

# FREEDOM OF EXPRESSION AND VIOLENCE AGAINST JOURNALISTS

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## Abstract

*This study will contain an analysis on the international and regional standards in the field of freedom of expression, as stipulated in the United Nations conventions and in the European Convention of Human Rights.*

*Further we will establish a link between the breach of the freedom of expression when cases of violence against journalists arise, especially tackling the impunity problem.*

*The paper will focus on the study of the ECtHR judgements regarding freedom of expression and cases of violence against journalists. Also, we will address the recent recommendations at the Council of Europe level.*

*Concluding, the study will attempt to express some recommendations in solving the problem of violence against journalists.*

**Keywords:** *freedom of expression; journalists; violence; United Nations; Council of Europe; ECHR.*

## 1. Introduction

Freedom of expression can take many forms, encompassing verbal, artistic, and physical expression. Freedom of opinion and expression is the cornerstone of any democratic society. However, it is a freedom which, as history attests, has been, and is, compromised in a number of States<sup>1</sup>.

The right to freedom of expression, guaranteed both at international level (Universal Declaration of Human Rights, International Covenant on Civil and Political Rights) and regional level (Convention for the Protection of Human Rights), constitutes one of the essentials in a democratic society, ensuring, amongst others, the sound information of the citizens and, if properly implemented, an effective functioning of the rule of law.

So, from this perspective, safeguarding freedom of expression has an even more importance when coupled with the necessity to safeguard the integrity of the journalists and to protect them from cases of violence.

Of course, given the expansion of internet-based information, when referring to journalists, one should have in mind a larger interpretation of the notion, rather than the *stricto sensu* one. Thus, the term 'journalists' will include media workers and social media producers who produce significant amounts of public-interest journalism.

At Council of Europe (CoE) level, the term 'journalist' means any natural or legal person who is regularly or professionally engaged in the collection

and dissemination of information to the public via any means of mass communication<sup>2</sup>.

Also, ongoing technological developments have transformed the traditional media environment, as described, *inter alia*, in CM/Rec(2011)7 on a new notion of media<sup>3</sup>, leading to new conceptions of media and new understandings of the evolving media ecosystem. Advances in information and communication technologies have made it easier for an increasingly broad and diverse range of actors to participate in public debate. Consequently, the European Court of Human Rights has repeatedly recognised that individuals, civil society organisations, whistle-blowers and academics, in addition to professional journalists and media, can all make valuable contributions to public debate, thereby playing a role similar or equivalent to that traditionally played by the institutionalised media and professional journalists<sup>4</sup>.

## 2. Freedom of expression

### 2.1. International level

At international level, freedom of expression is provided for in art. 19 of the Universal Declaration of Human Rights (1948), which states that *everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers*. Similarly, the International Covenant on Civil and Political Rights (1966) provides,

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<sup>1</sup> R. K.M. Smith, Textbook on International Human Rights, 5th edition (Oxford: Oxford University Press, 2012), 301.

<sup>2</sup> CoE, Committee of Ministers, Recommendation No R(2000)7 on the right of journalists not to disclose their sources of information, adopted 8 March 2000, accessed March 20, 2017, [http://www.inter-justice.org/pdf/Sejal\\_Parmar\\_Protection\\_and\\_Safety\\_of\\_Journalists.pdf](http://www.inter-justice.org/pdf/Sejal_Parmar_Protection_and_Safety_of_Journalists.pdf).

<sup>3</sup> CoE, Committee of Ministers, **Recommendation CM/Rec(2011)7 on a new notion of media**, adopted 21 September 2011, accessed March 20, 2017, [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016805cc2c0](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805cc2c0).

<sup>4</sup> CoE, Committee of Ministers, **Recommendation CM/Rec(2016)4 of the Committee of Ministers to member States on the protection of journalism and safety of journalists and other media actors**, adopted 13 April 2016, no. 9, accessed March 20, 2017, [https://search.coe.int/cm/Pages/result\\_details.aspx?objectid=09000016806415d9#\\_ftn1](https://search.coe.int/cm/Pages/result_details.aspx?objectid=09000016806415d9#_ftn1).

in article 19 para.2 and 3, that *everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.*

## 2.2. Regional level

At regional level, freedom of expression is regulated in art. 10 from the Convention for the Protection of Human Rights (ECHR):

1. *Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*

2. *The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*

## 2.3. Freedom of expression

In an impressive amount of judgments the European Court of Human Rights (ECtHR) has found that the national level of protection of the right to freedom of expression, media freedom and rights of journalists does not meet the requirements of Article 10 ECHR. The Court's case law has emphasized that *freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment*, while restrictions and sanctions need a relevant, pertinent and sufficient motivation. An interference with free speech and media

freedom can only be justified if there is a pressing social need and insofar as the interference is proportionate to the aim pursued<sup>5</sup>.

Any interference with the right to freedom of expression of journalists and other media actors therefore has societal repercussions as it is also an interference with the right of others to receive information and ideas and an interference with public debate<sup>6</sup>.

In a democratic system, the acts or omissions of government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the media and public opinion. The interest which the public may have in particular information can sometimes be so strong as to override even a legally imposed duty of confidence<sup>7</sup>.

In *Bucur and Toma v. Romania* the Court considered that the general interest in the disclosure of information revealing illegal activities within the Romanian Intelligence Services (RIS) was so important in a democratic society that it prevailed over the interest in maintaining public confidence in that institution. The Court observed that the information about the illegal telecommunication surveillance of journalists, politicians and business men that had been disclosed to the press affected the democratic foundations of the State. Hence it concerned very important issues for the political debate in a democratic society, in which public opinion had a legitimate interest. The fact that the data and information at issue were classified as 'ultra-secret' was not a sufficient reason in this case to interfere with the whistleblower's right to divulge the information. The conviction of Bucur for the disclosure of information to the media about the illegal activities of RIS was considered as a violation of Article 10 ECHR<sup>8</sup>.

