' knowledge of the possibility that a risk to life arose from the activities of persons acting with the knowledge or acquiescence of elements in the security forces.⁴³

25. There was a violation of Article 2 in *Dink v Turkey*⁴⁴ which concerned the murder of the journalist Hrant Dink, who had been the subject of intense hostility from extreme nationalists as a result of his newspaper articles on Turkish-Armenian relations. The Court found that the security forces could reasonably be considered to have been informed of the hostility towards Mr Dink, that the law enforcement bodies were informed of a real and imminent threat of assassination, and yet they failed to take reasonable measures to protect his life. Article 10 of the Convention was also found to have been breached, not only because of the authorities' failure to protect Hrant Dink against attack, but also because, as a result of his newspaper articles, he had been found guilty of the crime of denigrating Turkishness, which was considered by the Court to have no "pressing social need".

The duty to investigate fatalities

26. Article 2 of the Convention requires that there should be an effective investigation into an alleged unlawful killing, by both state agents and non-state actors.⁴⁵ The essential requirements of an investigation are as follows:⁴⁶

- (i) the authorities must act of their own motion, once the matter has come to their attention (in other words, it should not require the initiative of the next of kin to instigate an investigation);⁴⁷
- (ii) the investigation must be independent from those implicated in the events;⁴⁸
- (iii) the investigation must be effective in the sense that it is capable of leading to a determination of whether the force used was or was not justified and to the identification and punishment of those responsible.⁴⁹ Thus:

⁴¹ See, e.g., *Kılıç v Turkey*, No. 22492/93, 28.3.00, paras. 63; *Dink v Turkey*, Nos. 2668/07, 6102/08, 30079/08, 7072/09 & 7124/09, 14.9.10, para. 65.

⁴² See, e.g., *Gongadze v Ukraine*, No. 34056/02, 8.11.05, para. 168.

⁴³ See, e.g., *Kılıç v Turkey*, No. 22492/93, 28.3.00, para. 68.

⁴⁴ Nos. 2668/07, 6102/08, 30079/08, 7072/09 & 7124/09, 14.9.10.

⁴⁵ See, e.g., *Yaşa v Turkey*, No. 63/1997/847/1054, 2.9.98, para. 100.

⁴⁶ See, e.g., *Adalı v Turkey*, No. 38187/97, 31.3.05, paras. 221-224; *Gongadze v Ukraine*, No. 34056/02, 8.11.05, paras. 175-177; *Najafli v Azerbaijan*, No. 2594/07, 2.10.12, paras. 45-48.

⁴⁷ See, e.g., *Yaşa v Turkey*, No. 63/1997/847/1054, 2.9.98, para. 100.

⁴⁸ See, e.g. *Najafli v Azerbaijan*, No. 2594/07, 2.10.12, para. 52.

The authorities must have taken all reasonable steps to secure the evidence concerning the incident. Any deficiency in the investigation which undermines its ability to establish the cause of death or the persons responsible, whether the direct offenders or those who ordered or organised the crime, will risk falling foul of this standard.⁵⁰

- (iv) there is a requirement of promptness and reasonable expedition;
- (v) there must be effective access for the complainant to the investigation procedure;⁵¹ and
- (vi) there must be an element of public scrutiny of the investigation or its results sufficient to secure accountability in practice, maintain public confidence in the authorities' adherence to the rule of law, and prevent any appearance of collusion in, or tolerance of, unlawful acts.

27. For example, in *Kılıç v Turkey*⁵² there was a violation of Article 2 because of the limited scope and short duration of the investigation into the killing of the Özgür Gündem newspaper journalist, Kemal Kılıç.

28. Where it is plausibly claimed that a killing was related to journalistic activities, Article 2 may require the authorities to take adequate steps to investigate such a possibility.⁵³ Article 2 may be breached where investigators fail to allow for the possibility that state officials (such as members of the security forces) might have been implicated in attacks.⁵⁴

29. In addition to the investigative duty established by Article 2, Article 13 of the Convention (the right to an effective remedy) also requires the provision of a domestic remedy to deal with the substance of an arguable complaint under the Convention and to grant appropriate relief. Therefore, in addition to the payment of compensation where that is appropriate, Article 13 requires a thorough and effective investigation capable of leading to the identification and punishment of those responsible for the deprivation of life, including effective access for the complainant to the investigation procedure.⁵⁵

The prohibition of torture and ill-treatment

30. The use of force by state agents may violate Article 3 of the Convention which absolutely prohibits torture and inhuman or degrading treatment or punishment. This principle will be breached where ill-treatment is considered to reach a "minimum level

⁴⁹ See, e.g., *Tepe v Turkey*, No.27244/95, 9.6.03, paras. 176-182; *Dink v Turkey*, Nos. 2668/07, 6102/08, 30079/08, 7072/09 & 7124/09, 14.9.10, paras. 82-91.

⁵⁰ See, e.g., *Gongadze v Ukraine*, No.34056/02, 8.11.05, para. 176.

⁵¹ See, e.g., *Adali v Turkey*, No. 38187/97, 31.3.05, para. 232.

⁵² No. 22492/93, 28.3.00.

⁵³ *Adali v Turkey*, No. 38187/97, 31.3.05, para. 231.

⁵⁴ *Yaşa v Turkey*, No. 63/1997/847/1054, 2.9.98, para. 100.

⁵⁵ See, e.g., See, e.g., *Yaşa v Turkey*, No. 63/1997/847/1054, 2.9.98, paras. 112-115; *Kılıç v Turkey*, No. 22492/93, 28.3.00, para. 91; *Tepe v Turkey*, No.27244/95, 9.6.03, paras. 192-198; *Adali v Turkey*, No. 38187/97, 31.3.05, paras. 251-253; *Dink v Turkey*, Nos. 2668/07, 6102/08, 30079/08, 7072/09 & 7124/09, 14.9.10, paras 141-145.

of severity”, which will depend on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim.⁵⁶

31. For example, Article 3 was found to have been breached in *Tekin v Turkey* because a journalist was held blind-folded in a cold, dark cell and was forcibly interrogated in a way which left wounds and bruises on his body.⁵⁷ There was a violation of Article 3 in *Najafli v Azerbaijan* where a journalist was found to have been beaten by the police during the dispersal of a political demonstration, which he attended in order to report on: the use of force was held to be “unnecessary, excessive and unacceptable”.⁵⁸ Furthermore, the Court has held that any measures which prevent journalists from doing their work may raise issues under Article 10 of the Convention.⁵⁹ The applicant journalist in *Najafli v Azerbaijan* had been wearing a journalist’s badge on his chest and told the police officers that he was a journalist. The use of excessive force while he was performing his professional duties was therefore also held to violate Article 10 (irrespective of whether there had been any intention on the part of the police to interfere with journalistic activity).

