

# FREEDOM OF EXPRESSION: STILL A PRECONDITION FOR DEMOCRACY?

## CONFERENCE REPORT

By Tarlach McGonagle<sup>1</sup>

### The Conference

After the Second World War, the Council of Europe developed a regional system of human rights protection for Europe, as is commonly known. What is perhaps less widely known is that within that overarching system of human rights protection, the Council of Europe has also developed a distinct regional system of protection for freedom of expression. The Council of Europe conference, *Freedom of expression: still a precondition for democracy?*, organized in Strasbourg on 13-14 October 2015, was all about the organization's system of freedom of expression, the challenges that are currently confronting it and its ability to overcome those challenges.

The title of the conference asks whether freedom of expression is “still a precondition for democracy?” This may have been intended as a rhetorical question as it is inconceivable that freedom of expression would not be at the core of any (present or future) conceptualization of democracy. Freedom of expression is not only a precondition for democracy, but one of its defining values or features.

The conference, which involved more than 400 participants, provided the Council of Europe with a valuable opportunity for stock-taking, crowd-sourcing and strategic planning. It was organized around a number of key themes or challenges facing freedom of expression in Europe today:

Session	Title/Theme
1	Free and pluralist public debate, a precondition for democracy; how to create an enabling environment?
2	Freedom to “offend, shock or disturb”: where do we stand?
3	The fight against terrorism: are we all potential suspects?
4	Protecting freedom of expression online: what is the role of intermediaries?
5	Decrypting the implications and assessing the costs of mass surveillance on freedom of expression
6	Strengthening our commitment to freedom of expression in all contexts: policies – actions - tools

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The examination of these themes prompted reflection on the range of existing Council of Europe standards and mechanisms dealing with the challenges identified; their scope and their effectiveness. This exercise of normative *stock-taking* was carried out with the help of a broad range of stake-holders drawn from Council of Europe Member States and representing a variety of institutional, civil society, professional and disciplinary backgrounds. Prominent representatives of other intergovernmental organizations (IGOs) also featured among the invited speakers, such as Ms. Dunja Mijatović, the OSCE Representative on Freedom of the Media and Mr. David Kaye, the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression.

This exercise in *crowd-sourcing* will surely contribute to, and indeed, provide additional impetus to, ongoing *strategic planning* by the Council of Europe on the theme of freedom of expression. A key reference point for that strategic planning is the 2015 Report by the Secretary General of the Council of Europe, *State of Democracy, Human Rights and the Rule of Law in Europe: A shared responsibility for democratic security in Europe*.<sup>2</sup>

The conference also provided a point of convergence for a number of related initiatives promoting the right to freedom of expression and generating public awareness for key issues. The initiatives were taken by the Information Society Department of the Council of Europe. One initiative was ‘[The Hows and Whys: Freedom of Expression, a Human Right](#)’, a series of video interviews with seven experts on different aspects of the right to freedom of expression: hate speech, protection of sources, defamation, access to information, terrorism, Internet freedom and new opportunities and challenges for freedom of expression. Another initiative was the launch of an edited collection of essays, [Journalism at risk: Threats, challenges and perspectives](#).<sup>3</sup> The third initiative was to convene, during the conference, an initial meeting between a group of representatives of national ombudsman institutions to share thoughts and experiences that could lead to a new network facilitated by the Council of Europe. The purpose of the network would be to strengthen the capacities of such mechanisms to contribute to enhancing the safety of journalists in Member States.

### *Structure and scope of report*

The first main focus of this conference report is the Council of Europe’s system for the protection of freedom of expression. It explains the system’s normative elements and its institutional dynamics. It also explains how the system relates to external systems, actors and influences. It then explores selected challenges that the system is currently facing, some old and some new. Many of those challenges are influenced, if not driven, by technology. The third focus concerns how the system could and should respond to those challenges.

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<sup>2</sup> Chapter 2 of the Report is devoted to freedom of expression.

<sup>3</sup> Onur Andreotti (ed.), *Journalism at risk: Threats, challenges and perspectives* (Strasbourg: Council of Europe Publishing, 2015).

This report does not aim to provide a comprehensive summary of the rich discussions throughout the conference. Instead, it aims to give a sense of the discussions and provide some additional context and references in places. For more detailed session-specific focuses, please see the summaries prepared by the session rapporteurs, which are available on the conference website.

## The Context

The playwright, Arthur Miller, once wrote that “[w]e must re-imagine liberty in every generation, especially since a certain number of people are always afraid of it”.<sup>4</sup> When he wrote those words, however prescient they may be, it is highly unlikely that he was imagining a day when the Council of Europe might be expected to develop an app to guarantee its users the right to freedom of expression. But the quote nevertheless provides a useful point of departure.

Liberty or freedom, and in particular, freedom of expression is anything but static. It is a dynamic force that develops – for better or for worse – over time and as such, international and regional human rights standards must also be interpreted in a dynamic way. The European Convention on Human Rights (ECHR) needs to stay in tune with the times and be able to overcome the considerable, changing threats that it faces today. The European Court of Human Rights has accordingly developed a “living instrument” doctrine. This is necessary in order to ensure that the rights enshrined in the ECHR, including the right to freedom of expression, are not just theoretical or illusory, but practical and effective.

As technological developments and societal attitudes are re-shaping the contours of freedom of expression, Article 10 ECHR clearly needs to keep pace with technological and societal changes.

The protection of the right to freedom of expression requires constant and careful vigilance, not only due to technological and societal changes, but due to the threats it always faces. The brutal and fatal *Charlie Hebdo* attacks in January 2015 were a tragic but galvanizing moment for freedom of expression. The killings exposed the extent to which freedom of expression is threatened by intolerance and fundamentalism. At the same time they revealed the polarization of opinion within society about the meaning of freedom of expression and its limitations. The killings also pointed up the urgent need to think through the different types of legal, political and other responses required to counter such threats.

It is difficult to know the best way to describe the times we live in, when the world is ravaged by so many wars and crises and, as the Secretary General of the Council of Europe put it in his address to the conference, “freedom of expression is under attack [...] from many sides”. The present age is alternately characterized by feelings of pessimism, cynicism, anger and desensitization. But one thing is sure: we live in an age of unprecedented individual

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<sup>4</sup> Arthur Miller, quoted in Salman Rushdie, ‘Arthur Miller at Eighty’ in *Step across this line: collected non-fiction 1992-2002* (London, Vintage, 2002), pp. 51-53 at 53.

empowerment. Such empowerment is double-edged. On the one hand, technology provides individuals with the means to communicate with the masses, thereby creating pathways to participation in public debate and affairs. On the other hand, technology also enables extremists to disseminate hatred, incite to violence and to plan and even to carry out violent attacks with a speed and on a scale like never before. Technology, depending on how it is used, can serve both democracy and destruction.

## **The system**

At the outset of the conference, the keynote speaker, Mr. Joshua Rozenberg, called on the Council of Europe to “talk tough” and take firmer action against Member States which fail to honour their obligation to protect freedom of expression. To act on that call to arms, it is important to first understand the nature and composition of the Council of Europe’s system for the protection of freedom of expression (as visualized below in Figure 1). The next step is to determine which mechanisms within the system are best-placed to respond to the call to arms. A systemic perspective is very useful in this connection as it allows an assessment of the strengths and weaknesses of the system’s different components.