## 2.4. Restrictions

It was noted that at first sight it is remarkable that specifically with respect to the right to freedom of expression, to which Western democracies attach such great value, the restrictions are formulated more broadly than with respect to other rights and freedoms. However, in practice this broad formulation is of little impact<sup>9</sup>.

Subject to paragraph 2 of Article 10 [of the European Convention on Human Rights], it is applicable not only to 'information' or 'ideas' that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the

<sup>5</sup> D. Voorhoof, *On the Road to more Transparency: Access to Information under Article 10 ECHR*, 2014, accessed March 20, 2017, <http://journalism.cmpf.eui.eu/discussions/transparency-access-to-information-article-10-echr/>.

<sup>6</sup> CoE, Committee of Ministers, *Recommendation CM/Rec(2016)4 of the Committee of Ministers to member States on the protection of journalism and safety of journalists and other media actors*, adopted 13 April 2016, no. 2.

<sup>7</sup> ECtHR, Grand Chamber, 12 February 2008, no. 14277/04, *Guja v. Moldova*, § 74. All the ECtHR judgements mentioned in this study are available on the website of the ECtHR - <http://hudoc.echr.coe.int> and were accessed in March 20, 2017.

<sup>8</sup> ECtHR 8 January 2013, no. 40238/02, *Bucur and Toma v. Romania*, in D. Voorhoof, *On the Road to more Transparency: Access to Information under Article 10 ECHR*. In its judgment the Court also relied on Resolution 1729(2010) of the Parliamentary Assembly of the Council of Europe on protecting whistleblowers.

<sup>9</sup> P. van Dijk, F. van Hoof, A. van Rijn, L. Zwaak (editors), *Theory and practice of the European Convention on Human Rights*, 4th edition (Antwerpen-Oxford: Intersentia, 2006), 793.

population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'<sup>10</sup>.

Tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society. That being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance (...), provided that any 'formalities', 'conditions', 'restrictions' or 'penalties' imposed are proportionate to the legitimate aim pursued<sup>11</sup>.

Note should be made that, the essential function of the press is always taken into account when an assessment is made whether in the given situation a restriction of the freedom of expression is permissible or not<sup>12</sup>.

Interference by public authority in exercising the rights provided for in Article 10 will only be valid and legal if it meets the requirements of paragraph 2 of Article 10: such interference was *prescribed by law*, motivated by one or more of the *legitimate aims* set out in that paragraph, and *necessary in a democratic society*.

Concluding there are 3 main conditions that have to be met in order to meet the requirements of paragraph 2 of Article 10:

- A measure is *prescribed by the law* if it has, both, basis in domestic law and the national law, and it has a certain quality, meaning that it must be accessible to the person concerned and foreseeable as to its effects<sup>13</sup>.
- The interference must pursue a *legitimate aim* which justifies the interference with its rights.
- Finally, the interference must be *necessary in a democratic society*. As set forth in Article 10, this freedom is subject to exceptions. Such exceptions must, however, be construed strictly, and the need for any restrictions must be established convincingly, particularly where the nature of the speech is political rather than commercial. The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the

Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient". In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts<sup>14</sup>.

### 3. Violence against journalists and the 'chilling' effect

#### 3.1. International level

Journalists play a particularly prominent role in society: when they are threatened, attacked or killed, information flows shrink and entire communities are cowed. Citizens are deprived of the necessary information to develop their own opinions and take informed decisions about their lives and development<sup>15</sup>.

The safety of journalists and the struggle against impunity for their killers are essential to preserve the fundamental right to freedom of expression, guaranteed by Article 19 of the *Universal Declaration of Human Rights*. Freedom of expression is an individual right, for which no one should be killed, but it is also a collective right, which empowers populations through facilitating dialogue, participation and democracy, and thereby makes autonomous and sustainable development possible<sup>16</sup>.

In July 2011, article 19 was the subject of the General Comment 34 by the Human Rights Committee, which stated that *States parties should put in place effective measures to protect against attacks aimed at silencing those exercising their right to freedom of expression. Paragraph 3 may never be invoked as a justification for the muzzling of any advocacy of multi-party democracy, democratic tenets and human rights. Nor, under any circumstance, can an attack on a person, because of the exercise of his or her freedom of opinion or expression, including such forms of attack as arbitrary arrest, torture, threats to life and killing, be compatible with article 19. Journalists are frequently subjected to such threats, intimidation and attacks because of their activities. So too are persons who engage in the gathering and an alysis of information on the human rights situation and who publish human rights-related reports, including judges*

<sup>10</sup> ECtHR, 7 December 1976, *Handyside v. the United Kingdom*, §49.

<sup>11</sup> ECtHR, 6 July 2006, *Erbakan v. Turkey*, §56.

<sup>12</sup> P. van Dijk, F. van Hoof, A. van Rijn, L. Zwaak (editors), *Theory and practice of the European Convention on Human Rights*, 4th edition (Antwerpen-Oxford: Intersentia, 2006), 775.

<sup>13</sup> ECtHR, Grand Chamber, *Amann v. Switzerland*, no. 27798/95.

<sup>14</sup> ECtHR, 28 June 2001, *VgT Verein Gegen Tierfabriken v. Switzerland*, no. 24699/94, §66, 68.

