

CoE Freedom of Expression conference 13 October 2015

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I am a journalist. It's a job I have done for 40 years. I was trained by the BBC and worked for 25 years in broadcasting. I was then employed by a national newspaper before becoming a freelance reporter and commentator. For the past 30 years I have written mainly about the law.

But I am not the sort of journalist who will benefit most from this conference. I am not an investigative reporter. I have never been a war correspondent. If somebody disagrees with my views, the worst I can expect is an offensive comment on Twitter. I am not likely to be arrested. I am not likely to be murdered. But you can't say that about journalists in every part of the world.

You can't even say that about journalists working here in France. We all remember the massacre of eight journalists — as well as two police officers, a caretaker and a visitor — at the French satirical newspaper *Charlie Hebdo* in Paris earlier this year.

Of course, the French authorities were not to blame. The police had provided protection. But there are other countries where journalists have as much to fear from governments as they do from terrorists.

What risks do journalists face across Europe? Are things getting worse? And what is the Council of Europe doing about it? These are some of the questions I want to address this morning.

The Council of Europe works on two levels: political and judicial. Let's start at the political level.

This debating chamber — the hemicycle — houses the Council of Europe's own parliamentary assembly. In English, we sometimes call it PACE — P-A-C-E — which stands for Parliamentary Assembly of the Council of Europe.

PACE has more than 300 members drawn from parliaments in the 47 member states. It has no power to make laws but it has a great deal of influence on those who do.

At the beginning of this year, PACE debated media freedom in Europe. Ahead of the debate, assembly members received a report from their committee on culture, science, education and the media.

The committee reported that, during the years 2013 and 2014, at least 15 journalists and media workers in Europe had died because of their work. There was well-documented evidence that journalists are being attacked and killed with impunity. When we say “impunity” we mean that the attackers get away with it. We mean that states have failed to conduct proper investigations that could have led to the prosecution and punishment of those responsible. Impunity encourages further violence, the committee said. It’s a sign that the judges of a country lack independence and that its system of justice has failed.

Let me give you some examples drawn from the media committee’s report.

The Council of Europe has asked me not to identify the countries concerned but you can easily look them up. Since March 2014, representatives of the mainstream media in one particular country have faced intense hostility and high risk of assault or detention when seeking to cover events in a territory that is now governed by a neighbouring state. In an adjoining country, independent and critical journalists have frequently been subjected to unprovoked assaults — many by the police or security forces — as well as arbitrary arrests. In a third European country, journalists have faced threats to their safety and independence from restrictive laws, from questionable criminal investigations, from restrictions on internet access, from improper government interference and the government’s intolerance of criticism — while more than 20 journalists were still in prison at the end of last year. In a fourth country, critical journalists have faced aggressive attempts to silence them by physical attacks, detention and imprisonment for what are said to be fabricated charges.

Although there is praise for some initiatives, many other countries are identified by the media committee as having imposed unnecessary

restrictions on access to information. As we speak, the government of my own country, the United Kingdom, is planning new restrictions on extremists who radicalise young people through social media such as Twitter and Facebook. Although there may be popular support for restricting hate-speech, some well-respected British lawyers have argued that the UK proposals could be counter-productive. I want to talk about hate speech later.

And the end of January, the media committee's report was debated here in PACE, the parliamentary assembly. That was just three weeks after the terrorist attacks in Paris. A resolution proposed by the committee was strengthened in the light of the *Charlie Hebdo* murders. PACE stressed that freedom of expression included the right to say things that may offend, disturb or shock people, including those in government. "Political criticism and satire must be protected as an essential part of media freedom," the assembly concluded. "Any attack on the media... is an attack on a democratic society... Democracy and the protection of human rights depend on media freedom."

And who could disagree with that? Well, nineteen members of the assembly voted against the resolution. All five members from one country. All three from another. Eight members from a third country.

The assembly also made a number of recommendations to the committee of ministers of the Council of Europe, representing the member states. These recommendations were worthy, bland and — in my opinion — entirely unobjectionable. But there were objections by assembly members from from two states in particular. Again, you can look them up.