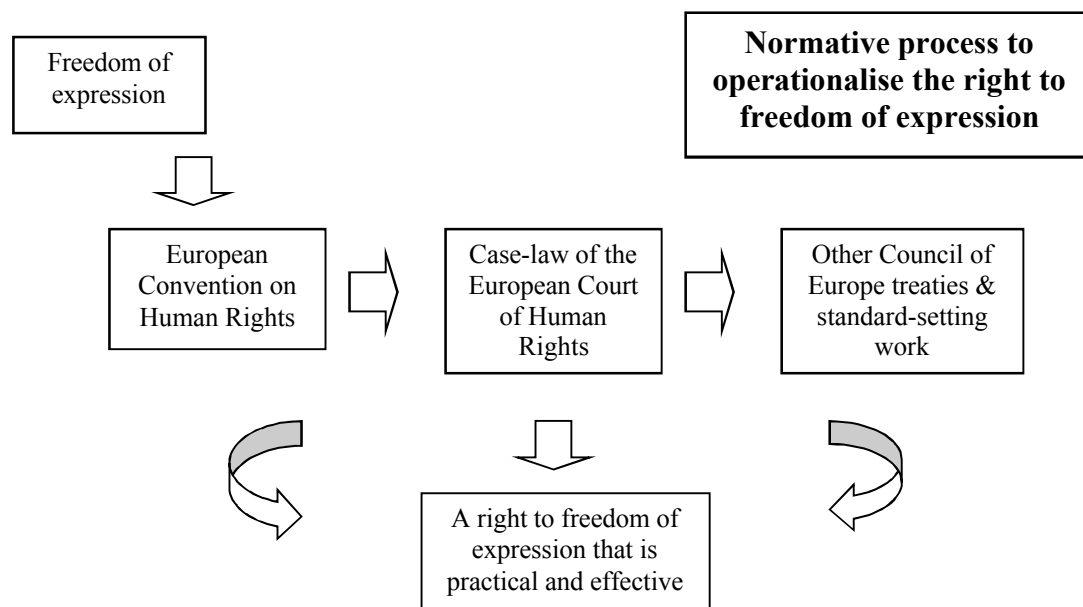
The system comprises principles and rights, as enshrined in treaty law and developed in case-law; political and policy-making standards, and State reporting/monitoring mechanisms. Each of the instruments and mechanisms has its own objectives and emphases and/or mandates and working methods. Each has its place in the system due to the overall “unity of purpose and operation”.<sup>5</sup> This system could even be described as a complex adaptive system. It is complex due to its composition of instruments and actors and the interplay between them, and it is adaptive to ever-changing internal political priorities and external political and socio-cultural circumstances, at the national and international levels.

The interplay between each of the system’s components also determines how the right to freedom of expression is exercised in practice. The system strives to operationalize abstract theories of freedom of expression and turn them into a right to freedom of expression that is meaningful and effective in practice. It seeks to create an enabling environment for freedom of expression, including as exercised by journalists and other media actors. The effectiveness of the normative framework is contingent on the effectiveness of its implementation.

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<sup>5</sup> This phrase is borrowed from Thomas Emerson, who used it in his treatise on the system of freedom of expression that has been built on the First Amendment of the US Constitution: Thomas I. Emerson, *The System of Freedom of Expression* (New York, Random House, 1970), p. 4.

**Figure 1: The Council of Europe’s system for freedom of expression**



The ECHR is the touchstone - the most important instrument in this system. Article 10 protects the right to freedom of expression, but that protection is integrated in the Convention’s broader, more general scheme of protection for human rights. The rights safeguarded by the ECHR, as interpreted by the European Court of Human Rights in its jurisprudence, are the drivers of the whole. The conference heard repeatedly that this must remain the case when exploring new dimensions to freedom of expression and overcoming persistent and emerging threats and challenges to the exercise of the right.

Over the years, various other treaties have been adopted by the Council of Europe, which reflect the general principles of the ECHR in their own theme-specific focuses. A systemic approach to freedom of expression helps to ensure that relevant treaties remain largely consistent and complementary in their focuses. A number of treaties covering some of the topics discussed at the conference could be listed as follows:

<b>CETS</b>	<b>Title</b>	<b>Entry into force</b>	<b>Specific focus at conference</b>
108	Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data	01/10/1985	Data protection
181	Additional Protocol regarding supervisory authorities and transborder data flows	01/07/2004	Data protection

132	European Convention on Transfrontier Television (as amended <sup>6</sup> )	01/05/1993	Reception and retransmission of broadcasts
157	Framework Convention for the Protection of National Minorities	01/02/1998	Intercultural dialogue, tolerance and the media
185	Convention on Cybercrime	01/07/2004	Online criminal activities
189	Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems	01/03/2006	Online hate speech
196	Council of Europe Convention on the Prevention of Terrorism	01/06/2007	Counter-terrorism

Other treaties, which have been opened for signature but have not yet entered into force, are also relevant. One example is the Council of Europe Convention on Access to Official Documents,<sup>7</sup> the first international, legally-binding treaty to recognize a general right of access to official documents held by public authorities. A second example is Protocol No. 15 amending the ECHR,<sup>8</sup> which will, among other things, insert an explicit reference in the preamble of the ECHR to the margin of appreciation doctrine developed in the case-law of the European Court of Human Rights. A third is the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism,<sup>9</sup> which “will make a number of acts, including taking part in an association or group for the purpose of terrorism, receiving terrorist training, travelling abroad for the purposes of terrorism and financing or organising travel for this purpose, a criminal offence”.<sup>10</sup> The Protocol also provides for “a network of 24-hour-a-day national contact points facilitating the rapid exchange of information”.<sup>11</sup>

The importance of the word “interplay” has already been mentioned in the context of the relationship between the Council of Europe’s normative standards and its mechanisms. Interplay is also important in the context of the relationship between legally-binding standards and political standard-setting texts. Political and policy-making texts (hereafter “standard-setting texts”) ought to be grounded in the European Convention on Human Rights and the case-law of the European Court of Human Rights, but they can also influence the development of that case-law.

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

<sup>6</sup> Since its entry into force on 1 March 2002, the Protocol amending the European Convention on Transfrontier Television, CETS No. 171, has been an integral part of the Convention.

<sup>77</sup> CETS No. 205, opened for signature on 8 June 2009.

<sup>8</sup> CETS No. 213, opened for signature on 24 June 2013.

<sup>9</sup> CETS No. 217, opened for signature on 22 October 2015.

<sup>10</sup> Council of Europe Treaty Office website.

<sup>11</sup> *Ibid.*

is noteworthy that judgments of the European Court of Human Rights refer, for example, to the Committee of Ministers' standard-setting texts in an increasingly systematic and structured way.<sup>12</sup> These standard-setting texts can also facilitate the interpretation of existing treaties by applying general principles to concrete situations or interpreting principles in a way that is in tune with the times.

Besides its normative standards, the system also relies on a set of actors that contribute in different ways to the Council of Europe's overall efforts to protect the right to freedom of expression. They include: the European Court of Human Rights, the Secretary General, the Committee of Ministers, the Parliamentary Assembly, the Commissioner for Human Rights, the European Commission for Democracy through Law (the 'Venice Commission') and the European Commission against Racism and Intolerance (ECRI).

