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Promoting dialogue between the European Court of Human Rights
and the media freedom community

*Freedom of expression and the role and case law of the
European Court of Human Rights:
developments and challenges*

Panel 2

Investigative journalism, access to information, protection of sources and whistleblowers

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Introduction

The concept note² to this conference refers to developments in the Court's case law that impact the expectations regarding the role of the European Court of Human Rights (ECtHR, or: the Court) as the *"ultimate watchdog over the right to freedom of expression and information for media and journalists in Europe"*. Over the last decades and particularly the last ten years the Court has delivered significant, even remarkable jurisprudence in support of the right to freedom of expression and information.³ But the Court, including the Grand Chamber, has also delivered some judgments that neglect crucial aspects of journalists' and civil society's rights to freedom of expression.⁴

This presentation will focus on all four issues mentioned in the title of this panel. Due to the Court's case law Article 10 ECHR guarantees (1) protection of acts of newsgathering and investigative journalism, (2) an enforceable right of access to official documents, (3) far-reaching protection of journalistic sources, and (4) protection of whistle-blowers based on the right to freedom of expression.⁵ Although the wording of Article 10 ECHR does not contain any reference to any of these specific aspects, the ECtHR succeeded in incorporating them in the protection system of the right to freedom of expression as guaranteed by Article 10 ECHR, only accepting interferences with these rights when they meet the strict test of Article 10 § 2 ECHR. This approach by the ECtHR has undoubtedly created higher European standards, obliging the member states to increase

¹ <http://www.coe.int/en/web/freedom-expression/ecpmflecthr2017>

² <https://rm.coe.int/16806fbf0f>

³ See Dirk Voorhoof, "Freedom of Journalistic Newsgathering, Access to Information and Protection of Whistle-blowers under Article 10 ECHR and the Standards of the Council of Europe", in Onur Andreotti (ed.), *Journalism at Risk. Threats, challenges and perspectives*, Council of Europe, Strasbourg, 2015, 105-143.

⁴ See e.g. Dirk Voorhoof, "The Grand Chamber strikes again: *Bédat v. Switzerland*. Criminal conviction of journalist for having published documents covered by investigative secrecy in a criminal case is no violation of Article 10 ECHR", *ECHR Blog* 7 April 2016; Dirk Voorhoof, "Delfi AS v. Estonia: Grand Chamber confirms liability of online news portal for offensive comments posted by its readers", *Strasbourg Observers Blog* 18 June 2015 and Dirk Voorhoof, "Journalist must comply with police order to disperse while covering demonstration", *Strasbourg Observers Blog* 26 October 2015.

⁵ The text of this article is the extended and updated version of the presentation at the Strasbourg conference on 24 March 2017, available at <https://vodmanager.coe.int/coe/webcast/coe/2017-03-24-2/lang> (minute 47.30-102.15).

substantially and effectively the level of protection of the right to freedom of expression and information which must be applied and secured in each of these four domains.

The first part of this presentation will highlight the important contribution and the achievements by the ECtHR in guaranteeing, broadening and enforcing the right to freedom of expression and information regarding newsgathering and investigative journalism, access to official documents, source protection and whistle-blowing. The second part will focus on some shortcomings, loopholes or inconsistencies in (recent) judgments and decisions by the ECtHR with regard to these four domains.

Part 1:

Positive achievements in the ECtHR's case law in support of Article 10 ECHR

Looking at the Court's case law since its first finding of a violation of Article 10 ECHR in the case of *Sunday Times v. the United Kingdom*, in 1979, one is confronted with an increasing number of judgments in which the ECtHR found violations of the right to freedom of expression.⁶ The Court's jurisprudence shows a dynamic interpretation of the Convention, also and especially in respect of applicants' claims referring to new dimensions of the right to freedom of expression. As a result, some aspects of journalistic practices, newsgathering, public debate, access to official documents and access to the Internet that were interfered with or lacked protection at national level found robust protection in the Strasbourg case law under Article 10 ECHR. The mere fact that the ECtHR in hundreds of judgments found violations of the right to freedom of expression shows the added value that the ECtHR has created, particularly in upholding high standards of protection for **media, journalists and civil society** in order to enable them to fulfill their public watchdog function in a democratic society.⁷

1.1. Protection of investigative journalism and acts newsgathering

Since *Fressoz & Roire v. France* the ECtHR has reiterated on several occasions that journalists should not be prosecuted or sanctioned because of **breach of confidentiality or the use of illegally obtained documents**, when the disclosure of confidential information is related to journalistic reporting on a matter of public interest and the journalist has furthermore acted in accordance with the standards of journalistic ethics.⁸ The Court has accepted that the interest in protecting the publication of information originating from a source which obtained and retransmitted the information unlawfully may in certain circumstances outweigh those of an individual or an entity, private or public, in maintaining the confidentiality of the information. In a case where a media company was sanctioned for having broadcast information which someone else had obtained illegally, the Court stated that it was "*not convinced that the mere fact that the recording had been obtained by a third person*

⁶ [Annual Report 2016](#), European Court of Human Rights, 202-203. See also Dirk Voorhoof, "Freedom of Expression, Media and Journalism under the European Human Rights System: Characteristics, Developments, and Challenges", in Peter Molnár (ed.), *Free Speech and Censorship Around the Globe*, Budapest - New York, Central European University Press, 2015, 59-104.

⁷ See also Dirk Voorhoof (et al.) and Tarlach McGonagle (Ed. Sup.), [Freedom of Expression, the Media and Journalists: Case-law of the European Court of Human Rights](#), IRIS Themes, European Audiovisual Observatory, Strasbourg, E-book, 2016, 451 p.

⁸ ECtHR Grand Chamber 21 January 1999, *Fressoz and Roire v. France*; ECtHR 25 April 2006, *Dammann v. Switzerland*; ECtHR 7 June 2007, *Dupuis and Others v. France*; ECtHR 19 December 2006, *Radio Twist v. Slovakia* and ECtHR 28 June 2011, *Pinto Coelho v. Portugal*.

contrary to law can deprive the applicant company which broadcast it of the protection of Article 10 of the Convention”.⁹ A newspaper that published emails between two public figures that had been gathered illegally, directly related to a public discussion on a matter of serious public concern, can be shielded by Article 10 ECHR against claims based on the right of privacy as protected under Article 8 ECHR.¹⁰ In a case concerning the conviction of four journalists for having illegally recorded and broadcast an interview using **hidden cameras**, the ECtHR found that the Swiss authorities had violated the journalists’ rights protected under Article 10 ECHR. The ECtHR emphasised that the use of hidden cameras by the journalists was aimed at providing public information on a subject of general interest, whereby the person filmed was not targeted in any personal capacity but in a professional context. The Court found that the interference with the private life of the person concerned had not been serious enough to override the public interest on denouncing malpractice, *in casu* in the field of insurance brokerage.¹¹

In principle journalists are not above the law, but the interest of the public to be informed on matters of public interest can be more important than the enforcement of criminal law. The case law of the ECtHR shows that convictions of journalists for breach of professional secrecy (by others) or using illegally forwarded documents amounted to violations of the journalists’ right to freedom of expression under Article 10 ECHR. On several occasions the ECtHR has emphasised that “*the gathering of information is an essential preparatory step in journalism and is an inherent, protected part of press freedom*”.¹²

The importance of **acts of newsgathering** being protected under Article 10 ECHR is also reflected in a judgment of 9 February 2017, in the case *Selmani and Others v. the former Yugoslav Republic of Macedonia*. The case concerns the forcible removal of journalists from the gallery of the national parliament where they were reporting on a parliamentary debate in the former Yugoslav Republic of Macedonia. In its reasoning the ECtHR referred to the crucial role of the media in providing information on the authorities’ handling of public demonstrations and the containment of disorder, such as in the present case. It reiterated that the “watchdog” role of the media assumes particular importance in such contexts, since their presence is a guarantee that the authorities can be held to account for their conduct *vis-à-vis* the demonstrators and the public at large when it comes to the policing of large gatherings, including the methods used to control or disperse protesters or to preserve public order. Any **attempt to remove journalists from the scene of demonstrations** must therefore be subject to strict scrutiny, especially “*when journalists exercise their right to impart information to the public about the behaviour of elected representatives in Parliament and about the manner in which authorities handle disorder that occurs during Parliamentary sessions*”.¹³ The ECtHR found that the government failed to establish convincingly that the journalists’ removal from the gallery was necessary in a democratic society.

⁹ ECtHR 19 December 2006, *Radio Twist v. Slovakia*, § 62.

¹⁰ ECtHR (Decision) 16 June 2009, Case No. 38079/06, *Jonina Benediktsdóttir v. Iceland*. See also ECtHR Grand Chamber 21 January 1999, *Fressoz and Roire v. France* and ECtHR 19 December 2006, *Radio Twist v. Slovakia*.

¹¹ ECtHR 24 February 2015, *Haldimann and Others v. Switzerland*.

¹² ECtHR 17 February 2015, *Guseva v. Bulgaria*, § 37.

¹³ ECtHR 9 February 2017, *Selmani and Others v. the former Yugoslav Republic of Macedonia*. Compare with ECtHR Grand Chamber 20 October 2015, *Pentikäinen v. Finland*, *infra*.

