HRA MONTENEGRO HUMAN RIGHTS ACTION | AKCIJA ZA LJUDSKA PRAVA

EUROPEAN COURT OF HUMAN RIGHTS AND FREEDOM OF EXPRESSION

Thematic Overview of Judgments on Freedom of Expression

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INTRODUCTION

This thematic overview of bulletins featuring judgments of the European Court of Human Rights on freedom of expression contains material that Human Rights Action (HRA), a non-governmental organization from Podgorica, Montenegro, published monthly from 2012 up to June 2016. A total of 66 bulletins were published in English and Montenegrin with summaries of 285 decisions of the European Court of Human Rights, including five decisions of several European countries and one decision of the Human Rights Committee. More than 400 journalists, judges, lawyers and civil society activists regularly received bulletins via e-mails. Several bulletins have also been published by the media in Montenegro.

The author of the bulletins is Peter Noorlander, media law expert, who was at that time director of the Media Legal Defense Initiative (MLDI), a non-profit organization from London providing legal assistance to journalists all over the world. All reference to the legislation of Montenegro was prepared by HRA.

Three embassies in Montenegro supported publication of bulletins – the British Embassy, as part of the HRA project "Monitoring journalistic self-regulatory bodies in Montenegro" (2012-2014), the United States Embassy within the HRA project "Support for understanding journalistic ethics and freedom of expression" (2014-2015) and the Australian Embassy in Belgrade within the HRA project "Reform of the Criminal Code for the benefit of media freedom" (2016). Coordinator of all three projects was Mirjana Radović.

The present publication provides classification of summaries of judgments under thematic headings, providing for easier usage of all accumulated information on the European standard of freedom of expression. The last judgment mentioned in this thematic overview is from March 2016.

We hope this publication will support protection of freedom of expression.

Tea Gorjanc-Prelević

Editor, HRA executive director

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THEMATIC OVERVIEW OF JUDGMENTS ON FREEDOM OF EXPRESSION

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1. DEFAMATION

Defamation judgments make up the largest share of the European Court of Human Rights' freedom of expression jurisprudence. This reflects the fact that defamation laws are the most commonly used legal provisions against journalists, particularly as regards reporting in which journalists allege wrongdoing of some sort by politicians, public officials and businessmen. In its judgments over the years, the European Court has developed a number of core principles in how these cases should be assessed:

a) Politicians need to tolerate a high level of criticism of their actions; they have voluntarily put themselves up for public office and elections and should therefore expect close scrutiny;
b) To a lesser extent, public officials should also tolerate greater scrutiny of their actions, because of the important positions they hold in society;
c) There should be significant scope for discussion on matters of public interest (not just related to politics, although that is an important part of it);
d) Journalists who report in good faith on an issue of public interest should not be punished even if allegations they make turn out to be wrong, so long as they reported in line with journalistic ethics;
e) Whereas factual allegations should have a solid basis, a journalist should not be required to prove the truth of an opinion – opinions cannot be proven;
f) Journalists should not be required to formally distance themselves from potentially defamatory allegations made by others which they report
g) Any sanctions for defamation should be proportionate and should take into account the impact of the sanction on the journalist or media outlet involved, as well as on media freedom in the country more broadly.

The following judgments illustrate how the court applies these principles in practice.

- ***Lingens v. Austria***, Application No. 9815/82, judgment of 8 July 1986: politician should tolerate greater criticism than ordinary individuals; journalists have wide latitude to express opinions.

This concerned the conviction for defamation of journalists who had published two articles discussing the participation of Austrians in atrocities committed during the Second World War. The articles criticised the Chancellor, who would be retiring following elections that had just been held, for allegedly protecting former Nazis. The Chancellor won a defamation judgment against the journalists. The European Court of Human Rights held that this conviction violated the journalists' right to freedom of expression, emphasising the important role the press plays in a democracy. It emphasised that the journalists had criticised the Chancellor in his official capacity, and that there should be wide latitude for this kind of criticism:

> "Freedom of the press ... affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and must consequently display a greater degree of tolerance. No doubt Article 10 para. 2 enables the reputa-

tion of others to be protected, and this protection extends to politicians too, even when they are not acting in their private capacity; but in such cases the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues." (para. 42)

The Court also noted that the facts on which the applicant had based his articles were undisputed; the applicant had been fined for his use of strong words to describe the retiring Chancellor's attitude. In such cases, the Court held that:

> "...[A] careful distinction needs to be made between facts and value-judgments. The existence of facts can be demonstrated, whereas the truth of value-judgments is not susceptible of proof ... [A requirement of proof with regard to value-judgments] infringes freedom of opinion itself, which is a fundamental part of the right." (para. 46)

- ***Thoma v. Luxembourg***, Application no. 38432/97, judgment of 29 March 2001: journalists should not be required formally to distance themselves from potentially defamatory allegations made by others.

This concerned a radio journalist who had quoted from a newspaper article which alleged that of all eighty forestry officials in Luxembourg only one was not corrupt. The journalist was convicted for libel but the European Court held that the conviction constituted a violation of his right to freedom of expression. The Court held, first of all, that civil servants, like politicians, should tolerate criticism of their functioning:

> "Civil servants acting in an official capacity are, like politicians, subject to wider limits of acceptable criticism than private individuals." (paragraph 47)

The Court also dismissed the contention that the journalist should have formally distanced himself from the allegation, warning the public that he was quoting from a newspaper report:

> "Punishment of a journalist for assisting in the dissemination of statements made by another person ... would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so ... A general requirement for journalists systematically and formally to distance themselves from the content of a quotation that might insult or provoke others or damage their reputation is not reconcilable with the press's role of providing information on current events, opinions and ideas." (paragraphs 62, 64)

- ***Feldek v. Slovakia***, Application No. 29032/95, judgment of 12 July 2001: journalists should not be required to proof statements of opinion.

*This concerned ... T*he European Court of Human Rights held that the defamation conviction violated the right to freedom of expression. It held that the use by the applicant of the phrase "fascist past" should be understood as stating the fact that a person had participated in activities propagating particular fascist ideals. It explained that the term was a wide one, capable of encompassing different notions as to its content and significance. One of them could be that a person participated as a member in a fascist organisation; on this basis, the value-judgment that that person had a "fascist past" could fairly be made.

- ***Smolorz v. Poland***, Application no. 17446/07, judgment of 16 October 2012: defamation conviction for commenting on ugliness of architecture violated the right to freedom of expression.

This concerned a Polish journalist who had published an article headlined, "Architect and master of self-satisfaction" on the subject of certain buildings designed by communist era architects in Katowice, Poland. The article was a response to remarks made by one of the architects, Mr Jarecki, in an interview published the previous week in the same newspaper, under the headline "The joy of demolishing". The journalist criticised buildings that were supposed to be symbols of modernity when built, but which even then, he argued, gave pleasure only to their architects and "the apparatchiks of the communist party". He criticised their "ugliness" and their "Bolshevik-ridden aesthetics". Mr Jarecki, who had been named in the article, brought an action against the journalist and won an apology and payment of his legal costs.

The European Court found that the journalist's right to freedom of expression had been violated. It noted that the article had been published in the context of a debate concerning the urban appearance of Katowice, and was thus a matter of public interest. Furthermore, Mr Jarescki was held to be a public figure for whom the limits of permissible criticism were wider than in relation to private citizens. The Court also considered that the discussion in which they were involved focussed on issues which could be described as "historical". With regard to the nature of the remarks, the Court considered that the issue under discussion was by its nature abstract and very subjective, and was not easily susceptible to tangible and objective assessment. To require the journalist to demonstrate the truth of his statements – which conveyed his opinion on a matter of aesthetics – was not reasonable. Furthermore, the European Court reiterated that a degree of exaggeration, or even provocation, was permitted to the press, which had a duty to comment on matters of public interest. The use of sarcasm and irony were perfectly compatible with the exercise of a journalist's freedom of expression. The Court also noted that the language used was neither vulgar nor intentionally excessive and that the journalist had criticised the architect's professional expertise, and had not made gratuitous personal statements. Finally, although the penalty imposed had been minor, the important point was that he had been required to apologise publicly for his comments.

- ***Szima v. Hungary***, Application no. 29723/11, judgment of 9 October 2012: defamation conviction for alleging nepotism and political interference in police force did not violate right to freedom of expression.

This concerned a retired Hungarian police officer who had posted critical comments on the website of the police union. In particular, she had complained about certain labour-issues – such as outstanding pay due to police staff – and had alleged nepotism and undue political influence in the force. Domestic courts imposed a fine and demoted her.

The European Court held that some of the applicant's statements, for example related to pay, concerned legitimate trade union activities, whilst other statements – in particular those criticising certain police officers as being in the service of political elements – did not. The Court also considered that as a senior police officer, the applicant should have observed greater care in her public statements since they could cause insubordination within the police force: the applicant had considerable influence on trade union members and other servicemen, among other things by controlling the trade union's website. Considering the minor nature of the sanction imposed, the Court concluded that applicant's right to freedom of expression had not been violated.

The president of the Chamber of the European Court who issued this judgment disagreed strongly with the conclusion of the majority. In her dissenting opinion, she criticises the majority for their restrictive interpretation of 'legitimate' trade union activities. She also disagreed that a demotion was a minor sanction.

- ***Bargao and Domingos Correia v. Portugal***, Application no. 53579/09 and 53582/09, judgment of 15 November 2012: defamation conviction for complaint in a private letter to ministry violated the right to freedom of expression.

This case concerned the conviction for defamation of two individuals who wrote a letter to the ministry of health, complaining of an abuse of power by an official in a local public health centre. Part of this letter was published in a local newspaper. While disciplinary proceedings were initiated against the public official, the defamation conviction was upheld since the applicants could not prove the full truth of their allegations. The European Court of Human Rights held that this conviction constituted a violation of the right to freedom of expression: the allegations were made in a simple private letter to the relevant government institution, even if parts of it were published in a local newspaper, and concerned legitimate concerns of public interest. The applicants had a factual basis on which to make their allegations, even if they could not prove them fully, and had acted in good faith. The defamation conviction could not therefore be considered to have been "necessary in a democratic society".

- ***Ileana Constantinescu v. Romania***, Application no. 32564/04, judgment of 11 December 2012: defamation conviction over allegations of fraud and mismanagement violated right to freedom of expression.

This concerned the publication of a biography of a professor of economics and member of the Romanian national academy, written by his daughter, which mentioned another prominent economist. This second economist, who headed the national association of economists and edited a prominent magazine on economics, sued in defamation over passages that alleged that he had engaged in fraudulent activity and mismanaged the association's finances. The domestic courts found in the second economist's favour, awarding him damages and ordering the applicant to pay his legal costs. The domestic courts found that the applicant had failed to prove the truth of the allegations made.

The European Court noted that the remarks found to have been defamatory were made in the context of a debate of general interest to the community of Romanian economists, and that they partially concerned issues of copyright – in itself subject of a debate of public interest, particularly in the academic community. The Court noted furthermore that the economist who sued could be considered a public figure, albeit of a lesser order than a politician, and that he should therefore tolerate greater scrutiny and criticism than an ordinary person. The Court emphasised that the criticism and allegations concerned his public functioning, not his private life, and partly responded to statements made by the economist in a series of newspaper articles which were provocative in nature. The Court went on to emphasise the difference between statements of fact and statements of opinion, and held that the domestic courts had not sufficiently considered this in their reasoning. Considering also the severity of the fine as well as the requirement to reimburse legal costs, the Court held that the conviction violated the applicant's right to freedom of expression.

- ***Ivpress and Others v. Russia***, Application no. 33501/04, 38608/04, 35258/05 and 35618/05, judgment of 22 January 2013: defamation conviction for statements of opinion violated the right to freedom of expression.

This concerned four convictions for defamation for a series of articles published in a Russian newspaper that had been critical of local officials and politicians, accusing them of not delivering on their political promises.

The Court held that the convictions constituted a violation of the right to freedom of expression, taking into account the position of the applicant newspaper, the position of the persons against whom their criticism was directed, the subject matter of the publications, the characterisation of the contested statement by the domestic courts, the wording used by the applicants, and the penalty imposed.

The Court took into account that the plaintiffs in all four defamation claims were State officials or employees, including two elected officials. The newspapers had published criticism of their public functioning. The Court reiterated that, in a democratic society, public officials must accept that they are subject to public scrutiny and criticism, particularly through the media, for their public functioning; and that the limits of permissible criticism are wider with regard to a government official in the course of performance of his or her functions than in relation to a private citizen. The Court stressed furthermore that some of the statements made in the newspaper articles were statements of opinion. The domestic courts had wrongly required some of the applicants to prove the 'truth' of their opinions, which was an impossible task. This was particularly the case with statements that one of the officials had performed their job "cynically, loudly, shamelessly"; that he had "created nothing, done nothing for [his] fellow townsmen", that his professional activity as a State official had "brought nothing but harm", and that he had lacked "wisdom, will, aspiration to promote unity in society by renouncing, at least temporarily, [his] ambitions and passion for wealth". Those expressions were examples of value judgments that represented the applicants' opinions.

Taking the above into consideration, and while acknowledging that the award made against the newspaper was "not significant even by the regional standard of living", the Court held that the convictions violated the right to freedom of expression.

- ***Bugan v. Romania***, Application no. 13824/06, judgment of 12 February 2013: defamation conviction of journalist for harsh criticism of functioning of hospital director violated freedom of expression.

This concerned an application by a journalist who had been ordered to pay damages to the director of a public hospital because of an article he had written complaining about the director's management, his alleged intimidation of the hospital's doctors, the closure of the intensive care department, and the director's attempts to obtain social housing despite not meeting the requirements. Some of the articles included derogatory terms and remarks, including allegations that the director had "pulled many strings to become director" and "aspired to the title of the most dreadful social climber". The director sued for defamation and won a judgment awarding him damages and legal costs.

The Court found that the conviction constituted a violation of the journalist's right to freedom of expression. It considered that the statements made concerned political issues and other matters of general interest, and that public officials – including hospital directors – should tolerate criticism of their functioning. It considered furthermore that freedom of expression is also applicable to "information" or "ideas" that offend,

shock or disturb. While some of the journalist's comments referred to the victim's private life, the overall language remained within the acceptable limits of journalistic freedom. It noted finally that the courts had not given a reasoned decision justifying the defamation conviction.

- ***Niculescu-Dellakeza v. Romania***, Application no. 5393/04, judgment of 26 March 2013: criminal conviction for defamation of theatre director violated the right to freedom of expression.

This concerned a man who, during a television programme, had called the director of a theatre a "seven-handed stage director" and had then published an open letter to him in the local paper accusing him of holding several posts simultaneously and misappropriating public funds. The theatre director sued for defamation and the applicant was sentenced to a fine and payment of compensation and costs. The European Court of Human Rights held that this conviction violated the right to freedom of expression. It stressed that the theatre concerned was a public institution, and that the allegations had been a mix of value judgments (for example, calling him 'seven handed') and statements of fact. The primary aim of the applicant had been to contribute to a debate on an issue of general interest, not to insult the director, and the allegations had been within the limits of allowable exaggeration or provocation. The Court finally took into account that the fine had been substantial (€1,100) and the proceedings against the applicant had been of a criminal nature. Taking all these considerations into account the Court held that the conviction constituted a violation of the right to freedom of expression.

- ***Novaya Gazeta and Borodyanskiy v. Russia***, Application no. 14087/08, judgment of 28 March 2013: defamation conviction over allegations of fraud did not violate the right to freedom of expression.

This concerned the publisher of a Russian newspaper and one of its journalists, who had been convicted of defamation for an article describing fraudulent schemes that had been used to obtain large bank loans. The article mentioned various individuals and one of them, a governor, sued in defamation over allegations that he had provided commercial and political favours to a Kazakh businessman. He was awarded damages of €1,800 and the newspaper was ordered to print a retraction. The newspaper complained to the European Court of Human Rights which held that the conviction did not violate the right to freedom of expression. The Court stated that while the article dealt with a matter of significant public interest, concerned a prominent politician and a certain degree of journalistic exaggeration and provocation had to be tolerated, the journalist and newspaper had not attempted to provide any proof whatsoever for their allegations. Therefore, the conviction did not violate the right to freedom of expression.

- ***Reznik v. Russia***, Application no. 4977/05, judgment of 4 April 2013: defamation conviction of lawyer for criticising conduct of prison officers violated the right to freedom of expression.

This concerned defamation proceedings against the president of the Moscow City Bar for critical statements on a live TV show about the conduct of male prison warders who had searched the female lawyer representing the prominent businessman Mikhail Khodorkovskiy. Mr Reznik had appeared on a TV talk show, together with a representa-

tive of the Ministry of Justice, and stated that there had been no grounds for carrying out a search and criticised the fact that it had been carried out by male prison warders "rummaging about the body" of the female lawyer. The remand centre and two of its warders lodged defamation proceedings against Mr Reznik, claiming that he had made false statements about them, and that they had not carried out a search but had merely inspected the lawyer's documents. The Moscow City Court granted their claim and ordered Mr Reznik to pay compensation, while the TV channel was ordered to broadcast a rectification.

The European Court of Human Rights held that the defamation finding violated Mr Reznik's right to freedom of expression. It considered that the statement had been made as part of a live TV debate, on a matter which had sparked great public interest around the country. The Court was not convinced by the Russian Government's argument that, being a lawyer, Mr Reznik should have shown particular meticulousness in his choice of words. The Court emphasised that lawyers have the right to comment in public on the administration of justice, provided that their criticism does not overstep certain bounds. Mr Reznik had spoken to a lay audience of television viewers, not to legal experts. The word "search", with which the Moscow City Court had found fault – holding that the prison officers had carried out an "inspection" with Ms A. rather than having searched her – was, in everyday language, an appropriate description of the procedure to which Ms A. had been subjected. Moreover, the TV talk show between Mr Reznik and the Ministry representative had encouraged a frank exchange of views so that the opinions expressed would counterbalance each other. As the discussion had been broadcast live, Mr Reznik had had no possibility to reformulate his words before they were made public. Furthermore, the representative of the Ministry of Justice had been given the floor after Mr Reznik and thus could have dispelled any allegation which he considered to be untrue. The Court considered furthermore that Reznik had not identified the prison officers concerned.

- ***OOO 'Vesti' and Ukhov v. Russia***, Application no. 21724/03, judgment of 30 May 2013: defamation conviction for allegations of misuse of public funds did not violate the right to freedom of expression.

This concerned a newspaper which had published an article reporting a news conference that had been held by a regional Federal Inspector and the Mayor of a city. The article was critical of some of the activities of the two and stated that investor had shied away from certain cultural projects because of concerns the funds would go into the pockets of the Federal Inspector, and he would spend the funds on 'lovers'. The Inspector brought defamation proceedings and was awarded damages of around €650. The domestic court found that no evidence had been produced the concerning the truth of the allegations.

The European Court held that the defamation conviction did not violate the right to freedom of expression. It considered that while it was regrettable that the domestic court had not clarified whether the statement was an allegation of fact or a statement of opinion, even a statement of opinion needed some basis in fact. It noted that the applicants had not tried to establish a sufficiently accurate and reliable factual basis for the allegation that the Federal Inspector had lovers and might spend public funds on them. It noted that, "even public figures may legitimately expect to be protected against the propagation of unfounded rumours relating to their private life…" Considering furthermore that the amount of damages was not excessive, the Court concluded that the conviction did not violate the right to freedom of expression.

- ***Węgrzynowski and Smolczewski v. Poland***, *Application no. 33846/07, judgment of 16 July 2013:* continuing publication of defamatory article on internet archives did not violate the right to respect for private life.

This concerned an application by two lawyers whom journalists had alleged to have been involved in questionable business practices. They successfully sued the journalists for defamation in the domestic courts but a copy of the article in question remained on the website of the newspaper. The lawyers therefore appealed to the European Court of Human Rights, claiming that the continuing publication of the article on the newspaper's website violated their right to private life.

The European Court held that the continuing publication did not violate the lawyers' right to respect for private life. It noted that while the right to respect for private life needs to be balanced against the right to freedom of expression, and that democratic society requires vigorous debate on matters of public interest, journalists must not overstep the bounds. However, with regard to internet archives, it held that it is not the role of the courts to 'rewrite history' and order the complete removal of all traces of an article from the internet, even if the print version of that article has been found to violate the right to freedom of expression. It stated that the right to freedom of expression protected the "legitimate interest of the public in access to the public Internet archives of the press". The Court also referred to earlier case law in which it had indicated that a requirement to add a note to the archived article stating that it had been subject to defamation proceedings would have been possible – but that the applicants in this case had instead requested the complete removal of the article in question.

- ***Sampaio e Paiva de Melo v. Portugal***, Application no. 33287/10, judgment of 23 July 2013: criminal defamation penalty for statement of opinion on a matter of public interest violated the right to freedom of expression.

This concerns a journalist who had published in which he criticised the chairman of a well-known football club, describing him as "the sworn enemy" of the national team and, referring to criminal proceedings in which the chairman had been involved, as the "national champion of prosecutions in Portuguese football". The journalist as found guilty of defamation and ordered to pay a fine as well as damages to the chairman. The sentence was upheld on appeal.

The European Court of Human Rights held that the conviction violated the journalist's right to freedom of expression. The Court noted that the events described in the book related to the World Cup of 2006 and the wider world of Portuguese football, which were issues of public interest, and in the context of an ongoing public debate. The Court noted also that the statements concerned amounted to statements of opinion, which had been based on facts that were common knowledge at the time. Finally, the Court held that in any case, the imposition of a criminal penalty in a matter like this is likely to cause a chilling effect on the contribution of the press to public debate on matters of general interest and should not be resorted to without particularly strong reasons.

- ***Welsh and Silva Canha v. Portugal***, Application no. 16812/11, judgment of 17 September 2013: defamation of director of satirical magazine for allegations of corruption against politician violated the right to freedom of expression.

This concerned a series of articles published by the applicants, the deputy director and director of a satirical newspaper, concerning illegal actions related to the purchase of

land by a local politician. The politician lodged a criminal complaint for defamation against them, and the applicants were convicted on the grounds that they had not been able to prove the truth of the allegations.

Considering the case, the European Court of Human Rights recalled that restrictions on political speech should be interpreted strictly, even more so when the comments made concern a well-known elected politician. It recalled furthermore that freedom of expression allows a certain amount of exaggeration and hyperbole – particularly with regard to satirical magazines. While journalists are obliged to act in good faith and strive to provide accurate information, the Court noted that in this case it was undisputed that the basic facts that had led to the allegations were true. A criminal prosecution into the alleged illegal conduct was ongoing, and the applicants had on several occasions given the politician the opportunity to respond to the allegations. The Court therefore held that the defamation conviction constituted a violation of the right to freedom of expression.

- ***Stojanović v. Croatia***, Application no. 23160/09, judgment of 19 September 2013: interviewee only responsible for defamatory statements actually made, not those that were attributed to him.

This case concerned two articles for which the applicant was convicted of defamation and ordered to pay damages. The first article featured an interview with the applicant in which he criticised the Minister of Health; in the second, a telephone conversation between the applicant and another politician was reported in which he refused to withdraw the allegations. The minister brought a defamation action against the publishing company as well as against the applicant, complaining that the headline of the first article had harmed his reputation, as had statements reported in the second article. The first article had reported that the applicant had said that the minister sat on ten supervisory boards and was highly paid for this. In the second article, the applicant was reported to have said that the minister had threatened him and said he would not become a professor "as long as I am the Minister". The applicant denied having made the statements.

The European Court of Human Rights considered both articles separately. Regarding the first, it held that the applicant – an interviewee – could not be held responsible for the headline that had been placed above the interview. Any liability for this would be on the magazine's editor; the conviction for defamation relating to the first article therefore violated his right to freedom of expression.

As regards the second article, the Court considered that the applicant had indeed referred to the minister's membership of several advisory boards and that he had no evidence for the allegation that the minister derived financial benefit from this. The defamation conviction related to this statement therefore did not violate applicant's right to freedom of expression. However, as regards the second statement, there was no evidence that the applicant had used the words "as long as I am the Minister", as had been reported in the article. He could not therefore be convicted for this statement.

- ***Jean-Jacques Morel v. France***, Application no. 25689/10, judgment of 10 October 2013: defamation conviction for local politician who criticised a mayor violated the right to freedom of expression.

This concerns a municipal councillor who had been convicted for defamation for having criticised, at a press conference, the pay and terms of employment of a public official. The public official had sued for libel.

The European Court of Human Rights held that the conviction for defamation violated the right to freedom of expression. It considered that the subject matter of the remarks concerned an issue of legitimate public interest and noted that the applicant had spoken at a press conference in his capacity as a local councillor. This meant the remarks were clearly 'political speech' which should not be restricted lightly. Furthermore, the applicant had primarily intended to criticise the local mayor's decision to create the post of the public official, rather than criticise the public official himself. While the language used had been somewhat provocative, by referring to the public official's post as a "dummy job", this had not overstepped the boundaries of what was permissible.

- ***Erdener v. Turkey*****,** Application no. 23497/05, judgment of 2 February 2016: defamation conviction for remarks about prime minister violated right to freedom of expression.

This concerned an MP who had spoken with a journalist about the health problems of the then-prime minister of Turkey, saying that he had discontinued his treatment at Başkent University Hospital because he was unhappy about the quality of the medical care there. She said, ""They nearly drove him to his death". The hospital sued for defamation and, in civil proceedings, was awarded compensation for damage to reputation. The MP's appeals were dismissed.

The European Court of Human Rights held that the defamation judgment violated the right to freedom of expression. The health of the prime minister was clearly a matter of public interest and the events giving rise to this case had received broad media coverage in Turkey. The manner in which the Prime Minister had been treated had been criticised not only by the media but also among parliamentarians. The applicant had made her remarks in her capacity as an MP, in a political capacity in which she should be given wide leeway.

Furthermore, the Court held that as a public entity, the hospital did not have a moral 'right' to a reputation, unlike private individuals. It noted that the domestic courts had not verified whether there had been any actual damage to the university's reputation. Even though the compensation awarded was a relatively low amount (€1,200) this nevertheless had a chilling effect on the right to freedom of expression.

- ***De Lesquen du Plessis-Casso v. France (No. 2)***, Application no. 34400/10, judgment of 30 January 2014: defamation conviction for baseless allegations against a town mayor did not violate right to freedom of expression.

This concerned the conviction for defamation of a local councillor for comments addressed to his mayor in an open letter which had been published on the Internet. In response to an invitation to attend a ceremony to pay tribute to French army soldiers during the Algerian war, the councillor had alleged that the mayor had waited until the end of the war to request French nationality, so that he could avoid military service in Algeria. The mayor sued for defamation and won. The councillor appealed to the European Court of Human Rights.

The European Court held that the defamation conviction did not violate the right to freedom of expression. It stated that while the remarks had been made in the context of a debate on a matter of public interest, and that political speech should not be restricted lightly, the applicant had produced absolutely no evidence for the truth of the allegations he had made. Accordingly, he had overstepped the permissible limits of the right to freedom of expression.

- ***Print Zeitungsverlag GmbH v. Austria***, Application no. 26547/07, judgment of 10 October 2013: damage award against newspaper for reprinting gratuitous personal attack on politicians did not violate freedom of expression.

This concerned a newspaper which had reported on an anonymous letter that had been circulated in a local area and that had been very critical of two local politicians. The letter had stated questions such as, "Would you buy a car from this man" and "Would you stake your money on a promise made by this man", and generally questioned his fitness for public office. As part of the report, the newspaper reprinted the letter. The two politicians sued the newspaper for defamation and won €2,000 damages each.

The European Court of Human Rights considered that the damages award did not violate the newspaper's right to freedom of expression. While the subject matter of the report considered an issue of public interest – upcoming local elections – the Court considered that the anonymous letter constituted a gratuitous attack on the politician's reputation. Reprinting the letter in full therefore overstepped the limits of permissible reporting. The Court also considered that the initial letter had been circulated among only a few hundred people while by reprinting it newspaper had given the letter a much larger audience; and that the damage award had not been disproportionate.

- ***Soltész v. Slovakia***, Application no. 11867/09, judgment of 22 October 2013: defamation conviction for repeating statements made by police officer violated right to freedom of expression.

This concerned a journalist who had published an article about the disappearance of a local businessman and official. He had included in his article statements by the police officer who had been in charge of the investigation, which implied that a local lawyer and entrepreneur had been involved in the disappearance. The lawyer/entrepreneur sued the journalist for defamation.

The European Court of Human Rights held that the conviction for defamation violated the journalist's right to freedom of expression. It considered that the local courts had not taken into account that the allegations concerned an issue of public interest, nor had they considered whether the article had been published in good faith and in keeping with journalistic ethics. The local courts had similarly dismissed the credibility of the police officer as a source of information. They had merely focused on whether, with the benefit of hindsight and several years later, the allegation had been proven to be 'true'. This was not in keeping with requirements under the European Convention. The Court reiterated that the extent to which a journalist can reasonably regard a source of information as reliable is to be determined in the light of the situation, and that on its face a police officer in charge of an investigation is a good source of information.

- ***Ristamäki and Korvola v. Finland***, Application no. 66456/09, judgment of 29 October 2013: defamation conviction for reporting on business crime violated the right to freedom of expression.

This concerned two broadcast journalists who had been convicted of defamation for a programme on economic crimes in which it had been mentioned that police had investigated the financial activities of a well-known Finnish businessman. The Finnish courts had held that the programme implied that the businessman had been guilty of a crime.

The European Court held that the conviction violated the right to freedom of expression.

The Court noted that the programme focused on criticising the lack of co-operation between the police and the tax authorities in two specific cases concerning economic crime, and that reference had been made to the businessman who, at the time, had been on trial for economic offences. The programme aimed to disclose a malfunctioning of the administration, and the major part of the programme focused on the tax authorities. The information that had been broadcast had been factually correct, it had been presented in an objective manner, without any insinuation, and the style of the programme was not provocative or exaggerated. The businessman had already been on the limelight and the issue of business crime was a matter of legitimate public concern. He was merely mentioned in the context of the wider issue and there was no suggestion that he had been guilty.

- ***Pauliukienė and Pauliukas v. Lithuania***, Application no. 18310/06, judgment of 5 November 2013: unsuccessful defamation proceedings did not violate the right to private life.

This concerned a public official and his wife who had been involved in a dispute with their neighbours over a plot of land. A newspaper had written an article about the dispute in which it was reported that the public official and his wife were illegally building on land that that did not belong to them. The public official brought defamation proceedings which were unsuccessful. He then complained to the European Court of Human Rights that his right to private life had been violated.

The European Court held that there had not been a violation of the right to private life. It first observed that only serious attacks on reputation fell within Article 8 of the European Convention on Human Rights, noting that "the attack on personal honour and reputation must attain a certain level of gravity and in a manner causing prejudice to personal enjoyment of the right to respect for private life." It held that in this case, that condition had been met – the allegation made by the newspaper was sufficiently serious. However, the Court noted that the newspaper article concerned a matter of public interest – namely, the abuse of powers by public officials – and observed furthermore that the applicant was a public official who should tolerate greater criticism of his functioning than an ordinary person. Finally, the Court observed that the journalism in question had been professional and ethical, and that the reporter had based his allegations on multiple sources of information.

- ***Jokšas v. Lithuania***, Application no. 25330/07, judgment of 12 November 2013: no violation of freedom of expression for soldier retired from the army following critical remarks in newspaper article.

This concerned a soldier who had criticised, in a newspaper article, new legislation which he thought did not sufficiently protect the rights of soldiers in disciplinary proceedings. Three months later, he was forced to retire from the army although many of his colleagues continued to serve beyond retirement age. He challenged his forced retirement before the courts but was unsuccessful. He then complained to the European Court of Human Rights on the grounds that he had been retired for what he had said in the article.

The European Court of Human Rights held that there had not been a violation of the right to freedom of expression. It noted that while the right to freedom of expression does apply to army personnel, it is legitimate for restrictions to be imposed when there is a real threat to military discipline. The Court also noted that the applicant had

not been subjected to disciplinary proceedings, and there was no clear evidence to connect his forced retirement to the statements he had made. It therefore found that there had not been any interference with his right to freedom of expression.

- ***Genner v. Austria***, Application no. 55495/08, judgment of 12 January 2016: defamation conviction for insulting the memory of a minister the day after her death did not violate right to freedom of expression.

This concerned an individual who worked for an NGO that supports asylum seekers. The day after the death of Austria's Minister for Interior Affairs, the individual posted a statement on the NGO's website that read, "The good news for the New Year: L.P., Minister for torture and deportation is dead." The statement said that the Minister had been "a desk criminal just like many others there have been in the atrocious history of this country", that she had been "the compliant instrument of a bureaucracy contaminated with racism" and that "no decent human is shedding tears over her death". The late Minister's widower filed a private prosecution for defamation against Mr Genner and the NGO, and they were convicted. The Austrian court concluded that the accusations, on the day after her death, overstepped the limits of acceptable criticism.

The European Court of Human Rights held that the defamation conviction did not violate the right to freedom of expression. One the one hand, Mr Genner's statement concerned an issue of public interest and could be seen as a contribution to a political debate of public interest – the treatment of asylum seekers under legislation introduced by the minister. Furthermore, the minister was undoubtedly a public figure and so she and her heirs should tolerate greater criticism than an ordinary individual. However, the press release was issued on the day after her unexpected death, giving the words added impact, and the applicant's statement was published within the immediate period of her family's grief and was likely to cause considerable damage to the late Minister's reputation. The Court considered that "[t]o express insult on the day after the death of the insulted person contradicts elementary decency and respect to human beings ... and is an attack on the core of personality rights." The Court emphasised that the statement did not discuss the policies introduced by the minister but was instead highly personal and compared her to a high-ranking Nazi-era official.

- ***Putistin v. Ukraine***, Application no. 16882/03, judgment of 21 November 2013: complaint regarding defamation of deceased relative inadmissible.

This concerned a newspaper article about a football match between Dynamo Kyiv and a team from the German Luftwaffe, "Flakelf", in 1942. The Ukrainian team won and the team allegedly suffered reprisals: some of the players were arrested and taken to a local concentration camp where four of the players were later executed. The newspaper article suggested that some of the Dynamo Kyiv footballers had collaborated with the Gestapo or the police. One of the player's children complained that the article was defamatory of his father, but was unsuccessful: the national courts ruled that his father was not mentioned in the text by name, and it was not possible to read his name on the photograph of the match poster published along with the article. He then complained to the European Court of Human Rights that his right to private life had been violated.

The European Court held that there had not been a violation of the right to respect for private life. The Court accepted that in certain circumstances, the reputation of a deceased family member might affect that person's private life and identity. However,

in this case the applicant's father had not been directly named in the article. The applicant was therefore only marginally affected which meant that his right to respect for private life had not been violated.

- ***Błaja News Sp. z.o.o. v. Poland***, Application no. 59545/10, judgment of 26 November 2013: defamation conviction for allegations of criminal conduct of a public prosecutor did not violate the right to freedom of expression.

This concerned a magazine that had been convicted for defamation for an article reporting on investigations into crime. It had reported that "prosecutor Anna" had links to criminal circles, had been present at the scene of a drug-trafficking incident, and was the subject of criminal proceedings. A public prosecutor who claimed that she was easily identified by the article sued for defamation and won a judgment awarding her 30,000 Polish zlotys (€8,000) in compensation. The newspaper complained to the European Court of Human Rights, claiming that its right to freedom of expression had been violated.

The European Court of Human Rights held that there had not been a violation of the right to freedom of expression. While it acknowledged the importance of a free press in a democratic society, the Court recalled that the media must act in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism. The Court noted the seriousness of the allegations made. It stated that while reporting on the personal integrity of public prosecutors is of obvious public interest, prosecutors should be protected from offensive, abusive and defamatory attacks which are likely to affect them in the performance of their duties and to damage public confidence in them and the office they hold. The Court considered that the applicant had not had any evidence for the allegations made, and that the journalists had not made any efforts to obtain comments from the prosecutor before publication. Finally, the Court considered that only civil proceedings had been instituted against the applicant, not criminal, and that the amount of damages did not threaten the survival of the publisher and could not be considered excessive.

- ***Mika v. Greece***, Application no. 10347/10, judgment of 19 December 2013: defamation conviction for local politician who made allegations of a political nature violated the right to freedom of expression.

This case concerned the conviction for defamation of a local councillor who had published an article in a newspaper accusing a mayor of corruption and favouritism in the recruitment of officials. The councillor was found guilty of criminal libel and sentenced to a suspended eight-month prison sentence and payment of a fine of 50 euros. The councillor complained to the European Court of Human Rights arguing that the conviction violated her right to freedom of expression.

The European Court held that the conviction violated the councillor's right to freedom of expression. It emphasised that the article had been published by a local councillor and criticised the functioning of the local mayor; it therefore clearly concerned 'political speech' which was the most highly protected form of speech. While the Court noted the seriousness of the accusations, it also noted the political nature of the issue discussed and the disproportionate nature of the criminal penalty imposed.

- ***Jalbă v. Romania***, Application no. 43912/10, judgment of 18 February 2014: publication of false allegations against a civil servant violated right to respect for private life.

This concerned a high-ranking civil servant in the office of a local mayor who had been accused of corruption by a local news website. The news website had alleged that he owned a private taxi business, which was incompatible with his status as a civil-servant. The civil servant brought proceedings against the website for defamation, but the domestic courts dismissed the claim holding that the public's right to be informed about the management of public funds was more important than his privacy rights. The civil servant complained to the European Court, arguing that his right to respect for private life had been violated.

The European Court of Human Rights held that the civil servant's right to respect for private life had indeed been violated. It considered that the allegation made was a factual allegation which was either true or untrue. The European Court disagreed with the assessment by the local courts that the allegation was a statement of opinion; it held that whether or not someone owns a business is "not merely a matter for speculation but is a fact capable of being substantiated by relevant evidence". The allegation was serious and damaged the applicant's reputation; it also hindered him in the performance of his duties. The Court reiterated that while civil servants must tolerate greater criticism of their functioning than ordinary individuals, they can still take action and can sue for the publication of false allegations that damage their reputation. The Court also noted that the news website had not provided the applicant the opportunity to respond to the accusations or that he had been allowed the opportunity to publish a reply.

- ***Dilipak and Karakaya v. Turkey***, Application no. 7942/05 and 24838/05, judgment of 4 March 2014: defamation conviction for criticism of deceased army commander violated the right to freedom of expression.

This concerned two journalists who had been found guilty of defamation for an article which was critical of a former commander-in-chief's political role at a meeting of the National Security Council in February 1997, which had been described by some observers as a "post-modern coup d'état". The commander-in-chief's family brought legal proceedings against the journalists but were unable to locate them. Proceedings went ahead in their absence. In January 2003 judgment was delivered, and in June they were located and enforcement proceedings were started against both. They appealed on the basis that they had not been able to defend themselves but their appeals were dismissed. They then complained to the European Court of Human Rights, claiming a violation of their right to freedom of expression as well as their right to a fair trial.

The Court held that the journalists' right to freedom of expression had been violated as well as their right to a fair trial. It considered that the journalists had commented on the role of the former commander during a coup d'etat, which was a matter of public interest. The commander was a well-known public figure whose family should tolerate criticism of his functioning as a public servant. While the journalists used a bitter and sarcastic tone that certainly offended the relatives of the deceased, they had remained within the limit of acceptable criticism. The Court noted in particular that the journalists commented on the poor functioning of the democratic regime, which was of the highest public interest. Furthermore, the Court considered that the amount of damages awarded did not take the financial status of the journalists into account, and that it had resulted in the seizure of one of the journalist's homes. This

was likely to have a chilling effect on the entire journalistic profession. Finally, the Court considered that it had not been justified for the proceedings to have gone ahead in the absence of the journalists.

- ***Jelševar and Others v. Slovenia***, Application no. 47318/07, judgment of 11 March 2014: complaint about derogatory nature of characters in a book did not constitute defamation.

This concerned a group of four women who alleged that they had been featured as characters in a book which had portrayed them and their family in a defamatory way. The main character in the book, Rozina, was depicted as a lively, ambitious and resourceful – but was also described as using sex to get her way with her husband, having illegally sold alcohol during the Prohibition in the United States, and as valuing money over the well-being of her children. The group of women alleged that the setting of the book was the area where the applicants' family had lived, and that the main characters had a name – Brinovc – that, although it was not their real name, was the name under which they were known in the community. They sued the author for defamation but their complaints were dismissed by the domestic courts on the ground that the average reader would not consider the events narrated in the book as facts about real people. Furthermore, the domestic courts considered that the events described were not defamatory, and that it had not been the author's intention to defame. The women then appealed to the European Court of Human Rights complaining that their right to respect for privacy had been violated.

The European Court dismissed the complaint as "manifestly ill-founded". It emphasised that the artistic freedom enjoyed by authors of literary works was of importance in itself and required a high level of protection under the Convention. The Court noted that national courts had attached fundamental importance to the question of whether the applicants' family could have been identified with the fictional characters of the book, and whether these characters had been depicted in an offensive way amounting to defamation. The Court found that the approach taken by the Slovenian Constitutional Court to the balance to be struck between the competing interests had been fair and in line with European case law. The Slovenian courts had considered whether an average reader would consider the story as real (non-fictional) and whether an average reader would consider it as offensive, given the context of the book as a whole. The European Court therefore found that the women's right to privacy had not been violated.

- ***Almeida Leitão Bento Fernandes v. Portugal***, Application no. 25790/11, judgment of 12 March 2015: defamation conviction for novel about the author's family did not violate the right to freedom of expression.

This case concerned a novelist who had been convicted of defamation for a book that featured members of her husband's family. The book told the story of a family who came from the north of Portugal and emigrated to the United States. It related events involving prostitution and extramarital affairs. In the preface to her book the novelist thanked the people who had inspired her, while stating that the facts narrated in her novel were the product of her imagination and that any resemblance with actual facts was purely fortuitous. The uncle, aunt, cousin, mother and sister of her husband nevertheless sued, complaining that the novel related their family history and damaged the family's reputation. The novelist was sentenced to a fine of EUR 4,000, and ordered to pay EUR 53,500 in damages.

The Court held that the conviction did not violate the right to freedom of expression. It noted that the persons depicted in the novel were not public figures. This meant that the national authorities were afforded a wide margin of appreciation in assessing the "necessity" of the punishment imposed on the novelist. The Court saw no reason to disagree with the conclusion of the Portuguese courts that the narrative of the novel was indeed defamatory, and noted that the Portuguese courts had, in their judgments, recognised the importance of the right to freedom of expression. The Court also noted that the amount of the fine and damages had been determined by reference to the novelist's own financial situation.

- ***Bartnik v. Poland***, Application no. 53628/10, judgment of 11 March 2014: defamation conviction for unfounded allegations of corruption did not violate the right to freedom of expression.

This concerned the defamation conviction of a man who had published several articles on a website in which he accused the managers of a housing cooperative of having mismanaged the cooperative and diverted funds. He was sentenced to a fine of €125. He complained to the European Court of Human Rights arguing that his articles had been satirical in nature, and that he was a citizen journalist and had commented on an issue of public interest.

The European Court dismissed the complaint as "manifestly ill-founded". While the Court accepted that the topic of criticism was indeed an issue of public interest, and it acknowledged the importance of 'citizen journalism' such as the web articles in question, it also noted that the internet is different from the written press and that it posed a greater risk to privacy and reputational interests. The Court noted furthermore that the applicant had no evidence of the truth of various of the allegations he had made, particularly as regards the diversion of funds from the housing trust, and that the use of words such as "bandits, thieves, racketeers, thieves" to describe the managers could not be justified even if the articles were intended to be satirical. Bearing in mind the low amount of the fine imposed, the Court therefore found that the defamation conviction did not violate the right to freedom of expression.

- ***Amorim Giestas and Jesus Costa Bordalo v. Portugal***, Application no. 37840/10, judgment of 3 April 2014: criminal defamation conviction for criticism of public officials violated the right to freedom of expression.

This concerned the conviction of a journalist and a newspaper editor for defamation. They had published an article concerning the donation of items that belonged to a local court to a particular charity. The article raised suspicions of favouritism. In the same issue of the newspaper, the editor published an editorial column in which he criticised the laws and regulations that govern such donations. A complaint was lodged against the editor and the journalist and they were found guilty of criminal defamation of the charity, and aggravated criminal defamation of the secretary of the local court. The journalists were ordered to pay fines as well as damages totalling €3,500, and pay court fees. The domestic court held that the articles implied that the court secretary had acted in a partial manner and in the charity's interests.

The European Court of Human Rights held that the convictions constituted a violation of the right to freedom of expression. It noted that the first article was factual in nature and merely identified the donations and the recipient of the donations, and noted that several other organisations had not received the donations. The second article provided an opinion on the law relating to such donations, and criticised it for being very

vague and leaving much to the discretion of those who donate items. This criticism, according to the court, was a contribution to a debate of general interest. Moreover, the journalists had consulted all those involved and had even obtained the opinion of the Department of Justice. The opinions of all of these had been published. The journalists had therefore clearly acted in good faith. The Court finally noted that the journalists had, under Portuguese law, risked a sentence of imprisonment. The Court emphasised that imprisonment is never an acceptable sanction in defamation cases, except when there is hate speech or incitement to violence. The Court furthermore stressed that the criminal conviction of the journalists was manifestly disproportionate per sé, because a civil law remedy was available.

- ***Hasan Yazıcı v. Turkey***, Application no. 40877/07, judgment of 15 April 2014: defamation conviction for allegations of plagiarism violated the right to freedom of expression.

This concerned the defamation conviction of a journalist for an article in which he had accused a high-profile and influential academic of plagiarism. The academic launched proceedings against the journalist alleging that the article constituted a personal attack. The domestic courts found that because the journalist could not prove the allegation of plagiarism, the article constituted an 'insult'. The journalist complained to the European Court that this finding violated his right to freedom of expression. He also complained about the excessive length – more than six years – of the proceedings against him.

The Court held that the conviction violated the journalist's right to freedom of expression, and that the excessive length of the proceedings had violated his right to a fair trial. It noted that the academic had headed the Higher Education Council between 1981 and 1992 and had set up two important universities in Turkey. He was therefore well known as a public figure and should be expected to tolerate a greater degree of public scrutiny. Furthermore, the allegation of plagiarism concerned a matter of public interest. The Court found that the domestic courts had not given due consideration to the applicant's right to freedom of expression, nor had they taken into account the public interest behind the issue. The Court found furthermore that the applicant had not been given an opportunity to provide evidence of his allegations, and that the domestic courts had instead relied on evidence from court-appointed experts, the neutrality of which the applicant has disputed. The Court therefore concluded that the domestic courts had failed properly to carry out the balancing between the right to freedom of expression and the protection of the reputation or rights of others. As regards the length of the proceedings, the Court noted that the time these had taken – six years – was excessive.

- ***Brosa v. Germany***, Application no. 5709/09, judgment of 17 April 2014: prohibition on the distribution of a leaflet that called on the public not to vote for a political candidate because of neo-nazi connections violated the right to freedom of expression.

This concerned a court injunction prohibiting the distribution of a leaflet in which the applicant called on the public not to vote for a particular candidate for mayor because he was linked with a neo-Nazi organisation. In granting the injunction, the court held in particular that the statement infringed the candidate's personality rights and that Mr Brosa had failed to provide sufficient evidence to support his allegation. The applicant appealed to the European Court of Human Rights.

The Court held that the injunction violated the right to freedom of expression. It consid-

ered that the leaflet concerned a politician, who inevitably and knowingly lays himself open to close scrutiny of his every word and must thus display a greater degree of tolerance, especially when he himself makes public statements that are susceptible to criticism. While a politician is entitled to have his reputation protected, this has to be weighed against the interests of open discussion of political issues. The applicant's leaflet set out his view of a candidate's suitability for the office of mayor and was therefore of a political nature on a question of public interest. The Court considered furthermore that term "Nazi", like the derivative term "neo–Nazi", evokes different notions as to its content and significance and cannot be considered as a mere allegation of facts. The German courts had required "compelling proof" of neo-Nazi activities. This was too high a standard of proof to be required for someone who is merely making a value judgment. The Court stressed that the standards applied when assessing someone's political activities in terms of morality are different from those required for establishing an offence under criminal law.

- ***Schuman v. Poland***, Application no. 52517/13, judgment of 3 June 2014: defamation conviction for false allegations did not violate the right to freedom of expression.

This concerned the editor of a news website which had reported that a local politician who was also the head of a local sports club had used the grounds of the club for his private business, earning him nearly €68,000. The councillor sued for defamation, saying that he had only earned a very small amount: €68. The domestic courts agreed that the report on the website had made it seem as though a major offence had been committed, which was false and misleading. It awarded the councillor damages. The journalist appealed to the European Court of Human Rights.

The European Court of Human Rights dismissed the application as 'manifestly ill-founded', holding that the Polish courts had been corrected in their assessment of the case. By inflating the amount that had been earned, the website had presented a misleading report of what happened.

- ***Axel Springer v. Germany (No. 2)***, Application no. 48311/10, judgment of 10 July 2014: prohibition on publishing allegations made by a politician about the federal chancellor violated right to freedom of expression.

This concerned a ban on the publication by the daily newspaper, *Bild*, of allegations made by a senior opposition politician regarding the former German Chancellor, Gerhard Schröder. The opposition politician had alleged that Schröder had called early elections because he knew that his party would do badly and that he would lose the chancellorship, but he had a lucrative position coming up on the board of a German-Russian joint venture to build a gas pipeline – a deal which he himself had negotiated with the Russian President, Putin. *Bild* had included these allegations in an article. Schröder considered the allegation to be defamatory and obtained a court order banning any further publication. *Bild* complained to the European Court of Human Rights.

The European Court of Human Rights held that Bild's right to freedom of expression had been violated. The Court noted that the allegation regarding Mr Schröder's private business was clearly connected to his conduct as Federal Chancellor and his controversial appointment to a German-Russian gas consortium shortly after he ceased to hold office as Chancellor. The allegation had been made by a senior opposition politician, as part of a political debate on an issue of public interest.

While the German courts had criticised *Bild* for being one-sided in its comments and

not reflecting Schröder's side of the story, the European Court of Human Rights held that this had not been necessary. As the former Chancellor, one of the highest political offices in Germany, Schröder had to show a much greater degree of tolerance than a private citizen. The Court also remarked that it was an important function for the press to be able to report on political debate. To punish the media for reporting statements made by another person would seriously hamper its ability to report the news. The Court also stated that a newspaper could not be required to verify systematically the merits of every comment made by one politician about another, when such comments concerned an issue of public interest.

- ***Stankiewicz and others v. Poland***, Application no. 48723/07, judgment of 14 October 2014: defamation conviction for report on corruption violated freedom of expression.

This concerned two journalists who had published an article alleging that a highly placed public official in the ministry of health was engaged in corruption. The journalists reported that he had demanded a bribe from representatives of a pharmaceutical company. The official sued the journalists for defamation and they were forced to publish an apology, pay the court fees and reimburse the official his legal costs.

The European Court of Human Rights held that the journalists' right to freedom of expression had been violated. The Court stated that "in situations where on the one hand a statement of fact is made and insufficient evidence is adduced to prove it, and on the other the journalist is discussing an issue of genuine public interest, verifying whether the journalist has acted professionally and in good faith becomes paramount." In the circumstances, the Court found that the journalists had indeed acted professionally and in good faith: they had done extensive research and checked the facts available to them, and the content and the tone of the article they published was on the whole fairly balanced. The journalists had provided as objective a picture as possible of the public official and had offered him to present his version of the relevant events and to comment on the allegations raised against him. The Court also noted that the domestic courts had not taken into account the status of the public official who, because of his position, was required to tolerate criticism of his function; nor had they take into account that the subject matter of the publication concerned an issue of public interest and that the press had an important role to play as "public watchdog".

- ***Erla Hlynsdottir v. Iceland (No. 2)***, Application no. 54125/10, judgment of 21 October 2014: defamation conviction for report on sexual offences prosecution violated freedom of expression.

This concerned a journalist who had been found liable for defamation concerning an article about a high-profile criminal case involving the director of a rehabilitation centre and his wife, who were suspected of sexual abuse. The director was later convicted of having had sexual relations with patients, while his wife was not indicted. The journalist had reported several statements by a former female patient describing how the director's wife had been involved in the sexual abuse and criticising the fact that the wife was at the time working as a teaching assistant in a school. The journalist was found to have defamed the wife by including the statement that it was "... not appropriate that the one who hunts for him works in a primary school" – because this had indicated criminal conduct, which had not been proven true.

The European Court of Human Rights held that the conviction for defamation violated the journalist's right to freedom of expression. The Court observed that the article had

been published in the context of a high-profile criminal investigation into accusations of sexual offences which had been the subject of previous TV reports, which clearly related to an issue of serious public concern in Iceland. It observed that the Icelandic courts had attached great importance to the use of the word "hunt" by the journalist, but the European Court disagreed that this would be perceived by the reader as suggesting a criminal act. The Court also took into account that it had been proven in the Icelandic courts that the director's wife had indeed taken part in sexual activities with patients together with her husband. The court also took into account that the journalist had interviewed several of the accused for the story and had sought to achieve balance in her reporting.

- ***Ion Cârstea v. Romania***, Application no. 20531/06, judgment of 28 October 2014: publication of intimate details of sex life and allegations of criminal activity violated right to respect for reputation.

This concerned an article in a local newspaper about Mr Cârstea, a university professor, which described in detail an incident in his sex life 19 years earlier and accused him of bribery, blackmail, child sex abuse and sexual deviance. The article included pictures of Mr Cârstea, nude and having sex. Mr Cârstea brought defamation proceedings against the journalist and editor-in-chief of the newspaper, but lost on the grounds that the article had been written to draw attention to the behaviour of a public figure, a university professor, and to expose what was going on behind the scenes in universities. Mr Cârstea complained to the European Court of Human Rights.