European Ministerial Conferences on Media and Information Society are held periodically and they map out future European media policy, supplemented by action plans for its implementation. The texts adopted at these Ministerial Conferences inform the Council of Europe's work in the field of media, information society and data protection, which is overseen by the Steering Committee on Media and Information Society (CDMSI). The CDMSI operates under the authority of the Committee of Ministers and is supported by the Media and Information Society Division.

A Task Force on Freedom of Expression and the Media was established by the Secretary General in 2012 to coordinate relevant activities within the Council of Europe.

The most recent mechanism in the Council of Europe's system for the protection of freedom of expression is its [Platform to promote the protection of journalism and the safety of journalists](#), which was launched on 2 April 2015. The platform is a public space to facilitate the compilation, processing and dissemination of information on serious concerns about media freedom and safety of journalists in Council of Europe member States, as guaranteed by Article 10 ECHR. It aims to improve the protection of journalists, better address threats and violence against media professionals and foster early warning mechanisms and response capacity within the Council of Europe.

The action-oriented nature of the Platform means that its place within the broader Council of Europe system is a crucial complement to the normative standards and the intra-institutional players. Another noteworthy feature of the Platform is that it has been developed and is run in cooperation with a number of civil society partners: Reporters Without Borders, the International Federation of Journalists, the European Federation of Journalists, the Association of European Journalists, ARTICLE 19, the Committee to Protect Journalists and Index on Censorship. On 4 December 2014, the Council of Europe and the first five of the aforementioned organizations signed a Memorandum of Understanding on the Platform and the latter two organizations joined on 13 October 2015 – during the conference.

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<sup>12</sup> For example, Recommendation No. R (97)20 of the Committee of Ministers to member states on 'hate speech', 30 October 1997, is cited in the European Court of Human Rights' judgments in *Gündüz v. Turkey*, no. 35071/97, § 22, ECHR 2003-XI and *Féret v. Belgium*, no. 15615/07, § 44 and 72, 16 July 2009.

Alerts may be submitted by any of the partner organizations and each alert contains the following basic information: date of entry (subsequent updates are also flagged); the Council of Europe Member State in which the violation has occurred; category; source of threat (i.e., State, non-State or unknown); identity of partner organization submitting the alert, and alert level. There are five categories of violation: A. Attacks on physical safety and integrity of journalists; B. Detention and imprisonment of journalists; C. Harassment and intimidation of journalists; D. Impunity; E. Other acts having chilling effects on media freedom. Additional information from other sources is usually provided for each entry, where available, as well as details of any follow-up by the Council of Europe, other IGOs or responses from governments.

A further example of interplay involves the relationship between the Council of Europe system for the protection of freedom of expression and Member States. The relationship between the European Court of Human Rights and national courts is one of subsidiarity; it should be a last resort for judicial redress – after domestic remedies have been exhausted. The system as a whole seeks to achieve its aims through a “virtuous trilogy” of types of activities: the establishment of norms and standards; monitoring their implementation by Member States, and cooperation with Member States in order to help them to bring their laws and practice into line with the organization’s norms and standards.<sup>13</sup>

Outreach to, and cooperation with, civil society is another important dimension to the Council of Europe’s system for the protection of freedom of expression, as exemplified by the spirit of cooperation behind the Platform. So, too, is its cooperation with a range of key international and other regional IGO mechanisms, including the UN Special Rapporteur on Freedom of Opinion and Expression and the OSCE Representative on Freedom of the Media. The Council of Europe’s role as a regional stake-holder in the implementation of the UN Plan of Action on the Safety of Journalists and the Issue of Impunity should also be mentioned in this connection. Finally, other international and regional legal orders can influence the internal operation of the Council of Europe system and the interpretation of its normative standards. As will be seen below, United Nations human rights standards and European Union regulatory texts both featured in the conference discussions.

In conclusion, the Council of Europe system for the protection of freedom of expression has a complex, but dynamic composition. The system is in many respects self-contained, but it necessarily interacts with the national legal orders of Member States, and it must also be seen in a broader international context. Civil society dynamics can also influence its workings. These external dimensions add to its complex and adaptive character.

## **The challenges**

The various panel sessions at the conference generated wide-ranging discussions which can help to identify pressing challenges to the right to freedom of expression today and in the

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<sup>13</sup> Closing address to the conference by Mr. Philippe Boillat, Director General of the Council of Europe’s Directorate General Human Rights and Rule of Law.



future; challenges that are common to all Member States of the Council of Europe. The sessions will now be addressed in turn, before reflecting on the implications of these challenges for the Council of Europe's system for the protection of freedom of expression.

### ***Session 1: An enabling environment for free and pluralist public debate***

The title of Session 1 points to a very important finding of the European Court of Human Rights in its *Dink v. Turkey* judgment:

“States are obliged to put in place an effective system of protection for authors and journalists as part of their broader obligation to create a favourable environment for participation in public debate by everyone and to enable the expression of opinions and ideas without fear, even when they are contrary to those held by the authorities or by a significant section of public opinion and even if they are annoying or shocking for the latter”.<sup>14</sup>

This finding recognizes that States have a far-reaching positive obligation to create a favourable, or “enabling”, environment for freedom of expression.<sup>15</sup> This should be read in light of the Court's *Handyside* judgment, which is probably its most famous and most influential judgment concerning freedom of expression. In that judgment, the Court held that freedom of expression:

“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 the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there would be no democratic society”.<sup>16</sup>

These focuses from the *Dink* and *Handyside* judgments together shape the European Court of Human Rights' vision of a pluralist democratic society that depends on, and is characterized by, robust public debate.

Much of the discussion during the first panel session concerned the distance between the aspiration of an environment that *en-ables* freedom of expression and the reality - in various countries – of an environment that actually *dis-ables* freedom of expression. An enabling environment can be said to exist when laws and policies are put in place and general conditions are created that guarantee space for pluralist public debate. Such an environment cannot exist when laws and policies either target, or are applied to, journalists, the media and

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<sup>14</sup> Author's own translation. *Dink v. Turkey*, nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, § 137, 14 September 2010.

<sup>15</sup> See further: Tarlach McGonagle, ‘Positive obligations concerning freedom of expression: mere potential or real power?’, in Onur Andreotti (ed.), *Journalism at risk: Threats, challenges and perspectives* (Strasbourg: Council of Europe Publishing, 2015), pp. 9-35.

<sup>16</sup> *Handyside v. the United Kingdom*, 7 December 1976, § 49, Series A, no. 24.

others who wish to participate in public debate in such a way as to prevent or discourage them from doing so.

The conference heard about instances and patterns of killing, attacking, threatening and harassing journalists due to the nature of their critical reporting. It heard, too, of the practice of subjecting journalists to public smear campaigns, in which false information is used to discredit them and their work. The conference also heard about trends of frivolous, vexatious and malicious use of legislative and administrative measures in order to harass journalists and other media actors, or to frustrate their ability to contribute effectively to public debate. For example, journalists are sometimes prosecuted pursuant to overly broad legislation, such as anti-terrorism legislation, or criminal defamation laws, which continue to exist in a number of countries. They are also sometimes prosecuted for fictitious charges, such as tax evasion or incitement to suicide. In addition, in respect of journalism and public debate conducted online, some States are reported as applying onerous registration requirements for maintaining websites, blocking websites and using copyright law as a technique for having online content removed.