32. As regards individuals detained in custody by the authorities who allege ill-treatment, there is a shifting of the burden of proof:

where an individual is taken into custody in good health but is found to be injured by the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused and to produce evidence casting doubt on the veracity of the victim’s allegations, particularly if those allegations are supported by medical reports.⁶⁰

33. Article 3 also incorporates obligations on the authorities to prevent and investigate ill-treatment (equivalent to the obligations discussed above as regards the right to life).

34. Thus, investigations of serious allegations of ill-treatment must be diligent and effective:⁶¹

...the authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation or as the basis of their decisions.⁶²

35. Article 13 of the Convention requires that there should be an effective domestic remedy in respect of any arguable claim of torture or ill-treatment.⁶³

⁵⁶ See, e.g., *Najafli v Azerbaijan*, No. 2594/07, 2.10.12, para. 35. The Court applies a “beyond reasonable doubt” standard of proof – see, e.g. *Rizvanov v Azerbaijan*, No. 31805/06, 17.4.12, paras. 44-48.

⁵⁷ No. 52/1997/836/1042, 9.6.98, paras. 48-54.

⁵⁸ *Najafli v Azerbaijan*, No. 2594/07, 2.10.12, para. 39. See also *Rizvanov v Azerbaijan*, No. 31805/06, 17.4.12.

⁵⁹ *Gsell v Switzerland*, No. 12675/05, 8.10.09, para. 49; *Najafli v Azerbaijan*, No. 2594/07, 2.10.12, para. 68.

⁶⁰ See, e.g., *Mehmet Eren v Turkey*, No. 32347/02, 14.10.08, para. 34.

⁶¹ See, e.g., *Mehmet Eren v Turkey*, No. 32347/02, 14.10.08, paras. 49-56.

⁶² *Rizvanov v Azerbaijan*, No. 31805/06, 17.4.12, para. 56; *Najafli v Azerbaijan*, No. 2594/07, 2.10.12, para. 47.

⁶³ See, e.g., *Tekin v Turkey*, No. 52/1997/836/1042, 9.6.98, paras. 62-69.

36. The family member of a “disappeared person” may be taken to have suffered inhuman and degrading treatment arising from the mental anguish caused by the death or disappearance of their next of kin and the complacent, or otherwise unresponsive, attitude of the authorities.⁶⁴

(v) Support for investigative journalism

37. The Court recognises the particular role played by investigative journalists:

The Court underlines that the investigative journalists’ role is to ... inform and alert the public on undesirable phenomena in society as soon as they receive the relevant information⁶⁵.

Hampering journalists’ work

38. The Court has held that any measures which prevent journalists from doing their work may raise issues under Article 10 of the Convention.⁶⁶ For example, in *Gsell v Switzerland*⁶⁷ a journalist was prevented by a general police ban from gaining access to the World Economic Forum in Davos, on which he was planning to write an article. The use of a general ban to exclude anyone wishing to travel to Davos was found not to have a sufficiently explicit legal basis, and therefore the interference with the journalist’s right to freedom of expression was not “prescribed by law”.

Access to information

39. The right to freedom of information under Article 10 of the Convention has, in essence, been interpreted as prohibiting governments from restricting a person from receiving information that others wish, or may be willing, to impart.⁶⁸

40. The Court also explicitly recognises the importance of journalists’ right of access to information:

- The gathering of information is an essential preparatory step in journalism and is an inherent, protected part of press freedom;⁶⁹
- Obstacles created in order to hinder access to information which is of public interest may discourage those working in the media or related fields from pursuing such matters. As a result, they may no longer be able to play their vital role as “public watchdogs,” and their ability to provide accurate and reliable information may be adversely affected;⁷⁰

⁶⁴ See, e.g., *Gongadze v Ukraine*, No.34056/02, 8.11.05, paras. 184-186.

⁶⁵ *Martin and others v France*, No. 30002/08, 12.4.12, para. 80 (non official translation).

⁶⁶ *Gsell v Switzerland*, No. 12675/05, 8.10.09, para. 49; *Najafli v Azerbaijan*, No. 2594/07, 2.10.12, para. 68.

⁶⁷ No. 12675/05, 8.10.09.

⁶⁸ *Leander v Sweden*, No. 9248/81, 26.3.87, para. 74. See also *Sdružení Jihočeské Matky v Czech Republic*, No. 19101/03, dec. 10.7.06.

⁶⁹ *Dammann v Switzerland*, No. 77551/01, 25.4.06, para. 52.

⁷⁰ *Társaság a Szabadságjogokért v Hungary*, No. 37374/05, 14.4.09, para. 38.

- the law cannot allow arbitrary restrictions which may become a form of indirect censorship should the authorities create obstacles to the gathering of information.⁷¹

41. Therefore, the Court will apply “the most careful scrutiny” when measures are taken which “are capable of discouraging the participation of the press....in the public debate on matters of legitimate public concern..., even measures which merely make access to information more cumbersome”.⁷²

42. It will not be open to politicians (and other public figures) to argue that their opinions on public matters constitute private data which cannot be disclosed without consent.⁷³

43. The Court has taken particular note of the censorious power of information monopolies:

the State’s obligations in matters of freedom of the press include the elimination of barriers to the exercise of press functions where, in issues of public interest, such barriers exist solely because of an information monopoly held by the authorities.⁷⁴

44. The Court has also found that “prompt and free access for journalists to [election-related] information” may be vital for the media coverage of an election process (and especially where there may have been election irregularities).⁷⁵

45. The Court acknowledges that “reporting on matters relating to management of public resources lies at the core of the media’s responsibility and the right of the public to receive information”.⁷⁶

46. Publication of information and comment about court proceedings is acknowledged to be an important media function, especially in the field of criminal justice.⁷⁷ The Court has stipulated that

There is a general recognition of the fact that the courts cannot operate in a vacuum. Whilst they are the forum for the settlement of disputes, this does not mean that there can be no prior discussion of disputes elsewhere, be it in specialised journals, in the general press or amongst the public at large. Furthermore, whilst the mass media must not overstep the bounds imposed in the interests of the proper administration of justice, it is incumbent on

⁷¹ *Ibid.*, para. 27.