1.2. Toward a right of access to official documents by journalists, NGOs and other “public watchdogs”.

For a long time, the ECtHR saw no reason to apply Article 10 ECHR in cases of denial of access to public documents. In the cases *Leander v. Sweden*, *Gaskin v. United Kingdom* and *Guerra and others v. Italy*, the Court pointed out “that freedom to receive information (...) basically prohibits a government from restricting a person from receiving information that others wish or may be willing to impart to him. That freedom cannot be construed as imposing on a State, in circumstances such as those of the present case, positive obligations to collect and disseminate information of its own motion”.¹⁴ In *Roche v. the United Kingdom* in 2005, the Grand Chamber referred to the *Leander*, *Gaskin* and *Guerra* judgments and it saw no reason “not to apply this established jurisprudence”.¹⁵

In the spring of 2009 the Court however delivered a judgment in which it recognised, to some extent, **the right of access to official documents**. The ECtHR made clear that when public bodies hold information that is needed for public debate, the refusal to provide documents to those who are requesting access is a violation of the right to freedom of expression and information as guaranteed under Article 10 ECHR. In *TASZ v. Hungary* the Court’s judgment mentioned the “*censorial power of an information monopoly*” when public bodies refuse to release information needed by the media or civil society organisations to perform their “watchdog” function. It also considered that the State had an obligation not to impede the flow of information sought by a journalist or NGO. The ECtHR recognized civil society’s important contribution to the discussion of public affairs and designated the applicant association, which was involved in human rights litigation, as a social “watchdog”. In these circumstances the applicant’s activities as an NGO warranted Convention protection similar to that afforded to the press. Furthermore, given the applicant’s intention to impart the requested information to the public, thereby contributing to the public debate concerning legislation on drug-related offences, its right to impart information was clearly impaired and the ECtHR found a violation of Article 10 ECHR.¹⁶

Also in subsequent cases the ECtHR found **violations of Article 10 ECHR** because of **refusal of access to official documents**.¹⁷ In a judgment of 17 February 2015, in the case of *Guseva v. Bulgaria*, the Court held that “the gathering of information with a view to its subsequent provision to the public can be said to fall within the applicant’s freedom of expression as guaranteed by Article 10 of the Convention”. And: “by not providing the information which the applicant had sought, the mayor interfered in the preparatory stage of the process of informing the public by creating an administrative obstacle (...) The applicant’s right to impart information was, therefore, impaired”.¹⁸ This right, as has been demonstrated in *Youth Initiative for Human Rights v. Serbia*, can also include the right to have access to documents belonging to an intelligence agency and its surveillance

¹⁴ ECtHR 26 March 1987, *Leander v. Sweden*, § 74; ECtHR 7 July 1989, *Gaskin v. UK*, § 52 and ECtHR 9 February 1998, *Guerra and others v. Italy*, § 53.

¹⁵ ECtHR Grand Chamber 19 October 2005, *Roche v. UK*, §§ 172-173. See also Wouter Hins and Dirk Voorhoof, “Access to State-Held Information as a Fundamental Right under the European Convention on Human Rights,” *European Constitutional Law Review* 3 (2007): 114–126.

¹⁶ ECtHR 14 April 2009, *Társaság A Szabadságjogokért v. Hungary*.

¹⁷ ECtHR 26 May 2009, *Kenedi v. Hungary*; ECtHR 25 June 2013, *Youth Initiative for Human Rights v. Serbia*; ECtHR 28 November 2013, *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirtschaftlichen Grundbesitzes v. Austria* and ECtHR 24 June 2014, *Roşianu v. Romania*.

¹⁸ ECtHR 17 February 2015, *Guseva v. Bulgaria*.

activities. The ECtHR can even order the authorities of a member state an intelligence agency to provide a journalist or NGO with the information requested.¹⁹

While some countries and national authorities still tried to deny or even explicitly opposed this new development in the Court's case law since 2009, the Grand Chamber judgment in the case of **Magyar Helsinki Bizottság v. Hungary**, left no doubt as to the applicability of Article 10 ECHR in cases of refusal of access to official documents in the context of an issue of public debate.²⁰ By denying access to the requested information the Hungarian authorities had impaired the applicant NGO's exercise of its freedom to receive and impart information, in a manner that strikes at the very substance of its Article 10 rights. The Court further concentrated on the **role of civil society and participatory democracy**, and emphasised that access to public documents by the press and NGOs can contribute to *"transparency on the manner of conduct of public affairs and on matters of interest for society as a whole and thereby allows participation in public governance"*. It considers *"that civil society makes an important contribution to the discussion of public affairs"*, and that *"the manner in which public watchdogs carry out their activities may have a significant impact on the proper functioning of a democratic society. It is in the interest of democratic society to enable the press to exercise its vital role of "public watchdog" in imparting information on matters of public concern ... just as it is to enable NGOs scrutinising the State to do the same thing. Given that accurate information is a tool of their trade, it will often be necessary for persons and organisations exercising watchdog functions to gain access to information in order to perform their role of reporting on matters of public interest. Obstacles created in order to hinder access to information may result in those working in the media or related fields no longer being able to assume their "watchdog" role effectively, and their ability to provide accurate and reliable information may be adversely affected"*. Before Article 10 ECHR can come into play, however, the information requested should not only be instrumental for the exercise of the right to freedom of expression: the information to which access is sought must also meet a **"public-interest test"** for the disclosure to be considered necessary under Article 10 ECHR. In addition, whether the person seeking access to the information in question does so with a view to informing the public in the capacity of a public "watchdog" and whether the information requested is "ready and available" are also important considerations for the Court. The Court does not restrict the notion of **public watchdog** *"exclusively to NGOs and the press"*, as it reiterates *"that a high level of protection also extends to academic researchers (...) and authors of literature on matters of public concern (...)"*. The Grand Chamber also emphasises *"that given the important role played by the Internet in enhancing the public's access to news and facilitating the dissemination of information (...), the function of bloggers and popular users of the social media may be also assimilated to that of "public watchdogs" in so far as the protection afforded by Article 10 is concerned"*.²¹ After finding that the denial to give the applicant NGO access to the requested information was an interference with the NGO's rights under Article 10, the ECtHR explained why this amounted to a violation of Article 10 ECHR. The Grand Chamber considered that the information requested by the NGO was "necessary" for it to exercise its right to freedom of expression and it found that no privacy rights would have been negatively affected had the NGO's request for information been granted.

The Grand Chamber's judgment in *Magyar Helsinki Bizottság v. Hungary* is considered as an important victory for journalists, bloggers, academics, and NGOs, who rely on access to public

¹⁹ ECtHR 25 June 2013, *Youth Initiative for Human Rights v. Serbia*.

²⁰ ECtHR Grand Chamber 8 November 2016, *Magyar Helsinki Bizottság v. Hungary*.

²¹ ECtHR Grand Chamber 8 November 2016, *Magyar Helsinki Bizottság v. Hungary*, § 168.

documents in order to conduct investigations as part of their role as “public watchdogs”. A consequence of the judgment in *Magyar Helsinki Bizottság v. Hungary* is that limitations or restrictions regarding access to official documents at national level cannot have an absolute character any more: the interests that eventually justify these **limitations or restrictions**, such as privacy or protection of personal data, or national security, **must be balanced with the right of access to information** and its contribution to the right of the public to be informed on matters of public interest. Most fundamentally, refusals at national level of requests of access to public documents that meet the criteria put forward in *Magyar Helsinki Bizottság v. Hungary*, can now be scrutinized by the ECtHR. This means that the Strasbourg Court looks over the shoulder of the national authorities at the way they implement and effectively secure the right of access to public documents on request by journalists, bloggers, academics, NGOs and other “public watchdogs”.

The Grand Chamber’s approach in *Magyar Helsinki Bizottság v. Hungary* also reflects an **evolutive interpretation** of Article 10 ECHR, with references to the developments in its own case law since 2005 and to national and international sources of law recognising a right of access to public documents. The Grand Chamber notes that *“there exists a broad consensus, in Europe (and beyond) on the need to recognise an individual right of access to State-held information in order to assist the public in forming an opinion on matters of general interest”*, and that therefore the ECtHR is not *“prevented from interpreting Article 10 § 1 of the Convention as including a right of access to information”*. Continuing its dynamic approach, the ECtHR argued that *“to hold that the right of access to information may under no circumstances fall within the ambit of Article 10 of the Convention would lead to situations where the freedom to “receive and impart” information is impaired in such a manner and to such a degree that it would strike at the very substance of freedom of expression. For the Court, in circumstances where access to information is instrumental for the exercise of the applicant’s right to receive and impart information, its denial may constitute an interference with that right. The principle of securing Convention rights in a practical and effective manner requires an applicant in such a situation to be able to rely on the protection of Article 10 of the Convention”*.²²

1.3. A robust protection of journalistic sources, including important procedural safeguards

Another important characteristic of the protection of the rights of media and journalists is reflected in the Court’s case law on **protection of journalistic sources**. According to the Court *“protection of journalistic sources is one of the basic conditions for press freedom, as recognised and reflected in various international instruments including the Committee of Ministers Recommendation (...). Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. 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*

²² ECtHR Grand Chamber 8 November 2016, *Magyar Helsinki Bizottság v. Hungary*, § 155. Compare the *dissenting opinion* by Spano en Kjølbør, opposing against the application of Article 10 ECHR in this matter and advocating more judicial self-restraint by the Court, and the *concurring opinion* by Sicilianos and Raimondi justifying the “*living instrument*” doctrine and the underlying evolutive approach, also emphasizing that far from creating new international obligations for the States, this approach *“corresponds in substance to what the parties to the Convention have already accepted for many years in ratifying the Covenant on Civil and Political Rights”*.