It was suggested during this session that we have now entered a new phase of the information society, in which propaganda, sponsored (commercial) information and public relations increasingly dominate and in which information wars are being waged, with the media and social media as weapons. Against trends towards “genetically-modified” media, there is a greater-than-ever need for free, independent, pluralist and sustainable media and independent journalists, it was argued. This is because of the importance of independent media for democracy: they not only fulfil the role of public watchdog, they are also, as Mr. Gvozden Srećko Flego of the Parliamentary Assembly put it, “co-creators of public opinion”.

Another threat to media freedom and pluralism is the concentration of media ownership, which is compounded by a lack of transparency concerning media ownership. These threats and problems represent significant challenges to States in their roles as ultimate guarantors of pluralism, especially in the audiovisual media sector.<sup>17</sup> This role implies for States a “positive obligation to put in place an appropriate legislative and administrative framework to guarantee effective pluralism”.<sup>18</sup> It also requires States to address the impact on pluralism in the media sector of multinational corporations and Internet intermediaries, both of which are often established outside the jurisdiction of the State. To address the transparency problem, the Parliamentary Assembly has proposed promoting a Media Identity Card “which should, *inter alia*, provide information about the owners of the media outlet concerned and those who contribute substantially to its income, such as big advertisers and donors”.<sup>19</sup>

## ***Session 2: Freedom to offend, shock or disturb***

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<sup>17</sup> *Informationsverein Lentia and Others v. Austria*, 24 November 1993, § 38, Series A no. 276.

<sup>18</sup> *Centro Europa 7 S.r.l. and Di Stefano v. Italy*, *op. cit.*, § 134. See further, § 130.

<sup>19</sup> Resolution 2035 (2015), Protection of the safety of journalists and of media freedom in Europe, 29 January 2015, para. 16.

Whereas the title of Session 1 referenced the *Dink* judgment, the title of Session 2 explicitly references *Handyside*. One of the key questions discussed during the panel session concerned the reach of the *Handyside* principle: where is the tipping point when expression that offends, shocks or disturbs the State or any sector of the population, reaches such an intensity that it no longer enjoys the protection afforded by Article 10, ECHR?

The relationship between Article 10 (freedom of expression) and Article 17 (prohibition of abuse of rights), ECHR, as developed in the case-law of the European Court of Human Rights, was elucidated. Article 17 was designed to prevent the ECHR from being misused or abused by those whose intentions are contrary to the letter and spirit of the Convention. When the Court finds Article 17 to be applicable in a given case, this usually leads to the case being declared inadmissible without a substantive examination of the case.<sup>20</sup> Article 17 is sometimes referred to as the Convention's "guillotine provision", due to the finality of the consequences when it is applied. Because the application of Article 17 constitutes a very severe interference with freedom of expression, the Court should exercise great moderation when applying it, the conference was told, by former Vice-President of the Court, Ms. Françoise Tulkens.

"Hate speech", which has not been defined by the European Court of Human Rights, was a main focus of this panel session. Despite the absence of an authoritative or legally-binding definition, the core meaning of hate speech is clear. It essentially involves expressing or inciting hatred towards, or inciting violence against, members of minority or vulnerable groups on account of their "otherness", e.g., race, ethnicity, gender (identity), sexual orientation, etc. Power structures in society and the ability to access and participate in the media and Internet-based fora/services and other channels of public debate can have significant influence over how hate speech is spread and countered. Misogynist hate speech, especially online, was identified as a particularly pressing problem in this connection.

As with other themes explored at the conference, hate speech and the limits of freedom of expression have also been affected by technological developments. The worldwide character of the Internet facilitates the ability of information and ideas to spread like wildfire across the globe. Expression directed locally can impact globally. This involves messages reaching beyond the immediate cultural contexts in which they were produced and beyond their intended recipients. In turn, this means that such messages may be judged by other legal standards and community values than those applicable where the messages have been produced. This can sometimes lead to friction, for instance, concerning satire, particularly when its target is religious in nature. The European Court of Human Rights has held that satire is entitled to protection because it is "a form of artistic expression and social commentary and, by its inherent features of exaggeration and distortion of reality, naturally

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<sup>20</sup> However, the Court has not always applied Article 17 consistently. For in-depth analysis, see: Hannes Cannie & Dirk Voorhoof, "The Abuse Clause and Freedom of Expression in the European Human Rights Convention: An Added Value for Democracy and Human Rights Protection?", 29 *Netherlands Quarterly of Human Rights* (No. 1, 2011), pp. 54-83; David Keane, "Attacking hate speech under Article 17 of the European Convention on Human Rights", 25 *Netherlands Quarterly of Human Rights* (No. 4, 2007), pp. 641-663.

aims to provoke and agitate”.<sup>21</sup> Nevertheless, in certain parts of the world, religious satire will likely fall foul of blasphemy laws. The continued existence and application of (criminal) blasphemy laws in some European States and their chilling effect on freedom of expression also remains a pressing concern.

A central message to emerge from the session was that the challenge of countering hate speech requires a complete package of differentiated but complementary strategies, involving a range of stake-holders. In other words, it must be countered by an array of measures: legal, political, educational, informational, cultural, etc. A root-and-branch approach is called for, because concrete instances of hate speech are a manifestation of underlying hatred, which can be traced to particular structural conditions that normalize hatred towards and violence against groups of individuals.

### ***Session 3: The fight against terrorism***

The third panel session placed considerable emphasis on how contemporary terrorist organizations exploit the Internet and in particular social media in order to disseminate propaganda, secure funding and recruit new members. Various explanations were offered as to why social media have become such a powerful tool for these purposes. For instance, jihadists are often young men who are particularly susceptible to radicalization due to a number of critical factors, including disillusionment with political structures and processes, socio-economic inequality, etc. As digital natives (as opposed to digital immigrants), youthful terrorists have an affinity with social media and the de-centralised, participatory nature of Web 2.0 services enables them to circumvent traditional or institutional forms of communication. Social media allow youth to level the hierarchies of knowledge and power that weigh against them in the offline world; their social media use can therefore be seen as a form of empowerment.

When terrorists have a sophisticated understanding of technology, they are able to develop and use speedy, agile and resilient networks of communication which can shift quickly across platforms and therefore prove difficult for authorities to monitor. In response to this situation, Europol recently established an EU Internet Referral Unit (IRU), which was presented during the panel session. Its main aims include: “To coordinate and share the identification tasks (flagging) of terrorist and violent extremist online content with relevant partners”; “To carry out and support referrals quickly, efficiently and effectively, in close cooperation with the industry”, and “To support competent authorities, by providing strategic analysis and operational analysis”.<sup>22</sup> The EU IRU does not have the mandate to compel online service providers to block or remove content from their platforms, so in practice, its working methods involve seeking voluntary cooperation by social media networks, through a dialogue based on the providers’ terms of service.

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<sup>21</sup> *Vereinigung Bildender Künstler v. Austria*, no. 68354/01, § 33, 25 January 2007.

<sup>22</sup> See further: <http://data.consilium.europa.eu/doc/document/ST-7266-2015-INIT/en/pdf>.

