

**Austrian answers
to the draft list of questions for CDMSI members on the
implementation of Council of Europe standards related to
safety of journalists and other media actors,
as agreed by the CDMSI Bureau in their 31 March/1 April meeting,
CDMSI(2015)Misc1rev2.**

1. Which are the existing mechanisms to ensure investigation and prosecution of attacks against journalists and other media actors?

Physical attacks, like bodily injury, as well as threats are criminal offences that have to be investigated and prosecuted ex officio. Ex officio investigations and prosecutions have to take place irrespective of whether the victim is a journalist or not. On the other hand, there is no margin of discretion left to police or judicial authorities that would give them any leeway to treat attacks on journalists in a different way (in the sense of more lenient or with less vigour than attacks on other persons).

2. Are there any non-judicial mechanisms, such as parliamentary or other public inquiries, ombudspersons, independent commissions, as useful complementary procedures to the domestic judicial remedies guaranteed under the ECHR, specifically dealing with threats and crimes targeting journalists and other media actors?

No.

3. Is the confidentiality of journalists' sources of information protected in both law and practice?

The protection of editorial confidentiality is guaranteed by Section 31 of the Federal Law on Media (Mediengesetz). Section 31 para 1 stipulates that media owners, editors, copy editors and employees of a media undertaking or media service as witnesses in criminal proceedings or other proceedings before a court or an administrative authority have the right to refuse answering questions concerning the person of an author, sender or source of articles and documentation or any information obtained for their profession.

Furthermore, this Section 31 of the Federal Law on Media is safeguarded by Section 144 (together with Section 157 para 1) of the Austrian Code of Penal Procedure (Strafprozessordnung) guaranteeing the non-circumvention of professional secrets during the investigation process.

The protection of editorial confidentiality was e.g. upheld in a case decided in 2010 by the Austrian Supreme Court in Civil and Criminal Matters (Oberster Gerichtshof; case nr.: 13 Os 130/10g). It held that the Austrian Broadcasting Corporation (ORF) was not obliged to hand over researched material which included a filmed sequence of persons who possibly violated the prohibitions of the Prohibition Act 1947 (Verbotsgesetz) which inter alia bans the Nazi Party and aims at suppressing any potential revival of Nazism, as the journalists acted consciously in order to gather information for a report. It further stated that Section 31 of the Federal Law on Media is more strict than other comparable European provisions because it does not contain a balancing requirement with regard to crime prevention or maintenance of order.

4. Does the domestic legislation in your country regarding defamation/libel include criminal law provisions?

Apart from the provision on defamation (Ehrenbeleidigung) under Austrian civil law (Section 1330 para 1 Allgemeines Bürgerliches Gesetzbuch) according to which the person wronged may obtain monetary compensation) there are three offences in the Austrian Penal Code (PC; Österreichisches Strafgesetzbuch – StGB) that tackle (elements of) defamation:

Section 111 PC (“Üble Nachrede”) is committed if a person accuses another person in such a way, that it may be perceived by a third person as possessing a contemptible character or attitude or being of dishonourable behaviour or of behaviour contrary to morality, which is suited to make him/her contemptible or otherwise lower him/her in public esteem (para 1).

This offence carries a higher punishment if committed in a printed document, by broadcasting or otherwise in such a way as to make the defamation accessible to a broad section of the public (para 2).

Section 115 PC (“Beleidigung”) is committed if a person insults, mocks, mistreats or threatens with ill-treatment another person in public or in the presence of several other persons (more than two persons, who are different from the offender and the assaulted one), unless the offender is liable to a more severe punishment under a different provision. The offence must take place in public or in the presence of

several other persons and the offender must have taken his fact into account when committing the offence.

Section 297 PC (“Verleumdung”) is committed if a person falsely accuses a specific person or several other specific persons in such a way as to expose such person or persons to the risk of prosecution. The offender is not liable to punishment if he removes the risk of prosecution voluntarily and in due time.

5. What are the procedural guarantees (the right to defence, the periods of limitation applicable to defamation suits, exceptio veritatis (defence of truth) and the burden of proof, presumption of good faith etc.) included in the civil and/or criminal legislation related to defamation?

Civil law:

As for defamation (Ehrenbeleidigung) under Austrian civil law (Section 1330 para 1 Allgemeines Bürgerliches Gesetzbuch), the plaintiff has the burden of proof and in light of the defamatory nature of the statement, the defendant does not have the option of demonstrating that the actuality he referred to is in fact true. The period of limitation lasts only one year (Section 1490 para 1 Allgemeines Bürgerliches Gesetzbuch).

Criminal Law:

In case of Section 111 PC (“Üble Nachrede”) the offender will not be punished if the assertion was proved true or, in the cases of para 1, if circumstances were proved, from which adequate reasons have arisen regarding the assertion as true (Section 111 para 3).

According to Section 112 PC (“Wahrheitsbeweis und Beweis des guten Glaubens”) the proof of the truth or of acting in good faith may take place, if the offender refers to the correctness of his/her assertion or his good faith. The proof of truth or of acting in good faith, however, is not admissible if it concerns facts of privacy, family life or (other) offences that may only be prosecuted on request of the victim.

In case of Section 115 PC (“Beleidigung”) the offender will not be punished if he/she has let him/herself get carried away by indignation caused by the conduct of another person and his/her indignation is generally apprehensible, in particular with regard to the timespan that has passed since the occasion.

Section 297 PC (“Verleumdung”) requires scienter, which means that Prosecution has to prove that the offender knew that the accusation was false (whereas in most of the other offences – including Sections 111 and 115 PC – “dolus eventualis” is sufficient).

The respective period of limitation depends on the range of punishment in each of the mentioned sections, together with the calculation scheme in Section 57 PC; for the different sections mentioned, the respective period of limitation may range from one year to five years.

6. In the domestic legal framework, are state officials protected against criticism and insult at a higher level than ordinary people, for instance through penal laws that carry a higher penalty?

No. There is only one slight difference under criminal law: Offences falling under Section 111 or 115 PC are, in general, only prosecuted on request of the victim; if committed against higher public officials during the exercise of their duties the offence is prosecuted ex officio (Section 116 and 117 para 1 PC).

7. Do laws on the protection of public order, national security or anti-terrorism have safeguards for the right to freedom of expression? What are these safeguards?

There are no particular safeguards. Both the Austrian Security Police Act (Sicherheitspolizeigesetz) as well as the Austrian Code of Penal Procedure (Strafprozessordnung), however, proclaim the principle of ‘proportionality’ (Section 29 SPA and Section 5 CCP) and reiterate it at several occasions. Besides, the right to freedom of expression has constitutional rank, whereas police and criminal laws are sub-constitutional (simple) laws that have to be interpreted and applied in conformity with constitutional law.

8. Are the following instruments translated into the national language and disseminated widely, in particular brought to the attention of judicial authorities and police services? Are these made available to representative organisations of lawyers and media professionals?

Although there is no concrete information on a translation of the mentioned instruments, it appears that their basic contents is covered by standing instructions on media and public relations for law enforcement officers.