

# **Freedom of expression in times of crisis**

**Guidelines of the Committee of Ministers  
of the Council of Europe**

Directorate General  
of Human Rights and Legal Affairs  
Council of Europe

Directorate General of Human Rights and Legal Affairs  
Council of Europe  
F-67075 Strasbourg  
France

<http://www.coe.int/justice/>

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## PREFACE

**By the Rt Hon Terry Davis  
Secretary General of the Council of Europe**

There is no democracy without freedom of expression and I believe that the right to free speech is a fundamental human right. In a way, however, it is more than that. In the shadow which inevitably falls whenever there is a deficit of freedom of expression and information, violations of other human rights remain hidden.

“In war, truth is the first casualty.” This famous quotation is attributed to Aeschylus, the great playwright from ancient Greece. It shows that the manipulation of information in times of crisis and in pursuit of dubious goals is not a recent invention. Nowadays, when words, sounds and pictures can instantly reach a global audience, the temptation to restrict freedom of expression and information is greater than ever. On the other hand, especially in the wake of recent terrorist attacks, the natural concern of most people for their safety makes them more willing to accept limits on free speech.

Imposing disproportionate restrictions on freedom of expression and information is, however, an inappropriate reaction which leads to a vicious circle. The right to receive and impart information is essential in a democratic society, and it becomes even more important in times of crises such as wars, terrorist attacks and natural disasters.

Article 10 of the European Convention on Human Rights and the relevant case-law of the European Court of Human Rights remain the fundamental standards concerning the right to freedom of expression and information in all situations including times of crisis.

There is no need to amend these standards or to elaborate new ones. Instead, we should focus on the practical problems linked to their implementation. At the

very least, national governments and parliaments should incorporate these standards into their national regulatory frameworks and implement them rigorously.

The Committee of Ministers' *Guidelines* presented in this booklet provide specific advice in this respect. They will also, I hope, serve as an important reference for media professionals, civil society and everyone else who is concerned about free expression.

**GUIDELINES OF THE COMMITTEE OF MINISTERS  
OF THE COUNCIL OF EUROPE ON PROTECTING FREEDOM  
OF EXPRESSION AND INFORMATION IN TIMES OF CRISIS**

*Adopted by the Committee of Ministers on 26 September 2007  
at the 1005th meeting of the Ministers' Deputies*

**Preamble**

The Committee of Ministers,

1. Emphasising that freedom of expression and information and freedom of the media are crucial for the functioning of a truly democratic society;
2. Reaffirming that Article 10 of the European Convention on Human Rights (ETS No. 5) and the relevant case-law of the European Court of Human Rights remain the fundamental standards concerning the exercise of the right to freedom of expression and information;
3. Deeply concerned by the fact that crisis situations, such as wars and terrorist attacks, are still wide spread and threaten seriously human life and liberty, and the fact that governments, concerned about the survival of society may be tempted to impose undue restrictions on the exercise of this right;
4. Condemning the killings and other attacks on media professionals and recalling its Recommendation No. R (96) 4 on the protection of journalists in situations of conflict and tension;
5. Recalling Resolution No. 1 on freedom of expression and information in times of crisis adopted by the Ministers of states participating in the 7th European Ministerial Conference on Mass Media Policy (Kyiv, 10-11 March 2005);

6. Having taken note of Resolution 1535 (2007) and Recommendation 1783 (2007) of the Parliamentary Assembly of the Council of Europe on threats to the lives and freedom of expression of journalists;
7. Welcoming Resolution 1738 (2006) of the Security Council of the United Nations condemning attacks on media professionals in conflict situations and recognising the urgency and necessity of taking action for the protection of these professionals;
8. Underlining that dialogue and co-operation between governments, media professionals and civil society can contribute to the efforts to guarantee freedom of expression and information in times of crisis;
9. Convinced not only that media coverage can be crucial in times of crisis by providing accurate, timely and comprehensive information, but also that media professionals can make a positive contribution to the prevention or resolution of certain crisis situations by adhering to the highest professional standards and by fostering a culture of tolerance and understanding between different groups in society,
10. Adopts, as an extension and complement to the “Guidelines on human rights and the fight against terrorism” adopted on 11 July 2002, the following guidelines and invites member states to ensure that they are widely disseminated and observed by all relevant authorities.