Anti-terrorist instruments and strategies pose other problems for freedom of expression, besides those associated with technology. Vague and/or overbroad laws criminalizing the glorification or indirect incitement of terrorism can have a chilling effect on freedom of expression. The same is true of legislation in which key terms and concepts are either not defined or defined with insufficient precision. The problematic nature of such laws has been highlighted and addressed by the Council of Europe, for example in the case-law of the European Court of Human Rights,<sup>23</sup> in standard-setting work by the Committee of Ministers<sup>24</sup> and at the Ministerial Conference in Reykjavik in 2009. Standards and safeguards developed by the European Court of Human Rights can offer useful guidance for anti-terrorism legislation and its application. In a Resolution adopted at the Reykjavik Conference, participating Ministers stated their resolve to “to review our national legislation and/or practice on a regular basis to ensure that any impact of anti-terrorism measures on the right to freedom of expression and information is consistent with Council of Europe standards, with a particular emphasis on the case law of the European Court of Human Rights”.<sup>25</sup>

Notwithstanding these standards, there is no shortage of recent examples of anti-terrorism measures being applied in ways that threaten or violate the right to freedom of expression, as is detailed in the session report on Session 3. Those examples, arising in different countries, concern censorship and self-censorship of artistic expression and exhibitions on sensitive themes; the arbitrary detention of journalists and other media actors; the blocking of websites and Internet-based services; the expulsion of journalists and the adoption of electronic surveillance laws granting sometimes sweeping powers to State intelligence services. The Convention on Cybercrime was criticised for not having incorporated sufficient safeguards against extensive online surveillance and for not providing for recourse to the European Court of Human Rights.

#### ***Session 4: Intermediaries and freedom of expression online***

Internet intermediaries carry out an influential gate-keeping function in respect of public debate that takes place online. They control the *private* networks, such as social media, through which *public* debate is often conducted. The fourth panel session was dominated by a discussion of the various legal issues raised by the *Delfi v. Estonia* judgment by the Grand Chamber of the European Court of Human Rights.<sup>26</sup>

Those issues are summarised in the session report, but include: the nature of the comments at issue in the case (whether they amounted to hate speech or not); the nature of the duties and

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<sup>23</sup> See, for example, *Leroy v. France*, no. 36109/03, 2 October 2008.

<sup>24</sup> Committee of Ministers Declaration on freedom of expression and information in the media in the context of the fight against terrorism, 2 March 2005.

<sup>25</sup> Resolution, Developments in anti-terrorism legislation in Council of Europe Member States and their impact on freedom of expression and information. See also: David Banisar, *Speaking of terror: A survey of the effects of counter-terrorism legislation on freedom of the media in Europe*, Council of Europe Media and Information Society Division, 2008, available at:

[http://www.coe.int/t/dghl/standardsetting/media/doc/SpeakingofTerror\\_en.pdf](http://www.coe.int/t/dghl/standardsetting/media/doc/SpeakingofTerror_en.pdf).

<sup>26</sup> *Delfi AS v. Estonia* [GC], no. 64569/09, ECHR 2015.

responsibilities of Delfi to moderate content (specifically in respect of its automatic filtering system, combined with its notice-and-takedown procedure); the extent of legal liability for intermediaries, as determined, *inter alia*, by the framework built around the EU's E-Commerce Directive,<sup>27</sup> and the relevance of the commercial nature of the online news portal operated by Delfi.

Another issue discussed concerns the precedential value of the *Delfi* judgment. Judge Spano, speaking in an extra-judicial capacity, stressed the particular nature of the intermediary service in question: on Delfi's online news portal, discussion by readers was channelled by editorial content/articles. The higher level of editorial involvement brought with it a higher level of responsibility or liability. The outcome would not necessarily be the same for other types of intermediary services. In other words, a more passive role, with less (or no) editorial involvement in shaping or framing the content, such as neutral discussion boards, would not necessarily lead to the same outcome as in *Delfi*.

In the ensuing discussion, it was pointed out that the *Delfi* case was the first time the Court had squarely dealt with these issues. However, the suggestion that it was therefore understandable that the Court should adopt a cautious approach and develop principles that seemed limited to a particular type of intermediary role or service did not meet the expectation that a Grand Chamber judgment should in fact seek to establish principles that are broadly applicable. The discussion also led to the suggestion that a graduated approach to determining the monitoring obligations of hosting services should be developed, in order to distinguish between strictly neutral hosting services and more editorially active types of intermediaries which exercise different levels of editorial control over content. However, some intermediaries provide different services, which could result in the same intermediary being subject to different levels of liability.

It must be recalled that online intermediaries are required to uphold their users' right to freedom of expression and other human rights. The responsibility to do so does not always sit easily with commercial motives and the danger that risk-minimization strategies favouring content removal would prevail over free speech interests. The rule of law and the authority of the judicial system – not private actors – are essential here. Other dimensions to intermediaries' responsibility to uphold users' right to freedom of expression include how the intermediaries enforce their terms of use or community standards and the transparency that they provide about removal requests from States and other parties, for example through public reporting.

Finally, other concerns included uncertainty about the scope of hate speech, and the ambiguous functions of anonymous speech online. On the one hand, anonymity can provide a valuable shield to whistleblowers, but on the other hand, it can conceal the identities of those seeking to make malicious or unlawful statements which could violate the rights of others.

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<sup>27</sup> The framework for intermediary liability created by the E-Commerce Directive creates exemptions from liability for services acting as a 'mere conduit' for content, 'caching' content and 'hosting' content (Articles 12-14, respectively). It also provides that such services may not be subject to a general obligation either "to monitor the information which they transmit or store" or "actively to seek facts or circumstances indicating illegal activities" (Article 15(1)).

### ***Session 5: The impact of mass surveillance on freedom of expression***

The focus of Panel Session 5 was two-fold: the dangers of mass surveillance for freedom of expression and the importance of source protection for journalists and whistle-blowers in particular and the right to freedom of expression in general. The European Court of Human Rights has a growing body of case-law dealing with both focuses,<sup>28</sup> which provides valuable guidance as new dimensions to these themes continue to emerge due to ongoing technological developments. Other mechanisms within the Council of Europe system for the protection of freedom of expression have likewise been engaging actively with relevant themes and issues. For example, the Parliamentary Assembly,<sup>29</sup> the Venice Commission<sup>30</sup> and the Commissioner for Human Rights<sup>31</sup> have all brought out reports on (aspects of) mass surveillance and/or oversight of national security/intelligence services.

One of the session's main lines of discussion explored how human rights safeguards can be used to guide approaches to surveillance, a very topical theme in the wake of the Snowden revelations. It was pointed out that human rights and surveillance are not irreconcilable, as long as the democratic oversight of security agencies is properly framed and implemented. The Venice Commission's study was a central reference point for this discussion. Various terminological questions were unpacked, including "mass" surveillance *vis-à-vis* "targeted" surveillance. A variety of models for "democratic control" of security services were considered, with preference being expressed for a "judicial or quasi-judicial body that authorizes the selectors used in searches".<sup>32</sup> Such a body would be better-suited to the task than a parliamentary committee, it was submitted, but such a body could still be accountable to parliament. An independent data protection authority should then oversee the follow-up, retention and processing and use of intelligence data collected.<sup>33</sup>

From a freedom of expression perspective, there may be legitimate and compelling reasons to wish to avoid surveillance, for example in relation to the collection and sharing of

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<sup>28</sup> On surveillance, see, for example: *Klass and Others v. Germany*, 6 September 1978, Series A no. 28; *Malone v. the United Kingdom*, 2 August 1984, Series A no. 82; *Weber and Saravia v. Germany* (dec.), no. 54934/00, ECHR 2006-XI. On protection of journalistic sources, see, for example: *Goodwin v. the United Kingdom*, 27 March 1996, *Reports of Judgments and Decisions* 1996-II; *Sanoma Uitgevers B.V. v. the Netherlands* [GC], no. 38224/03, 14 September 2010; *Ressiot and Others v. France*, no. 15054/07 and 15066/07, 28 June 2012; *Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands*, no. 39315/06, 22 November 2012. On protection of whistle-blowers, see, for example: *Guja v. Moldova* [GC], no. 14277/04, ECHR 2008; *Matúz v. Hungary*, no. 73571/10, 21 October 2014.