⁷² *Ibid.*, para. 26.

⁷³ *Ibid.*, para. 37.

⁷⁴ *Ibid.*, para. 36.

⁷⁵ *Shapovalov v. Ukraine*, N° 45835/05, 31 July 2012, para. 69

⁷⁶ *Saliyev v. Russia*, N° 35016/03, 21 October 2010, para. 74

⁷⁷ See, e.g., *Worm v Austria*, No. 22714/93, 29.8.97; *Dupuis and others v France*, No. 1914/02, 7.6.07, para. 42; *Obukhova v Russia*, No. 34736/03, 8.1.09; *Ressiot and Others v France*, No. 15054/07, 28.6.12, para. 102. The Court may take into account whether a journalist has acted in compliance with Recommendation Rec(2003)13 of the Committee of Ministers to Member States on the provision of information through the media in relation to criminal proceedings, 10 July 2003 – see *Godlevskiy v Russia*, No. 14888/03, 23.10.08, para. 43. Pursuant to Article 6(1) of the Convention, court proceedings should, as a general rule, be conducted in public. The right to a public hearing may be waived, but such waiver must not be contrary to any important public interest. See also *Crook, Atkinson and the Independent v UK*, dec. No. 13366/87, 3.12.90.

them to impart information and ideas concerning matters that come before the courts just as in other areas of public interest. Not only do the media have the task of imparting such information and ideas: the public also has a right to receive them⁷⁸

However, statements which are likely to prejudice a fair trial (regardless of intention) or which undermine the confidence of the public in the role of the courts in the administration of justice may not be protected under Article 10.⁷⁹ There may also be wider, competing interests:

the public interest in receiving information only covers facts which are connected with the criminal charges brought against the accused. This must be borne in mind by journalists when reporting on pending criminal proceedings, and the press should abstain from publishing information which is likely to prejudice, whether intentionally or not, the right to respect for the private life and correspondence of the accused persons.⁸⁰

47. The Court recognises that the media's role extends beyond simply objective court reporting, as such:

It is of primary importance for the proper functioning of judicial systems that journalists are free not only to inform the general public about the factual aspects of cases examined by the courts, but also to formulate and disseminate their views and opinions on important issues involved in or connected with the subject-matter of cases under judicial consideration. In the same vein, it is important that the courts have an opportunity to obtain feedback on how their acts and judicial decisions are understood and regarded by the public. Such knowledge contributes to the quality of judicial decision-making and to a better understanding by society at large of the complexity of the issues involved in the administration of justice.⁸¹

48. Seeking historical truth is considered to be an integral part of freedom of expression, and the Court has also emphasised that debate on the causes of acts of particular gravity (which may amount, for example, to war crimes or crimes against humanity) should be able to take place freely.⁸²

49. The Court has underlined the valuable role of media internet archives in preserving and making available news and information, and as constituting an important source for education and historical research. However, states will be afforded a wider margin of appreciation in relation to such news archives:⁸³

...the duty of the press to act in accordance with the principles of responsible journalism by ensuring the accuracy of historical, rather than perishable, information published is likely to be more stringent in the absence of any urgency in publishing the material.

⁷⁸ *Sunday Times v UK* (No. 1), Series A No. 30, 26.3.79, para. 65.

⁷⁹ *News Verlags GmbH & Co.KG v Austria*, No. 31457/96, 11.1.00, para. 56.

⁸⁰ *Craxi (No. 2) v Italy*, No. 25337/94, 17.7.03, para. 65.

⁸¹ *Semik-Orzech v Poland*, No. 39900/06, 15.11.11, para. 62.

⁸² *Giniewski v France*, No. 64016/00, 31.1.06, para. 51; *Fatullayev v Azerbaijan*, No. 40984/07, 22.4.10, para. 87; *Dink v Turkey*, Nos. 2668/07, 6102/08, 30079/08, 7072/09 & 7124/09, 14.9.10, para. 135. See also *Kenedi v Hungary*, No. 31475/05, 26.5.09, para. 43.

⁸³ *Times Newspapers Ltd (Nos. 1 and 2) v UK*, Nos. 3002/03 and 23676/03, 10.3.09, para. 45. The Court held in that case that there was no violation of Article 10 as a result of the application of a common law rule that a new cause of action accrues every time defamatory material on the internet is accessed. The Court concluded that the requirement to publish an appropriate qualification to an article contained in an internet archive, where a libel action has been initiated in respect of the same article published in the written press, did not amount to a disproportionate interference with the right to freedom of expression.

50. The right of access to information to enable journalists to practise their profession may be considered to be a “civil right” pursuant to Article 6 of the Convention, and accordingly would be subject to the right to a fair hearing.⁸⁴

Protection of journalists’ sources

51. The importance of the principle of the protection of a journalist’s sources has long been recognised in the jurisprudence of the European Court,⁸⁵ which holds that

Protection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and the professional codes of conduct in a number of Contracting States and is affirmed in several international instruments on journalistic freedoms.⁸⁶

and

The right of journalists to protect their sources is part of the freedom to “receive and impart information and ideas without interference by public authorities” protected by Article 10 of the Convention and serves as one of its important safeguards. It is a cornerstone of freedom of the press, without which sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information to the public may be adversely affected.⁸⁷

52. Furthermore, the Court has emphasised that the right is not “a mere privilege to be granted or taken away depending on the lawfulness or unlawfulness of their sources, but is part and parcel of the right to information, to be treated with the utmost caution”.⁸⁸

53. Accordingly, orders requiring the disclosure of journalists’ sources⁸⁹ must be justified by an overriding requirement in the public interest.⁹⁰ The Court has emphasised that disclosure orders

...have a detrimental impact not only on the source in question, whose identity may be revealed, but also on the newspaper against which the order is directed, whose reputation may be negatively affected in the eyes of future potential sources by the disclosure, and on the members of the public, who have an interest in receiving information imparted through anonymous sources and who are also potential sources themselves.⁹¹

⁸⁴ *Shapovalov v Ukraine*, No.45835/05, 31.7.12, para. 49.