## **I. Definitions**

1. As used in these guidelines,
  - the term *crisis* includes, but is not limited to, wars, terrorist attacks, natural and man-made disasters, i.e. situations in which freedom of expression and information is threatened (for example, by limiting it for security reasons);
  - the term *media professionals* covers all those engaged in the collection, processing and dissemination of information intended for the media. The term includes also cameramen and photographers, as well as support staff such as drivers and interpreters.

## **II. Working conditions of media professionals in crisis situations**

### **Personal safety**

2. Member states should assure to the maximum possible extent the safety of media professionals – both national and foreign. The need to guarantee the

safety, however, should not be used by member states as a pretext to limit unnecessarily the rights of media professionals such as their freedom of movement and access to information.

3. Competent authorities should investigate promptly and thoroughly the killings and other attacks on media professionals. Where applicable, the perpetrators should be brought to justice under a transparent and rapid procedure.

4. Member states should require from military and civilian agencies in charge of managing crisis situations to take practical steps to promote understanding and communication with media professionals covering such situations.

5. Journalism schools, professional associations and media are encouraged to provide as appropriate general and specialised safety training for media professionals.

6. Employers should strive for the best possible protection of their media staff on dangerous missions, including by providing training, safety equipment and practical counselling. They should also offer them adequate insurance in respect of risks to the physical integrity. International organisations of journalists might consider facilitating the establishment of an insurance system for freelance media professionals covering crisis situations.

7. Media professionals who are expelled from zones with restricted access for disobeying national and international law, inciting violence or hatred in the content of their news or spreading propaganda of warring parties should be accompanied by military forces to a neutral, secure region or a country or embassy.

### **Freedom of movement and access to information**

8. Member states should guarantee freedom of movement and access to information to media professionals in times of crisis. In order to accomplish this task, authorities in charge of managing crisis situations should allow media professionals accredited by their media organisations access to crisis areas.

9. Where appropriate, accreditation systems for media professionals covering crisis situations should be used in accordance with Principle 11 of the Appendix to Recommendation No. R (96) 4 of the Committee of Ministers to member states on the protection of journalists in situations of conflict and tension.

10. If required by national law, accreditation should be given to all media professionals without discrimination according to clear and fast procedures free of bureaucratic obstacles.

11. Military and civilian authorities in charge of managing crisis situations should provide regular information to all media professionals covering the events through briefings, press conferences, press tours or other appropriate means. If

possible, the authorities should set up a secure information centre with appropriate equipment for the media professionals.

12. The competent authorities in member states should provide information to all media professionals on an equal basis and without discrimination. Embedded journalists should not get more privileged access to information than the rest except for the advantage naturally due to their attachment to military units.

### **III. Protection of journalists' sources of information and journalistic information**

13. Member states should protect the right of journalists not to disclose their sources of information in accordance with Recommendation No. R (2000) 7 of the Committee of Ministers on the same subject. Member states should implement in their domestic law and practice, as a minimum, the principles appended to this recommendation.

14. With a view, *inter alia*, to ensuring their safety, media professionals should not be required by law-enforcement agencies to hand over information or material (for example, notes, photographs, audio and video recordings) gathered in the context of covering crisis situations nor should such material be liable to seizure for use in legal proceedings. Any exceptions to this principle should be strictly in conformity with Article 10 of the European Convention on Human Rights and the relevant case-law of European Court of Human Rights.

### **IV. Guarantees against misuse of defamation legislation**

15. Member states should not misuse in crisis situations libel and defamation legislation and thus limit freedom of expression. In particular, member states should not intimidate media professionals by law suits or disproportionate sanctions in libel and defamation proceedings.

16. The relevant authorities should not use otherwise legitimate aims as a pretext to bring libel and defamation suits against media professionals and thus interfere with their freedom of expression.

### **V. Guarantees against undue limitations on freedom of expression and information and manipulation of public opinion**

17. Member states should not restrict the public's access to information in times of crisis beyond the limitations allowed by Article 10 of the European

Convention on Human Rights and interpreted in the case-law of the European Court of Human Rights.

18. Member states should always bear in mind that free access to information can help to effectively resolve the crisis and expose abuses that may occur. In response to the legitimate need for information in situations of great public concern, the authorities should guarantee to the public free access to information, including through the media.

19. Member states should not use vague terms when imposing restrictions of freedom of expression and information in times of crisis. Incitement to violence and public disorder should be adequately and clearly defined.