<sup>15</sup> U.N., *Implementation Strategy 2013-2014 on U.N. Plan of Action on the safety of journalists and the issue of impunity*, 2, accessed March 20, 2017, [http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CI/CI/pdf/official\\_documents/Implementation\\_Strategy\\_2013-2014\\_01.pdf](http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CI/CI/pdf/official_documents/Implementation_Strategy_2013-2014_01.pdf).

<sup>16</sup> U.N., *Plan of Action on the safety of journalists and the issue of impunity*, 2012, 1, accessed March 20, 2017, [http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CI/CI/pdf/official\\_documents/UN-Plan-on-Safety-Journalists\\_EN\\_UN-Logo.pdf](http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CI/CI/pdf/official_documents/UN-Plan-on-Safety-Journalists_EN_UN-Logo.pdf).

and lawyers. All such attacks should be vigorously investigated in a timely fashion, and the perpetrators prosecuted, and the victims, or, in the case of killings, their representatives, be in receipt of appropriate forms of redress<sup>17</sup>.

Also, Resolution 29<sup>18</sup> condemns violence against journalists and calls upon its Member States to uphold their obligation to prevent, investigate, prosecute and sentence those which are committing crimes against journalists. More to the point, the legislation must provide that the persons responsible for offences against journalists discharging their professional duties or the media must be judged by civil and/or ordinary courts and that there should be no statute of limitations for crimes against persons when these are perpetrated to prevent the exercise of freedom of information and expression or when their purpose is the obstruction of justice<sup>19</sup>.

Moreover, Human Rights Council condemned in the strongest terms all attacks and violence against journalists and expressed its concern that there was a growing threat to the safety of journalists posed by non-State actors<sup>20</sup>.

While recognizing that investigating crimes against journalists remains the responsibility of Member States, the acts of violence and intimidation (including murder, abduction, hostage taking, harassment, intimidation and illegal arrest and detention) are becoming ever more frequent in a variety of contexts. Notably, the threat posed by non-state actors such as terrorist organizations and criminal enterprises is growing. This merits a careful, context sensitive consideration of the differing needs of journalists in conflict and non-conflict zones, as well as of the different legal instruments available to ensure their protection<sup>21</sup>.

**Impunity** has remained the predominant trend, with few perpetrators of killings or attacks against journalists being brought to justice. Impunity refers to the effect of exemption from punishment of those who commit a crime. It thus points to a potential failure of judicial systems as well as the creation of an environment in which crimes against freedom of expression go unpunished, posing a serious threat to freedom of expression. The practice and expectation of

impunity may further encourage violations of numerous human rights besides freedom of expression and press freedom, while also encouraging other forms of criminality. Physically silencing criticism, arbitrary arrests and detention, enforced disappearance, harassment and intimidation have often been aimed at silencing not only journalists, but also intimidating a population towards self-censorship<sup>22</sup>.

In other words, impunity remains one of the greatest challenges to the safety of journalists around the world. As violence against and harassment of journalists goes unpunished, the problem persists and even increases. However, if real legal consequences exist, perpetrators may think twice before committing such acts. The problem of impunity for crimes committed against journalists is acute and enduring, and it must be addressed by all stakeholders - especially government and state representatives – in order to have any hope of resolution<sup>23</sup>.

The safety of journalists and question of avoiding impunity for acts of violence against them interacts, also, with other relevant provisions from the Universal Declaration of Human Rights, such as: the right to life (Article 2), the prohibition of torture (Article 3), the right to liberty and security (Article 5), the right to a fair trial (Article 6), no punishment without law (Article 7) and the right to an effective remedy (Article 13).

### 3.2. Regional level

It is alarming and unacceptable that journalists and other media actors in Europe are increasingly being threatened, harassed, subjected to surveillance, intimidated, arbitrarily deprived of their liberty, physically attacked, tortured and even killed because of their investigative work, opinions or reporting, particularly when their work focuses on the misuse of power, corruption, human rights violations, criminal activities, terrorism and fundamentalism. These abuses and crimes have been extensively documented in authoritative reports published by the media, non-governmental organisations and human rights defenders<sup>24</sup>.

**Protection of journalism and safety of journalists and other media actors** must be organized into four pillars: prevention, protection, prosecution

<sup>17</sup> U.N., Human Rights Committee, *General comment No. 34. Article 19: Freedoms of opinion and expression*, 102nd session, Geneva, 11-29 July 2011, 12 September 2011, no. 23, accessed March 20, 2017, <http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>.

<sup>18</sup> U.N.E.S.C.O. (United Nations Educational, Scientific and Cultural Organization), General Conference, Twenty-ninth Session, Paris, 21 October to 12 November 1997, accessed March 20, 2017, <http://unesdoc.unesco.org/images/0011/001102/110220E.pdf>.

<sup>19</sup> U.N., *Implementation Strategy 2013-2014 on U.N. Plan of Action on the safety of journalists and the issue of impunity*, 24-25.

<sup>20</sup> U.N., *The UN Human Rights Council Resolution A/HRC/21/12 on the Safety of Journalists*, adopted by consensus in September 2012, in U.N., *Implementation Strategy 2013-2014 on U.N. Plan of Action on the safety of journalists and the issue of impunity*, 23.

See, also: *The Belgrade Declaration, 2004; The Medellin Declaration, 2007; The Carthage Declaration, 2012; The San Jose Declaration, 2013, on 'Safe to Speak: Securing Freedom of Expression in all Media' and The Paris Declaration, 2014, on 'Media Freedom for a Better Future: Shaping the Post-2015 Development Agenda'*.

<sup>21</sup> U.N., *Plan of Action on the safety of journalists and the issue of impunity*, 4.