The European Court of Human Rights held that the publication violated Mr. Cârstea's right to respect for his reputation. It held that while the publication of photographs can make a contribution to a debate of general interest involving issues such as politics, crime, sport or arts, there has to be a genuine public interest. In this case, the article described in detail an incident in the applicant's sex life which happened nineteen years before, as well as crimes allegedly committed by him in connection with his job as a university professor nine years before. The article included pictures of the applicant nude and having sex. The domestic courts did not make a serious assessment as to whether all of the material published contributed to a debate of general interest, or whether what was published was true. For example, the public interest at the moment of publishing of matters dating back to nine or even nineteen years ago, was not analysed. Furthermore, the domestic courts did not discuss at all whether the photographs themselves contained information related to an event of contemporary society or contributed to a debate of public interest. The journalist had also failed to make an effort to verify the allegations of bribery and sexual abuse made against the applicant. The Court therefore found that the publication violated Mr. Cârstea's rights.

- ***Braun v. Poland***, Application no. 30162/10, judgment of 4 November 2014: applying different legal tests for defamation to commentators and journalists violates the right to freedom of expression.

This concerned a film director, historian and well-known commentator on current affairs issues who had, during a radio debate, referred to a well-known professor as an informant for the secret political police during the communist era. The professor sued for defamation and won. The domestic courts held that under national law a journalist who reported on an issue of public interest could not be obliged to prove the truthfulness of every statement statement. However, Mr Braun could not be considered a

journalist, he was merely someone who commented on public affairs, and so he was required to prove that what he said was absolutely true.

The European Court of Human Rights held that this violated Mr. Braun's right to freedom of expression. It noted that Braun had made a serious accusation against the professor which constituted an attack on his reputation. However, in determining the case, the Polish courts had made a distinction between the standards applicable to journalists and those applicable to other participants in a public debate. That could not be justified: what mattered was that Mr Braun had been involved in a public debate on an important issue. Participants in such debates should enjoy protection of their right to freedom of expression. As had been acknowledged by the Polish courts, Mr. Braun was a specialist on the issue and he had been invited to participate in a radio programme about that issue. The Court was therefore unable to accept that he should enjoy a lower level of protection than someone who would be recognised as a 'journalist' under Polish national law.

- ***Pinto Pinheiro Marques v. Portugal***, Application no. 26671/09, judgment of 22 January 2015: defamation conviction for criticism of municipal council violated right to freedom of expression.

This concerned a historian who was also the chairman of a cultural association. He wrote an article in a newspaper in which he criticised the municipal council for publishing a book with works of a local poet in apparent breach of a contract with him. He was convicted of 'insult', sentenced to a €2,320 fine and ordered to pay €1,000 in damages to the municipal council. His appeal was dismissed on the grounds that the municipal council's right to protection of its reputation prevailed over the applicant's right to freedom of expression.

The European Court held that the conviction constituted the historian's right to freedom of expression. It noted that the domestic courts had convicted the historian under a criminal code provision that prohibits spreading false facts that undermine the honour of a public authority. The Court held that because the historian had pointed out an error in the publication – namely, they had suggested that the historian had been involved in the book's publication – he had not spread 'false facts' and so the wrong legal code provision had been used against him. This meant that his conviction had no proper basis in domestic law. This alone sufficed to find a violation of the right to freedom of expression. The European Court went to criticise the Portuguese courts for placing the reputational interests of a municipal council above right of the public to discuss issues of legitimate public interests, as well as for the harshness of the financial penalty imposed. The Court held that "the applicant's conviction in a criminal fine was manifestly disproportionate manner and posed an excessive and disproportionate burden, likely to have a chilling effect on the freedom to criticise public institutions".

- ***Cojocaru v. Romania***, application no. 32104/06, judgment of 10 February 2015: defamation conviction for provocative article calling for mayor's resignation violated right to freedom of expression.

This concerned a Romanian journalist who had been convicted of defamation for an article in which he questioned a local mayor's professional activities and called for his resignation. The article was headlined "Resignation of honour" and had listed ten reasons why the mayor should resign. It referred to the mayor's work with descriptions such as "Twenty years of local dictatorship"; "[the mayor] at the peak of the pyramid

of evil"; "in Pașcani, only those who subscribe to [the mayor]'s mafia-like system can still do business"; "we have been ruled for over twenty years by a former communist who still has the reflexes of a county chief secretary"; and "[the mayor] does not represent the interests of the [local community]". On the same page, the journalist had also written a news piece about an official investigation into the mayor's activities. This article included a statement by another politician as well as the mayor's point of view on the investigation.

The European Court held that the criminal conviction for defamation violated the journalist's right to freedom of expression. It noted that the case concerned matters of public concern, namely the activities undertaken by the mayor, a public figure, and referred strictly to the acts performed in his official capacity and not to his private life. It noted furthermore that the domestic courts had not distinguished between parts of the report that were factual and other parts that constituted the journalist's opinion, which was important in defamation cases (the truth of a factual statement can be established, but not that of an opinion). The Court also took into account that the journalist had relied on official reports which had revealed irregularities in the local administration. These should have been accepted as a reasonable basis for the statements the journalist had made. The Court noted that while some of the statements in the article were provocative, they were not "particularly excessive". The Court also held that the fact that the journalist had been convicted of defamation in the past did not mean that he did not act in "good faith" in this case. Finally, the Court found that the fact that the conviction meant the journalist had a criminal record was significant, as was the fact that the fine imposed constituted four times the average monthly income in Romania.

- ***Armellini and others v. Austria*****,** Application no. 14134/07, judgment of 16 April 2015: defamation conviction for unfounded match fixing allegations did not violate right to freedom of expression.

This concerned two journalists who had published an article in a regional newspaper alleging that a number of football players had been bribed by the betting mafia to 'fix' the results of matches. The players concerned filed a criminal complaint and the journalists were prosecuted and convicted of defamation. They were sentenced to a suspended fine. Furthermore, the company that owned the newspaper was ordered to pay damages of €12,000 to each of the plaintiffs. All domestic appeals were dismissed and the journalists complained to the European Court of Human Rights.

The European Court of Human Rights noted that the article concerned an issue of considerable public interest, namely manipulation of sports games and fraud connected with this. At the same time, the Court observed that the journalists did not discuss this in a general manner but directly attacked three individual football players whom they accused of match fixing. The Court noted that the accusations were very serious and had not only damaged the personal and professional reputation of the football players but may also have had important financial repercussions for them. The Court held that the journalists should have had a solid factual basis for the accusations, but that they did not. They had also failed to get a sufficient response from the players themselves. Finally, the Court observed that the journalists themselves had only been given a suspended fine and that the company had been order to pay damages. Neither the amount of the fine nor the damages were deemed disproportionate. For these reasons, the Court held that the conviction did not violate the right to freedom of expression.

- ***Erla Hlynsdottir v. Iceland (No. 3)***, Application no. 54145/10, judgment of 2 June 2015: defamation conviction for reporting on criminal proceedings violated the right to freedom of expression.

This concerned a newspaper journalist who had reported on ongoing criminal proceedings against a man suspected of importing a large quantity of cocaine into Iceland. One of her reports carried the headline, "Scared cocaine smugglers"; and another reported that the cocaine in question had been hidden in a car. Following his acquittal, the accused brought defamation proceedings against the journalist and her newspaper. Although the first-instance court initially found for the journalist, the Supreme Court overturned this acquittal and ordered the journalist to pay compensation to the accused.

The European Court of Human Rights held that the defamation conviction violated the journalist's right to freedom of expression. While it agreed that the words "cocaine smugglers" in the newspaper's headline and the statement in the article in question insinuated that the defendant in the trial was guilty of the offence of which he was accused, the Court noted a large number of counter-veiling factors: the criminal case in question had been one of the largest cocaine smuggling cases in Iceland and reporting on it was of clear public interest; the journalist had made it clear that the proceedings were pending and that no finding of guilt had been made; the journalist had relied for her reporting on the official indictment, which was an official source on which she could rely; and the context of the article made it clear that the accusations reported by the journalist came from the Public Prosecutor. All in all, the Court found that the journalist had acted in good faith and in keeping with the diligence expected of a responsible journalist reporting on a matter of public interest.

- ***Niskasaari and Otavamedia Oy v. Finland***, Application no. 32297/10, judgment of 23 June 2015: defamation conviction in dispute between two journalists violated right to freedom of expression.

This concerned a journalist working for a major weekly magazine who had criticised the manner in which two TV documentaries had been made. The documentaries concerned the issues of mould-infested houses and the protection of forests. The journalist alleged that some statistics in the documentaries were fabricated and that a researcher's testimony which one of the TV reporters knew to be false had nonetheless been included in one of the documentaries. The TV reporter brought a claim for damages against the journalist and the magazine and won 6000 euros in damages. The journalist and the magazine appealed to the European Court of Human Rights.

The Court held that the defamation conviction violated the right to freedom of expression. It considered that the reports in question could be classified as investigative journalism on a matter of legitimate public interest. Both parties to the dispute were professional journalists who were relatively well-known to the general public, and the magazine had published follow-up discussions including a response by the TV reporter and a page-long counter-reply by the magazine's journalist. The Court noted that different statistical information existed as far as the conserved forest area in Finland was concerned and that it could not therefore be said that the figures given by the complainant were fabricated. The Court considered furthermore that the TV reporter who had brought the defamation claim was himself a journalist and so could expect to be the subject of robust scrutiny, comment and criticism regarding his professional conduct. Finally, the Court also took into account the severity of the sanction imposed.

- ***Morar v. Romania***, Application no. 25217/06, judgment of 7 July 2015: criminal defamation conviction and large damage award violated right to freedom of expression.

This concerned a Romanian journalist who had been convicted of criminal defamation for a series of articles about a political adviser to a presidential candidate. The journalist had insinuated that the adviser had worked as a spy and a money launderer under the communist-era secret service, the Securitate. The political adviser lodged a complaint and Mr. Morar was sentenced to a suspended fine and also ordered to pay damages and costs totalling US$26,000.

The European Court of Human Rights held that this conviction violated his right to freedom of expression. It noted that the reports in question concerned subjects of public interest, namely the strategies of different candidates in presidential elections and in particular possible links of the candidates to the communist-era secret police. The Court considered that the political adviser to a presidential candidate, though not a politician himself, was to be regarded as a public figure and should therefore tolerate greater criticism of his actions than an ordinary individual. The Court furthermore held that the alleged link to the secret service was based on some evidence and that, given the difficulties associated with accessing secret service files, this could not be proven completely. Finally, the Court held that the amount of damages was particularly high; it represented more than fifty times the amount of the average wage at the time, in addition to the very high amount of legal costs that the applicant had to repay.

- ***Ringier Axel Springer Slovakia, a.s. v. Slovakia (No. 2)***, Application no. 21666/09, judgment of 7 January 2014: failure by domestic courts to consider the right to freedom of expression in a defamation case violated the right to freedom of expression.

This concerned an article about a car driver who had hit a pedestrian, who later died. The pedestrian was the son of a chief prosecutor and the driver was detained following the incident. The article focused on the long time the Slovakian courts were taking to address the driver's request for bail. The article also mentioned the name of the chief prosecutor and that of his son. The prosecutor sued the publishers for libel, submitting that the article had caused him pain and distress. He succeeded and the newspaper was ordered to apologise and pay damages of 100,000 Slovak korunas (the equivalent of around 2,600 euros (EUR) at that time). The publishers appealed to the European Court of Human Rights.

The Court held that there had been a violation of the right to freedom of expression. It noted that the Slovakian courts had focused only on the facts that the accident constituted a tragedy for the family and that the disclosure of their identity together with a description of the accident had revived the family's suffering. The domestic courts had failed to take into account the overall content of the article, in particular the question marks around the prolonged detention of the driver. Furthermore, the European Court noted that the Slovakian Constitutional Court had dismissed the newspaper's appeal stating that it could only consider violations of procedural rules, and not review whether lower courts had sufficiently protected the newspaper's right to freedom of expression. Neither the Constitutional Court nor the lower courts in Slovakia had given any consideration to the question whether the article had been published in good faith, or to the overall public interest in the publication of the article. The domestic courts had thus failed to fulfil their duties under the European Convention on Human Rights.

- ***Ringier Axel Springer Slovakia, a.s. v. Slovakia (No. 3)***, Application no. 37986/09, judgment of 7 January 2014: failure by domestic courts to consider the right to freedom of expression in a defamation case violated the right to freedom of expression.

This concerned a series of articles about a contestant on the TV quiz "Who Wants To Be A Millionaire?". The articles stated that there had been a dispute between the organisers of the quiz and the contestant, the organisers claiming that the contestant had cheated; and the contestant claiming that the EUR 50,000 question had been ambiguous, and that he had in fact answered it correctly. After publication of the articles, the contestant sued the publishers for defamation, claiming that it was wrong to say he was a cheat and that a criminal investigation had been started against him. The courts agreed and the publishers were ordered to publish an apology and pay the contestant the equivalent of EUR 1,450 in damages. The publishers appealed to the European Court of Human Rights.

The Court held that there had been a violation of the right to freedom of expression. It noted that the domestic courts had failed to take into consideration whether the articles related to a matter of public interest; whether they had been published in good faith; or any other criteria relevant to the assessment of the publishers' compliance with its "duties and responsibilities" under the right to freedom of expression. The Court noted furthermore the failure of the Slovakian Constitutional Court to consider whether the applicant's right to freedom of expression had been violated. The domestic courts had thus failed to fulfil their duties under the European Convention on Human Rights.

2. INSULT

The European Court of Human Rights has considered numerous cases in which it had to judge whether a conviction for publishing an insult violated the right to freedom of expression. In considering these cases, it takes into account several factors, including the following:

- that the right to freedom of expression protects statements that offend as well as inoffensive language;
- whether or not the statement constitutes a gratuitous personal attack; and
- the importance of debate on issues of public interest.

The Court has found that the use of some words, such as "fascist" or idiot", when used to describe a politician who has made provocative remarks, is nearly always justified. Similarly, convictions for 'insulting' the government or a head of state have been found to violate the right to freedom of expression. However, insulting language directed at a politician's wife, particularly when it is not clear how those remarks contribute to a debate on an issue of public interest, has not been deemed acceptable.

In its decisions, the Court found that exaggerated language may be justified when used to describe politicians who themselves are prone to making exaggerated remarks. In other cases, exaggerated or insulting language has been approved when it clearly related to a topic of public interest and the language was relevant in that context. However, the Court has consistently disapproved of what it calls 'gratuitous' insults. The Court has also consistently disapproved of needless attacks on the judiciary, reflecting the protective stance of the European Convention towards upholding the dignity of the judiciary.

The following judgments provide examples of how the European Court of Human Rights has ruled in these matters.

- ***Castells v. Spain***, Application no. 11798/85, judgment of 23 April 1992: article which complained of government supporting attacks in the Basque region was not insulting.

The applicant was convicted of insulting the government through an article accusing the government of supporting or tolerating attacks on Basques by armed groups. In the context of political murders that had gone unpunished, the applicant had referred to the government as including fascist organisations who were responsible for this impunity. The domestic courts did not identify any specific words that were insulting but deemed the entire article to be an insult to the government. The article did not use any potentially offensive words other than the word 'fascist'.

The European Court of Human Rights held that the conviction violated the right to freedom of expression. The applicant's article had been clearly political in nature and did not overstep the mark: "Mr Castells began by denouncing the impunity enjoyed by the members of various extremist groups, the perpetrators of numerous attacks in the Basque Country since 1977. He thereby recounted facts of great interest to the public opinion of this region, where the majority of the copies of the periodical in

question were sold. [While] he levelled serious accusations against the Government, which in his view was responsible for the situation which had arisen ... The article must be considered as a whole ..."

- ***Oberschlick v. Austria (No. 2)***, Application no. 20834/92, judgment of 1 July 1997: conviction for calling a politician an 'idiot' violated the right to freedom of expression.

The applicant had called a politician a "trottel" (idiot) in the context of a newspaper article criticising one of his speeches. The European Court held that while offensive, the use of the word was justified when taken in context. The Court held that the politician had "clearly intended to be provocative and consequently to arouse strong reactions ... [T]he applicant's words ... may certainly be considered polemical, [but] they did not on that account constitute a gratuitous personal attack as the author provided an objectively understandable explanation for them derived from the politician's speech ...". The word "idiot" "[did] not seem disproportionate to the indignation knowingly aroused" by the politician in his speech. The conviction of the journalist was therefore in breach of the right to freedom of expression.

- ***Tammer v. Estonia***, Application 41205/98, judgment of 6 February 2001: conviction for insulting wife of government minister did not violate freedom of expression, no public interest justification made out.

The applicant had published an article in which he had referred to the wife of a government minister as someone who had broken up a marriage ("abielulõhkuja" in Estonian) and an unfit and careless mother deserting her child ("rongaema" in Estonian).

The European Court held that the conviction did not violate the right to freedom of expression. It considered that while the person at whom the insults were directed was married to a prominent politician, it had not been established that the statement served any public interest or related to a matter of general concern. The applicant could also have expressed his negative opinion without using offensive language. In view of the small fine imposed, the Court concluded that the national courts had appropriately balanced the interests at stake, namely the protection of the reputation of others and a journalist's right to impart information on problems of public interest.

- ***Constantinescu v. Romania***, Application no. 28871/95, judgment of 27 June 2000: use of insulting term accusing teachers of fraud not justified.

The applicant had used the term "delapidatori" to describe certain teachers suspected of fraud. He was convicted for having offended and libelled the teachers. The European Court held that this conviction did not violate the right to freedom of expression: the term "delapidatori" was normally used to refer to persons convicted of fraud, and the persons referred to by the applicant had not been convicted of fraud. While he had used the term in the context of a debate on a matter of public interest (fraud in schools), he could have expressed his criticism without using this term.

- ***Colombani and others v. France***, Application 51279/99, judgment of 25 September 2002: conviction for insulting foreign head of state breached right to freedom of expression.

The applicants, a newspaper director and a journalist, had been convicted of insulting a foreign head of state in an article which had questioned the determination of the Moroccan authorities, and in particular the King, to combat drug trafficking in their country. The domestic courts had held that accusations of duplicity, artifice and hypocrisy by the Moroccan king were insulting. No specific words were held to be insulting but rather the article and allegations made therein as such.

The European Court of Human Rights held that the conviction violated the right to freedom of expression. Whilst acknowledging the strong, polemical language used, it pointed out that the Convention protected information or ideas that offended, shocked or disturbed. The restriction imposed on the applicants was accordingly found to be disproportionate to the aim pursued. Moreover, the Court pointed out that the offence of insulting a head of state was out of step with the notion of modern democracy, stating that "the offence of insulting a foreign head of State is liable to inhibit freedom of expression without meeting any "pressing social need" capable of justifying such a restriction."[1]

- ***Tuşalp v. Turkey***, Applications no. 32131/08 and 41617/08, judgment of 21 February 2012: conviction for insulting prime minister violated right to freedom of expression.

The applicant was convicted for insult for a newspaper article in which he had written that, "The Prime Minister and his men are continuing to be stable in creating their absurdities ... He does not know what crime or punishment is .... He doesn't read, he doesn't learn. He is content with what entered his head ... when he was 12-13 years old."

The European Court of Human Rights held that the conviction violated the right to freedom of expression. It stated that "the author chose to convey his strong criticisms, coloured by his own political opinions and perceptions, by using a satirical style ... [Although] offensive language may fall outside the protection of freedom of expression if it amounts to wanton denigration, for example where the sole intent of the offensive statement is to insult ... the use of vulgar phrases in itself is not decisive in the assessment of an offensive expression as it may well serve merely stylistic purposes. For the Court, style constitutes part of communication as a form of expression and is as such protected together with the content of the expression. [In] the instant case, the domestic courts ... omitted to set the impugned remarks within the context and the form in which they were expressed ... Consequently, the ... strong remarks contained in the articles in question and particularly those highlighted by the domestic courts could not be construed as a gratuitous personal attack against the Prime Minister ..."

1 Note: The Criminal Code of Montenegro still has a criminal offense "Ruining the reputation of SMN and of a member state" according to which anyone who publicly exposes SMN or one of its member states, its flag, coat of arms or anthem to mockery, shall be punished to a fine in the amount of € 3,000 to 10,000. In addition to being incompatible with the principles of freedom of expression, this offense is absurd because it protects the symbols from insult, as well as only those countries with which Montenegro has diplomatic relations, or only those organizations whose Montenegro is a member. A more detailed HRA explanation for deletion of this criminal offense can be seen: http://www.hraction.org/wp-content/uploads/predlog_reforme-zakon_o_kleveti_i_uvredi.pdf.

- ***Özçelebi v. Turkey***, Application no. 34823/05, judgment of 23 June 2015: conviction for insulting founder of Turkish nation violated right to freedom of expression.

This concerned a Turkish navy commander who had used a slang word for 'head' in reference to photographs and a statue of Atatürk, the founder of the modern nation of Turkey. He was charged to have said to a non-commissioned officer, while pointing to images of Atatürk exhibited on a wall: "While you were at it, you might have chosen a bigger picture of his mug." He was sentenced him to one year's imprisonment, the Court holding that he had intended to insulting the memory of Atatürk. Following various appeals and legal proceedings which lasted nearly sixteen years, this sentence was finally quashed and the commander was sentenced to a suspended fine, pending for a period of three years.

The European Court of Human Rights held that the conviction violated the commander's right to freedom of expression. The Turkish courts had not specified how the use of the slang word was insulting to the memory of Atatürk, and had not taken into account that the words had been spoken in a confined space and before a small circle of people. There was no indication that he had any intention or demonstrated a willingness to make them public. Finally, the Court noted that the legal proceedings had lasted nearly sixteen years and while his sentence of imprisonment had been commuted to a fine, this was kept hanging over his head and had a serious chilling effect on his right to freedom of expression. In all, the conviction was therefore not "necessary in a democratic society".

- ***Eon v. France***, Application no. 26118/10, judgment of 14 March 2013: conviction for insulting the French president violated the right to freedom of expression.

This concerned a socialist who had waved a placard reading "Casse toi pov'con" ("Get lost, you sad prick") during a presidential visit to his region. The phrase had been spoken by the president himself several months previously when a farmer had refused to shake his hand. The applicant was immediately arrested, prosecuted and convicted for insulting the president. The applicant complained that his conviction breached the right to freedom of expression. The European Court agreed, stating that while the phrase would be considered offensive to the president, it was clearly a satirical remark. The president himself had used the same words against a farmer only months previously. To criminalise such a remark would have a deterrent effect on satire as well as on free debate questions of general interest. The conviction was therefore not "necessary in a democratic society".

- ***Porubova v. Russia***, Application no. 8237/03, judgment of 8 October 2009: conviction for vague assertion of homosexual relationship violated the right to freedom of expression.

A journalist had written an article criticising misappropriation of state funds. In the course of the article, he had vaguely suggested that a politician and a public servant involved in the misappropriation had a homosexual relationship. The domestic courts convicted the journalist of insult, stating that the suggestion of a homosexual relationship between the two was insulting particularly taking into account the Russian mentality. The European Court of Human Rights held that this violated the journalist's right to freedom of expression. It stated that "the Court is unable to discern any such pejorative or rude terms in the text of the original article. Even the word 'homosexual'

– which may appear to be the most objectionable term in the article – was employed in a rhetorical question without reference to either [the politician or the public servant]".

- ***Mladina d.d. Ljubljana v. Slovenia***, Application no. 20981/10, judgment of 17 April 2014: defamation conviction for offensive statement about a politician who made homophobic remarks violated the right to freedom of expression.

This concerned the conviction of a publisher for insulting a parliamentarian in a report on a parliamentary debate on a law concerning legal recognition of same-sex relationships. During the debate, the parliamentarian expressed the opinion that homosexuals were generally undesirable. To prove his point, he imitated a homosexual man picking up his children from school, using effeminate speech and gestures. The author of the article described the parliamentarian's behaviour as that of "a cerebral bankrupt". The parliamentarian brought proceedings against the applicant publisher in August 2005, claiming that the article was offensive and had caused him severe distress. The Slovenian courts held that describing him as "cerebral bankrupt" was offensive and ordered the publishers to pay €2,921 euros in damages.

The European Court of Human Rights held that the defamation conviction violated the publisher's right to freedom of expression. It noted, firstly, that the impugned statement was made in the context of a political debate on a question of public interest, and was directed against a politician. The Court has emphasised on many occasions that a politician must in this regard display a greater degree of tolerance than a private individual, especially when he himself makes public statements that are susceptible of criticism. The Court also reiterated that journalistic freedom covers possible recourse to a degree of exaggeration or even provocation, or in other words, somewhat immoderate statements. While the Court agreed that describing the politician's conduct as that of a "cerebral bankrupt" could be considered offensive, it had to be viewed in the context in which it had been made: the politician had himself ridiculed homosexual people and promoted a negative stereotype which was discriminatory and violated the spirit of democracy and human rights. Viewed in this context, the publisher's offensive remark was a legitimate response. The Court emphasised that the statement did not amount to a gratuitous personal attack on the politician, and noted that political invective often spills over into the personal sphere; such are the hazards of politics and the free debate of ideas, which are the guarantees of a democratic society.

- ***Mengi v. Turkey***, Application nos. 13471/05 and 38787/07, judgment of 27 November 2012: conviction for referring to law scholar involved in law reform as a bigot violated the right to freedom of expression.

The applicant had written an article in which he had referred to a scholar involved in law reform as "so obsessed and [having] a discriminatory attitude as regards criminal provisions concerning women and children ... instead of having elderly legal scholars, we should now have young lawyers working at the Justice Commissions ... Those who ... are aware that discriminatory attitudes have become out of date." The domestic court considered that the above passages were insulting.

The European Court held that the conviction violated the right to freedom of expression, stating that "the author disseminated her views, coloured by her own political opinions and perceptions, by using an informal style ... [T]he domestic courts [did not] set the impugned remarks within the context and the form in which they were expressed ... [O]ffensive language may fall outside the protection of freedom of expression if it

amounts to wanton denigration, for example where the sole intent of the offensive statement is to insult ... However, the use of vulgar phrases in itself is not decisive in the assessment of an offensive expression, as it may well serve merely stylistic purposes. For the Court, style constitutes part of communication as a form of expression and as such is protected together with the content of the expression".

- ***Uj v. Hungary***, Application no. 23954/10, judgment of 19 July 2011: conviction for insult in relation to criticism of wine produced by State-owned company violated freedom of expression.

The applicant had been very critical of Hungarian wine produced by a state-owned company. He wrote that "1,000 [Hungarian forints] per bottle, that represents the world's best wine region, the Hungarian National Pride and Treasure... [and that could make me cry]. Not only because of the taste – although that alone would easily be enough for an abundant cry: sour, blunt and over-oxidised stuff, bad-quality ingredients collected from all kinds of leftovers, grey mould plus a bit of sugar from Szerencs, musty barrel – but because we are still there ...: hundreds of thousands of Hungarians drink [this] shit with pride, even devotion... our long-suffering people are made to eat (drink) it and pay for it at least twice ([because we are talking about a] State-owned company); it is being explained diligently, using the most jerk-like demagogy from both left and right, that this is national treasure, this is how it is supposed to be made, out of the money of all of us, and this is very, very good, and we even need to be happy about it with a solemn face. This is how the inhabitants (subjects) of the country are being humiliated by the skunk regime through half a litre of alcoholised drink ..." He was convicted of insult.

The European Court of Human Rights held that the conviction violated the right to freedom of expression. It stated that, "[T]he expression used by the applicant is offensive. Nevertheless, the subject matter of the case is not a defamatory statement of fact but a value judgment or opinion, as was admitted by the domestic courts. The publication in question constituted a satirical denouncement of the company within the context of governmental economic policies and consumer attitudes ... the applicant's primary aim was to raise awareness about the disadvantages of State ownership rather than to denigrate the quality of the products of the company in the minds of the readers. The opinion was expressed with reference to government policies concerning the protection of national values and the role of private enterprise and foreign investment. It dealt therefore with a matter of public interest ... [T]he domestic courts failed to have regard to the fact that the press have possible recourse to a degree of exaggeration or even provocation, or in other words to make somewhat immoderate statements ... the wording employed by the applicant was exaggerated but made in a public context; the expression used is, regrettably, a commonly used one in regard of low-quality wine and its vulgarity thus constituted a forceful part of the form of expression."

- ***Andrushko v. Russia***, Application no. 4260/04, judgment of 14 October 2010: conviction of politician for insulting another politician in an election leaflet violated the right to freedom of expression.

The applicant, a politician, had published a leaflet during an election campaign which had referred to another politician as "that terrible man [whose] fortune was made from our tears ... whatever he undertakes is damned". The rival politician sued for insult and won, the domestic courts holding that the statements were clearly insulting and were formulated in cynical terms. The European Court of Human Rights held that the

conviction violated the right to freedom of expression, stating that "[a] clear distinction must ... be made between criticism and insult ... [P]olitical invective often spills over into the personal sphere ... The Court accepts that certain expressions used in the leaflet could be considered to be polemical. They do not, however, amount to insult or constitute a gratuitous personal attack because the authors supported them with an objective explanation. Although the comments contained in the leaflet were without doubt severely critical, they nevertheless appear proportionate to the frustration and indignation caused by Mr K.'s behaviour ...".

- ***Birol v. Turkey***, Application no. 44104/98, judgment of 1 March 2005: conviction for use of strong words, including the words 'blood stained fascist', at a demonstration violated the right to freedom of expression.

The applicant had been convicted after giving a speech at a demonstration in which she had said: "They appoint blood stained fascists Minister of Justice. They put fascists and murderers in charge of the government." He was convicted for insult. The European Court of Human Rights held that this violated the right to freedom of expression. It noted that the speech, although hostile to the Minister of Justice, had not contained any kind of incitement to violence or insurrection and had not been hate speech. The comments had been made at an outdoor demonstration, preventing the applicant from rewording, perfecting or retracting them. In nature and severity the penalties imposed were disproportionate to the aim pursued.

- ***Gavrilovići v. Moldova***, Application no. 25464/05, judgment of 15 December 2009: conviction for calling someone a fascist violated the right to freedom of expression.

The applicant had been convicted for calling someone a 'fascist', which was deemed to be insulting. The applicant asserted he had not used this word. The European Court of Human Rights held that the conviction violated the right to freedom of expression. It stated that "even assuming that the applicant called I.M. a "fascist", the domestic courts failed to address the crucial issue of whether the utterance attributed to him was capable of being a value judgment, the veracity of which, unlike a statement of fact, is not susceptible of proof. It recalls that it has previously found that terms such as "neo-fascist", and "Nazi" do not automatically justify a conviction for defamation on the ground of the special stigma attached to them ... the generally offensive expressions "idiot" and "fascist" may be considered to be acceptable criticism in certain circumstances ... calling someone a fascist, a Nazi or a communist cannot in itself be identified with a factual statement of that person's party affiliation".

- ***Bodrožić v. Serbia***, Application no. 32550/05, judgment of 23 June 2009: conviction for using the words "fascist" and "idiot" violated the right to freedom of expression.

The applicant had referred to someone as a "fascist" and "idiot". The domestic court concluded that the applicant's article had had the sole aim of insulting. The European Court held that the conviction violated the right to freedom of expression. It stated that "in criticising J.P. the applicant used harsh words which, particularly when pronounced in public, may often be considered offensive. However, his statements were given as a reaction to a provocative interview and in the context of a free debate on an issue of general interest for the democratic development of his region and the country as a whole. Their content did not in any way aim at stirring up violence ... Moreover, Article

10 protects not only "information" or "ideas" that are favourably received or regarded as inoffensive, but also to those that offend, shock or disturb".

- ***Krutil v. Germany***, Application no. 71750/01, admissibility decision of 20 March 2003: conviction for comparing a journalist to Goebbels, head of Nazi regime propaganda during second world war, did not violate right to freedom of expression.

The applicant had compared a German journalist to Mr. Goebbels, the head of the German Nazi regime's propaganda department. He had written that a report written by the other journalist was "a piece of crap [Schweinerei] and deception [Hinterfotzigkeit] without parallel. If he had not been not left-wing, it could be argued that even [German Nazi-era propaganda minister] Goebbels would not have done better." He was convicted of insult and complained to the European Court of Human Rights that this conviction violated his right to freedom of expression. The European Court held that it did not. It stated that, "whatever the intentions of the applicant or the author of the article, there is no doubt that to compare a journalist with a person like Goebbels undermines his honour and goes beyond the limits of acceptable criticism, even within a debate between two players in public life..." The Court also considered it important that the applicant had only been sentenced to payment of a relatively low fine (900 Deutschmark) and damages (1200 Deutschmark), the amounts of which had been set taking the applicant's income into account.

- ***Hoffer and Annen v. Germany***, Applications no. 397/07 and 2322/07, judgment of 13 January 2011: insult conviction for comparing doctor to holocaust perpetrator did not violate freedom of expression.

This concerned a protestor who had produced and handed out anti-abortion leaflets comparing doctors who carry out abortions to perpetrators of the holocaust. The leaflet stated, "Stop the murder of children in their mother's womb on the premises of the Northern medical centre ... then: Holocaust - today: Babycaust". The director of a medical centre where the leaflets had been handed out sued for insult and won a judgment ordering the applicant to pay 1800 Deutschmarks in damages. The applicant appealed to the European Court of Human Rights arguing that his right to freedom of expression had been violated.

The Court held that the conviction did not violate the right to freedom of expression. It considered that while the leaflet addressed questions of public interest and that while a certain degree of exaggeration is allowed, the comparison of a doctor with a perpetrator of the holocaust was a very serious attack, particularly in the German context. The Court considered that the applicant could have been expected to express his criticism in a way which was less detrimental to the physician's honour.

- ***Długołęcki v. Poland***, Application no. 23806/03, judgment of 24 February 2009: conviction for insulting politician violated right to freedom of expression.

The applicant had criticised a politician in a newsletter, stating that he "had already as mayor reached his level of incompetence a few years ago, but this blunder [had] not put him off and he [was] crawling up again to another level". The domestic court held that this "amount to proffering insult because the use of those words, particularly the word 'crawling' are undoubtedly pejorative..."

The European Court held that this conviction violated the right to freedom of expression. It stated that "[t]he domestic court adopted a narrow definition of what could be considered acceptable criticism, excluding from it all statements expressing "contempt and disrespect" ... In doing so the court did not take into consideration the fact that the impugned statements had been made in the context of a heated political debate. Moreover, it failed to notice that the applicant was exercising his right to impart information and ideas on political questions and on other matters of public interest and in so doing might have recourse to a degree of exaggeration. The statements in question were limited to an assessment of the professional sphere of the life of Mr A.W. and denounced his alleged lack of ability as a politician. The Court notes that although political invective often spills over into the personal sphere, in the instant case the applicant's critical comment did not concern the private or family life of that politician."

- ***Lepojić v. Serbia***, Application no. 13909/05, judgment of 6 November 2007: describe politician as "near-insane" was obviously not used to describe the his mental state but rather to explain the manner in which he had allegedly been spending the money of the local taxpayers.

The applicant had published a leaflet that described a politician as "near-insane" (sumanuto). The domestic courts deemed that this implied mental illness and convicted the applicant of insult.

The European Court held that the conviction violated the right to freedom of expression. It stated that "[t]he target of the applicant's criticism was the Mayor, himself a public figure, and the word "sumanuto" was obviously not used to describe the latter's mental state but rather to explain the manner in which he had allegedly been spending the money of the local taxpayers ... [T]he applicant ... clearly had some reason to believe that the Mayor might have been involved in criminal activity and, also, that his tenure was unlawful. In any event, although the applicant's article contained some strong language, it was not a gratuitous personal attack and focused on issues of public interest rather than the Mayor's private life, which transpired from the article's content, its overall tone as well as the context."

- ***Rujak v. Croatia***, application no. 57942/10, judgment of 2 October 2012: vulgar insults that do not contribute to debate on an issue of public interest are not protected under the right to freedom of expression.

This concerned a soldier who had been convicted for insult for shouting, during an argument with other soldiers, "I fuck your baptised mother!"; "I fuck your Ustaše mother!". He appealed to the European Court of Human Rights arguing that the conviction constituted a violation of his right to freedom of expression. The Court held that it did not, stating that the language used was not protected under the European Convention on Human Rights. The Court stated:

> "While assertions of fact and statements of value or feeling are [potentially protected under the Convention] because, for instance, they express an individual's beliefs or identity, or contribute to the formation of public opinion, it is open to question whether there is a good reason for protecting expression of insults ... [T]he concept of "expression" in Article 10 concerns mainly the expression of opinion and receiving and imparting information and ideas, including critical remarks and observations ... Certain classes of speech, such as lewd and obscene speech have no essential role in the expression of ideas. An offensive statement

> may fall outside the protection of freedom of expression where the sole intent of the offensive statement is to insult ... In view of the fact that the applicant's statement mostly concerned vulgar and offensive language, the Court is not persuaded that, by making the offending statements, the applicant was trying to "impart information or ideas". Rather, from the context in which those statements were made, it appears that the applicant's only intention was to insult his fellow soldiers and his superiors. The Court considers that such "expression" falls outside the protection of [the right to freedom of expression] because it amounted to wanton denigration and its sole intent was to insult."

- ***Otto-Preminger-Institut v. Austria***, Application no. 13470/87, judgment of 20 September 1994: banning of a film that was insulting to Christians did not violate the right to freedom of expression.

This concerned the banning in Austria of a film which presents the Christian God the Father as old, infirm and ineffective, Jesus Christ as a 'mummy's boy' of low intelligence and the Virgin Mary as unprincipled. All of them are portrayed as conspiring with the Devil to punish mankind for its immorality. In one scene God kisses the devil whilst in other scenes, God, the Virgin Mary and Christ are applauding the Devil. The film was banned on the grounds that it insulted Christians.

The European Court of Human Rights held that the ban did not violate the right to freedom of expression. It stated that,

> "Whoever exercises the [right to freedom of expression] undertakes 'duties and responsibilities'. Amongst them - in the context of religious opinions and beliefs - may legitimately be included an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs."

The Court noted that especially on the issue of morals, State have a significant margin of appreciation in deciding what is and what is not acceptable in their societies. What may be acceptable in a very liberal country may not be acceptable elsewhere. The Court stated:

> "The Court cannot disregard the fact that the Roman Catholic religion is the religion of the overwhelming majority of Tyroleans. In seizing the film, the Austrian authorities acted to ensure religious peace in that region and to prevent that some people should feel the object of attacks on their religious beliefs in an unwarranted and offensive manner. It is in the first place for the national authorities, who are better placed than the international judge, to assess the need for such a measure in the light of the situation obtaining locally at a given time. In all the circumstances of the present case, the Court does not consider that the Austrian authorities can be regarded as having overstepped their margin of appreciation in this respect."

- ***Giniewski v. France***, Application no. 64016/00, judgment of 31 January 2006: conviction for religious insult following publication of critical analysis of catholic doctrine violated the right to freedom of expression.

This concerned a newspaper which had published an article analysing a particular Catholic church doctrine and its possible links with the origins of the Holocaust. The article stated that "[m]any Christians have acknowledged that scriptural anti-Judaism

and the doctrine of the 'fulfilment' [accomplissement] of the Old Covenant in the New led to anti-Semitism and prepared the ground in which the idea and implementation [accomplissement] of Auschwitz took seed." They were found guilty of publishing insulting statements against the Christian community and ordered to pay damages to a Christian organisation, "General Alliance against Racism and for Respect for the French and Christian Identity". The Court held that the conviction violated the right to freedom of expression. It considered that it had contributed to a debate on the various possible reasons behind the extermination of Jews in Europe, and that this was an issue of public interest in a democratic society. It considered furthermore that the article did not contain attacks on religious beliefs as such, but that it proposed a critical analysis. Finally, the Court considered that the article had not been "gratuitously offensive" or insulting; and that it had not incited hatred.

- ***Skalka v. Poland***, Application no. 43425/98, judgment of 27 May 2003: eight month prison sentence for insulting letter of complaint about a judge violated right to freedom of expression.

The applicant had sent a letter of complaint to a court in which he referred to the judge who had handled his case as a "cretin", an "irresponsible clown", and a "fool" who should take his frustrations out on his dog or his mistress. He was convicted for insult and sentenced to eight months imprisonment. The European Court held that "that the tone of the letter as a whole was clearly derogatory ... It should be noted that the applicant did not formulate any concrete complaints against the [judge]. He expressed his anger and frustration, but did not take reasonable care to articulate clearly why, in his view, the [judge] complained of deserved such a strong reaction." It held furthermore that the authority of the judiciary must be upheld, and that in principle this "was important enough to justify limitations on the freedom of expression." However, it held that imposing a sentence of eight months imprisonment was disproportionate and violated the right to freedom of expression.

- ***Alfantakis v. Greece***, Application no. 49330/07, judgment of 11 February 2010: conviction for insulting a public prosecutor violated right to freedom of expression.

This concerned a Greek lawyer who, during a television interview, stated that he had "laughed" on reading the report of public prosecutor concerning his client. He described the report as a "literary opinion showing contempt for his client". The public prosecutor sued for insult and a court ordered the lawyer to pay damages of about €12,000. The lawyer appealed to the European Court of Human Rights arguing that this violated his right to freedom of expression.

Considering that the lawyer's comments had been directed at a prosecutor – a member of the national legal service – the European Court considered that they created a risk of undermining the authority of the judiciary and public confidence in the proper administration of justice. The Court recalled furthermore that although lawyers are entitled to comment on issues concerning the judiciary, they are expected to observe certain limits. However, the Court also noted that the Greek courts had exaggerated the meaning of the lawyer's words, and that they had failed to take into account that the lawyer had made his comments in the course of his duty to defend his client. The Greek courts had also failed to take into account the fact that the comments had been broadcast on live television and could therefore not be rephrased. It therefore held that the conviction violated the right to freedom of expression.

- ***Andreescu v. Romania***, Application no. 19452/02, judgment of 8 June 2010: conviction and high fine for uttering suspicion regarding a public official's link with communist security service violated the right to freedom of expression.

This concerned a conviction for insult of a human rights activist who had, during a press conference, alleged that a member of the Consiliul Național pentru Studierea Arhivelor Securității (National Council for the Study of the Archives of the Securitate - CNSAS) had also been a collaborator with the reviled communist "Securitate" security service. He was sued for insult and convicted to payment of a criminal fine of 5 million Lei together with a 50 million Lei in damages (more than 50 times the average national salary at the time). He appealed to the European Court of Human Rights.

The Court held that the conviction violated the right to freedom of expression. It considered that the applicant's speech had been made in the specific context of a national debate on the issue of citizens' access to the personal files kept on them by the Securitate, and the inefficiency of the national agency tasked with regulating this. His remarks had been a mix of value judgments and factual elements and he had stated that he was voicing suspicions rather than certainties. These suspicions had a basis in undisputed facts. The Court therefore considered that it was clear that the remarks had been made in good faith and in an attempt to inform the public. The Court finally noted furthermore that the extremely high level of damages could deter the media and others from commenting on issues and debates of public interest.

- ***Mengi v. Turkey***, Application nos. 13471/05 and 38787/07, judgment of 27 November 2012: insult conviction for using harsh language in the context of legitimate criticism violated the right to freedom of expression.

The applicant, a journalist, wrote a series of articles in a daily newspaper criticising provisions of the new draft criminal code which proposed reduced sentences for certain offences committed against women and children. The articles criticised the members of the drafting commission, two of whom sued and obtained damaged for defamation. The applicant's first article had referred to one of the drafters as an obsessive and a backward person and a bigot who discriminated against women and did not talk to women; the second article had implied that the second plaintiff was stupid, unhealthy and mentally ill and not fit to be a professor.

The European Court held that the defamation convictions constituted a violation of the right to freedom of expression. The Court noted that the articles concerned the applicant's comments on certain allegedly controversial provisions of the draft Criminal Code. In the applicant's opinion these provisions were discriminatory against women and, if adopted, would have harmful effects on them and on children. She alleged that some of the drafters of these provisions had a discriminatory mindset. This was an issue of public interest. The Court noted furthermore that, as drafters of the new criminal code, the plaintiffs in the defamation action were public figures who had laid themselves open to greater criticism and scrutiny than ordinary individuals.

While the applicant had used harsh language that could be perceived as offensive, her articles were value judgments and part of heated debate in society on a controversial topic. The Court noted that the applicant used an informal style, which had not been taken into account by the domestic courts. The Court recalled that while offensive language may fall outside the protection of freedom of expression if the sole intent of the statement is to insult, the use of vulgar phrases in itself is not decisive in the assessment of an offensive expression, as it may well serve merely stylistic purposes. For these reasons, the European Court held that the conviction for defamation was not "necessary" in a democratic society.

3. PRIVACY

The European Court of Human Rights has stated that "even the publication of items which are true and describe real events may under certain circumstances be prohibited [for example] the obligation to respect the privacy" (*Markt intern Verlag GmbH and Klaus Beermann v. Germany*, 1989). In recent times this has been in issue in particular with regard to the publication of photographs and videos, including on the internet.

The leading European Court of Human Rights decisions on the publication by journalists of private materials are the Grand Chamber judgments in the cases of *Von Hannover v. Germany (1)* and *(2)*; *Axel Springer v Germany*, *MGN Ltd v United Kingdom*, and *Mosley v United Kingdom*.

The basic principles established by the Court are as follows:

(α) Contribution to a debate of general interest

An initial essential criterion is the contribution made by photos or articles in the press to a debate of general interest. The definition of what constitutes a subject of general interest will depend on the circumstances of the case. The Court has recognised the existence of such an interest not only where the publication concerned political issues or crimes, but also where it concerned sporting issues such as doping practices or performing artists.

(β) How well known is the person concerned and what is the subject of the report?

The role or function of the person concerned and the nature of the activities that are the subject of the report and/or photo constitute another important criterion. A distinction has to be made between private individuals and persons acting in a public context, as political figures or public figures. Whilst a private individual unknown to the public may claim particular protection of his or her right to private life, the same is not true of public figures. A fundamental distinction needs to be made between reporting facts capable of contributing to a debate in a democratic society, relating to politicians in the exercise of their official functions for example, and reporting details of the private life of an individual who does not exercise such functions. Although in certain special circumstances the public's right to be informed can even extend to aspects of the private life of public figures, particularly where politicians are concerned, this will not be the case – despite the person concerned being well known to the public – where the published photos and accompanying commentaries relate *exclusively* to details of the person's private life and have the *sole aim* of satisfying public curiosity in that respect.

(γ) Prior conduct of the person concerned

The conduct of the person concerned prior to publication of the report or the fact that the photo and the related information have already appeared in an earlier publication are also factors to be taken into consideration. However, the mere fact of having cooperated with the press on previous occasions cannot serve as an argument for depriving the party concerned of all protection against publication of the photo at issue.

(δ) Content, form and consequences of the publication

The way in which the photo or report are published and the manner in which the person concerned is represented in the photo or report may also be factors to be taken

into consideration. The extent to which the report and photo have been disseminated may also be an important factor, depending on whether the newspaper is a national or local one, and has a large or a limited circulation.

(ε) Circumstances in which the photos were taken

The context and circumstances in which the published photos were taken cannot be disregarded. Regard must be had to whether the person photographed gave their consent to the taking of the photos and their publication or whether this was done without their knowledge or by subterfuge or other illicit means. Regard must also be had to the nature or seriousness of the intrusion and the consequences of publication of the photo for the person concerned. For a private individual, unknown to the public, the publication of a photo may amount to a more substantial interference than a written article.

The following paragraphs highlight the leading cases.

- ***Von Hannover v. Germany***, Application no. 59320/00, judgment of 24 June 2004: publication of photographs taken in a private place violated the right to respect for private life.

This concerned an application by Princess Caroline of Monaco in 2000, on which the Court gave judgment in 2004. The issue was whether the publication in several German magazines of photographs taken of her in a restaurant infringed her right to respect for private life. The German courts had decided that just because Princess Caroline was a figure of contemporary society "par excellence", she had to tolerate a degree of intrusion into her private life and even photographs taken of her in a restaurant could be published.

The European Court, in a judgment handed down just after the death of Princess Diana in a car accident while pursued by press photographers ('paperazzi'), ruled that the reasoning of the German courts had been inadequate. The European Court noted that while the right to respect for privacy needs to be balanced against the right to freedom of expression, the present case concerned "the dissemination of ... images containing very personal or even intimate 'information' about an individual. Furthermore, photos appearing in the tabloid press are often taken in a climate of continual harassment which induces in the person concerned a very strong sense of intrusion into their private life or even of persecution". The Court noted furthermore that "a fundamental distinction needs to be made between reporting facts even controversial ones capable of contributing to a debate in a democratic society relating to politicians in the exercise of their functions, for example, and reporting details of the private life of an individual who, moreover, as in this case, does not exercise official functions. While in the former case the press exercises its vital role of 'watchdog' in a democracy by contributing to 'imparting information and ideas on matters of public interest', it does not do so in the latter case". The Court noted furthermore that "increased vigilance in protecting private life is necessary to contend with new communication technologies which make it possible to store and reproduce personal data. This also applies to the systematic taking of specific photos and their dissemination to a broad section of the public".

Given these factors, the German courts had been wrong to rule that just because Princess Caroline is a figure of contemporary society "par excellence", she had to tolerate intrusion into her private life. It therefore found a violation of the right to respect for private life.

- ***Von Hannover v. Germany (No. 2)***, Application nos. 40660/08 and 60614/08, judgment of 7 February 2012 (Grand Chamber) and ***Axel Springer AG v. Germany***, Application no. 39954/08, judgment of 7 February 2012 (Grand Chamber): publication of photos used to illustrate news stories did not violate right to respect for private life.

This concerned two cases at the European Court of Human Rights that were jointly heard by the Grand Chamber. The first again concerned Princess Caroline of Monaco; the second was brought in relation to photographs that had been published of a German actor.

The European Court held that media coverage and the publication of photographs of celebrities is acceptable when the publication concerns matters of public interest or contributes to a debate of general interest. In *Von Hannover v. Germany (no. 2)*, the Court held unanimously that the publication of a picture of Princess Caroline of Monaco that was used to illustrate an article about the Principality of Monaco did not violate the right to respect for private life. The European Court emphasised that the Princess is a public person, the photograph was used to take illustrate a story on an issue of public interest, and that it had not been taken surreptitiously or by other secret means.

The case of *Axel Springer AG v. Germany* concerned press coverage of the arrest and conviction of a TV actor for possession of drugs. The actor was known as a policeman in a popular TV series and so his arrest for drugs possession was thought to be newsworthy. The actor obtained an injunction stopping publication of the story, and a German magazine appealed to the European Court complaining that this violated their right to freedom of expression. The European Court found that it had: there was a genuine public interest in the arrest and conviction of the actor. The actor was closely identified with his role as a policeman whose mission was law enforcement and crime prevention. Furthermore, the arrest had taken place in public, in a tent at the beer festival in Munich. The Court also noted that the magazine had not published any further details of the actor's private life, and the article was very factual. The Court also noted that information had been obtained legally, and referred to the chilling effect of the injunction on the right to freedom of expression. The Court therefore held that the injunction had violated the right to freedom of expression.

- ***Hannover v. Germany (No. 3)***, Application no. 8772/10, judgment of 19 September 2013: publication of a photograph of a public figure to illustrate an article on an issue of general interest did not violate the right to respect for private life.

This concerned a complaint lodged by Princess Caroline von Hannover relating to the publication of a photograph of her and her husband taken without their knowledge. The photograph had been used to illustrate an article about the trend amongst the very rich towards letting out their holiday homes. Caroline von Hannover sought injunctions against the publication of these photographs but were denied by the German courts on the basis that Von Hannover was a public figure and that the report could generate a discussion on a matter of general interest. Therefore, the photograph could legitimately be used to illustrate the article. The German courts also emphasised that the photograph itself did not intrude on the Von Hannover's privacy: it had not been taken in an intrusive manner.

Von Hannover complained to the European Court of Human Rights that the publication had violated her right to respect for private life. The European Court of Human Rights first recalled the relevant criteria for balancing the right to respect for private life against the right to freedom of expression: whether the publication concerned a

debate of general interest; how well known the person concerned was; the subject of the report; the prior conduct of the person concerned; the content, form and consequences of the publication and, in the case of photographs, the circumstances in which they were taken. The Court noted that the photograph had been used to illustrate an article on an issue of general interest (the trend among celebrities towards letting out their holiday homes). The Court also noted that the article itself did not contain information concerning the private life of the applicant or her husband, but focused on practical aspects relating to the villa and its letting. The Court considered that it could not be said that the article had merely been a pretext for publishing the photograph in question or that the connection between the article and the photograph had been contrived. The Court also pointed out that the applicant and her husband were to be regarded as public figures who could not claim protection of their private lives in the same way as individuals unknown to the public. Noting that the German courts had taken into consideration all the essential criteria, the Court therefore concluded that there had been no violation of the right to respect for private life.

- ***MGN Limited v. United Kingdom***, Application no. 39401/04, judgment of 18 January 2011: publication of photograph taken outside drug rehabilitation clinic violated right to respect for private life, but order to pay excessive legal costs of the claimant violated journalist's right to freedom of expression.

This case concerned the publication of a newspaper report on the supermodel, Naomi Campbell, and her treatment for drug addiction. The report was accompanied with photographs that had been taken secretly. Ms Campbell sued the newspaper concerned for breach of privacy, and won damages of a relatively modest £3,500. The newspaper was also ordered to pay Ms Campbell's legal costs, which were more than £1,000,000 and which included a "success fee" that her lawyers had charged. The newspaper appealed to the European Court.

The European Court held that the ruling by the English courts that the newspaper had violated Ms. Campbell's right to respect for private life did not violate the newspaper's right to freedom of expression. It considered that a balance had to be struck between the public interest in the publication of the articles and the photographs of Ms. Campbell and the need to protect her private life. The Court agreed with the reasoning of the English courts that while there was a public interest in the publication of the articles, because Ms. Campbell had herself spoken out against the use of drugs, there was no public interest in the publication of the photographs, which had been taken surreptitiously.