20. International and national courts should always weigh the public's legitimate need for essential information against the need to protect the integrity of court proceedings.

21. Member states should constantly strive to maintain a favourable environment, in line with the Council of Europe standards, for the functioning of independent and professional media, notably in crisis situations. In this respect, special efforts should be made to support the role of public service media as a reliable source of information and a factor for social integration and understanding between the different groups of society.

22. Member states should consider criminal or administrative liability for public officials who try to manipulate, including through the media, public opinion exploiting its special vulnerability in times of crisis.

## **VI. Responsibilities of media professionals**

23. Media professionals need to adhere, especially in times of crisis, to the highest professional and ethical standards, having regard to their special responsibility in crisis situations to make available to the public timely, factual, accurate and comprehensive information while being attentive to the rights of other people, their special sensitivities and their possible feeling of uncertainty and fear.

24. If a system of embedded journalists needs to be maintained and journalists choose to make use of it, they are advised to make this clear in their reports and to point out the source of their information.

25. Self-regulation as the most appropriate mechanism for ensuring that media professionals perform in a responsible and professional way needs to be made more effective in times of crisis. In this regard, co-operation between self-regulatory bodies is encouraged at both the regional and the European levels. Member states, professional organisations of journalists, other relevant non-gov-

ernmental organisations and the media are invited to facilitate such co-operation and provide further assistance where appropriate.

26. Media professionals are invited to take into consideration in their work Recommendation No. R (97) 21 of the Committee of Ministers to member states on the media and the promotion of a culture of tolerance and to apply as a minimum the professional practices outlined in the appendix to this recommendation.

## **VII. Dialogue and co-operation**

27. National governments, media organisations, national or international governmental and non-governmental organisations should strive to ensure the protection of freedom of expression and information in times of crisis through dialogue and co-operation.

28. At the national level, relevant stakeholders such as governmental bodies, regulatory authorities, non-governmental organisations and the media including owners, publishers and editors might consider the establishment of voluntary fora to facilitate, through dialogue, the exercise of the right to freedom of expression and information in times of crisis.

29. Media professionals themselves are encouraged, directly or through their representative organisations, to engage in a constructive dialogue with the authorities in situations of crisis.

30. Non-governmental organisations and in particular specialised watchdog organisations are invited to contribute to the safeguarding of freedom of expression and information in times of crisis in various ways, such as:

- maintaining help lines for consultation and for reporting harassment of journalists and other alleged violations of the right to freedom of expression and information;
- offering support, including in appropriate cases free legal assistance, to media professionals facing, as a result of their work, lawsuits or problems with the public authorities;
- co-operating with the Council of Europe and other relevant organisations to facilitate exchange of information and to effectively monitor possible violations.

Governmental and non-governmental donor institutions are strongly encouraged to include media development and media assistance as part of their strategies for conflict prevention, conflict resolution and post-conflict reconstruction.

## PROTECTING FREEDOM OF EXPRESSION AND INFORMATION IN TIMES OF CRISIS: BACKGROUND PAPER

This paper, written by Gavin Millar QC, is intended to be read alongside the *Guidelines of the Committee of Ministers of the Council of Europe on protecting freedom of expression and information in times of crisis* (above, p. 7). It seeks, first, to explain the principles developed by the European Court of Human Rights (“the Court”) under Article 10 of the European Convention on Human Rights (“the Convention”) upon which the guidance is based. The *Guidelines* themselves are then discussed by reference to these all-important principles and other related provisions under the Convention.

As emphasised in paragraph 2 of the Preamble to the *Guidelines* these Article 10 principles establish the *fundamental standards concerning the exercise of the right to freedom of expression and information* in times of crisis. **This text is not meant to be taken as an explanatory report or memorandum of the Guidelines.**

### Article 10 – General principles

#### Article 10

Article 10 of the European Convention on Human Rights provides:

1. **Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.**
2. **The exercise of these freedoms, since it carries with it duties and responsibilities may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in**

**the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.**

## The right to freedom of expression

The first paragraph of Article 10 gives a wide-ranging right to freedom of expression. The European Court of Human Rights in Strasbourg has stressed the importance of this wide-ranging right in any democracy. In one of the first major judgments on Article 10 the Court said that:

**...Freedom of expression constitutes one of the essential foundations of a society, one of the basic conditions for its progress and for the development of every man. Subject to Article 10 (2), it is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society”...<sup>1</sup>**

Moreover, when adjudicating upon a case involving an infringement of the Article 10 (1) right, the Court considers itself faced:

**... not with a choice between two conflicting principles, but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted... It is not sufficient that the interference involved belongs to that class of the exceptions listed in Article 10 (2) which has been invoked; neither is it sufficient that the interference was imposed because its subject-matter fell within a particular category or was caught by a legal rule formulated in general or absolute terms; the Court has to be satisfied that the interference was necessary having regard to the facts and circumstances prevailing in the specific case before it.<sup>2</sup>**

As the opening words of Article 10 make clear, *everyone* has the right. This includes individuals, such as journalists as well as profit and non-profit making media organisations.

The protected expression may take any number of forms. Most obviously it includes words, both spoken and written, and the display of pictures or images. Participation in a political demonstration also engages the Article 10 right.<sup>3</sup> Article 10 protects expression in the form of communication of opinions and the

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1. *Handyside v. the United Kingdom*, judgment of 7 December 1976, Series A no. 24, §49.

2. *Sunday Times v. the United Kingdom (no. 1)*, judgment of 26 April 1979, Series A no. 30, §65.

3. *Steel and others v. the United Kingdom*, judgment of 23 September 1998, Reports of Judgments and Decisions 1998-VII.

passage of information and ideas. The protection applies regardless of the way in which the communication takes place, whether for example: in person; over a telephone line; by leaflets, banners or posters; or to a wider audience by newspapers, television, cinema, radio or the internet. Article 10 protects the right to criticise, speculate and make value judgments, as well as to make factual statements.<sup>4</sup>

The words *right ... to receive* in Article 10 (1) are also important. Where a person is obstructed in communicating, the Article 10 rights of both the speaker and the potential audience are interfered with.<sup>5</sup> The right of the public to receive information on matters of public interest from journalists is the corollary of the media's function in disseminating such information.

### **The hierarchy of types of expression**

The Court attributes greater value to some types of expression than others. In broad terms speech on political or public interest matters is of the highest value, then comes artistic expression and lastly commercial expression, such as advertising. The highest value speech receives the greatest protection under Article 10. "Political" expression covers many things, going well beyond the main political process. For example, it covers speech about the conduct of the police and security services, the courts and policies for public safety/health.

The Court has repeatedly stated that where political speech is concerned there will be very little scope for lawful restraint of the expression<sup>6</sup>. This is so even if the state invokes the aim of protecting national security or territorial integrity and even if it identifies a "crisis" (see further below).<sup>7</sup> Expression *by* politicians, and media coverage of the same, is considered particularly important.<sup>8</sup>

### **The negative obligation on the state and its officials – not to interfere**

The right is to *expression without interference by public authority*. The Court deems any act which prevents or limits a person in exercising the right of expression to be an *interference* with it. Thus preventing a journalist from attending a meeting, speaking to a particular political grouping, reporting from a particular place or using satellite communication equipment is an interference with the right – just as much as censoring his or her copy or closing down the newspaper for which the journalist writes. As discussed below, a requirement for a journalist to dis-

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4. *Lingens v. Austria*, judgment of 8 July 1986, Series A no. 103.

5. See e.g. *Autronic AG v. Switzerland*, judgment of 22 May 1990, Series A no. 178.

6. *Dyuldin and Kislov v. Russia*, no. 25968/02, 31 July 2007.

7. *Şener v. Turkey*, no. 26680/95, 18 July 2000.

8. *Castells v. Spain*, judgment of 23 April 1992, Series A no. 236, §42.

close the identity of a confidential source is also a serious interference with the Article 10 rights of both the journalist and the source.

### **Lawful interference**

However, the Article 10 right is not absolute. It is a “qualified” right. This means that in certain circumstances public authorities may lawfully interfere with this right. These circumstances are indicated in Article 10 (2). In essence interference is lawful if it is:

- *prescribed by law*;
- in pursuit of a *legitimate aim* and;
- *necessary in a democratic society*.

These requirements will be considered in turn.

*Prescribed by law:* There are two requirements here:

- first, the act representing the interference must have a legal basis in national law. This may be legislation or case-law;
- secondly, the law must be publicly accessible and sufficiently precise for each individual to be able to regulate his/her conduct in accordance with it.