<sup>22</sup> U.N.E.S.C.O., *World Trends in Freedom of Expression and Media Development*, 2014, 87, accessed March 20, 2017, <http://unesdoc.unesco.org/images/0022/002270/227025e.pdf>.

<sup>23</sup> The International Women's Media Foundation, *An overview of the current challenges to the safety and protection of journalists*, 2016, 4, accessed March 20, 2017, <https://www.iwmf.org/wp-content/uploads/2016/02/IWMFUNESCO-Paper.pdf>.

<sup>24</sup> CoE, Committee of Ministers, *Recommendation CM/Rec(2016)4 of the Committee of Ministers to member States on the protection of journalism and safety of journalists and other media actors, recitals - no. 1*.

(including a specific focus on impunity) and promotion of information, education and awareness-raising:

- *Prevention:* Member States should put in place a comprehensive legislative framework that enables journalists and other media actors to contribute to public debate effectively and without fear. The legislative framework, including criminal law provisions dealing with the protection of the physical and moral integrity of the person, should be implemented in an effective manner, including through administrative mechanisms and by recognising the particular roles of journalists and other media actors in a democratic society<sup>25</sup>.
- *Protection:* Legislation criminalising violence against journalists should be backed up by law enforcement machinery and redress mechanisms for victims (and their families) that are effective in practice. Clear and adequate provision should be made for effective injunctive and precautionary forms of interim protection for those who face threats of violence. State authorities have a duty to prevent or suppress offences against individuals when they know, or should have known, of the existence of a real and immediate risk to the life or physical integrity of these individuals from the criminal acts of a third party and to take measures within the scope of their powers which, judged reasonably, might be expected to avoid that risk. State officials and public figures should not undermine or attack the integrity of journalists and other media actors, nor should they require, coerce or pressurise, by way of violence, threats, financial penalties or inducements or other measures, journalists and other media actors to derogate from accepted journalistic standards and professional ethics by engaging in the dissemination of propaganda or disinformation. State officials and public figures should publicly and unequivocally condemn all instances of threats and violence against journalists and other media actors, irrespective of the source of those threats and acts of violence<sup>26</sup>.
- *Prosecution:* Investigations must be effective in the sense that they are capable of leading to the establishment of the facts as well as the identification and eventually, if appropriate, punishment of those responsible. The authorities must take every reasonable step to collect all the

evidence concerning the incident. The conclusions of the investigation must be based on thorough, objective and impartial analysis of all the relevant elements, including the establishment of whether there is a connection between the threats and violence against journalists and other media actors and the exercise of journalistic activities or contributing in similar ways to public debate. For an investigation to be effective, the persons responsible for, and who are carrying out, the investigation must be independent and impartial, in law and in practice. Any person or institution implicated in any way with a case must be excluded from any role in investigating it. Moreover, investigations should be carried out by specialised, designated units of relevant State authorities in which officials have been given adequate training in international human rights norms and safeguards<sup>27</sup>.

- *Promotion of information, education and awareness raising on the issue of violence against journalists is extremely important, as it is aimed at underlining the necessity to respect the freedom of expression. Also, training programmes should be organized, as well as putting in place a platform for cooperation between public institutions and civil society.*

Regarding the **impunity** problem, it should be stated firmly that impunity represents the general failure of the functions of government and the rule of law.

In recent years a large number of cases of killings and attacks on journalists remain unsolved. The low rate of successful prosecution in cases involving journalists is in contrast with the much higher conviction rate recorded in cases of violent crime where the victim is a nonjournalist<sup>28</sup>.

Impunity is a serious barrier to safeguarding a free press. The failure to properly investigate and prosecute crimes against journalists needs to be urgently addressed. By effectively prosecuting criminals, governments can decrease the number of future attacks<sup>29</sup>.

In order for an investigation to be effective, it should respect the following essential requirements: adequacy, thoroughness, impartiality and independence, promptness and public scrutiny<sup>30</sup>.

<sup>25</sup> CoE, Committee of Ministers, *Recommendation CM/Rec(2016)4 of the Committee of Ministers to member States on the protection of journalism and safety of journalists and other media actors*, no. 2, 3.

<sup>26</sup> CoE, Committee of Ministers, *Recommendation CM/Rec(2016)4 of the Committee of Ministers to member States on the protection of journalism and safety of journalists and other media actors*, no. 8, 9, 15.

<sup>27</sup> CoE, Committee of Ministers, *Recommendation CM/Rec(2016)4 of the Committee of Ministers to member States on the protection of journalism and safety of journalists and other media actors*, no. 18-20.

<sup>28</sup> O.S.C.E., *Safety of journalists guidebook*, 2nd edition, 2014, 72-75, accessed March 20, 2017, <http://www.osce.org/fom/118052?download=true>.

<sup>29</sup> O.S.C.E. - *The OSCE representative on freedom of the media, safety of journalists. Why it matters*, accessed March 20, 2017, accessed March 20, 2017, <http://www.osce.org/fom/101983?download=true>.

<sup>30</sup> CoE, Committee of Ministers, *Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations*.

When it occurs, impunity is caused or facilitated notably by the lack of diligent reaction of institutions or state agents to serious human rights violations (e.g. in relation with art. 2, 3, 4, 5 paragraph 1, 8 of the Convention). In these circumstances, faults might be observed within state institutions, as well as at each stage of the judicial or administrative proceedings<sup>31</sup>.

Combating impunity requires that there be *an effective investigation* in cases of serious human rights violations, whether committed by state agents or private persons. This duty has an absolute character<sup>32</sup>.