⁸⁵ The Court has made substantial reference in its judgments, in particular, to Committee of Ministers Recommendation No. R(2000) 7 on the right of journalists not to disclose their sources of information, 8 March 2000.

⁸⁶ See, e.g., *Goodwin v UK*, No. 17488/90, 27.3.96, para. 39.

⁸⁷ See, e.g., *Sanoma Uitgevers B.V. v Netherlands*, No. 38224/03, 14.9.10, para. 50.

⁸⁸ *Tillack v Belgium*, No. 20477/05, 27.11.07, para. 65.

⁸⁹ Or material containing information capable of identifying journalistic sources - see, e.g., *Sanoma Uitgevers B.V. v Netherlands*, No. 38224/03, 14.9.10.

⁹⁰ *Goodwin v UK*, No. 17488/90, 27.3.96, para. 39; *Voskuil v Netherlands*, No. 64752/01, 22.11.07, para. 65; *Tillack v Belgium*, No. 20477/05, 27.11.07, para. 53; *Financial Times Ltd and others v UK*, No. 821/03, 15.12.09, para. 59. See also *Roeman and Schmit v Luxembourg*, No. 51772/99, 25.2.03 (where the Court stated that a search undertaken with a view to finding out a journalist’s source was even more intrusive than an order for the disclosure of a source’s identity).

⁹¹ *Financial Times Ltd and others v UK*, No. 821/03, 15.12.09, para. 63.

54. In *Sanoma Uitgevers B.V. v Netherlands*,⁹² the Grand Chamber of the Court assessed the police seizure of a CD-ROM containing photographs of illegal street racing taken by journalists for a car magazine owned by the applicant company. The basis for the seizure was the Code of Criminal Procedure; however, the quality of the domestic law was not considered sufficient to pass the “prescribed by law” test. The Court emphasised that orders requiring journalists to disclose their sources must be subject to the guarantee of review by a judge or other independent and impartial decision-making body.⁹³ There are the following requirements for such a review:

- (i) it should be carried out by a body separate from the executive and other interested parties, invested with the power to determine whether a requirement in the public interest overriding the principle of protection of journalistic sources exists prior to the handing over of such material and to prevent unnecessary access to information capable of disclosing the sources’ identity if it does not;
- (ii) the exercise of a review that only takes place subsequently to the handing over of material capable of revealing such sources would undermine the very essence of the right to confidentiality;
- (iii) there must be a weighing of the potential risks and respective interests prior to any disclosure and with reference to the material that it is sought to have disclosed so that the arguments of the authorities seeking the disclosure can be properly assessed;
- (iv) the review should be governed by clear criteria, including whether a less intrusive measure may be sufficient;
- (v) it should be possible for the judge or other authority to refuse to make a disclosure order or to make a limited or qualified order so as to protect sources from being revealed, whether or not they are specifically named in the withheld material, on the grounds that the communication of such material creates a serious risk of compromising the identity of journalists’ sources; and
- (vi) in urgent situations, there should be a procedure to identify and isolate, prior to the exploitation of the material by the authorities, information that could lead to the identification of sources from information that carries no such risk.⁹⁴

55. It is important to note that whether the order (or other acts of compulsion) actually resulted in the disclosure or prosecution of journalistic sources is not decisive in determining whether there has been an interference with a journalist’s rights under Article 10. This is because of the “chilling effect” which the Court acknowledges will arise wherever journalists are seen to assist in the identification of anonymous sources.⁹⁵ Nor is it decisive that the authorities may not have *intended* to establish the identity of a journalist’s sources of information:

⁹² No. 38224/03, 14.9.10.

⁹³ That was not the case in the Netherlands, where the decision was made by the public prosecutor.

⁹⁴ *Sanoma Uitgevers B.V. v Netherlands*, No. 38224/03, 14.9.10, paras.90- 92.

⁹⁵ See, e.g., *Financial Times Ltd and others v UK*, No. 821/03, 15.12.09, para. 56; *Sanoma Uitgevers B.V. v Netherlands*, No. 38224/03, 14.9.10, paras. 65-72.

The Court's understanding of the concept of journalistic "source" is "any person who provides information to a journalist"; it understands "information identifying a source" to include, as far as they are likely to lead to the identification of a source, both "the factual circumstances of acquiring information from a source by a journalist" and "the unpublished content of the information provided by a source to a journalist".⁹⁶

56. The Court will look askance at measures taken by the authorities which hamper whistle-blowing about public authority misconduct, especially if it discourages people who have "true and accurate information relating to wrongdoing...from coming forward and sharing their knowledge with the press in future cases".⁹⁷

57. The conduct of the source (for example, if they were acting in bad faith) may be an important factor to be taken into account in carrying out the requisite balancing exercise under Article 10(2), but it can never be decisive in determining whether a disclosure order ought to be made.⁹⁸

58. Where proceedings concern an unauthorised leak, the Court acknowledges that if the leak remains undetected, there will continue to be a risk of future unauthorised leaks. Nevertheless,

the aim of preventing further leaks will only justify an order for disclosure of a source in exceptional circumstances where no reasonable and less invasive alternative means of averting the risk posed are available and where the risk threatened is sufficiently serious and defined to render such an order necessary within the meaning of Article 10 § 2⁹⁹.

59. There was a violation of Article 10 in *Goodwin v UK*¹⁰⁰ because of a disclosure order which required a journalist to reveal the identity of a person who had provided him with information on an unattributable basis, and as a result of the fine imposed for refusing to do so. Article 10 has also been found to have been violated as a result of searches carried out at journalists' offices or homes, seeking to identify civil servants who had provided them with confidential information.¹⁰¹ Search and seizure operations must also comply with Article 8 of the Convention (the right to respect for private and family life, home and correspondence).¹⁰²

60. The Court has acknowledged that secret state surveillance may result in an interference with a journalist's freedom of expression if there is a danger that communications for journalistic purposes may be monitored, as this could mean that journalistic sources might be disclosed or deterred from providing information by telephone. The confidentiality of sources may also be impaired by the transmission of

⁹⁶ *Telegraaf Media Nederland Landelijke Media BV and Others v Netherlands*, No. 39315/06, 22.11.12, paras. 86. See also *Nordisk Film & TV A/S v Denmark*, No. 40485/02, dec. 8.12.05.