*Legitimate aim:* The legitimate aims which can be invoked in justifying an interference with freedom of expression are identified in Article 10 (2). The *interests of national security, territorial integrity or public safety* and *the prevention of disorder or crime* are the aims most likely to be invoked in times of crisis.

*Necessary in a democratic society:* For an interference in pursuit of a legitimate aim to be justified it must be *necessary in a democratic society*. This means something more than “useful”, “reasonable” or “desirable”.<sup>9</sup> Rather, it requires the state to show that the interference fulfils a “pressing social need” and that it is proportionate to the legitimate aim being pursued in all the circumstances. There must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. In other words, could the public authority have achieved the same objective by a different, less restrictive, measure? A proportionate measure is not arbitrary, unfair or irrational. Most of the Court’s findings of violations of the Article 10 right are made because the state has failed to establish that the interference was proportionate.

A person claiming to be victim of an unlawful interference with (known as a “violation of”) his/her Convention rights may complain to the Court. If the

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9. *Sunday Times v. the United Kingdom (no. 1)*, judgment of 26 April 1979, Series A no. 30, §65

court finds that there has been an interference, the contracting state must demonstrate that each of the above requirements for *lawful* interference is made out on the facts of that case. If they are not, a violation will be established.

The Court exercises a supervisory jurisdiction. It reviews "... whether the reasons given by the national authorities to justify [the interference] are "relevant and sufficient".<sup>10</sup> It will ask itself whether in interfering with the expression the national authorities applied standards "in conformity with the principles embodied in Article 10 and, moreover, that they based themselves on an acceptable assessment of the relevant facts".<sup>11</sup>

The standard of justification required from the state varies. However, in all cases involving interference with freedom of expression the justification must be "convincingly established".<sup>12</sup>

The review in Strasbourg will be more intense, the greater the value of the expression. And the more severe the interference, the greater the justification required. Criminal sanctions against speech always require specific and strong justification. So do orders for forfeiture or disclosure of journalistic material. If an interference has the following features it is liable to be regarded as more severe and requiring stronger justification:

- Where it operates as a prior restraint on expression. This is especially so where the media is concerned, as delaying the dissemination of news may deprive it of its value and interest to the public;
- Where it has a "chilling effect" on expression generally – i.e. is likely to deter expression by others in the future. Again this is particularly important where the measure may discourage the media from fully reporting matters of public interest in the future;
- Where the information is already in the public domain. It will often be difficult to justify measures taken against those who re-publish the information.

Sometimes, the Court may accept that domestic authorities are better placed to assess the measures needed to achieve a particular legitimate aim. This may lead the Court to apply a lower standard, giving the authorities of the state a greater latitude – or "margin of appreciation". See for example *Leander v. Sweden*, judgment of 26 March 1987, Series A no. 116, §59, where national security considerations were invoked.

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10. *Barthold v. Germany*, judgment of 25 March 1985, Series A no. 90, §55.

11. *Zana v. Turkey*, judgment of 25 November 1997, *Reports of Judgments and Decisions* 1997-VII

12. *Barthold* (above) at §58.

## **The exercise of the right carries with it duties and responsibilities**

Article 10 indicates that a person exercising the right has *duties and responsibilities* when doing so. In deciding whether an infringement is justified, the Court will consider whether the appellant exercised the right responsibly on the occasion in question.<sup>13</sup> The greater the impact of the medium of expression on the public, the greater the need for responsible expression. Thus, the audio-visual media, in particular, must take care to act responsibly.<sup>14</sup> The extra protection which Article 10 affords journalists reporting on matters of public interest (see below) is subject to the proviso that they act “in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism” [*Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, ECHR 1999-III].

The requirement to exercise the right responsibly becomes even more important in times of crisis.<sup>15</sup> In crisis situations journalists must take particular care to avoid expressing themselves in ways which could be interpreted as inciting violence or disorder or racial/religious hatred (see below, p. 21). However the state cannot argue that one or more instances of “irresponsible” expression justify a blanket restriction on the rights of expression of a particular class of persons – for example a political grouping. Furthermore, in the particular case the state must show with clear evidence and examples how the “irresponsible” nature of the expression has necessitated the interference.<sup>16</sup>

## **The positive obligation**

The principal purpose of Article 10 – protecting individuals from infringements of their Article 10 rights – is generally achieved by strict enforcement of the obligation not to interfere. However, Article 10 also imposes a “positive” obligation on states to take action to protect freedom of expression in some circumstances. Where such an obligation exists, doing nothing is not an option. Failure by the state to act to protect the right will be a violation of the right. Positive obligations may be identified in many different circumstances. Most commonly they are identified where the state should act to prevent one individual or non-state organisation from interfering with the Article 10 rights of another. The more fundamental the Article 10 values at stake and the more serious the effect of not acting would be on the exercise of the Article 10 right, the more likely it is that the state is under a positive obligation to act to protect the right.