However, the Court held that the order to pay Ms Campbell's legal fees did violate the newspaper's right to freedom of expression: the amount was vastly disproportionate to the damages that had eventually been awarded, and had a strong chilling effect on other publications who would be reluctant to publish anything they might have to defend in court.

- ***Mosley v. the United Kingdom***, Application no. 48009/08, judgment of 10 May 2011: newspaper not required to notify in advance of publication of photographs that may violate right to respect for private life.

This case concerned the publication, on a newspaper website, of a video showing the president of the International Automobile Federation, Max Mosley, engaged in an orgy with prostitutes wearing what looked like prison uniforms and speaking in German accents. The newspaper website said that the orgy had a "nazi" theme. Mr Mosley

sued for violation of his right to respect for private life and was awarded damages. Mr Mosley subsequently complained to the European Court of Human Rights, arguing that the newspaper should have warned him that it was going to publish the story and arguing that its failure to do so violated his right to respect for private life. He asked the European Court to rule that whenever the media publish stories that potentially intrude on someone's privacy, they should be required to notify that person.

The European Court ruled that the publications in question had resulted in a flagrant and unjustified invasion of Mr. Mosley's private life. However, the Court did not agree that a legally binding pre-notification rule was required. The Court noted that a pre-notification requirement would impact on political reporting and serious journalism as well as "celebrity" journalism, and would therefore have a serious chilling effect on freedom of expression. It might even be seen as a form of censorship, particularly if there were fines or other serious sanctions for failing to notify people. The Court also noted that any pre-notification obligation would have to allow for an exception if the public interest were at stake, and that this was likely to be unworkable in practice. Therefore the Court concluded that a legally binding pre-notification requirement could not be justified under the European Convention on Human Rights.

- ***Verlagsgruppe News GmbH and Bobi v. Austria*****,** Application no. 59631/09, judgment of 4 December 2012: publication of photographs of someone who was not a public person violated right to privacy.

This concerned the publication of newspaper articles which reported allegations that the principal of a catholic seminary had been engaged in homosexual activities with some of his students. The article also reported a police raid on the seminary on suspicion that someone had downloaded child pornography from the Internet. According to the article, the existence of homosexual relations was well-known within the seminary and was even known to the bishop, who had tried to "hush up" the issue. Both articles were accompanied by photographs, including one taken at a party showing the principal with his hand on the crotch of a seminarian. The principal sued for defamation and invasion of privacy but lost. However, he obtained an injunction prohibiting the magazine from publishing further photographs of him.

The Court considered that what was at stake was not the reported allegations of homosexual relations, but rather the photographs accompanying the articles. It considered that while the articles concerned an issue of general public interest which the newspaper was entitled to report on, this did not automatically justify the publication of photographs. The Court considered furthermore that the principal had not been a 'public figure' prior to the publication of the articles; that the photographs that had been published were taken at a private party and as such were of an intrusive nature; and that the sanction imposed had been light. For these reasons, the injunction prohibiting the publication of further photographs did not violate the applicants' rights.

- ***Bohlen v. Germany and Von Hannover v. Germany***, Application nos. 53495/09 and 53649/09, 19 February 2015: use of names of celebrities in satirical advertisements did not violate right to respect for private life.

These cases concerned the use in tobacco advertising of the applicants' first names and of news items concerning them, without their consent. The first applicant, Dieter Bohlen, is a musician and producer. In 2003, passages in a book he had published had to be removed following court rulings. In October 2003, British American Tobacco (Germany) launched an advertising campaign referring to this, showing text which

included the applicant's first name and which had been partly crossed out using black ink. The second applicant is the husband of Princess Caroline of Monaco. In 1998 and 2000 he was involved in two violent incidents, one with a cameraman and the other with a discotheque manager, and was subsequently convicted of assault. In March 2000, British American Tobacco used these events in an advertisement which mentioned Mr von Hannover's first names and showed a picture of a crumpled cigarette packet. Bohlen and Von Hannover sought orders prohibiting the distribution of the advertisements in question, and the cigarette manufacturer complied immediately but refused to pay the €100,000 which the duo had demanded by way of licence payments for the use of their names. Following lengthy court proceedings, the Federal Court of Justice eventually held that despite their commercial nature, the ads had shaped public opinion; had not sought to exploit the applicants' good name; nor contained anything that was degrading to them. Bohler and Von Hannover complained to the European Court of Human Rights.

The Court held that the applicants' rights had not been violated. It held, first of all, that States have a broad 'margin of appreciation' as far as conflicts between the right to freedom of expression and protection of privacy are concerned, and that this margin was particularly wide with respect to the regulation of commercial speech such as the ads concerned. The Court went on to reiterate the relevant criteria laid down in its case-law for assessing the manner in which the domestic courts had balanced the right to respect for private life against the right to freedom of expression. These were: the contribution to a debate of general interest, the extent to which the person in question was in the public eye, the subject of the report, the prior conduct of the person concerned and the content, form and impact of the publication. Firstly, regarding the issue of general interest, the Court held that the advertisements had been apt to contribute to some degree to a debate of general interest as they had dealt in a satirical manner with events that had been the subject of public debate. Secondly, as to the extent to which the applicants had been in the public eye, the Court considered that they were already well known and therefore could not claim the same degree of protection of their private lives as persons who were unknown to the public at large. Thirdly, in the Court's view, the subject of the advertisements had been confined to specific events already known to the public, which had been covered in the media and were beyond dispute. Lastly, with regard to the content, form and impact of the advertisements, the Court noted that the image of the applicants that had been conveyed had not been degrading and that the indirect allusions made by the advertisements would have made it difficult to establish a connection with the events in question. The Court accepted in that regard that the use of a public figure's name in connection with a commercial product without his or her consent could raise issues under Article 8, especially where the product in question was not widely accepted socially. However, in this specific case the Court found it fitting to agree with the findings of the Federal Court of Justice, particularly in view of the humorous nature of the advertisements in question. Accordingly, the Court held that the Federal Court of Justice had struck a fair balance between freedom of expression and the right to respect for private life.

- ***Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland***, Application no. 931/13, judgment of 21 July 2015: limitations on publishing freely available tax data did not violate right to freedom of expression.

This concerned the publishers of a magazine which reported on taxation information, in particular on persons' taxable income and assets. In 2003, the publishers of the magazine started an SMS-service through which people could obtain tax information from a database which held the details of 1.2 million people. This constituted about

a third of the country's taxable population. This database had been compiled from publicly available information and had already been published by the magazine in 2002. The Finnish Data Protection Ombudsman brought administrative proceedings against the magazine arguing that the SMS service violated data protection law and in November 2009, the Data Protection Board prohibited the magazine from continuing the SMS service. Following several appeals, including to the European Court of Justice which had held that in principle the publication of publicly available tax data could constitute 'journalism', the Supreme Administrative Court held that providing the entire database could not be regarded as a 'journalistic activity'. It therefore ruled that this publication violated the right to privacy of the individuals whose tax data had been published. It ruled that the publication of smaller selections of data could be lawful. As a result of the ruling, the magazine published significantly reduced taxation data in the autumn of 2009 and has not appeared since then. The SMS-service wasshut down. The magazine complained to the European Court of Human Rights that its right to freedom of expression had been violated.

The European Court held that there had been no violation of the right to freedom of expression. One the one hand, the Court considered that taxation data was already a matter of public record in Finland, and that the magazine had received the information legally and directly from the tax authorities. It also considered that the information had been published accurately. The sole issue of concern to the Court was the extent of the data published. The Court reviewed the reasoning of the Finnish Supreme Administrative Court which had held that publishing an entire tax database of 1.2m people was not a 'journalistic activity' and that the 'journalism exception' to data privacy principles did not therefore apply. In its reasoning, the Finnish Supreme Administrative Court attached importance both to the applicant companies' right to freedom of expression as well as to the right to respect for private life of those taxpayers whose taxation information had been published but held that on balance, the right to privacy of the individuals concerned outweighed the freedom of expression rights of the company. The European Court of Human Rights found this reasoning 'convincing'. As regards the sanction imposed, the court considered that the companies could still publish taxation data – just not the entire database as a whole. While the Court acknowledged that the magazine had had to shut down because of this restriction, it regarded this as an economic decision taken by the publishers themselves; it did not regard the sanction as such disproportionate.

Judge Tsotsoria issued a dissenting judgment in which she criticises the Court for upholding an act of censorship, arguing that the states should not restrict the publication of data which is publicly available. She also criticises the Court for "the linking of journalistic activity to the extent of the information published"; put plainly, Judge Tsotsoria argues that the Court should not have said that the publication of an entire database does not constitute journalism.

- ***Ruusunen v. Finland****, Application* no. 73579/10, and ***Ojala and Etukeno Oy v. Finland***, Application no. 69939/10, judgment of 14 January 2014: book that contained intimate details of the relationship between a single mother and the Finnish prime minister violated right to privacy.

This concerned the publication of a book by a single mother who had had a relationship with Finland's prime minister, Matti Vanhanen (Ruusunen was the book's author; Ojala the publisher; and Etukeno Oy was the publishing company). The book, which was published whilst Vanhanen was still Prime Minister, detailed how their relationship had developed; their different lifestyles; Vanhanen's children; as well as details of

their sex life. Upon publication of the book, the public prosecutor brought charges for breaching the privacy of the prime minister. The Finnish courts agreed that the book's references to their sex life had unlawfully violated the Prime Minister's right to privacy and imposed a fine as well as a forfeit of part of the book's proceedings. The book's author and publishers appealed to the European Court of Human Rights.

The European Court held that there been no violation of the right to freedom of expression. It agreed that there was certainly a public interest in the subject matter of the book, stating that, "...the former Prime Minister had been a public figure at the time when the book was published. He was thus expected to tolerate a greater degree of public scrutiny which may have a negative impact upon his honour and reputation than a completely private person."

However, the Court disagreed that publication of sexual aspects of their relationship was in the public interest. Ruusunen had argued that inclusion of these details had been necessary since readers would be guessing if they had been left out. The European Court disagreed, noting that the Finnish courts had carried out a full balancing of the applicant's right to freedom of expression with the Prime Minister's right to privacy.

- ***Couderc and Hachette Filipacchi v. France***, Application no. 40454/07, judgment of 12 June 2014: privacy award against magazine for publishing article regarding the illegitimate son of the Prince of Monaco violated the right to freedom of expression.

This concerned a magazine, which had published an article about a woman who claimed that the reigning Prince of Monaco was the father of her son. The information came from the woman, who had contacted the media when the Prince would not acknowledge that he was the father. The article was accompanied with photographs of the Prince together with the child and was also published in a German magazine. An English newspaper had already reported on the story. The Prince sued for invasion of privacy and won damages of €50,000. The court also ordered details of the judgment to be printed in a full-page feature on the front cover of the magazine. The Prince subsequently admitted that the child was his.

The Prince also sued for invasion of privacy in the German courts, but his claim there was dismissed on the grounds that the public's right to be informed regarding a possible male heir to the throne of Monaco outweighed any privacy interests. The German courts also considered that it was for the child's mother and not for the Prince, who had not acknowledged paternity, to decide whether the disclosure of the child's existence was a private matter.

The European Court of Human Rights held that the judgment by the French courts violated the magazine's right to freedom of expression. It considered that the issue of a possible heir was a matter of public importance, and, like the German courts, it also held that the case was not simply one between the Prince and the magazine but also concerned the mother and her child, and the child's right to have his identity recognised. The mother had provided information to the press and had played a pivotal role in the publication of the article in question. The Court noted that the mother had a legitimate claim to publicity, particularly given that the Prince had not recognised the child, and the Prince should not be able to stop by claiming his own right to privacy. The photographs that accompanied the article had been taken with the Prince's consent, in the mother's apartment. Furthermore, the Court considered that because English and French magazines had also reported the story, the information could no longer be regarded as confidential. Finally, the Court took into consideration that no defamatory allegations had been made and that the Prince had not contested the truth of the issue – namely, that the child was his.

- ***Sousa Goucha v. Portugal,*** Application no. 70434/12, judgment of 22 March 2016: refusal to prosecute for joke about a homosexual celebrity referred to as a "female" did not violate the right to private life.

This concerned a well-known TV host who is gay and who had jokingly been included in a list of "best female television hosts" during a late night satirical TV show. He lodged a criminal complaint for defamation and insult against the TV production company, arguing that this joke had harmed his reputation as it had mixed his gender with his sexual orientation. The local courts dismissed his complaint and refused to prosecute the TV production company. The TV host complained to the European Court of Human Rights, arguing that the refusal to prosecute had been discriminatory and in violation of his right to reputation.

The European Court of Human Rights held that the TV host's right to reputation had not been violated. Article 8 of the Convention did apply to the case, because sexual orientation is a profound part of a person's identity. Furthermore, the Court held that even public persons have a "legitimate expectation" of protection and respect for their private life. However, noting that the joke had been satirical, the Court held that satire is a form of artistic expression and social commentary which aims to provoke and agitate. The Court reiterated that the joke had been about the TV host's behaviour and feminine way of expressing himself, rather than about him personally. The Court also considered that the applicant's sexual orientation was not a causal factor in the domestic courts' refusal to prosecute; there was nothing to suggest that the Portuguese authorities would have arrived at different decisions had the applicant not been gay.

- ***Bărbulescu v. Romania***, Application no. 61496/08, judgment of 12 January 2016: interception of electronic communications by employer did not violate right to respect for private life.

This concerned an individual who had been dismissed from his job for unauthorised use of email during work hours. He was a sales engineer and, at his employers' request, had set up a Yahoo Messenger account for the purpose of responding to clients' enquiries. In July 2007, he was notified that the use of his account had been monitored and that it showed he had been using the account for personal purposes. His contract was terminated for breach of the company's internal regulations that prohibited the use of company resources for personal purposes.

The European Court of Human Rights held that this did not violate his right to respect for private life. The Court did not consider it unreasonable for an employer to verify that employees were completing their professional tasks during working hours, and noted that the employer had accessed Mr Bărbulescu's account in the belief that it contained client-related communications. They had not intended to search for private communications, and Mr Bărbulescu had been able to raise his arguments related to the alleged breach of his private life and correspondence before the domestic courts. The domestic courts had used the transcript of his communications only to the extent that it proved that he had used the company's computer for his own private purposes during working hours and the identity of the people with whom he had communicated was not revealed.

4. DAMAGE AWARDS IN DEFAMATION AND PRIVACY CASES

The European Court of Human Rights has held that disproportionate awards of damages in defamation and privacy cases can violate the right to freedom of expression – even if what the media wrote was untrue and defamatory. Not only must there be a relationship of proportionality between the damage done by the defamatory remarks and the damages awarded, the court must also have regard to the impact of the award on the journalist or media outlet concerned. Finally, the court must take into account the wider 'chilling effect' of the damage award on the media. The European Court of Human Rights requires that rules relating to damages are clearly stated in domestic law.

The Committee of Ministers affirmed these principles in its 2004 Declaration on freedom of political debate in the media.

The following judgments indicate how the European Court applies these general principles.

- ***Tolstoy Miloslavsky v. the United Kingdom***, Application no. 18139/91, judgment of 13 July 1995: disproportionate defamation award, three times bigger than any award previously made, violated the right to freedom of expression.

This concerned a historian who had published a pamphlet accusing Lord Aldington of war crimes. Lord Aldington sued for libel and was awarded £1,500,000 in damages. This sum was three times greater than the largest amount previously awarded in a libel case. The European Court of Human Rights held that although the accusation was very grave, the amount of damages violated the right to freedom of expression of the historian. It stated that, as a rule, "an award of damages for defamation must bear a reasonable relationship of proportionality to the injury to reputation suffered." It noted that English law at the time did not require for such proportionality, nor did it provide for any safeguards to keep defamation awards within reasonable limits.

- ***Steel and Morris v. the United Kingdom***, Application no. 68416/01, judgment of 15 May 2005: defamation award was disproportionate when compared to the income of the defendants.

This concerned two individuals who had written and distributed a leaflet entitled "What's wrong with McDonald's?", which was critical of the fast food chain. McDonalds sued for defamation and won, after very long proceedings, damages of £40,000. McDonalds did not enforce the award and did not apply to have its legal costs, which were substantial, paid. The European Court of Human Rights considered the case and noted that the two earned very low incomes and had not been represented by lawyers. The Court concluded that this had placed the two at a considerable disadvantage, and that "[while the damages awarded were] relatively moderate by contemporary standards [they were] very substantial when compared to the modest incomes and resources of the ... applicants". The award of damages therefore constituted a violation of the right to freedom of expression.

- ***Koprivica v. Montenegro***, Application no. 41158/09, judgment of 22 November 2011: defamation award that was to be paid off in instalments each equalling half the applicant's pension violated the right to freedom of expression.

This concerned a complaint brought by the editor of a magazine, who had been convicted for defamation for an article which had reported, in 1994, that a number of journalists were to be tried for war crimes. The editor was ordered to pay €5,000, together with the magazine's publisher, which was to be paid in regular payments each of which amounted to half his pension. The European Court of Human Rights found that this violated the right to freedom of expression, stating that "the damages and costs awarded were very substantial when compared to the applicant's income at the time, being roughly twenty-five times greater than the applicant's pension [and were] very substantial even when compared to the highest incomes in the respondent State in general".

- ***Filipović v. Serbia***, Application no. 27935/05, judgment of 20 November 2007: defamation order totalling six months' salary was disproportionate and violated the right to freedom of expression.

This concerned a tax inspector who, at a public meeting, had alleged that a local mayor had embezzled public funds. He was found guilty of defamation and ordered to pay damages of 120,000 Serbian Dinars, which equalled six months' of his salary. The European Court held that this violated his right to freedom of expression, stating that the order had not been necessary in a democratic society.

- ***MGN Limited v. the United Kingdom***, Application no. 39401/04, judgment of 12 June 2012: order to pay legal fees as well as 'success fee' of more than £1m to claimant in privacy case violated right to freedom of expression.

This concerned a case of invasion of privacy brought by a model against a newspaper, for the publication of photographs that showed her outside a drug treatment centre. The newspaper had lost the privacy case and had been ordered to pay £3,500 in damages, as well as legal costs totalling more than £1m. The European Court held that this violated the right to freedom of expression, stating that "the requirement that the applicant pay success fees to the claimant was disproportionate having regard to the legitimate aims sought to be achieved and exceeded even the broad margin of appreciation accorded to the Government in such matters."

- ***Krone Verlag GmbH v. Austria***, Application no. 27306/07, judgment of 19 June 2012: order that a newspaper company pay €130,000 in damages for intrusion of privacy did not violate the right to freedom of expression.

This concerned compensation proceedings brought by a mother and child against two publishing companies for their newspapers' reports on the dispute between the parents over custody. The reports revealed the child's identity and showed photographs from which he could be recognised, and were found to constitute an interference with the child's right to respect for his private life. The applicant was ordered to pay €130,000 in damages, in respect of a series of 13 articles, and complained to the European Court of Human Rights that this was disproportionate and violated the right to freedom of expression. The Court held that it did not. It stated that the amount was in line with

domestic law, which explicitly required that damages should not endanger the economic existence of the media owner. The Court held that this constituted a sufficient safeguard and that the amount ordered was not disproportionate in the particular circumstances of the case.

- ***Independent News and Media and Independent Newspapers v. Ireland*,** Application no. 55120/00, judgment of 16 June 2005: order to pay €381,000 in defamation damages did not violate right to freedom of expression taking into account safeguards in domestic law.

This concerned an application brought by a newspaper company which had been convicted of defamation and ordered to pay €381,000, an award which was three times higher than any previous award for defamation made in Ireland. The European Court considered that this did not violate the right to freedom of expression. It noted that "as matter of principle, unpredictably large damages' awards in libel cases are considered capable of having [a chilling effect on the press] and therefore require the most careful scrutiny". However, bearing in mind that the libel was serious and grave, and noting that appeal courts had considered the amount to be proportionate, the Court held that the order did not violate the right to freedom of expression.

- ***Tešić v. Serbia*,** Application nos. 4678/07 and 50591/12, judgment of 11 February 2014: defamation award that constituted the majority of the applicant's income violated the right to freedom of expression.

This concerned a pensioner who had been found guilty of defaming her lawyer and who had been ordered to pay him the equivalent of approximately €4,900 on compensation and costs. The Municipal Court ordered two thirds of the applicant's pension to be transferred to the lawyer's bank account each month, until the sum awarded had been paid in full. This left the applicant approximately €60 a month to live on.

The European Court of Human Rights held that the order violated the right to freedom of expression. The Court considered that while the applicant had not been able to prove the truth of the defamatory statement, it was not a gratuitous personal attack. The statement had concerned the lawyer's competence, and the Court recalled that given the role lawyers play in the proper administration of justice, this was an issue of public concern. The Court furthermore considered that the domestic courts had applied the maximum possible penalty on the pensioner and had ordered her to repay the maximum possible monthly contribution. This was a particularly precarious situation for an elderly person suffering from a number of serious illnesses. Recalling its previous decisions emphasising that defamation awards must take into account the personal circumstances of the person concerned, the Court held that this violated the applicant's right to freedom of expression.

- ***Morar v. Romania***, Application no. 25217/06, judgment of 7 July 2015 criminal defamation conviction and large damage award violated right to freedom of expression).

This concerned a Romanian journalist who had been convicted of criminal defamation for a series of articles about a political adviser to a presidential candidate. The journalist had insinuated that the adviser had worked as a spy and a money launderer under the communist-era secret service, the Securitate. The political adviser lodged a complaint

and Mr. Morar was sentenced to a suspended fine and also ordered to pay damages and costs totalling US$26,000.

The European Court of Human Rights held that this conviction violated his right to freedom of expression. It noted that the reports in question concerned subjects of public interest, namely the strategies of different candidates in presidential elections and in particular possible links of the candidates to the communist-era secret police. The Court considered that the political adviser to a presidential candidate, though not a politician himself, was to be regarded as a public figure and should therefore tolerate greater criticism of his actions than an ordinary individual. The Court furthermore held that the alleged link to the secret service was based on some evidence and that, given the difficulties associated with accessing secret service files, this could not be proven completely. Finally, the Court held that the amount of damages was particularly high; it represented more than fifty times the amount of the average wage at the time, in addition to the very high amount of legal costs that the applicant had to repay.

5. ACCESS TO INFORMATION

The European Court has held that access to information is a protected right under the Convention if the information requested is necessary for the fulfilment of another protected right. For journalists, whose day-to-day job entails the exercise of the right to freedom of expression, this means that they have a right of access to the information needed for their reporting.

The European Court's leading judgments on this are the following:

– *Kenedi v. Hungary*, application no. 31475/05, judgment of 26 May 2009,

and

– *Társaság a Szabadságjogokért v. Hungary*, no. 37374/05, judgment of 14 April 2009.

It should be noted that these judgments concern the right to information held by public bodies other than private information. Access to such information is protected as part of the right to respect for private life, under Article 8 of the Convention.

The UN Human Rights Committee, the body of independent experts that monitors implementation of the International Covenant on Civil and Political Rights (ICCPR, which Montenegro has ratified) has adopted a broader interpretation of the right of access to information, holding that such a right is protected per se under Article 19 ICCPR – whether or not the information is needed for the enforcement or fulfilment of another right.

Several other international treaties also protect a right of access to information, including treaties on the environment and anti-corruption. The Council of Europe has recently adopted a Convention on Access to Official Documents. This has not yet entered into force.

The following paragraphs highlight the main ECHR cases establishing a right of access to information and summarise other international law.

- ***Társaság a Szabadságjogokért v. Hungary***, Application no. 37374/05, judgment of 14 April 2009: refusal to provide access to state-held information violated right to freedom of expression.

This concerned a request by the Hungarian Civil Liberties Union for access to court documents which had been denied by the domestic courts. The European Court of Human Rights held that Article 10 ECHR protected a right of access to information, stating that denying access was a form of indirect censorship. It reasoned that gathering information was an inherent journalistic activity and so restrictions on it interfered with the right to freedom of expression: "the law cannot allow arbitrary restrictions which may become a form of indirect censorship should the authorities create obstacles to the gathering of information. For example, the latter activity is an essential preparatory step in journalism and is an inherent, protected part of press freedom." The Court emphasised that the applicant had sought the information with a specific goal of publishing: "given that the applicant's intention was to impart to the public the information gathered from the constitutional complaint in question, and thereby

to contribute to the public debate concerning legislation on drug-related offences, its right to impart information was clearly impaired."

- ***Kenedi v. Hungary,*** Application no. 31475/05, judgment of 26 May 2009: access to information is essential part of the right to freedom of expression.

The applicant, a historian, asked the Ministry of the Interior for access to certain documents as he wished to publish a study on the functioning of the Hungarian State Security Service in the 1960s. After his request had been refused on the grounds that the documents were classified as State secrets the applicant obtained an order from a regional court for unrestricted access after successfully arguing that it was necessary for the purposes of his ongoing historical research. Following the failure of its appeal to the Supreme Court, the Ministry offered access on condition that the applicant signed a confidentiality undertaking. The applicant refused and instituted enforcement proceedings in October 2000. However, following repeated court applications and appeals by the Ministry on various grounds, the applicant had still not been given unrestricted access to all the documents concerned some eight and a half years later.

This concerned a request for access to information by a historian, which had been denied by the domestic courts and authorities. The European Court held that the denial of access constituted a clear interference with the right to freedom of expression, stating that "access to original documentary sources for legitimate historical research [is] an essential element of the exercise of the applicant's right to freedom of expression". The denial of access could not be justified as being "necessary in a democratic society" and so constituted a violation of the right to freedom of expression.

- ***Youth Initiative for Human Rights v. Serbia,*** Application no. 48135/06/07, judgment of 25 June 2013: access to information regarding surveillance conducted by security services.

This concerned an application by an NGO which had requested the Serbian intelligence agency (Bezbednosno-informativna agencija) to inform it how many people had been subjected to electronic surveillance in 2005. The agency refused, but the country's Information Commissioner (Poverenik za informacije od javnog značaja i zaštitu podataka o ličnosti), ordered it to release the information. The agency appealed, but the Supreme Court of Serbia dismissed its appeal. Then, the intelligence agency notified the applicant that it did not hold the information requested.

The European Court of Human Rights held that the agency's actions violated the applicant's right to freedom of expression. It stated that the notion of "freedom to receive information" includes a right of access to information; and that the activities of the NGO concerned a matter of public interest. It noted that the applicant requested the intelligence agency to provide it with factual information concerning the use of electronic surveillance measures which the agency had first refused to disclose and then claimed it did not have. The Court held that the agency's statement that it did not have the information was "unpersuasive" and concluded that the intelligence agency's refusal was in defiance of domestic law and tantamount to arbitrariness.

The Court ordered Serbia to ensure that the intelligence agency of Serbia provide the applicant with the information requested within three months.

In a joint concurring opinion, Judges Sajó and Vučinić emphasised the need to interpret Article 10 in conformity with developments in international law regarding freedom of information, which entails a right of access to information held by public bodies. They

referred to the Court's recent case law on access to information (*Gillberg v. Sweden* no. 41723/06, § 74, 3 April 2012), to other legal developments including the adoption of the Council of Europe Convention on Access to Official Documents (2009, not yet in force), and highlighted three implications of this judgment that the Court should address. First, they stated that the distinction between 'journalism' and other members of society was fast disappearing, particularly in view of the development of the internet. Government should be open and transparent with respect to all citizens. Second, they stated that Governments should take active steps to ensure the provision of information to citizens. Third, they stated that there should not be a more restrictive regime for access to personal data than existed for access to information for the general public.

- ***Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirtschaftlichen Grundbesitzes v. Austria***, Application no. 39534/07, judgment of 28 November 2013: refusal to provide access to decisions of government commission violated right of access to information.

This concerned an NGO which had requested that a regional commission provide access to documents concerning decisions on agricultural and forest land transactions. The NGO requested access to all decision from 2000-2005, in anonymised form, and indicated that it was willing to pay for the costs of this. The request was refused and the refusal was upheld by the courts. The NGO then complained to the European Court of Human Rights that the refusal of access to information violated its right to freedom of expression and to receive information.

The Court noted that the right of access to information was recognised as a right under the European Convention on Human Rights, particularly when the information being requested related to matters of public interest. The Court considered that the refusal had been unconditional, although the NGO had proposed to reimburse the costs arising from the production and mailing of the requested copies. Moreover, the Court found it striking that none of the authority's decisions were being published, for example in an electronic database. Consequently, much of the difficulty anticipated by the Commission, which would result from providing the association with copies of numerous decisions, had been caused by its own choice not to publish any of its decisions. The Court further noted that the applicant association received anonymised copies of the equivalent decisions from other Austrian regions without any difficulty. Therefore, the Court found a violation of the right to freedom of expression.

- ***Roşiianu v. Romania***, Application no. 27329/06, judgment of 24 June 2014: refusal by a mayor to provide information to journalist violated right to freedom of expression.

This concerned the refusal by a mayor to disclose information about the use of public money to a journalist. The mayor had also refused to comply with court decisions ordering him to hand over the information requested, and had instead invited the journalist to come to the town hall to make photocopies of thousands of pages of documents himself.

The Court held that by refusing to comply with a court order, the mayor had deprived the applicant of effective access to a court. The Court considered that there had not been any suggestion by the Romanian government that the interference in the journalist's right had been prescribed by law or that it pursued a legitimate aim. The Court emphasised that the journalist had made the request as part of his investigations on a matter of public importance. Given that the journalist's intention had been to commu-

nicate the information to the public and thereby to contribute to the public debate on good public governance, his right to impart information had clearly been impaired. The Court held that the invitation by the mayor to come and photocopy the documents could not possibly amount to execution of a judicial decision ordering disclosure of information of a public nature.

- ***Guseva v. Bulgaria***, Application no. 6987/07, judgment of 17 February 2015: refusal to release information on animal rights violated right to freedom of expression.

This concerned a request for access to information from a local mayor. The applicant, an animal rights activist, had made several requests for information on the treatment of stray animals. Despite obtaining court orders for the release of the information, the mayor's office had refused to provide it.

The European Court held that the public has a right to receive information of general interest. Its case-law in this field has been developed in relation to press freedom, the purpose of which is to impart information and ideas on such matters. Furthermore, the Court recalled that it has held that non-governmental organisations, like the press, may also be characterised as social "watchdogs"; and that their activities warrant similar protection to that afforded to the press. The information requested in this case was of public interest and had been requested in order to contribute to public debate on the topic of animal rights. The failure to release the information therefore constituted an interference with the right to freedom of expression which, in view of the domestic court orders for the disclosure, had no legal basis. The Court also observed that under national law, there was no clear time-frame for the release of information ordered by the courts; this was left to the good will of the administrative body responsible for the implementation of the judgment. The Court found that this created unpredictability as to the likely time of enforcement, which in itself was a violation of the right to freedom of expression.

6. PROTECTION OF JOURNALISTIC SOURCES

The European Court of Human Rights has held that the protection of journalists' sources and journalistic material more broadly is a key aspect of the right to freedom of expression, without which journalists would not be able to fulfil their role as 'watchdog' of democratic society. As for the protection of the whistleblowers, the lack of protection of the identity of journalists' sources would have a terrifying effect on the potential sources to help inform the public and achieve justice. The use of anonymous sources is crucial for reporting on issues of public interest, with which the public otherwise would not be able to be informed.

Laws should establish clear rules and procedures regarding the protection of the secrecy of sources, that is, the secrecy of journalistic communications and materials.

The Montenegrin Media Law of 2002 stipulates the protection of sources in an absolute way: "A journalist and other persons who, in the course of gathering, editing or publicising programme contents, obtain information that could indicate the identity of the source, shall not be obliged to disclose to the legislative, judiciary or executive authority or any other natural or legal person the source of information that wants to remain unknown" (Article 21, para. 3). However, the European Court of Human Rights, beginning with the *Goodwin* judgment (in which for the first time dealt with this topic), prescribes the protection of journalistic sources in principle, except when their disclosure is "justified by the public interest", which would be, for example, the prevention of crime.

- ***Goodwin v. United Kingdom***, Application no. 17488/90, judgment of 27 March 1996: journalists' sources must be protected in order to be encouraged to assist journalists in informing the public on issues of public interest.

The applicant, a trainee journalist in the magazine "Engineer", contacted a source who gave him information about the company, saying that the company was seeking a loan in the amount of £ 5m, and that financial problems incurred as a result of the expected loss for the current year. The applicant invited the company to confirm these facts and requested a comment. Because they thought that this information came from the draft of a confidential corporate plan, one copy of which had gone missing, the company requested and received a provisional measure from the High Court prohibiting the publication of the disputed article. The company subsequently issued a warrant from the court ordering the applicant to disclose his notes, "in the interests of justice", which would reveal the identity of the source and enable the company to initiate the proceedings in order to restore the missing plan and enable the claim for compensation for costs to which it had been put. The applicant refused to disclose his source and was fined £ 5,000 for contempt. The journalist filed an application with the European Court of Human Rights for violating the right to freedom of expression.

In this landmark case, the European Court of Human Rights found that a request for disclosure of a confidential source in a journalistic context was an impermissible violation of Article 10 of the European Convention on Human Rights. The applicant was a trainee journalist who received sensitive information regarding the financial state of a company which appeared to come from a confidential corporate plan, one copy of which had gone missing. The court found that injunctions to prevent the publication

of the information could be considered "necessary in a democratic society" but disclosure of the source of said information was unnecessary. The Court also stated that "protection of journalistic sources is one of the basic conditions for press freedom. .... 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 be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest."

- ***Nordisk Film & TV A/S v. Denmark,*** Application no. 40485/02, judment of 8 December 2005 (decision on admissibility).

This concerned a court order requiring a television company to hand over to the police unbroadcast footage of a documentary into a paedophile ring. The footage had been obtained by a journalist who had gone undercover and, for the period of a year, posed as a member of "The Paedophile Association". He befriended two other members who made incriminating statements regarding their involvement in paedophilia in Denmark and India. Following the broadcast, during which the two had had their identities disguised, one of the two was arrested by police, who had already been investigating his activities and had been able to identify him from the broadcast despite the disguise. The police also investigated the other member and requested disclosure of footage that had not been broadcast. The supreme court eventually ordered the television company to disclose the footage; the television company lodged a complaint with the European Court alleging that the order violated its right to freedom of expression. The police eventually decided to discontinue its investigation against one of the two.

The European Court dismissed the application as manifestly ill-founded. The Court found that the case did not concern the question of journalistic sources, but rather research material: it considered that the individuals whom the journalist had recorded had not been aware that they had been speaking with a journalist, and so could not be considered as sources of journalistic information in the traditional sense. The Court held that while the compulsory hand-over of journalistic research material was an interference with the right to freedom of expression, each case should be regarded on its own facts. In this case, the degree of protection afforded to the company under the right to freedom of expression did not reach the same level as that afforded to journalists, when it comes to their right to keep their sources confidential. The Court elaborated that the protection of journalists' sources is of a dual nature, protecting not just the journalist but also the source who has provided the information. The Court considered furthermore that the order had been proportionate in relation to the aim pursued, the investigation of the serious crime of child abuse.

- ***Ressiot and others v. France***, Application nos. 15054/07 and 15066/07, judgment of 28 June 2012: search of newspaper offices violated the right to freedom of expression.

The applicants in this case were journalists employed at the French newspapers L'Equipe and Le Point. In 2004, Le Point published an article reporting on a judicial investigation into allegations of doping among members of a professional cycling team. The article reproduced whole passages from records of transcripts of recorded telephone con-

versations made in the course of the investigation carried out by the French police. A follow-up article divulged a list of illicit substances found during a search at the home of a former professional cyclist. The French police opened an investigation into how the journalists had obtained these materials. Two months later, L'Equipe published a series of articles on the same subject, reproducing excerpts from official records and procedural documents. The cycling team subsequently launched a criminal complaint for breach of confidence. Following preliminary judicial proceedings, the French public prosecutor ordered a search of the offices of the two newspapers to uncover traces of the leaked documents.

In 2005, the investigating judge transferred the file to the public prosecutor to prepare the investigation of the journalists for using information obtained through a breach of the confidentiality of a judicial investigation. Several months later, the judge declared in an interview with another newspaper that the case had not been not a priority case, that he had not had enough police officers to assist him and that technical errors had been made. Subsequently, the journalists concerned requested that all the material relating to the search carried out at the newspapers' be declared null and void, together with all the materials relating to the search of the journalists' homes and the list of their telephone calls that had been placed under seal.

Following lengthy proceedings, the French courts eventually held that while the materials had been obtained as a result of a breach of confidence, the journalists themselves had not committed an offence in publishing the materials. Furthermore, the French courts found that while the journalists should not have been placed under surveillance and their phone calls should not have been intercepted, the search and seizure of their offices had been legitimate. The journalists complained to the European Court of Human Rights.

The European Court held that the protection of journalistic sources was one of the cornerstones of media freedom. Without such protection, sources might be deterred from assisting the press in informing the public. As a result the vital public-watchdog role of the press might be undermined and the ability of the press to provide accurate and reliable information might be adversely affected.

The Court recalled some of its earlier judgments, reiterating the importance of the media's role in the area of criminal justice. The Court also referred to a Recommendation by the Committee of Ministers of the Council of Europe on the provision of information through the media in relation to criminal proceedings. It stressed the importance of media reporting in informing the public on criminal proceedings and ensuring public scrutiny of the functioning of the criminal justice system.

The Court went on to state that interference with the confidentiality of journalistic sources could only be justified by an overriding requirement in the public interest. It noted that the authorities had not taken any action against the journalists until more than a year after the publication of the articles. It noted that the sole aim behind the searches and the interception of the journalists' phone calls had been to identify the source of the information.

The Court pointed out that the right of journalists not to disclose their sources could not be considered a mere privilege to be granted or taken away depending on the lawfulness or unlawfulness of their sources, but was part and parcel of the right to information. The seizure and placing under seal of the lists of the telephone calls of two of the journalists, and the searches carried out at their homes as well as at the offices of the two newspapers had been allowed by the investigation division without any evidence showing the existence of an overriding social need.

The Court concluded that the Government had not shown that a fair balance had been

struck between the various interests involved. Even if the reasons given were relevant, the Court considered that they did not suffice to justify the searches and seizures carried out. The means used were not reasonably proportionate to the legitimate aims pursued having regard to the interest of a democratic society in ensuring and maintaining the freedom of the press.

The Court therefore held that the actions taken by the French police violated the right to freedom of expression of the journalists.

- ***Martin and Others v. France***, Application no. 30002/08, judgment of 2 April 2012: search of newspaper offices violated the right to freedom of expression.

The applicants in this case were journalists at the French newspaper, *Midi Libre*. In 2005, they published an article reporting that the Regional Audit Office of the French region of Languedoc-Roussillon was critical of the management of region. In their article, they published parts of the draft report, even though this was still confidential. A complaint was lodged for breach of professional secrecy and the handling, by the journalists, of confidential material. Although the case has come to the European Court of Human Rights for the search of newspaper editions, the court's comments on disclosure of confidential information are of great importance. The Court gave the following explanation:

> "The applicants, journalists, had published ... parts of the draft report of the Regional Auditor Court ... the articles contain mainly information on the management of public funds by elected officials ... The topic was undoubtedly of public interest to the local community and thereof the applicants had the right to inform the public ... the controversial texts were in the context of a public debate about the interest of the local population, which has the right to be informed ... The role of investigative journalism is precisely to inform and alert the public particularly of bad news, as soon as the information came into their possession ... The journalists had mentioned on the first page of the newspaper that it was a 'preliminary report ... about the ongoing investigation' ... In such circumstances, the Court considers that the applicants ... have shown good faith and respect for the ethics of their profession."

- ***Telegraaf Media Nederland Landelijke Media B.V. and Others v. The Netherlands***, application no. 39315/06, judgment of 22 November 2012: interception of journalists' phone calls violated right to freedom of expression.

The applicants, a Dutch newspaper and two of its journalists, had published articles about investigations by the AIVD (Dutch secret service) which suggesting that they had obtained highly secret documents that had become available in the criminal circuit of Amsterdam. The Dutch courts ordered the newspaper to surrender these documents. Separately, the journalist applicants brought civil proceedings against the State claiming that their phones had been tapped. The applicants appealed both issues to the European Court of Human Rights.

The European Court considered the matters jointly under Articles 8 (protecting privacy) and 10 (protecting the right to freedom of expression) of the Convention and found a violation of both in relation to the interception of communications. The Court found that the AIVD had used its special powers (to intercept communications) to circumvent the protection of a journalistic source. The use of these special powers had been authorised without prior review by an independent body with the power to prevent or

terminate it; and judicial review would have been unable to restore the confidentiality of the journalists' sources once it had been destroyed. The Court therefore concluded that there had been a violation of Articles 8 and 10 as the law had not provided appropriate safeguards in respect of the powers of surveillance used.

With regard to the order to surrender documents, the Court found that the need to identify the AIVD official(s) who had supplied the secret documents to the applicants had not justified the surrender order. The person(s) in question could have been found simply by studying the contents of the documents and identifying the officials who had had access to them. Further, while the Court accepted that it had been legitimate for the AIVD to check whether all documents taken had been withdrawn from circulation, it had not been sufficient to justify the disclosure of the applicant's journalistic source. The Court noted in that connection that this withdrawal could no longer prevent the information which they contained from falling into the wrong hands in any case, as it had probably long been known to persons described by the parties as criminals. The actual handover of the documents taken had not been necessary as visual inspection to verify that they were complete, followed by their destruction, would have sufficed.

- ***Szabó and Vissy v. Hungary***, Application no. 37138/14, judgment of 12 January 2016: legislation providing broad powers of surveillance without adequate safeguards against abuse violated the right of privacy.

This was an application by two individuals who worked for an NGO that was frequently critical of the Hungarian government. They complained that under new legislation introduced in 2011, a special police task force was empowered to conduct secret house searches, electronic surveillance and intercept mail. They filed a constitutional complaint which was dismissed, and the applicants complained to the European Court of Human Rights arguing that the legislation violated their right to privacy.

The European Court of Human Rights held that the legislation violated the right to respect for private life. It held that it was clear that the applicants belonged to a targeted group, since they worked for an NGO that was critical of the government. It was likely that the applicants might have been targeted because of their affiliation with a watchdog NGO, and the Court emphasised that as "staff members of a watchdog organisation, whose activities have previously been found similar, in some ways, to those of journalists … any fear of being subjected to secret surveillance might have an impact on [their] activities". The Court ruled that the legislation failed to provide safeguards which were sufficiently precise, effective and comprehensive in as far as the ordering, execution and potential redressing of surveillance measures were concerned. The Court was particularly critical that under the legislation, virtually any person in Hungary could be subjected to secret surveillance, because the legislation failed to describe the categories of persons who, in practice, might have their communications intercepted. The Court also criticized the legislation for failing to limit the duration of surveillance measures, as well as the fact that there was no judicial supervision. As regards accountability, the Court noted that individuals affected by surveillance had no redress whatsoever and the bi-annual reports to parliament were secret. This was not sufficient to provide adequate safeguards against abuse of the powers.

- ***Saint Paul SA v. Luxembourg***, Application no. 26419/10, judgment of 18 April 2013: search of premises of media company breached right to freedom of expression and right to privacy.

This concerned a newspaper which had published an article about families losing custody of their children. The article was signed by "Domingos Martins", but this name did not appear on the list of Luxembourg press council journalists, although there was a journalist named "Alberto De Araujo Domingos Martins". A defamation complaint was made and a criminal investigation was opened. In March 2009 a search warrant was issued to obtain documents in relation to these offences, including in relation to the identification of the author of the article.

The European Court of Human Rights held that the search warrant violated the right to privacy as well as the right to freedom of expression. It stated that Article 8 of the European Convention on Human Rights protects privacy not only of individuals, but extends also to offices and business premises. It considered that the stated purpose of the search – to identify the author of the article – was questionable: the author of the article was easily identifiable. The Court also considered that there was a real danger that the search would be used to obtain information about the journalist's sources. This was in violation of the right to freedom of expression.

- ***Nagla v. Latvia***, Application no. 73469/10, judgment of 11 July 2013: search of journalist's home and seizure of laptop and other materials violated right to freedom of expression.

This concerned an application by a TV journalist who had reported on vulnerabilities in the security of one of the databases maintained by the national revenue service. She had obtained the information through an anonymous source and had immediately reported her concerns to the revenue service. Several months later, the police searched her house and seized a number of materials, including computer hard drives. The search was retrospectively approved by a judge.

The European Court of Human Rights held that the search of her house and seizure of equipment had violated the right to freedom of expression, which protected the confidentiality of sources. It noted that although the search took place three months after she had first reported the flaw, the police had utilised an 'urgent' procedure under which no prior judicial approval needed to be sought. The search had encompassed a wide range of items, and the national courts had provided no justification for either the breadth of the search or the use of the 'urgent' procedure.

7. PUBLICATION OF CONFIDENTIAL MATERIALS

The leading European Court of Human Rights decisions on the publication by journalists of confidential materials are the Grand Chamber judgments in the cases of *Stoll v Switzerland*, *Pasko v. Russia*, *Fressoz and Roire v. France* and, as concerns the liability of civil servants for 'whistleblowing' or leaking material to the press, *Guja v. Moldova*. The recent decision in the case of *Martin v. France* helps to better understand the Court's view, as well some older judgments such as *Fressoz and Roire v. France* (Grand Chamber, Application no. 29183/95, 1999) and *Goodwin v. the United Kingdom* (27 March 1996).

The basic principle established by the Court is as follows:

> "Press freedom assumes even greater importance in circumstances in which State activities and decisions escape democratic or judicial scrutiny on account of their confidential or secret nature. The conviction of a journalist for disclosing information considered to be confidential or secret may discourage those working in the media from informing the public on matters of public interest. As a result the press may no longer be able to play its vital role as "public watchdog" and the ability of the press to provide accurate and reliable information may be adversely affected..." (*Stoll v. Switzerland*, par. 39, and reaffirming Goodwin v. UK, par. 39)

This does not, however, mean that the media have 'carte blanche' to publish confidential materials. The Court has clarified that a number of further factors need to be taken into account: in particular, the nature of the interests at stake; and whether or not the journalist behaved ethically and professionally.

The following judgments illustrate how these principles are applied in practice.

- ***Stoll v. Switzerland***, Application no. 69698/01, judgment of 10 December 2007 (Grand Chamber): fine for the sensationalised and partial publication of confidential materials violated the right to freedom of expression.

This concerned a journalist who had been sentenced to a fine for publishing a confidential report by the Swiss ambassador to the United States relating to the strategy to be adopted by the Swiss Government in the negotiations between, among others, the World Jewish Congress and Swiss banks regarding compensation due to Holocaust victims for unclaimed deposited assets in Swiss bank accounts.

The Grand Chamber of the European Court of Human Rights held that in principle, the right to freedom of expression protected the publication of confidential material, when publication serves the public interest. However, it considered that the disclosure of the extracts from the ambassador's report had been liable to have negative repercussions on the negotiations in which Switzerland was engaged, particularly because of the highly sensationalist way in which the articles accompanying the disclosure had been written. The Court also noted that as a journalist the applicant should have known that the disclosure of the report was a criminal offence. Therefore, and also considering the relatively light fine that had been imposed, the Court did not find that the sentence violated the journalist's right to freedom of expression.

It should be noted that five (out of seventeen) judges dissented, considering that the majority of the court had focused unnecessarily on the sensationalist nature of the article and not enough on the serious issue of public interest that the article concerned.

- ***Martin and others v. France***, Application no. 30002/08, judgment of 12 April 2012: publication by journalists of draft official report on the mismanagement of funds was of public interest.

This concerned journalists at the French newspaper, *Midi Libre*. In 2005, they published an article reporting that the Regional Audit Office of the French region of Languedoc-Roussillon was critical of the management of region. In their article, they published parts of the draft report, even though this was still confidential. A complaint was lodged for breach of professional secrecy and the handling, by the journalists, of confidential material. The case went to the European Court of Human Rights on a related search that had been carried out at the journalists' offices, but it is worth noting the European Court's remarks on the publication of confidential material. The Court reasoned as follows (the judgment is available only in French and the following is an unofficial English translation):

> "[T]he applicants, journalists, published ... excerpts from a draft report of the Regional Court of Auditors ... [T]he articles in question contained information mainly on the management of public funds by some local politicians and public officials ... This was definitely a topic of general interest to the local community, that the applicants had the right to inform the public through the press ... the impugned articles were within the context of a discussion of interest to the local population [which] had the right to be informed ... [T]he role of investigative journalists is precisely to inform and alert the public to undesirable phenomena in society, as soon as relevant information comes into their possession ... [T]he journalists had reported on the front page of the newspaper that this was a "preliminary report ... concerning an ongoing investigation" ... In these circumstances, the Court considers that the applicants ... demonstrated their good faith and concern for the respect of ethics of their profession."

- ***Pasko v. Russia***, Application no. 69519/01, judgment of 22 October 2009: liability for whistleblower in the Russian navy charged with espionage for collecting military documents did not violate the right to freedom of expression.

This concerns the liability of a journalist in the service of the Russian navy, who had reported on environmental pollution, nuclear incidents and other issues related to the Russian Pacific Fleet. He also freelanced for a Japanese TV station and a newspaper. Upon his return from a trip to Japan he was arrested and charged with espionage for having collected secret information with the intention of transferring it to a foreign national. He was convicted and sentenced to imprisonment in 2001.

The European Court held that his conviction did not violate the right to freedom of expression: as a serving military officer, he had been bound by an obligation of confidentiality. The documents he had collected contained information of a military nature which could have caused considerable damage to national security. Finally, the Court took into account that the applicant had been convicted as a serving military officer, and not as a journalist.

- ***Guja v. Moldova***, Application no. 14277/04, judgment of 12 February 2008 (Grand Chamber): dismissal for leaking information about abuse of power by police violated the right to freedom of expression.

This concerned the head of the Press Department of the Moldovan Prosecutor General's office, who had leaked two letters to the media concerning the abuse of power by police and other law enforcement agencies. He was dismissed from his job as a result.

The Grand Chamber of the Court held that in this case, leaking information to a newspaper could be justified because the information concerned the pressure exerted by a senior politician on pending criminal cases. The Court also noted that the Public Prosecutor had given the impression that he had succumbed to political pressure. The Court considered that the public had a legitimate interest in being informed on these matters, which fell within the scope of political debate. The public interest in being informed on wrongdoing within the Prosecutor's Office outweighed the interest in maintaining public confidence in the Prosecutor General's Office. The Court also noted that the applicant had been given a very harsh sanction (dismissal) which had had negative repercussions on his career and would also discourage others from reporting any misconduct. Guja's dismissal therefore violated his right to freedom of expression.

- ***Ricci v. Italy***, Application no. 30210/06, judgment of 8 October 2013: suspended imprisonment and damage award for broadcasting confidential information violated right to freedom of expression.

This concerned the producer and presenter of a satirical TV programme who had obtained confidential tapes of a programme from another broadcaster, RAI, which showed a heated argument between two guests in a TV show. He had decided to show the tape to expose how RAI deliberately provoked arguments between guests as a way of entertainment. Both civil and criminal proceedings were started against the applicant. In the civil proceedings, RAI sued for disclosure of confidential information and won a €30,000 damage award. A lower court had also imposed a suspended prison sentence in the criminal proceedings, but this was overturned on appeal on technical grounds.

The European Court of Human Rights held that the damages award violated the right to freedom of expression. It considered that the subject of Mr Ricci's programme was an issue of public interest – namely the "real nature" of television in modern society. However, the Court disagreed that it had been necessary for the applicant to broadcast confidential information; he could have started a debate on this issue in other ways. The applicant should have been aware that broadcasting the tape would breach confidentiality and he had therefore violated journalistic ethics. The conviction in itself therefore did not violate the right to freedom of expression. However, the Court found that the sanction of imprisonment, even if overturned on appeal, and the award of financial damages was disproportionate.

Joint declaration of the UN, the OAS (Organization of American States) and the ACHPR (African Commission on Human and Peoples' Rights)

It may be noted that the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR Special Rapporteur on Freedom of Expression have adopted a standard on this as well, stating that:

Journalists should not be held liable for publishing classified or confidential information where they have not themselves committed a wrong in obtaining it. See their Joint Declaration of 19 December 2006: http://merlin.obs.coe.int/iris/2007/2/article101.en.html.

8. PUBLICATION OF MATERIAL FROM CRIMINAL INVESTIGATIONS AND PROSECUTIONS

Journalists sometimes obtain material from criminal investigations or prosecutions. Such material may be 'leaked' to them from police or sources within judicial administration, and sometimes concerns issues of great public interest – particularly when the trial or investigation concerns a high profile public figure. Are they allowed to publish such materials? Under principles established by the European Court of Human Rights, and guidelines issued by the Council of Europe, this depends heavily on the circumstances of the individual case.

While the journalist's right to freedom of expression is an important right, and is further added to by the right of the public to be informed on issues of public interest, counterbalancing interests are the right to privacy of all persons whom the information concerns as well as the right to a fair trial and the public interest in the proper administration of justice.

Below are the main European Court of Human Rights judgments, Council of Europe guidance as well as a very brief overview of the state of the law in some European countries.

European Court of Human Rights decisions

- ***Dupuis and Others v. France***, Application no. 1914/02, judgment of 7 June 2007: conviction for publishing material from investigation when this was already widely reported on elsewhere violated right to freedom of expression.

This concerned the conviction of two journalists for using material obtained from a judicial investigation in their book which reported on illegal phone tapping, orchestrated by the French President's office and directed at journalists, lawyers and other high profile individuals. The French Courts found the two journalists guilty of the offence of using information obtained through a breach of the confidentiality of the investigation, or of professional confidentiality, and that publication of the material could be detrimental to the right to a fair trial of the deputy director of the President's private office (who had been placed under formal investigation for the illegal phone tapping campaign). They were fined €750 and ordered to pay €7,500 in compensation.