<sup>29</sup> PACE, Legal Committee on Legal Affairs and Human Rights Report (Rapporteur: Mr. Pieter Omtzigt), "Mass surveillance", Doc. No. 13734, 18 March 2015.

<sup>30</sup> The Venice Commission, *Update of the 2007 Report on the democratic oversight of the security services and report on the democratic oversight of signals intelligence agencies* (Rapporteur: Mr. Iain Cameron), March 2015.

<sup>31</sup> Council of Europe Commissioner for Human Rights, *Democratic and effective oversight of national security services*, Issue Paper (author: Mr. Aidan Willis), May 2015.

<sup>32</sup> Summary report of Session 5.

<sup>33</sup> For further discussion of these issues, see: Sarah Eskens, Ot van Daalen and Nico van Eijk, *Ten standards for oversight and transparency of national intelligence services* (Amsterdam, Institute for Information Law (IViR), 2015).

confidential information by journalists, whistle-blowers and other contributors to public debate. A range of individuals and groups who are at a risk of heightened surveillance therefore have a very clear incentive to ensure that their communications are secure. Encryption and anonymity/pseudonymity, which can be enhanced through, *inter alia*, encryption software and anonymous browsers, can contribute to their information and communications security. These are measures of digital self-defence or self-empowerment.

The UN Special Rapporteur on freedom of opinion and expression, Mr. Kaye – whose first report to the UN Human Rights Council focused on encryption and anonymity in digital communications,<sup>34</sup> advocated the use of such measures and training in relevant skills for journalists and bloggers. Mr. Kaye’s second thematic report, this time to the UN General Assembly, focused on the protection of sources of information and whistle-blowers – another category of persons for whom secure communications are essential.<sup>35</sup>

It was stressed during the discussion that state actors are not the only sources of threats to freedom of expression and data protection. Private actors, especially multinational corporate actors offering a variety of online services, collect, retain, use and – through voluntary or involuntary cooperation with various state authorities – share their users’ data. Notwithstanding their financial motives, such private actors have a responsibility to uphold their users’ human rights, including their right to privacy and data protection. Everyone is entitled to self-determination over their own data and be able to correct and/or erase that data. Online service providers should accordingly give effect to that.

Although the European Court of Human Rights has developed its own jurisprudence on relevant topics, this session revealed the extent to which legislative and jurisprudential developments elsewhere must be taken into account. These issues are pressing in various legal and political fora and cannot be dealt with in isolation. Two judgments by the Court of Justice of the European Union (CJEU) were identified as having particular relevance: the *Digital Rights Ireland* judgment (in which the CJEU struck down the EU’s Data Retention Directive)<sup>36</sup> and the *Max Schrems* judgment (in which the CJEU declared invalid the European Commission’s Safe Harbour Decision concerning the exchange of data between Europe and the United States).<sup>37</sup> It is clear that the Council of Europe will have to take cognizance of these kinds of developments elsewhere as it develops and implements its own standards on relevant issues, such as internet intermediaries and oversight of national security/intelligence services.

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<sup>34</sup> Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye, UN Doc. No. A/HRC/29/32, 22 May 2015.

<sup>35</sup> “Promotion and protection of the right to freedom of opinion and expression”, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye, UN Doc. No. A/70/361, 8 September 2015.

<sup>36</sup> CJEU, Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others*, 8 April 2014.

<sup>37</sup> CJEU, Case C-362/14, *Maximillian Schrems v. Data Protection Commissioner*, 6 October 2015.



## ***Session 6: Strengthening our commitment to freedom of expression in all contexts***<sup>38</sup>

The final panel session at the conference provided two sets of perspectives on how to reinforce intergovernmental commitment to protecting the right to freedom of expression. First, a selection of institutional perspectives were presented: the European Union, UNESCO and the Council of Europe. The second set of perspectives focused on the ‘Policies, Actions and Tools’ used to give effect to the intergovernmental commitments.

The European Union ascribes to the principles of freedom of expression, media freedom and pluralism, as set out in Article 11 of the Charter of Fundamental Rights of the European Union. These principles inform various activities undertaken by the EU, including in cooperation with the Council of Europe. One focus of the EU’s relevant activities is to fund and facilitate projects that aim to promote media freedom and pluralism standards in EU member states. Such projects include Mapping Media Freedom, which monitors and reports on violations of media freedom; the Media Pluralism Monitor, which implements a tool to measure media pluralism on a country-by-country basis, assessing the risks for media pluralism for each country; European Centre for Press and Media Freedom, coordinating a network of media freedom organizations throughout Europe.

UNESCO’s activities to promote freedom of expression, information and media freedom include the coordination and implementation of the UN Plan of Action on the Safety of Journalists and the Issue of Impunity (discussed earlier in this conference report). The annual Report of UNESCO’s Director-General on the Safety of Journalists and the Danger of Impunity is an important tool for monitoring the safety of journalists and in preventing the impunity of the perpetrators of crimes against journalists. The organization also conducts a range of educational, training and capacity-building activities.

### **Challenges and responses**

The various panel sessions, in particular Session 6, revealed a number of challenges that concern the system as a whole and its overall effectiveness. First, there is the criticism, voiced at different stages during the conference, that the Council of Europe should do more to guarantee freedom of expression; that it should “talk tough” whenever Member States violate the right to freedom of expression and threaten to suspend or expel them from the Council of Europe, and actually follow up on those threats, if necessary.

“Talking tough” is one of a range of crucial, complementary strategies that needs to be used by the Council of Europe in order to protect and promote the right to freedom of expression. One of the advantages of seeing the Council of Europe’s system of freedom of expression as

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<sup>38</sup> Please note that the main focuses of the two presentations on the Council of Europe by Mr. Jan Kleijssen, Director of the Information Society and Action against Crime Directorate of the Council of Europe and Mr. Matjaž Gruden, Director of the Policy Planning Directorate of the Council of Europe (i.e., its general activities in the realm of freedom of expression, media and information society, as well as the Platform to promote the protection of journalism and safety of journalists) have been discussed in an earlier part of this conference report and are therefore not detailed again here.

a systemic whole is that it then becomes easier to identify which bodies of the Council of Europe are (i) best-placed to “talk tough” and (ii) most likely to have political impact when they do “talk tough”.

Some bodies may not have the mandate to chastise States for failing to safeguard freedom of expression. The Court is a case in point – its judgments are essentially declaratory. Its task is to determine whether there has been a violation of the right to freedom of expression in particular sets of circumstances. It does not concern itself with the political consequences of such a determination. Instead, responsibility for the execution of the Court’s judgments lies with the Committee of Ministers.