And what is the Council of Europe doing about this? As you heard from the ambassador just now, it launched an internet-based "platform", as it called it six months ago. The platform — which is part of the Council of Europe website — outlines specific attacks on journalists and identifies the governments concerned. But what's unique about the platform is that the

information on it comes from one of five independent media organisations. I'm told that two more will be joining at this very conference.

This is an excellent development except for its name, which is “platform to promote the protection of journalism and safety of journalists”. That could never have been chosen by a journalist: it's far too long. How about calling it “Free Speech in Europe”? Or just the free speech website?

All the media organisations that post alerts on it have their own websites. But what's unique about the journalism platform is that each alert — and by yesterday there were 84 — each is forwarded to the government concerned through its diplomatic mission here in Strasbourg. And it's a measure of the platform's success that there have now been more than 25 responses from the states themselves which you can read online. They may not tell us very much. We may not always believe them. But at least the governments concerned have had to consider the complaints and work out what to say. Some states have even taken action.

I asked earlier whether things were getting worse. My answer is: yes, certainly. As the Secretary General said in his report to the committee of ministers this summer, almost half the member states can't promise journalists safety from violence and threats or the laws and public information the allow journalists to do their work. Even where the situation is satisfactory, the Secretary General added, “a significant number are regressing and over a third of states are experiencing a deterioration in protection for journalists”.

[And what impact is that having on the practice of journalism? That's my next question.

You might think of journalists as free-spirited, brave young men and women, prepared to accept great hardship and take extraordinary risks for

the greater glory of winning a scoop, an exclusive story. If that was ever an accurate summary, it's not any more.

Reporters and camera crews from the big television news organisations still go into war zones, but only under strictly controlled conditions. They wear protective clothing. They have bodyguards. They are trained in what to do if they are kidnapped. And they are usually in and out of the most dangerous locations before viewers know they have arrived. They have a very limited opportunity to find out what is going on.

So news organisations cut corners. They use pictures and stories from news agencies. But if an area is controlled by an armed militia, which news agencies will be allowed in? Who will provide the fixers, the drivers and the interpreters that foreign journalists need? Are viewers and readers likely to be given an objective, balanced account? Or will selective editing and even downright fabrication be used to give whatever impression those in charge want the world to see?

Of course, it's easier for reporters who live in the country they are covering. But how much harassment, imprisonment and even physical attacks will they put up with before deciding that there are easier ways to earn a living?

You may think that this doesn't matter so much now that most people have access to the internet. Who needs network news reporters when there are freelancers who are willing to operate without any of the restrictions that the networks impose? Who needs journalists when anyone with an iPhone can write and broadcast live to the world?

But more is not always better. Freelance war correspondents may have their own agendas. And the more material there is available online, the more that readers and viewers need journalists to make sense of it — to work out what's true and what's propaganda. That's why attacks on journalists matter more than ever.]

So far, I have been talking mainly about how the Council of Europe works at a political level. But the Council of Europe is better known for its judicial

achievements — setting up a court whose rulings are binding on individual member states.

That court is the European Court of Human Rights, or the human rights court as it's usually called. Its courtroom and offices are less than 10 minutes walk down the road from here -- even with the roadworks -- and you should go and see them if you have not been there before. The human rights court decides whether or not Council of Europe members have complied with the European Convention on Human Rights — the human rights convention for short.

States must ensure that “everyone within their jurisdiction” — broadly speaking, everyone in the country — can enjoy their human rights as set out in this international treaty.

The human rights convention is divided into sections, known as articles. I want to mention just two of them: article 8 and article 10. Some of you know these articles very well: some of you may not.

Let's start with article 10, which is about free speech. Article 10 begins by saying that “everyone has the right to freedom of expression”. And it goes on to say that freedom of expression includes “freedom to hold opinions and receive and impart information and ideas without interference by public authority”. But article 10 then limits the right to freedom of expression.

Restrictions in paragraph 2 include those that are “prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary”. That's quite a list.

The other article you need to know about is article 8. That says that “everyone has the right to respect for his private or family life, his home and his

correspondence”. Broadly speaking, article 8 creates a right to privacy. But the right to privacy is also subject to exceptions in much the same way as freedom of expression.