Restating first the importance in a democratic society of the right to freedom of expression, the European Court noted that the book concerned a debate of considerable public interest, and that the deputy director of the President's office was a public person who was involved in politics at the highest level. The public had a legitimate interest in being informed about the trial, and in particular, about the facts dealt with or revealed in the book. While the Court agreed that the protection of the judicial process was a legitimate aim and needed safeguarding both with regard to the fair trial rights of the individuals concerned and because of the wider public interest in maintaining the proper administration of justice, the Court also noted that at the time the book was published, the case had been widely covered in the media and the individual circumstances of

the deputy director had been well-publicised. The Court questioned whether there was still an interest in confidentiality when much of the information had already been made public. The Court also noted that including the material added to the accuracy and credibility of the story, providing evidence of its accuracy and authenticity, and that this was in line with journalistic rules of ethics. Noting, finally, that the journalists' conviction could have a chilling effect on media freedom in the country generally, it held that the journalists' conviction violated the right to freedom of expression.

- ***Draksas v. Lithuania***, Application no. 36662/04, judgment of 31 July 2012: failure to protect content of an intercepted phone call violated right to respect for private life.

This concerned several alleged violations of the right to respect for privacy of a senior Lithuanian politician, including the leaking to the media of a telephone conversation which had been recorded as part of a judicial investigation into his possible involvement in criminal activities. He complained to the European Court of Human Rights, having unsuccessfully challenged this in the domestic courts, that the leaking of this telephone conversation violated his right to respect for private life.

The Court observed that, despite legal provisions designed to protect the right to privacy, in actual practice Mr Draksas's right to privacy had not been respected. While the Court observed that the public has a right to be informed about matters of public interest, the State authorities were under a duty to ensure that material obtained via covert methods is protected. Noting also that the source of the 'leak' had never been identified, which was an aggravating factor in the eyes of the Court, it held that Mr Draksas's right to respect for privacy had been violated.

- ***Pinto Coelho v. Portugal***, Application no. 28439/08, judgment of 28 June 2011: failure of domestic courts to take into account public interest in media report on criminal proceedings violated right to freedom of expression.

This concerned a Portuguese journalist who broadcast a report showing that the former director-general of the criminal investigation department, who had recently been dismissed, had been charged with a breach of secrecy of judicial proceedings. For several months the press had been reporting that the director-general could have been responsible for leaking information about a case concerning the accounts of a private university and a commercial company. As part of her report, Ms Pinto Coelho showed viewers a facsimile copy of the indictment and the public prosecutor's document opening the investigation. She was prosecuted for publishing "copies of documents in the file of proceedings prior to a first-instance judgment", and sentenced to a fine of €400.

The European Court of Human Rights held that the conviction violated the journalist's right to freedom of expression. It reiterated that the press had the task of imparting information and ideas on all matters of public interest, although it had to be careful not to violate the rights and interests of others. The Court also noted that when reporting on matters before the courts, the media should refrain from publishing anything that might prejudice the chances of a person receiving a fair trial or undermine the confidence of the public in the role of the courts. However, in Ms Pinto Coelho's case, the Court pointed out that the report in question clearly dealt with a matter of public interest, because the person concerned was the director-general of the judicial police. The Portuguese courts had not taken into account the importance of the right to free-

dom of expression, nor had they considered whether the broadcast of the documents prejudiced the investigation or the defendant's right to a fair trial.

- ***Wirtschafts-Trend Zeitschriften-Verlagsgesellschaft v. Austria (No. 2)***, Application no. 62746/00, judgment of 14 November 2011: conviction for naming of criminal suspect in early stages of criminal investigation did not violate right to freedom of expression.

This concerned a report in a magazine about a preliminary criminal investigation into the conduct of three police officers who had accompanied an individual deported to Nigeria, and who had died during the flight under circumstances that were unclear. The incident received high coverage in the media and evoked a debate on deportation practices. The article set out conflicting statements and quoted one of the officers. While throughout the article the police officers concerned had been anonymised, the full name of one of them was given in an eye-catching position directly above the headline. He filed a claim for intrusion of privacy and the newspaper was ordered to pay him €1,816 (25,00 Austrian shillings).

The European Court held that this did not violate the newspaper's right to freedom of expression and declared its application inadmissible as being 'manifestly ill-founded'. It noted that while the article certainly concerned an issue of public concern and had sparked a political debate on the lawfulness of deportation practices, there was no justification for publishing the full name of the police officer concerned while criminal investigations were still pending at a very early stage. The Court noted that the Austrian courts had wished to protect the police officer from 'trial by media' and took into account that the magazine had not been prevented from reporting about other aspects of the case, and that the amount awarded had been modest.

- ***A.B. v. Switzerland***, Application no. 56925/08, judgment of 1 July 2014*:* conviction for publication of documents from judicial investigation violated right to freedom of expression.

This concerned a journalist who had reported on the criminal proceedings against someone who had run over and killed three pedestrians and injured eight others. The report described the defendant's background, gave a summary of the questions asked by the police and the investigating judge and the defendant's replies and was illustrated by a number of photographs of letters that had been sent to the investigating judge. The journalist was convicted of publishing confidential documents and fined €2667. He appealed to the European Court of Human Rights.

The European Court of Human Rights held that the conviction violated the right to freedom of expression. It recalled that the public has a right to be informed of criminal proceedings. The Court considered that the domestic courts had confined itself to finding that both the premature disclosure of the statements and the letters from the accused to the judge had damaged the right of the defendant to be presumed innocent and to have a fair trial. However, the main hearings in the trial had not taken place until two years later, and the documents discussed in the article were by then considered to be of secondary importance. Furthermore, the Court found it important that the trial was conducted before professional judges, not a lay jury. In these circumstances, the Court did not agree that publication of the materials could have influenced the defendant's trial. The Court also noted that the defendant could himself have sued for invasion of privacy, but had not done so.

- ***Du Roy and Malaurie v. France***, Application no. 34000/96, judgment of 3 October 2000: ban on reporting on criminal proceedings violated right to freedom of expression.

This concerned the conviction of a journalist and the director of a newspaper who had reported on the proceedings brought by a company that managed hostels for immigrant workers against one of its former directors. They were convicted under a French law, which prohibited any reporting on proceedings instigated by an individual.

The journalist and the director complained to the European Court of Human Rights, which held that this violated the right to freedom of expression. While noting that journalists who report on ongoing criminal proceedings must respect the rights of the parties involved, the Court observed that in this case – which concerned a prosecution instigated by a private party – there was an absolute ban on reporting. The Court noted that under French law there are many other mechanisms to protect the rights of those involved in criminal proceedings, and held that the absolute ban on reporting violated the right to freedom of expression.

- ***Craxi (No. 2) v. Italy***, Application no. 25337/94, judgment of 17 July 2003: failure to prevent leaking to the media of phone calls intercepted as part of judicial investigation violated right to respect for private life.

This concerned a former Prime Minister of Italy who had been charged with corruption, dishonest receipt of money, concealment of dishonest gain and illegal financing of political parties. He did not appear at trial and he was sentenced to prison in absentia. The public prosecutor obtained an order for Mr Craxi's telephone calls between Italy and his home to be intercepted. A specialist branch of the Italian police intercepted his calls between 20 July and 3 October 1995, and transcripts of some of these calls were read out in court. The media subsequently published these together with other parts of the transcripts which had not been read out in court. Craxi applied to the European Court of Human Rights that this violated his right to respect for privacy.

The European Court of Human Rights observed that some of the conversations published in the press had been of a strictly private nature and had had little or no connection with the criminal charges brought against Craxi. The Court considered that there had been no "pressing social need" to publish them. It found that the conversations had not been formally been made available to the press, but that the publication had instead been "likely to have been caused either by a malfunction of the registry or by the press obtaining the information from one of the parties to the proceedings or from their lawyers." Whichever of these ways the media had obtained the information, the Italian state had failed to safeguard Mr Craxi's right to respect for privacy. The Court held that "public figures are entitled to the enjoyment of the [right to privacy] on the same basis as every other person. In particular, the public interest in receiving information only covers facts which are connected with the criminal charges brought against the accused. This must be borne in mind by journalists when reporting on pending criminal proceedings, and the press should abstain from publishing information which are likely to prejudice, whether intentionally or not, the right to respect for the private life and correspondence of the accused persons."

- ***Bédat v. Switzerland***, Application no. 56925/08, judgment of 29 March 2016: fine for publishing documents from criminal investigation did not violate right to freedom of expression.

This concerned a journalist who had published an article about legal proceedings against a motorist who had rammed his car into a group of pedestrians, killing three of

them and injuring eight, before throwing himself off the Lausanne Bridge. The article described the events and then summarised the questions put to him by the police officers and the investigating judge, and the motorist's responses. It mentioned that the motorist had been charged with murder and suggested that he had and that he had shown no remorse. The article quoted from the case file, which had been lost in a shopping centre by one of the parties claiming damages against the motorist. Criminal proceedings were brought against the journalist for having published documents from court proceedings covered by investigative secrecy, and he was convicted and fined 4,000 Swiss francs (CHF).

The Grand Chamber of the European Court of Human Rights held that the conviction did not violate the right to freedom of expression. It considered that when the article was published, the investigation was still ongoing. This meant that there was an inherent risk of influencing the conduct of proceedings, justifying the prohibition of disclosing confidential information. The Court specifically noted the sensationalist nature of the report. The Court also considered that the State had been under a duty to act in order to protect the right to privacy of the accused, and it took into account that the penalty which had been imposed had not been disproportionate.

- ***Rusu v. Romania,*** Application no. 25721/04, judgment of 8 March 2016: conviction for failing to retract incorrect allegations did not violate the right to freedom of expression.

This concerned a journalist who had published an article about a criminal investigation into a burglary, naming the main suspect and reporting that he was on the run. The suspect's father immediately wrote to the newspaper, explaining that it was impossible that his son had committed the burglary as he had been in Italy at the time. The newspaper published the letter. Subsequently, the suspect lodged a criminal complaint for defamation, complaining that, even though his father's letter had been published, the article had not been retracted as requested. The courts ultimately – in a final judgment of January 2004 – cleared the journalist of defamation, finding that the information he had published had been provided by the local police department. However, they considered that the article should have been retracted as soon as it had become clear that the information had been wrong, and ordered the journalist to pay approximately €270 in compensation.

The European Court of Human Rights held that this order did not violate the right to freedom of expression. The Court held that although the report concerned a matter of public concern, after it was published the police had revoked the 'wanted' notice, realising the name of the suspect to be wrong. Merely publishing the father's latter was not the same as retracting the newspaper report. The Court emphasised "the importance of the right of a person who feels aggrieved by a press article to a rectification, with a corresponding obligation on the journalist or newspaper" and held that by failing to publish a retraction, "the [journalist] has failed to act in accordance with the principles governing journalistic ethics, requiring of him to clearly and explicitly correct any published information which has proved to be erroneous or defamatory." The Court also took into account the relatively low damages that had been imposed.

There was a strongly worded dissenting judgment by two judges, including the President of the Chamber, Judge Sajo.

- ***Société de Conception de Presse et d'Édition v. France***, Application no. 4683/11, judgment of 25 February 2016: order requiring the anonymization of photographs of a young man held captive and tortured did not violate right to freedom of expression.

This concerned a magazine which had been ordered to withdraw one of its issues from sale and to pay compensation to the family of a man whose photograph they had published on the cover. The man had been kidnapped, tortured and had eventually died, and the photo showed him showed him wearing shackles and bearing visible signs of ill-treatment. On appeal, the order to withdraw the magazine from sale was replaced with an order requiring the photograph in question to be blacked out.

The European Court of Human Rights held that this order did not violate the right to freedom of expression. It noted that the article as a whole, which concerned a court case against the kidnappers, had contributed to a debate of general interest. However, the photograph had not been intended for public viewing. It had been published without the permission of the young man's relatives and with a grave disregard for their grief. In merely ordering the photograph to be blacked out and not restricting any of the text of the report or the other photographs accompanying it, the Paris Court of Appeal had ensured respect for the publication as a whole, and the measure was unlikely to have a chilling effect on freedom of expression.

Council of Europe guidance

Council of Europe Recommendation Rec(2003)13, "on the provision of information through the media in relation to criminal proceedings", states that (relevant excerpts are quoted only):

- "the media have the right to inform the public due to the right of the public to receive information, including information on matters of public concern, under Article 10 of the Convention, and that they have a professional duty to do so;
- ... the rights to presumption of innocence, to a fair trial and to respect for private and family life under Articles 6 and 8 of the Convention constitute fundamental requirements which must be respected in any democratic society;
- Stressing the importance of media reporting in informing the public on criminal proceedings, making the deterrent function of criminal law visible as well as in ensuring public scrutiny of the functioning of the criminal justice system."

Principle 1 - Information of the public via the media

The public must be able to receive information about the activities of judicial authorities and police services through the media. Therefore, journalists must be able to freely report and comment on the functioning of the criminal justice system, subject only to the limitations provided for under the following principles.

Principle 2 - Presumption of innocence

Respect for the principle of the presumption of innocence is an integral part of the right to a fair trial. Accordingly, opinions and information relating to on-going criminal proceedings should only be communicated or disseminated through the media where this does not prejudice the presumption of innocence of the suspect or accused.

Principle 3 - Accuracy of information

Judicial authorities and police services should provide to the media only verified information or information which is based on reasonable assumptions. In the latter case, this should be clearly indicated to the media.

Principle 4 - Access to information

When journalists have lawfully obtained information in the context of on-going criminal proceedings from judicial authorities or police services, those authorities and services should make available such information, without discrimination, to all journalists who make or have made the same request.

Principle 5 - Ways of providing information to the media

When judicial authorities and police services themselves have decided to provide information to the media in the context of on-going criminal proceedings, such information should be provided on a non-discriminatory basis and, wherever possible, through press releases, press conferences by authorised officers or similar authorised means.

Principle 6 - Regular information during criminal proceedings

In the context of criminal proceedings of public interest or other criminal proceedings which have gained the particular attention of the public, judicial authorities and police services should inform the media about their essential acts, so long as this does not prejudice the secrecy of investigations and police inquiries or delay or impede the outcome of the proceedings. In cases of criminal proceedings which continue for a long period, this information should be provided regularly.

Principle 7 - Prohibition of the exploitation of information

Judicial authorities and police services should not exploit information about on-going criminal proceedings for commercial purposes or purposes other than those relevant to the enforcement of the law.

Principle 8 - Protection of privacy in the context of on-going criminal proceedings

The provision of information about suspects, accused or convicted persons or other parties to criminal proceedings should respect their right to protection of privacy in accordance with Article 8 of the Convention. Particular protection should be given to parties who are minors or other vulnerable persons, as well as to victims, to witnesses and to the families of suspects, accused and convicted. In all cases, particular consideration should be given to the harmful effect which the disclosure of information enabling their identification may have on the persons referred to in this Principle.

Principle 9 - Right of correction or right of reply

Without prejudice to the availability of other remedies, everyone who has been the subject of incorrect or defamatory media reports in the context of criminal proceedings should have a right of correction or reply, as the case may be, against the media concerned. A right of correction should also be available with respect to press releases containing incorrect information which have been issued by judicial authorities or police services.

Principle 10 - Prevention of prejudicial influence

In the context of criminal proceedings, particularly those involving juries or lay judges, judicial authorities and police services should abstain from publicly providing information which bears a risk of substantial prejudice to the fairness of the proceedings.

Principle 11 - Prejudicial pre-trial publicity

Where the accused can show that the provision of information is highly likely to result, or has resulted, in a breach of his or her right to a fair trial, he or she should have an effective legal remedy.

Principle 16 - Protection of witnesses

The identity of witnesses should not be disclosed, unless a witness has given his or her prior consent, the identification of a witness is of public concern, or the testimony has already been given in public. The identity of witnesses should never be disclosed where this endangers their lives or security. Due respect shall be paid to protection programmes for witnesses, especially in criminal proceedings against organised crime or crime within the family."

Comparative overview

Practice across Europe varies. The following is a snapshot of the legal situation in a few European countries.

Belgium

Reporting on ongoing criminal investigations is restricted, but Article 28 of the Belgian Criminal Code provides that information may be provided when this is deemed in the public interest. However, any reports should respect the right to be presumed innocent as well as the right to privacy of the victims, witnesses and any other parties involved. A guideline from the ministry of justice sets out the modalities in which information may be provided, included through formal on the record briefings as well as informal information or the provision of background information to enable journalists to understand proceedings correctly.

France

Journalists who publish materials 'leaked' to them by police or individuals from within the judicial investigations department may, if they publish the information, be liable as 'accomplices' to the civil servants who provided it – 'leaking' information is a criminal offence. The European Court held in the case of *Dupuis*, summarised above, that this may in some circumstances violate the right to freedom of expression.

Germany

Coverage of criminal investigations is permissible where this is in the public interest, but the media must respect the presumption of innocence. The Criminal Code prohibits literal quotations from indictments of other documents before a case is brought before a public hearing. The names of witnesses, victims or others connected with

proceedings may be mentioned only in relation to serious crimes or in other cases that are of particular public interest (see Section 353 of the German Criminal Code).

Poland

The publication of any material from judicial or police investigations prior to them being disclosed at trial is a criminal offence. Journalists may report on pending criminal investigations in other ways, including by conducting their own research – but they may not publish or quote from official records. Any such reports, or reports on ongoing trials, must respect the rights of the parties involved, including the right to be presumed innocent.

Montenegro

The Criminal Procedure Code provides for the possibility of issuing an order of secrecy of the investigation, violation of which then constitutes a criminal offence (Art. 284). The Criminal Code prescribes a criminal offence Violation of Confidentiality of Procedure (Art. 391), which provides punishment for anyone who, without authorization, discloses information obtained in a court, misdemeanour, administrative or other legally defined procedure, where such information may not be publicized under law or where it has been declared secret by a competent body. Ms Snežana Jonica, MP of Socijalistička narodna partija (SNP), recently proposed amendments to the Law on the Special Prosecutor's Office, according to which publishing all data from the investigation procedure within competence of the Special State Prosecutor's Office, without prior consent of the Chief Special Prosecutor, i.e. publishing of any data from investigations led by the Special Prosecutor's Office when an order for keeping a secret has been issued, and the investigating judge did not allow such publication, shall constitute a criminal offence.

9. USE OF HIDDEN RECORDING DEVICES

The use of hidden recording devices can be an important tool for journalists, particularly when doing investigative journalism. Some investigative reports justify the use of undercover means, typically those stories of real public interest where the journalist tries to expose suspected wrong-doing or to gain access to a clandestine world.

The following paragraphs highlight the main European Court of Human Rights' decisions.

- ***Radio Twist v. Slovakia***, Application no. 62202/00, judgment of 19 December 2006: journalists allowed to broadcast taped telephone conversation between minister and a senior civil servant.

This case concerned a radio company which broadcast the recording of a telephone conversation involving the deputy Prime Minister and a senior civil servant at the ministry of Justice. The domestic courts held that even public figures had the right to have their privacy protected by law and found that the recorded and broadcast telephone conversation was private in nature and, therefore, should not have been broadcast.

The European Court of Human Rights disagreed. It noted that the telephone conversation in question was between two high-ranking government officials, and concerned a matter of public interest – the management and privatisation of State-owned enterprises. The Court further observed that the domestic courts had attached decisive importance to the fact that the broadcast audio recording had been obtained by unlawful means, even though it had not been made by the journalists themselves. The court did not consider that the mere fact that a recording had been made and obtained illegally could deprive the journalists who broadcast it from the protection of the right to freedom of expression. It therefore found a violation of the right to freedom of expression.

- ***Haldimann and others v. Switzerland***, Application no. 21830/09, judgment of 24 February 2015: use of hidden cameras legitimate tool in consumer journalism.

This case concerned the conviction of four journalists for broadcasting an interview with an insurance broker that had been taped using a hidden camera. The interview was part of a television documentary that reported on misleading advice provided by life insurance brokers, an issue of public debate in Switzerland at the time. The broker filed for an injunction but failed and when the programme was broadcast, filed a police complaint for violation of privacy – a criminal offence under Swiss law. Although the journalists were acquitted at first instance and an injunction to prevent the broadcast failed, they were convicted on appeal and sentenced to a fine on the grounds that the use of a hidden camera had not been strictly "necessary" for the programme. The journalists appealed to the Swiss Federal Court, and from there to the European Court of Human Rights.

The Court first affirmed its "general principles" on freedom of expression and invasion of privacy, emphasising the importance of the right to freedom of expression as well as the duty on journalists to behave ethically. In cases concerning the invasion of privacy of public figures, six criteria in particular are relevant: (1) the extent to which the story contributed to a debate of general interest; (2) the reputation of the person concerned

and the purpose of the report; (3) the past behaviour of the individual reported on; (4) the method by which the information was obtained; (5) the report's content, form and impact; and (6) the severity of the sanction imposed.

Applying these criteria to the case, the Court found that while the insurance broker was not a public figure, the journalists had clearly sought to report on an issue of general interest: the mis-selling of insurance schemes. In this, their aim was not attack the broker individually but rather to use him as an example to illustrate the wider issue. The impact of the story on the reputation of the dealer was therefore limited and the Court took this into account in its assessment of the case.

At the same time, the Court held that the broker did have a reasonable expectation of privacy. He was not a public figure and he had not consented to being filmed. This was counterbalanced, however, by the fact the he was not the sole focus of the report, which instead focused on the mis-selling of insurance schemes generally, and that he had not been interviewed in his own offices. This meant that while the filming had constituted an 'interference' with his privacy, this interference was at the lower end of the scale.

The Court went on to consider the crucial element of the case from a jurisprudential perspective – the method by which the information had been obtained. It first reaffirmed that while journalists have considerable leeway in their reporting on issues of public interest, they must do so in good faith, on an accurate factual basis and they have to strive to provide "reliable and precise" information in accordance with the ethics of journalism. The Court then considered the way in which the report had been broadcast. It took into account that the broker's face had been pixelated and his voice disguised, that he had not been interviewed in his own offices and that his suit was nondescript. This meant that the level of interference with the broker's privacy was minimal and did not outweigh the public interest in the story. Finally, the Court took into account the severity of the sanction. While in financial terms the penalty was light, the Court held that the use of the criminal law had been disproportionate. For all these reasons, the Court found that the conviction violated the right to freedom of expression.

- ***Tierbefreier e.V. v. Germany***, Application no. 45192/09, judgment of 16 January 2014: injunction on use of undercover footage by animal protesters did not violate right to freedom of expression.

This case concerned an injunction preventing an association of animal rights activists from publishing footage which had been secretly filmed on the premises of a company that performs experiments on animals for the pharmaceutical industry. The footage had been taken from documentary films which had been shown by several TV networks; but the association's compilation of the footage – a film of about 20 minutes with the title "Poisoning for profit" – was ordered to be withdrawn from its website. The association appealed to the European Court of Human Rights.

The European Court found that there had been no violation of the right to freedom of expression. It considered, first, that the domestic courts had carefully examined whether the injunction would violate the applicant association's right to freedom of expression. The domestic courts had acknowledged that the film material related to an issue of public interest, which called for special protection under the right to freedom of expression. However, the German courts had also considered that the way the animals were being treated was not illegal, and that further dissemination of the material by the association would seriously violate the company's rights. The association had previously violated the company's rights and made personal attacks against the company's executives, which had also been taken into account when the injunction was

granted. The European Court noted that domestic courts had applied the appropriate standards and saw no reason to disagree with their assessment.

- ***'Saint Projet', 'Institut du Bon Pasteur' and others v. De Carolis, Pujadas and others***, Regional Court of Paris (press chamber), judgment of 16 October 2014: use of hidden camera does not mean journalists do not report in "good faith".

This concerned a defamation case brought by local school and parish associations against TV journalists who had broadcast a report on right-wing religious groups. The journalists had infiltrated a small extreme right-wing group presented, which was portrayed as being extremely violent and racist, and had used a hidden camera as part of the report. The report claimed that Roman Catholic associations had links with this small group and with the school, which was described as a "nest of Fascists". It was also claimed that the school's teaching was "overtly anti-Semitic".

The Court found that the report was defamatory with regard to the parish, the school, and its manager, who was shown un-blurred in the broadcast and who was wrongly presented as the founder of the school, whereas he is in fact chairman of the association which manages the school. However, the journalists had acted in good faith. Their aim had been to inform the public of the existence of violent and racist political groups, and of the links that may exist between such groups and religious associations. This was clearly an issue of public interest which the journalists were entitled to report on. The journalists had heard both sides and had included interviews with the school's manager as well as with the priest who was its head teacher, and another priest had been present among the participants in the studio debate that followed the broadcast. The use of a hidden camera did not mean that the journalists did not act in good faith: hidden cameras were permitted if they were necessary to reveal legitimate information to the public on an item of general interest that could not have been discovered otherwise.

10. EDITORIAL INDEPENDENCE OF JOURNALISTS

The right to editorial independence implies that journalists should have the right to exercise their own right to freedom of expression. In the context of the professional work environment of a journalist, this is complicated by the fact that a journalist typically works within a structure whereby one or more editors have editorial responsibility over a media outlet, and owners often try to have a say in content as well. Whilst journalists and editors often work together fairly harmoniously, there can be significant tension between the owner of a media outlet and the editorial team.

The Council of Europe has adopted a number of declarations and recommendations emphasising the importance of editorial freedom, and the need for protection against undue political and commercial interference. The European Court of Human Rights has confronted the issue of editorial independence in the context of a case concerning attempted state control over the national broadcaster, a case concerning a journalist who was sacked by his employer, as well as in a case that dealt with broadcast licensing. The following paragraphs summarise these judgments and recommendations.

- ***Manole v. Moldova***, Application no. 13936/02, judgment of 17 September 2009: sanctioning journalists for asserting editorial independence and failure to guarantee editorial independence of public broadcaster violates right to freedom of expression.

This concerned a group of journalists employed by Teleradio-Moldova (TRM), a State-owned broadcasting company which at the time the application was made was the only national television and radio station in the country. There was a long history of political control at TRM, which had got worse after the election victory of the Communist Party, in 2001. Senior managers were replaced by persons loyal to the Government and only a small group of journalists was used for reports of a political nature, which were edited to present the ruling party in a favourable light. Journalists were reprimanded for using expressions which reflected negatively on the Soviet period or reports that suggested cultural and linguistic links with Romania. Journalists who did not follow these policies were subjected to disciplinary measures. The applicants were dismissed from their posts as journalists and appealed to the European Court of Human Rights arguing that their editorial independence had been violated and that they had been subjected to a regime of censorship by the State.

The European Court held that the journalists' right to freedom of expression had been violated. The Court emphasised that States must ensure that a pluralistic media sphere exists in which the public can receive ideas and opinions from a range of viewpoints. States must implement a regulatory framework to promote this, and also ensure that within this framework, individual journalists can work independently and free from political or other undue interference.

The Court emphasised that, "A situation whereby a powerful economic or political group in a society is permitted to obtain a position of dominance over the audio-visual media and thereby exercise pressure on broadcasters and eventually curtail their editorial freedom undermines the fundamental role of freedom of expression in a democratic society..."

It emphasised that when a State decides to create a public broadcasting system, it was vital that it provides an independent and pluralistic service. This is particularly important when the public broadcaster is the dominant broadcaster within a country or region. The independence of public service broadcasters should be assured by, among other things, a clear statement of editorial independence and institutional autonomy in the broadcaster's legal framework, in particular as regards the editing and presentation of news and current affairs programmes and the recruitment, employment and management of staff.

With regard to the situation of the applicants, the Court noted that there had been a significant bias by TRM towards reporting on the activities of the President and Government, and that there was evidence of a policy of restricting on topics that reflected badly on the Government, including human rights violations committed during the Soviet period. The Court also considered that TRM had enjoyed a virtual monopoly over broadcasting in Moldova, and that this put the State under an obligation to transmit accurate and balanced news and information reflecting the full range of political opinion and debate. The State had clearly failed in this duty and TRM's independence from political interference and control had been insufficiently guaranteed.

- ***Fuentes Bobo v. Spain***, Application no. 39293/98, judgment of 29 February 2000: dismissal of journalist violated right to freedom of expression.

This concerned a producer and presenter at TVE, the Spanish State television station, whose programme was dropped from the schedule. He was offered no replacement work but was still required to complete his working hours. Following a demonstration by staff about mismanagement at the station, he then co-authored an article in a daily newspaper criticising TVE management. He was then suspended without pay. He appealed, and during his appeal he appeared in two radio programmes in which he criticised TVE's actions in words that TVE's managers regarded as offensive. He was dismissed.

The Court held that the dismissal violated the presenter's right to freedom of expression. Although the disciplinary action concerned a private law employment relationship, this did not mean that the right to freedom of expression could be disregarded. The Court found that it was clear that the presenter had been dismissed because of his criticism of the management of the broadcaster. These contributed to a wider, on-going public debate about TVE, and were clearly in the public interest. While the language he used had been offensive, it appeared to have been provoked by the radio-show hosts in lively and spontaneous exchanges. In addition, neither TVE nor its managers had instituted defamation proceedings or taken any other legal action against the applicant; TVE had immediately imposed the severe penalty of dismissal.

- ***Matúz v. Hungary***, Application no. 73751/10, judgment of 21 October 2014: dismissal by public broadcasting company of journalist who alleged censorship violated right to freedom of expression.

This concerned a journalist who had been employed by the State television company. He was dismissed for breaching a confidentiality clause after he published a book concerning alleged censorship by a director of the company. The applicant challenged his dismissal in the domestic courts, but without success.

The European Court of Human Rights held that the dismissal violated his right to freedom of expression. The Court considered that the book concerned a matter of

public interest – allegations of censorship within the State broadcasting company – and no third party had even complained about it. Confidentiality constraints and the obligation of discretion in the context of employment could not be said to apply with equal force to journalists, given that it was in the nature of their functions to impart information and ideas. Furthermore, much of the subject matter of the book was already in the public domain before the book had been published, through a website, and the journalist had published the book in good faith. The Court also observed that the sanction of immediate dismissal had been very severe.

- ***Nenkova–Lalova v. Bulgaria***, Application no. 35745/05, judgment of 11 December 2012: dismissal of journalist did not violate freedom of expression.

The applicant, a radio journalist, complained about her disciplinary dismissal from work and about the alleged unfairness and the length of the proceedings in which she had challenged that dismissal. She was employed by the Bulgarian National Radio ("BNR"), and had broadcast an interview with another BNR journalist, discussing a journalistic investigation into corruption amongst other things, against the wishes of the editorial board. The interview had been such as to effectively let the second journalist take over the show and speak for most of it. As a result, the applicant was dismissed. Further appeals and domestic court proceedings lasted seven years, and upheld the dismissal.

The Court held that the applicant's dismissal on grounds related to her work as a journalist amounted to an interference with her right to freedom of expression. However, the Court was satisfied that applicant's dismissal was intended to ensure the obligation of the BNR to offer balanced and objective programming, in the interests of listeners. The Court considered furthermore the applicant's "duties and responsibilities" as a journalist in a public broadcasting organisation, and that journalists in a public broadcaster had a particular duty to adhere to editorial decisions. It noted that the applicant was dismissed for her wilful disregard of an editorial decision. Neither this decision nor the order for the applicant's dismissal mentioned any limitations on the topics to be discussed during her show. The Court held that applicant's capacity as such a journalist did not automatically entitle her to flout editorial decisions which were intended to ensure balanced broadcasting, or to have unlimited access to BNR airtime. The Court held furthermore that employers generally enjoy a broad discretion in imposing disciplinary sanctions. While dismissal was a severe sanction, it had been prompted by concrete and deliberate actions on the part of the applicant, which showed that she could not be trusted to perform her duties in good faith. Therefore, the applicant's dismissal did not violate her right to freedom of expression.

- ***Remuszko v. Poland***, Application no. 1562/10, judgment of 16 July 2013: refusal by private newspapers to publish an advertisement by a third party did not violate third party's right to freedom of expression.

This concerned an application by a journalist who had written a critical history of one of Poland's main newspapers. No reviews of his book had been published and so he attempted to buy advertising space in various national newspapers. All newspapers refused to publish the advertisement drafted by the journalist. Following domestic court proceedings which were partly successful, the journalist appealed to the European Court of Human Rights arguing that the refusal by the newspapers to publish his advertisement violated his right to freedom of expression.

The European Court of Human Rights noted that States have a wide margin of appre-

ciation in the regulation of commercial speech, which the advertisement was. It also noted that there is no general right of access to the media, even for book that discussed an issue of politics, and it considered that the applicant had been able to publicise his book through various other means, including the internet. It therefore held that the journalist's right to freedom of expression had not been violated.

Council of Europe Recommendations

The Committee of Ministers and Parliamentary Assembly of the Council of Europe have adopted several declarations and recommendations emphasising the importance of editorial freedom.

- Parliamentary Assembly Resolution 428 (1970), on mass communication media and human rights:

  "The internal organisation of mass media should guarantee the freedom of expression of the responsible editors. Their editorial independence should be preserved."

- Committee of Ministers Recommendation Rec (99) 1 on Measures to Promote Media Pluralism:

  "Member states should consider possible measures to ensure that a variety of media content reflecting different political and cultural views is made available to the public, bearing in mind the importance of guaranteeing the editorial independence of the media...

  Member states should encourage media organisations to strengthen editorial and journalistic independence voluntarily through editorial statutes or other self-regulatory means."

- Committee of Ministers Recommendation Rec(2011)7 on a new notion of media:

  "Editorial freedom or independence is an essential requirement for media and a direct corollary of freedom of expression and the right to hold opinions and to receive and impart information, guaranteed under Article 10 of the European Convention on Human Rights.

11. MEDIA PLURALISM

Article 10 of the European Convention on Human Rights requires States to ensure that the public has access to impartial and accurate information and a range of opinion and comment, reflecting the diversity of political outlook within the country. The European Court of Human Rights has handed down a small number of judgments explaining what this principle means in practice, while the Council's Committee of Ministers has issued a recommendation on the issue. The European Union has enshrined the principle of media pluralism in its Charter of Fundamental Rights.

The following is a summary of the judgments of the European Court of Human Rights concerning media pluralism.

- ***Informationsverein Lentia and Others v. Austria***, Application no. 13914/88, judgment of 24 November 1993: denial of broadcasting licence violated right to freedom of expression, breached principle of media pluralism.

This concerned a housing association which wanted to establish an internal cable television network for its members but was unable to do so because Austrian law provided that only the Austrian Broadcasting Corporation had a right to broadcast. The association appealed to the European Court of Human Rights arguing that this violated its right to freedom of expression.

The European Court upheld the complaint and held that the association's right to freedom of expression had been breached. In its judgment, the Court emphasises the need for pluralism and diversity in the media, stating that it "has frequently stressed the fundamental role of freedom of expression in a democratic society, in particular where, through the press, it serves to impart information and ideas of general interest, which the public is moreover entitled to receive. Such an undertaking cannot be successfully accomplished unless it is grounded in the principle of pluralism, of which the State is the ultimate guarantor. This observation is especially valid in relation to audio-visual media, whose programmes are often broadcast very widely."

- ***Manole and Others v. Moldova*****,** Application no. 13936/02, judgment of 17 September 2009: dismissal of journalists violated right to freedom of expression and threatened diversity of media content.

This concerned a group of employees at the country's national broadcaster who had been dismissed from their posts. They argued that they had been dismissed as part of a political 'purge' of the broadcaster and complained to the European Court of Human Rights that their right to freedom of expression had been violated.

The Court found that the applicants' right to freedom of expression had indeed been violated and made a number of important statements regarding media pluralism. The Court took as its starting point the "fundamental truism" that "there can be no democracy without pluralism" and emphasised that the State "must be the ultimate guarantor of pluralism". Furthermore, it stated that:

> *Freedom of the press and other news media afford the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. It is incumbent on the press to impart information and ideas on political issues and on other subjects of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them … The audio-visual media, such as radio and television, have a particularly important role in this respect. Because of their power to convey messages through sound and images, such media have a more immediate and powerful effect than print. The function of television and radio as familiar sources of entertainment in the intimacy of the listener or viewer's home further reinforces their impact … Moreover, particularly in remote regions, television and radio may be more easily accessible than other media.*

It went on to state that there is "a duty on the State to ensure, first, that the public has access through television and radio to impartial and accurate information and a range of opinion and comment, reflecting inter alia the diversity of political outlook within the country and, secondly, that journalists and other professionals working in the audio-visual media are not prevented from imparting this information and comment".

- ***Centro Europa 7 S.r.l. and Di Stefano v. Italy***, Application no. 38433/09, judgment of 7 June 2012: denial of frequency to broadcaster violated right to freedom of expression and threatened media pluralism.

This concerned a complaint by a company which, despite having been awarded a broadcasting licence, had not been allocated a frequency on which to broadcast. Following lengthy proceedings in the Italian courts it appealed to the European Court of Human Rights. Its complaints included that the country's broadcast media was dominated by just a few large companies, and that this in itself constituted a violation of the right of the Italian people to a more diverse and pluralistic media sector. The Court held that the company's right to freedom of expression had been violated, as well as its right to a fair trial and its right to property. In holding so, the Court made several important statements regarding the need for States to guarantee pluralism in the media.

First, the Court emphasised that "in such a sensitive sector as the audio-visual media, in addition to its negative duty of non-interference the State has a positive obligation to put in place an appropriate legislative and administrative framework to guarantee effective pluralism". The Court went on to explain that, "to ensure true pluralism in the audio-visual sector in a democratic society, it is not sufficient to provide for the existence of several channels or the theoretical possibility for potential operators to access the audio-visual market. It is necessary in addition to allow effective access to the market so as to guarantee diversity of overall programme content, reflecting as far as possible the variety of opinions encountered in the society at which the programmes are aimed."

The Court went on to warn of the dangers of undue economic and business influence over editorial policy, stating that this danger is particularly acute when the media are concentrated in the hands of only a few owners: "A situation whereby a powerful economic or political group in society is permitted to obtain a position of dominance over the audio-visual media and thereby exercise pressure on broadcasters and eventually curtail their editorial freedom undermines the fundamental role of freedom of expression in a democratic society (…) in particular where it serves to impart information and ideas of general interest, which the public is moreover entitled to receive".

European Union

Article 11 of the Charter of Fundamental Rights of the *European Union*, based on the constitutional traditions of the EU's Member States, guarantees that:

The freedom and pluralism of the media shall be respected.

Council of Europe declarations and recommendations

The Committee of Ministers of the *Council of Europe* has adopted a Recommendation on media pluralism and diversity of media content (Recommendation no. 2007-2). This Recommendation emphasises that "media pluralism and diversity of media content are essential for the functioning of a democratic society and are the corollaries of the fundamental right to freedom of expression and information", and that "the demands which result from Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms will be fully satisfied only if each person is given the possibility to form his or her own opinion from diverse sources of information."

The Recommendation provides for a number of measures which States should implement, including the following:

- ensure that a sufficient variety of media outlets provided by a range of different owners, both private and public, is available to the public;
- consider the adoption of rules aimed at limiting the influence which a single person, company or group may have in one or more media sectors as well as ensuring a sufficient number of diverse media outlets;
- act against concentration operations of all forms, notably to divest existing media properties where unacceptable levels of concentration are reached and/or where media pluralism is threatened;
- guarantee the independence of public service media organisations vital for the safeguard of their editorial independence and for their protection from control by one or more political or social groups. These mechanisms should be established in co-operation with civil society;
- adapt the existing regulatory frameworks, particularly with regard to media ownership, and adopt any regulatory and financial measures called for in order to guarantee media transparency and structural pluralism as well as diversity of the content distributed.

12. BROADCAST REGULATION

The European Convention on Human Rights specifically provides that States may be required to licence broadcasting, meaning that not any company can just get a transmitter and start broadcasting. However, any broadcast regulation needs to take place in accordance with principles of fairness and impartiality, and the overriding aim of regulation should be to ensure 'plurality' so that public receives information from a variety of different sources and hears from different points of view. The following cases explain how this is applied in practice.

- ***Informationsverein Lentia and others v. Austria***, Application Nos. 13914/88, 15041/89, 15717/89, 15779/89, 17207/90, judgment of 28 October 1993: state monopoly over broadcasting violated the right to freedom of expression.

Austrian law established the Austrian Broadcasting Company as the sole national broadcaster. It was an autonomous public law corporation and was under a duty to provide comprehensive, objective and diverse coverage of current affairs including news reports, commentaries and critical opinions. It operated two television channels and three radio stations. The applicants, all of whom were refused licences to operate independent television or radio stations, complained that this constituted a monopoly incompatible with the right to freedom of expression. The respondent State argued that this was necessary to ensure quality, diversity, objectivity and impartiality of broadcasting as well as to prevent a private company establishing a monopoly.

The European Court of Human Rights held that the state monopoly violated the right to freedom of expression of companies who wished to establish radio or television stations. It explained that the principle of pluralism is especially important when applied to the broadcast media:

> "The Court has frequently stressed the fundamental role of freedom of expression in a democratic society, in particular where, through the press, it serves to impart information and ideas of general interest, which the public is moreover entitled to receive. Such an undertaking cannot be successfully accomplished unless it is grounded in the principle of pluralism, of which the State is the ultimate guarantor. This observation is especially valid in relation to audio-visual media, whose programmes are often broadcast very widely." (para. 38).

The Court held that a state monopoly system represents the most serious interference with freedom of expression, explaining that this established "the total impossibility of broadcasting otherwise than through a national system". This violated the right to freedom of expression.

- ***Glas Nadezhda EOOD and Elenkov v. Bulgaria***, Application no 14134/02, judgment of 11 October 2007: absence of proper reasoning for refusal of broadcast licence and of effective judicial review violated right to freedom of expression.

This concerned a company which was refused a broadcasting licence on the basis of a decision by the National Radio and Television Committee which found that the proposed radio station failed to meet fully its requirements. The applicants unsuccessfully

sought judicial review of this decision before the Supreme Administrative Court which held that the NRTC's discretion was not open to judicial scrutiny.

The European Court of Human Rights held that this absence of an effective judicial review violated the right to freedom of expression. The NRTC had not held any form of public hearing and its deliberations had been kept secret, despite a court order obliging it to provide the applicants with a copy of its minutes. Nor had it given reasons explaining why it considered that the applicant company had failed to meet its requirements. This lack of reasons had not been made good in the ensuing judicial review proceedings, because the Supreme Administrative Court had held that the NTRC's discretion was not reviewable. This, coupled with the vagueness of some of the NRTC's criteria, had denied the applicants legal protection against arbitrary interference with their freedom of expression. The Court recalled that guidelines adopted by the Committee of Ministers of the Council of Europe in the broadcasting regulation domain called for open and transparent application of the regulations governing the licensing procedure and specifically recommended that all decisions taken by the regulatory authorities be duly reasoned and open to review by the competent jurisdictions.

- ***Meltex Ltd and Mesrop Movsesyan v. Armenia***, Application no. 32283/04, judgment of 17 September 2008: the right to freedom of expression has been violated refusing to issue a broadcasting license.

This concerned a broadcasting company which had been set up after its predecessor, the independent television company (A1+), had had its licence suspended by the authorities for refusing to broadcast only pro-Government material in the run-up to the 1995 presidential elections.

In January 1997 the applicant company was granted a five-year broadcasting licence and A1+ was relaunched within that structure. In October 2000 the Government brought in new legislation under which the National Television and Radio Commission ("the NTRC") was entrusted with the licensing and monitoring of private television and radio companies. The Act also introduced a new licensing procedure, whereby broadcasting licences were granted by the NTRC on the basis of calls for tenders. In February 2002 the NTRC announced calls for tenders for various broadcasting frequencies, including the band on which the first applicant operated. At a public hearing in April 2002 it awarded the tender to another company, without stating reasons. The applicant company subsequently made bids for seven other bands, but was unsuccessful on each occasion. Although it challenged the decisions in the courts its claims were dismissed on the grounds that the tender procedure had been carried out in accordance with domestic law.

The European Court of Human Rights held that the refusal to grant a licence had violated the company's right to freedom of expression. Although the Broadcasting Act defined the criteria on which the NTRC was to make its choice, it did not explicitly require it to give reasons, so that while the NTRC had held public hearings, it had not announced the reasons for its decisions. Consequently, neither the applicant company nor the public were aware of the basis on which the NTRC had exercised its discretion to refuse a licence. The Court noted that the Committee of Ministers' guidelines on broadcasting regulations called for the open and transparent application of regulations governing licensing procedures and specifically recommended that all decisions taken by regulatory authorities should be duly reasoned. The court held that a procedure which did not require the licensing authority to give reasons for its decisions did not provide adequate protection against arbitrary decision making.

- ***Animal Defenders International v. United Kingdom***, Application no. 48876/08, judgment of 22 April 2013: ban on political broadcast advertisements does not violate the right to freedom of expression.

This concerned a complaint by a non-governmental organisation that it had been denied the possibility to advertise on TV or radio. The organisation had wanted to screen a TV advertisement with images of a girl in chains in an animal cage followed by a chimpanzee in the same position. The Broadcast Advertising Clearance Centre, the body responsible for clearing advertisements, refused to clear the advert because it judged ADI's objectives to be political in nature. The BACC decision was upheld on in the domestic courts.

The European Court of Human Rights held that the refusal did not violate the right to freedom of expression. It considered, on the one hand, the applicant NGO's right to impart information and ideas of general interest which the public is entitled to receive, and, on the other hand, the authorities' desire to protect the democratic debate and process from distortion by powerful financial groups with advantageous access to influential media. The European Court took strong account of the fact that the complex regulatory regime governing political broadcasting in the United Kingdom had been subjected to detailed review by both parliament and the courts. There had been extensive pre-legislative review of the ban on political advertising, while the proportionality of the ban was examined in detail in the High Court and the House of Lords.

The European Court found that the UK had demonstrated that there was a need to regulate political advertisements in broadcasting. It found that the broadcast media is highly influential, and its impact is immediate and powerful. Broadcast advertising was expensive, and if political ads were allowed only rich and wealthy NGOs would be able to have access to broadcast adverts, creating inequality which would be unfair.

The Court also noted that the ban only applied to advertising and that NGOs still had access to alternative media, both broadcast (through election broadcasts, radio and television discussion programmes of a political nature or adverts on radio and television on non-political matters) and non-broadcast (print media, the internet and social media, demonstrations, posters and flyers). The Court finally considered that there was no European consensus on how to regulate paid political advertising in broadcasting, which meant that the UK Government had more room for manoeuvre when deciding on these matters.

It should be noted that the judgment was not unanimous: Judges Ziemele, Sajó, Kalaydjieva, Vučinić and De Gaetano expressed a joint dissenting opinion and Judge Tulkens expressed a dissenting opinion, joined by Judges Spielmann and Laffranque.

- ***Centro Europa 7 S.r.l. and Di Stefano v. Italy***, Application no. 38433/09, judgment of 7 June 2012: denial of frequency to broadcaster violated right to freedom of expression and threatened media pluralism.

This concerned a complaint by a company which, despite having been awarded a broadcasting licence, had not been allocated a frequency on which to broadcast. Following lengthy proceedings in the Italian courts it appealed to the European Court of Human Rights. Its complaints included that the country's broadcast media was dominated by just a few large companies, and that this in itself constituted a violation of the right of the Italian people to a more diverse and pluralistic media sector.

The Court held that the company's right to freedom of expression had been violated, as well as its right to a fair trial and its right to property. In holding so, the Court made

several important statements regarding the need for States to guarantee pluralism in the media. In paragraph 133 of the judgment, the Court emphasized:

> "A situation whereby a powerful economic or political group in society is permitted to obtain a position of dominance over the audio-visual media and thereby exercise pressure on broadcasters and eventually curtail their editorial freedom undermines the fundamental role of freedom of expression in a democratic society ..."

In paragraph 1134, the Court emphasised that "in such a sensitive sector as the audio-visual media, in addition to its negative duty of non-interference the State has a positive obligation to put in place an appropriate legislative and administrative framework to guarantee effective pluralism".

13. LIABILITY OF INTERNET PORTALS FOR UNLAWFUL CONTENT

The issue of liability for internet content has been an area in which the European Court of Human Rights caselaw has undergone rapid development. On 16 June 2015, the Grand Chamber of the European Court of Human Rights handed down its first standard-setting judgment, in the matter of *Delfi v. Estonia.* The case concerned the question whether a news website is liable in law for comments left on its website by its readers. The European Court ruled that the website was indeed liable for the comments, which it qualified as "hate speech" and "clearly unlawful" and which the website had failed to remove. Eight months later, in February 2016, the Court ruled in another important case: *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*. Here, the Court concluded that the news portals were not responsible for comments which they had removed after they had been informed that they were controversial. The main difference, among others, between these two cases was the content of the comments - in the first case it was about "clearly unlawful content", and in the second only about offensive and potentially defamatory comments. Based on these two judgments, it can be concluded that the portal is expected to immediately remove hate speech and call for violence, as "clearly unlawful" comments, while for other the responsibility arises only after the "notice and take down". Also, the authors of the comments are primarily responsible if they can reveal their identity, while "particularly strong reasons" are needed before the punishment for a journalist or website is predicted for comment by third parties.

- ***Delfi v. Estonia***, Application no. 64569/09, judgment of 16 June 2015 (GC).

Facts

Delfi is one of the largest news websites in Estonia. In 2006, it published an article about a ferry company which had changed it winter routes, as a result of which ice roads had been broken up. Because ice roads – winter roads over frozen sea ice – are a cheaper and faster connection to the islands compared to the ferry services, the ferry company's decision to break up the ice thereby making the ice roads unusable was an issue of hot contention. People who would normally drive to the islands were now compelled to use the ferry. While the news piece itself was in keeping with journalistic ethics, many readers had left highly offensive or threatening comments below the news item about the ferry operator and its owner. At the request of the lawyers of the owner of the ferry company, *Delfi* removed the offensive comments about six weeks after their publication. The owner of the ferry company sued *Delfi* and the Estonian courts found that the comments were defamatory, and that Delfi was responsible for them. The owner of the ferry company was awarded 5,000 kroons in damages (around 320 euros). *Delfi*'s appeals were dismissed, and Estonia's Supreme Court rejected *Delfi*'s argument that, under EU Directive 2000/31/EC on Electronic Commerce, its role as an information society service provider or storage host was merely technical,

passive and neutral, and that it therefore should not be liable for the comments. The Supreme Court did recognise that there was a difference between a portal operator and a traditional publisher of printed media, pointing out that the former could not reasonably be required to edit comments before publishing them in the same manner as the latter. However, both had an economic interest in the publication of comments and should therefore be considered "publishers" of information.

Court ruling

The Grand Chamber of the European Court of Human Rights ruled on the case after *Delfi* requested the case to be referred to it, following a ruling of one of the European Court's lower 'chambers'. The Grand Chamber noted that while the internet offered great possibilities for the fulfilment of the right to freedom of expression, it also meant that hate speech could be published around the world in a matter of seconds and sometimes remain available online indefinitely, in violation of personality rights (such rights being protected under Article 8 of the European Convention).

The Grand Chamber accorded significant weight to the Estonian Supreme Court's finding that the comments posted on *Delfi*'s portal were clearly "unlawful" and tantamount to hate speech (the owner of the ferry company was of Jewish descent, and some of the comments were clearly anti-semitic). Furthermore, the Grand Chamber held that it would not consider the question whether, under EU law, *Delfi* should be seen as a 'passive' intermediary. The Supreme Court had considered that *Delfi* should be regarded as a publisher both with regard to its own news content and with regard to comments left by users, and the Grand Chamber found that this was a matter for national courts to decide.

Considering the comments themselves, the Grand Chamber considered that they were not only offensive but that they clearly amounted to hate speech or incitement to violence – they referred to the ferry owner's Jewish ethnicity and incited hatred on anti-Semitic grounds. As such, they were not protected under the right to freedom of expression. The Grand Chamber went on to consider whether *Delfi* could be held liable for them. It identified four key aspects in this regard: (1) the context of the comments; (2) the liability of the actual authors of the comments as an alternative to Delfi being held liable; (3) the steps taken by *Delfi* to prevent or remove the defamatory comments; and (4) the consequences of the proceedings before the national courts for *Delfi*.

Firstly, as regards the context, the Grand Chamber attached particular weight to the extreme nature of the comments and the fact that *Delfi* was a professionally managed Internet news portal, run on a commercial basis, which sought to attract a large number of comments on news articles published by it. Moreover, as the Supreme Court had pointed out, Delfi had an economic interest in the posting of the comments: more views and 'clicks' meant more income. The actual authors of the comments could not modify or delete their comments once they were posted, only Delfi had the technical means to do this. The Grand Chamber therefore agreed with the Chamber and the Supreme Court that, although *Delfi* had not been the actual writer of the comments, that did not mean that it had no control over the comment environment and its involvement in making the comments on its news article public had gone beyond that of a passive, purely technical service provider.

Secondly, *Delfi* had not ensured a realistic prospect of the authors of the comments being held liable. *Delfi* allowed readers to make comments without registering their

names, and it was almost impossible to establish the identity of the authors. This means that pursuing the authors of the comments was also impossible.

Thirdly, the Grand Chamber found that the steps taken by *Delfi* to prevent or remove without delay the defamatory comments once published had been insufficient. Delfi did have certain mechanisms in place to filter hate speech, including an automatic system of deletion of comments which contained certain keywords and a notice-and-take-down system (whereby users could tell the portal's administrators about offensive comments by clicking a single button). Nevertheless, these had failed to filter out the manifest expressions of hatred and blatant threats to the owner of the ferry company. As a consequence, the comments had remained online for six weeks. The Grand Chamber considered that it was not disproportionate for *Delfi* to have been obliged to remove from its website, without delay, clearly unlawful comments, even without notice from the alleged victims or from third parties whose ability to monitor the Internet was obviously more limited than that of a large commercial Internet news portal such as *Delfi*.