For other bodies, however, being outspoken and applying political pressure, may be part of their key business. This is the case, for example, for the Parliamentary Assembly, which styles itself as “Europe’s democratic conscience”<sup>39</sup> and which systematically reports on the safety of journalists and media freedom in Europe, naming specific countries, individuals and cases.<sup>40</sup> Mr. Nils Muižnieks, the Council of Europe Commissioner for Human Rights, explained that other actors, like himself, are freer, by virtue of their mandates, to choose their own working methods and therefore judge which tactics are required in a given situation. This makes it possible to weigh up the competing merits of, for example, silent diplomacy on the one hand and the public naming and shaming of States on the other hand. It was suggested by Mr. Rozenberg in this regard that the Secretary General’s annual reports on the state of democracy in Europe could usefully provide specific information about violations of freedom of expression in Member States.

The opening session of the conference captured different tensions that remained present in later sessions. The Secretary General of the Council of Europe, Mr. Thorbjørn Jagland, welcomed judicial developments in Turkey in which some of the key free speech principles of the European Court of Human Rights were applied by the Constitutional Court of Turkey in its recent case-law. Mr. Zühtü Arslan, President of Turkey’s Constitutional Court, provided details of those developments in his intervention. Yet this progress is taking place against the backdrop of a general, much criticized situation regarding freedom of expression in Turkey and of continuing reports of violations of freedom of expression in the country.

Similar tensions about national track records on the protection of freedom of expression are also present in respect of other countries, e.g. Azerbaijan, the Russian Federation and

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<sup>39</sup> Website of the Parliamentary Assembly of the Council of Europe and Bruno Haller, *An Assembly for Europe: The Council of Europe’s Parliamentary Assembly 1949-1989* (Strasbourg, Council of Europe Publishing, 2006), pp. 148-149.

<sup>40</sup> PACE Resolution 2035 (2015) and Recommendation 2062 (2015), both entitled “Protection of the safety of journalists and of media freedom in Europe”, 29 January 2015; PACE Recommendation 1897 (2010), “Respect for media freedom”, 27 January 2010; PACE Resolution 1636 (2008) and Recommendation 1848 (2008), both entitled, “Indicators for media in democracy”, 3 October 2008; PACE Resolution 1535 (2007) and Recommendation 1783 (2007), both entitled “Threats to the lives and freedom of expression of journalists”, 25 January 2007.

Hungary, which were mentioned during the conference and in PACE's Resolution 2035 (2015).<sup>41</sup>

It was stressed that it is important for the Council of Europe (and other IGOs) to engage with member states about their track records on freedom of expression. There is a default assumption of good faith, implied by States' membership of IGOs that are committed to human rights, but when it becomes apparent that good faith is not present, then other, stricter measures become necessary. While one view was that it may be better to keep such States within the fold and keep dialogical channels open, the opposing view was that such an approach could compromise the credibility of the organization. It was added that the expulsion of a State from the Council of Europe would deprive citizens of that state from having recourse to the European Court of Human Rights. It was further pointed out that IGOs have the instruments and mechanisms that are needed to protect the right to freedom of expression, but that what is sometimes missing is the political will to implement them.

These tensions and criticisms, often very sharp in nature, directed alternately at particular States and at the Council of Europe itself, are essential for taking the debate about more effective protection of freedom of expression forward. They are the drivers of the responses of the Council of Europe to the various challenges identified during the conference discussions and the various recommendations put forward by conference participants to improve the Council of Europe's efforts to ensure a higher level of protection for freedom of expression.

At the time of the conference, the Platform to promote the protection of journalism and the safety of journalists had registered 84 alerts and reported them to the governments concerned. Those alerts had elicited 25 responses from governments. Having only come into operation in April 2015, this was an impressive start, and as already mentioned, on the occasion of the conference, two civil society organizations joined the Platform as partners. These initial results have created high expectations for the future of the Platform and much more remains to be done in order to continue the initial momentum. One suggestion put forward at the conference was to ask PACE to issue regular follow-up reports on the cases submitted. The PACE is already active in monitoring media and journalistic freedom in Europe and this could be a useful added prong to both the Platform's activities and those of PACE.

Some of the most significant challenges for freedom of expression are currently being addressed by ongoing standard-setting by the Council of Europe. A draft Recommendation to Member States on the protection of journalism and the safety of journalists and other media actors is due to be finalized by the CDMSI this year and, it is expected, submitted to the Committee of Ministers for its consideration and approval. The draft text was elaborated by the Committee of Experts on protection of journalism and safety of journalists (MSI-JO) over the course of the past two years.

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<sup>41</sup> PACE Resolution 2035 (2015) "Protection of the safety of journalists and of media freedom in Europe", *op. cit.*

The draft Recommendation carries on the focuses of the Committee of Ministers' Declaration on the protection of journalism and safety of journalists and other media actors (2014). It seeks to provide Member States with detailed guidance on the various, complementary measures they can use to fulfil their obligations to overcome the many-sided challenge of ensuring effective protection of journalism and the safety of journalists and other media actors. The Guidelines it puts forward are based on an extensive body of principles, anchored in the ECHR and developed by the case-law of the European Court of Human Rights.

Numerous contributors to the conference stressed the need for preventive action, in particular to address threats against journalists and others seeking to contribute to public debate, and for a redoubling of efforts to combat and eradicate impunity for crimes against journalists and other contributors to public debate. One of the key features of the Guidelines to the aforementioned draft Recommendation seeks to address this. They call on Member States to put in place a comprehensive legislative and administrative framework to enable freedom of expression. The framework should be subject to independent, substantive review, to ensure that safeguards for the exercise of the right to freedom of expression are robust and effective in practice and that the legislation is backed up by effective enforcement machinery. After an initial expeditious review, further reviews should be carried out at regular periodic intervals. The reviews should cover existing and draft legislation, including legislation which concerns terrorism, extremism and national security, and any other legislation that affects the right to freedom of expression of journalists and other media actors as well as other rights that are crucial for ensuring that their right to freedom of expression can be exercised in an effective manner.

Another draft Recommendation – on Internet freedom - is also being developed under the auspices of the CDMSI, by a Committee of experts on cross-border flow of Internet traffic and Internet freedom (MSI-INT). It, too, is built around a list of fundamental principles, presented as indicators, on selected themes: an enabling environment for Internet freedom; the right to freedom of expression; the right to freedom of assembly and association; the right to private life, and remedies. Each of these broad themes contains sub-divisions, such as, in the case of the right to private life, focuses on personal data protection and freedom from surveillance.

Calls were also made for the establishment of a Council of Europe Commissioner for Freedom of Expression, a dedicated mandate to coordinate internal Council of Europe activities concerning freedom of expression and to intervene in Member States and liaise with counterpart mandates at other IGOs.

Another pertinent suggestion at the conference was a call for a shift in understanding of 'monitoring' exercises, so that a perception of shame would be replaced by a more constructive relationship centring on the provision of high-level legal expertise, to help certain States to develop their freedom of expression standards in a sustainable manner.