*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”.*²³

Only with respect of strict substantial and procedural guarantees interferences with the right to protection of journalists' sources can be justified. The ECtHR can only accept a disclosure order or any other interference with a journalist's source in order to meet an **“overriding requirement in the public interest”**, such as for instance preventing or investigating major crime or acts of (racist) violence, protecting the right to life or preventing that minors would be sexually abused and hence subjected to inhuman or degrading treatment.²⁴

In its 2010 Grand Chamber judgment in the case of *Sanoma Uitgevers v. the Netherlands*²⁵, the ECtHR referred to *“the vital importance to press freedom of the protection of journalistic sources and of information that could lead to their identification”* and it emphasised that *“any interference with the right to protection of such sources must be attended with legal procedural safeguards commensurate with the importance of the principle at stake”*. It also noted that *“orders to disclose sources potentially have a detrimental impact, not only on the source, whose identity may be revealed, but also on the newspaper or other publication against which the order is directed, whose reputation may be negatively affected in the eyes of future potential sources by the disclosure, and on members of the public, who have an interest in receiving information imparted through anonymous sources”*. First and foremost among the **procedural safeguards** is *“the guarantee of review by a judge or other independent and impartial decision-making body”*. The ECtHR went on clarifying that *“(t)he requisite review should be carried out by a body separate from the executive and other interested parties, invested with the power to determine whether a requirement in the public interest overriding the principle of protection of journalistic sources exists prior to the handing over of such material and to prevent unnecessary access to information capable of disclosing the sources' identity if it does not”*. The ECtHR concluded in *Sanoma Uitgevers v. the Netherlands* that the quality of the law in the Netherlands was deficient, in that there was no procedure attended by adequate legal safeguards for the applicant company in order to enable an independent assessment as to whether the interest of the criminal investigation overrode the public interest in the protection of journalistic sources. There had accordingly been a violation of Article 10 ECHR in that the interference complained of was not *“prescribed by law”*. Incorporating the guarantee of an **ex ante review by a judge or other independent and impartial decision-making body** obviously has an enormous impact, as any interference with or access to journalists' sources by public prosecutors or police, without prior authorisation by a judge or independent and impartial decision-making body amounts *as such* to a breach of Article 10 ECHR. In situations of urgency, a procedure should exist to identify and isolate, prior to the exploitation of the material by the authorities, information that could lead to the identification of sources from information that carries no such risk. In such urgent situations the ECtHR clarified that *“an independent review carried out at the very least prior to the access and use of obtained materials should be sufficient to determine whether any issue of confidentiality arises,*

²³ ECtHR Grand Chamber 27 March 1996, *Goodwin v. UK*.

²⁴ ECtHR (Decision) 8 December 2005, Case No. 40485/02, *Nordisk Film & TV A/S v. Denmark* and ECtHR 31 May 2007, Case No. 40116/02, *Šečić v. Croatia*. See also ECtHR (Decision) 27 May 2014, Case No. 8406/06, *Stichting Oostde Dade Blade v. The Netherlands*.

²⁵ ECtHR Grand Chamber 14 September 2010, *Sanoma Uitgevers BV v. The Netherlands*.

and if so, whether in the particular circumstances of the case the public interest invoked by the investigating or prosecuting authorities outweighs the general public interest of source protection”.²⁶

On several occasions, the European Court was of the opinion that searches of media offices, or in the home and place of work of journalists amounted to a violation of Article 10 ECHR, disrespecting the subsidiarity principle or the proportionality principle in cases of protection of journalistic sources.²⁷ Searches and confiscations in the newsroom or in the journalist’s private house, with the aim of identifying an alleged “leaking” civil servant or employee, such as in *Roemen and Schmit v. Luxembourg*, *Tillack v. Belgium* and *Nagla v. Latvia*, were considered as violations of Article 10 ECHR. In the case of *Tillack v. Belgium* the ECtHR clarified that a “journalist’s right not to reveal her or his sources could not be considered a mere privilege to be granted or taken away depending on the **lawfulness or unlawfulness** of their sources, but is part and parcel of the right to information, to be treated with the utmost caution”.²⁸

The right of journalists to shield their sources shows in many cases the need to protect the leaking of information by **whistle-blowers**, as illustrated in the Court’s case law in *Goodwin v. the United Kingdom*, *Roemen and Schmit v. Luxembourg*, *Voskuil v. the Netherlands*, *Tillack v. Belgium*, *Financial Times Ltd. v. the United Kingdom*, *Nagla v. Latvia* and most recently in *Görmüş and others v. Turkey*.²⁹ In the latter case the ECtHR held that a contested article published in a Turkish magazine, on the basis of confidential military documents, was capable of contributing to public debate, as it had been highly pertinent in relation to discussions on discrimination against the media by State bodies in Turkey. The ECtHR considered the seizure, retrieval and storage by the Turkish authorities of all of the magazine’s computer data, with a view to identifying the public-sector whistle-blowers who leaked the document, as a disproportionate interference with the right to freedom of expression and information. The Court also held that the impugned interference by the Turkish authorities could risk deterring potential sources from assisting the press in informing the public of matters involving the armed forces, including when they concerned a public interest. In the Court’s view, this intervention was likely not only to have very negative repercussions on the relationships of the journalists in question with their sources, but could also have **a serious and chilling effect** on other journalists or other whistle-blowers who were State officials, and could discourage them from reporting any misconduct or controversial acts by public authorities. Furthermore, the ECtHR noted that the reasons for which the contested documents had been classified as confidential were not justified, as

²⁶ ECtHR Grand Chamber 14 September 2010, *Sanoma Uitgevers BV v. The Netherlands*, §§ 91-100. See also ECtHR 16 July 2013, *Nagla v. Latvia*.

²⁷ ECtHR 23 February 2003, *Roemen and Schmit v. Luxembourg*; ECtHR 15 July 2003, *Ernst and Others v. Belgium*; ECtHR 22 November 2007, *Voskuil v. the Netherlands*; ECtHR 27 November 2007, *Tillack v. Belgium*; ECtHR 15 December 2009, *Financial Times Ltd. and Others v. UK*; ECtHR Grand Chamber 14 September 2010, *Sanoma Uitgevers BV v. the Netherlands*; ECtHR 12 April 2012, *Martin and Others v. France*; ECtHR 28 June 2012; *Ressiot and Others v. France*; ECtHR 22 November 2012, *Telegraaf Media Nederland Landelijke Media N.V. and others v. the Netherlands*; ECtHR 18 April 2013; *Saint-Paul Luxembourg S.A. v. Luxembourg* and ECtHR 16 July 2013, *Nagla v. Latvia*. See also Committee of Ministers of the Council of Europe, [Recommendation No. R \(2000\) 7 on the right of journalists not to disclose their sources of information](#), 8 March 2000 and [Parliamentary Assembly of the Council of Europe, Recommendation 1950 \(2011\) on the Protection of Journalists’ Sources](#), 25 January 2011.

²⁸ ECtHR 27 November 2007, *Tillack v. Belgium*, § 65.

²⁹ ECtHR Grand Chamber 27 March 1996, *Goodwin v. UK*; ECtHR 23 February 2003, *Roemen and Schmit v. Luxembourg*; ECtHR 22 November 2007, *Voskuil v. the Netherlands*; ECtHR 27 November 2007, *Tillack v. Belgium*; ECtHR 15 December 2009, *Financial Times Ltd. and others v. UK*; ECtHR 16 July 2013, *Nagla v. Latvia* and ECtHR 19 January 2016, *Görmüş and others v. Turkey*.

the government had not shown that there had been a detrimental impact as a result of their disclosure.

1.4. Protection of whistle-blowers

Over and above the indirect protection of whistle-blowers through the recognition and application of the journalist's right to source protection, the ECtHR in its recent case law has added substantial **protection to whistle-blowers in a direct way**. Indeed while in most European countries there is no solid or effective protection of whistle-blowers for disclosing information of public interest, the ECtHR has tried to remedy this situation by securing whistle-blowers protection under Article 10 ECHR. In its judgment in *Guja v. Moldova* the Grand Chamber of the ECtHR considered the dismissal of a civil servant who had leaked information to the press revealing corrupt practices within politics and the administration of justice, to be an unjustified and disproportionate interference with his right to freedom of expression.³⁰ Most importantly, the Court noted that *"a civil servant, in the course of his work, may become aware of in-house information, including secret information, whose divulgation or publication corresponds to a strong public interest"*. The protection guaranteed by Article 10 ECHR is conditional, but also substantial. First of all, the ECtHR considered it necessary to examine whether or not the information could have been communicated in another, internal, way in order to reveal and remedy the wrongdoing at issue. However, the Court imposed the condition that an internal duty to report also has to be an effective mechanism to remedy the wrongdoing that one wants to uncover: *"In assessing whether the restriction on freedom of expression was proportionate, therefore, the Court must take into account whether there was available to the applicant any other effective means of remedying the wrongdoing which he intended to uncover"*. Apart from the expectation that a whistle-blower has in principle a duty to report wrongdoing internally before any public disclosure to media or journalists, there are also some more factors to be taken into account. Indeed, a public interest must be at issue; the information that has been leaked must be authentic and accurate; the damage the information can produce and the public interest will have to be weighed up; good faith must be the basis of the motives for uncovering the information; and the sanction imposed must be proportionate. Having regard to each of these criteria and factors the ECtHR concluded that Guja's dismissal amounted to a violation of his right to freedom of expression and especially his right to impart information, as guaranteed under Article ECHR.

Also in more recent cases the Court has found violations of Article 10 ECHR where whistle-blowers, both in the public and the private sector, had experienced interference with their right to freedom of expression, **including the disclosure of confidential information to the media**. The Court's case law, applying the six criteria in *Guja v. Moldova*, gave crucial protection to whistle-blowing by civil servants and government officials. Even whistle-blowing by magistrates and employees of military intelligence agencies is effectively protected pursuant to Article 10 ECHR.³¹ In *Bucur and Toma v. Romania* the ECtHR considered that the general interest in the disclosure of information to the media 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

³⁰ ECtHR Grand Chamber, 12 February 2008, *Guja v. Moldova*.