Finally, the Grand Chamber agreed with the Chamber that the consequences of *Delfi* having been held liable were small. The 320 euro fine was by no means excessive for *Delfi*, one of the largest Internet portals in Estonia, and the portal's popularity with those posting comments had not been affected in any way – the number of comments posted had in fact increased. Furthermore, the tangible result for Internet operators in post-*Delfi* cases before the national courts had been that they have taken down offending comments but have not been ordered to pay compensation.

For these reasons, the Grand Chamber found that *Delfi*'s right to freedom of expression had not been violated.

Comment

This was the first Grand Chamber case which concerned the question of liability for user comment and for that reason, it sets an important landmark. The main implication is that it will not be considered a violation of the right to freedom of expression if national laws require large, commercially run news websites to monitor their sites and remove "clearly unlawful" comments. At the same time, the Grand Chamber's judgment includes many caveats. In particular, the Grand Chamber stresses repeatedly that this ruling only applies to large commercial websites, and the nature of the anti-Semitic comments which the Grand Chamber repeatedly characterises as "clearly unlawful" may well have influenced its judgment.The Court's refusal to consider the imposition of liability against EU law also leaves considerable doubt as regards the applicability of the "notice and take down" exemption for liability formulated under EU law. It is therefore likely that further cases will need to be brought, to the European Court of Human Rights in Strasbourg as well as the European Court of Justice in Luxembourg, to more precisely define the parameters in this area of law.

- ***Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary***, Application no. 22947/13, judgment of 2 February 2016: defamation conviction for website for comments left by user violated the right to freedom of expression.

This concerned a news website and an association of internet content providers who had been sued for defamation over comments which had appeared underneath an

article on real-estate management websites, and which were very critical of these sites. The company operating the real estate websites sued for defamation and won, despite the applicants having immediately removed the offending user comments.

The European Court of Human Rights held that the defamation judgment violated the right to freedom of expression. Applying the criteria established in the case of *Delfi v. Estonia*, the Court held:

a) context in which the comments were posted: The comments concerned a matter of public interest, and the article itself had a clear factual basis – consumer protection proceedings against the real estate website had already begun;

b) the content of the comments: none of the comments constituted hate speech. Although some used vulgar language, this was to be expected bearing in mind the different 'style of communication' on websites (one commenter had said that "people like this should go and shit a hedgehog and spend all their money on their mothers' tombs until they drop dead");

c) liability of the authors of the comments: The domestic courts had not made any effort to ascertain whether the actual authors of the comments could be held liable. The Court recalled that "particularly strong reasons" are required before envisaging the punishment of a journalist or a website for statements made by a third party;

d) measures taken by the applicants and conduct of the injured party: the applicants had removed the comments in question as soon as they were notified of the initiation of civil proceedings. They also had general measures in place to prevent or remove defamatory comments on their portals, including a disclaimer, a team of moderators, and a notice-and-take-down system. Despite this, the domestic courts held them liable for allowing unfiltered comments to be posted. The Court held that this was excessive, particularly bearing in mind that the real estate company had not requested the applicants to remove the comments but went directly to court;

e) consequences for the injured party and the applicants: what was at stake was the commercial reputation of a private company rather than the reputation of a natural person, which enjoys greater protection under ECHR law. The comments were unlikely to have an impact on the real estate company's reputation, particularly since consumer protection proceedings against it had already begun. The domestic courts had failed to evaluated whether the comments actually caused any prejudice.

14. JOURNALISTIC ETHICS

In a number of judgments, the European Court of Human Rights has elaborated on the need for journalists to report in accordance with the rules of journalistic ethics. This is particularly relevant where journalists produce reports that contain allegations of wrong doing, such as corruption. This is particularly relevant when such allegations turn out to be incorrect: under European Court of Human Rights jurisprudence, a journalist can rely on their right to freedom of expression to defend claims of defamation in such cases only when they acted ethically and publication of the story was in the public interest. The main ethical duties as discussed by the Court have been to verify the accuracy of information, avoid misleading editing or misrepresenting information, and avoid unnecessarily sensationalising stories – although each of these have to be considered in the circumstances of every individual case.

- ***Bladet Tromsø and Stensaas v. Norway***, Application no. 21980/93, judgment of 20 May 1999: journalists are entitled to rely on findings in a formal report without having to conduct their own investigations into the truth of allegations.

This concerned a series of newspaper reports on seal hunting. Its journalists had obtained a formal report from the Ministry of Fisheries which had alleged a series of violations of seal hunting regulations and which had made allegations against five named crew members. The report claimed among other things that seals had been flayed alive. The Ministry of Fisheries withheld the report, but the newspaper published an article by the inspector who had drafted the report which reproduced some of the allegations. It followed that up with publication of the full report, but deleting the names of individuals against whom allegations had been made. A number of fishermen disputed the competence of the official who had drawn up the report and brought defamation proceedings against, and the domestic courts found that the allegations could not be proven to be true and were defamatory.

The European Court of Human Rights considered that the reports should be seen against the ongoing reporting on the issue of seal hunting in the press, and widespread public concern about the practice. During the late 1980s, the newspaper concerned had published almost on a daily basis the different points of views including the newspaper's own comments, those of the Ministry of Fisheries, the Norwegian Sailors' Federation, Greenpeace and, above all, the seal hunters. The reporting was therefore balanced overall. The Court considered in particular whether or not the journalists should be required to verify the truth of the allegations made by the journalists, which it held to be part of the journalistic duty to "provide accurate and reliable information in accordance with the ethics of journalism". This was particularly relevant when the fishermen had denied the allegations and questioned the competence of the official who had drawn up the report. In this case, the Court held that this depended on the nature and degree of the defamation at hand. While some of the accusations were relatively serious, the Court noted that the criticism was not an attack against all the crew members or any specific crew member. The Court also noted that the newspaper could reasonably regard the formal report which it had obtained as authoritative, and stated that the press should normally be entitled, when contributing to public debate on matters of legitimate concern, to rely on the contents of official reports without having to undertake independent research. The Ministry had not publicly expressed a

doubt as to the possible truth of the criticism or questioned the official's competence, and it had not been suggested that the newspaper was acting in breach of the law on confidentiality.

- ***Stoll v. Switzerland***, Application no. 69698/01, judgment of 10 December 2007: journalist unethically sensationalised and distorted a confidential report.

This concerned the publication in the press of a confidential report by the Swiss ambassador to the United States concerning the strategy to be adopted by the Swiss Government in negotiations between, among others, the World Jewish Congress and Swiss banks on the subject of compensation due to Holocaust victims for unclaimed assets deposited in Swiss bank accounts. A copy of this had been obtained by a journalist, as a result of a breach of confidence, and the journalist published articles along with extracts from the report, headlined "Ambassador Jagmetti insults the Jews". The journalist was prosecuted for publishing confidential information and sentenced to payment of a fine. The Swiss Press Council also considered the matter and stated that, while the subject matter of the report was of public importance, the journalist had acted irresponsibly by making the ambassador's remarks appear shocking and scandalous by selectively quoting from the strategy paper. The Press Council added that other newspapers, by contrast, had placed the affair in its proper context by publishing the strategy paper in its near entirety.

The European Court of Human Rights held that the question of whether the journalist had acted ethically was of significant importance, stating that "[t]hese considerations play a particularly important role nowadays, given the influence wielded by the media in contemporary society: not only do they inform, they can also suggest by the way in which they present the information how it is to be assessed. In a world in which the individual is confronted with vast quantities of information circulated via traditional and electronic media and involving an ever-growing number of players, monitoring compliance with journalistic ethics takes on added importance." The Court held that as far as the ethics of journalism are concerned, a distinction must be made between two aspects in the case: (1) the manner in which the journalist obtained the report, and (2) the form of the impugned articles. With regard to the first, the Court held that while the journalist had not himself obtained the document illegally, he should have been aware that it was a confidential document. This in itself was not determinative of whether or not he acted in good faith, and so the Court went on to look at the second issue – how the journalist had presented the information. With regard to this, the Court was concerned that the report had been published from selectively, and that the journalist had used highly sensational language, and that he had misrepresented the sequence of events. In this, it affirmed the opinion of the Swiss Press Council, which had objected to the 'bellicose' language used and to the misleading and sensational way in which the document had been edited. These factors combined to lead the Court to conclude that the reporting had not been ethical, and that the fine imposed on the journalist – which was modest – did not violate his right to freedom of expression.

- ***Cumpănă and Mazăre v. Romania***, Application no. 33348/96, judgment of 17 December 2004: journalists unethically made allegations of corruption without factual basis.

This concerned a newspaper article which questioned the legality of a contract which the city council had awarded to a private company, to tow away illegally parked cars. The article named a former deputy mayor and a legal expert who had since become a

judge, and was accompanied by a cartoon showing the judge on the deputy mayor's arm carrying a bag of money that had the company's name of the company on it. They brought defamation proceedings and won; the journalists were fined and banned from working as journalists for a year.

The European Court noted that the subject matter of the report was of public interest, and addressed the question of whether the journalists had acted ethically as part of its judgment. It considered that the journalists had failed in this regard. It agreed that they had presented a distorted view of reality and had not based their report on actual facts. The Court also took into account that during the criminal proceedings against them, the journalists displayed a clear lack of interest in their trial, not attending the hearings, not stating any grounds for their appeal and failing to provide any evidence for the allegations they had made. While the journalists had argued that their sources for the allegations were confidential, the Court considered that they could have provided evidence without naming their sources. While the journalists had also relied on an audit report, this report did not go so far as to make allegations of dishonesty against the two individuals whom the journalists had named. The Court therefore held that the conviction of defamation did not violate their rights – although it did go on to hold that the severity of the sanction that been imposed on them did violate their rights.

- ***Monnat v. Switzerland***, Application no. 73604/01, judgment of 21 September 2006: broadcaster with serious current affairs programme could not be required to expressly state views presented as his own.

This concerned a journalist who had broadcast a critical documentary on the position of Switzerland during the Second World War. It began by the 'official' line, also taught in schools, that Switzerland had been on the side of democracy; but the programme then introduced harsh criticism of Switzerland's position by public figures and also presented conflicting opinions expressed by Swiss citizens who had lived through the war. The programme went on to analyse anti-Semitism in Switzerland, its economic relations with Germany and the laundering of Nazi money and the role of Swiss banks and insurance companies in the matter of unclaimed Jewish assets. Complaints were filed following the broadcast and the Swiss Broadcasting Complaints Commission, a tribunal-like statutory body that exercises oversight over the broadcast media, held that the programme had failed to broadcast objectively, including by failing to specify the broadcaster's personal views as such. Appeals to the Federal Court failed.

The European Court of Human Rights held that this violated the journalist's right to freedom of expression. It held that while journalists must act "in good faith and provide reliable and precise information in accordance with the ethics of journalism", and that "the audio-visual media have a more immediate and powerful effect than the print media", it also considered that the programme concerned was a current affairs programme with a serious reputation. The Court therefore held that the journalist, who was well-known, should not have been required to make it clear that the programme reflected his own "subjective" views and that they did not represent the "sole historical truth" (which, as the Federal Court had also pointed out, does not exist in relation to historical events). It could not therefore be said that the journalist had not failed to discharge his duty to act in good faith.

- ***Radio France and Others v. France***, Application no. 53984/00, judgment of 30 March 2004: broadcasting alleged admission of involvement in genocide was careless and defamatory.

This concerned a series of short broadcasts which had mentioned a magazine article which alleged that Michel Junot, deputy prefect of Pithiviers in 1942 and 1943 and still a politician in the 1980s, had supervised the deportation of a thousand Jews. The journalists were convicted of defamation, fined €3,000 and order to pay Mr Junot €7,000 in damages; the French courts held that by mentioning the magazine report he broadcasters had damaged the honour and dignity of the Mr Junot.

The European Court held that broadcast journalists must act in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism. However, the Court also held that journalistic freedom covers possible recourse to a degree of exaggeration, or even provocation; and that a general requirement for journalists systematically and formally to distance themselves from the content of a quotation that might insult or provoke others or damage their reputation is not reconcilable with the press's role of providing information on current events, opinions and ideas. It noted that he broadcasters had quoted, with systematic references to their source, from a detailed and well-documented article and interview published in a reputable weekly magazine. They could not therefore be accused of having failed to act in good faith simply because they had made those broadcasts. However, the broadcasts also alleged that Michel Junot had admitted "having organised the departure of a convoy of deportees to Drancy". This accusation did not accurately reflect the published article. The Court concluded that in view of the extreme seriousness of the facts inaccurately attributed to Michel Junot, and the intention to repeat the broadcasts as part of the news several times throughout the whole of France, the journalist concerned should have exercised the utmost caution and shown special moderation. The defamation sanction therefore did not violate the journalists' right to freedom of expression.

- ***Flux v. Moldova***, Application no. 22824/04, judgement of 29 July 2008: unprofessional conduct of a newspaper in publishing two articles defamatory of a high school principal.

This concerned the publication by a newspaper of an anonymous letter from several parents criticising the spending of school funds by the school principal, and alleging that he had received bribes for enrolling children. The school principal published a reply to that article in another newspaper, since the applicant newspaper had refused to do so, and the first newspaper then published an article explaining why they had refused to publish the response and making further allegations of bribery. The school principal then brought defamation proceedings and won.

The European Court of Human Rights held that the defamation conviction did not violate the journalists' rights. It considered that the journalists had not acted ethically and set out a number of principles by which this should be judged: (1) the nature and degree of the defamation at hand, (2) the manner in which the impugned article was written and (3) the extent to which the applicant newspaper could reasonably regard its sources as reliable with respect to the allegations in question. This last issue should be determined in light of the situation as it was at the time. Applying these principles, the Court particularly criticised the newspaper for not even attempting to contact the principal, despite the seriousness of the accusations in the anonymous letter, and for not having made any investigation into the issues mentioned in the letter.

Moreover, the applicant had refused to publish the principal's reply to the letter, con-

sidering it offensive, whereas there was nothing in the language used to justify this. As to the second article, the Court considered this as akin to a reprisal against the persons who had questioned the newspaper's professionalism. The tone of the article indicated mockery and the article itself suggested an alleged personal relationship between the principal and a teacher, without any evidence. The Court reiterated that the right to freedom of expression should not be perceived as an absolute right to act in an irresponsible manner by charging individuals with criminal acts when there is no evidence to support this.

- ***Pedersen and Baadsgaard v. Denmark***, Application no. 49017/99, judgment of 17 December 2004: defamation conviction for making specific and unfounded allegations against police officers did not violate the right to freedom of expression.

This concerned a TV programme about the trial of an individual who had been sentenced to 12 years' imprisonment for the muder of his wife. The programmes criticised Frederikshaven Police's handling of the investigation and explored whether there had been a miscarriage of justice. In particular, the programme highlighted the alleged failure by the investigating authorities to include in a statement taken from a taxi driver which would have provided an alibi. The commentator on the programme asked: "Why did the vital part of the taxi driver's explanation disappear and who in the police or public prosecutor's office should carry the responsibility for this?... Was it [the named Chief Superintendent] who decided that the report should not be included in the case file? Or did he and the Chief Inspector of the Flying Squad conceal the witness's statement from the defence, the judges and the jury?" The Chief Superintendent and Chief Inspector of the Flying Squad in charge of the investigation were named and photographs of them shown. The case was re-opened and the suspect was eventually acquitted – although not because of the taxi-driver's evidence. A subsequent inquiry into the police investigation held that in general the police had failed to give witnesses an opportunity to read through their statements. Nevertheless, the two police officers named in the television programme sued for defamation and won.

The European Court of Human Rights considered whether in naming the police officers, the journalists acted in good faith and complied with the ordinary journalistic obligation to verify a factual allegation. This obligation required that they should have relied on a sufficiently accurate and reliable factual basis which could be considered proportionate to the nature and degree of their allegation, given that the more serious the allegation, the more solid the factual basis has to be. The Court considered furthermore that the broadcast went out at peak viewing time on a national television station in a programme devoted to objectivity and pluralism, that it was therefore seen by a wide audience. The Court also took into account that the broadcast media often have a much more immediate and powerful effect than the print media, and that the accusation was very serious for the named chief superintendent and would have entailed criminal prosecution had it been true. The Court then went on to consider that the journalists had only had one source for making the allegations against the police officer: the taxi driver. The journalists did nothing to verify whether the taxi driver's allegations were correct, although they could have easily checked part of this. The Court also considered that the taxi driver herself had at no point made the very specific allegation that the journalists had made; that had been the journalists' own conclusion. Therefore, the defamation conviction for making the specific and unfounded allegations against the police officers did not violate the right to freedom of expression.

- ***Jucha and Żak v. Poland***, Application no. 19127/06, judgment of 23 October 2012: defamation conviction violated right to freedom of expression when journalists had behaved ethically.

The applicants are the editor-in-chief and a journalist working for the Polish newspaper, TEMI. They had been convicted for defaming a local councillor in an article alleging that he had broken the law by disclosing confidential information and committing financial fraud in his election campaign.

The Court held that the conviction violated the right to freedom of expression of the journalists: while their articles had been critical and the allegations serious, the journalists had acted responsibly and in good faith. They had approached a significant number of the councillor's former collaborators and fellow local politicians to have as objective a picture of him as possible. They had requested him to comment on court cases in which he had been involved; however, their requests were refused. Furthermore, the content and the tone of the articles were on the whole fairly balanced and could not be said to constitute a gratuitous personal attack. The domestic courts had only looked at certain passages in isolation and had disregarded the general critical opinion about the councillor's activities, which was supported by information from various sources. Given the councillor's controversial standing in the community, evidenced by a statement of the municipal council signed by thirty-four councillors, he should have displayed a greater degree of tolerance of scathing remarks about his performance or policies. The European Court also noted that a degree of exaggeration and immoderation is allowed for those who take part in a public debate on issues of general interest.

- ***Yordanova and Toshev v. Bulgaria***, application no. 5126/05, 2 October 2012 (defamation conviction violated right to freedom of expression when journalists had behaved ethically even if there had been some sensationalising).

The applicants are a journalist and the editor in chief of the Bulgarian newspaper, Trud. They had published articles that were critical of a former employee of the Ministry of Internal Affairs who had been investigated for abuse of office. The journalists had been found guilty of defamation for those articles.

The European Court found that their conviction for defamation constituted a violation of their right to freedom of expression. It noted that the articles reflected statements of the police and the prosecuting authorities concerning allegations of serious misconduct, and that there was no doubt that they were of high public interest. While freedom of expression does come with "duties and responsibilities", the Court held that in this case, the journalists had complied with these duties: the journalists had relied on official police documents the truth of which they should not have to verify, and information about the case was published also by the press service of the Ministry of Internal Affairs and was later disseminated by the Bulgarian Telegraph Agency. The journalists did not adopt the allegations as their own; and while the journalists had engaged in a degree of 'sensationalising' the story this had been legitimate in the context of their job of reporting the news. The Court held that journalists cannot be expected to act with total objectivity and must be allowed some degree of exaggeration or even provocation, and the fact that the text of the articles and their captions contained expressions designed to attract the public's attention did not in itself present a problem. No gratuitously offensive language was used. Finally, the Court emphasised that national courts, in ruling on cases such as these, must take into account the likely impact of their rulings on the media in general.

- ***Rusu v. Romania***, Application no. 25721/04, judgment of 8 March 2016: conviction for failing to retract incorrect allegations did not violate the right to freedom of expression.

This concerned a journalist who had published an article about a criminal investigation into a burglary, naming the main suspect and reporting that he was on the run. The suspect's father immediately wrote to the newspaper, explaining that it was impossible that his son had committed the burglary as he had been in Italy at the time. The newspaper published the letter. Subsequently, the suspect lodged a criminal complaint for defamation, complaining that, even though his father's letter had been published, the article had not been retracted as requested. The courts ultimately – in a final judgment of January 2004 – cleared the journalist of defamation, finding that the information he had published had been provided by the local police department. However, they considered that the article should have been retracted as soon as it had become clear that the information had been wrong, and ordered the journalist to pay approximately €270 in compensation.

The European Court of Human Rights held that this order did not violate the right to freedom of expression. The Court held that although the report concerned a matter of public concern, after it was published the police had revoked the 'wanted' notice, realising the name of the suspect to be wrong. Merely publishing the father's latter was not the same as retracting the newspaper report. The Court emphasised "the importance of the right of a person who feels aggrieved by a press article to a rectification, with a corresponding obligation on the journalist or newspaper" and held that by failing to publish a retraction, "the [journalist] has failed to act in accordance with the principles governing journalistic ethics, requiring of him to clearly and explicitly correct any published information which has proved to be erroneous or defamatory." The Court also took into account the relatively low damages that had been imposed.

There was a strongly worded dissenting judgment by two judges, including the President of the Chamber, Judge Sajo.

- ***Yordanova and Toshev v. Bulgaria***, Application no. 5126/05, judgment of 2 October 2012: condemnation for defamation violates the right to freedom of expression when the journalist acted ethically even if there was some sensationalism in reporting.

The applicants are a journalist and the editor in chief of the Bulgarian newspaper, Trud. They had published articles that were critical of a former employee of the Ministry of Internal Affairs who had been investigated for abuse of office. The journalists had been found guilty of defamation for those articles.

The European Court found that their conviction for defamation constituted a violation of their right to freedom of expression. It noted that the articles reflected statements of the police and the prosecuting authorities concerning allegations of serious misconduct, and that there was no doubt that they were of high public interest. While freedom of expression does come with "duties and responsibilities", the Court held that in this case, the journalists had complied with these duties: the journalists had relied on official police documents the truth of which they should not have to verify, and information about the case was published also by the press service of the Ministry of Internal Affairs and was later disseminated by the Bulgarian Telegraph Agency. The journalists did not adopt the allegations as their own; and while the journalists had engaged in a degree of 'sensationalising' the story this had been legitimate in the context of their job of reporting the news. The Court held that journalists cannot be expected to act with total objectivity and must be allowed some degree of exagger-

ation or even provocation, and the fact that the text of the articles and their captions contained expressions designed to attract the public's attention did not in itself present a problem. No gratuitously offensive language was used. Finally, the Court emphasised that national courts, in ruling on cases such as these, must take into account the likely impact of their rulings on the media in general.

15. THE RIGHT OF REPLY

The right of reply allows individuals to have their say in response to information that is incorrect and that has affected their rights. This concerns the right to freedom of expression of the individual concerned, as well as the right to freedom of expression of the journalists and the media that published the original article. This requires a delicate balancing test that provides space to the reader whose rights have genuinely been affected by an article, whilst also respecting the right to freedom of expression of the media outlet concerned.

The main European Court of Human Rights judgments on the right to a reply are the following:

- ***Kaperzyński v. Poland***, Application no. 43206/07, judgment of 3 April 2012: harsh sentence for refusing to publish reply violated right to freedom of expression.

This concerned a journalist's conviction for not having published a reply to an article which criticised the authorities' dealing with deficiencies of the local sewage system. He had been sentenced to 80 hours' community service, suspended, and prohibited from working as a journalist for two years.

The European Court held that the sentence imposed on him had violated his right to freedom of expression. However, the Court also found that, in principle, the right of reply did not violate the right to freedom of expression nor did a requirement that a journalist should provide reasons for not publishing a reply. The Court stated:

> "[A] legal obligation to publish a rectification or a reply may be seen as a normal element of the legal framework governing the exercise of the freedom of expression by the print media. It cannot, as such, be regarded as excessive or unreasonable ... [T]he right of reply, as an important element of freedom of expression, falls within the scope of Article 10 of the Convention. This flows from the need not only to be able to contest untruthful information, but also to ensure a plurality of opinions, especially on matters of general interest such as literary and political debate. Likewise, an obligation to inform the party concerned in writing about the reasons for a refusal to publish a reply or rectification is not, in the Court's opinion, of itself open to criticism. Such an obligation makes it possible, for example, for the person who feels aggrieved by a press article to present his reply in a manner compatible with the editorial practice of the newspaper concerned."

However, the sanction imposed on the journalist for not publishing the reply was simply too harsh. The Court stated:

> "[A] criminal sentence depriving a media professional of the right to exercise his or her profession must be seen as very harsh. Moreover, it heightens the above mentioned danger of creating a chilling effect on the exercise of public debate. Such a conviction imposed on a journalist can only be said to have, potentially, an enormous dissuasive effect for an open and unhindered public debate on matters of public interest..."

- ***Melnychuk v. Ukraine***, Application no. 28743/03, judgment of 5 July 2005: refusal to publish a reply that contained obscene and abusive remarks did not violate the right to freedom of expression.

This concerned a writer whose books had been criticised by a fellow author, in a book review published in a local newspaper. The review doubted the literary and linguistic qualities of the writer. He sent a reply to the newspaper in which he harshly criticised the reviewer, but the newspaper refused to publish his reply. The applicant then instituted defamation proceedings but lost because the courts found that the book reviews were merely the expression of the reviewer's personal opinions about the literary quality of the writer's work. Moreover, the courts found that the newspaper's refusal to publish the reply had been justified because it had contained obscene and abusive remarks (he had referred to the reviewer, who was a member of the Union of Writers, as the "member" – which is slang for penis; and also called him "subhuman"). The writer then complained to the European Court of Human Rights that the refusal to publish his response had violated his right to freedom of expression.

The European Court found that the refusal did not violate the right to freedom of expression, declaring the application inadmissible as being 'manifestly ill-founded'. The Court held that while the right of reply was part of the right to freedom of expression, it did not give an unfettered right to have access to the media. As a general principle, private media should be free to exercise editorial discretion in deciding whether to publish or not letters of private individuals. While, in exceptional circumstances, a newspaper could be required to publish a retraction, in the present case no such special circumstances existed. Moreover, the writer went beyond simply replying to the criticism by making obscene and abusive remarks about the critic. He had been invited to modify his reply but had failed to do so.

- ***Oktar v. Turkey***, Application no. 42876/05, judgment of 10 May 2011: refusal by a newspaper to publish a reply that was too long did not violate the right to freedom of expression.

This concerned a newspaper which had refused to publish a reply by a religious leader whose books it had criticised in a humorous manner. The religious leader started proceedings against the newspaper at the local courts, but the judge found that the reply was longer than permitted under Turkish law. The religious leader then complained to the European Court of Human Rights, arguing that his right to freedom of expression had been violated.

The Court held that the religious leader's right to freedom of expression had not been violated and declared the application "manifestly ill-founded". It observed that the right of reply is an integral part of the Turkish legal system, but that the Turkish law provides limitations on the exercise of this right – including that a reply should not be disproportionately long. The Court did not find that this was an unreasonable requirement and dismissed the application.

Council of Europe Recommendations

- Recommendation Rec(2004)161 of the Committee of Ministers to member states on the right of reply in the new media environment (Adopted by the Committee of Ministers on 15 December 2004 at the 909th meeting of the Ministers' Deputies)

This Recommendation provides the following general principles on the right of reply:

- Any person should be given a right of reply to react to any information in the media which (1) presents inaccurate facts *and* (2) affects his or her rights.
- A request for a reply should be made within a reasonably short time from the publication of the contested information, and the media should publish the reply public promptly.
- The reply should as far as possible have, as far as possible, the same prominence as was given to the original publication.
- The reply should be made public free of charge for the person concerned.
- The media refuse to publish a reply if:
    - It is disproportionately long
    - It is not limited to a correction of the facts challenged;
    - Its publication would render the media itself liable to criminal or civil liability
    - The individual request a reply cannot demonstrate a legitimate interest;
    - The reply is in a different language different from that in which the contested information was made public;
    - The contested information was part of a truthful report on public sessions of the public authorities or the courts.
- In order to safeguard the effective exercise of the right of reply, the media should make public the name and contact details of the person to whom requests for a reply can be addressed.

16. THE "RIGHT TO BE FORGOTTEN"

On 13 May 2014, the Court of Justice of the European Union ruled that search engines must consider requests from individuals to remove links to websites that result from a search on their name when the results "appear to be inadequate, irrelevant or no longer relevant or excessive … having regard to all the circumstances of the case".

The case arose from the situation of a Spanish businessman who was upset that among the top hits for a search on his name was a reference to his bankruptcy, which had occurred more than ten years ago. He won, and the case quickly became known as the "Google Spain" case and the issue came to be referred to as the "right to be forgotten".

Since then, a small number of judgments have been handed down in different European countries applying the Court's dictum.

- ***Arthur van M. v. Google Netherlands and Google Inc***, Amsterdam Court of Appeals, judgment of 31 March 2015: convicted criminal does not have "right to be forgotten".

This case concerned a convicted criminal, known only as "*Arthur van M.*" who had lodged a request with Google that links to his criminal conviction be deleted from searches on Google for his name. In 2012, the plaintiff had been convicted for attempted incitement to assassination, but he appealed and pending this appeal was released from custody. The record of his conviction was still online and was among the top 'hits' in Google for an internet search on the plaintiff's name. He requested that these links be removed from the Google index, but Google refused. The plaintiff then sued Google. On 18 September 2014, the Amsterdam Court denied his request for removal. Arthur van M. appealed.

On 31 March 2015, the Amsterdam Court of Appeal confirmed that every data-subject has the right to have their personal data rectified, deleted or suppressed when the processing of their data is unlawful under the European Data Protection Directive. However, the Court emphasised that an important consideration in deciding requests was whether the person concerned is a public figure or whether the wider public has a legitimate interest in receiving the information. Looking at the facts of this case, the Court considered that the news reporting on the plaintiff's conviction was a result of his own actions. The Court also considered that the public has a strong interest in receiving information regarding serious crimes, such as the one perpetrated by the plaintiff. Furthermore, the Court also took into consideration that several websites did not have the plaintiff's full name but only his initials. For these reasons, the Court upheld the decision of the Amsterdam Court not to require Google to remove news reports of his conviction from results for searches on his name.

- ***Marie-France M. v. Google France and Google Inc*****,** the Regional court of Paris (urgent procedure), judgment of 19 December 2014: reports of eight year old fraud conviction should be removed from search results for individual's name.

This concerned a request to Google by an individual who had been convicted of fraud in 2006 that websites mentioning the fraud conviction be removed from search results

for her name. The matter was considered by the Paris Regional Court (the *Tribunal de Grande Instance*) under its 'urgent procedure'.

The Court held that it was required to balance the right to protection of personal information on the one hand with the right to freedom of information on the other hand. The 2006 report of fraud was legitimate, and the plaintiff had not objected to publication at that time. However, the plaintiff argued that in 2014, several years after the conviction, the continued inclusion of news reports on the fraud conviction were harmful to her attempts to find a job. The Court agreed, taking into account in particular the fact that more than eight years had passed since the conviction and the sanction was no longer indicated on the plaintiff's criminal record. This meant that the plaintiff's claim outweighed the public's right to information.

- ***Franck J. v. Google France and Google Inc***, The Regional court of Toulouse (urgent procedure*),* judgment of 21 January 2015: reports of dismissal for harassment in which legal proceedings were still ongoing do not need to be removed from search results.

This concerned a request by an individual who had been dismissed from his job for reasons of harassment to have reports of this removed from search results for his name. Legal proceedings concerning the dismissal were still pending. The matter was considered by the Toulouse Regional Court (the *Tribunal de Grande Instance*) under its 'urgent procedure'.

The Toulouse Court noted that the news reports in the disputed links referenced complaints by the plaintiff's employer which had resulted in legal proceedings. The judgment in these proceedings, which had resulted in his dismissal, had been handed down in open court, was accessible to the general public and had been reported on in the media. The facts at issue were still relatively recent, dating from 2011, and it could not be claimed that the news reports were inaccurate, inadequate, irrelevant or excessive. While an appeal was still pending, this did not mean that the earlier judgment was wrong and that the harassment never happened. The Court therefore found that the right of the public to be informed about a current legal case outweighed an individual's 'right to be forgotten' and rejected the request for removal.

- ***Ewald van Hamersveld v. Google Inc***, Amsterdam Court, judgment of 13 February 2015: news report of recent dispute between account and his builders does not need to be removed from search results.

This concerned a request that news reports of the plaintiff's dispute with his builders which resulted in the builders changing the locks on his house and forcing the plaintiff to live in a container on his estate be removed from Google search results for his name. The plaintiff, an accountant with KPMG, had withheld a EUR200,000 payment because he was unhappy with the quality of some of the work. Following news reports, the accountant requested that Google remove these news reports from searches for his name as well as from searches for certain other words.

The Amsterdam Court ruled that the news reports could not be removed from searches for terms other than the accountant's name, because such searches did not involve 'personal data'. As to the request for results to be removed from searches for the accountant's name, the Court considered first that services like Google have an important societal function and limitations on them required strict scrutiny. While results that were deemed to be inadequate, irrelevant and/or excessive could be removed, this needed

to be balanced with the public's right to information. The Court also said that it could not rule on the content of any of the news articles that appeared in the Google search results, and that 'right to be forgotten' requests should not be used as an alternative to defamation actions against the authors of the news articles. The Court went on to hold that the events reported had happened only very recently, and that the request was therefore very different from that in the 'Google Spain' case. For these reasons, the Court held that Google could not be required to remove the results.

17. VIOLENCE AGAINST JOURNALISTS

The European Court of Human Rights has considered a number of cases in which violence had been used against journalists, or journalists had been murdered, because of their journalistic work. These are serious cases that raise issues under the right to life, as protected under Article 2 of the European Convention on Human Rights, as well as other rights. The Court has ruled that States must take steps to investigate the incidents and also minimise the risk of future attacks taking place. The Court has ruled that States are under a duty to ensure that an environment exists in the country – regulatory and otherwise – that allows the media to exercise their right to freedom of expression. Every State is under two general duties in this regard:

- If the State is aware that a journalist is in danger, it is under a duty to put in place protective measures
- When violence against a journalist has occurred, or a journalist has been murdered, the State is under a duty to conduct an independent and effective investigation

The following cases and recommendations illustrate how these standards should be implemented.

Duty to protect and safeguard life

The European Court has ruled in several cases that States are under a duty to protect and safeguard the right to life, and to take effective steps to this end when there are indications that a journalist may be threatened. The following cases illustrate how this principle is applied in practice:

- ***Özgür Gündem v. Turkey***, Application no. 23144/93, judgment of 16 March 2000: State must protect journalists when there are indications that they may be under threat.

The Court found that over a two year period there had been numerous incidents of violence, including killings, assaults and arson attacks, involving the Özgür Gündem newspaper and journalists, distributors and others associated with it (including newsagents). It had taken no steps to protect the newspaper, which the Court held to be in violation of the right to freedom of expression. The Court held that if the State is aware of threats or intimidation perpetrated against journalists or media organisations, it may be under a duty to take protective measures and to carry out an effective investigation into such allegations.

- ***Gongadze v. Ukraine***, Application no. 34056/02, judgment of 8 November 2011: State had failed to act when a journalist had complained that there was a threat to his safety.

This concerned the disappearance and murder of a journalist. The Court held that in certain circumstances, there is a positive obligation on the authorities to take preven-

tive operational measures to protect an individual or individuals whose lives are at risk from the criminal acts of another individual. The Court summarised the applicable principle as follows:

> "Bearing in mind the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, the positive obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. For a positive obligation to arise, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party, and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk." (para. 165)

Applying this general principle to the case, the Court found that there had been a violation. First, prior to his disappearance the journalist had written to the Prosecutor General, requesting the investigation of harassment by police of his family and surveillance by unknown persons. Second, the Court noted that prosecutors ought to have been aware of the vulnerable position in which a journalist who covered politically sensitive topics placed himself/herself vis-à-vis those in power. Third, the Court noted that the office of the general prosecutor was under a duty to supervise the activities of the police and investigate the lawfulness of any actions taken by them. Two weeks after the journalist had written to the prosecutor, no action had been taken to investigate the police and the journalist disappeared. (In this case, the European Court of Human Rights obliged the Ukraine to pay the widow of Georgi Gongadze a 100,000€ compensation for violating the right to life, the prohibition of torture and similar abuse and the lack of a legal remedy for ineffective investigation).

- ***Dink v. Turkey***, Application nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, judgment of 14 September 2010: State had been aware of threat against journalist, and had exacerbated the situation by encouraging hostility against him.

This concerned the murder of the journalist Hrant Dink, who had been the subject of hostility from nationalists as a result of his newspaper articles on Turkish-Armenian relations. The Court found that the security forces could reasonably be considered to have been informed of the hostility towards Mr Dink, that the law enforcement bodies were informed of a real and imminent threat of assassination, and that they failed to take reasonable measures to protect his life. The Court summarised the general principle as follows:

> "...the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party, and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk..." (par. 65)[2].

The Court furthermore took into account the hostile criminal law environment of the

2 Judgment available in French only, which states: *Pour qu'il y ait obligation positive, il doit être établi que les autorités savaient ou auraient dû savoir sur le moment qu'un individu donné était menacé de manière réelle et immédiate dans sa vie du fait des actes criminels d'un tiers et qu'elles n'ont pas pris, dans le cadre de leurs pouvoirs, les mesures qui, d'un point de vue raisonnable, auraient sans doute pallié ce risqué*.

country, under which Dink's writings had been considered to be a threat to "Turkishness". This contributed to the hostile environment towards the writer and had been a contributing factor in the attack on him.

Duty to investigate violence and fatalities

State authorities are under a duty to investigate violence and murder of journalists, whether the alleged perpetrators are state agents or non-state actors. There are two elements to this. First, the State must act independently and of their own motion – it should not wait for relatives or others to start an investigation. Second, the investigation should be conducted independently from those who have been alleged to have been involved in the incident. Furthermore, the investigation must be effective. The authorities must have collected relevant evidence and the investigation must have been prompt and thorough. Finally, there has to be some transparency as well as public scrutiny of the investigation or of its results, so as to secure accountability and maintain public confidence. Finally, when there are indications that a murder or violence against a journalist was related to their journalistic activities, the authorities must take adequate steps to investigate this.

The following decisions illustrate how these principles are applied in practice.

- ***Yaşa v. Turkey***, Application no. 63/1997/847/1054, judgment of 2 September 1998: State had failed to conduct an effective investigation into violence against journalists.

This concerned an application by a Turkish journalist and his uncle who complained that they had been victims of armed attacks because they sold the newspaper Özgür Gündem. The attacks were part of a campaign orchestrated against that and other pro-Kurdish newspapers with the connivance or even the direct participation of State agents. The Court summarised the applicable principle as follows:

> "...the obligation is not confined to cases where it has been established that the killing was caused by an agent of the State. Nor is the issue of whether members of the deceased's family or others have lodged a formal complaint about the killing with the competent investigatory authorities decisive. In the case under consideration, the mere fact that the authorities were informed of the murder of the applicant's uncle gave rise ipso facto to an obligation under Article 2 to carry out an effective investigation ... The same applies to the attack on the applicant which, because eight shots were fired at him, amounted to attempted murder ..." (par. 100).

Applying this principle to the case, the Court considered that five years after an investigation had been opened, there had been no tangible results. The only explanation given by the Government for this was that the investigations were taking place in the context of the fight against terrorism and that in such circumstances the police and judicial authorities had to proceed with caution. While the Court held that this might be a constraining factor, it could not "relieve the authorities of their obligations ... to carry out an investigation, as otherwise that would exacerbate still further the climate of impunity and insecurity in the region and thus create a vicious circle." The Court furthermore held that the authorities had excluded from the outset the possibility that State agents might have been implicated in the attacks, despite the fact that there had been numerous attacks against journalists in the region in which State agents had

been implicated. IT therefore found that the authorities had failed to fulfil their duty to investigate effectively.

- ***Najafli v. Azerbaijan***, Application no. 2594/07, judgment of 2 October 2012: State had failed to conduct effective investigation into beating of a journalist.

This concerned a journalist who alleged that he had been beaten up by the police during the dispersal of a demonstration and that the domestic authorities had failed to investigate this incident effectively. The Court held that while an investigation had been opened, this had been carried out by the same police department whom he had accused. This could not be considered an effective investigation and was therefore in breach of his rights. The Court held:

> "The Court has repeatedly stressed that ... an investigation [must] be independent and impartial, both in law and in practice .... The Court notes that the Sabail District Prosecutor's Office, which was formally an independent investigating authority and which conducted the investigation in the present case, requested the Sabail District Police Department to carry out an inquiry with the aim of identifying those who had allegedly ill-treated the applicant. As such, the investigating authority delegated a major and essential part of the investigation – identification of the perpetrators of the alleged ill–treatment – to the same authority whose agents had allegedly committed the offence. In this respect, the Court finds it of no real significance that, while the alleged perpetrators were officers of the Riot Police Regiment of the Baku Police Department, it was another police department which was requested to carry out the investigation. What is important is that the investigation of alleged misconduct potentially engaging the responsibility of a public authority and its officers was carried out by those agents' colleagues, employed by the same public authority. In the Court's view, in such circumstances an investigation by the police force of an allegation of misconduct by its own officers could not be independent in the present case..." (par. 52).

- ***Emin Huseynov v. Azerbaijan***, Application no. 59135/09, judgment of 7 May 2015: beating of head of journalists' association violated right to be free from inhuman and degrading treatment.

This concerned the head of the Azeri Institute for Reporters' Freedom and Safety, Emin Huseynov. In 2008, he attended a party at a café to celebrate Che Guevara's birthday. Shortly after the event began, police officers entered the café, suspended the party and announced that they would take the participants to the police station. Mr Huseynov identified himself to the police as a journalist and phoned a media agency to inform them of the police presence at the café. He was then punched and put in a police car and taken to the police station. At the police station he was threatened, pushed around and then struck on the back of his neck. He passed out and was taken to hospital by ambulance where he was diagnosed with a traumatic brain injury and admitted to the intensive care unit. The police started an investigation into the incident but did not begin criminal proceedings on the grounds that the injury was linked to a pre-existing medical condition and nothing to do with any alleged maltreatment by the police (and which the police denied to have inflicted). He complained to the European Court of Human Rights that the beating and subsequent failure to institute proceedings against the police had violated his rights.

The European Court of Human Rights noted that when an individual was in good health when taken into police custody but injured at the time of release, the State needed to offer a plausible explanation of how the injuries had occurred. In this case, Mr Huseynov was apparently in good health when he arrived at the café and yet he left the police station in an ambulance and was unconscious when admitted to the hospital's intensive care unit. The Government had failed to explain why the police examiner had come to a different conclusion from the doctor who had admitted the applicant into intensive care. The Court also noted that several witnesses had stated that Mr Huseynov was in excellent health when arrested, and who had also heard the abuse at the police station. The Court therefore held that it was more than likely that the injuries had been inflicted by the police. They were so serious as to constitute inhuman and degrading treatment, in violation of Article 3 of the Convention.

The Court also noted that the applicant's complaint against the police had been investigated by an officer from the same police station where the abuse had occurred, and that a spokesman for the Ministry of Internal Affairs had told the media that Mr Huseynov had not been ill-treated even before the investigation was concluded. The investigation had therefore not been independent or impartial. The Court also noted that the authorities had decided not to pursue criminal proceedings in July 2008, but Mr Huseynov only learnt of this decision in March 2009. The Court therefore concluded that there had been no effective investigation of Mr Huseynov's allegation of ill-treatment, in further violation of Article 3.

Finally, as regards the arrest of the attendees at the birthday party, the Court noted that there had been no evidence that any of them had committed an offence. The Government claimed that the police had gone to the café following a complaint from neighbours but failed to produce any evidence or proof that the police had received a complaint. This mean that the arrest had been arbitrary and unlawful, in violation of Article 5 of the Convention (which protects the right to liberty) and that this had also violated the right to freedom of assembly protected under Article 11.

- ***Mehdiyev v. Azerbaijan***, Application no. 59075/09, judgment of 18 June 2015: failure by authorities to investigate violence against journalist violated right to be free from inhuman and degrading treatment.

This concerned a journalist who had been arrested and beaten up by police after he published articles in which he criticised the local authorities in his region. When he complained to the police about his treatment, he was arrested for using loud and abusive language in public and sentenced to administrative detention for obstructing the police. He was then examined by a doctor but was not provided with a medical report. According to the applicant, he was deprived of food and water and received no bedding during his detention. No action was taken against those who had beaten him.

The European Court of Human Rights held that Article 3 of the European Convention on Human Rights had been violated because the national authorities had failed to conduct an effective official investigation into the journalist's claim of mistreatment. The Court noted that the complaints which the applicant had lodged with the domestic bodies had not led to any criminal inquiries and no action had been taken by the domestic courts even though sufficient information regarding the identity of the alleged perpetrators and the date, place and nature of the alleged ill-treatment had been provided. However, this lack of any action by the domestic authorities meant that the European Court was unable to ascertain whether the journalist's maltreatment had been due to his professional work, and so it was unable to find a violation of the right to freedom of expression.

18. BANNING JOURNALISTS FROM THE PROFESSION

The European Court of Human Rights has dealt with a small number of cases which concerned the question whether a journalist can ever be banned from the profession – for example, for repeated acts of defamation or invasion of privacy. In none of the cases before it has the Court upheld such a ban, which it has described as extremely severe and a form of "prior restraint" which can be justified only in extreme circumstances. It has emphasised that prohibiting a journalist from working is a serious sanction in terms not only of its impact on the journalist concerned but also because of the wider chilling effect that such a sanction has on society.

The main cases considered by the Court are the following:

- ***De Becker v. Belgium***, Application no. 214/5, judgment of 27 March 1962: a lifetime ban on a journalist for collaborating with the enemy during wartime was a disproportionate interference with his right to freedom of expression.

This was the very first freedom of expression case considered by the Court. It concerned a journalist who had been sentenced to death for collaborating with the German authorities during the Second World War. The sentence was commuted and the journalist was released, but he was banned for life from participating in the publication of a newspaper.

The European Court of Human Rights decided to strike the case off its list because by the time the case came to it, Belgium had changed its laws and the question had become academic. However, the European Commission on Human Rights – one of the predecessor bodies of the current Court, which ruled on cases during the initial stage of proceedings, issued a formal report stating that a lifelong ban violated the right to freedom of expression. The Commission attached great importance to the extreme circumstances of that particular case. When the ban was imposed Belgium was just emerging from five years of war and enemy occupation, and the journalist had committed treason. In those circumstances, a temporary ban might be justified. However, the Commission considered that over time, as society emerged from the fog of war and attitudes changed, the ban should be reconsidered.

- ***Kaperzyński v.*** **Poland**, Application no. 43206/07, judgment of 3 April 2012: prohibition of working as a journalist for two years for refusing to publish reply violated right to freedom of expression.

This concerned the criminal conviction of a journalist for not having published a reply by a local mayor to an article which had been critical of the local sewage system. The journalist had written that the sanitary situation in the city posed significant public health risks and was a matter of public concern. He reported that the municipal authorities were dealing with the problems in a slow and incompetent manner because they were more interested in saving money; and that despite having been in office for two terms, the mayor had failed to deal with the issue. The mayor demanded a reply which the journalist refused, without stating reasons. The mayor lodged a complaint and the journalist was eventually sentenced to a suspended prison term and was prohibiting from working as a journalist for two years.

The European Court held that while the journalist had failed in his professional duties by not stating any reasons for his refusal to publish the mayor's reply, the sanction of denying him the right to work as a journalist had a deterrent effect on public debate.

The Court held:

> "[A] criminal sentence depriving a media professional of the right to exercise his or her profession must be seen as very harsh. Moreover, it heightens the above mentioned danger of creating a chilling effect on the exercise of public debate. Such a conviction imposed on a journalist can only be said to have, potentially, an enormous dissuasive effect for an open and unhindered public debate on matters of public interest..." (par. 74).

- ***Cumpănă and Mazăre v. Romania***, Application no. 33348/96, judgment of 17 December 2004: prohibition on newspaper reporter and editor from working as journalists violated right to freedom of expression.

This case concerned two journalists who had questioned the legality of a contract between e city council and a contractor for parking services. One of the individuals named was a judge who had been employed by the council as a legal expert, and she sued for defamation. She won and the journalists were, amongst other things, prohibited from working as journalists for one year. The journalists appealed to the European Court of Human Rights which held that this violated their right to freedom of expression. With regard to the prohibition in particular, the Court held:

> "Although the Contracting States are permitted, or even obliged, by their positive obligations under Article 8 of the Convention to regulate the exercise of freedom of expression so as to ensure adequate protection by law of individuals' reputations, they must not do so in a manner that unduly deters the media from fulfilling their role of alerting the public to apparent or suspected misuse of public power. Investigative journalists are liable to be inhibited from reporting on matters of general public interest – such as suspected irregularities in the award of public contracts to commercial entities – if they run the risk, as one of the standard sanctions imposable for unjustified attacks on the reputation of private individuals, of being sentenced to ... a prohibition on the exercise of their profession.
>
> The chilling effect that the fear of such sanctions has on the exercise of journalistic freedom of expression is evident. This effect, which works to the detriment of society as a whole, is likewise a factor which goes to the proportionality, and thus the justification, of the sanctions imposed ...
>
> The Court reiterates that prior restraints on the activities of journalists call for the most careful scrutiny on its part and are justified only in exceptional circumstances ... The Court considers that ... the sanction ... was particularly severe and could not in any circumstances have been justified by the mere risk of the applicants' reoffending ...
>
> The Court considers that by prohibiting the applicants from working as journalists as a preventive measure of general scope, albeit subject to a time-limit, the domestic courts contravened the principle that the press must be able to perform the role of a public watchdog in a democratic society" (paragraphs 113, 114, 118, 119).

19. PUBLICATION BANS

Closing down a media outlet or suspending it for a period of time is one of the toughest sanctions that can be imposed, affecting not only the media owner but all journalists and others who work for it, as well as its audience. Publication bans, whether of a book or an edition of a newspaper, are similarly harsh. Such sanctions are rarely imposed and when they come before the European Court of Human Rights, they are considered very carefully. While the Court has not ruled that a ban always violates the right to freedom of expression, it views it as a 'prior restraint' (by which it means a form of censorship) which it subjects to very strict scrutiny.

It should be noted that the broadcasting industry is more tightly regulated than the rest of the media. Broadcasting licences can be withdrawn for failure to abide by licence terms, and certain programmes can be 'banned' from being broadcast.

The European Court of Human Rights as well as the UN Human Rights Committee have dealt with a few cases that illustrate how human rights law deals with publication bans and the closure (temporary or permanent) of media outlets.

These cases emphasise that a legislative framework needs to be in place to prevent the abuse of power by the executive authorities.

- ***Ekin Association v. France***, Application no. 39288/98, judgment of 17 July 2001: ban on book concerning history of the conflict in the Basque region violated right to freedom of expression.

This concerned a French association whose aim was to protect Basque culture and which had published a book that gave a historical account of the ongoing conflict in the Basque region. The book, entitled "Euskadi at war", was banned by ministerial order on the grounds that it promoted separatism, vindicated recourse to violent action and therefore represented a potential danger to public order. The association appealed the ban and was eventually successful at the Conseil d'Etat. However, the Conseil d'Etat held that the legislative provisions under which the ban had been issued did not violate the right to freedom of expression. The association received no compensation and appealed the case to the European Court of Human Rights.

The European Court held that the ban constituted a violation of the right to freedom of expression. It considered that as a prior restraint, the ban should be considered very carefully:

> "The dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court. This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value. This risk exists equally with regard to those publications, other than periodicals, that discuss issues of topical interest."

The Court considered that while the legislative provision under which the ban had been ordered was couched in very wide terms and conferred wide-ranging powers to issue administrative bans on the dissemination of publications of foreign origin or written in a foreign language, this was not in itself incompatible with the right to freedom of

expression. However, a legal framework was required that ensured control over the scope of bans and effective judicial review to prevent abuse of power. With regard to the scope of the rules applicable to foreign publications, the Court noted that the law did not define the concept of "foreign origin" and gave no indication of the grounds on which a publication deemed to be foreign could be banned. Although those gaps had been progressively filled by case law, the application of the rules had, in certain cases, produced results that were surprising and sometimes even arbitrary.

The Court furthermore considered that while judicial review of the ban could be applied for, the applicant had had to wait nine years for its case to be determined. This substantially undermined the effectiveness of the judicial review, which had furthermore suffered from various other defects: stays of execution were granted only if the requesting party was able to show that a ban would cause damage for which it would be difficult to make reparation; and if the authorities certified that a ban was urgently required, the publisher was not entitled to submit oral or written observations before the decree issuing the ban was adopted, which was what had happened in the present case before the Court.

- ***Çetin and Others v. Turkey***, Application nos. 40153/98 and 40160/98, judgment of 13 February 2003: ban on newspaper that could not be appealed to a court violated right to freedom of expression.

The applicants were journalists for the newspaper, Ülkede Gündem, which had been prohibited from publishing in a region in which a state of emergency had been declared.

The European Court of Human Rights held that the ban violated the right to freedom of expression. It noted that the emergency laws were drafted in very broad terms and gave the governor of the region vast powers to impose publication bans. It held that while such bans are not, in principle, incompatible with the Convention, they may only be imposed if a particularly strict framework of legal rules regulating the scope of bans and ensuring the effectiveness of judicial review to prevent possible abuse is in place. Such a framework was not in place in the instant case: in particular, the Court noted that there was no judicial review of a decision to ban a publication.

While in the past, the Court had declared inadmissible other cases concerning restrictions imposed on broadcast media as part of the fight against terrorism (in particular, *Purcell and Others v. Ireland*, no. 15404/89, Commission decision of 16 April 1991, and *Brind and Others v. the United Kingdom*, no. 18714/91, Commission decision of 9 May 1994), these cases had concerned limited bans that had been very carefully circumscribed, and they had been subject to judicial scrutiny. The Court also emphasised that states can impose greater restrictions on broadcast media than they can on print media, because the impact of broadcast media is far more immediate and powerful than that of the press.