⁹⁷ *Voskuil v Netherlands*, No. 64752/01, 22.11.07, para. 71.

⁹⁸ *Financial Times Ltd and others v UK*, No. 821/03, 15.12.09, para. 63; *Telegraaf Media Nederland Landelijke Media BV and Others v Netherlands*, No. 39315/06, 22.11.12, para. 128.

⁹⁹ *Financial Times Ltd and others v United Kingdom*, N° 821/03, 15 March 2010, para. 69

¹⁰⁰ No. 17488/90, 27.3.96.

¹⁰¹ See, e.g., *Roeman and Schmit v Luxembourg*, No. 51772/99, 25.2.03; *Ernst and others v Belgium*, No. 33400/96, 15.7.03; *Tillack v Belgium*, No. 20477/05, 27.11.07.

¹⁰² See, e.g., *Roeman and Schmit v Luxembourg*, No. 51772/99, 25.2.03, paras. 64-72.

data to other authorities, by their destruction or by the failure to notify the journalist of the surveillance measures.¹⁰³

(vi) The prevention of intimidation of journalists by the misuse of law

Defamation and other criminal or civil proceedings

61. The Court has frequently emphasised that it will apply “the most careful scrutiny” where

measures taken or sanctions imposed by the national authority are capable of discouraging the participation of the press in debates over matters of legitimate public concern.¹⁰⁴

62. Moreover,

defamation laws or proceedings cannot be justified if their purpose or effect is to prevent legitimate criticism of public officials or the exposure of official wrongdoing or corruption. A right to sue in defamation for the reputation of officials could easily be abused and might prevent free and open debate on matters of public interest or scrutiny of the spending of public money.¹⁰⁵

63. The instigation of criminal or civil proceedings against journalists or media organisations, including defamation, will be subject to the requirements of Article 10 of the Convention. Thus, any such restrictive measure must be adequately “prescribed by law”,¹⁰⁶ it must pursue one of the legitimate aims set out in Article 10(2) and it must pass a test of proportionality (whether the restriction was “necessary in a democratic society”). In assessing proportionality, the Court will take into account, where relevant, the principles which are set out in section (iii) above.

64. There may be competing interests at stake:

Although the Contracting States are permitted, or even obliged, by their positive obligations under Article 8...to regulate the exercise of freedom of expression so as to ensure adequate protection by law of individuals’ reputations, they must not do so in a manner that unduly deters the media from fulfilling their role of alerting the public to apparent or suspected misuse of public power.¹⁰⁷

¹⁰³ *Weber and Saravia v Germany*, No. 54934/00, dec. 29.6.06, para. 145.

¹⁰⁴ See, e.g., *Jersild v Denmark*, No. 15890/8, Series A, No. 298, 23.9.94, para. 35; *Novaya Gazeta V Voronezhe v Russia*, No. 27570/03, 21.12.10, para. 42.

¹⁰⁵ *Cihan Öztürk v Turkey*, No. 17095/03, 9.6.09, para. 32.

¹⁰⁶ See, e.g., *Editorial Board of Pravoye Delo and Shtetel v Ukraine*, No. 33014/05, 5.5.11 (order to publish an apology was not sufficiently “prescribed by law”). Furthermore, under Article 7 of the Convention, any criminal offence applied against a journalist must be sufficiently defined by the domestic law – see, e.g., *Radio France and Others v France*, No. 53984/00, 30.3.04, para. 20; *Başkaya and Okçuoğlu v Turkey*, Nos. 23536/94 & 24408/94, 8.7.99, paras. 41-43 (as regards sentence).

¹⁰⁷ *Cumpănă and Mazăre v Romania*, No. 33748, 17.12.04, para. 113.

65. The Court has frequently pointed to the “dominant position” of State authorities, meaning that they must be restrained in resorting to criminal proceedings, particularly where there are other available means of rebuttal:¹⁰⁸

where a publication cannot be categorised as inciting to violence or instigating ethnic hatred, Contracting States cannot restrict, with reference to maintaining public order and safety, the right of the public to be informed of matters of general interest, by bringing the weight of the criminal law to bear on the media.¹⁰⁹

66. Furthermore, the authorities must tolerate criticism, even if it could be regarded as being provocative or insulting.¹¹⁰

67. Prior restraint of the media will require particular justification:

the dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court. This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest.¹¹¹

Any mechanism of prior restraint must be subject to a legal framework which provides “tight control” over the scope of any restrictions and which also ensures that there is an effective system of judicial review to prevent abuse of power.¹¹²

68. According to the Court, journalists should be free to report on events based on information gathered from official sources without further verification.¹¹³ The Court has also held that there will have to be particularly strong reasons for punishing journalists for assisting in disseminating the statements of others.¹¹⁴ Furthermore,

a general requirement for journalists systematically and formally to distance themselves from the content of a quotation that might insult or provoke others or damage their reputation is not reconcilable with the press’s role of providing information on current events, opinions and ideas.¹¹⁵

69. In *Jersild v Denmark*,¹¹⁶ the applicant was prosecuted and convicted after making a television documentary about self-proclaimed racist youths. The Court found that the applicant had not intended to propagate racist ideas, but to raise an issue of important

¹⁰⁸ *Castells v Spain*, No. 11798/85, Series A, No. 236, 23.4.92, para. 46; *Özgür Gündem v. Turkey*, No. 23144/93, 16.3.00, para. 60.

¹⁰⁹ *Sürek and Özdemir v Turkey*, Nos. 23927/94 and 24277/94, 8.7.99, para. 63; *Erdoğan v Turkey*, No. 25723/94, 15.6.00, para. 71; *Fatullayev v Azerbaijan*, No. 40984/07, 22.4.10, para. 116.

¹¹⁰ *Özgür Gündem v. Turkey*, No. 23144/93, 16.3.00, para. 60.

¹¹¹ See, e.g., *Observer and Guardian v UK*, No. 13585/88, 26.11.91, para. 60; *Ekin Association v France*, No. 39288/98, 17.7.01, paras. 56–7.