Where an arguable claim is made, or the authorities have reasonable grounds to suspect that a serious human rights violation has occurred, the authorities must commence an investigation on their own initiative. Although there is no right guaranteeing the prosecution or conviction of a particular person, prosecuting authorities must, where the facts warrant this, take the necessary steps to bring those who have committed serious human rights violations to justice. A decision either to refuse to initiate or to terminate investigations may be taken only by an independent and competent authority in accordance with the criteria of an effective investigation. It should be duly reasoned. Such decisions must be subject to appropriate scrutiny and be generally challengeable by means of a judicial process. Also, States should ensure the independence and impartiality of the judiciary in accordance with the principle of separation of powers. Proceedings should be concluded within a reasonable time. The sentences which are handed out should be effective, proportionate and appropriate to the offence committed. Domestic court judgments should be fully and speedily executed by the competent authorities<sup>33</sup>.

Regarding the **positive obligations of the State**, the ECtHR has constantly held that public authorities have *positive* obligations inherent in an effect respect of the rights concerned. Consequently, for a real and effective exercise of certain freedoms the State's duty isn't only *not* to interfere, but also the State has the obligation to take measures of protection. In order to be in line with ECtHR case-law, such positive measures a fair balance has to be struck between the general interest of the community and the interests of the individual and, also, the obligation must not be interpreted in such a way as to impose an impossible or disproportionate burden on the authorities<sup>34</sup>.

On the positive obligations of the state which rise under article 10, 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 (see, for example, *mutatis mutandis*, *Observer and Guardian v. the United Kingdom*, §59, and *Informationsverein Lentia and Others v. Austria*, §38). Such an undertaking cannot be successfully accomplished unless it is grounded in the principle of pluralism, of which the State is the ultimate guarantor<sup>35</sup>.

The concept of positive obligation assumes greater importance in relation to any violence or threats of violence directed by private persons against other private persons, such as the press, exercising free speech. In this sense, in the *Özgür Gündem v. Turkey* case, the Court *has held that, although the essential object of many provisions of the Convention is to protect the individual against arbitrary interference by public authorities, there may in addition be positive obligations inherent in an effective respect of the rights concerned. It has found that such obligations may arise under Article 8 and Article 11. Obligations to take steps to undertake effective investigations have also been found to accrue in the context of Article 2 and Article 3, while a positive obligation to take steps to protect life may also exist under Article 2. The Court recalls the key importance of freedom of expression as one of the preconditions for a functioning democracy. Genuine, effective exercise of this freedom does not depend merely on the State's duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals. In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which is inherent throughout the Convention*<sup>36</sup>.

### 3.3. Case study: prohibition of torture

- **Substantial limb.** The safety of journalists regarding the acts of violence against them interacts, *inter alia*, with Article 3 of the ECHR regulating the principle of prohibition of torture.

Article 3 of the ECHR enshrines one of the basic values of the democratic societies whose core purpose is to protect a person's dignity and physical integrity – prohibition, in absolute and unqualified terms, of torture or inhuman or degrading treatment or punishment<sup>37</sup>.

<sup>31</sup> CoE, Committee of Ministers, *Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations*, adopted on 30 March 2011 at the 1110th meeting of the Ministers' Deputies, accessed March 20, 2017, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016805cd111>

<sup>32</sup> CoE, Committee of Ministers, *Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations*.

<sup>33</sup> CoE, Committee of Ministers, *Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations*.

<sup>34</sup> See, for example, *Rees v. the United Kingdom*, 17 October 1986, §37, and *Osman v. the United Kingdom*, 8 October 1998, §116.

<sup>35</sup> ECtHR, *Research Report. Positive obligations on member States under Article 10 to protect journalists and prevent impunity*, 2011, 4-5, accessed March 20, 2017, [http://www.echr.coe.int/Documents/Research\\_report\\_article\\_10\\_ENG.pdf](http://www.echr.coe.int/Documents/Research_report_article_10_ENG.pdf).

<sup>36</sup> ECtHR, *Özgür Gündem v. Turkey*, no. 23144/93, §42-43.

<sup>37</sup> Article 3 – Prohibition of torture.

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

The unconditional terms of article 3 also mean that there can never, under the Convention or under international law, be a justification for acts which breach the article. In other words, there can be no factors which are treated by a domestic legal system as justification for resort to prohibited behaviour – not the behaviour of the victim, the pressure on the perpetrator to further an investigation or prevent a crime, any external circumstances or any other factor<sup>38</sup>.

According to the well-established case-law of the Court, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim. In order for a punishment or treatment associated with it to be “inhuman” or “degrading”, the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment<sup>39</sup>.

➤ From the *procedural point of view*, where an individual raises an arguable claim that he has been seriously ill-treated in breach of article 3 of the Convention, the member state has an obligation to initiate a thorough, prompt, independent and effective investigation, which should be capable of leading to the establishment of the facts of the case and, if the allegations prove to be true, to the identification and punishment of those responsible. This means that the authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation or as the basis of their decisions. They must take all reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony, forensic evidence etc. Any deficiency in the investigation which undermines its ability to establish the cause of injuries or to identify the persons responsible will risk falling foul of this standard. For an effective investigation into alleged ill-treatment by state agents, such investigation should be independent. Thus, the investigation lacked independence where members of the same division or detachment as those implicated in the alleged ill-treatment were undertaking the investigation. The independence of the

investigation implies not only the absence of a hierarchical or institutional connection, but also independence in practical terms<sup>40</sup>.