³¹ ECtHR 13 November 2008, *Kayasu v. Turkey*; ECtHR 16 December 2008, *Frankovicz v. Poland*; ECtHR 19 February 2009, *Marchenko v. Ukraine*; ECtHR 26 February 2009, *Kudeshkina v. Russia*; ECtHR 21 July 2011, *Heinisch v. Germany*; ECtHR 18 October 2011, *Sosinowska v. Poland*; ECtHR 21 October 2014, *Matúz v. Hungary*. See also ECtHR 16 July 2009, *Wojtas-Kaletka v. Poland*; ECtHR 13 January 2015, *Rubins v. Latvia*; ECtHR Grand Chamber 23 April 2015, *Morice v. France* and ECtHR 28 March 2017, *Marunić v. Croatia*.

institution. While the Court was not convinced that a formal complaint to a Parliamentary Commission would have been an effective means of tackling the irregularities within RIS, it also observed that the information about the illegal telecommunication surveillance of journalists, politicians and businesses that had been disclosed to the press affected the democratic foundations of the state. The fact that the data and information at issue were classified as “ultra-secret” was not a sufficient reason to interfere with the whistle-blower’s right in this case and the measures taken also risked creating a chilling effect. The conviction for the disclosure of information to the media about the illegal activities of RIS was therefore considered as a violation of Article 10 ECHR.³²

Part 2

Critical comments: shortcomings, loopholes and inconsistencies

The brief overview of developments in the Court’s case law leaves no doubt about the enormous support the Court’s jurisprudence has created in the last decade to the right to freedom of expression and information. But, as already mentioned in the introduction, the ECtHR has also delivered some decisions and judgments neglecting crucial aspects of journalists’ and civil society’s rights to freedom of expression. Some of the judgments in which the Court found no violation of Article 10 ECHR have been sharply criticised within the Court itself, showing a fierce disagreement expressed in dissenting opinions.³³ Paraphrasing the Grand Chamber in *Morice v. France*, the following critical comments are also meant as “constructive criticism”³⁴, in order to draw attention to what can be qualified as (potential) shortcomings in the Court’s reasoning in applying Article 10 ECHR. They are also formulated in the spirit that was evoked by the former president of the ECtHR, Luzius Wildhaber: “(i)nstitutions (...) will perish, if those who love them do not criticise them, and if those who criticise them do not love them”.³⁵ By highlighting some of the problematic findings by the ECtHR the dialogue can indeed be nourished between the judges and lawyers of the ECtHR and the community of freedom of expression gathered at this conference under the title “Promoting dialogue between the European Court of Human Rights and the media freedom community”.

2.1. Challenges to protection of investigative journalism and acts of newsgathering

Two recent Grand Chamber judgments are especially worrying. The finding of no violation of Article 10 ECHR in the case of *Pentikäinen v. Finland*³⁶ (arrest, detention and prosecution of a journalist for disobeying a police order to leave a demonstration) is discussed in the third panel of this conference, and therefore we refer to the excellent analysis by Daniel Simons and the reflections on this case by

³² ECtHR 8 January 2013, *Bucur and Toma v. Romania*.

³³ Dirk Voorhoof, “Freedom of Expression, Media and Journalism under the European Human Rights System: Characteristics, Developments, and Challenges”, in Peter Molnár (ed.), *Free Speech and Censorship Around the Globe*, Budapest - New York, Central European University Press, 2015, 59-104 and Dirk Voorhoof, “Judge Tulkens on the barricades of freedom of expression and information”, [Strasbourg Observers Blog](#) 24 August 2012.

³⁴ ECtHR Grand Chamber 23 April 2015, *Morice v. France*, § 167.

³⁵ Luzius Wildhaber, “Criticism and case-overload: Comments on the future of the European Court of Human Rights”, in Spyridon Flogaitis, Tom Zwart and Julie Fraser, *The European Court of Human Rights and its discontents: Turning criticism into strength*, Cheltenham, E. Elgar, 2013, 10. See also Marc Bossuyt, “Should the Strasbourg Court exercise more self-restraint? On the extension of the jurisdiction of the European Court of Human Rights to social security regulations”, *Human Rights Law Journal*, n° 28, 2007, 321-332.

³⁶ ECtHR Grand Chamber 20 October 2015, *Pentikäinen v. Finland*.

the other panelists.³⁷ The crucial question remains: how could Pentikäinen's detention, prosecution in a criminal court and final conviction be held necessary in order to protect public safety and prevent disorder and crime, bearing in mind that no allegation was made that he posed a threat to public order on account of violent behaviour nor was he taking any active part in the demonstration? It is also remarkable that the majority of the Court casts doubts whether Pentikäinen has acted in accordance with "*responsible journalism*", simply for disobeying a police order to leave the scene of a demonstration that he was covering as a journalist and was subsequently supposed to report on. The approach by the Grand Chamber that a journalist is not entitled to obtain "*a preferential or different treatment in comparison to the people left at the scene*"³⁸ obviously neglects the difference between the journalist executing his task as member of the press playing its public watch-dog role and the demonstrators who were responsible for the event turning into a riot. The judgment in the case of *Pentikäinen v. Finland* has provoked the reaction that this is "*a missed opportunity for the Court to reinforce, in line with its consistent case-law, the special nature and importance of the press in providing transparency and accountability for the exercise of governmental power by upholding the rights of journalists to observe public demonstrations or other Article 11 activities effectively and unimpeded, so long as they do not take a direct and active part in hostilities. Recent events in many European countries demonstrate, more than ever, the necessity of safeguarding the fundamental role of the press in obtaining and disseminating to the public information on all aspects of governmental activity. That is, after all, one of the crucial elements of the democratic ideal protected by the European Convention on Human Rights*". This is not a quote from an NGO advocating for freedom of expression, nor a statement from a press release by the European Centre for Press and Media Freedom or the European Federation of Journalists. It is the final conclusion by four dissenting judges of the Grand Chamber itself, firmly protesting against the approach and findings by the Grand Chamber's majority in *Pentikäinen v. Finland*.

Another highly controversial judgment was delivered by the Grand Chamber on 29 March 2016 in the case of *Bédat v. Switzerland*.³⁹ In its earlier decision the Chamber of the Court had found a violation of Article 10 ECHR in this case.⁴⁰ The Chamber considered the criminal sanction of Bédat, who had published confidential information about a criminal case, to be not necessary in a democratic society. The Grand Chamber overruled this finding by fifteen votes to two. The Grand Chamber is of the opinion that the Swiss authorities stayed within their margin of appreciation and that recourse to criminal proceedings and the penalty imposed on the journalist did not amount to a disproportionate interference in the exercise of his right to freedom of expression. The Grand Chamber emphasised that as a professional journalist Bédat must have been aware of the confidential nature of the information which he was planning to publish and that the publication of extracts from secret criminal files amounted to a criminal offence under Swiss law. The ECtHR also refers to the "sensationalist tone" of the impugned article and it considers that the journalist had failed to demonstrate that his article could have contributed to any public debate on the ongoing investigation. It agrees with the findings by the Swiss Courts that the records of interviews and the

³⁷ For a critical analysis, see also Dirk Voorhoof, "Journalist must comply with police order to disperse while covering demonstration", *Strasbourg Observers Blog* 26 October 2015.

³⁸ ECtHR Grand Chamber 20 October 2015, *Pentikäinen v. Finland*, § 109.

³⁹ ECtHR Grand Chamber *Bédat v. Switzerland*, 29 March 2016.

⁴⁰ For an extensive comment, see Dirk Voorhoof, "The Grand Chamber strikes again: Bédat v. Switzerland. Criminal conviction of journalist for having published documents covered by investigative secrecy in a criminal case is no violation of Article 10 ECHR", *ECHR Blog* 7 April 2016.

accused's correspondence had been *"discussed in the public sphere, before the conclusion of the investigation, before the trial and out of context, in a manner liable to influence the decisions taken by the investigating judge and the trial court"*. According to the Grand Chamber, *"(t)he risk of influencing proceedings justifies per se the adoption by the domestic authorities of deterrent measures such as prohibition of the disclosure of secret information"*.⁴¹ It found in the present case that the recourse to criminal proceedings and the penalty imposed on Bédât did not amount to a disproportionate interference in the exercise of his right to freedom of expression.

Two judges strongly dissented (López Guerra and Yudkivska). Yudkivska formulated a robust message at the end of her dissenting opinion, by pointing out that *"(t)his Court had always regarded the press as the servant of an effective judicial system, granting little scope for restrictions on freedom of expression in such matters as the public interest in the proper administration of justice. In my view, the present judgment constitutes a regrettable departure from this long-established position"*.

The Grand Chamber's judgment in *Bédât v. Switzerland* is indeed highly controversial for several reasons. First, the Court refers to the **concept of "responsible journalism"**, including the expectation that a journalist in his or her actions of newsgathering shall not breach the law, even in cases where a journalist has acted in order to inform the public on important matters in society.⁴² In fact the Grand Chamber opts for a kind of circular reasoning. Indeed the starting point is that the journalist is prosecuted for committing a criminal offence, while the journalist's defence is that this criminal offence is justifiable in order to pursue his task as public-watchdog in society. Adding the condition that a journalist must act *"responsibly"* and by requiring that he shall not breach the law, the scope of the public interest defence of journalists is at risk of being substantially narrowed down, if not annihilated. Secondly, it is remarkable that the Court is not so much considering the pressing social need of the interference at issue, but is rather requesting from the journalist to give evidence that the content of the article has effectively contributed to a public debate. While emphasising that the journalist in this case *"failed to demonstrate"* that the article contributed to a debate on a matter of public interest, the Grand Chamber is of the opinion that the authorities do not need to demonstrate that the interference in the journalist's freedom of expression was effectively necessary. For the Grand Chamber it is enough that the article might *"in one or another way"* influence the investigation, the position of the victims or the objectivity of the trial court, **without further specifying where precisely the impact or prejudice is or was to be situated**. For the Grand Chamber such influences are an *"inherent risk"* of making information public that is part of the secret criminal investigation. And while in other judgments the Court took into consideration whether or not the criminal court was composed of professional judges, in order to evaluate the impact of media coverage on the fair trial principle and presumption of innocence, now the Grand Chamber emphasises the risk of influencing the trial court *"irrespective of its composition"*.