¹¹² *Ekin Association v France*, No. 39288/98, 17.7.01, paras. 58 & 61. See also *Mosley v UK*, No. 48009/08, 10.5.11, para. 117 (where the Court held that Article 8 of the Convention does not impose a legally binding pre-notification requirement on the media as regards publications which may violate their subjects’ right to respect for private life).

¹¹³ See, e.g., *Selistö v Finland*, No. 56767/00, 16.11.04, para. 60; *Axel Springer AG v Germany*, No. 39954/08, 7.2.12, para. 105; *Yordanova and Toshev v Bulgaria*, No. 5126/05, 2.10.12, para. 51.

¹¹⁴ See, e.g., *Jersild v Denmark*, No. 15890/8, Series A, No. 298, 23.9.94, para. 35; *Thoma v Luxembourg*, No. 38432/97, 29.3.01, para. 62.

¹¹⁵ *Thoma v Luxembourg*, No. 38432/97, 29.3.01, para. 64.

¹¹⁶ No. 15890/8, Series A, No. 298, 23.9.94. See, by contrast, *Pedersen and Baadsgaard v Denmark*, No. 49017/99, 17.12.04.

public concern: news reporting based on interviews was said to be one of the most important means of fulfilling the public watchdog role of the press.

70. The execution of search warrants in respect of the homes or offices of journalists should comply with the requirements as to lawfulness and proportionality under Article 10 (in addition to Article 8).¹¹⁷

71. The Court recognises that media operations may be time-critical:

News is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest¹¹⁸

Therefore, the Court has found that the disruption of newspaper production for a period of two days as a result of a search and seizure operation by the security forces, during which many of the newspaper's employees were also arrested, amounted to a serious interference with the right to freedom of expression.¹¹⁹

72. In the case of *Editorial Board of Pravoye Delo and Shtekel v Ukraine*¹²⁰ the Court found that the absence of an adequate domestic legal framework allowing journalists to use information obtained from the internet without fear of incurring sanctions seriously hindered the exercise of the function of the press as a "public watchdog".

73. The Court recognises the particular role of the judiciary in society.

As the guarantor of justice, a fundamental value in a State subject to the rule of law, it must enjoy public confidence if it is to be successful in carrying out its duties. It may therefore prove necessary to protect such confidence against destructive attacks that are essentially unfounded, especially in view of the fact that judges who have been criticised are subject to a duty of discretion that precludes them from replying.¹²¹

74. In assessing the necessity of interference under Article 10(2), the Court will consider whether the relevant domestic authorities (notably the courts) dealt with the case in accordance with the principles embodied in Article 10.¹²² Thus, there may be a violation because of the failure of a domestic court to give adequate reasons for its decisions.¹²³ The Court has also held that

if the national courts apply an overly rigorous approach to the assessment of journalists' professional conduct, the latter could be unduly deterred from discharging their function of

¹¹⁷ See, e.g., *Ernst and others v Belgium*, No. 33400/96, 15.7.03.

¹¹⁸ *Sanoma Uitgevers B.V. v Netherlands*, No. 38224/03, 14.9.10, para. 70. This principle is not just limited to publications which deal with "topical" issues or current affairs: see also *Alınak v Turkey*, No. 40287/98, 29.3.05, para. 37.

¹¹⁹ *Özgür Gündem v Turkey*, No. 23144/93, 16.3.00, para. 49.

¹²⁰ No. 33014/05, 5.5.11. The Court also said (para. 63): "It is true that the Internet is an information and communication tool particularly distinct from the printed media, especially as regards the capacity to store and transmit information. The electronic network, serving billions of users worldwide, is not and potentially will never be subject to the same regulations and control. The risk of harm posed by content and communications on the Internet to the exercise and enjoyment of human rights and freedoms, particularly the right to respect for private life, is certainly higher than that posed by the press. Therefore, the policies governing reproduction of material from the printed media and the Internet may differ. The latter undeniably have to be adjusted according to the technology's specific features in order to secure the protection and promotion of the rights and freedoms concerned."

¹²¹ See, e.g., *Falter Zeitschriften GmbH v Austria (no. 2)*, No. 3084/07, 18.9.12, para. 39.

¹²² *Pedersen and Baadsgaard v Denmark*, No. 49017/99, 17.12.04, para. 91.

¹²³ See, e.g., *Kommersant Moldovoy v Moldova*, No. 41827/02, 9.1.07.

keeping the public informed. The courts must therefore take into account the likely impact of their rulings not only on the individual cases before them but also on the media in general.¹²⁴

75. The application of the proportionality test will include an assessment of the nature and severity of any penalties imposed on journalists or media organisations:

The Court must...exercise the utmost caution where the measures taken or sanctions imposed by the national authorities are such as to dissuade the press from taking part in the discussion of matters of legitimate public concern.¹²⁵

76. Although the Court has reiterated that the use of criminal-law sanctions in defamation cases is not *in itself* disproportionate, the imposition of such sanctions will be taken into account in considering proportionality.¹²⁶

77. Imprisonment is recognised as being a particularly severe sanction:

Investigative journalists are liable to be inhibited from reporting on matters of general interest if they run the risk, as one of the standard sanctions imposable for unjustified attacks on the reputation of private individuals, of being sentenced to imprisonment. A fear of such a sanction inevitably has a chilling effect on the exercise of journalistic freedom of expression.¹²⁷

78. Indeed, the Court has taken express note of a Resolution of the Parliamentary Assembly of the Council of Europe relating to the decriminalisation of defamation - urging member States whose legal systems still provide for prison sentences for defamation, to abolish them without delay.¹²⁸

79. Accordingly, the imposition of a prison sentence¹²⁹ for a press-related offence will only be compatible with Article 10 in exceptional circumstances, notably where other fundamental rights have been seriously impaired (such as, for example, in cases of hate speech or incitement to violence).¹³⁰ In *Cumpănă and Mazăre v Romania*,¹³¹ which concerned the applicant journalists' convictions for insult and defamation of a city council official, the Court found that the authorities had been justified in bringing proceedings to protect the official's reputation and dignity. Nevertheless, Article 10 was violated in view of the severity of the sanctions imposed: imprisonment and a ban from working as journalists for a year.

¹²⁴ *Yordanova and Toshev v Bulgaria*, No. 5126/05, 2.10.12, para. 55.

¹²⁵ *Cumpănă and Mazăre v Romania*, No. 33348/96, 17.12.04, para. 111.