➤ In *Najafli v. Azerbaijan*<sup>41</sup>, a journalist had been beaten by the police while covering an unauthorised demonstration in Baku. The Court noted that the role of the press in imparting information and ideas on matters of public interest undoubtedly included reporting on opposition gatherings and demonstrations which was essential for the development of any democratic society. It found in particular that the physical ill-treatment by State agents of journalists carrying out their professional duties had seriously hampered the exercise of their right to receive and impart information. Irrespective of whether there had been any actual intention to interfere with Mr Najafli’s journalistic activity, he had been subjected to unnecessary and excessive use of force, despite having made clear efforts to identify himself as a journalist at work. In conclusion, the Court found violations of Article 3 (prohibition of inhuman or degrading treatment) concerning Mr Najafli’s ill-treatment, on the procedural limb of Article 3, concerning the investigation into his claim of ill-treatment and also of Article 10 regarding freedom of expression<sup>42</sup>.

### 3.4. Statistics

Pursuant to the International Press Institute, in the period since 2000, more than 900 journalists have been killed as a result of their professional activities. The number of violent attacks against journalists is rising. The increase of targeted killings against representatives of the critical media is particularly alarming. At the same time, the number of resolved cases is appallingly low – around 94% of reported cases are never resolved and perpetrators enjoy impunity<sup>43</sup>.

Around 19 journalists were killed in Central & Eastern Europe in 2007-2012. As a comparison, only 3 journalists were killed in the same period in Western Europe & North America<sup>44</sup>.

According to UNESCO data, fewer than one in ten killings of journalists have led to a conviction in the past period. The UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression has attributed the root cause of

<sup>38</sup> A. Reidy, The prohibition of torture. A guide to the implementation of Article 3 of the European Convention on Human Rights. Human rights handbooks, No. 6, Directorate General of Human Rights, Council of Europe, 2002, 19, accessed March 20, 2017, <http://echr.coe.int/NR/rdonlyres/0B190136-F756-4679-93EC-42EEBEAD50C3/0/DG2ENHRHAND062003.pdf>.

<sup>39</sup> See, *mutatis mutandis*, ECtHR, 20 November 2012, *Ghiurău v. Romania*, §52-53.

<sup>40</sup> See, *mutatis mutandis*, ECtHR, 26 January 2006, *Mikhenyev v. Russia*, §107-108, 110.

<sup>41</sup> ECtHR, 2 October 2012, *Najafli v. Azerbaijan*, no. 2594/07.

<sup>42</sup> See, CoE, Media coverage of protests and demonstrations. Thematic factsheet, February 2016, accessed March 20, 2017, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016805a39cb>.

<sup>43</sup> Austria, *Safety of Journalists*, accessed March 20, 2017, <http://www.austria.org/safety-of-journalists/>.

<sup>44</sup> U.N.E.S.C.O., World Trends in Freedom of Expression and Media Development, 2014, 85.

impunity to the lack of political will to pursue investigations<sup>45</sup>.

While the commitment to protect freedom of the media is a noble goal, its implementation has not been successful so far. In the OSCE region, around 30 journalists are estimated to have been killed in the past five years alone. And that number is surpassed exponentially by those who were beaten or whose lives were threatened<sup>46</sup>.

### 3.5. Cases of violence against journalists

- **Romania.** *Reporters Without Borders* invoked the freelance cameraman Christian Gesellmann's violent arrest by police officers while covering an anti-government demonstration in Bucharest on Wednesday 1 February 2017. The police hit Gesellmann and held him for several hours for refusing to delete or surrender the video he had shot of clashes between police officers and hooligans during the protest. Gesellmann was not clearly identified as a journalist and did not have a Romanian press card. But it would not have taken the police long to confirm that he was indeed a journalist, instead of detaining him and confiscating his video recording<sup>47</sup>.
- **Croatia.** On 3 November 2010 a court convicted and sentenced six men for the murder of Ivo Pukanić, the director of the weekly *Nacional* and its marketing director Niko Franji. Both men were killed by a car bomb in 2008; it is hoped that those responsible for ordering the killings will also be brought to justice<sup>48</sup>.
- **France.** In France, in January 2011, Michael Szames (reporter for *France 24*) was allegedly the victim of a violent attack. The reporter filed a complaint with the police accusing eight security staff of the National Front Party of having beaten and insulted him as he was covering a party congress<sup>49</sup>.
- **Serbia.** The Independent Journalists' Association of Serbia (IJAS) said its records showed that as many as 128 assaults on journalists occurred since 2014: 27 of the assaults were physical. The stable trend of

frequent physical and verbal attacks on media and journalists continued in the year behind us, as corroborated by IJAS data, according to which 69 journalists were assaulted in 2016: nine physically<sup>50</sup>.

Several death threats have been sent to journalists at the investigative journalism portal *insajder.net* which is owned by broadcaster B92. The threats have been sent via email to several reporters over a week's time, between 14 and 22 March 2016. They have also been received by *Insajder's* editor-in-chief Brankica Stankovic and B92's editor-in-chief Veran Matic. Both have been under police protection for years due to serious threats. Due to a pending police investigation no details of the threats have been revealed, according to Veran Matic<sup>51</sup>. According to a reply from the Republic of Serbia provided by the Ministry of Interior (21 Nov 2016)<sup>52</sup>, the Department of Criminal Police, Office for combating organized crime, filed criminal charges against persons in respect of whom there is reasonable suspicion of committing a criminal offence *endangering security* (art. 138 Criminal Code). The criminal offence was done by sending (from private e-mail address, via contact form on portal *Insajder*) several threatening messages to Ms Brankica Stankovic and to all employees of the portal *Insajder*, as well as threats to Mr Veran Matic.