The Court also emphasised that no real reasons had been given as to why the publication constituted a danger to public order, and that instead it was likely that the real reason the newspaper had been banned was because of its criticism of the military:

> "The Court considers that the political tension caused by terrorist acts in the region concerned at the material time is a factor to be taken into account. While it is certainly possible that the articles that led to the seizure of the newspapers would have exacerbated an already tense situation, the decision to impose the ban contained no reasons ... In the absence of detailed reasoning accompanied by proper judicial scrutiny, the decision to implement such a measure lays itself open to various interpretations. Thus, the ban could be perceived by the

applicants as a response to heavy criticism in Ülkede Gündem of the security forces' operations in the region."

- ***Karatas v. Turkey***, Application no. 23168/94, judgment of 8 July 1999: confiscation of collection of poems violated right to freedom of expression.

This concerned the publication of a collection of poems entitled 'The Song of a Rebellion'. The author was convicted of disseminating propaganda against the indivisible unity of the State, sentenced to twenty months' imprisonment and ordered to pay a large fine. Furthermore, copies of the poems were confiscated.

The European Court of Human Rights held that the imprisonment and confiscation of the poems constituted a violation of the right to freedom of expression. The Court noted that the book consisted of poems calling for self-sacrifice for Kurdistan and included some particularly aggressive passages directed at the Turkish authorities. However, the Court noted that poetry is a form of artistic expression that appeals only to a small audience. This limited any potential impact on "national security", "public order" and "territorial integrity". Furthermore, the Court held that the aggressive tone of the poems was less a call to violence and more an expression of deep distress.

- ***Handyside v. the United Kingdom***, Application no. 5493/72, judgment of 7 December 1976: ban of sexually explicit book to protect children did not violate right to freedom of expression.

This concerned the ban of a book entitled "the Little Red Book" which had been intended for schoolchildren aged twelve and older. The book contained chapters on sex, including sections on issues like masturbation, contraceptives, menstruation, pornography, homosexuality and abortion and addresses for help and advice on sexual matters. The book had first been published in Denmark and subsequently, after translation and with certain adaptations, in Belgium, Finland, Germany, Greece, Iceland, Italy, the Netherlands, Norway, Sweden and Switzerland. Upon publication in the UK, complaints were made to the police and copies of the books were seized. The book's publisher was found guilty of publishing an "obscene book" and all copies were destroyed.

The European Court of Human Rights held that the ban on the book did not violate the right to freedom of expression. The Court emphasised that the right to freedom of expression was one of the essential foundations of democratic society, and that it protects information or ideas that offend, shock or disturb the State or any sector of the population. However, freedom of expression was not an unlimited right and restrictions may be imposed on it, amongst others to protect public morals. The Court considered that in the area of 'protecting public morals', different European countries in Europe had different standards and should therefore be afforded a "margin of appreciation" in interpreting whether a particular measure is 'necessary'. Considering the facts of this particular case, the Court attached importance to the fact that the publication was aimed at children and adolescents, and that it was going to be marketed for widespread circulation. The book included passages that young people at a critical stage of their development could have interpreted as an encouragement to indulge in precocious activities harmful for them or even to commit certain criminal offences. Furthermore, the Court considered that the fact that no proceedings had been taken against a revised edition of the book, which differed extensively from the original edition on the points at issue. This indicated that the authorities had limited the ban to that which had been strictly necessary. For these reasons, the Court found no violation of the right to freedom of expression.

- ***Vereniging Weekblad Bluf! v. Netherlands***, Application no. 16616/90, judgment of 9 February 1995: seizure of magazine to protect national security violated right to freedom of expression.

This concerned a weekly magazine, entitled "Bluf!", whose journalists had obtained a report by the Dutch internal security service which showed that the security service had been investigating the Communist Party of the Netherlands as well as the anti-nuclear movement in the country. The editor proposed to publish the report along with a commentary. Prior to publication, the entire print-run was seized by police. However, during the night, the magazine was re-printed and 2,500 copies were sold. The police then obtained a court order which required that the entire issue of the magazine should be withdrawn from circulation.

The European Court of Human Rights held that the ban violated the right to freedom of expression. The Court held that national authorities must be able to protect national security, and that this could in theory justify the seizure of a magazine. However, national law should provide safeguards to protect against the abuse of these powers. In this case, Dutch law had provided such safeguards by allowing the party concerned to complain to a court, but the Dutch courts had been mistaken in their assessment of the case. The information contained in the security services' report was six years old at the time of the seizure, and was of a very general nature. The head of the security service had already admitted that the information concerned could no longer be regarded as a "state secret". By the time the magazine was withdrawn from circulation, thousands of copies had already been sold and the issue had been widely commented upon by other media. The protection of the information as a state secret was therefore no longer justified and the withdrawal of the impugned issue was not "necessary" to protect national security.

- ***Mavlonov and Sa'adi v. Uzbekistan***, communication no. 1334/2004, judgment of 19 March 2009 (UN Human Rights Committee): forced closure of newspaper violates freedom of expression right of editor as well as of readers.

This concerned the editor of the newspaper "Oina" and one of the newspaper's regular readers. "Oina" was published almost exclusively in the Tajik language, and was the only non-governmental Tajik-language publication in the Samarkand region of Uzbekistan. It had been initially registered in 1999, but in 2001 it was required to re-register when one of the government departments that had initially supported its registration withdrew its support. The newspaper was subsequently unable to re-register, different administrative reasons being given every time registration was attempted, and was effectively closed down as a result. The editor and one of the readers lodged a complaint with the UN Human Rights Committee, the only international tribunal to which Uzbeks can complain violations of their right to freedom of expression.

The Committee held that the effective closure of the newspaper had violated the right of the editor as well as of the paper's readers. The Committee noted that in the proceedings before it, Uzbekistan had not made any attempt to address the claim that "Oina" had been denied re-registration because of its critical content. Therefore, the right of both applicants had been violated: Mr. Mavlonov's right to publish, and Mr. Sa'di's right to receive information and ideas in the newspaper. The Committee emphasised that,

"[T]he public has a right to receive information as a corollary of the specific function of a journalist and/or editor to impart information. It considers that Mr. Sa'di's right to receive information as an "Oina" reader was violated by its non-registration."

- ***Güdenoğlu and Others v. Turkey***, Application nos. 42599/08, 30873/09, 38775/09, 38778/09, 40899/09, 40905/09, 43404/09, 44024/09, 44025/09, 47858/09, 53653/09, 5431/10 and 8571/10, judgment of 29 January 2013: suspension of newspapers violated the right to freedom of expression.

This concerned the owners, executive directors, editors-in-chief and editors of six weekly and three daily newspapers who had been prosecuted and whose publications had been suspended for allegedly publishing propaganda for illegal organisations. The Court held that the suspension of the newspapers constituted a violation of their right to freedom of expression. It recalled that in earlier cases (in particular, Ürper and others v. Turkey), it had already found that the practice of banning the future publication of entire periodicals goes beyond any notion of "necessary" restraint in a democratic society and, instead, amounts to censorship. The Court found no circumstances in the instant case which would require it to depart from this jurisprudence.

- ***Perihan and Mezopotamya Basın Yayın A.Ş. v. Turkey***, Application no. 21377/03, judgment of 21 January 2014: closure of publishing company without sufficient ground violated right to freedom of expression.

This case concerned the dissolution in 2001 of the publishing company, "Mesopotamia Publishing". Following police searches of three of its local branch offices and the confiscation of allegedly illegal publications, including material allegedly used for propaganda in favour of the illegal Kurdistan Workers' Party, a court ordered the dissolution of Mesopotamia Publishing on the basis that its activities were against public order. All appeals to have it reinstated were futile. The company complained to the European Court of Human Rights.

The European Court held that there had been a violation of the right to freedom of expression. It noted that while the company had ostensibly been dissolved for engaging in activities "against public order", it was unclear which of its activities were of such a nature. While searches had been conducted in some of the company's offices and materials had been confiscated, subsequent criminal proceedings against the company had been discontinued. No criminal convictions had ever been delivered in respect of Mesopotamia Publishing. There being no evidence that the company had ever engaged in any activities against public order, the Court therefore held that its dissolution breached its right to freedom of expression.

20. CRITICISM AND INSULT OF JUDGES AND PROSECUTORS

A large number of defamation and insult judgments from the European Court of Human Rights concern the extent to which judges and prosecutors can be criticised. The European Court of Human Rights has adopted a relatively strict approach in such cases and allows States a significant margin of appreciation in the measures taken and sanctions imposed to protect the judiciary, which is seen as an important institution in democracy.

The European Court's general approach and reasoning as regards criticism of judges and the courts is that the courts have a fundamental role in a State governed by the rule of law and need to enjoy public confidence. They should therefore be protected against unfounded attacks. However, the courts are not immune from criticism and scrutiny. Therefore the media – and others – are entitled to comment on the administration of justice so long as their criticism does not overstep certain bounds.

The general principle has been stated by the European Court of Human Rights in the case of *Sunday Times v. UK (no. 1)*:

> "[T]he administration of justice ... serves the interests of the community at large and requires the co-operation of an enlightened public. There is general recognition of the fact that the courts cannot operate in a vacuum. Whilst they are the forum for the settlement of disputes, this does not mean that there can be no prior discussion of disputes elsewhere, be it in specialised journals, in the general press or amongst the public at large. Furthermore, whilst the mass media must not overstep the bounds imposed in the interests of the proper administration of justice, it is incumbent on them to impart information and ideas concerning matters that come before the courts just as in other areas of public interest. Not only do the media have the task of imparting such information and ideas: the public also has a right to receive them." (Application no. 6538/74, judgment of 26 April 1979, paragraph 65).

The Court has held that a clear distinction must be made between criticism and insult. If the sole intent of any form of expression is to insult a court, or individual judges, this will not be protected by the right to freedom of expression. As regards criticism of particular judgments, the court has held that only those articles that can realistically and objectively prejudice the outcome of a trial may be restricted by way of imposing a very light penalty. This does not mean that all articles that express an opinion on the outcome of a trial can be restricted.

The Court applies slightly different standards to lawyers who criticise courts, because they are seen as having a special duty to behave professionally. The following paragraphs therefore summarise, first, cases against journalists; and then cases concerning criticism of judges and prosecutors by lawyers.

Criticism and insults of judges and prosecutors by journalists

- ***The Sunday Times v. The United Kingdom (No. 1)***, Application no. 6538/74, judgment of 26 April 1979: prohibition on newspaper publishing article criticising a settlement violated right to freedom of expression.

This concerned the reporting by a British newspaper on court proceedings and settlement negotiations involving a company which had provided drugs to expectant mothers which had resulted in children being born with deformities, and the children that had been born with deformities. These proceedings had been going on for years and a settlement was reached with some families, but not with all. The newspaper had criticised the settlement and had also opined that the pharmaceutical company had not done enough testing before selling the drugs. The British Attorney General obtained an injunction prohibiting the newspaper from elaborating on these last allegations.

The European Court held that the injunction violated the right to freedom of expression. While the judiciary, taken to mean the entire machinery of the administration of justice, needed to be protected from false accusations, it did not operate in a vacuum and "it is incumbent on [the media] to impart information and ideas concerning matters that come before the courts just as in other areas of public interest … the public also has a right to receive this." The injunction had been granted to prevent "disrespect" for the processes of the law and to prevent the proceedings becoming a 'trial by media'. Whilst these were legitimate aims, it was not shown that the injunction had been proportionate to these aims. The proposed article had been balanced, presenting both sides of the argument, and it was unlikely that it would have had adverse consequences for the "authority of the judiciary", especially since there had been a nation-wide debate in the meantime. Finally, the issues raised were concerned important questions about the rights of the victims, and the proceedings had been dragging on for years.

- ***Perna v. Italy***, Application no. 48898/99, judgment of 6 May 2003 (Grand Chamber): defamation conviction for unfounded criticism of public prosecutor did not violate right to freedom of expression.

This concerned a journalist who had published an article about the Public Prosecutor in Palermo. The article was entitled "Caselli, the judge with the white quiff", and the sub-heading was "Catholic schooling, communist militancy – like his friend Violante…" The article criticised the prosecutor's political militancy, referring to "a threefold oath of obedience – to God, to the Law and to Via Botteghe Oscure (a reference to the Italian Communist Party). It then accused him of taking part in a plan to gain control of the public prosecutors' offices in all Italian cities and of using a criminal-turned-informer to destroy the political career of Italy's former prime minister, Andreotti, by charging him with aiding and abetting crime – in the full knowledge that he would eventually have to discontinue the case for lack of evidence. The prosecutor lodged a complaint for defamation and the journalist and the manager of the newspaper were found guilty and fined €775 and €515 euros. They were also ordered to pay damages and legal costs totalling €31,000 euros, reimburse the complainant's costs and publish the judgment. The fines were upheld on appeal.

The European Court of Human Rights held that the conviction did not violate the journalist's right to freedom of expression. The Court observed that it was important not to lose sight of the report's overall content. The journalist had not confined his remarks to the assertion that the prosecutor had particular political conviction; he

had alleged that the prosecutor had committed an abuse of authority by taking part in a Communist Party plot to gain control of public prosecutors' offices in Italy. In that context, even phrases like the one relating to the "oath of obedience" took on a meaning which was anything but symbolic. Moreover, at no time had the applicant tried to prove the truth of his allegations; on the contrary, he had argued that he had merely expressed value judgments which there were no need to prove. For these reasons, the Court held that the defamation judgment against him did not violate the right to freedom of expression.

- ***Ümit Bilgiç v. Turkey***, Application no. 22398/05, judgement of 3 September 2013: detention in psychiatric hospital for insulting judges violated the right to freedom of expression and the right to liberty.

This concerned the conviction for contempt of court of an individual who had written letters accusing local judges of bias in proceedings against him, and alleging that they conspired against him with prosecutors. He was found guilty and sentenced to be detained in a psychiatric hospital.

The European Court of Human Rights considered that his detention violated the right to freedom of expression as well as the right to liberty. The Court recalled that the judiciary, as the guarantor of justice, needs the public's trust and may therefore be protected against insult; and while individual judges may be criticised for the exercise of their duties they may be protected against unnecessarily harsh verbal attacks. At the same time, the Court recalled that in the context of criminal proceedings there must be room for the parties in proceedings to state their case, and that there should also be room for a free and energetic exchange of views. The Court noted that in this case, the applicant had written letters that were particularly virulent and offensive, and that he had accused judges of bias and corruption. This went beyond a simple criticism of the administration of justice. While the letters had not been published, and while the Court noted that the applicant did suffer from a psychiatric disorder, the Court therefore considered that in principle some form of sanction against the applicant might have been justified. However, the severity of the sanction eventually imposed – detention in a psychiatric institution – was disproportionate and constituted a violation of the applicant's rights.

- ***Belpietro v. Italy***, Application no. 43612/10, judgment of 24 September 2013: suspended imprisonment and order to pay damages for defamation violated the right to freedom of expression.

This concerned the defamation conviction of the publisher of a national newspaper for an article, published by an Italian Senator, which referred to a "war" between judges and prosecutors on the one hand and the police on the other hand, in the effort to combat the Mafia. The newspaper article accused judges and prosecutors of using political strategies. Two prosecutors alleged that the article harmed their reputation and lodged a complaint for defamation. Proceedings were instituted and the applicant was eventually sentenced to a suspended term of four months' imprisonment and ordered to pay damages totalling €110,000.

The European Court of Human Rights first recalled its general principles: the press must be able to provide information and ideas on all matters of general interest, including those related to the justice system. However, while the limits of acceptable criticism may be wider in relation to public officials than to private individuals the Court also

considered that public officials need to enjoy the confidence of the public without being unduly disturbed. The Court noted that this was particularly so for public officials who work in the justice system.

The Court noted that the article clearly concerned an issue of very high public interest; but it also noted that the allegations made in the article were very serious and were not supported by objective evidence. While the article had been written by a member of the Italian Senate, this did not absolve the applicant – the newspaper's publisher – from the duty to check the veracity of claims made. The Court also considered that the article had been accompanied by an illustration that had reinforced the claim made in the article. The Court therefore did not find that the conviction for defamation as such violated the right to freedom of expression. However, it found that the sentence of imprisonment, even if suspended, together with the requirement to pay substantial damages, was disproportionate and had a serious chilling effect on the right to freedom of expression. Therefore, the Court found that the case constituted a violation of the right to freedom of expression.

- ***Ungváry and Irodalom Kft v. Hungary***, Application no. 64520/10, judgment of 3 December 2013: defamation conviction for article alleging that a Constitutional Court judge had been an informer for the security service violated right to freedom of expression.

This concerned a defamation case against a historian and a magazine publisher who had published an article written by the historian. In the article, the historian discussed the relationship between civil society and the security services during the communist era, and as part of this he stated that a Constitutional Court judge had been an active party member and an "official contact" for the state security services. The judge complained and although the magazine printed a rectification, the historian repeated his allegation in interviews and in a book. The Constitutional Court judge then sued for defamation and won a judgment awarding him damages. The historian and the magazine publisher complained to the European Court of Human Rights arguing that this violated their right to freedom of expression.

The Court held that there had been a violation of the right to freedom of expression. The Court first recalled its general principles on freedom of expression, including that while civil servants should tolerate criticism of their functioning, it may be necessary to protect judges from offensive and abusive verbal attacks in order to preserve public faith in the functioning of the judiciary. Applying these general principles to the first applicant, the historian, the Court noted that the article had a strong basis in fact. The Court held that the term "official contact" could be understood to have a number of different meanings, including that the judge had written reports and provided information which had contributed to the work of the security services – even though the security service had not instructed the judge to do so. The Court particularly considered that the domestic courts had failed to take into account the overall context of the article, which had argued that there was a close relationship between various civil society organisations and the state security service. The Court therefore concluded that the domestic courts had interpreted the meaning of the term "official contact" too restrictively; they should have looked at it in light of the broader context of the article. The Court also emphasised that the subject matter of the article, the role of the security services during the communist era, was an issue of strong public interest; and that the judge, as a senior civil servant elected to the highest judicial office in the country by parliament, should tolerate criticism. The Court also noted that it was undisputed that the judge had been an active party member during the communist era.

As regards the magazine publishers, the Court held that it had exercised sufficient responsibility. The Court held, in particular, that:

> "[P]ublishers are understandably motivated by considerations of profitability and (...) holding them responsible for publications often results in proprietary interference in the editorial process. In order to enable the press to exercise its 'watchdog' function, it is important that the standards of liability of publishers for publication [should] be such that they shall not encourage censorship of publications by the publisher ..."

The Court concluded that given the reputation of the first applicant as a well-respected historian, the magazine publisher had no reason to call into question the accuracy of the article. There was no evidence that the article had been published with the intention to denigrate the judge. The Court therefore concluded that the publishers had acted in accordance with journalistic ethics.

- ***Mustafa Erdoğan and others v. Turkey***, Application no. 346/04 and 39779/04, judgment of 27 May 2014: academic criticism of Turkish judges for dissolving a political party was within acceptable bounds.

This concerned the complaint by a law professor and the editor and publisher of an academic journal that they were ordered by the Turkish courts to pay damages to three judges of the Constitutional Court for insulting them in a journal article which had criticised a decision dissolving a political party. The article was published in a quarterly law journal in 2001, and had questioned whether, as a matter of law, the conditions for dissolving the political party had been met. The article called the impartiality of the judges into question and insinuated that the judges were incompetent. Three of the judges brought defamation proceedings against the applicants, claiming that the article was a serious personal attack on their honour and integrity, and won damages.

The European Court of Human Rights held that the defamation award violated the right to freedom of expression. It considered that members of the judiciary acting in an official capacity should expect to be subject to wider limits of acceptable criticism than ordinary citizens. While the judiciary must enjoy public confidence, criticism of it can be restrained only when this constitutes an unfounded destructive attack. The Court found that the national courts did not place the language and expressions used in the article in the context and form in which they were expressed. Therefore, whilst some of the remarks made in the article were harsh they were largely value judgments, set out in general terms, with sufficient factual basis. They could not be considered gratuitous personal attacks on the three judges. In addition, the article was published in a quarterly law journal, and had been written in the context of an ongoing public debate on the dissolution of the political party. Neither of these factors had been considered by the national courts. The Court emphasised the importance of academic freedom and the ability of academics to freely express their views, even if controversial or unpopular, in the areas of their research, professional expertise and competence.

- ***Baka v. Hungary***, Application no. 20261/12, judgment of 27 May 2014: termination of mandate of President of Supreme Court for criticising legislative reforms violated right to freedom of expression.

This concerned the premature termination of the mandate of the President of the Supreme Court of Justice of Hungary. The applicant had been a judge at the European Court of Human Rights from 1991-2008, and in 2009 he had been elected by the

Parliament of Hungary as President of the Supreme Court for a six-year term. As part of this position he was required to express his opinion on parliamentary bills affecting the judiciary. Throughout 2011, he had criticised legislative reforms, including a proposal to reduce the mandatory retirement age for judges. On 1 January 2012, as part of a programme of reforms, the Hungarian Supreme Court was renamed 'Kúria' (the historical Hungarian name for the Supreme Court) and the mandate of the President of the Supreme Court was terminated –three and a half years before its normal date of expiry. According to the criteria for the election of the President of the new Kúria, candidates were required to have at least five years' experience as a judge in Hungary. The time served as a judge in an international court was not counted and this led to the applicant's ineligibility for the post of President of the new Kúria. He was unable to challenge this in the domestic courts and so appealed to the European Court of Human Rights.

The European Court of Human Rights held that the early termination of the applicant's mandate was clearly linked to the criticism he had expressed and violated his right to freedom of expression. The Court noted that the proposals to terminate his mandate as well as the new eligibility criterion for the post of President of the Kúria had all been submitted to Parliament after he had publicly expressed his views on several legislative reforms affecting the judiciary, and had been adopted within an extremely short time. His ability to exercise his functions nor his professional behaviour had been called into question before the Hungarian authorities. The Court therefore agreed that the facts and the sequence of events seen as a whole corroborated the applicant's contention that the early termination of his mandate had been related to the criticisms he had expressed. The reforms that he had criticised concerned the functioning of the judicial system, the independence and irremovability of judges and the retirement age of judges. These were matters of public interest, and it had been the applicant's duty as President of the National Council of Justice to express his views on them. The Court noted furthermore that the applicant had not been able to challenge the termination of his mandate before the Hungarian courts, which in itself constituted a violation of his right of access to a court.

- ***Marian Maciejewski v. Poland***, Application no. 34447/05, judgment of 13 January 2015: defamation conviction for allegations of corruption in the administration of justice violated right to freedom of expression.

This concerned a journalist for a national newspaper who had been convicted of defamation for an article on the alleged theft of hunting trophies from the office of a former bailiff. The sub-heading for the article read, "Thieves in the administration of justice", and the article itself referred to the "mafia-like prosecutor-judge association". Among other things, the article described how a prosecutor had mismanaged the investigation against the former bailiff. The domestic court held that both the heading and the reference to mafia were defamatory. The journalist appealed to the European Court of Human Rights.

With regard to the first count of defamation which concerned the phrases "thieves in the administration of justice" and "mafia like prosecutor judge association", the Court considered that the factual basis on which these comments were made – namely, the long and drawn-out proceedings – was not contested and that there clearly were irregularities in the functioning of the courts and of the prosecution service. This was an issue of public interest which the media should be allowed to comment on and even use harsh language. Overall, while the article was undoubtedly critical in tone, it did not aim to undermine the public confidence in the integrity of the judicial system.

With regard to the second count of defamation, concerning the allegation that the prosecutor had mishandled the investigation, the Court noted that the domestic courts had left several questions concerning the prosecutor's conduct unanswered and that there had been numerous irregularities in the investigation, which the domestic courts had disregarded. The journalist had commented on this in good faith and in line with his journalistic code of ethics, and the domestic courts had disregarded this and instead focused purely on whether or not the allegations made were fully 'true'. This violated the journalist's right to freedom of expression.

- ***Łozowska v. Poland***, Application no. 62716/09, judgment of 13 January 2015: defamation conviction for unfounded accusation of criminal dealings did not violate right to freedom of expression.

The applicant was a journalist for a regional newspaper who had been convicted of "malicious defamation" for a series of articles in which she speculated on the possible overlap between members of a mafia-like network and persons working for the local justice system. In particular, she had written that a specific judge had been dismissed because of "her shady links with criminal circles [and] of the role she had played in cases in which her spouse had been implicated". Her appeal was dismissed by a single judge – the only one out of the 53-strong panel of judges of appeal who did not have a connection with the judge who had made the complaint of defamation. She appealed to the European Court of Human Rights.

The European Court considered that the impugned remarks addressed issues of general interest and that the former judge's dismissal was not contested. The media had a right to comment on and discuss this, and the wider public has a right to receive this information. However, the Court noted that it had not been proven that the judge had been dismissed because of "dark dealings with criminal circles" on his part. It furthermore considered that the journalist had extensive knowledge of the workings of the justice system in general, and of the disciplinary proceedings against the judge. She should therefore have shown the greatest rigour and caution before publishing the article. The Court considered furthermore that the journalist, in using the words she did, must have known that her article was likely to harm the judge's reputation. While the Court acknowledged the journalist's right to discuss the issue of the judge's dismissal, as an issue of public interest, it held that there was not enough evidence to accuse the judge of dealings with criminal elements. Therefore, the Court held that the applicant had not acted in accordance with the requirements of professional ethics and good faith.

- ***Barfod v. Denmark***, Application no. 11508/85, judgment of 22 February 1998: while journalists should be able to voice their criticism of the judicial system, which was an issue of public interest, they could have done so without attacking the two lay judges personally.

This concerned a journalist who criticised the performance of two lay judges who had heard a case involving the question whether or not Danish nationals who worked on US military bases should pay local taxes. The journalist argued that because the lay judges were also employees of the local authority which collected the taxes, they should have been disqualified for conflict of interest. He questioned their ability to decide impartially in a case brought against their employer, the local government, and suggested that by deciding in its favour the lay judges "did their duty". The journalist was fined for this last remark which was judged to damage the reputation of the lay judges and impair confidence in the legal system.

The journalist appealed the matter to the European Court of Human Rights, which held that the main issue was whether the remark that the lay judges "did their duty" could impair the authority of the judiciary and damage public confidence in the legal system. The Court considered that while journalists should be able to voice their criticism of the judicial system, which was an issue of public interest, they could have done so without attacking the two lay judges personally. Moreover, there was no indication whether the two lay judges had indeed voted against the local government: they had been part of a court of three judges, which had held in favour of the local authority in a two to one vote – but the vote itself had been secret. It therefore held that the fine imposed on the journalist did not violate his right to freedom of expression.

- ***De Haes and Gijsels v. Belgium***, Application no. 19983/92, judgment of 24 February 1997: considering also the freedom of journalists to employ a polemical and even aggressive tone, particularly in the context of a public debate on such an emotional issue, the Court found that the journalists' conviction violated their right to freedom of expression.

This concerned a magazine editor and journalist who had published five articles criticising judges who had heard a divorce case and awarded custody of the children to the father, even though he was a self-confessed Nazi who had been prosecuted for child abuse and incest. In their articles, the two had accused the judges of sharing the father's Nazi sympathies; they also referred to medical reports which showed that the children had been raped on visits with their father. Criminal proceedings had been started against the father but these had been aborted. The journalists were prosecuted for defamation. Nominal damages were awarded and an order was made requiring the journalists to publish the judgment in their magazine and pay for it to be published in six other newspapers.

The European Court of Human Rights recalled that the press play an important role in society by informing the public on matters of public interest. At the same time, the Court also recalled that the courts, as guarantors of justice must enjoy public confidence and be protected from unfounded attacks. The Court furthermore recalled that judges are subject to a duty of discretion that precludes them from replying to criticism. Considering the facts of this case, the Court emphasised that while the journalists based their articles on medical and other evidence, some of which they had been unable to produce in court to protect their sources, they were not prosecuted for these factual allegations but for opinions which they based on the factual evidence. While the journalists' criticism was severe, this was commensurate with the "stir and indignation" caused by the issue itself. The journalists had published their articles at a time when incest and child abuse and the response of the judiciary to these were issues of great public debate in the country. Considering also the freedom of journalists to employ a polemical and even aggressive tone, particularly in the context of a public debate on such an emotional issue, the Court found that the journalists' conviction violated their right to freedom of expression.

- ***Worm v. Austria***, Application no. 39401/04, judgment of 18 January 2011: public's becoming accustomed to the regular spectacle of pseudo-trials in the news media might in the long term have nefarious consequences for the acceptance of the courts as the proper forum for the determination of a person's guilt or innocence.

This case concerned a journalist who published more than one hundred articles concerning the criminal trial of a Mr Androsch, former Vice Chancellor and Finance Minister.

The journalist was severely critical of Androsch and stated that the flow of funds in and out of various bank accounts showed definitively that Androsch was guilty of tax evasion. The courts held that the article was clearly capable of influencing the outcome of the criminal proceedings which were still pending and imposed a modest fine.

The European Court held that the media have a duty to comment on issues of public interest, including ongoing court proceedings. This is protected by the right to freedom of expression. However, they must remain within certain bounds and respect the right to a fair trial. Thus, journalists must not make statements that are likely to prejudice the chances of a fair trial or to undermine the confidence of the public in the role of the courts in administering criminal justice. The Court took into consideration the large number of articles that had been published – more than one hundred – and that these had been written in a style that conveyed to the reader that a criminal court could not possibly do otherwise than convict Androsch. The court also took into account that lay judges (ie not professionally trained judges) were involved in the trial, and that these lay judges were likely to read the articles and be influenced by them. The Court noted that the public's becoming accustomed to the regular spectacle of pseudo-trials in the news media might in the long term have nefarious consequences for the acceptance of the courts as the proper forum for the determination of a person's guilt or innocence. Taking also into account the modest size of the fine, the Court therefore held that this did not constitute a violation of the right to freedom of expression.

- ***Obukhova v. Russia***, Application no. 34736/03, judgment of 8 January 2009: the scope of the injunction was unnecessarily broad and disproportionate: it prevented the publication of any reports on the proceedings.

This concerned a journalist who had published an article about a civil action for compensation instituted by a judge in connection with a road traffic accident. The article reproduced a letter from the other party's spouse, who alleged that the judge was "taking advantage of her office and connections in the judiciary". The judge responded by suing the newspaper, the journalist who wrote the article as well as the spouse of the other party for defamation. The court hearing the case issued an injunction prohibiting the newspaper from publishing anything relating to the accident or to the court proceedings pending its judgment.

The European Court considered whether the injunction prohibiting any publication of the proceedings constituted a violation of the right to freedom of expression. It noted that the injunction had remained in effect throughout the defamation proceedings as well as the proceedings concerning the actual road traffic accident. However, although the domestic courts had held the injunction to be justified as a means of protecting the reputation of others and maintaining the authority of the judiciary, their reasons for this were inadequate.

As regards the order restraining the publication of information on the factual circumstances of the accident, the Court noted that the newspaper had merely represented the other party's view as one of various possible views of the accident. The domestic court had only justified the injunction by stating that expert evidence had been commissioned, but failed to explain why the publication of any other reports would be prejudicial to the proceedings. The Court also emphasised that since the judge had been involved in the accident as a private individual, the injunction restraining further reports on the accident could not have been for the purpose of maintaining the authority of the judiciary.

As regards the prohibition on further reporting of the claim for damages, the Court

accepted that the allegation that the judge had taken advantage of her office and connections in the judiciary could have been damaging to her reputation and to the authority of the judicial system. However, the scope of the injunction was unnecessarily broad and disproportionate: it prevented the publication of any reports on the proceedings. The Court disagreed that such a broad prohibition was "necessary in a democratic society" and emphasised that instead, the injunction had done a disservice to the authority of the judiciary by reducing transparency and raising doubts about the court's impartiality.

The injunction therefore violated the right to freedom of expression.

Criticism by lawyers

- ***Karpetas v. Greece***, Application no. 6086/10, judgment of 30 October 2012: no violation of the lawyer's right to freedom of expression: the applicant had no factual basis for his allegation.

This concerned a Greek lawyer who had been convicted for defamation of a prosecutor and an investigating judge who had released on bail someone who had assaulted the lawyer in his office. Mr Karpetas suggested that the prosecutor and judge had taken bribes from his assailant. Both lodged proceedings for defamation, and the lawyer was ordered to pay 15,000 euros (EUR) to the prosecutor (the proceedings concerning the investigating judge are still pending).

The European Court held that this did not constitute a violation of the lawyer's right to freedom of expression: the applicant was an experienced lawyer and he had lodged formal complaints against the prosecutor and judge which had been dismissed. Applicant's accusations had been repeated in the press and spread to a large audience and clearly implied that the judge and prosecutor were corrupt individuals. Applicant had no factual basis for his allegation whatsoever. The Court also took into account that the administration of justice should be protected, and accusations of corruption should not be made lightly.

- ***Di Giovanni v. Italy***, Application no. 51160/06, judgment of 9 July 2013: formal warning for a judge who had made unfounded allegations of corruption in judicial appointments did not violate right to freedom of expression.

This concerned a judge who had stated, in a newspaper interview, that one of the members of the board of examiners for new judges had used his influence to help a relative. She was found guilty of having failed in her duty of respect and discretion with regard to members of the board of examiners, and was given a formal warning.

The European Court of Human Rights held that the warning did not violate the right to freedom of expression. It stated that the allegation she had made had been very serious and had not had any basis in fact. It noted that members of the judiciary should exercise discretion and not use the media to respond to provocations. It further noted the very light nature of the sanction imposed on the judge.

- ***Morice v. France***, Application no. 29369/10, judgment of 23 April 2015: defamation conviction for lawyer who criticised judges violated freedom of expression.

This concerned the conviction of a lawyer for defamation for remarks that he had made about two investigating judges who had been removed from the investigation into the murder of a French judge in Djibouti. The lawyer had been acting for the widow of the murdered judge, and he had criticized the judges for not having handed evidence from the investigation over to the judge who took over from them. He also criticized the judges for being too close to the investigators in Djibouti, which tainted their independence. One of the two judges he criticized also sat in another controversial case in which Mr Morice was involved as well. He also complained about the conduct of the judge in that case. Mr Morice complained to the Minister of Justice about the Djibouti case and the national newspaper, *Le Monde*, published on the matter. *Le Monde* cited Morice as saying that the behavior f the investigative judges had been "completely at odds with the principles of impartiality and fairness" and that there had been extensive "connivance between the prosecutor [in Djibouti] and the French judges". The judges filed a criminal complaint against the publication director of *Le Monde*, the journalist who had written the article and Mr Morice, accusing them of defamation. Mr Morice was found guilty of complicity in that offence and ordered to pay a fine of €4,000; € 1,000 to one of the judges for costs; and €7,500 in damages to each of the judges. He was also ordered to publish a notice in *Le Monde* newspaper. A subsequent appeal to the European Court of Human Rights was dismissed, and Mr Morice requested that the case be referred to the Court's 'Grand Chamber' for a review.

The Grand Chamber held that the defamation conviction constituted a violation of Mr Morice's rights. The Court noted that as a lawyer, Mr Morice had the right to defend his clients through the press – although it held that there was a clear distinction between words spoken by a lawyer inside the courtroom, which had a very high degree of protection, and outside the court room where such heightened protection did not apply. The Court noted that Mr Morice relied furthermore on his right, as a citizen, to contribute to a debate on a matter of public interest. While his role in this was not as a journalist, to whom the Court accords a high degree of protection, the national authorities nevertheless have a duty to protect debate on matters of public interest. The Court also noted that Mr Morice had a strong factual basis for his comments. Mr Morice had acted in his capacity as lawyer in two high-profile cases in which Judge M. was an investigating judge and in both of them shortcomings had been identified by the appellate courts, leading to the judge's withdrawal of the cases. As to Mr Morice's remarks, they had a close connection with the facts of the case and had been neither misleading nor gratuitous.

The Grand Chamber noted furthermore that the case had generated intense media attention. The domestic courts had taken this as proof of personal animosity between Mr Morice and one of the two judges. The Grand Chamber disagreed with this assessment and held instead that while the remarks reflected some hostility, they concerned alleged shortcomings in a judicial investigation – a matter to which a lawyer should be able to draw the public's attention.

The Court stated that generally, judges should tolerate criticism. The limits of acceptable criticism *vis-à-vis* members of the judiciary, part of a fundamental institution of the State, are wider than in the case of ordinary citizens. At the same time, the Court emphasised the need to maintain the authority of the judiciary and to ensure relations based on mutual consideration and respect between the different protagonists of the justice system.

Finally, the Court took into account the nature and severity of the sanctions imposed.

It reiterated that even a relatively small fine would still have a chilling effect on the exercise of freedom of expression. Imposing a sanction on a lawyer might also have certain repercussions, particularly as regards their image or the confidence placed in them by the public and their clients.

Taking all this into account, the court held that the defamation judgment against Mr Morice was a disproportionate interference with his right to freedom of expression.

- ***Kincses v. Hungary***, Application no. 66232/10, judgment of 27 January 2015: fine imposed on lawyer for calling a judge's professional competence into question did not violate the right to freedom of expression.

This concerned a lawyer who had been fined for criticising the judge sitting on one of his cases. He had filed a motion for bias against the judge alleging his professional incompetence and personal dislike for the respondent party. In the motion, he had stated that, "the judgment reflected the personal opinion of the judge and was not based on any evidence ... we cannot but call into question the professional competence of the sitting judge. His conduct was guided either by sympathy for the plaintiff or a dislike for the respondent." This earned him disciplinary proceedings and an eventual fine of €570 for infringing the dignity of the judiciary. His appeals were dismissed.

The European Court held that the statements made by the lawyer had indeed belittled the professional competence of the judge and had suggested that the court had circumvented the law. The Court found that the lawyer could have raised the substance of his objection without making these allegations. The Court also noted that the applicant, as a lawyer, was bound by the rules of professional conduct, and that he should be expected to contribute to the proper administration of justice, and thus to maintain public confidence in it. Bearing in mind, finally, that the lawyer was only fined and that no other penalties were imposed, the Court found that the sanction did not violate the right to freedom of expression.

- ***Martin v. Hungary***, Application no. 69582/13, judgment of 7 April 2015: disciplinary proceedings against lawyer for offensive criticism of judge did not violate right to freedom of expression.

This concerned a lawyer for a company involved in a medical malpractice case. He filed an appeal in the decision at first instance had gone against the company, and wrote in the appeal filing that "in its judgment, the court 'dreamt' that there were pains and swellings in the plaintiff's limbs... again, the judge dreamt about something in the judgment and in the expert opinion that is not there... the judge, severely biased against the respondents and their legal representative disregarded the expert opinion." He subsequently added that the mistakes that he perceived in the judgment could not be explained as a mistake of an inexperienced judge, because the judge in question had many years' experience. In a separate case presided over by the same judge, he asked for the judge to be excluded on grounds of bias, stating that he "had demonstrated unlawful kindness" towards the plaintiffs because the judge personally disliked the lawyer. Several weeks later, the lawyer complained to the President of the Regional Court about the judge, suspecting him of criminal conduct. As a consequence, criminal investigations were opened against the judge. They were eventually discontinued. The judge then filed a complaint about the lawyer with the local bar association. The disciplinary board fined him €400 on the grounds that the lawyer had, through his various statements, conducted a personal attack against the judge and denied him the requisite respect. His appeals were dismissed, the courts holding that the lawyer's

disrespectful tone was capable of undermining the authority of the judiciary. He then appealed to the European Court of Human Rights, arguing that the fine violated his right to freedom of expression.

The European Court of Human Rights held that the lawyer's complaint was manifestly ill-founded and declared it inadmissible. It agreed with the domestic courts that the lawyer's statements had been offensive in tone and disrespectful by accusing him of having incorporated imaginary elements in a judgment. The lawyer could have easily raised the substance of his criticism without using offensive language. Furthermore, the Court noted that a relatively light fine was imposed in the course of disciplinary proceedings, which were not made public and had no consequences on his right to exercise his profession. The Court agreed that the reasons given by the domestic courts in support of their decisions had been "relevant and sufficient" and that the fine imposed was not disproportionate to the legitimate aim pursued, namely, the maintenance of the authority of the judiciary.

- ***Peruzzi v. Italy***, Application no. 39294/09, judgment of 30 June 2015: defamation conviction for baseless allegations of judicial bias did not violate right to freedom of expression.

This concerned an Italian lawyer who had written a letter to the "Supreme Council of the Judiciary" of Italy complaining of the conduct of a district court judge. He followed this up with a letter to several judges of the same court to which he appended the letter to the Supreme Council, but without mentioning the judge by name. This letter detailed decisions adopted by the judge in question in the context of a set of inheritance proceedings, and it also specified alleged unacceptable conduct, including "wilfully committing errors with malice or gross negligence or through lack of commitment". The judge launched proceedings against the lawyer for defamation and insult. The lawyer was sentenced to four months' imprisonment for defamation and insult; on appeal this was replaced with a fine of 400 euros. The lawyer was additionally ordered to pay 15,000 euros (EUR) in compensation.

The European Court held that this did not violate the lawyer's right to freedom of expression. It noted that the letter had been personal and aimed at one judge in particular. The first part of the letter, in which the lawyer alleged that the judge had adopted unjust and arbitrary decisions, did not amount to excessive criticism since the remarks constituted value judgments that had some factual basis – particularly taking into account that the lawyer had represented one of the parties in the inheritance proceedings in question. However, the second criticism, that the judge was "biased" and had committed errors "wilfully ... with malice or gross negligence or through lack of commitment", implied that the judge had disregarded his ethical obligations or had even committed a criminal offence (the adoption by a judge of a decision he or she knew to be erroneous could constitute an abuse of official authority). There was no evidence of this and the lawyer had circulated the letter without awaiting the outcome of the case he had brought against the judge before the Supreme Council of the Judiciary. The Court also noted that the letter had been sent to numerous judges at the district court, and that this had been bound to undermine the judge's reputation and professional image. The Court finally took into account that the custodial sentence originally imposed had been replaced on appeal by a fine and a damage award which could not be regarded as excessive. Therefore, and taking into account the need to maintain the authority and impartiality of the judiciary, the European Court found that the defamation judgment did not violate the right to freedom of expression.

- ***Lavric v. Romania***, Application no. 22231/05, judgment of 14 January 2014: baseless newspaper allegations of impropriety by a prosecutor violated the right to respect for reputation.

This concerned a prosecutor who had been subject to disciplinary proceedings. A newspaper had commented on these proceedings whilst they were ongoing, alleging that the prosecutor had falsified indictments; had "cheated" and that innocent people had been imprisoned as a result. After the disciplinary proceedings had been concluded the prosecutor sued for defamation. At first instance she won a judgment finding the journalist guilty of defamation and ordering him to pay a fine; but on appeal, the journalist was acquitted. The prosecutor appealed to the European Court of Human Rights arguing that her right to respect for privacy and reputation had been violated.

The European Court found that there had been a violation of the right to respect for privacy and reputation. It stated the allegations made were allegations of serious misconduct that went beyond mere statements of opinion. These were statements of fact, for which the journalist had absolutely no proof. The journalist had simply reproduced rumours and allegations made by someone else. As such the journalist had not acted with the professional care required of him and had overstepped the limits of professional conduct.

21. INCITING TERRORISM/PROTECTING NATIONAL SECURITY

In a series of cases, nearly all against Turkey, the European Court of Human Rights has consistently held that only statements that clearly incite terrorism can be prosecuted. Merely expressing sympathy with a particular political cause does not equate inciting terrorism.

The following cases illustrate how the Court approaches these cases in practice.

- ***Vereniging Weekblad Bluf! v. Netherlands***, Application no. 16616/90, judgment of 9 February 1995: seizure of magazine to protect national security violated right to freedom of expression.

This concerned a weekly magazine, entitled "Bluf!", whose journalists had obtained a report by the Dutch internal security service which showed that the security service had been investigating the Communist Party of the Netherlands as well as the anti-nuclear movement in the country. The editor proposed to publish the report along with a commentary. Prior to publication, the entire print-run was seized by police. However, during the night, the magazine was re-printed and 2,500 copies were sold. The police then obtained a court order which required that the entire issue of the magazine should be withdrawn from circulation.

The European Court of Human Rights held that the ban violated the right to freedom of expression. The Court held that national authorities must be able to protect national security, and that this could in theory justify the seizure of a magazine. However, national law should provide safeguards to protect against the abuse of these powers. In this case, Dutch law had provided such safeguards by allowing the party concerned to complain to a court, but the Dutch courts had been mistaken in their assessment of the case. The information contained in the security services' report was six years old at the time of the seizure, and was of a very general nature. The head of the security service had already admitted that the information concerned could no longer be regarded as a "state secret". By the time the magazine was withdrawn from circulation, thousands of copies had already been sold and the issue had been widely commented upon by other media. The protection of the information as a state secret was therefore no longer justified and the withdrawal of the impugned issue was not "necessary" to protect national security.

- ***Hadjianastassiou v. Greece***, Application No. 12945/87, judgement of 16 December: conviction for army engineer who disclosed military technology did not violate right to freedom of expression.

This concerned an aeronautical engineer and Captain in the Greek Air Force who had submitted a report to the Air Force on a missile design on which he had been working. Shortly after submitting this report, he provided, in his private capacity, a technical study on guided missiles to a private company. Although the two studies concerned different missiles, the Greek authorities considered that there had been some transfer

of military technology. He was charged with and found guilty by a military court of disclosing minor military secrets.

The Court emphasised that the right to freedom of expression applies to military personnel just as it does to everyone else, and that its scope extends to commercial information and technical studies:

> "[F]reedom of expression ... applies to servicemen just as it does to other persons ... Moreover information of the type in question does not fall outside the scope of Article 10, which is not restricted to certain categories of information, ideas or forms of expression." (para. 39)

However, the Court noted that the disclosure concerned military information, which by its very nature is sensitive:

> "[T]he disclosure of the State's interest in a given weapon and that of the corresponding technical knowledge, which may give some indication of the state of progress in its manufacture, are capable of causing considerable damage to national security." (para. 45)

Furthermore, the Court noted that special conditions and duties attached to military life and that the applicant was bound by an obligation of discretion in relation to anything concerning the performance of his duties. Finally, the Court did not think that the sanction imposed was disproportionate with regard to the aim pursued. Therefore, the Court did not find that the case disclosed a violation of the right to freedom of expression.

- ***The Observer and Guardian v. the United Kingdom***, Application no. 13585/88, judgment of 26 November 1991: injunction on book that disclosed state secrets when the book was already being imported from abroad violated the right to freedom of expression.

A former member of the British Security Service wrote his memoirs "Spycatcher" and made arrangements for their publication in Australia, without obtaining the authorisation of the Security Service. He asserted that until the late 1970s, the Security Service had been engaged in unlawful activities, including the bugging and burgling of friendly embassies. Proceedings were instituted in Australia to restrain publication of the book and of any information contained therein. Whilst the Australian proceedings were still pending, the applicants, daily newspapers, published short articles reporting on the forthcoming hearing in Australia and giving details of the contents of Spycatcher. Proceedings were instituted in the English courts and interim injunctions obtained restraining any further publication of the kind in question pending the substantive trial of the action in Australia.

Subsequently, it was announced that Spycatcher would be published in the United States. Another newspaper obtained a copy of the manuscript from the US publishers and started serialisation. The British Government instituted contempt of court proceedings against that newspaper, but took no legal action to restrain publication in the US, and a substantial number of copies were brought into the UK by British citizens who had visited the US or who had purchased it by mail order from US bookshops. In the Australian proceedings, the Australian High Court declined to grant temporary injunctions restraining its publication in Australia in view of its publication in the US, and Spycatcher was published in Australia. It also went on sale in Canada, Ireland and various other European countries as well as in Asia. However, a varied version of the injunction restraining the applicants from publishing details from the book remained

in place until after the conclusion of both the Australian proceedings as well as the contempt of court proceedings that had been commenced against the newspaper that had started serialisation.

The Court held that freedom of expression was of the utmost importance in a democratic society, and that any form of prior restraint, such as the injunction in question, should be submitted to the strictest scrutiny:

> "The dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court. This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value." (para. 60)

During the first period, before Spycatcher had been published in the US, the applicants had published two articles which touched upon allegations in Spycatcher of wrongdoing by the Security Service. Injunctions had been granted on the grounds that the Attorney General was seeking a permanent ban on the publication of Spycatcher; to refuse interlocutory injunctions would effectively destroy the substance of the actions and, with it, the claim to protect national security. These were "relevant" reasons both in terms of protecting national security and of maintaining the authority of the judiciary, and as regards this period the injunction could be justified as "necessary in a democratic society".

However, as regards the second period, after Spycatcher had been published in the US, the Court observed that the Attorney General's case underwent a metamorphosis. On 14 July 1987 Spycatcher was published in the United States, meaning that the contents of the book ceased to be a matter of speculation and that their confidentiality was destroyed. The continuation of the injunctions after July 1987 prevented the newspapers from exercising their right and duty to purvey information, already available, on a matter of legitimate public concern. Therefore, after 30 July 1987 the interference complained of was no longer "necessary in a democratic society".

- ***Surek and Ozdemir v. Turkey***, Application nos. 23927/94 and 24277/94, judgment of 8 July 1999: publication of interviews with terrorist leader did not endanger national security.

This concerned the publication of a two-part interview with the leader of the Kurdistan Workers Party (PKK), an illegal organisation as well as a joint declaration by four socialist organisations. The National Security Court ordered the seizure of all copies of the 31 May issue, on the basis that it contained a declaration by terrorist organisations and disseminated separatist propaganda. The applicants were charged with and convicted of having disseminated propaganda against the indivisibility of the State by publishing the interview, and declaration.

The European Court of Human Rights held that the context in which the interviews were published was highly relevant and that the statements on the basis of which the journalists had been convicted should be read in the context of the interview as a whole:

> "The fact that the impugned interviews were given by a leading member of a proscribed organisation cannot in itself justify an interference with the applicants' right to freedom of expression; equally so the fact that the interviews contained hard-hitting criticism of official policy and communicated a one-sided view of the origin of and responsibility for the disturbances in South-east Turkey. While it is clear from the words used in the interviews that the message was one of intransigence and an unwillingness to compromise with the authorities as long

as the objectives of the PKK had not been secured, the texts taken as a whole cannot be considered to incite violence or hatred." (para. 61).

The Court held that the interview allowed the public to have an insight into the psychology of those who are the driving forces behind them. The domestic authorities failed to have sufficient regard to the public's right to be informed of a different perspective on the situation in Southeastern Turkey, irrespective of how unpalatable that perspective may be for them. The same conclusion was reached with regard to the joint statement. The severity of the penalties imposed on the applicants is a factor to be taken into account when assessing the proportionality of the interference.

- ***Surek v. Turkey***, Application no. 26682/95, judgment of 8 July 1999: providing a platform for terrorists to stir up hatred not protected under right to freedom of expression.

This concerned the publication of articles by a magazine's readers in which the State authorities were severely criticised for their part in the massacres in "Kurdistan" in Southeastern Turkey. The magazine director was convicted of the offence of disseminating propaganda against the indivisibility of the State and provoking enmity and hatred among the people; he was fined.

The Court held that the background of the case must be taken into consideration, namely the problems linked with the prevention of terrorism. The impugned articles used labels such as "fascist Turkish army", "murder gang" alongside references to "massacres", "brutalities" and "slaughter". In the Court's view they amounted to an appeal to bloody revenge by stirring up base emotions and hardening already embittered prejudices which had manifested themselves in deadly violence. The letters were published in the context of serious disturbances where there had been heavy loss of life and the imposition of emergency rule. The letters must therefore be seen as capable of inciting to further violence. One of the letters identified persons by name, exposing them to risk of violence. The fine imposed on the applicant was a modest one. The reasons given by the national authorities for the applicant's conviction were accordingly both relevant and sufficient and the therefore the interference was proportionate to its legitimate aim. While the applicant did not personally associate himself with the views contained in the letters, he provided their authors with an outlet for stirring up violence and hatred.

- ***Bayar and Gürbüz v. Turkey (No. 2)***, Application no. 37569/06, judgment of 27 November 2012: conviction for quoting statements made by members of terrorist organisation in the context of a news report violates the right to freedom of expression.

The applicants are the owner and editor of a Turkish newspaper which had published articles about the Kurdistan Workers Party, PKK, which is considered a terrorist organisation in Turkey, and had cited statements from two of its members. They were convicted of "publishing propaganda through the press against the indivisible unity of the State" and "publication of statements by an illegal armed organization".

The European Court of Human Rights held that the conviction constituted a violation of the right to freedom of expression. It recalled its jurisprudence in similar cases, and noted that the writings in question merely contained statements of one of the PKK's leaders, expressing his views on the reorganization of the PKK and the union of leftist

movements after the election. The articles did not constitute a call to use violence, armed resistance or an uprising, and they did not constitute hate speech. The conviction of the applicants was therefore not 'necessary in a democratic society.

- ***Kasymakhunov and Saybatalov v. Russia***, Application nos. 26261/05 and 26377/06, judgement of 14 March 2013: conviction for membership of a religious organisation deemed to be 'terrorist' did not violate rights to freedom of expression, association or religion.

The applicants in this case had been convicted for their membership of the religious group, Hizb ut-Tahrir, and complained that this violated their rights to freedom of religion, freedom of expression and freedom of association. The Court held that the application constituted an 'abuse of rights' under Article 17 and held the conviction therefore did not violate the rights to freedom of religion, expression or association. The Court considered that political and/or religious organisations must act within certain limits. In particular, a political or religious party or organisation may promote a change in the law or the legal and constitutional structures of the State only on two conditions: (1) the means used to that end must be legal and democratic; (2) the change proposed must itself be compatible with fundamental democratic principles. Therefore, a political organisation whose leaders incite to violence or put forward a policy which fails to respect democracy or which is aimed at the destruction of democracy and human rights cannot claim the protection of Convention rights. The Court held that the ideology and activities of Hizb ut-Tahrir failed these tests.

- ***Aslan and Sezen v. Turkey***, Application nos. 43217/04 and 15066/05, judgement of 17 June 2014: conviction of journalists for reporting statement by member of a terrorist organisation violated the right to freedom of expression.