Finally, it is remarkable that the Grand Chamber expands its approach of balancing the competing interests of privacy protection (Article 8) and freedom of expression (Article 10) to the situation of conflicting interests between fair trial (Article 6) and freedom of expression. The ECtHR indeed considers that analogous reasoning must apply in weighing up the rights secured under Article 10 and Article 6 § 1 respectively. Meanwhile there is no doubt that Article 8 has a horizontal effect and

⁴¹ ECtHR Grand Chamber *Bédât v. Switzerland*, 29 March 2016, §§ 70-71.

⁴² See also ECtHR Grand Chamber 10 December 2007, *Stoll v. Switzerland*.

that the state has a positive obligation in order to ensure that other private persons do not interfere with the privacy of fellow citizens or data subjects, **Article 6 § 1 and the fair trial principle** is of another nature. Article 6 § 1 ECHR does indeed impose a direct obligation for the state authorities themselves to secure fair trial principles, including the presumption of innocence before independent and impartial judges and courts. Broadening the scope and enforcement of the presumption of innocence to be respected by private actors in society is a problematic extension of Article 6 § 1 ECHR, and it further weakens the right of freedom of expression being situated in the frame of conflicting rights, with consequently a wider margin of appreciation for the State authorities to interfere, even by way of criminal prosecution and conviction of journalists. Requiring media reporting about crime and court cases, including major crime and even acts of terrorism, to uphold **the presumption of innocence** as it is required from the judiciary, is a big step to take. Actually it is too big a step and it contrasts with the Court's viewpoint that *"it is inconceivable that there should be no prior or contemporaneous discussion of the subject matter of trials, be it in specialised journals, in the general press or amongst the public at large. Not only do the media have the task of imparting such information and ideas; the public also has a right to receive them"*. Furthermore, imposing on media and journalism the same or a similar obligation in upholding the presumption of innocence as it applies to the judiciary is not only a 'mission impossible', it also confuses the different roles and functions of the media and the judiciary. It is up to the authorities to guarantee within the administration of justice the highest possible level of ensuring the impartiality and independence of judges and to have the presumption of innocence respected by them. The duties and responsibilities of media and journalists should not be derived from Article 6 § 1 ECHR, but should be evaluated from the scope of Article 10 § 2 ECHR. There is no doubt that journalists and media are to bear in mind the presumption of innocence when reporting and commenting on pending criminal proceedings. It is certainly one of the basic principles of journalistic ethics and may induce their civil liability. Criminalising journalists and media because of the publication of (leaked) information from criminal investigations, because this kind of information as such, *in abstracto* and inherently risks affecting the rights guaranteed by Article 6 § 1 ECHR, creates a new legal standard that limits substantially the actual practices of court and crime reporting in Europe. The new standard the Grand Chamber has introduced makes it possible that state authorities will develop a stricter policy and will prosecute, as part of their (alleged) positive obligations under Article 6 § 1 ECHR, media and journalists because of **publishing leaked information from criminal files**, even in cases of media reporting about major crime.

Although extremely controversial, this approach by the Grand Chamber has been confirmed and even been reinforced in the case of **Giesbert and others v. France**.⁴³ In a unanimous decision this time the ECtHR held that the French judicial authorities' orders sanctioning the editor-in-chief and a journalist of the magazine *Le Point* for publishing documents from a set of criminal proceedings before it was to be read out at a public hearing, in the high profile "Bettancourt" case, did not violate Article 10 ECHR. Given the public interest in the case, which was neglected or at least underestimated in the domestic proceedings, and the absence of reliance on privacy rights, the balance in this case could have been expected to have been struck in a different way. The Court noted that the applicant journalists could not have been unaware of the origin of the documents reproduced in their articles nor of the confidentiality of the information published, while the French law clearly punishes the mere fact that such documents have been published: *"Cela étant, les*

⁴³ ECtHR 1 June 2017, *Giesbert a.o. v. France*.

requérants devaient savoir que la publication littérale d'une partie des actes litigieux se heurtait à la prohibition de cette disposition".⁴⁴ The ECtHR reiterates also that "*un simple risque d'influence sur les suites d'une procédure peut suffire*" to justify an interference or sanction caused by publishing documents relating to the secrets of criminal investigation. This refers to the consideration in *Bédát v. Switzerland* that "*an inherent risk of influencing the course of proceedings in one way or another*" can indeed be a sufficient reason for an interference with the journalist's right to freedom of expression: "*(t)he risk of influencing proceedings justifies per se the adoption by the domestic authorities of deterrent measures such as prohibition of the disclosure of secret information*".⁴⁵

It is most surprising that the ECtHR concludes that the domestic findings had met "*a sufficiently compelling social need*" to take precedence over the public interest in the freedom of the press. This formulation is indeed surprising, as until now the threshold to justify interference in the right to freedom of expression has been the presence of "*a pressing social need*". In the original French version of the judgment, it is formulated slightly differently, the Court finding that "*les condamnations répondaient à un besoin social assez impérieux pour primer l'intérêt public s'attachant à la liberté de la presse (...)*".⁴⁶ The judgment in *Giesbert and others v. France* therefore constitutes another regrettable departure from the Court's long-established position.

While instances of interference with **court and crime reporting** should be carefully scrutinised by the ECtHR along the lines of the criteria developed in the Grand Chamber judgment in the case of *Axel Springer AG v. Germany* of 7 February 2012⁴⁷, this approach is at least not obvious in a few recent decisions and judgments of the ECtHR. In *Salumäki v. Finland* the central issue was whether the title of a newspaper article that could be interpreted as damaging the reputation of a public person could justify the criminal conviction of the journalist who wrote the article, while the article itself was written in good faith and did not contain any factual errors or defamatory allegations.⁴⁸ The front page of the newspaper carried a headline asking whether the victim of a homicide had connections with K.U., a well-known Finnish businessman. A photograph of K.U. appeared on the same page and next to the article was a separate column mentioning K.U.'s previous conviction for economic crimes. Salumäki complained that her conviction amounted to a violation of Article 10 ECHR, arguing that the information presented in the article was correct and that the title of the article only connected K.U. to the victim and did not insinuate that K.U. had connections with the perpetrator, nor that he was involved in the homicide. First the ECtHR emphasised that the criminal investigation into a homicide was clearly a matter of legitimate public interest, having regard in particular to the serious nature of the crime: "*From the point of view of the general public's right to receive information about matters of public interest, and thus from the standpoint of the press, there were justified grounds for reporting the matter to the public*". The ECtHR also recognised that "*the article was based on information given by the authorities and K.U.'s photograph had been taken at a public event*", while "*the facts set out in the article at issue were not in dispute even before the domestic courts. There is no evidence, or indeed any allegation, of factual errors, misrepresentation or bad faith on the part of the applicant*". Nevertheless the decisive factor in this case was that according to the domestic courts, the title created a connection between K.U. and the homicide, implying that he was involved

⁴⁴ ECtHR 1 June 2017, *Giesbert a.o. v. France*, § 86.

⁴⁵ ECtHR Grand Chamber *Bédát v. Switzerland*, 29 March 2016, § 70.

⁴⁶ For a first comment, see Hugh Tomlinson, "Case Law, Strasbourg: *Giesbert v France*, Sanctions for publishing prosecution statements, no violation of Article 10", [Inform's Blog](#) 2 June 2017.

⁴⁷ ECtHR Grand Chamber 7 February 2012, *Axel Springer AG v. Germany* (no. 1).

⁴⁸ ECtHR 29 April 2014, *Salumäki v. Finland*.

in it. Even though it was specifically stated in the text of the article that the homicide suspect had no connections with K.U., this information only appeared towards the end of the article. The ECtHR is of the opinion that Salumäki must have considered it probable that her article contained a false insinuation and that this false insinuation was capable of causing suffering to K.U. The Court refers to the principle of presumption of innocence under Article 6 § 2 ECHR and emphasises that this principle may be relevant also in Article 10 contexts in situations in which nothing is clearly stated but only insinuated. The Court therefore comes to the conclusion that what the journalist had written was defamatory, implying that K.U. was somehow responsible for P.O.'s murder. Having regard to all the foregoing factors, and leaving a (very) wide margin of appreciation to the domestic authorities, the ECtHR considers that a fair balance had been struck between the competing interests at stake. There has therefore been no violation of Article 10 ECHR.

Also a recent decision by the ECtHR in which the rights of Article 8 and 10 were conflicting, illustrates that in certain cases of crime and court reporting the ECtHR left **a very broad margin of appreciation** to the judicial authorities of the defending state and discarded its own findings based on some of the crucial criteria of the Axel Springer-judgment. In *Barbara Van Beukering and Het Parool B.V. v. the Netherlands*⁴⁹ the ECtHR first makes clear that it sees no reason to doubt “that the newspaper article – which announced the trial of R.P. for having stabbed three members of the staff of a shelter for the homeless in Amsterdam with a knife, killing one and seriously injuring the two others – was a matter of serious public concern. The same may be said about the violent subculture to which R.P. belonged and R.P.'s personal circumstances in so far as they were typical of members of that social group. Nor is there any reason to doubt that R.P. enjoyed a certain notoriety, which he had actively encouraged by giving his co-operation to the 2007 television documentary and a rap clip made available on YouTube; that the article published by the applicants in the newspaper Het Parool and on their web site was true and correct; and that adding the portrait image enhanced the article's expressive power”. After this findings and evaluation of the facts of the case, the ECtHR refers to the view of the domestic authorities' that “these features of the case did not outweigh R.P.'s right to respect for his private life”, as “in publishing portraits of persons suspected of criminal acts reticence [was], in principle, appropriate”. On this basis, without any more reference to its own findings regarding the other relevant characteristics of the case, the ECtHR considers that the domestic judicial authorities did not act “unreasonably in deciding thus”. On this slim basis and taking an overly deferential position, the ECtHR finds the application ill-founded and declares it inadmissible, rejecting the claim of a violation of Article 10 ECHR.