You can see that article 10 may sometimes clash with article 8: free speech may sometimes conflict with the right to privacy. Article 10 may allow you to publish information about my private life. But article 8 may allow me to stop you doing so. So whenever a court deals with these issues under the human rights convention, it has to strike a balance — a balance between free speech and privacy. And the court must also balance both those rights against the rights of others.

Sometimes, the court comes down in favour of privacy — even for public figures. Fifteen years ago, Princess Caroline of Monaco complained that German magazines had published paparazzi photographs of her. In 2004 the human rights court said the pictures of Princess Caroline out shopping or on holiday with her family made no contribution to what it called a “debate of general interest to society”.

Sometimes, the court finds in favour of journalists. In 1990, a British reporter called Bill Goodwin was ordered to identify the source of a story. He refused and eventually won his case here at the human rights court. “Protection of journalistic sources is one of the basic conditions for press freedom,” the court said in 1996. “Without such protection, 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 may be adversely affected”.

[There have been many similar cases since then but I'll mention only two. In 2010, the Latvian police raided the home of a broadcast journalist called Ilze Nagla and seized her computer data. Again, they were trying to identify her source. In 2013, the human rights court found that there had been breach of her rights under article 10. The right of journalists not to disclose their

sources was not “a mere privilege to be granted or taken away depending on the lawfulness or unlawfulness of their sources”, the judges added. The Latvian authorities had failed to establish that the interests of the investigation in securing evidence were sufficient to override the public interest in the protection of the journalist’s freedom of expression.

But there are limits to the protection of sources. In 1996, the Dutch police searched the offices of a magazine for a letter from an organisation that had claimed responsibility for a bomb attack. But the magazine publisher’s complaint was thrown out by the human rights court. It said the police search had been conducted to retrieve evidence and prevent future crimes. These were legitimate aims and necessary in a democratic society.]

I hope you can see now how the human rights court balances free speech against other rights. Freedom of expression can never be unlimited. But it is an essential part of a democratic society. And by upholding complaints brought under article 10, the court has made a major contribution to protecting freedom of expression across Europe.

It has been doing so for 40 years, as the Secretary General reminded us. In 1971, a British publisher called Richard Handyside published what he called the Little Red Schoolbook. This was a slightly subversive paperback aimed at children aged 12 and over. The English courts found that the book had what was called “a tendency to deprave and corrupt” — because it appeared to support drug-taking and under-age sex. Copies were seized and Richard Handyside was fined. He complained to the human rights court — only to lose in 1976. But listen to what the court had to say in its ruling:

The court’s supervisory functions oblige it to pay the utmost attention to the principles characterising a “democratic society”. Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. [sic] Subject to paragraph 2 of Article 10, it 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 is no “democratic society”.

And we see those principles expressed again and again. In July of this year, the court ruled on complaint by a former Turkish naval commander who’d been sentenced to a year in prison for insulting the memory of Atatürk, founder of modern Turkey. It recalled several recent judgments in which the court had built on the Handyside ruling. This is the court’s latest position, which I have shortened slightly:

Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfilment... This freedom is subject to exceptions, which... must, however, be construed strictly; and the need for any restrictions must be established convincingly...

The adjective “necessary” [in article 10, paragraph 2] implies the existence of a “pressing social need”. The contracting states have a certain margin of appreciation [which means latitude; or room for manoeuvre] in assessing whether such a need exists, but it goes hand in hand with European supervision... The court is therefore empowered to give the final ruling on whether a “restriction” is reconcilable with freedom of expression as protected by article 10. What the court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was “proportionate to the legitimate aim pursued” and whether the reasons adduced by the national authorities to justify it are “relevant and sufficient”...

What do we think of that? “Freedom of expression constitutes one of the essential foundations of a democratic society.” Anyone here disagree? I hope not. Of course, nobody is saying that a country ceases to be a democracy just because there has been a breach of article 10. But a state that denies its people the right to free speech is a state that fails to respect the rule of law.

What about the next bit? “The court is... empowered to give the final ruling on whether a restriction is reconcilable with freedom of expression.” That’s a little more difficult.

Of course, it’s true that if a state signs up to the human rights convention it gives the human rights court power to make rulings on individual claims against it. But countries are sometimes reluctant to put the court’s rulings into effect.