In another case, the 27-year-old investigative journalist Ivan Ninić was attacked on 27 August 2015 in front of his home as he was locking his car in the parking lot. Two young men beat him with metal rods. The journalist suffered a hematoma under his eye, severe bruising to the thigh bone and an injury to the right shoulder. The incident, which has been condemned by all journalists' organisations in Serbia including the three IFJ/EFJ affiliates, the Association of Journalists of Serbia (UNS), the journalists' union of Serbia (SINOS) and the Independent Association of Journalists of Serbia (NUNS), has been reported to the police<sup>53</sup>. According to a reply from the Republic of Serbia provided by the Ministry of Interior (21 Nov

<sup>45</sup> U.N.E.S.C.O., *World Trends in Freedom of Expression and Media Development*, 2014, 87.

<sup>46</sup> O.S.C.E., *Protection of journalists from violence*. Issue Paper, Strasbourg, 4 October 2011 CommDH/IssuePaper(2011)3, 10, accessed March 20, 2017, <http://www.osce.org/fom/83569?download=true>.

<sup>47</sup> *Reporters without Borders*, *Romania: Bucharest police hit, arrest German cameraman at protest*, accessed March 20, 2017, <https://rsf.org/en/news/romania-bucharest-police-hit-arrest-german-cameraman-protest>.

<sup>48</sup> O.S.C.E., *Safety of journalists guidebook*, 2nd edition, 2014, 72-75.

<sup>49</sup> O.S.C.E., *Protection of journalists from violence*. Issue Paper, Strasbourg, 4 October 2011 CommDH/IssuePaper(2011)3, 11.

<sup>50</sup> Belgrade Center for Human Rights, *Human Rights in Serbia 2016*, Series Reports 28 (Belgrade: The Belgrade Center for Human Rights, 2017), 216.

<sup>51</sup> See CoE, *Media freedom alerts*, accessed March 20, 2017, <https://www.coe.int/en/web/media-freedom/all-alerts/-/soj/alert/15675610>. See, also *Notable Cases of Journalists and Media Safety Violations*, April 11, 2016, accessed March 20, 2017, <http://www.slavkocuruvijafondacija.rs/en/notable-cases-of-journalists-and-media-safety-violations/>.

<sup>52</sup> See Reply from the Republic of Serbia provided by the Ministry of Interior, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806bf092>, accessed March 20, 2017.

<sup>53</sup> See CoE, *Media freedom alerts*, accessed March 20, 2017, [http://www.coe.int/en/web/media-freedom/all-alerts?p\\_p\\_id=sojdashboard\\_WAR\\_coesoportlet&p\\_p\\_lifecycle=2&p\\_p\\_state=normal&p\\_p\\_mode=view&p\\_p\\_cacheability=cacheLevelPage&p\\_p\\_col\\_id=column-4&p\\_p\\_col\\_count=1&\\_sojdashboard\\_WAR\\_coesoportlet\\_alertPK=12991225&\\_sojdashboard\\_WAR\\_coesoportlet\\_cmd=get\\_pdf\\_one&\\_sojdashboard\\_WAR\\_coesoportlet\\_selectedCategories=11709576&\\_sojdashboard\\_WAR\\_coesoportlet\\_fulltext=1&\\_sojdashboard\\_WAR\\_coesoportlet\\_et\\_mvcPath=%2Fhtml%2Fdashboard%2Fsearch\\_results.jsp&\\_sojdashboard\\_WAR\\_coesoportlet\\_yearOfIncident=0](http://www.coe.int/en/web/media-freedom/all-alerts?p_p_id=sojdashboard_WAR_coesoportlet&p_p_lifecycle=2&p_p_state=normal&p_p_mode=view&p_p_cacheability=cacheLevelPage&p_p_col_id=column-4&p_p_col_count=1&_sojdashboard_WAR_coesoportlet_alertPK=12991225&_sojdashboard_WAR_coesoportlet_cmd=get_pdf_one&_sojdashboard_WAR_coesoportlet_selectedCategories=11709576&_sojdashboard_WAR_coesoportlet_fulltext=1&_sojdashboard_WAR_coesoportlet_et_mvcPath=%2Fhtml%2Fdashboard%2Fsearch_results.jsp&_sojdashboard_WAR_coesoportlet_yearOfIncident=0), accessed March 20, 2017.



2015)<sup>54</sup>, in assurance with the instructions of the Deputy to the First Public Prosecutor of Belgrade, the Belgrade Police Department is talking all necessary measures to identify and establish whereabouts of persons who attacked journalist Ivan Ninić.

- **Spain.** In January 2011, there was a case in Spain where Fernando Santiago, President of the Press Association of Cadiz, was brutally attacked in response to a newspaper article about the use of public funds to rescue Delphi, a struggling automobile parts company<sup>55</sup>.

#### 4. Conclusions

“*It is a matter of trust*”. Trust is something you need to build, both with individuals and institutions - when the trust is broken, serious problems occur - resignations are given, media are covering the story, and the people responsible for the situation stay marked for a lifetime<sup>56</sup>.

Impunity – meaning the the failure to bring perpetrators of human rights violations to justice – must be addressed as gives a sentiment of uncertainty and of failure to preserve the rule of law and freedom of expression.

To this sense, in evaluating the legal framework of a country, the main conclusion is that only a comprehensive approach can lead to an improvement of the cases of violence against journalists. By that we mean is of paramount importance to maintain an open dialogue between the institutions and the representatives of the journalist and civil society organisations.