A worrying trend for investigative journalism is also reflected in two recent decisions by the ECtHR dealing with “check it out”-journalism⁵⁰, namely in the cases *Diamant Salihu and others v. Sweden*⁵¹ and *Boris Erdtmann v. Germany*.⁵² Investigative journalism sometimes operates at the limits of the law and this is especially true for “check it out”-journalism: reporting in which a journalist tests how effective a law or procedure is by attempting to circumvent it. The decisions in *Diamant Salihu and others v. Sweden* and *Boris Erdtmann v. Germany* show that journalists who commit (minor) offences during this type of newsgathering activity cannot count on (major) support from the ECtHR.

⁴⁹ ECtHR (Decision), 20 September 2016, Case No. 27323/14, *Barbara Van Beukering and Het Parool B.V. v. the Netherlands*.

⁵⁰ See also Dirk Voorhoof and Daniel Simons, “European Court upholds criminal conviction for purchasing illegal firearm as a form of ‘check it out’ journalism in *Salihu v. Sweden*”, [Strasbourg Observers](#) 29 June 2016.

⁵¹ ECtHR (Decision) 2 June 2016, Case No. 33628/15, *Diamant Salihu and others v. Sweden*.

⁵² ECtHR (Decision) 28 January 2016, Case No. 56328/10, *Boris Erdtmann v. Germany*.

In the Swedish case, journalists of the newspaper *Expressen* had undertaken to demonstrate the easy **availability of illegal firearms by purchasing one**. The Swedish courts were of the opinion that the editor and the journalists could not be exempted from criminal liability as they had wilfully breached the Swedish Weapons Act. In a unanimous decision, the ECtHR confirmed the necessity of the journalists' criminal conviction. It declared the application for alleged breach of the right of journalistic newsgathering under Article 10 ECHR manifestly ill-founded. Coming after the Grand Chamber's judgment in *Pentikäinen v. Finland* and *Bédat v. Switzerland*, the decision in *Diamant Salihu and others v. Sweden* can be perceived as a new step in downgrading the rights of journalists with regard to their newsgathering activities. The Court's ruling may also have a chilling effect on undercover investigative reporting. Referring to the Grand Chamber judgment in *Pentikäinen v. Finland*, the Court in *Diamant Salihu and others v. Sweden* reiterates that *"notwithstanding the vital role played by the media in a democratic society, journalists cannot, in principle, be released from their duty to obey the ordinary criminal law on the basis that, as journalists, Article 10 affords them a cast-iron defence. In other words, a journalist cannot claim an exclusive immunity from criminal liability for the sole reason that, unlike other individuals exercising the right to freedom of expression, the offence in question was committed during the performance of his or her journalistic functions"*. In contrast with the facts in *Mikkelsen and Christensen v. Denmark* on the purchasing and transport of illegal and dangerously explosive fireworks⁵³, the applicants in *Diamant Salihu and others v. Sweden* took a series of relevant safety precautions, and there is no suggestion any risk was created. The Swedish Supreme Court indeed explicitly recognised that there had been *"no risk that the firearm would be used and that it was for a journalistic purpose"*. The decisive argument, echoed by the ECtHR, was that the breach of law was not necessary for the story: *"the question if it was easy to purchase a firearm could have been illustrated in other ways"*. In the past, the ECtHR has stressed that judges should be careful not to *"substitute their own views for those of the press as to what technique of reporting should be adopted by journalists"*⁵⁴. Against this background, the Court's failure to explain its assertion that the journalists could have made their point in another way is at least deplorable, as it is not readily obvious that they could. The Swedish Supreme Court argued that the journalists' purpose had already been achieved when they received the offer to purchase the firearm. But this is not entirely convincing: at that point, there was still a possible doubt about the seriousness of the offer. Purchasing the firearm also allowed the journalists to take pictures proving and documenting their story. As the ECtHR has stated at earlier occasions: *"if the national courts apply an overly rigorous approach to the assessment of journalists' professional conduct, the latter could be unduly deterred from discharging their function of keeping the public informed"*⁵⁵. In this instance, the journalists were reporting on a matter of substantial public interest and appear to have acted in good faith, without causing the type of risk the Swedish Weapons Act aims to prevent. The journalists' criminal conviction and the fines imposed on them, while below the normal statutory level, may have a potential chilling effect on investigative journalism on issues of societal interest.

The case of *Boris Erdtmann v. Germany* concerned the conviction of a journalist for carrying a weapon on board an aeroplane. After the terrorist attacks of 11 September 2001 in New York, Erdtmann researched the **effectiveness of security checks at German airports** and he made a short television documentary about his investigation and findings, filmed with a hidden camera. The ECtHR

⁵³ ECtHR (Decision) 24 May 2011, Case No. 22918/08, *Jacob Adrian Mikkelsen and Hendrik Lindahl Christensen v. Denmark*.

⁵⁴ ECtHR 23 September 1994, *Jersild v. Denmark*, § 31.

⁵⁵ ECtHR 19 April 2011, *Kasabova v. Bulgaria*, § 55.

found that the criminal conviction of the journalist was pertinent and necessary in a democratic society and that there was no appearance of a violation of the journalist's rights under Article 10 ECtHR. Again the ECtHR emphasises that the journalist *"must, or could, have known that his actions infringed ordinary criminal law"* and it accepts the reasoning by the domestic courts that Erdtmann could have revealed the security flaws at the airport without committing a criminal offence, for example by abandoning the attempted offence by disposing of the knife after the security check-points. Although it is recognised that Erdtmann's report *"had in fact increased airport security, that he was a television journalist reporting on an issue of general public interest, and that the knife had been securely stowed away and did not lead to any concrete threat for the other passengers"*, still the criminal conviction of the journalist in the form of a warning and deferred fine, being the most lenient sentence possible to domestic law, was considered necessary in a democratic society. The ECtHR was of the opinion that the conviction of Erdtmann had no chilling effect discouraging the press from investigating a certain topic or expressing an opinion on topics of public debate.

To what extent **"check it out"-journalism** should enjoy the protection of Article 10 ECHR remains a thorny but important issue. By leaving a (very) wide margin of appreciation to the national authorities and especially by relying on the non-substantiated argument that other ways of journalistic reporting could also have demonstrated the easy availability of firearms or the lack of security in airports, the ECtHR has missed an opportunity in both decisions for a more in-depth examination about this form of investigative journalism, especially as in both cases the journalists did not create any security risk.

A third dimension with regard the protection of investigative journalism is related to **safety aspects for the journalists themselves**. At several occasions the ECtHR has emphasised the positive obligations doctrine such as in cases of violence against or assassinations of journalists. Physical violence against journalists can amount not only to a violation of Article 10, but also to a violation of the right to life (Article 2) or of the prohibition of torture or inhuman or degrading treatment (Article 3), in combination sometimes with the right to an effective remedy (Article 13)⁵⁶. In recent cases relating to killings of or violent attacks on journalists, the ECtHR reiterated that States, under their positive obligations of the Convention, are required to create a favourable environment for participation in public debate by all the persons concerned, enabling them to express their opinions and ideas without fear⁵⁷. However, in some cases the Court only finds a violation of Article 2 or 3 ECHR under the procedural limb, because of lack of investigation of the violent attacks. After finding a violation of Article 2 or 3 ECHR, the Court considered that there was no need to examine the complaint under Article 10 ECHR⁵⁸. As the two dissenting judges in the case of *Huseynova v. Azerbaijan* pointed out *"(t)he consequence of the approach the Court has adopted so far is that the motives behind the killing of a journalist are not given any prominence"*. Therefore it is preferable to interpret the lack of an investigation into the killing of a journalist also in the context of Article 10 ECHR, as this could reveal the specific features of this fundamental human-rights violation, namely the potential motive behind the killing of a journalist, is aim of silencing a critical voice in a country. Such an approach would be able to take into consideration **the destructive effect of violent acts**

⁵⁶ ECtHR 16 March 2000, *Özgür Gündem v. Turkey*; ECtHR 8 November 2005, *Gongadze v. Ukraine*. See also ECtHR 14 September 2010, *Dink v. Turkey* and ECtHR 7 May 2015, *Emin Huseynov v. Azerbaijan*.

⁵⁷ ECtHR 29 January 2015, *Uzeyir Jafarov v. Azerbaijan*.

⁵⁸ ECtHR 29 January 2015, *Uzeyir Jafarov v. Azerbaijan* and ECtHR 13 April 2017, *Huseynova v. Azerbaijan*. See also ECtHR 31 March 2005, *Adalı v. Turkey*.

against journalists and it would guarantee that the ECtHR is not turning a blind eye to the fact that murders of journalists are to be understood as *“the most extreme form of censorship”*.⁵⁹ By not examining these kinds of complaints under Article 10 ECHR the ECtHR risks neglecting a crucial dimension and the particular political context in which journalists and media workers are the victims of violence. As it is stated in the partly dissenting opinion in *Huseynova v. Azerbaijan*, if this *“is omitted, the central question of the case, which is of utmost importance for democracy, political pluralism and human rights in general, has not been addressed adequately”*.