The best example I can give you is from my own country, the United Kingdom — though it’s not really about freedom of speech. Ten years ago, almost to the day, the grand chamber of the human rights court — in effect, the appeal court — ruled that the total or “blanket” ban on voting by convicted prisoners in the United Kingdom was a breach of their rights under the convention. The United Kingdom has not so far put this ruling into effect. I don't think it ever will.

Article 46 of the human rights convention says that the high contracting parties — that means the states that signed the treaty — “undertake to abide by the final judgment of the court in any case to which they are parties”. And what if they don’t?

It’s not the responsibility of the court to enforce its own judgments. That’s the job of the committee of ministers of the Council of Europe — which means the member states acting through their ambassadors here in Strasbourg. The

committee of ministers — usually diplomats but sometimes politicians — meet here four times a year to supervise the enforcement of judgments against each other. Their decisions are public and so they can certainly put political pressure on states that do not comply with the court's decisions. But there is not much more they can do.

You can understand why the politicians designed the system like this. If your country doesn't make too much of a fuss about my country this month, then maybe my country won't complain too much about your country next month. These people are diplomats, after all. They believe that quiet pressure, behind the scenes, is more effective than shouting from the rooftops. And that approach is reflected at every level throughout the Council of Europe.

Take the Secretary General's annual reports on the state of democracy in Europe. The first of these was published last year. It was critical. But it did not identify the countries it criticised. As I myself reported, "to avoid the risk that its publication will be vetoed by member states, the report does not name and shame individual governments". But at least last year's report told us the number of states in which particular problems had been identified. This year's report does not even do that. Without specific examples, it is very difficult for journalists to construct stories. And without publicity reports have little effect.

We are here to discuss whether free speech is still a precondition for democracy. My answer is: yes, it certainly is. The human rights court was right to say that "freedom of expression constitutes one of the essential foundations of a democratic society".

But that's the easy bit. The problem comes at a political level. A planned amendment to the human rights convention — known as protocol 15 — will put more emphasis on the states' margin of appreciation. By ratifying it, member states are telling the human rights court to keep its distance and

allow their own judges a measure of discretion when dealing with human rights breaches.

That's fine if those states respect rights such as free speech. Some don't. So it's necessary for other states to speak out. The committee of ministers should tell the world about states that fail to comply with article 10 rulings, perhaps in a new section on its freedom of expression platform or maybe just by identifying breaches more clearly on the committee of ministers' own web pages.

That's just a start. Member states should instruct the Secretary General to name individual countries in future reports on democracy in Europe — and in the report he has now commissioned from the Swiss Institute of Comparative Law. It's fine to report on “trends and common problems”. But it's much more effective to identify specific failings by individual countries. After all, the Secretary General already issues statements condemning specific attacks. At the beginning of this month for example, after the Turkish journalist Ahmet Hakan had been beaten up outside his home, the Secretary General referred to Hakan by name and said that “repeated attacks on journalists in Turkey have a chilling effect on freedom of expression in the country”. In my view, that message should be endorsed by every other state in the Council of Europe.

If states repeatedly refuse to comply with rulings from the human rights court — or if they fail to respect preconditions for democracy such as free speech — they should have no place in an international institution founded on human rights. I know the Council of Europe thinks it's always better to keep countries inside the tent rather than kick them out. I know it thinks that's the best way to help them become democracies. But countries are not allowed to join the European Union unless they meet basic democratic standards. Why should the Council of Europe put up with countries that flout the rule of law?

So it's time to talk tough. And if talking doesn't work, the committee of ministers must take action. The Council of Europe must threaten expulsion. I don't suppose any state would take offence at that threat and walk out of the Council of Europe. But if the Council of Europe has to suspend a country's membership for a couple of years or even has to lose one or two members, then the remaining states are likely to pay more attention to the fundamentals of democracy. It's a risk worth taking — and a price worth paying.

The Council of Europe has made a good start with its freedom of expression platform. But there's much more it could say. It must speak out. Its voice needs to be heard more widely. Countries that deny free speech should be named and shamed.

I am sorry if those who invited me to Strasbourg have had to listen to an uncomfortable message: what the English call a *mauvais quart d'heure*. But I am a journalist. All I have is words. And I thank the Council of Europe for giving me the most precious gift of all today: my democratic right to freedom of expression.