¹²⁶ See, e.g. *Radio France and Others v France*, No. 53984/00, 30.3.04, para. 40; *Lindon, Otchakovsky-Laurens and July v France*, Nos. 21279/02 & 36448/02, 22.10.07, para. 59.

¹²⁷ *Mahmudov and Agazade v Azerbaijan*, No. 35877/04, 18.12.08, para. 49.

¹²⁸ *Mariapori v Finland*, No. 37751/07, 6.7.10, para. 69; *Niskasaari and Others v Finland*, No. 37520/07, 6.7.10, para. 77 – both judgments making reference to *Towards decriminalisation of defamation*, Resolution 1577 (2007) of the Parliamentary Assembly of the Council of Europe, 4 October 2007.

¹²⁹ Regardless of whether or not the sentence was actually served. See, e.g., *Cumpănă and Mazăre v Romania*, No. 33348/96, 17.12.04, para. 116; *Mariapori v Finland*, No. 37751/07, 6.7.10, para. 68.

¹³⁰ *Fatullayev v Azerbaijan*, No. 40984/07, 22.4.10, para. 103.

¹³¹ No. 33748, 17.12.04.

80. Where a prison sentence is unjustifiably imposed on a journalist, the European Court may order that the person be immediately released.¹³²

81. Disqualification or the imposition of other barriers to the practice of the profession of journalism will only be exceptionally justified, especially where such a ban is a “preventive measure of general scope”.¹³³

82. Disproportionate awards of damages or legal costs in defamation proceedings may lead to a finding of a violation of Article 10,¹³⁴ depending on whether or not there are adequate and effective safeguards to ensure there is a reasonable degree of proportionality as between the award and the injury to reputation.¹³⁵

83. The Court has also found that where a state establishes a public broadcasting system, Article 10 requires that domestic law and practice must guarantee that the system provides a pluralistic service. This important principle was violated in *Manole and others v Moldova*,¹³⁶ because of a deficient legislative framework regulating broadcasting in Moldova. The law did not prevent governmental interference with Teleradio-Moldova (TRM), which had a virtual monopoly of audio-visual broadcasting, by controlling the appointment of its senior management. The applicants made complaints (which were upheld) that as journalists at TRM they had been pressurised by its management to avoid topics embarrassing to the government, and to give disproportionate coverage to members of the ruling party.

84. Statements made by officials about ensuing criminal proceedings against journalists should not infringe the right to presumption of innocence under Article 6(2) of the Convention. For example, this principle was violated in *Fatullayev v Azerbaijan* because of a statement to the press by the Prosecutor General of Azerbaijan to the effect that Mr Fatullayev’s newspaper article contained a threat of terrorism. This was found by the Court to amount to an unequivocal statement that he had committed a criminal offence.¹³⁷

Anti-terrorism measures

85. In cases concerning both Articles 10 and 11 of the Convention, the Court has emphasized the importance of the principle of open debate of political ideas:

Freedom of assembly and the right to express one’s views through it are among the paramount values of a democratic society. The essence of democracy is its capacity to resolve problems through open debate. Sweeping measures of a preventive nature to suppress freedom of assembly and expression other than in cases of incitement to violence or rejection of democratic principles – however shocking and unacceptable certain views or words used may appear to the authorities, and however illegitimate the demands made may be – do a disservice to democracy and often even endanger it.

¹³² *Fatullayev v Azerbaijan*, No. 40984/07, 22.4.10, para. 177.

¹³³ *Cumpănă and Mazăre v Romania*, No. 33348/96, 17.12.04, paras. 117-119.

¹³⁴ See, e.g., *Tolstoy Miloslavsky v UK*, No. 18139/91, 13.7.95; *M.G.N. Limited v UK*, No. 39401/04, 18.1.11.

¹³⁵ *Independent News and Media and Independent Newspapers Ireland Limited v Ireland*, No. 55120/00, 16.6.05, para. 113.

¹³⁶ No. 13936/02, 17.9.09. See also *Saliyev v Russia*, No. 35016/03, 21.10.10 (withdrawal of copies of municipal newspaper containing applicant’s article—violation of Article 10).

¹³⁷ *Fatullayev v Azerbaijan*, No. 40984/07, 22.4.10, paras. 159-163.

In a democratic society based on the rule of law, political ideas which challenge the existing order and whose realisation is advocated by peaceful means must be afforded a proper opportunity of expression...¹³⁸

86. It is also said to be of the essence of democracy to permit various political programmes to be put forward and debated, even those calling into question the way in which the state is organised, provided that they do not damage democracy itself.¹³⁹

87. At the same time, the Court recognises that the media does have particular responsibilities in relation to conflict situations:

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. At the same time, where such views cannot be categorised as such, Contracting States cannot with reference to the protection of territorial integrity or national security or the prevention of crime or disorder restrict the right of the public to be informed of them by bringing the weight of the criminal law to bear on the media.¹⁴⁰

88. Any measures imposed under anti-terror legislation which are restrictive of the right to freedom of expression (or any other Convention right) must be sufficiently prescribed by law, must pursue a legitimate aim and must be proportionate.¹⁴¹ The term “prescribed by law” not only means that the measures invoked should have “some basis in domestic law”, but also refers to the quality of law: “legal norms should be accessible to the person concerned, their consequences foreseeable and their compatibility with the rule of law ensured”.¹⁴² In assessing the proportionality of measures taken, the Court will take account of the wider context to the case, including problems linked to the prevention of terrorism.¹⁴³

89. The *arbitrary* application of criminal law provisions relating to terrorism will not be acceptable to the Court:

Such arbitrary interference with the freedom of expression, which is one of the fundamental freedoms serving as the foundation of a democratic society, should not take place in a state governed by the rule of law.¹⁴⁴

90. An interference with a media organisation’s freedom of expression cannot be justified simply by the publication of interviews with, or statements by, a member of a proscribed organisation, or indeed on the basis that such statements contain views which are strongly disparaging of government policy:

¹³⁸ *Stankov and the United Macedonian Organisation Ilinden v Bulgaria*, Nos. 29221/95 & 29225/95, 2.10.01, paras. 97 & 107.

¹³⁹ See, e.g., *Ibrahim Aksoy v Turkey*, Nos. 28635/95, 30171/96 and 34535/97, 10.10.00.