The above are examples of and suggestions for responses by the Council of Europe to the threats and challenges to freedom of expression identified during the conference. Various action-lines had already been developed prior to the conference, for example in successive

Thematic Debates by the Committee of Ministers on the safety of journalists. Chapter 2 (Freedom of expression) of the Secretary General's 2015 Report, *State of Democracy, Human Rights and the Rule of Law in Europe*, concludes with a number of 'Proposed Actions and Recommendations', directed at the European and national levels. They are quoted here in full due to their relevance to on-going strategic planning at the Council of Europe:

#### “EUROPE-WIDE

- Drawing on existing initiatives – notably the work of the Commissioner for Human Rights, PACE, DG1 and the safety of journalists platform – the Council of Europe will develop a three-year<sup>42</sup> Europe-wide programme to support national mechanisms to protect journalists, such as ombudsman institutions, press commissioners and non-governmental organizations. The goal of the programme will be to strengthen the capacities of such mechanisms, to promote networking and exchanges of experience in the area of safety of journalists and to raise the visibility of the issue in the member states.
- Accurate and up-to-date data on media ownership is an essential component of media pluralism and a safeguard against corruption. All member states should ensure they collect and make public sufficient information to identify the financial beneficiaries and ultimate owners of any media licensed to operate within their borders.
- Member states should implement effective regulation and monitor media concentration in order to encourage pluralism and independence. The Council of Europe will provide expertise on national legal and regulatory frameworks based on the case law of the ECHR (Article 10) and Recommendation CM/Rec(2007)2 on media pluralism and diversity of media content.
- The Council of Europe will publish a review of states' practices with regard to blocking, filtering and removing Internet content, identifying key trends, best practices and areas in need of action. Based on the case law of the Court and standards developed by the Committee of Ministers, the Council of Europe will offer assistance to member states to uphold freedom of expression online while guaranteeing the safety of citizens.
- The Council of Europe will improve its capacity to collect and process media-related information through existing activities and co-operation programmes.

#### NATIONAL

The Council of Europe's bilateral work with member states, including through action plans, will now make the promotion of free media and freedom of expression a priority, focusing on:

- practical steps to improve the safety of journalists and to raise the visibility of the issue in the member states;
- actions to address impunity for those responsible of crimes against journalists;
- co-operation with member states in preparing, assessing, reviewing and bringing in line with the European Convention on Human Rights any laws which place

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<sup>42</sup> Rapporteur's note: since the publication of the Secretary General's report, it has been changed to a two-year programme. Mr. Boillat's closing intervention refers to a two-year programme.

restrictions on freedom of expression. This includes legislation relating to defamation, hate speech and blasphemy, as well as laws aimed at protecting public order, morals or national security. They should duly take into account the requirements of Article 10 of the ECHR and the case law of the Court. In particular, all laws limiting freedom of expression must respond to a pressing social need, be clearly and narrowly defined and be proportionate in scope and sanctions. Special attention will be given to the drafting and application of anti-terror laws, as well as legislation regulating access to official documents;

- implementing Council of Europe standards on the independence of media regulatory authorities, the remit of public-service broadcasters and media concentration;
- ensuring that legislation governing the use of Internet adequately reflects state obligations under the European Convention on Human Rights and the case law of the European Court of Human Rights.”

### **Conclusions and recommendations**

The title of the Secretary General’s speech at the conference was “Freedom of expression under attack” and he noted that the right is “under attack from many sides”. Too often, journalists and others who contribute to public debate are murdered, attacked, threatened and harassed as a result of their reporting or the expression of their opinions in the context of public debate. The conference provided emphatic re-affirmation that the old battles are still being waged against impunity for crimes against journalists and other media actors, criminal defamation, blasphemy and hate speech laws, as well as the harassment, vexatious prosecution and arbitrary detention of those seeking to contribute to public debate. At the same time and partly as a result of technological advances and empowerment, new battlefronts have emerged: protection of personal data, protection against mass surveillance and heightened restrictions on freedom of expression due to national security concerns.

All of these battles demand a range of effective institutional responses by the Council of Europe, in cooperation with its Member States and the intergovernmental community and civil society. The responses should be geared towards creating a “favourable environment for participation in public debate by everyone and to enable the expression of opinions and ideas without fear, even when they are contrary to those held by the authorities or by a significant section of public opinion and even if they are annoying or shocking for the latter”, as stated by the European Court of Human Rights. Pluralism, independence and freedom of the media are prerequisites for such a favourable environment for pluralist, inclusive public debate. Another prerequisite is the diversity of individual opinions, which is increasingly dependent on the ability to access and use online services. This, in turn, calls for States and online intermediaries, in keeping with their respective roles, to uphold the right to freedom of expression of the users of those services. Hate speech, which is increasingly disseminated online, constitutes a grave threat to pluralist, inclusive public debate in democratic societies and should be countered by a range of effective, complementary measures, in accordance with Article 10, ECHR. This conference report has already identified a number of challenges and responses that could be developed into full-fledged recommendations. In addition, the following recommendations have been formulated:

- The rights enshrined in the ECHR and the principles developed by the European Court of Human Rights, must remain the touchstone for all future standard-setting and monitoring work by the Council of Europe in order to ensure an enabling environment for freedom of expression.
- These rights, democratic principles and the rule of law must be guaranteed in the online environment, which requires extra efforts through the “virtuous trilogy” of the Council of Europe’s activities: the establishment of norms and standards; monitoring their implementation by Member States, and cooperation with Member States in order to help them to bring their laws and practice into line with the organization’s norms and standards.
- The right to freedom of expression should be the point of departure and restrictions are only permissible when they meet all the criteria developed by the European Court of Human Rights (prescribed by law, accessible and foreseeable and necessary in democratic society); restrictions must therefore be narrowly drawn, correspond to a pressing social need and respect the principle of proportionality.
- Within the range of complementary measures and strategies used by the Council of Europe system for protection of freedom of expression, greater emphasis should be placed on the strategies of “talking tough”, publicly “naming and shaming” and bringing the necessary political pressure to bear on States which fail to meet their obligations to protect freedom of expression and create an enabling environment for public debate.
- In parallel, greater emphasis should also be placed on further developing monitoring approaches, with a view to ensuring more constructive engagement by Member States.
- It is essential that preventive, pre-emptive action is taken at the national level; an independent, ongoing periodic review of national legislative and administrative frameworks governing freedom of expression and their implementation should be promoted by the Council of Europe. Such a review system is a key feature of the draft Recommendation on the protection of journalism and safety of journalists and other media actors, but it also has roots elsewhere in the Council of Europe system for freedom of expression.
- In order to fulfil the early promise shown by the Platform to promote the protection of journalism and the safety of journalists and thereby help to strengthen the capacity of the Council of Europe to warn of and respond effectively to threats and violence against journalists and other media actors, possibilities for the further development of the Platform, including synergies with other Council of Europe mechanisms, should be actively explored and adequate resources should be made available to realise that development.
- All relevant mechanisms within the Council of Europe system for the protection of freedom of expression should employ all political and diplomatic measures available to them in order to create greater political resolve at all levels to combat and eradicate impunity for crimes against journalists and other media actors. The Platform could prove a useful tool in this regard.

- Similar efforts should be made to ensure that Member States engage with the envisaged national reviews of laws and practice governing freedom of expression and in particular to bring laws that have a chilling effect on freedom of expression into line with the case-law of the European Court of Human Rights, e.g. criminal defamation and blasphemy laws; over-broad anti-terrorism, anti-extremism, anti-“hate speech” and surveillance laws.
- The Council of Europe should continue to examine the effectiveness of its system for the protection of freedom of expression and consider the added value of a designated mandate for freedom of expression to operate alongside existing mechanisms and promote the implementation of existing normative standards.
- The Council of Europe should continue to explore the themes discussed during the conference, taking into account the conclusions and recommendations of the individual panel sessions and the “challenges and responses” set out in the previous section of this report. In doing so, it should continue to engage with Member States, other intergovernmental organizations and mechanisms and civil society.