This concerned the owner and editor-in-chief of a magazine which had published an article reporting on a clash between the Turkish army and the Workers' Party of Kurdistan (PKK), an illegal armed organisation in Turkey, and another article in which it quoted one of the representatives of the PKK. The Turkish State Security Court ordered the seizure of the magazine and the owner and editor were prosecuted and fined. The magazine was ordered to be closed for a day in respect of the first article, and a further week in respect of the second article.

The European Court of Human Rights held that the articles did not incite hatred or constituted a call to arms, and that they did not endorse any terrorist policies. The conviction for merely reproducing the statements of someone considered to be a member of a terrorist organisation or reporting on a clash involving such an organisation therefore violated the right to freedom of expression.

- ***Belek and Özturk v. Turkey***, Application nos. 10752/09, 4375/09, 4327/09, 4323/09, 28616/08, 28470/08, judgment of 17 June 2014: conviction of journalists for reporting statement by member of a terrorist organisation violated the right to freedom of expression.

This concerned the owner and editor-in-chief of a daily newspaper which had published various articles that contained statements by the Workers' Party of Kurdistan (PKK), an illegal armed organisation in Turkey. They were convicted for publishing statements by

an illegal armed organisation, an offence punishable under the Turkish Prevention of Terrorism Act, and ordered to pay a small fine. They appealed to the European Court of Human Rights arguing that their right to freedom of expression had been violated. They also complained that because of the small size of the fine they had not been able to appeal their case to the Turkish Court of Cassation.

The European Court of Human Rights held that the articles did not incite hatred or constituted a call to arms, and that they did not endorse any terrorist policies. The conviction for merely reproducing the statements of someone considered to be a member of a terrorist organisation therefore violated the right to freedom of expression. With regard to the inability to appeal to the Court of Cassation, the Court found that this constituted a denial of the right of access to justice.

- ***Nedim Şener v. Turkey and Şik v. Turkey***, Application nos. 38270/11 and 53413/11, judgment of 8 July 2014: detention of journalists who had written about the investigation into an attempted coup d'etat violated the right to freedom of expression.

This concerned two investigative journalists who had been detained for more than a year on suspicion of aiding and abetting an organisation named 'Ergenekon', whose members had been suspected of plotting a military coup d'état. The journalists had written books in which they accused the government of infiltrating Islamist extremists into the State apparatus, and that the trial against the Ergenekon leaders had been diverted from its proper purpose by these same Islamist leaders. They had not been informed of the evidence against them because of the authorities' refusal to allow them to consult the case file for reasons of confidentiality. They finally claimed that their detention pending trial, for more than a year, and the investigations carried out prevented them from working as investigative journalists and required them to censor themselves.

The European Court of Human Rights held that the journalists' right to freedom of expression had been violated as well as their right to liberty. The Court observed that the offence of "bringing pressure to bear on the judicial authorities in charge of a criminal investigation" had been central to the accusations against the applicants. However, this was not one of the offences which, under the Turkish penal code, warranted pre-trial detention and it was therefore doubtful whether the detention of the two had been lawful. The journalists had lodged several requests for bail, all of which had been denied without any specific reasons being given. The Court also observed that the accusations against the journalists had been based mainly on documents and computer files that had been seized from third parties, and the prosecution authorities had not disclosed these to the lawyers for the journalists for reasons of 'confidentiality'. This made it impossible for the journalists to challenge the lawfulness of their detention.

Finally, the Court observed that by detaining the journalists for such a long time, without justification, the Turkish authorities had exerted a 'chilling effect' on the journalists' right to freedom of expression. The imprisonment of the two journalists had created a climate of self-censorship for any investigative journalist wanting to research and comment on the conduct and actions of State authorities. As well as violating the journalists' right to liberty, the authorities had therefore also violated the right to freedom of expression.

- ***Öner and Türk v. Turkey***, Application no. 51962/12, judgment of 31 March 2015: conviction for 'disseminating terrorist propaganda' in speech calling for peaceful solution to Kurdish problem violated right to freedom of expression.

The case concerned two individuals who had made speeches during celebrations for the Kurdish New Year (Newroz). In their speech, they had expressed discontent with respect to certain policies of the government, the practices of the security forces, and the detention conditions of the leader of the Kurdish Workers Party, Abdullah Öcalan. They ended their speech with, "The state did not take any steps for democratisation or to solve the Kurdish problem. We believe in peace and the state should take appropriate steps for solving the Kurdish problem". They were convicted of "disseminating terrorist propaganda" on behalf of an illegal organisation, the PKK (Kurdish Workers' Party) and sentenced to one year and eight months' imprisonment. They appealed and the Court of Cassation upheld the conviction.

The European Court held that the conviction violated the right to freedom of expression. It held that taken as a whole, the speeches did not encourage violence, armed resistance or an uprising. The Court also held that the speeches were not capable of inciting violence by instilling a deep-seated and irrational hatred against identifiable persons, and that they therefore did not constitute hate speech. Finally, the Court held noted that the domestic courts' judgments did not indicate whether they had examined the proportionality of the sentence and its impact on the right to freedom of expression. For all these reasons, the European Court of Human Rights held that the conviction and sentence was disproportionate and therefore not "necessary in a democratic society".

- ***Karatas v. Turkey***, Application no. 23168/94, judgment of 8 July 1999: confiscation of collection of poems violated right to freedom of expression.

This concerned the publication of a collection of poems entitled 'The Song of a Rebellion'. The author was convicted of disseminating propaganda against the indivisible unity of the State, sentenced to twenty months' imprisonment and ordered to pay a large fine. Furthermore, copies of the poems were confiscated.

The European Court of Human Rights held that the imprisonment and confiscation of the poems constituted a violation of the right to freedom of expression. The Court noted that the book consisted of poems calling for self-sacrifice for Kurdistan and included some particularly aggressive passages directed at the Turkish authorities. However, the Court noted that poetry is a form of artistic expression that appeals only to a small audience. This limited any potential impact on "national security", "public order" and "territorial integrity". Furthermore, the Court held that the aggressive tone of the poems was less a call to violence and more an expression of deep distress.

22. OBSCENITY AND PUBLIC MORALS

This is an area where the European Court typically allows States a considerable "margin of appreciation" in deciding the extent to which restrictions can be imposed on the right to freedom of expression. The Court does not allow States unlimited discretion – any restrictions that States impose must still be justified as "necessary" in a democratic society, and be imposed by a clearly formulated law – but the Court does recognise that public morals vary considerably from country to country. What the public in one country might find perfectly acceptable may be highly obscene to the public in another country. The Court distinguishes between forms of expression that are purely artistic and political speech, applying a higher standard of protection to political speech.

The following cases indicate how the Court approaches such cases.

- ***Müller and others v. Switzerland,*** Application no. 10737/84, judgment of 24 May 1988: fine and temporary confiscation of obscene paintings did not violate right to freedom of expression.

This concerned the exhibition of three sexually explicit paintings depicting fellatio, sodomy and sex with animals, at a contemporary art show. The exhibition had been widely advertised and was open to all, and the accompanying catalogue contained photographs of the paintings. On the opening day the public prosecutor initiated proceedings against the artists arguing that the paintings were obscene and should be destroyed. In the ensuing legal proceedings, the paintings were temporarily confiscated and the artists were fined. The artists appealed to the European Court of Human Rights.

The Court held that there had been no violation of the right to freedom of expression. The Court emphasised that on the topic of morals, countries are left a considerable margin of appreciation in deciding what is acceptable, stating that "it is not possible to find in the legal and social orders of the [European countries] a uniform European conception of morals. The view taken of the requirements of morals varies from time to time and from place to place, especially in our era, characterised as it is by a far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them."

Considering the fine on the artists and the confiscation of the paintings, the Court considered that the paintings showed sexual manners in a crude manner, particularly between men and animals, and that the exhibition of which they formed part was open to the public at large, without admission being charged. Although the Court acknowledged that concepts of sexual morality had changed over time, it held that it was reasonable and within the limits of the margin of appreciation for the Swiss courts to have held that the paintings were "liable grossly to offend the sense of sexual propriety of persons of ordinary sensitivity".

With regard to the temporary confiscation of the paintings, the Court held that it was common practice across Europe to allow for confiscation of "items whose use has been lawfully adjudged illicit and dangerous to the general interest". Considering that the

purpose of the temporary confiscation was to prevent repetition of the offence, and that the paintings were later returned, the Court did not consider that this constituted a violation of the right to freedom of expression.

- ***Handyside v. the United Kingdom,*** *A*pplication no. 5493/72, judgment of 7 December 1976: ban of sexually explicit book to protect children did not violate right to freedom of expression.

This concerned the ban of a book entitled "the Little Red Book" which had been intended for schoolchildren aged twelve and older. The book contained chapters on sex, including sections on issues like masturbation, contraceptives, menstruation, pornography, homosexuality and abortion and addresses for help and advice on sexual matters. The book had first been published in Denmark and subsequently, after translation and with certain adaptations, in Belgium, Finland, Germany, Greece, Iceland, Italy, the Netherlands, Norway, Sweden and Switzerland. Upon publication in the UK, complaints were made to the police and copies of the books were seized. The book's publisher was found guilty of publishing an "obscene book" and all copies were destroyed.

The European Court of Human Rights held that the ban on the book did not violate the right to freedom of expression. The Court emphasised that the right to freedom of expression was one of the essential foundations of democratic society, and that it protects information or ideas that offend, shock or disturb the State or any sector of the population. However, freedom of expression was not an unlimited right and restrictions may be imposed on it, amongst others to protect public morals. The Court considered that in the area of 'protecting public morals', different European countries in Europe had different standards and should therefore be afforded a "margin of appreciation" in interpreting whether a particular measure is 'necessary'. Considering the facts of this particular case, the Court attached importance to the fact that the publication was aimed at children and adolescents, and that it was going to be marketed for widespread circulation. The book included passages that young people at a critical stage of their development could have interpreted as an encouragement to indulge in precocious activities harmful for them or even to commit certain criminal offences. Furthermore, the Court considered that the fact that no proceedings had been taken against a revised edition of the book, which differed extensively from the original edition on the points at issue. This indicated that the authorities had limited the ban to that which had been strictly necessary. For these reasons, the Court found no violation of the right to freedom of expression.

- ***Vereinigung Bildender Künstler v. Austria***, Application no. 68354/01, judgment of 25 January 2007: permanent ban on display of painting showing politicians in a sexually explicit caricature violated the right to freedom of expression.

This concerned a fine and withdrawal from public display of a painting entitled "Apocalypse", a collage of 34 public figures – including Mother Teresa, the Austrian cardinal Hermann Groer and the former head of the Austrian Freedom Party Jörg Haider - all naked and involved in sexual activities. The bodies of those figures were painted but their heads and faces used photos taken from newspapers, the eyes of some of the people portrayed being hidden by black bands. Among those portrayed was Mr Meischberger, a former general secretary of the Austrian Freedom Party, who was shown in a sexual pose with Mr Haider, two other politicians and Mother Teresa. The painting had been on display as part of an exhibition by an association of Austrian artists. Mr Meischberger sued the artists and won a judgment permanently barring the display of

the painting on the grounds that the painting debased him and his political activities. The association of artists complained to the European Court of Human Rights.

The European Court held that the fine and ban violated the association's right to freedom of expression. While the Court noted that the painting depicted Mr Meischberger in a somewhat outrageous manner, it was clear that it the figures were caricatures and the painting was satirical. The Court emphasised that satire was a form of artistic expression and social comment which, by exaggerating and distorting reality, was both intentionally provocative and political in nature. As such, restrictions on it should be examined with particular care. Mr Meischberger had been depicted in the context of his political work and functioning, and the painting could be seen as a reaction against the Austrian Freedom Party, whose members had previously been critical of the artist's work. Meischberger was of the least prominent of those depicted – and at the time he sued, he was not recognisable at all since his photograph had been covered with red paint. The Court also took into consideration that the injunction granted by the Austrian courts had been unlimited and left the association – which directed one of Austria's best known modern art galleries – no possibility of exhibiting the painting ever again, irrespective of whether Mr Meischberger was known, or was still known, at the place and time of a potential exhibition in the future.

- ***Akdaş v. Turkey***, Application no. 41056/04, judgment of 16 February 2010: ban on translation of classic work of literature that contained graphic descriptions of sex violated the right to freedom of expression.

This concerned a Turkish publisher who published the Turkish translation of the erotic novel "*Les onze mille verges*" ("The Eleven Thousand Rods") by French writer, Guillaume Apollinaire. The book included graphic sexual descriptions, including of practices such as sadomasochism, vampirism and paedophilia. The Turkish publisher was prosecuted and convicted for publishing obscene material liable to arouse and exploit sexual desire. He was fined €1,100. The publisher complained to the European Court of Human Rights, arguing that the book had been written by literary specialists, did not contain any violent overtones and that its humorous and exaggerated tone was more likely to extinguish sexual desire than to arouse it.

The Court held that the conviction violated the right to freedom of expression. While the Court emphasised that the requirements of morals vary from time to time and from place to place, even within the same country, and that national authorities are in a better position to judge this than the European Court, it held that the Turkish authorities had not applied the correct standard. The French original of the book had been first published in 1907, had been republished in various languages and had obtained the status of a 'classic' work of European literature. There was no "pressing social need" that could possibly justify banning access to a literary work of such status and fining its publisher.

- ***Karttunen v. Finland***, Application no. 1685/10, judgment of 10 May 2011 – admissibility decision: display of child pornography downloaded from the internet as part of art installation demonstrating against pornography violated the right to freedom of expression.

This case concerned the conviction for possession and public display of child pornography of a Finnish artist who had included photographs of teenage girls and young women in sexual poses in an exhibition in an art gallery, under the title "the Virgin-Whore Church". The pictures had been downloaded from publicly accessibly internet sites

and the artist had intended to use her exhibition to criticise the free availability of such material online. The exhibition was closed, the pictures were confiscated and the artist was convicted of distributing child pornography – but because the artist had intended the exhibition as a protest, no fine or other sentence was imposed. She complained to the European Court of Human Rights that the conviction and confiscation of the photographs violated her right to freedom of expression.

The European Court held that the conviction did not violate the right to freedom of expression. It noted that while the artist's intention had been to protest the availability of child porn on the internet, the possession and public display of child pornography was a criminal offence in Finland. The conviction of the artist was therefore still justified – there was a genuine social need to protect children against sexual abuse, to protect their privacy and for other moral considerations. The applicant's right to freedom of expression and her good intentions did not justify the possession and public display of child pornography.

- ***Perrin v. United Kingdom,*** Application no. 5446/03, judgment of 18 October 2005 - admissibility decision: obscenity conviction for publishing website showing very graphic scenes of sex did not violate the right to freedom of expression.

This concerned the conviction and 30 month prison sentence for a man who published a website showing scenes of sex involving excrement, including the eating of excrement, and fellatio. The website was published through a company registered in the United States and from servers in the US, and complied with US law. However, the publisher lived in the UK and he was prosecuted under UK law on obscenity. He complained to the European Court of Human Rights that his conviction and imprisonment had violated his right to freedom of expression. He argued that because the material was published through a US-based company and was published on US-based servers, he should not be subject to English law.

The European Court of Human Rights held that the conviction did not violate the publisher's right to freedom of expression. It held that because the publisher resided in the UK and published the website as a business, he should have taken legal advice as regards the applicability of UK law. The Court held that UK law on obscenity was sufficiently clear and it was obvious that material such as that on the website fell within its scope. The Court also considered that some of the material was available free of charge and that the domestic courts had been right to note that it could be sought out by very young people – which is precisely what the law on obscenity sought to prevent. The fact that publication of the material was legal in the United States was irrelevant: the European Court emphasised that on issues of public morals, standards differ from country to country. The Court also held that imprisonment was not disproportionate: it emphasised that the publisher's only aim was financial (the material was of no artistic or literary merit and did not contribute to any political debate) and that the publisher would have been eligible for release after fifteen months.

23. HATE SPEECH

The European Court of Human Rights has identified several categories of speech which are considered to be offensive to the concept of human rights and are therefore not protected by the right to freedom of expression. This type of speech is referred to as "hate speech".

The mere use of language that is deemed insulting or that is offensive is not considered 'hate speech'. 'Hate speech' is only classified as such if it undermines fundamental norms of human rights and democracy, or if it incites hatred or violence against a group.

The Court has not formulated a single and all-encompassing definition of "hate speech", preferring instead to leave the definition open. But in its jurisprudence, it has identified as "hate speech" speech that aims to stir up racial or ethnic hatred (as illustrated by its decisions in *Féret v. Belgium* and, as regards the specific issue of holocaust denial, *Garaudy v. France*); speech that inciteds hatred against individuals on grounds of their sexual orientation (illustrated by its decision in *Vejdeland and others v. Sweden*); religion (as illustrated by the Court's decision in *Norwood v. the United Kingdom*). The Court has also dealt with a number of cases concerning speech that denied fundamental values of democracy and tolerance; it will generally reject any applications which are inspired by totalitarian or anti-democratic doctrine (best illustrated by the decision in *Refah Partisi (The Welfare Party) and Others v. Turkey*).

At the same time, whilst recognising that "hate speech" exists and denying it the protection of Article 10 of the European Convention of Human Rights, the Court has been very careful to distinguish between what it considers legitimate political speech and hate speech (see for example *Association of Citizens "Radko" & Paunkovski v. the former Yugoslav Republic of Macedonia*), and it has also allowed journalists to report on hate speech (as illustrated by its decision in *Jersild v. Denmark*).

The Committee of Ministers of the Council of Europe has adopted a recommendation on the topic of hate speech which elaborates on the Court's jurisprudence.

The following paragraphs summarise the Court's main decisions in this area.

- ***Féret v. Belgium***, Application no. 15615/07, judgment of 16 July 2009: inciting hatred against immigrants and on grounds of religion not protected by right to freedom of expression.

This concerned an application to the Court by a Belgian politician and member of parliament who had been convicted for distributing election leaflets that carried the slogans, "Stand up against the Islamification of Belgium", "Stop the sham integration policy" and "Send non-European job-seekers home". He was sentenced to community service and disqualified from being a member of parliament for ten years. The Court held that this did not constitute a violation of his right to freedom expression: the politician's comments had been clearly likely to incite hatred against foreigners, particularly in the heightened political context of elections. The conviction could therefore be considered as "necessary" to prevent public disorder and to prevent the rights of others, namely members of the immigrant community.

In the context of Montenegro, it should be noted that Criminal Code in Article 370

stipulates the criminal offense Causing National, Racial and Religious Hatred and a penalty for a term of six months to five years for anyone who publicly incites to violence or hatred towards a group or a member of a group defined by virtue of race, skin color, religion, origin, national or ethic affiliation.

- ***Garaudy v. France***, Application no. 65831/01, judgment of 24 June 2003: holocaust denial not protected by the right to freedom of expression.

This concerned a French author who had written and published a book entitled "The Founding Myths of Modern Israel", in which he disputed the extent of the holocaust. He was convicted for 'holocaust' denial', a crime under French law, defamation of the Jews and incitement to racial hatred; and appealed to the European Court of Human Rights arguing that his right to freedom of expression had been violated.

The Court held that the conviction did not violate the right to freedom of expression. It considered that "[d]enying crimes against humanity [was] one of the most serious forms of racial defamation of Jews and of incitement to hatred of them". It also held that disputing the existence of clearly established historical events such as the holocaust did not constitute scientific or historical research, and that its clear purpose was instead to rehabilitate the Nazi regime and accuse the victims of falsifying history. This was incompatible with fundamental values underlying the European Convention on Human Rights and was not therefore protected under the right to freedom of expression.

In the context of Montenegro, it should be noted that Criminal Code in Article 370 stipulates the criminal offense Causing National, Racial and Religious Hatred and a penalty for a term of six months to five years, and under special circumstances even longer, to anyone who publicly approves, renounces the existence, or significantly reduces the gravity of criminal offences of genocide, crimes against humanity and war crimes committed against a group or a member of group by virtue of their race, skin color, religion, origin, national or ethnic affiliation in a manner which can lead to violence or cause hatred against a group of persons or a member of such group, where such criminal offences have been established by a final judgment of a court in Montenegro or of the international criminal tribunal.

- ***Vejdeland and others v. Sweden***, Application no. 1813/07, judgment of 9 February 2012: hate speech towards homosexuals not protected under right to freedom of expression.

This concerned the conviction of the applicants for distributing leaflets in a school alleging that homosexuality was a "deviant sexual proclivity", had "a morally destructive effect on the substance of society" and was responsible for the development of HIV and AIDS. The leaflets were considered to be offensive to homosexuals and the applicants were convicted. The applicants appealed to the European Court arguing that they had not intended to express contempt for homosexuals as a group, but that they had sought to start a debate about the lack of objectivity in the education in Swedish schools.

The Court held that the applicants' conviction did not violate their right to freedom of expression. It considered that the allegations in the leaflets had constituted serious and prejudicial allegations, and that that discrimination based on sexual orientation was as serious as discrimination based on "race, origin or colour". Even though the statements did not constitute a direct call to hatred or hateful acts, the conviction could be reasonably regarded as "necessary" in a democratic society for the protection of the reputation and rights of others.

- ***Norwood v. the United Kingdom***, Application no. 23131/03, judgment of 16 November 2004: inciting hatred on grounds of religion not protected under right to freedom of expression.

The applicant had displayed a poster by a rightwing political party, showing the Twin Towers in New York in flame accompanied by the text "Islam out of Britain – Protect the British People". He was convicted of aggravated hostility towards a religious group and argued that this conviction violated his right to freedom of expression. The Court declared the case inadmissible, holding that no issues were raised under Article 10: such a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, was incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination.

- ***Refah Partisi (The Welfare Party) and Others v. Turkey***, Application nos. 41340/98, 41342/98, 41343/98 and 41344/98, judgment of 13 February 2003: advocacy for anti-democratic concepts not protected under the right to freedom of expression.

This concerned an application by a political party which had been dissolved on the grounds that it had become a "centre of activities against the principle of secularism". Amongst its goals and objectives, the party sought the introduction of strict Islamic law and the establishment of a theocratic regime. Several of the parties members complained to the European Court of Human Rights, arguing that their right to freedom of expression and association had been violated.

The European Court considered that the party's acts and speeches by its leaders revealed that its long term policy was the establishment of a political regime of Sharia law that was not compatible with fundamental values underlying the Convention, and that it did not exclude recourse to force. This presented an immediate danger to democracy and meant that the party's dissolution could be justified as "necessary" in a democratic society. There had been no violation of the right to freedom of expression and the right to freedom of association.

- ***Association of Citizens "Radko" & Paunkovski v. the former Yugoslav Republic of Macedonia***, Application no. 74651/01, judgment of 15 January 2009: dissolving an association whose name was associated with fascism violated the rights to freedom of association and expression.

This concerned the dissolution of a citizens' association that had been named after the leader of the Macedonian Liberation Movement for over 60 years. The authorities considered that the name of the movement promoted fascist ideas concerning the Bulgarian origins of the Macedonian people, negated the identity of the Macedonian people and encouraged national or religious hatred and intolerance.

The Court held that the dissolution of the association violated the group's rights to freedom of association and expression. The mere fact of naming the association after an individual who was perceived negatively by the majority of the population did not by itself be considered a present and imminent threat to public order. The association had not advocated hostility nor did it intend to use violence. While the Court acknowledged that the association's interpretation of national history was liable to shock people, this did not amount to an attack on fundamental values and rules of democracy.

- ***Jersild v. Denmark***, Application no. 15890/89, judgment of 23 September 1994: criminal conviction for reporting on hate speech and broadcasting statements by neo-Nazis violated right to freedom of expression.

This concerned a journalist who had made a documentary that included extracts from a television interview he had conducted with three members of a racist group. These three had made abusive and derogatory remarks about immigrants and ethnic groups, and the journalist was convicted for assisting in the dissemination of racist remarks. He complained to the Court arguing that the conviction violated his right to freedom of expression.

The Court held that the conviction did violate his right to freedom of expression. It drew a distinction between the three racist youth, who had made racist remarks, and the journalist, who had reported the remarks. It considered furthermore that the journalist's aim had been to expose racism, and analyse and explain racist attitudes. This was a matter of great public concern which the public had a right to be informed on. The Court also considered that, taken as a whole, the documentary had clearly not been aimed at propagating racist views and ideas.

- ***Önal v. Turkey***, Application nos. 41445/04 and 41453/04, judgment of 2 October 2012: hate speech conviction for publisher of book that attempted to inform the public on discrimination violated the right to freedom of expression.

This case concerned the conviction of the director of a publishing house for publications that had allegedly incited hatred and hostility. The applicant had published the biography of a businessman of Kurdish origin accused of drug trafficking and belonging to the illegal armed organisation PKK (Kurdistan Workers' Party); as well as a translation of a book originally published in Swedish, concerning the Alevis of Dersim. Domestic courts had found that both publications divided the people between Turks and Kurds, Alevis and Sunnis, and thus incited hatred and hostility.

The European Court found that both convictions violated the publisher's right to freedom of expression. It held that while certain passages in the first book painted an extremely negative picture of the Turkish state, and thus gave the narrative a hostile tone, it stressed that the Kurdish 'problem' had to be solved by peaceful means. The book did not present a 'call to arms'. As regards the second book, the Court noted that this traced the social and cultural history of the Alevis. It provided a perspective on the issues that have afflicted the Alevis from a different context than that 'normally' held, and the Court emphasised that by doing this it promoted diversity of opinion and fulfilled the public's right to receive different ideas and information from a variety of sources. Both books clearly intended to inform the public on important points of public policy, and neither aimed to instigate violence in any way nor did they seek to instil hatred.

- ***Yavuz et Yaylalı v. Turkey***, Application no. 12606/11, judgment of 17 December 2013: conviction for promoting a terrorist organisation violated the right to freedom of expression.

This concerned two individuals who had been imprisoned for their participation in a demonstration against the security forces which took place in the aftermath of another demonstration, organised by the Maoist Communist Party, at which the security services had shot and killed 17 people. The Maoist Communist Party is regarded as a terrorist organisation in Turkey, and the two were convicted for "promoting a terrorist organisation".

The European Court of Human Rights held that the conviction violated the right to freedom of expression. It stated that while States may take measures to safeguard national security and prevent terrorism, they must strike a fair balance between the right to freedom of expression and the need for a democratic society to protect itself against terrorism. The Court emphasised that national laws should in this regard give a precise definition of what is "terrorism", warning that

> "the concept of terrorism should be carefully specified by the national authorities in order to avoid ... a charge of terrorism-related crimes in cases where [a statement] is simply critical of government policy".

The Court noted that Turkish law prohibited the "glorification" of terrorism. The Court agreed that the glorification of terrorism, the denigration of victims, calls for funding terrorist organizations or other similar behaviours could indeed be regarded as an incitement to violence and hatred and could therefore legitimately be restricted. However, in practice, such restrictions should be applied very carefully and with restraint. In the present case, the Court held that the applicants had been convicted merely for their participation in a demonstration against the use of excessive force by the security services. They had not encouraged violence or promoted a terrorist organization.

- ***Perincek v. Switzerland***, Application no. 27510/08, judgment of 17 December 2013: conviction for challenging the legal characterisation of the Armenian genocide violated the right to freedom of expression.

This concerned a Turkish national who was convicted in Switzerland for publicly challenging the characterisation of killings of Armenians by the Ottoman empire as a "genocide". The Swiss courts convicted him of racial discrimination, holding that the Armenian genocide was, like the Jewish genocide, a historical fact recognised as proven by the Swiss parliament. He complained to the European Court of Human Rights.

The European Court held that the conviction violated the right to freedom of expression. It held that the rejection of the legal characterisation as "genocide" of the 1915 events was not such as to incite hatred against the Armenian people. It stated that the question whether the events of 1915 and thereafter could be characterised as "genocide" was of great interest to the general public, and that the applicant had engaged in speech of a historical, legal and political nature which was part of a public debate. The Court noted furthermore that whether or not the 1915 events were indeed a "genocide" was not a matter of consensus within the academic community, and only about twenty States out of the 190 in the world had officially recognised the Armenian genocide as such. Finally, the Court distinguished the present case from those concerning the negation of the crimes of the Holocaust. In those cases, the applicants had denied the historical facts even though they were sometimes very concrete, such as the existence of the gas chambers; and the denying of the holocaust was a means by which to incite hatred against Jews. In the present case, the applicant had not engaged in such conduct.

- ***PETA Deutschland v. Germany***, Application no. 43481/09, judgment of 8 November 2012: publication ban for denigrating the memory of holocaust victims did not violate the right to freedom of expression.

PETA Deutschland, the German branch of the animal rights organisation PETA, planned to launch an advertising campaign entitled "The Holocaust on your plate", showing posters which bore a photograph of concentration camp inmates along with a picture of animals kept in mass stocks, accompanied by a short text. The Central Jewish Coun-

cil in Germany obtained a court injunction ordering PETA to refrain from publishing seven specific posters, arguing that the campaign was offensive and violated their human dignity as holocaust survivors as well as the personality rights of the family members one of them had lost. PETA launched appeals to the Federal Constitutional Court which were rejected, holding that the campaign banalised the fate of the victims of the Holocaust.

The European Court of Human Rights found that the injunction did not violate PETA Deutschland's right to freedom of expression. While it held that the intended campaign did not aim to debase concentration camp, the Court held that the facts of the case could not be detached from the historical and social context of the holocaust – particularly in Germany. The Court accepted the German Government's stance that they deemed themselves under a special obligation towards the Jews living in Germany. In that light, the Court found that the German courts had given relevant and sufficient reasons for granting the civil injunction.

Furthermore, as regards the severity of the sanction, the proceedings had not concerned any criminal sanctions, but only a civil injunction preventing PETA from publishing seven specific posters. Finally, PETA had not established that it did not have other means at its disposal to draw public attention to the issue of animal protection.

- ***Mehmet Hatip Dicle v. Turkey***, Application no. 9858/04, judgment of 15 October 2013: conviction for criticism of government policy regarding the Kurds violated right to freedom of expression.

This concerns a journalist who was convicted for an article in which he criticised local government policy, denouncing the economic situation and the growth of drug trafficking. He also claimed that the Kurds in the region had been victims of a policy of assimilation and genocide.

The European Court of Human Rights held that the conviction violated the right to freedom of expression. It considered that the article was undeniably virulent in tone, using terms such as "war machine", "burning of villages", "genocide," "murder", "torture" and "oppression". At the same time, the article discussed issues such as the depopulation of the region, low economic development, political violence and repression against the Kurdish population and the proliferation of drug trafficking; and the applicant appealed to his readers for a campaign for peace and freedom. The Court held that while the tone of the article was negative of state policy, it did not incite violence, armed resistance or an uprising. It could also not be considered as "hate speech".

24. "WHISTLEBLOWERS"

A 'whistleblower' is a person who exposes misconduct, alleged dishonest or illegal activity occurring in an organisation. For example, someone who works in a company and witnesses corruption and then exposes that to the media would be considered a 'whistleblower'. Often, such whistleblowers face reprisals - they may be dismissed from their jobs, and sometimes they are even prosecuted for disclosing 'official secrets'.

The European Court of Human Rights has examined a small number of cases involving whistleblowers who have faced reprisals and who complained that this violated their right to freedom of expression. The main criteria that the Court has applied in assessing these cases are:

- whether the information is of public interest;
- whether the 'whistleblower' disclosed the information in good faith or merely for personal gain;
- whether the 'whistleblower' attempted to report the information through internal channels before disclosing to the outside world.

The following cases illustrate how the Court uses these criteria.

- ***Guja v. Moldova***, Application no. 14277/04, judgment of 12 February 2008: dismissal of whistleblower for publishing letters that disclosed political interference in the justice system violated the right to freedom of expression.

This concerned the Head of the Press Department of the Moldovan Prosecutor General's Office, who had been dismissed from his job for giving a newspaper two letters received by the Prosecutor General's Office. The first letter was from the Deputy Speaker of Parliament and asked the Prosecutor General to "get personally involved in the case" of four police officers charged with illegal detention and ill-treatment of detainees. The letter stated that the police officers, who had asked for protection from prosecution, were part of one of the "best teams" in the Ministry of Internal Affairs and were being prevented from working normally"as a result of the efforts of the employees of the Prosecutor General's Office". He also asked in that context whether the "Vice Prosecutor General fights crime or the police". The second letter, from a vice-minister, concerned the same police officers and revealed that they had been previously investigated and had been sentenced only to a fine. The letter also revealed they had been re-employed despite being convicted, among other things, of illegal detention endangering life or health or causing physical suffering and abuse of power accompanied by acts of violence, use of firearms or torture.

Newspaper articles were written about the revelation and the applicant was dismissed from his job, along with a prosecutor who was suspected of having the letters to the applicant. The reason given for his dismissal was that he had failed to consult the heads of other departments of the Prosecutor General's Office before handing over the letters, in breach of the press department's internal regulations. He complained to the European Court of Human Rights arguing that his dismissal violated his right to freedom of expression.

The Court held that Mr Guja's dismissal had violated his right to freedom of expression. First, the Court noted that neither Moldovan legislation nor the internal regulations of the Prosecutor General's Office contained any provision concerning the reporting of irregularities by employees. Therefore, there was no authority other than the applicant's superiors to which he could have reported his concerns and no prescribed procedure for reporting such matters. It also noted that the disclosure concerned the conduct of a Deputy Speaker of Parliament, who was a high-ranking official, and that, despite having been aware of the situation for some six months, the Prosecutor General had shown no sign of having any intention to respond, instead giving the impression that he had succumbed to political pressure. The Court therefore considered that, in the circumstances of the applicant's case, external reporting, even to a newspaper, could be justified.

Furthermore, the Court considered that the matter of political interference with the operation of the justice system in the country was an issue of serious public interest which had been debated by NGOs as well as in the media. The letters disclosed by the applicant concerned issues such as the separation of powers, improper conduct by a high-ranking politician and the Government's attitude towards police brutality. There was no doubt that those were very important matters in a democratic society which the public had a legitimate interest in being informed about and which fell within the scope of political debate.

The Court considered that the public interest in the provision of information about undue pressure and wrongdoing within the Prosecutor's Office was so important in a democratic society that it outweighed the interest in maintaining public confidence in the Prosecutor General's Office. Open discussion of topics of public concern was essential to democracy and it was of great importance for members of the public not to be discouraged from voicing their opinions on such matters.

The Court found no reason to believe that the applicant was motivated by a desire for personal advantage, held any personal grievance against his employer, or that there was any other ulterior motive for his actions. He had therefore acted in good faith.

- ***Bucur and Toma v. Romania,*** Application no. 40238/02, judgment of 13 January 2013: punishment of 'whistleblower' who disclosed illegal phone tapping to the media violated right to freedom of expression.

This concerned the conviction and two year prison sentence for a government employee who had disclosed to the media the practice of illegal interception of journalists' and politicians' phones by the military secret service.

The European Court held that this violated the right to freedom of expression. While the Court acknowledged that the issue concerned 'national security', which it described as being at the 'core of State sovereignty', the Court considered the following factors. First, it took into account that the 'whistleblower' had initially attempted to report his concerns to his superiors and others within government. However, there was no formal legislation protecting 'whistleblowers' or providing for official channels through which concerns can be reported. The Court examined the existing informal channels for reporting concerns within the government agency concerned and found that these were unsatisfactory, as was the potential option of making a direct report to parliament.

The Court considered furthermore that the information concerned was undeniably of public interest. It noted that the interception of telephone communications was of particular importance in a society that had experienced during the communist regime a policy of close surveillance by the secret services. The Court also took into account

that the information had been disclosed in good faith, and that the domestic courts had failed to give due consideration to all arguments put forward by the whistleblower.

Finally, the Court considered that the disclosure had not caused "substantial prejudice" to the interests of the security service agency concerned. Any damage that might have been done to the agency's reputation was outweighed by the public interest in disclosing wrongdoing.

- ***Görmüş and Others v. Turkey***, Application no. 49085/07, judgment of 19 January 2016 (search and seizure of documents to reveal identity of whistleblower violated right to freedom of expression)

This concerned the publisher, editor and journalists working for a weekly magazine which had published an article commenting on a military list that divided the media into categories of 'friendly' and 'non-friendly'. The article was based on confidential documents which had been given to the journalists by a whistleblower. Following a complaint by the Chief of Staff of the armed forces, a Military Court ordered a search of the magazine's offices, demanding electronic and paper copies of the files stored on all private and professional computers, in the archives and on CDs and USB sticks. The journalists handed over the materials but appealed against the search warrant, complaining that this violated the right to protection of journalists' sources. Their appeals were turned down by the Turkish courts, and the journalists appealed to the European Court of Human Rights.

The European Court of Human Rights held that the search and seizure of the documents violated the right to freedom of expression. The Court noted in order to identify the State employees who had handed over the confidential information, the judicial authorities had raided the journalists' workplace unannounced and gained access to all of their systems and documents, transferring data from all the magazine's computers. This was a far more serious act than a mere order to divulge the source's identity and extended far beyond the initial request by the military prosecutor's office, which had been to identify the whistleblower. This could deter potential sources from assisting the press in informing the public on matters of public interest, such as the involvement of the army in politics.

With regard to the protection of whistle-blowers who were State officials, the Court noted that the investigation had been intended to identify those responsible for the leak. The Court acknowledged that while whistleblowers could be required to go through internal administrative procedures in order to draw the wrongdoing they had uncovered to the attention of their superiors, Turkish law did not provide for such a procedure. Therefore, the journalists could not be criticised for having published the contested information. The Court acknowledged that the confidential nature of information concerning the internal organisation and functioning of the armed forces was in principle justified, but that this should not be protected at any cost – and it should not stop legitimate debate about the actions of the armed forces from taking place. Moreover, the Court noted that the reasons for which the contested documents had been classified as confidential were not justified, as the Government had not shown that there had been a detrimental impact as a result of their disclosure.

25. INTERNET FREEDOM AND FREEDOM OF EXPRESSION

Over the past decade, the Internet has become one of the main means by which people exercise the right to freedom of expression. Traditional media have gone 'online' and individuals, companies, organisations and governments have set up websites providing information on issues ranging from healthy eating to reporting the daily news.

As a medium that crosses frontiers (something that is uploaded in Moscow can be immediately read in Buenos Aires) and that relies on companies such as Google to transmit and index the trillions of pages of information that are available, the increasing use of the Internet poses many legal questions. Courts, including the European Court of Human Rights, have begun to issue judgments on these issues; and organisations such as the Council of Europe have issued recommendations regarding the legal standards to be applied. This bulletin will summarise European Court judgments as well as a few of the recommendations by international organisations that concern issues of the right of access to the internet, including the filtering and blocking of internet content, and restrictions on internet freedom. While this is a new and developing area of law and many questions are yet to be answered, the judgments and recommendations summarised indicate how the law is developing.

Republishing information found on the internet

- ***Editorial Board of Pravoye Delo and Shtekel v. Ukraine***, Application no. 33014/05, judgment of 5 May 2011: restrictions on republishing material found on internet should be clearly provided by law.

In this case, the Court held that Article 10 of the Convention imposes on States a positive obligation to protect journalists' right to freedom of expression online. The applicant journalists had been ordered to pay damages for republishing an anonymous text that they had downloaded from the Internet. The journalists had accompanied the text with an editorial indicating its source and distancing themselves from the text. The domestic courts ordered them to publish a retraction and an apology. The European Court held that because Ukrainian law did not protect republishing content and because the domestic judges had refused to extend 'traditional' republication news to the online environment, the sanction imposed on the journalists had not been 'provided by law'.

- ***Aleksey Ovchinnikov v. Russia***, Application no. 24061/04, judgment of 16 December 2012: newspaper not allowed to reprint details regarding a minor who had been involved in an incident, despite that this had already been revealed on the internet.

This concerned an application by a newspaper that had been fined for republishing details of a minor grandchild of a politician who had been involved in an incident, details of which had already been published online. The Court held that in the absence of any public interest, politicians should not be exposed to opprobrium because of

matters concerning their family. In this case, considering in particular that the family member was a minor, restrictions imposed on circulating his identity and details of an incident he had been involved in did not violate the right to freedom of expression.

Blocking and filtering of websites and internet access

- ***Yildirim v. Turkey***, Application no. 3111/10, judgment of 18 December 2012: blocking and filtering of entire internet domain because of one page that was subject to a court order violated the right to freedom of expression.

This concerned the blocking of an internet domain, "Google Sites", which meant that the applicant could no longer access his own website that was hosted on this domain. The Court considered that because the Internet was now one of the principal means of exercising the right to freedom of expression, restrictions on access to it or part of it are acceptable only under strict conditions. The first of these conditions is that any restriction must be imposed by law and that this law must be 'foreseeable' in its application. The Court considered that access to the entire Google Sites domain had been blocked because of one page in respect of which court proceedings had been initiated. Because neither the applicant nor Google Sites were the subject of any of these court proceedings and were only 'collateral victims', the Court held that the blocking of the entire domain could not be considered to be 'in accordance with law' and therefore violated the right to freedom of expression.

Political debate on the internet should not to be restricted lightly

- ***Renaud v. France***, Application no. 13290/07, judgment of 25 February 2010: internet provides an important forum for political discussion and should not be restricted lightly.

This concerned the criminal conviction of a webmaster for publicly insulting a mayor, on account of remarks published on the website of an association chaired by the webmaster. The European Court considered the importance of political debate, including online, and remarked that political debate often spills over into statements of opinion of a personal nature. This was part and parcel of the right to freedom of expression. The Court therefore held that his conviction violated the right to freedom of expression.

Trademark and copyright violations online

- ***Neij and Sunde Kolmisoppi v. Sweden***, admissibility decision, Application no. 40397/12, judgment of 19 February 2013: penalty for copyright infringement imposed on founders of file-sharing website did not violate right to freedom of expression.

This concerned an application by the founders of the file sharing website, Pirate Bay, who claimed that their conviction under Swedish copyright law violated their right

to freedom of expression. They argued that they had merely provided the technical infrastructure for users to share files, and that any illegality in file sharing was the responsibility of the users, not theirs. The European Court agreed that the right to freedom of expression protected the setting up of a website and other technical infrastructure. However, the Court disagreed that the conviction violated the right to freedom of expression. It held that the majority of files shared were commercial, and that the Pirate Bay served commercial speech more than political.

- ***Ashby Donald v. France***, Application no. 36769/08, judgment of 10 January 2013: fine for publishing photographs on website that infringed copyright did not constitute violation of right to freedom of expression.

This concerned an application by photographers who had uploaded copyright material onto their website without the permission of the copyright owners. They were convicted for copyright infringement. The European Court held that their conviction did not violate the right to freedom of expression, pointing to the commercial nature of the photographs (which were of fashion shows) and referring to the wide margin of appreciation accorded to States in issues involving commercial speech.

- ***Paeffgen Gmbh v. Germany***, admissibility decision, Application nos. 25379/04, 21688/05, 21722/05 and 21770/05, judgment of 18 September 2007: company ordered to dispose of domain names that infringed trademarks held by third parties.

This concerned a company that had bought several thousand domain names but was ordered to dispose of them because they infringed copyright and trademarks held by others. The European Court held that the registered domain names fell under the right to property, as protected in Article 1 Protocol 1. Therefore the order to dispose of the domain names was not unreasonable and did not violate the company's rights.

Licence to provide Internet access

- ***Megadat.com SRL v. Moldova***, Application no. 21151/04, judgment of 8 April 2008: withdrawal of licence to provide internet access constituted violation of right to property.

This case concerned the biggest Internet service provider in Moldova, whose telecommunications licences had been invalidated on the grounds that it had not informed the supervisory authority of a change of address. As a result, the company had had to discontinue its activity. It brought a case against the European Court on the ground that its licence constituted a property under Article 1 of Protocol 1. The European Court noted that the examination carried out by the Moldovan courts appeared to have been very formalistic; no balancing exercise had been carried out between the general issue at stake and the sanction applied to the company. The Court also noted that the applicant company had been treated more harshly than others. The Court finally noted that a disproportionately harsh sentence had been applied. It concluded that the licence withdrawal violated Article 1 of Protocol No. 1.

Issues of jurisdiction

- ***Perrin v. the United Kingdom***, admissibility decision, Application no. 5446/03, judgment of 18 October 2005: Frenchman resident in UK could be prosecuted in the United Kingdom for internet publications even if the website was operated from the United States.

This concerned the applicant's conviction, in the United Kingdom, for publishing an obscene article on a website. The applicant was a French national living in the United Kingdom, but the website was operated and controlled by a company based in the United States of America. All US laws were complied with and the applicant complained that he should not have been prosecuted in the United Kingdom. The European Court held that as a resident in the UK, the applicant could not argue that the laws of the United Kingdom were not applicable to him. The applicant knew the law, carried on a professional activity with his website and could therefore be reasonably expected to have proceeded with a high degree of caution and to take legal advice. While the publication of the images in question may have been legal in the United States, the United Kingdom still had a reasonable interest in limiting the circulation of these images within its jurisdiction. The conviction did not constitute a violation of the right to freedom of expression.

- ***Ben El Mahi v. Denmark***, admissibility decision, Application no. 5853/06, judgment of 11 December 2006: Moroccan associations could not invoke the jurisdiction of the European Court in respect of publications in Denmark.

This concerned a Moroccan national, resident in Morocco, and two Moroccan associations based in Morocco, who complained that the publication in Denmark of offensive cartoons violated their right to freedom of religion. The Court found that there was no jurisdictional link between the applicants, who were outside Europe, and Denmark. Despite the availability of the cartoons in Morocco, through the internet, it could not be said that the applicants fell under the jurisdiction of Denmark on account of an extraterritorial act. Their application was therefore dismissed.

States have a duty to protect minors

- ***K.U. v. Finland***, Application no. 2872/02, judgment of 2 December 2008: internet service provider could be forced to provide details of user who had uploaded paedophile content.

This concerned a situation where a child had been made a target for paedophiles on the internet and an internet service provider had resisted disclosing the identity of the person who had placed the advertisement. The Court held that serious penalties might be imposed on individuals who misused the internet for such purposes, stating that "effective deterrence against grave acts, where fundamental values and essential aspects of private life are at stake, requires efficient criminal-law provisions". The Court explained that the duty on States to protect minors against paedophile acts such as this trumped the right to freedom of expression and confidentiality in telecommunications: "Although freedom of expression and confidentiality of communications are

primary considerations and users of telecommunications and Internet services must have a guarantee that their own privacy and freedom of expression will be respected, such guarantee cannot be absolute and must yield on occasion to other legitimate imperatives, such as the prevention of disorder or crime or the protection of the rights and freedoms of others."

Importance of internet as means of making government information available to a wide audience

- ***Wypych v. Poland***, admissibility decision, Application no. 2428/05, judgment of 25 October 2005: internet important means of providing information to the public regarding the income and financial situation of local councillors.

This concerned an application brought by a town councillor who had been required to disclose details concerning his financial situation and property portfolio. His declaration had been published on the Internet, together with the declarations of all the councillors. The Councillor complained this would violate his right to private and family life, and that he and his family would be targets for criminals. While the Court acknowledged that making this declaration would be an interference with his right to private and family life, it found that this was outweighed by the public interest in making the information public and fighting corruption. It held that "[t]he general public has a legitimate interest in ascertaining that local politics are transparent and Internet access to the declarations makes access to such information effective and easy. Without such access, the obligation would have no practical importance or genuine incidence on the degree to which the public is informed about the political process."

26. PROTEST AND FREEDOM OF EXPRESSION

The right to protest and peaceful assembly is closely linked to the right to freedom of expression. The exercise of the right to protest invariably includes the exercise of the right to freedom of expression (even a silent assembly is a form of 'expression'). The right to protest and peaceful assembly is protected under Article 11 of the European Convention of Human Rights and the right to freedom of expression is protected under Article 10.

Like the right to freedom of expression, the right to peaceful assembly is not an unlimited right. It may be restricted, but only insofar as is truly necessary to protect public order. The Court has stated that, like freedom of expression, the right to peaceful assembly is a fundamental democratic right and any interference with it should not take away its core substance.

The Court has developed the following general principles.

- notification, and even authorisation, procedures for a public event are permitted as long as the purpose of the procedure is to allow the authorities to take reasonable and appropriate measures guarantee the smooth conduct of the public event (including a demonstration or protest);
- it is inevitable that the right to peaceful assembly causes some disruption to ordinary life, including disruption of traffic, and public authorities must show tolerance of this;
- some regulation may be imposed on protestors. However, even when protestors do not abide by the rules that does not necessarily justify an infringement of the right. Regulations should not represent a hidden obstacle to the right to protest;
- in special circumstances when an immediate response might be justified, for example to protest against a political event in the form of a spontaneous demonstration, it may not be possible to obtain prior authorisation. In such cases, and when there is no other illegal conduct by the protestors, the dispersal of a spontaneous demonstration may violate the right to protest.

The following judgments illustrate how these principles are applied in practice.

- ***Berladir and Others v. Russia***, Application no. 34202/06, judgment of 10 July 2012: dispersal of demonstration did not violate right to freedom of assembly when local authorities had offered an alternative venue and protestors had not engaged with local procedures.

The applicants had participated in an unauthorised demonstration. The organisers had applied for permission, but the local authorities had required that the demonstration should be held in an alternative location. The organisers ignored the local authority's response and decided to proceed with their event on the scheduled date in the planned location. The demonstration was dispersed almost immediately and the participants had not had the opportunity to express their views. Some of the protestors were taken to a police station, remained there for some hours and were found guilty of participating in an unlawful or non–endorsed assembly.

The Court held that there had been no violation of the right to protest or the right to freedom of expression. It held that reasonable notification or authorisation procedures for a public event do not normally violate Article 11 as long as the purpose of the procedure is to allow the authorities to take reasonable and appropriate measures in order to guarantee the smooth conduct of a public gathering. The Court noted that when the authorities proposed an alternative venue, the organisers withdrew their application and simply went ahead with the demonstration at the original location. The Court noted in particular that the authorities did not ban the demonstration, but gave a swift reply proposing an alternative venue. The decision of the organisers to go ahead was not justified by any particular urgency or compelling circumstances, and the organisers knowingly placed themselves in an unlawful situation.

- ***Sergey Kuznetsov v. Russia***, Application no. 10877/04, judgment of 23 October 2008: a merely formal breach of the requirement to notify a demonstration did not justify convicting demonstrators of a criminal offence.

This concerned a small group which had protested in front of a regional court to attract public attention to violations of the right of access to a court. The group distributed leaflets about the president of the regional court, who had allegedly been involved in corruption scandals, and collected signatures calling for his dismissal. The authorities had been notified of the protest eight days before and police were present to maintain public order and traffic safety. A few days after the protest, a deputy president of the regional court started proceedings against the applicant on the basis that he had misled the municipality as to the purpose of the picket and had used the event to defame the court president. The applicant was found guilty and fined EUR 35.

The Court held that the conviction violated the right to freedom of assembly and protest. It considered that while Russian law required ten days notification to be given, and the applicant had applied eight days before the protest, the two-day difference had not impaired the authorities' ability to make necessary preparations. Given the small scale of the protest, the town administration had not considered it to be a problem. The two day difference had been noted only after the deputy president of the court started proceedings. The Court concluded that a merely formal breach of the notification time-limit was not a sufficient reason for finding the applicant guilty. The Court also noted that the domestic courts had found that the protest had blocked a passage. However, there had been no complaints by anyone about this, and any hindrance had been very brief. Finally, with regard to the content of the leaflet, the Court held that the materials distributed by the applicant and the ideas he had advocated had not been shown to contain any defamatory statements, incitement to violence or rejection of democratic principles. However unpleasant the call for dismissal of the president of the regional court could have been to him and however insulting he may have considered the article alleging corruption in the regional court, it was not a relevant or sufficient ground for convicting the applicant. Finally, the Court stressed that the purpose of the protest had been to attract public attention to the alleged dysfunctioning of the judicial system in the region. This serious matter was undeniably part of a political debate on a matter of general and public concern, which should not be restricted lightly.

- ***Samüt Karabulut v. Turkey***, Application no. 16999/04, judgment of 27 January 2009: dispersal of unlawful protest could not be justified as a "necessary" restriction on the right to protest.

The applicant took part with 30-35 other people in a peaceful demonstration against Israeli operations in Palestine. The organisers had not given the authorities prior no-

tification of the demonstration as they were required to do by law and were asked repeatedly by the police to disperse. Although most of the demonstrators complied with the police's request almost immediately, the applicant intervened verbally when he saw a fellow demonstrator being arrested. He was then arrested, punched and kicked hit on the head and back with a truncheon.

The European Court of Human Rights held that the police action had violated the right to protest. It held that although the demonstration was unlawful, this did not per se justify an infringement of freedom of assembly. It emphasised that laws and regulations should not be used as a hidden obstacle to the right to protest. The government had not shown that the demonstrators represented a danger to public order or public safety and, in the absence of violence on their part, the authorities were expected to show a degree of tolerance. The demonstrators had in fact dispersed fairly quickly after being prompted by the police and the applicant had been forced to leave without being given enough time to manifest his views.

- ***Oya Ataman v. Turkey*****,** Application no. 74552/01, judgment of 5 December 2006: dispersal of unlawful protest could not be justified as a "necessary" restriction on the right to protest.

This concerned a group of protestors who organised a protest march. They had not given advance notification of the protest and were asked by the police to disperse. The demonstrators refused to obey and continued marching towards the police, who dispersed the group using a kind of tear gas known as "pepper spray". The police arrested thirty-nine demonstrators, including the applicant, and took them to a police station. The rally had not lasted more than thirty minutes.

The European Court of Human Rights held that the police action violated the right to protest. It noted that the demonstrators – some fifty persons in total – had not represented any danger to public order, apart from possibly disrupting traffic. The demonstrators did not engage in acts of violence. The Court emphasised that it is very important for the public authorities to show a certain degree of tolerance towards peaceful gatherings. The forceful intervention of the police had been disproportionate and had not been necessary for the prevention of disorder. While it recognised that the demonstration was technically unlawful, because notification had not been given, this in itself did not justify an infringement of the right to protest.