2.2. The right of access to official documents: only instrumental, conditional and limited

The importance and impact of the support by the Court’s case law in guaranteeing a right of access to official documents has been extensively explained in the first part of this analysis. The recent judgment in the case of *Bubon v. Russia*⁶⁰ raises concerns, however, on how to apply the conditions and criteria developed in the Grand Chamber judgment in *Magyar Helsinki Bizottság v. Hungary* (cf. *supra* part 1), especially with regard to the condition that the requested information must be *“ready and available”*. In its judgment of 7 February 2017 the ECtHR accepts the Russian Government’s arguments that the authorities did not have information or documents that were specifically sought by the applicant. The information the applicant was seeking *“was therefore not only not “ready and available”, but did not exist in the form the applicant was looking for”*. In this case the applicant is a lawyer who also writes articles for various Russian law journals and online legal information databases and networks. He obtained no access to statistical data in relation to his research on (the fight against) exploitation of prostitution in the Khabarovsk Region: the police and the Ministry argued that there were no data available on the number of criminal cases and the number of people found liable. According to the domestic authorities, the information Bubon was seeking did not exist in the form the applicant was looking for or was kept by another authority. The ECtHR essentially notes that the applicant *“did not seek access to the statistical data cards or even final statistical reports, which were ready and available. Instead he essentially asked the domestic authorities to process and summarise information using specific parameters”*. And it reiterates that Article 10 ECHR *“does not impose an obligation to collect information upon the applicant’s request, particularly when, as in the present case, a considerable amount of work is involved”*.⁶¹

Also in *Friedrich Weber v. Germany* the ECtHR held that the right to receive information cannot be construed as imposing on a State positive obligations to collect and disseminate information of its own accord, particularly when, as in the present case, a considerable amount of work is involved.⁶² In this case an online journalist was refused access to public documents from the municipal budget of the city of Wuppertal, requesting a compilation of a list of payments from the city budget to political parties, parliamentary groups and political foundations, as well as a list of payments to political parties from holding companies that belong to the city. The ECtHR, sitting as a committee with three judges, decided that regardless of his possible status as member of the press, there had been no interference with the applicant’s right to receive and to impart information as enshrined in Article 10 § 1 ECHR. The ECtHR focused mainly on the fact that the documents were not directly available in the form the applicant had requested. The ECtHR noted that the applicant *“could have requested*

⁵⁹ Partly dissenting opinion by judges Nußberger and Vehabović in ECtHR 13 April 2017, *Huseynova v. Azerbaijan*.

⁶⁰ ECtHR 7 February 2017, *Bubon v. Russia*.

⁶¹ ECtHR 7 February 2017, *Bubon v. Russia*, §§ 43-48.

⁶² ECtHR (Decision) 29 January 2015, Case No. 70287/11, *Friedrich Weber v. Germany*.

budgets, financial statements and balance sheets of the companies as such. Such information would have put the applicant in a position to carry out his research on the above mentioned topic or he could then have asked for further concrete information”.

It is obvious that a rigid interpretation of the condition that the requested documents must be ready and available in the form the applicant requested, combined with a wide margin of appreciation for the member states’ authorities in this matter, risks limiting extensively the newly acquired right of access to public documents as recognised in *Magyar Helsinki Bizottság v. Hungary*.

2.3. Only protection of ‘lawful’ sources?

In line with the criticism that was formulated regarding some of the Court’s case law justifying interferences against illegal use or reproduction of secret or confidential information (*see Bédat v. Switzerland (GC), Giesbert and others v. France and Stoll v. Switzerland (GC), supra*), we also highlight that the judgment in the case in ***Görmüş and others v. Turkey*** (*cf. supra*) contains a worrying consideration in this regard.⁶³ The ECtHR acknowledged that the duties and responsibilities of journalists can include the duty not to publish information provided by whistle-blower State officials until such time as the latter had made use of the administrative procedures provided in order to draw their superiors’ attention to potentially unlawful acts committed in their workplace. However, the Court noted that the Turkish legislation did not provide for such a procedure and therefore the journalists could not be criticised for having published the contested information without waiting for their sources to raise their concerns through the chain of command. In its original French version the Court considered that it could accept “*que les devoirs et les responsabilités qu’assument les journalistes qui exercent leur droit à la liberté d’expression puissent inclure le devoir de ne pas publier les renseignements que des fonctionnaires lanceurs d’alerte leur ont fournis, jusqu’à ce que ces fonctionnaires aient utilisé les procédures administratives internes prévues pour faire part de leurs préoccupations à leurs supérieurs*”.⁶⁴ This consideration however, formulated as a general principle that journalists should only publish information obtained from whistle-blowers under the condition that they shall have first exhausted all internal procedures that are available to them, is certainly (too) far-fetched. The consideration also contrasts with earlier case law of the ECtHR in which the Court was of the opinion that a “*journalist’s right not to reveal her or his sources could not be considered a mere privilege to be granted or taken away depending on the lawfulness or unlawfulness of their sources, but is part and parcel of the right to information, to be treated with the utmost caution*”.⁶⁵

The outcome in another case related to the protection of journalistic sources, demands for a critical observation of another kind. In the case of the ***Telegraaf Media (..) Van der Graaf v. the Netherlands***⁶⁶ the Government finally admitted at the end of long proceedings, that the applicants’ right to have their sources protected had been violated by the authorities in the Netherlands. While the application before the Court was lodged on 6 May 2011, the Government wrote on 8 November 2013 to the Court : “(t)he Government hereby wishes to express – by way of unilateral declaration – its acknowledgement that the requirements of Article 10 of the Convention were violated in respect of the applicants. Consequently, the Government is prepared to reimburse the applicants with any costs

⁶³ ECtHR 19 January 2016, *Görmüş and others v. Turkey*.

⁶⁴ ECtHR 19 January 2016, *Görmüş and others v. Turkey*, § 61.

⁶⁵ ECtHR 27 November 2007, *Tillack v. Belgium*, § 65.

⁶⁶ ECtHR (Decision) 22 September 2016, Case No. 33847/11, *Telegraaf Media (..) Van der Graaf v. the Netherlands*.

and expenses related to the proceedings before the Court, provided they were incurred necessarily and are reasonable as to quantum, plus any tax that may be chargeable to the applicants. I look forward to the Court's decision in this respect."

On the basis of this unilateral declaration, and despite the applicants asking the Court to dismiss the Government's unilateral declaration, the ECtHR finally decided to strike the case out of the list. The Court said it was satisfied that the **unilateral declaration by the Government offered** a sufficient basis for finding that respect for Article 10 and the protection of journalistic sources did not require it to continue its examination of the application. By the decision the Court missed the opportunity to clarify the characteristics of the violation of the applicants' source protection and to put additional pressure on the Netherlands' Government in order to take steps to effectively guarantee protection of journalistic sources, after already being found three times in violation of Article 10 ECtHR in this matter.⁶⁷ Also the applicants had argued, *"that despite the Court's findings of violations of Article 10 in no fewer than three judgments against the Netherlands, no legislation capable of preventing the recurrence of the violation acknowledged was yet in place, and (...) that the guarantees of independent review provided by the Lawyers and Journalists (...) Temporary Review Order were insufficient"*.

Another peculiar aspect of the Court's decision in this case is the dismissal of the applicants' claim for **costs and expenses** in respect of the long and complex domestic proceedings and in respect of the proceedings in Strasbourg. The ECtHR drastically reduced the amount of the requested compensation, by excluding important parts of the costs in domestic (injunction) proceedings and especially by considering that *"the hourly rate charged by the lawyers who assisted the applicants in the domestic proceedings, namely EUR 375 per hour, goes well beyond what the Court is prepared to consider reasonable"*. One can wonder if the actual rate for law firms in large European cities such as Amsterdam, London, Brussels, Paris, Rome or Berlin, especially for cases involving complicated legal issues related to national security, intelligence and anti-terror policy inducing a diversity of legal proceedings against the government or other public agencies, would differ very much from the Amsterdam lawyers' rates in this case. Therefore it is somewhat surprising that the Court considered the applicants' claims based on the hourly rates charged by the lawyers as going well beyond reason. Couldn't one expect that a victory of principle for victims of human rights violations should also lead to adequate compensation in terms of costs and expenses?

A more general observation in this regard is that the Court could more often apply **direct measures against member states blatantly violating Article 10 rights** of journalists and other public watchdogs, as the Court did in *Fattulayev v. Azerbaijan* (ordering the immediate release from prison of a journalist convicted of defamation of the government)⁶⁸ and in *Youth Initiative for Human Rights v. Serbia* (order to provide the applicant NGO with the information requested).⁶⁹ One may also wonder whether victims of violations of their right to freedom of expression will not lose their trust or abandon their hope in relying on the ECtHR as the ultimate guarantor of the fundamental rights, being confronted with **very long delays in the handling of their case before the Strasbourg Court**.

⁶⁷ ECtHR 22 November 2007, *Voskuil v. the Netherlands*; ECtHR Grand Chamber 14 September 2010, *Sanoma Uitgevers BV v. the Netherlands* and ECtHR 22 November 2012, *Telegraaf Media Nederland Landelijke Media N.V. and Others v. the Netherlands*.

⁶⁸ ECtHR 22 April 2000, *Fattulayev v. Azerbaijan*.

⁶⁹ ECtHR 25 June 2013, *Youth Initiative for Human Rights v. Serbia*.

The recent judgment in the case of *Milisavljević v. Serbia* is a striking example in this regard.⁷⁰ The case concerns the conviction of a journalist for insult of a well-known human rights activist, a case in which the ECtHR, completely in line with its settled case law, emphasises that criminal prosecution for insult of public figures is likely to deter journalists from contributing to the public discussion of issues affecting the life of the community. It took the Court more than 10 years to deliver a unanimous judgment to conclude that the Serbian authorities' reaction to the journalist's article was disproportionate to the legitimate aim of protecting the reputation of others, and was therefore not necessary in a democratic society, within the meaning of Article 10 § 2 ECHR.

2.4. Protection of whistle-blowers not always sufficiently guaranteed

Despite the crucial and substantial protection of whistle-blowers reflected in the Court's case law since *Guja v. Moldova*, the Court in some cases took a more deferential position, accepting far-reaching cases of interference with the rights of whistle-blowers or severe sanctions because of leaking public interest information.