¹⁴⁰ *Sürek and Özdemir v Turkey*, Nos. 23927/94 and 24277/94, 8.7.99, para. 63.

¹⁴¹ See, e.g., *Özgür Gündem v. Turkey*, No. 23144/93, 16.3.00, paras. 56-57 *et seq.*

¹⁴² *Ürper and Others v Turkey*, Nos. 14526/07, 14747/07, 15022/07, 15737/07, 36137/07, 47245/07, 50371/07, 50372/07 and 54637/07, 20.10.09, paras. 28- 29.

¹⁴³ See, e.g., *Karataş v Turkey*, No. 23168/94, 8.7.99, para. 51; *Demirel and Ateş v Turkey* (No. 3), No. 11976/03, 9.12.08, para. 28.

¹⁴⁴ *Fatullayev v Azerbaijan*, No. 40984/07, 22.4.10, para. 124.

...regard must be had instead to the words used and the context in which they were published, with a view to determining whether the texts taken as a whole can be considered as inciting to violence.¹⁴⁵

91. For example, as regards the Kurdish situation in south-east Turkey, the Court was

...not convinced that, even against the background of serious disturbances in the region, expressions which appear to support the idea of a separate Kurdish entity must be regarded as inevitably exacerbating the situation.¹⁴⁶

92. However, the limits of the extent of the right to freedom of expression may be crossed where an article is found to incite violence, armed resistance or an uprising, or which amounts to hate speech:¹⁴⁷

where...remarks incite...violence against an individual or a public official or a sector of the population, the State authorities enjoy a wider margin of appreciation when examining the need for an interference with freedom of expression.¹⁴⁸

93. For example, in *Sürek v Turkey* (No. 1),¹⁴⁹ the Court found no violation of Article 10 arising from a prosecution under prevention of terrorism legislation and the criminal code, relating to the publication of readers' letters condemning military activity in south-east Turkey. The letters were found to have named individuals and thereby exposed them to a risk of physical violence and were considered to amount to hate speech and the glorification of violence. Similarly, there was no violation of Article 10 in *Falakaoğlu and Saygılı v Turkey*,¹⁵⁰ which concerned the applicants' convictions under anti-terrorism legislation for publishing in a newspaper a declaration made by a group of detainees held on charges of belonging to an armed terrorist group, without any additional editorial analysis. The declaration appealed to public opinion to mobilise "support" for an action to "demolish" F-type prisons—an action that had already caused violent clashes between detainees and the security forces, leading to the loss of lives.

94. Bans on the publication of entire periodicals are highly likely to breach Article 10. For example, the case of *Ürper and Others v Turkey*¹⁵¹ concerned the suspension of several newspapers for periods of between 15 days and a month, under the Prevention of Terrorism Act. In finding the measures taken to be disproportionate, and to amount to "censorship", the Court noted that the national courts had banned the future publication of entire newspapers, whose content was unknown at the time of the decisions, and that:

¹⁴⁵ *Özgür Gündem v. Turkey*, N° 23144/93, 16.03.2000, para. 63; *Sürek and Özdemir v Turkey*, Nos. 23927/94 and 24277/94, 8.7.99, para. 61.

¹⁴⁶ *Özgür Gündem v Turkey*, No. 23144/93, 16.3.00, para. 70.

¹⁴⁷ See, e.g., *Gerger v Turkey*, No. 24919/94, 8.7.99, para. 50; *Sener v Turkey*, No. 26680/95, 18.7.00, para. 45; *Halis Doğan v Turkey*, No. 75946/01, 7.2.06, paras. 35-38; *Ulusoy v. Turkey*, No. 52709/99, 31.7.07, para. 48; *Demirel and Ateş v Turkey* (No. 3), No. 11976/03, 9.12.08, para. 26.

¹⁴⁸ *Sürek and Özdemir v Turkey*, Nos. 23927/94 & 24277/94, 8.7.99, para. 60.

¹⁴⁹ No. 26682/95, 8.7.99 (the Grand Chamber was, however, divided – voting 11–6 in favour of no violation).

¹⁵⁰ Nos. 22147/02 and 24972/03, 23.1.07.

¹⁵¹ Nos. 14526/07, 14747/07, 15022/07, 15737/07, 36137/07, 47245/07, 50371/07, 50372/07 and 54637/07, 20.10.09. See also *Turgay and Others v Turkey*, Nos. 8306/08, 8340/08 & 8366/08, 15.6.10.

the preventive effect of the suspension orders entailed implicit sanctions on the applicants to dissuade them from publishing similar articles or news reports in the future, and hinder their professional activities.¹⁵²

In the Court's view, less draconian measures could have been considered, such as the confiscation of particular issues of the newspapers or restrictions on the publication of specific articles. As the Prevention of Terrorism Act had been similarly invoked in a number of cases, the Court identified a systemic problem in the legislation and stipulated that it should be revised.¹⁵³

95. The European Commission of Human Rights found bans imposed by Ireland and the UK on the broadcasting of interviews of representatives of various political organisations (including Sinn Fein, which was not a proscribed organisation) to be justifiable under Article 10(2) in combating terrorism.¹⁵⁴

96. A personal search of a journalist carried out by the police or security forces under prevention of terrorism legislation may raise various issues under the Convention. In *Gillan and Quinton v UK*¹⁵⁵ a journalist intending to film public protests concerning an arm fair was searched by the police and told to stop filming. Being stopped and searched (even for a few minutes) was found to constitute a "deprivation of liberty" under Article 5(1) of the Convention.¹⁵⁶ Article 8 was held to be breached as the powers invoked (sections 44 and 45 of the Terrorism Act 2000) were found to be neither sufficiently prescribed nor subject to adequate legal safeguards to prevent abuse.

* * *

¹⁵² *Ürper and Others v Turkey*, *ibid.*, para. 43.

¹⁵³ *Ürper and Others v Turkey*, *ibid.*, paras. 51-52.

¹⁵⁴ *Purcell and others v Ireland*, No. 15404/89, dec. 16.4.91; *Brind and Others v UK*, No. 18714/91, dec. 9.5.94.

¹⁵⁵ No. 4158/05, 12.1.10.

¹⁵⁶ The Court did not go on to consider the merits of the complaint under Article 5, in view of its finding of a violation of Article 8.