Securing an effective implementation of the existing legal provisions by the states` institutions and the existence of an open and effective dialogue with the media organisations, civil society representatives, States and international organisations constitutes, in our opinion, the pillars that will result in the effective protection of journalists, thus ensuring the freedom of expression, as it was said<sup>57</sup> that the Court has repeatedly emphasized the vital role that freedom of expression, and the free press in particular, have to play in a democratic society.

The safety of journalists and the combating of impunity for crimes against their use of freedom of expression, can only be effectively addressed through a holistic approach: preventive, protective and pre-

emptive measures, through to combating impunity and promoting a social culture which cherishes freedom of expression and press freedom<sup>58</sup>.

All in all, the relevant institutions and stakeholders must be aware that the rationale is that the safety of journalists is an important prerequisite for achieving freedom of expression, democracy, social development and peace<sup>59</sup>.

Although, the international and regional documents recommend that the crimes involving attacks against journalists must be designated as ‘aggravated offences’<sup>60</sup>, which may attract more severe penalties, and that no statute of limitations should apply to such crimes, we think that before amending the criminal framework, a country must try to tackle the problem of violences against journalists using the existing legal framework, which usually is enough, if properly enforced, to ensure the punishment of those guilty of violences against journalists.

To this end, some possible solutions can be imagined, other than amending the legislation, but rather aiming at a proper implementation of current legal framework:

- There is a stringent need to effectively investigate murders and other serious violent crimes against journalists; investigations should be carried out promptly and efficiently and that the prosecutors and investigators must be independent, as well as trained and qualified for the job. No political interference should hinder them from doing their work<sup>61</sup>.
- There is a need to facilitate capacity-building in state institutions, thus encouraging all the relevant stakeholders to fully respect and implement the existing legal provisions, as the only way of effectively ensuring the reality of a satisfactory level of protection ensured in cases of violence against journalists. To this sense, it was said that State authorities must advocate that the authorities make it their priority to carry out swift and effective investigations, sending a message to society that perpetrators and masterminds of violence against journalists will be efficiently brought to justice<sup>62</sup>.
- For the judicial authorities (public prosecutor's office and the court system) is necessary to communicate to the general public, thus increasing the transparency (e.g. by posting on their websites) the evolution and the

<sup>54</sup> See CoE, *Media freedom alerts*, accessed March 20, 2017, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168048addb> accessed March 20, 2017.

<sup>55</sup> O.S.C.E., *Protection of journalists from violence. Issue Paper*, Strasbourg, 4 October 2011 CommDH/IssuePaper(2011)3, 11.

<sup>56</sup> M. Ivanović, *Investigative Journalism and Corruption - A guide for more efficient reporting -*, in *Training Manual: Reporting on court processes pertaining to corruption and on investigative journalism*, Belgrade, 2015, accessed March 20, 2017, <https://www.coe.int/t/dghl/cooperation/economiccrime/corruption/Publications/PACS-Serbia/Manual%20journalists%20eng.pdf>.

<sup>57</sup> C. Ovey, R. White, Jacobs & White *The European Convention on Human Rights*, 4th edition (Oxford: Oxford University Press, 2006), 334.

<sup>58</sup> U.N. *Implementation Strategy 2013-2014 on U.N. Plan of Action on the safety of journalists and the issue of impunity*, 2.

<sup>59</sup> U.N. *Implementation Strategy 2013-2014 on U.N. Plan of Action on the safety of journalists and the issue of impunity*, 2.

<sup>60</sup> See, for example, O.S.C.E., *Safety of journalists guidebook*, 2nd edition, 2014, 71-72.

<sup>61</sup> O.S.C.E., *Protection of journalists from violence. Issue Paper*, Strasbourg, 4 October 2011 CommDH/IssuePaper(2011)3, 4.

<sup>62</sup> O.S.C.E., *Vilnius Recommendations on Safety of Journalists*, 2011, accessed March 20, 2017, <http://www.osce.org/cio/78522?download=true>.

effectiveness of the investigation on murders and other serious violent crimes against journalists, which shall include the following, in the form of press statements: the fact that investigations respected the needs to be carried out promptly and efficiently; the final decision as given in a particular case by the court; the posting on the website (and periodic update) of the Statistics of cases of violence against journalists (no. of cases, no. of cases still under investigation, no. of solved cases, the criminal provision incident in the case (the type of crime committed against a journalist), if the case is linked or not with the responsible of a journalist.

- As State authorities, namely the law enforcement agencies and media need to jointly establish good practices that can increase the safety of members of the media<sup>63</sup>, the publishing of Good practices is a way of levelling the implementation of the legal provisions on violence against journalists and ensuring the necessary transparency that a real content is provided by the national relevant authorities as a way of addressing the violence against journalist issue.
- For the judicial authorities (public prosecutor's office and the court system) is necessary to

organise trainings in order to emphasise and make them aware of the importance of bringing everyone responsible for violence against journalists to justice.

- State authorities must ensure that law enforcement agencies be given sufficient resources and expertise to carry out effective investigations in the particular field of the media and to develop practices that respect the legal rights of members of the media.<sup>64</sup>
- Only if evaluating the above solutions the conclusion is that a state does not have a proper and effective system of protecting the journalists of cases of violence, the two solutions amending the criminal legislation can be implemented:
- crimes involving attacks against journalists must be designated as 'aggravated offences', which may attract more severe penalties,
- no statute of limitations should apply to such crimes.

Of course, in this situation, also, there will be a pressing need to ensure effective mechanisms that can ensure the existence of investigations capable of leading to the establishment of the facts as well as the identification and eventually, if appropriate, punishment of those responsible.

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<sup>63</sup> See, *mutatis mutandis*, OSCE, *Vilnius Recommendations on Safety of Journalists*, 2011.

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