In *Pasko v. Russia*⁷¹ for instance the applicant was a military journalist and researcher who disclosed information to the Japanese media about massive **dumping of nuclear waste** by the Russian navy. After being found in possession of **classified information** he was convicted for treason through espionage for having collected secret information with the intention of transferring it to a foreign national. The Court observed that the applicant was convicted "*as a serving military officer, and not as a journalist, of treason through espionage for having collected and kept, with the intention of transferring it to a foreign national, information of a military nature that was classified as a State secret*" and it considered "*that the domestic courts cannot be said to have overstepped the limits of the margin of appreciation which is to be left to the domestic authorities in matters of national security*". In *Pasko v. Russia* the ECtHR however failed to apply the Guja-criteria, while the information at issue concerned serious environmental issues, relating to massive nuclear pollution. The Court choose rather to emphasise that "*the applicant was bound by an obligation of discretion in relation to anything concerning the performance of his duties*" and that "*the information concerning military exercises which the applicant had collected and kept was capable of causing considerable damage to national security*". Most striking is the finding by the Court that the conviction of Pasko to **four years imprisonment** "*was very lenient*" (sic). The ECtHR explained its finding by referring to the fact that this sanction was "much lower" than the sanctions provided by law of twelve to twenty years' imprisonment and confiscation of property. Therefore Court is of the opinion that there was no "*lack of a reasonable relationship of proportionality between the means employed and the legitimate aim pursued*", and that "*(t)here is nothing in the materials of the case to support the applicant's allegation that his conviction was overly broad or politically motivated or that he had been sanctioned for any of his publications*".

The case of *Langner v. Germany*⁷² concerns the accusation, uttered by a civil servant during a staff meeting in a municipal Housing Committee in the presence of some external participants, of "*perversion of justice*" by a deputy mayor. At the request of his superior Langner substantiated his intervention in writing, referring to some concrete allegations of misconduct in housing policy in

⁷⁰ ECtHR 4 April 2017, *Milisavljević v. Serbia*.

⁷¹ ECtHR 22 October 2009, *Pasko v. Russia*.

⁷² ECtHR (Decision) 17 September 2015, Case No. 14464/1, *Langner v. Germany*.

relation to a demolition permit in which the deputy mayor (W.) was involved. A short time later Langner was dismissed. According to the letter of dismissal, Langner's accusations against W. had been unjustified. By making these accusations in front of a large number of staff members and representatives of the staff committee and of the trade union, Langner had damaged his superior's reputation and thus irrevocably destroyed the mutual trust which was necessary for effective co-operation. A few months later a local newspaper published a letter to the editor in which Langner expressed the opinion that the deputy mayor lacked any competence for resolving problems relating to housing issues. At two instances labour courts found that the employment contract had not been terminated by the dismissal since this could not be justified under section 1 of the Unfair Dismissal Act. The labour court did not find it necessary to decide whether Langner's allegations had been correct, as they were, in any event, covered by his right to freedom of expression. At a later stage in the domestic proceedings, however, the Labour Court of Appeal found that Langner's dismissal had been justified because Langner, in his statement at the staff meeting and in his subsequent written submissions, had seriously insulted and slandered the deputy mayor by accusing him of perversion of justice. Furthermore **the allegations had turned out to be unfounded**. The ECtHR confirmed the justification of the interference with Langner's right to freedom of expression, considering *inter alia* that "*the unfounded allegation of a serious crime*" were "*rather a defamatory accusation than a criticism in the interest of the public*". Referring to the domestic authorities' findings, the ECtHR also held that Langner's statement "*was not aimed at uncovering an unacceptable situation within the Housing Office, but was rather motivated by the applicant's personal misgivings about the Deputy Mayor arising from the prospect of the impending dissolution of his sub-division*". Therefore the ECtHR is of the opinion that the current case has "*to be distinguished from cases of 'whistle-blowing', an action warranting special protection under Article 10 of the Convention, in which an employee reports a criminal offence in order to draw attention to alleged unlawful conduct of the employer*". One may wonder whether this kind of reasoning does not hold the risk that in the future the protection of whistle-blowers on the basis of Article 10 ECHR and the right to freedom of expression in the employment relation might be substantially weakened in practice.

Most worrying from the perspective of freedom of expression of civil servants is the recent judgment in the case of **Karapetyan and others v. Armenia**, a judgment that became final on 24 April 2017, after the refusal by the Court's panel to refer the case, on request of the applicants, to the Grand Chamber.⁷³ In *Karapetyan and others v. Armenia* the ECtHR considered Article 10 ECtHR applicable with regard to the reaction and sanction by the public authorities because of **the expression of a political view in a public statement by civil servants of the Ministry of Foreign Affairs**. In that statement the applicants had expressed their concern with the situation created in Armenia and the alleged fraud of the election process (in 2008), which, according to the statement "*shadow the will of our country and society to conduct a civilised, fair and free presidential election*". The statement continued: "*As citizens of Armenia, we demand that urgent steps be undertaken to call into life the recommendations contained in the reports of the international observation mission, as well as other prominent international organisations. Only by acting in conformity with the letter and spirit of the law can we create democracy and tolerance in Armenia and earn the country a good reputation abroad*". The ECtHR found that the applicants' dismissal from their posts as a result of this statement "*clearly constituted*" an interference with their right to freedom of expression⁷⁴. The Court however

⁷³ ECtHR 17 November 2016, *Karapetyan a.o. v. Armenia*.

⁷⁴ ECtHR 17 November 2016, *Karapetyan a.o. v. Armenia*, § 36.

found that the dismissal of the applicants did not amount to a violation of their rights guaranteed under Article 10 ECHR.

The judgment is highly controversial, as it seems to go against some of the principles and approach in the Grand Chamber's judgment in the case of *Baka v. Hungary*⁷⁵ and other case law of the Court on the right to freedom of expression in the employment relation.⁷⁶ In a dissenting opinion, judge Trajkovska emphasises that it does not emerge from the reasoning of the domestic courts what "pressing social need" existed to justify, as proportionate to the legitimate aim pursued, the protection of the Armenian State's interests over the applicants' right to freedom of expression. Moreover she notes that the Court has usually considered dismissal from employment to be a very harsh measure, particularly when other more lenient and more appropriate disciplinary sanctions could or should have been envisaged, while it appears that the domestic authorities did not consider the imposition of other sanctions, but instead proceeded instantly, as a result of applicants' actions, to their dismissal from office. Furthermore, the effects of the applicants' dismissal were severe, as they were deprived of the opportunity to exercise the profession for which they had a calling, for which they had been trained and in which they had acquired skills and experience. Even taking into account the difficult political situation at the time and allowing the national authorities a certain margin of appreciation, to dismiss the applicants from their posts as diplomats was disproportionate to the legitimate aim pursued, according to the dissenting opinion.

Others⁷⁷ have criticised the judgment as the Court's emphasis on "*a politically neutral body of civil servants*" is troublesome, "*because it appears to reduce civil servants to mere lackeys of the executive, rather than potential defenders of democracy. Yet, there are good reasons to consider the alternative viewpoint*". The majority finding in *Karapetyan a.o. v. Armenia* is indeed "worrying", because it bars senior civil servants from speaking out in defence of democracy and the rule of law. The Court's decision also neglects to a large extent the content of the petition at issue, as the applicant's statements were manifestly of a peaceful nature. The petition indeed called for "*the preservation of stability in the country*" and for "*our compatriots and especially the representatives of all the structures in the country responsible for maintaining public order and peace to avoid the temptation of resolving problems by use of force*".

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Conclusion

This article showed how the ECtHR has delivered significant support to securing the right to freedom of expression and information with regard protection of acts of newsgathering and investigative journalism, access to official documents, protection of journalistic sources, and protection of whistleblowers based on the right to freedom of expression through its jurisprudence of the last decade. The second part of the analysis, however, exposed some weaknesses or inconsistencies in the Court's

⁷⁵ ECtHR Grand Chamber 23 June 2016, *Baka v. Hungary*.

⁷⁶ See also Dirk Voorhoof and Patrick Humblet, "Human Rights and the Employment Relation. The Right to Freedom of Expression at Work", in X., *Proceedings of the International Conference on the European Convention on Human Rights and the Employment Relation, Actes du Colloque "La convention européenne des droits de l'homme et la relation de travail"*, CNRS and Strasbourg University, 30-31 January 2014, 33 p., <http://europa-cnrs.unistra.fr/publications/les-e-publi/e-publi-des-unites/>

⁷⁷ Stijn Smet, "*Karapetyan and Others v. Armenia: Senior Civil Servants as Defenders of Democracy or as Lackeys of the Executive*", *Strasbourg Observers Blog* 8 December 2016.

case law applying Article 10 ECHR in each of these matters. It also focused on some considerations by the Court that risk neglecting crucial aspects of journalists' and civil society's rights to freedom of expression and information.

It will undoubtedly be the Court's main challenge to remain extremely aware of its task as the ultimate guarantor to protect the right to freedom of expression in Europe. Therefore it will need to keep on ***strictly scrutinising*** all kind of interference with journalists', media outlets', NGOs' and other public watchdogs' rights, and hence to leave a narrow margin of appreciation to the member states in these matters. That is the actual and future task the Court is facing so as not to risk a diminution of the high standards of protection it has developed. In the actual political context in Europe it is the Court's task, more than ever, to reinforce freedom of expression and information as a key element in democracy : *"Au moment où les vents sont contraires, nous pensons que notre Cour doit plus que jamais renforcer la liberté d'expression qui, loin de constituer une protection ou un privilège, est un des éléments clés de la démocratie"*.⁷⁸

⁷⁸ Dissenting opinion of Tulkens, Popović, and Sajó in ECtHR 11 January 2011, *Barata Monteiro da Costa Nogueira and Patrício Pereira v. Portugal*.