- ***Bukta and Others v. Hungary***, Application no. 25691/04, judgment of 17 July 2007: dispersal of spontaneous protest violated right to freedom of assembly.

This concerned a demonstration by 150 people against the attendance of a reception to celebrate Romania's national day by the Hungarian prime minister. The visit had been announced a day prior to the reception, and the demonstrators had therefore not been able to give advance notice of a demonstration. Police at the reception forced the demonstrators to disperse.

The European Court of Human Rights held that the dispersal violated the right to protest. It emphasised that the only reason given for the dispersal had been the failure of the protestors to give prior notice. Given that the prime minister's visit had been announced only the day before, they had not had any other choice. The Court emphasised that in special circumstances such as these where an immediate response – in the form of a demonstration – to a political event might be justified and where there was no evidence to suggest a danger to public order, a decision to disband the ensuing,

peaceful assembly solely because of the failure to comply with the notice requirement, without any illegal conduct by the participants, was disproportionate.

- ***Galstyan v. Armenia***, Application no. 26986/03, judgment of 15 November 2007: conviction for obstructing traffic and making loud noise violated the right to protest.

In April 2003, while on his way home from a demonstration by some 30,000 people, mostly women, the applicant was arrested for "obstructing traffic and behaving in an anti-social way at a demonstration". He argued that he and most of the other men present had not participated in the demonstration; but were there to support and protect the women and prevent trouble from breaking out. At the police station the applicant was charged with "minor hooliganism". He signed the relevant police record certifying that he had been made aware of his rights to legal representation and added "I do not wish to have a lawyer". He was sentenced to three days' administrative detention for "obstruction of street traffic" and "making a loud noise".

The Court held that the conviction violated the right to freedom of expression. The Court reiterated that freedom to take part in a peaceful assembly was of such importance that a person could not be subjected to a sanction – even one at the lower end of the scale of disciplinary penalties – for participation in a demonstration which had not been prohibited, so long as he or she had not committed a reprehensible act. The Court noted that the applicant had been convicted for "obstruction of street traffic" and "making a loud noise", despite the fact that the street where the demonstration took place had been packed with people and traffic had been suspended prior to the demonstration. The Court therefore found that it followed that the offence of "obstructing street traffic" of which the applicant was found guilty consisted merely of his physical presence at a demonstration in a street where the flow of traffic had already been suspended. As to the "loud noise" he had made, there was no suggestion that it involved any obscenity or incitement to violence and it was hard to imagine a huge political demonstration of people expressing their opinions not generating a certain amount of noise.

- ***Cholakov v. Bulgaria***, Application no. 20147/06, judgment of 1 October 2013: conviction of protestor who demonstrated against local corruption violated freedom of expression.

This concerned an individual who had gotten into a conflict with police officers – for reasons which are unknown – and who had been given a warning to refrain from "performing indecent and inappropriate actions ... addressing indecent words to representatives of the public authorities, and breaching public order ...". A week later he was on the street protesting against local corruption. He had chained himself to a metal column and was shouting slogans through a loudspeaker, including "All of them are criminals"; "The prosecutor is a Mafioso"; "The mayor is a Mafioso"; "Political prostitutes" and "A mass of political prostitutes". When he refused to stop he was arrested, convicted for "minor hooliganism" and sentenced to ten days' detention.

The European Court held that the conviction and detention violated the right to freedom of expression. It considered that while the interference aimed at preserving the legitimate aims of "public order" and "maintaining the authority of the judiciary", it had been disproportionate and therefore not "necessary in a democratic society". It recalled that public officials must tolerate wide criticism of their functioning. The Court noted

furthermore that the applicant had attempted to contribute to a public debate on the way the city was governed, in the wake of the local elections. This context rendered the comments of "public interest". The Court also noted that, despite being provocative, the applicant's statements were not particularly scandalous, shocking or calumnious, nor was his conduct (chaining himself to a post and his using a loudspeaker). Finally, the court noted that the sentence – ten days' detention' was in itself disproportionate in the circumstances.

- ***Taranenko v. Russia***, Application no. 19554/05, judgment of 15 May 2014: prolonged detention and severe sentencing of participant in non-violent anti-government protest violated right to freedom of expression.

This concerned the detention and conviction of a student who had been arrested together with a group of people who had occupied the reception area of the President's administration building in Moscow, waved placards and distributed leaflets calling for the President's resignation. The applicant argued that she was not a member of the group of protesters but that she had attended the protest to collect information for her thesis in sociology. Following her arrest, she was held in pre-trial detention for almost one year. She was eventually convicted of participation in mass disorder and received a suspended sentence of three years' imprisonment. The Russian court noted that it was irrelevant whether she had joined the action for research or other purposes, because she had directly participated in the mass disorder.

The European Court of Human Rights held that the conviction breached her right to freedom of expression, and that her detention pending trial for nearly a year had violated her right to liberty. The Court emphasised that although the protest had involved some disturbance of public order, it had been largely non-violent. The protesters had wanted to draw public attention to their disapproval of the President's policies and their demand for his resignation. Those were questions of public interest, for which there should be space in a democratic society. The Court did note that the protesters had stormed the Presidential administration building and that they had pushed a guard aside. In those circumstances, the arrest of the protesters could have been considered justified by the demands of the protection of public order. However, holding the applicant for nearly a year before her trial and the subsequent imposition of a penalty of three years prison, even suspended, had been clearly disproportionate. The Court noted that the conviction had at least in part been founded on the Russian courts' condemnation of the political message conveyed by the protesters. The unusually severe sanction had a chilling effect on her and other persons taking part in protest actions and was incompatible with democratic values.

- ***Pentikäinen v. Finland***, Application no. 11882/10, judgment of 4 February 2014: arrest of photographer along with protesters did not violate right to freedom of expression.

This concerned a press photographer who had been reporting on a demonstration. Although a separate area had been reserved for the press he decided not to use it and stayed with the demonstrators. When the demonstration turned violent, the police ordered the protesters to disperse. Most left but around 20 protestors remained, as did the photographer. They were all arrested, detained for over 17 hours and prosecuted and found guilty of disobeying police orders. The photographer was not given a penalty, however. The photographer appealed his conviction to the European Court of Human Rights.

The Court held that the photographer's right to freedom of expression had not been violated. It considered that he had been given several opportunities to cover the event adequately. He had not in any way been prevented from taking photographs and he had waived his right to use the separate secured area reserved for the press, deciding instead to stay with the demonstrators even after the orders to disperse. Therefore, the Court judged that his conviction for disobeying police orders was not related to his journalistic activity, but rather for his refusal to comply with a police order at the very end of the demonstration, when police considered that it had become a riot. The domestic courts had taken into account the photographer's right to freedom of expression and imposed no penalty, and no entry of the conviction was made in his criminal record.

- ***Murat Vural v. Turkey***, Application no. 9540/07, judgment of 21 October 2014: imprisonment of protestor for pouring black paint over statues of Ataturk violated right to freedom of expression.

This concerned an individual who had been sentenced to thirteen years prison for pouring paint over statues of Mustafa Kemal Atatürk, the founder of the Republic of Turkey, as a political protest. He was freed after eight years, on a conditional basis.

The Court found that the sentence imposed upon Mr Vural was grossly disproportionate to the legitimate aim of protecting the reputation or rights of others under Article 10. The Court held that while Atatürk was an iconic figure in Turkey, the protection of his memory did not warrant any custodial sentence. The Court emphasised that "peaceful and non-violent forms of expression should not be made subject to the threat of imposition of a custodial sentence."

- ***Shvydka v. Ukraine***, Application no. 17888/12, judgment of 30 October 2014: hooliganism conviction for politician who tore ribbon from a wreath violated right to freedom of expression.

The case concerned a member of the Ukrainian opposition party who had torn a ribbon from a wreath which had been laid by the President of Ukraine. The applicant was arrested and convicted of petty hooliganism and sentenced to ten days' administrative detention. She appealed against that conviction on the first day of her detention but the appeal was not heard for a further three weeks.

The Court held that the applicant's right to freedom of expression had been violated. It noted that the removal of the ribbon from the wreath was an act of political protest, and that the applicant had been punished for her refusal to change her political views and accept that her actions had been wrong. Additionally, the Court noted that the appeal was only heard after she had served her sentence in full. This had not provided adequate protection against any shortcomings in the first-instance proceedings. The European Court also noted that the toughest possible sanction had been imposed under the law, and stated that "the domestic courts applied to the applicant, a sixty–three-year-old woman with no criminal record, the harshest sanction for what in fact constituted a wrongdoing not involving any violence or danger. In doing so, the court referred to the applicant's refusal to admit her guilt, thus penalising her reluctance to change her political views. The Court sees no justification for that."

- ***Yoslun v. Turkey***, Application no. 2336/05, judgment of 10 February 2015: fine for "unauthorised" political comments violated right to freedom of expression.

This concerned a singer who had been fined for a speech which he had given during a concert. He had criticised the Turkish government and had said that modern Turkey was neither free nor democratic. He also made comments in support of the Kurdish nationalist movement. The fine was imposed on the grounds that authorisation given for the concert by the municipality precluded any political speeches. He appealed the fine and also requested a hearing to argue his case. His appeal was refused and a hearing was denied.

The European Court of Human Rights noted that this case was different from other Turkish cases in that an administrative law had been used to impose the fine, rather than the often-used anti-terrorism laws. The Court noted that the speech in question was political in nature and that political speech should not be restricted lightly – it is the most strongly protected category of expression under the European Convention. It is a fundamental criterion under Convention law that expression should be restricted only on the basis of legislation that is clear and the use of which is 'foreseeable', so that individuals know whether something they might say is prohibited. This prevents the authorities from using the law arbitrarily. The Court considered that the law on the basis of which the singer was convicted made it a criminal offence to fail to comply with "an order from a competent authority or a preventive measure taken by it". The Court considered that this formulation was not sufficiently clear to enable the applicant to realize that just making comments, as a singer, as part of a previously authorized concert would constitute disobedience to an administrative order. Therefore, the Court concluded that the domestic courts had extended the scope of the provision beyond what could have been reasonably foreseeable in the circumstances of the case; this constituted a violation of the right to freedom of expression.

- ***Maguire v. United Kingdom***, Application no. 58060/13, judgment of 3 March 2013: conviction for wearing provocative t-shirt did not violate right to freedom of expression.

This concerned an individual who had attended a football match wearing a t shirt that had the logo of the Irish National Liberation Army, which is a proscribed organisation under the UK's Terrorism Act 2000, along with the slogan "F... YOUR POPPY REMEMBER DERRY" (in the United Kingdom, the poppy flower symbolises remembrance of the members of the armed forces who have died in the line of duty and is widely worn around 11 November). The football match was between Rangers Football Club and Celtic Football Club, and previous matches between these clubs had seen sectarian violence between the two clubs' respective rival Protestant and Catholic supporters. After the football match ended, the applicant, together with other Celtic supporters, was convicted of a "breach of the peace" and banned from attending football matches for two years.

The European Court of Human Rights held that the man's right to freedom of expression had not been violated and declared the case inadmissible as being 'manifestly ill-founded'. It accepted that there was a risk of sectarian violence around football matches such as this one, and that the police were best-placed to judge whether or not the wearing of the t-shirt could lead to violence. The Court also noted that the sentence imposed had been light (no prison sentence was imposed). It did not find that the two-year ban was excessive, even taken into account that the applicant was a football fan and holder of a Celtic season ticket.

- ***Identoba and Others v. Georgia***, Application no. 73235/12, judgment of 12 May 2015: failure by police to prevent and investigate homophobic attacks against protesters violated protesters' rights.

This concerned members of a Georgian NGO that had been set up to protect the rights of Lesbian, Gay, Bi- and Transsexual (LGBT) people. They had organised a peaceful demonstration to mark the International Day against Homophobia which was attended by approximately 30 people. During the event, the protesters were insulted, threatened and assaulted by a larger group of counter-demonstrators who were members of two religious groups. The counter-demonstrators shouted insults at the marchers – calling them among other things "perverts" and "sinners" –, blocked their passage and attacked the marchers, leaving three of them with injuries. The police remained relatively passive in the face of the violence and said that it was not their duty to intervene. Four of the applicants were eventually arrested and briefly detained and driven around in a police car – allegedly for their own safety. Following the events, the applicants filed several criminal complaints, requesting in particular that criminal investigations be launched into the attacks against them as well as against the police who had failed to protect them. Two investigations into the injuries sustained by two of the applicants were opened in 2012 and remained pending. The applicants complained to the European Court that the acts of the police, and the failure to conclude the investigations, were a violation of their rights.

The European Court of Human Rights considered the case under Article 3, which protects against torture and degrading treatment, as well as under Article 11, which protects the right to freedom of assembly. The applicants' claim under Article 10, on the right to freedom of expression, was deemed to be included in their claim under Article 11. As regards the right to be free from degrading treatment, the Court took into the very precarious situation of LGBT people in the country. It noted that the death threats and violence against the protesters had been motivated by a clear homophobic bias, demonstrated by the particularly insulting and threatening language used by the two religious groups. The aim of this had been to frighten the applicants so that they would desist from their public expression of support for the LGBT community. The applicants' feelings of distress had been exacerbated by the fact that the police protection which had been promised to them had not been provided. This meant that the fear, anxiety and insecurity experienced by the applicants was so severe as to be regarded 'degrading treatment' under Article 3 of the Convention, read together with Article 14 which provides a right to be free from discrimination.

The Court held that because the organiser of the march had warned the police about the likelihood of violence against the protesters, the police had been under a duty to provide protection. They had clearly failed to do this; and by the time they finally did take action, the applicants had already been bullied, insulted and assaulted. Furthermore, instead of restraining the counter-demonstrators and protecting the demonstrators, the police arrested some of the demonstrators. Following the incident, the police also failed to carry out an effective investigation into the violence. Instead of investigating the complaints that had been lodged by the applicants, the police only investigated two cases concerning physical injuries that had been suffered by two demonstrators, and which had resulted in administrative sanctions and a fine of EUR45 on two of the assailants.

The Court held that the police should instead have taken all reasonable steps to unmask possible homophobic motives for the events in question. In the absence of such an investigation, similar attacks would happen again and again. This would be tanta-

mount to official acquiescence or even connivance in hate crimes. Moreover, it would be difficult for the State to implement measures aimed at improving the policing of similar peaceful demonstrations in the future, thus undermining public confidence in the State's anti-discrimination policy. In the light of these considerations, the Court found a violation of Article 3.

The Court also held that the disruption of the applicants' protest violated their right to freedom of assembly, which included a right to freedom of expression.

- ***Akarsubaşı v. Turkey***, Application no. 70396/11, judgment of 21 July 2015: fine for participating in peaceful demonstration violated right to freedom of assembly and association.

This concerned a Turkish civil servant who had taken part in a press conference organised by a trade union following a demonstration. The demonstrators, including the civil servant, had called for a crèche to be set up in their workplace. Mr Akarsubaşı was fined because the demonstration had taken place in front of a court building, where it was not formally allowed to hold press conferences. He complained to the European Court of Human Rights.

The Court held that the conviction violated his right to freedom of assembly and association, protected under Article 11 of the Convention. It noted that the demonstration took place peacefully; that the press statement was read in minutes and that after reading the statement, the demonstrators had dispersed peacefully. There had been no violent acts against the public or against officials entering or leaving the courthouse. There was no deterioration of public equipment or firearms use or similar objects from any member of the group of demonstrators. There were no excesses that would have been obliged the administrative authorities or police to intervene to maintain public order at the courthouse or around, not even on the movement. In short, there had been absolutely no reason for the authorities to convict the applicant; on the contrary, by fining the applicant the authorities had created a 'chilling effect' which might dissuade others from legitimately exercising their rights.

- ***Bülent Kaya v. Turkey***, Application no. 52056/08, judgment of 22 October 2013: conviction for slogans shouted during a speech at a rally violated the right to freedom of expression.

This concerned an individual who was ordered to pay a fine after giving a speech at a rally organised in 2003 by a political party. During his speech, people in the audience shouted slogans in support of Abdullah Öcalan, a convicted terrorist, including "Long live our leader Abdullah Öcalan", "Tooth for tooth, blood for blood, we are with you Öcalan", and "we do not regret anything, we are supporters of Öcalan". He was convicted of "glorifying crime and a criminal" and fined 2,000 Turkish liras.

The European Court of Human Rights held that the conviction violated the right to freedom of expression. It stated that the applicant's speech did not incite violence or call for an uprising and did not constitute hate speech. Although slogans in support of Abdullah Öcalan were chanted by others while the applicant was delivering his speech, the applicant had not prompted this. In any event, the Court noted that these slogans were not likely to have an impact on national security or public order.

- ***Szél and Others v. Hungary and Karácsony and Others v. Hungary***, Application nos. 44357/13 and 42461/13, judgment of 16 September 2014: fines for opposition MPs for symbolic protests during parliamentary sessions violated right to freedom of expression.

This concerned the members of two opposition parties who, during sessions of parliament, had conducted symbolic protests. The applicants in the case of Szel had up held billboards saying "FIDESZ [the governing party] You steal, you cheat and you lie" and (during the final vote on a law related to smoking) "Here operates the national tobacco mafia". The applicants in the case of Karácsony had placed a wheelbarrow full of soil in front of the prime minister during the final vote of a controversial bill on the transfer of agricultural lands. The applicants were fined between €170 and €600 for disturbing Parliament's work. The fines were proposed by the Speaker of Parliament and adopted by the plenary without a debate. The applicants complained that these fines violated their right to freedom of expression, and that they had not had any opportunity to appeal against them.

The European Court of Human Rights considered that while the fine had pursued a legitimate aim – namely the protection of the rights of other parliamentarians and the prevention of disorder – they had not been "necessary" in a democratic society. The Court underlined that, in a democratic society, freedom of expression was especially important for elected representatives. The Court considered that the applicants, members of the parliamentary opposition, had expressed their views on public matters of the highest political importance. The symbolic element in their protest was an important part of their right to freedom of expression. Furthermore, the Court underlined the particular importance of ensuring the right of minority members and parties in Parliament to express their opinions, and the right of the public to hear them. The Court furthermore noted that the applicants had not delayed or prevented either the parliamentary debate or the vote. Finally, the Court noted that the sanctions against the applicants had been imposed without debate and that the Speaker had not given the applicants any warning.

Because the applicants had not been able to appeal or otherwise challenge the fines, the Court also found a violation of Article 13, which provides that everyone whose rights have been infringed should have an effective remedy under national laws and proceedings.

- ***Görgün v. Turkey***, Application no. 42978/06, judgment of 16 September 2014: small fine for trade union president meant he had not suffered a 'significant disadvantage' and his appeal to the European Court was inadmissible.

This concerned the head of a trade union which had organised protests against social security reforms. Posters advertising the demonstration had been put up in various places around Ankara, and the applicant was fined 124 Turkish liras (around €75) by the Ankara municipality for putting them up without permission. The applicant objected to that decision, arguing that he had no involvement in the hanging of the posters in question, but the Ankara Magistrates' Court rejected his objection without holding a hearing. The applicant then complained to the European Court of Human Rights.

The European Court of Human Rights held that the complaint was inadmissible. Firstly, with regard to the complaint about his right to freedom of expression, the Court considered that complaints about human rights violations should be made to national courts first, before appealing to the European Court of Human Rights. The Court noted that the applicant had not raised his complaint regarding his right to freedom of

expression before the Magistrates' Court or any other authority, not even implicitly. Instead, the applicant's arguments to the Ankara court had been focused on that he had had nothing to do with the hanging of the posters. Therefore, the application that his right to freedom of expression had been violated had to be rejected for non-exhaustion of domestic remedies.

The applicant had also complained that his right to a fair trial had been violated. However, the European Court held that the applicant had not suffered a "significant disadvantage", which is a requirement for any case to be heard. The Court reiterated that this criterion applies where, even where a violation of a human right has taken place from a purely legal point of view, the level of severity of the violation is so low that it does not warrant consideration by an international court. The absence of any significant disadvantage can be based on criteria such as the financial impact of the matter in dispute or the importance of the case for the applicant. The Court observed that the applicant had been fined €75, as the representative of a trade union. This was a small amount and there was no evidence that it had had any undue financial impact on the applicant. The fine had been administrative and had not been registered in the applicant's criminal record. Furthermore, there were no other reasons why the case should be heard (for example, the case might have raised a point of general importance – but it did not).

- ***Frumkin v. Russia***, Application no. 74568/12, judgment of 5 January 2016: failing to ensure peaceful protest and detention of protestors breached the right to freedom of assembly.

This concerned a participant in a demonstration against alleged election rigging following the 2011 and 2012 Duma and Presidential elections in Russia. The demonstration was to be held on a river embankment and in a neighbouring park and had been authorised by the city authorities. On the day, however, the protestors found that access to the park had been closed off by police. Following unsuccessful negotiations with the police, the organisers called for a 'sit in'. As the crowd grew larger, unrest ensued and the police made several arrests. The protestors lodged formal complaints of police violence but these were dismissed and instead the several of the protestors were convicted of 'organising mass disorder' and similar offences, resulting in the imposition of prison sentences for some of them of up to four years. The applicant, who had only received a 15 day sentence, appealed to the European Court of Human Rights.

The European Court of Human Rights held that the conviction and imposition of the prison sentence as well as the failure of the police to ensure the peaceful assembly violated the right to freedom of assembly. By excluding the park from the protest, going against what had previously been agreed between the organisers and the authorities, and by failing to communicate with the protestors but instead moving in aggressively to disperse them, police had failed to ensure the peaceful conduct of the protest. They had also failed to prevent disorder and to secure the safety of all the citizens involved. As regards the applicant's arrest and detention for fifteen days, the Court held that this was grossly disproportionate. The Court also held that the trial against the applicant had been unfair, because the Russian courts had based their judgment exclusively on standardised documents submitted by the police and had refused to accept additional evidence.

27. COPYRIGHT AND FREEDOM OF EXPRESSION

There can be a tension between copyright and freedom of expression as well as a supportive relationship. Artists, writers and others who produce original content have a copyright in the material they produce. This allows them to monetise their work, enables them to make a living and thus strengthens their right to freedom of expression. At the same time, copyright claims by one producer can stop others using material that is protected under copyright, and in those cases there is a conflict between the two. One particularly clear conflict between freedom of expression and copyright occurs in cases involving the activities of file sharers, including through websites such as the Pirate Bay.[3] A final way in which copyright and freedom of expression have come into conflict is where individuals – often politicians – attempt to stop stories being published about them or having pictures published in the media by claiming that they are covered by copyright.

Under the European Convention on Human Rights, copyright is protected under the right to property, in Article 1 of the First Protocol to the Convention. Where there is a conflict between freedom of expression and the right to copyright, the Court can therefore engage in a 'balancing' exercise, weighing the rights of copyrights owners against the right to freedom of expression. Generally speaking, freedom of expression enjoys stronger protection under the Convention since it can be restricted only insofar as is "necessary", whereas property rights can be restricted when this is "reasonable" (in the English language this is a lower threshold). However, an important caveat to this general rule is that commercial speech enjoys a lower level of protection under the Convention, and so a conflict between purely commercial speech and copyright would result in a different outcome than when a copyright claim is brought to restrict 'political' speech.

The following judgments illustrate how the Court has handled these claims in practice.

- ***Ashby Donald and others v. France***, Application no. 36769/08, judgment of 10 January 2013: penalty for copyright infringement did not violate the right to freedom of expression.

This concerned fashion photographers who had published, on their website, photographs taken at Paris fashion shows, without permission from the fashion houses concerned. They were sued for breach of copyright and ordered to pay fines and damages totalling €255.000.

The European Court held that this did not violate their right to freedom of expression. The Court took into account that the photographs concerned fashion and did not contribute to a debate on a topic of public interest. It qualified the pictures as "commercial speech", not "political speech", which enjoys a lesser degree of protection. The Court balanced the photographers' right to freedom of expression to the right of copyright owners to protect their rights, and found that the restriction on the publication of the

3 The Pirate Bay is currently the world's largest BitTorrent index (BitTorrent is a communication protocol for peer-to-peer file sharing). It was founded by the Swedish anti-copyright organization in 2003. BitTorrent files allow individuals to share content including music and films as well as software. The material that is shared usually breaches copyright laws, and the PirateBay website, which links to this content, has been embroiled in legal battles since its founding.

photographs was legitimate. While the Court acknowledged that the fines and damage award were very high, it stated that no evidence had been put forward to argue that this threatened the livelihood of the photographers.

- ***Neij and Sunde Kolmisoppi v. Sweden***, admissibility decision, Application no. 40397/12, judgment of March 2013: penalty for copyright infringement imposed on founders of file-sharing website did not violate right to freedom of expression).

This concerned an application by the founders of the file sharing website, Pirate Bay, who claimed that their conviction under Swedish copyright law violated their right to freedom of expression. They argued that they had merely provided the technical infrastructure for users to share files, and that any illegality in file sharing was the responsibility of the users, not theirs. The European Court agreed that the right to freedom of expression protected the setting up of a website and other technical infrastructure. However, the Court disagreed that the conviction violated the right to freedom of expression. It held that the majority of files shared were commercial, and that the Pirate Bay served commercial speech more than political.

- ***Anheuser-Busch Inc. v. Portugal***, Grand Chamber, Application no. 73049/01, judgment of 11 January 2007: copyright claim by rival beer brewer not upheld.

This concerned the American beer brewing company, Anheuser-Busch, which produces the "Budweiser" beer which is sold across the world. In 1981, it applied to have the name registered as a trade mark in Portugal. This application was opposed by a Czech company which had registered "Budweiser Bier" in 1968. In 1995, the US company obtained a court order cancelling the Czech registration and registered its own trademark. The Czech company challenged that decision and, and following lengthy court proceedings it was successful. The US company's trade mark registration for "Budweiser" was therefore set aside. It applied to the European Court of Human Rights arguing that this violated its right to copyright.

The European Court held that the US company's rights had not been infringed. It held that the Portuguese courts had balanced the two companies' competing interests, and that the findings of the Portuguese Supreme Court were not arbitrary or manifestly unreasonable. The Supreme Court had reached its decision on the basis of the material it considered relevant and sufficient for the resolution of the dispute, after hearing representations from the interested parties.

- ***Krone Verlag Gmbh & Co. KG v. Austria***, Application no. 34315/96, judgment of 26 February 2002: injunction against publication of photograph of politician in connection with suspected unlawful activity violated the right to freedom of expression.

This concerned a newspaper that had published a series of reports on the financial situation of a Mr Posch who was employed as a teacher while also being a member of the Austrian National Assembly and the European Parliament. The articles alleged that he unlawfully received three salaries and were accompanied by photographs of Mr Posch. Posch then obtained an injunction under the Austrian Copyright Act on the grounds that his face was not generally known, and that the publication of his photograph therefore infringed his rights. The newspaper appealed to the European Court of Human Rights.

The European Court held that the injunction violated the newspaper's right to freedom of expression. The Court observed that the newspaper had accused Mr Posch, a politician, of earning money illegally, which was, without doubt, a matter of public concern. The Court found that the Austrian courts failed to take into account the essential function the press fulfils in a democratic society and its duty to impart information and ideas on all matters of public interest. Moreover, it was of little importance whether a certain person (or his or her picture) was actually known to the public. In view of Mr Posch's position as a politician, there was no doubt that he had entered the public arena. Therefore, there was no valid reason why the newspaper should have been prevented from publishing his picture.

- ***News Verlags Gmbh & Co. Kg v. Austria***, Application no. 31457/96, judgment of 11 January 2000: publication of photograph of suspect did not violate copyright.

This concerned the editor and owner of the magazine, "News", which had published several reports on a letter bombing campaign against politicians and others in the public eye. The reports named the suspect and published his photograph. The suspect went to court and obtained an injunction stopping his photograph being published, under Austrian copyright law. The magazine complained to the European Court of Human Rights that this violated its right to freedom of expression.

The Court held that the injunction violated the magazine's right to freedom of expression. The offences with which the suspect had been charged had a political background and were directed against the foundations of democracy; the publications therefore concerned an issue of public interest. The Court considered that none of the photos disclosed details of the suspect's private life; and it disagreed that there were any legitimate copyright or privacy claims to justify the injunction.

- ***Yaman Akdeniz v. Turkey***, Application no. 20877/10, judgment of 11 March 2014: individual who was denied access to blocked music sharing websites could not be considered a 'victim' of a human rights violation.

This concerned the blocking of the internet domains myspace.com and last.fm on the grounds that these sites violated copyright. The applicant, a user of the sites, complained that the wholesale blocking of these domains rendered thousands of webpages inadmissible, many of whom did not violate copyright. The local courts dismissed his complaints, and the applicant appealed to the European Court of Human Rights arguing that his right to receive information had been violated.

The European Court of Human Rights dismissed the complaint, holding that the applicant could not be considered to be a 'victim' of a violation of his rights under European Convention on Human Rights case law. While the Court recognised the paramount importance of the internet as a tool for the exercise of the right to freedom of expression, the mere fact that the applicant had suffered the 'side effects' of the blocking of a web domain did not in itself render him a victim. He was only an occasional user of the last.fm domain, and did not have a myspace.com account that had been affected. Furthermore, the applicant could easily access the music he wanted to listen to via other means.

28. IMMIGRATION AND FREEDOM OF EXPRESSION

Immigration laws are sometimes used to exclude controversial individuals from entering a country on the grounds that their presence might cause a risk to public order, or because they are otherwise unwanted. A number of cases concerning this issue have reached the European Court of Human Rights. The general rule applied by the Court is that while States have the discretionary power to decide whether to expel a foreigner, this power must be exercised in such a way as not to infringe on their human rights. Furthermore, the Court has made it clear that when an individual is expelled or excluded from a country for alleged national security or public order concerns, there must be a real and not some imagined or remote risk.

The following judgments illustrate how these principles are applied in practice.

- ***Piermont v. France**,* Application Nos. 15773/89 and 15774/89, judgment of 20 March 1995: controversial politician could not be excluded from country for peaceful expression of her views.

This concerned a German member of the European Parliament who visited French Polynesia during an election campaign. She took part in a demonstration during which she denounced the continued French presence in the Pacific and nuclear testing in the region by the French. As a result, she was expelled from French Polynesia. She then flew to New Caledonia, which was also in the midst of an election campaign. Upon arrival, she was issued with an order barring her from the territory on the grounds that her presence constituted an immediate risk to public order (forty activists were waiting for her arrival to protest against her presence in the territory). She complained to the European Court of Human Rights that the orders excluding her from French Polynesia ad New Caledonia violated her right to freedom of expression.

With regard to the exclusion from French Polynesia, the Court held that while the political climate there was undoubtedly sensitive, this alone could not justify the expulsion. Reiterating the importance of freedom of expression, the Court stated that there must be space for the expression of a variety of viewpoints and ideas in politics. It noted that the right to freedom of expression is especially important for an elected politician. The Court emphasised that the speech given by the applicant was made during a peaceful, authorised demonstration; that she did not call for violence; that no violence followed the demonstration; and that there was no evidence of any unrest whatsoever caused by the speech. Furthermore, the applicant's speech had been in support of anti-nuclear and independence demands made by several local political parties and had clearly been a contribution to a democratic debate.

As regards the applicant's subsequent expulsion from New Caledonia, the Court acknowledged that political tensions there were even greater than in French Polynesia. However, even considering that the applicant's arrival had been met with demonstrations against her, this in itself did not justify her exclusion from the territory. The Court therefore held that both her expulsion from French Polynesia and her exclusion from New Caledonia violated applicant's right to freedom of expression.

- ***Gerard Adams and Tony Benn v. the United Kingdom***, Application nos. 28979/95 and 30343/96, judgment of 13 January 1997: politician could be excluded when there was a real and continuous threat of terrorism.

This concerned an Irish politician, president of the political party Sinn Fein, who had been invited to visit the United Kingdom to speak to MPs and journalists by the second applicant, who was an opposition member of parliament. The Irish politician had himself been an MP from 1983 until 1992 and had visited Great Britain on a number of occasions to attend meetings and conferences. However, on this occasion he was barred from visiting the UK. An order excluding him had been issued on the grounds that he had been involved in terrorism and that he might say things that could lead to further terrorist acts being committed. He appealed to the European Commission of Human Rights (one of the predecessor bodies of the current Court of Human Rights).

The Commission considered that the motivation behind the exclusion order had been that the first applicant might "say things which could lead to the instigation of terrorism". The Commission noted furthermore that the first applicant had not denied that he had links to the IRA (a terrorist group in Northern Ireland). The Commission acknowledged the importance of the right to freedom of expression and that this should not be restricted lightly. At the same time, the Commission acknowledged that terrorist acts had been committed in the United Kingdom by Northern Irish terrorists and that at the time the order was made, there was a real and continuous threat of renewed incidents of violence. The Commission noted furthermore that, following the announcement by the IRA of a ceasefire, the exclusion order had been lifted. It therefore concluded that the exclusion order had been necessary I the prevention of terrorism and had not violated the right to freedom of expression.

- ***Women on Waves and Others v. Portugal***, Application no. 31276/05, judgment of 3 February 2009: women's rights activists could not be barred from entering the country without any evidence that they were planning to commit illegal acts.

This concerned three associations who campaigned on reproductive rights. The first, Dutch-based Women on Waves, had been invited by the other two, who were based in Portugal, to visit the country and conduct a campaign. "Women on waves" then chartered a ship and sailed to Portugal, planning to hold a series of meetings on board of the ship to discuss topics such as the prevention of sexually transmitted diseases, family planning and the decriminalisation of abortion. However, the ship was banned from entering Portuguese waters and its entry was blocked by a Portuguese warship on the grounds that the association intended to provide access to abortion procedures and medication that was illegal in Portugal.

The European Court acknowledged the legitimate aims pursued by the Portuguese authorities, namely the prevention of disorder and the protection of health, but it also reiterated that pluralism, tolerance and broadmindedness towards ideas that offended, shocked or disturbed were prerequisites for a "democratic society". The Court furthermore pointed out that the right to freedom of expression included the choice of the form in which ideas were conveyed, without unreasonable interference by the authorities, particularly in the case of symbolic protest activities. The Court observed that the applicant associations had not trespassed on private land or publicly owned property, and noted that there was no strong evidence that the association intended to deliberately breach Portuguese abortion laws. Insofar as the applicant association did indeed have medication on board that was prohibited in Portugal, this could simply have been seized; there had not been any need to send a warship. The actions of the Portuguese government therefore constituted a violation of the right to freedom of expression.

- ***Cox v. Turkey***, Application no. 2933/03, judgment of 20 May 2010: re-entry ban on academic for controversial statements on Kurdish and Armenian issues violated the right to freedom of expression.

This concerned a US national who had been a university lecturer in Turkey during the 1980s and who had been expelled for statements she had made on Kurdish and Armenian issues. She returned to the country several years later and was again expelled, this time for handing out leaflets protesting against a film she considered to be offensive to Christians. When she left Turkey for the final time, in 1996, she was banned from the country permanently. In subsequent court proceedings, the ministry of the interior stated that she had been banned because of statements she had made about Turks assimilating Kurds and Armenians, that Turks had forced Armenians out of the country and had committing genocide. This constituted a risk to national security. The Turkish courts upheld this reasoning.

The European Court of Human Rights held that the expulsion violated the applicant's right to freedom of expression. The Court reiterated that while the right of a foreigner to enter or remain in a country was not as such guaranteed by the Convention, immigration controls had to be exercised consistently with human rights including the right to freedom of expression. The Court noted that there had never been any suggestion that the applicant had committed an offence by voicing controversial opinions on Kurdish and Armenian issues and that no criminal prosecution had ever been brought against her. The Court noted furthermore that the opinions voiced by the applicant related to topics which were the subject of heated international debate. While the applicant's opinions might be offensive to some in Turkey, a democratic society required tolerance of statements that are controversial. Moreover, the Court observed that here was no evidence of actual harm to Turkey's national security as a result of the applicant's statements. It therefore appeared that that the expulsion had been designed solely to stifle the spreading of the applicant's ideas, and this constituted a violation of her right to freedom of expression.

- ***Petropavlovskis v. Latvia***, Application no. 44230/06, judgment of 13 January 2015: denial of citizenship did not violate right to freedom of expression.

This concerned a campaigner for the right of the Russian-speaking population in Latvia to be educated in Russian and to preserve State-financed schools with Russian as the sole language of instruction. He applied for Latvian citizenship but his application was refused around the same time as he had been conducting an extensive campaign in the media. He appealed to the European Court of Human Rights that the denial of citizenship violated his right to freedom of expression.

The Court held that his right to freedom of expression had not been violated. The Court disagreed that the denial of citizenship had been intended to silence him: it pointed out that he had continued to campaign and speak out, including through the national media. The Court also noted that he had remained politically active on other matters of public interest, and that he had become an assistant to a member of the European Parliament. Secondly, the Court noted that the applicant had never been given a criminal sanction for expressing his opinion or participating in a demonstration. Thirdly, the Court noted that the Convention did not protect a 'right' to acquire a specific nationality; and that there was nothing in Latvian law to confer such a right on him. Finally, the Court held that the procedure of naturalisation could legitimately include a requirement to demonstrate a certain level of loyalty to the State.

29. ACADEMIC FREEDOM AND FREEDOM OF EXPRESSION

'Academic freedom' is an important element of the right to freedom of expression. Not only do academics – like everyone else in society – have the right to freedom of expression; the Court has recognised that academic freedom itself has an important role to play in democratic society. The ideas and opinions of academics may be controversial and deeply unpopular, but their right to express them is extremely important. This freedom includes a right to criticise politicians and political ideas.

The following cases illustrate how the Court approaches the issue of academic freedom:

- *Mustafa Erdoğan v. Turkey*, Applications nos. 346/04 and 39779/04, judgment of 27 May 2014: academic criticism of Turkish judges for dissolving a political party was within acceptable bounds.
- *Hertel v. Switzerland*, Application No. 25181/94, judgment of 25 August 1998: injunction banning an academic from further publishing his views on microwave ovens violated the right to freedom of expression.
- *Sorguç v. Turkey*, Application No. 17089/03, judgment of 23 June 2009: defamation conviction for professor for criticising system of academic appointments violated the right to freedom of expression.
- *Lombardi Vallauri v. Italy*, Application no. 39128/05, judgment of 20 October 2009: dismissal of professor for views that were incompatible with the university's values violated the right to freedom of expression.
- *Wille v. Liechtenstein*, Application no. 28396/95, judgment of 28 October 1999: banning judge from public office for remarks made during an academic lecture violated the right to freedom of expression.
- *Stambuk v. Germany*, Application no. 37928/97, judgment of 17 October 2002: fine for scientist who was accused of unlawfully advertising his work in a newspaper report violated the right to freedom of expression.

Furthermore, the Council of Europe and European Union have included academic freedom among basic rights in a democratic society and have adopted several resolutions and recommendation.

- ***Mustafa Erdoğan v. Turkey***, Application nos. 346/04 and 39779/04, judgment of 27 May 2014: academic criticism of Turkish judges for dissolving a political party was within acceptable bounds.

This concerned the complaint by a law professor, editor and publisher that they were ordered by the Turkish courts to pay damages to three judges of the Constitutional Court for insulting them in an article in an academic law journal reporting on a decision dissolving a political party. In the article, Mr Erdoğan questioned whether, as a matter of law, the conditions for dissolving the political party were met, which was allegedly operating contrary to the principles of secularism. The article called the impartiality of the judges into question and insinuated that the judges were incompetent. Three of the judges brought defamation proceedings against the ap-

plicants, claiming that the article was a serious personal attack on their honour and integrity, and won damages.

The Court held that the conviction violated the professor's right to freedom of expression and that members of the judiciary acting in an official capacity should expect to be subject to wider limits of acceptable criticism than ordinary citizens. Because the article had been written by a law professor and had been published in a law journal, the Court emphasised the importance of academic freedom, holding that this, "extends to the academics' freedom to express freely their views and opinions, even if controversial or unpopular, in the areas of their research, professional expertise and competence. This may include an examination of the functioning of public institutions in a given political system, and a criticism thereof."

In their concurring opinion, judges Sajó, Vučinič and Kūris further elaborated on the importance of academic freedom. Their opinion states that an important aspect of academic freedom is the ability of scholars to communicate their ideas beyond the academic community, stating that:

> "There is no Chinese wall between science and a democratic society. On the contrary, there can be no democratic society without free science and free scholars. This interrelationship is particularly strong in the context of social sciences and law, where scholarly discourse informs public discourse on public matters including those directly related to government and politics."

They also suggest that the Court should develop a test to determine whether or not speech classifies as 'academic' speech, stating that:

> "In determining whether "speech" has an "academic element" it is necessary to establish: (a) whether the person making the speech can be considered an academic; (b) whether that person's public comments or utterances fall within the sphere of his or her research; and (c) whether that person's statements amount to conclusions or opinions based on his or her professional expertise and competence. These conditions being satisfied, an impugned statement must enjoy the utmost protection under Article 10."

- ***Hertel v. Switzerland***, Application no. 25181/94, judgment of 25 August 1998: injunction banning an academic from further publishing his views on microwave ovens violated the right to freedom of expression.

This concerned a scientist whose report on the effects of microwave ovens on food and on health of those who eat the food was used as the basis of an article which called for the banning of microwave ovens.

The article included an extract of the report as well as a summary of the findings. An association representing manufacturers of household appliances secured a court order preventing the applicant, on pain of imprisonment or a fine, from making any more statements concerning the safety of food cooked in microwave ovens. The scientist appealed to the European Court of Human Rights.

The European Court held that comes to the conclusion that the injunction violated Mr. Hertel's right to freedom of expression. The Court stated that: "the effect of the injunction was partly to censor the applicant's work and substantially to reduce his ability to put forward in public views which have their place in a public debate whose existence cannot be denied".

The Court emphasised that the fact that the academic's view was a minority view was irrelevant: "It matters little that this opinion is a minority one and may appear to

be devoid of merit since, in a sphere in which it is unlikely that any certainty exists, it would be particularly unreasonable to restrict freedom of expression only to generally accepted ideas".

- ***Sorguç v. Turkey***, Application No. 17089/03, judgment of 23 June 2009: defamation conviction for professor for criticising system of academic appointments violated the right to freedom of expression.

This concerned a professor of construction management who distributed a paper at a conference criticising the selection procedure for assistant professors, without mentioning specific names. In response, an assistant professor brought a defamation case against him claiming that certain comments in the paper were an attack on his reputation. The assistant professor was later dismissed from his academic post because of incompetence and because his personal values were found to be incompatible with the university's. The domestic courts, however, found that the article did constitute an attack on the assistant professor's reputation and ordered the professor to pay damages.

The European Court of Human Rights held that Mr Sorguç had expressed his opinion on an issue of public importance - the question of the system for appointments and promotion in universities. He had made his statements on the basis of personal experience, and what he said had been widely known inside the academic community. The Court therefore found that the domestic courts had not given him the opportunity to substantiate his statements and that they had attached greater importance to protecting the reputation of one unnamed individual than to academic freedom. The Court emphasised the importance of academic freedom, stating that this includes: "the academics' freedom to express freely their opinion about the institution or system in which they work and freedom to distribute knowledge and truth without restriction."

- ***Lombardi Vallauri v. Italy***, Application no. 39128/05, judgment of 20 October 2009: dismissal of professor for views that were incompatible with the university's values violated the right to freedom of expression.

This concerned a legal philosophy professor who had lectured at the Faculty of Law of the Catholic University of the Sacred Heart in Milan, on the basis of a series of annual contracts. In 1998, the post was advertised and the applicant was refused because his views were "in clear opposition to Catholic doctrine" and that "in the interests of truth and of the well–being of students and the University" the applicant should no longer teach there. All his appeals were dismissed.

The European Court of Human Rights held that this violated the professor's right to freedom fo expression as well as his right to a fair trial. It noted that the university had not informed the professor to what extent his supposedly unorthodox views were reflected in his teaching work and how they were liable to affect the University's interests. The University's interest in providing teaching that was based on academic values could not justify violating the procedural guarantees inherent in the right to freedom of expression.

- ***Wille v. Liechtenstein***, Application no. 28396/95, judgment of 28 October 1999: banning judge from public office for remarks made during an academic lecture violated the right to freedom of expression.

This concerned a judge who gave a public lecture in which he criticised the Prince of Liechtenstein in the context of a wider controversy around Liechtenstein's accession to the European Economic Area. The Prince subsequently wrote to the judge, disagreeing with the criticism and disqualifying him from holding a public office. When he was subsequently proposed by parliament for a further term of office as President of the Administrative Court, the Prince refused to appoint him.

The Court found that this violated the judge's right to freedom of expression. It noted that the judge's remarks had been made during a series of academic lectures on questions of constitutional jurisdiction and fundamental rights. Because his lecture dealt with constitutional law and the question whether the Prince was subject to the jurisdiction of a constitutional court, it inevitably had political implications. However, this alone should not have prevented the applicant from making any statement on this matter. His opinion on the matter was shared by a considerable number of others and the lecture had not contained any remarks on pending cases, severe criticism of persons or public institutions or insults to high officials or the Prince.

- ***Stambuk v. Germany***, Application no. 37928/97, judgment of 17 October 2002: fine for scientist who was accused of unlawfully advertising his work in a newspaper report violated the right to freedom of expression.

This concerned an ophthalmologist who had been interviewed by a journalist about a new form of laser treatment that he performed. He had stated that the risks of the treatment were low and that he had treated more than 400 patients with a 100% success rate. He was subsequently fined by the Disciplinary Court for Medical Practitioners for disregarding the ban on advertising for medical practitioners on the grounds that the aim of the article had been self-promotion.

The European Court held that this violated the right to freedom of expression. The Court observed that observed that medical practitioners had a duty of care towards the individual and the local community which might explain certain restrictions on their conduct, including rules on their public communications or participation in public communications on professional issues. However, these rules of conduct in relation to the press had to be balanced against the legitimate interest of the public to obtain information. They should not be interpreted as putting an excessive burden on medical practitioners to control the content of press publications. The article in question gave a balanced explanation of the new technique and was not incorrect or misleading.

- ***Rubins v. Latvia***, Application no. 79040/12, judgment of 13 January 2015: dismissal of head of university department for criticism violated right to freedom of expression.

This concerned the head of a university department who had been dismissed from his post following an email in which he had voiced criticism of university management. His appeal was dismissed by the domestic courts, and the applicant complained to the European Court of Human Rights.

The European Court held that the dismissal had violated his right to freedom of expression. It noted that the applicant's dismissal was mainly based on an email of 20 March

2010 in which he criticised the Rector and referred to several existing problems at the University. The university had considered that this above email amounted to serious misconduct, a finding that had been upheld by the domestic courts. The Court noted that the email discussed issues of public interest – namely, shortcomings identified by the State Audit Office, and plagiarism. The Court also noted that the applicant had not been insulting in his email, nor had he published any private information that had been damaging to the reputation of the rector. The Court also noted that harshness of the sanction imposed – dismissal.

Charter of Fundamental Rights of the European Union

Article 13 of the EU Charter explicitly protects freedom of the arts and sciences: "The arts and scientific research are free. Academic freedom is respected".

Council of Europe Recommendations and other statements

- *Recommendation CM/Rec(2012)7 of the Committee of Ministers to member States on the responsibility of public authorities for academic freedom and institutional autonomy*

  In this recommendation, the Committee of Ministers state that:

  - academic freedom and institutional autonomy are essential values of higher education, and they serve the common good of democratic societies;
  - academic freedom should guarantee the right of both institutions and individuals to be protected against undue outside interference, by public authorities or others. It is an essential condition for the search for truth, by both academic staff and students, and should be applied throughout Europe. University staff and/or students should be free to teach, learn and research without the fear of disciplinary action, dismissal or any other form of retribution;
  - institutional autonomy should not impinge on the academic freedom of staff and students. Public authorities should provide a framework based on trust and respect within the academic community. Only in a climate of confidence can higher education fully serve open democratic societies and encourage their development through freedom of thought and critical and creative thinking.

- *Recommendation 1762 (2006) of the Parliamentary Assembly of the Council of Europe*

  This Recommendation by the Parliamentary Assembly of the Council of Europe states that:

  - academic freedom in research and in training should guarantee freedom of expression and of action, freedom to disseminate information and freedom to conduct research and distribute knowledge and truth without restriction;
  - history has proven that violations of academic freedom and university autonomy have always resulted in intellectual relapse, and consequently in social and economic stagnation.

30. RELIGIOUS EXPRESSION

The expression of religious identity, such as wearing a Christian cross on a necklace or a headscarf, is a right protected under article 10 of the European Convention – which protects the right to freedom of expression – as well as Article 9, as the expression of religious belief. Aspects of this also fall within the scope of Article 8, as the expression of one's personal identity.

While holding a religious belief is a deeply personal experience which the State cannot interfere with – the police cannot order someone not to be a Christian or a Muslim, for example – the expression of that belief can at times be restricted. There have been a number of cases in recent years concerning wearing religious cloths and symbols. In general, it can be summarised that the European Court of Human Rights accepts that States may decide to restrict the expression of religious identity in places such as schools or in other scenarios when this is deemed necessary to protect the secular character of the State. This is a controversial position which is not shared by HRA. (HRA does not advocate for the introduction of this type of restriction in Montenegro. We emphasize that these restrictions are not mandatory, but are allowed if the state decides to impose them).

At the same time, the banning of expression of religious identity by employers unless there is a clear health and safety reason for this has been found to violate the right to freedom of religion.

The following cases illustrate the Court's approach:

- ***S.A.S. v. France**,* Application no. 43835/11, judgment of 26 June 2014: ban on wearing full-face veil did not violate right to freedom of religion.

This concerned a French Muslim who complained that following the entry into force in 2011 of a law prohibiting the concealment of one's face in public places she was no longer able to wear the full-face veil in public. She argued that this violated her right to express her religious identity; she wore the burqa and niqab in accordance with her religious faith, culture and personal convictions.

She also emphasised that this was her personal choice: she was not pressured by her husband or anyone else. Her aim in this was not to cause a nuisance to others, but to live her life in accordance with her religious convictions.

The Grand Chamber of the Court held that the ban on her wearing a full face veil did not violate Article 8, protecting he right to respect for privacy, nor Article 9, protecting the right to freedom of religion. The Court noted that the law had been introduced to provide equal conditions for the enjoyment of all religions as part of France's "living together" policy, which protected fundamental ideals of democracy, liberty and equality. The Court considered that this was a legitimate aim and emphasised that individual states have a considerable "margin of appreciation" in deciding how measures such as this can be implemented. The Court held that there was no violation of the right not to be discriminated against in the enjoyment of one's religion either.

While the Court admitted that the ban had specific negative effects on the situation of Muslim women who, for religious reasons, wished to wear the full-face veil in public,

this was justified by the wider aim of devising a society where all religions can "live together".

- ***Leyla Şahin v. Turkey***, Application no. 44774/98, judgment of 10 November 2005: ban on wearing a headscarf on university premises did not violate the right to freedom of religion.

This concerned a Turkish student who had been banned from wearing an Islamic headscarf at university. She was a practising Muslim and eventually felt forced to leave the country and pursue her studies in Austria, where wearing a headscarf was permitted. She complained to the European Court on Human Rights that the ban in Turkey violated her right to freedom of religion.

The Court held that there had been no violation of the right to freedom of religion. It noted that the matter had been considered by the Turkish Constitutional Court, which had ruled that wearing a headscarf in universities violated constitutional values of constitutionalism and equality. The Court noted that these values were central to Turkish democracy and were central to protecting the rights to liberty and equality. This protected individuals not only from State interference in the enjoyment of religion, but also from external pressure from extremist movements. The Court noted the impact that wearing a headscarf could have on others not wearing it, particularly when wearing one was presented as or perceived as a compulsory religious duty. It was therefore legitimate for the State to ban wearing a headscarf on university premises.

- ***Phull v. France***, Application no. 35753/03, judgment of 11 January 2005 (admissibility decision): requirement to remove turban for airport security did not violate right to freedom of religion.

This concerned a member of the Sikh religion who complained that airport authorities had interfered with his right to freedom of religion by requiring him to remove his turban as part of a security check imposed on passengers entering the departure lounge. He argued that there had been no need for the security staff to make him remove his turban, especially as he had not refused to go through the walk-through scanner or to be checked with a hand-held detector.

The European Court of Human Rights held that this application was "manifestly ill-founded" and there was no violation of the right to freedom of expression. It considered that security checks in airports were necessary in the interests of public safety and that the question of how to ensure airport safety was well within the State's margin of appreciation.

- ***Eweida and Chaplin v. the United Kingdom***, Application nos. 48420/10, 59842/10, 51671/10 and 36516/10, judgment of 15 January 2013: wearing a Christian cross can be prohibited for health and safety reasons, but not for reasons of protecting a corporate image.

This concerned two applicants who were practising Christians and who had been banned from displaying their necklaces with a Christian cross. One worked for British Airways; the second was a nurse. They complained that the restriction on visibly wearing Christian crosses around their necks while at work violated their right to freedom of religion, and that domestic law had failed adequately to protect their rights.

The Court held that in relation to the British Airways employee, there had been a violation of the right to freedom of expression but that there had not been a violation in the case of the nurse. The Court held that the lack of protection in UK law to regulate the wearing of religious symbols did not as such present a violation of the right to freedom of expression. UK law contained a broad prohibition against discrimination, and claims could be brought within the context of that. With regard to the British Airways employee, the Court held that the countervailing rights and interests were the applicant's right to express her religious beliefs on the one hand, and the employer's desire to project a certain corporate image on the other. In this balancing exercise, the employer's interests had been given undue prominence in the domestic courts. As regards the nurse, the Court emphasised that she had been asked to remove her cross for health and safety reasons. This was a more important interest than her own right to express her religious identity.