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13. *Handyside* (above, p. 14) at §49.

14. *Jersild v. Denmark*, judgment of 23 September 1994, Series A no. 298, §39.

15. *Süretek v. Turkey (no. 1)* [GC], no. 26682/95, ECHR 1999-IV

16. *Vereinigung demokratischer Soldaten Österreichs and Gubi v. Austria*, judgment of 19 December 1994, Series A no. 302

## Access to information held by the state

Article 10 does not give a right of access to, or to “demand”, information held by government bodies.<sup>17</sup> However, the state may be under a positive obligation to pass information to journalists exercising their Article 10 rights in certain circumstances. These may include times of crisis (see below, p. 26).

## The special position of journalists and the media

Although everyone has the Article 10 right, the Court has repeatedly emphasised that the media have a special role in a democracy. They have a duty to impart, in a manner consistent with its obligations and responsibilities, information and ideas on all matters of public interest.<sup>18</sup> In other words they are a “watchdog” on behalf of the public. Interferences with media freedom of expression will therefore be carefully scrutinised and must be strictly justified. The Court has emphasised on numerous occasions that there may be a positive obligation to act so as to protect and promote freedom of expression by the media.<sup>19</sup>

Protection of sources is “one of the basic conditions for press freedom”. Orders requiring journalists to disclose their sources have a particularly worrying “chilling effect” on expression by the press. Other confidential sources will be reluctant to approach journalists if they feel that they are liable to be identified. Therefore, the media must be able to protect the anonymity of sources unless there is some overwhelming public interest reason why they should not.<sup>20</sup> The requirement to disclose must also meet the requirements of necessity and proportionality. The Court will readily find violations of the Article 10 right where the state makes questionable criminal allegations in order to search the homes/offices of journalists for information relating to sources and other matters, *Tillack v. Belgium*, no. 20477/05, 27 November 2007.

Many judgments in Strasbourg underline the importance of freedom of expression in a democracy where the media are reporting on matters of public interest. There is more scope to attack politicians. A politician

**... inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display and even greater degree of tolerance ...<sup>21</sup>**

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17. *Leander v Sweden* (above); *Guerra and others v. Italy*, judgment of 19 February 1998, *Reports of Judgments and Decisions 1998-I*, §53; *Gaskin v. the United Kingdom*, judgment of 7 July 1989, Series A no. 160.

18. *Jersild v. Denmark*, judgment of 23 September 1994, Series A no. 298, §38.

19. *Özgür Gündem v. Turkey*, no. 23144/93, ECHR 2000-III.

20. *Goodwin v. the United Kingdom*, judgment of 27 March 1996, *Reports of Judgments and Decisions 1996-II*, §61.

21. *Lingens v. Austria*, judgment of 8 July 1986, Series A no. 103, §42.

There is yet more scope to attack the government. As the Court observed in *Şener v. Turkey*, no. 26680/95, 18 July 2000:

**... the limits of permissible criticism are wider with regard to the government than in relation to a private citizen or even a politician...the dominant position which a government occupies makes it necessary for it to display restraint in resorting to criminal proceedings ....**

This is so even if the criticism is provocative or insulting or involves serious allegations against security forces.<sup>22</sup>

### **Misuse of defamation laws**

Although protection of reputation is a legitimate aim under Article 10 (2), the Court is particularly careful to prevent defamation laws being misused by courts and other public authorities to restrict legitimate free speech. It recognises the severe “chilling effect” that restrictive defamation laws have. Violations have been found, for example, where the state has used a distorted interpretation of the meaning of the words complained of to justify punishment; where journalists have been forced to try and prove the “truth” of a defamatory statement of opinion (a “value judgment”); and where the domestic authorities have given insufficient weight to the public interest nature of the speech in question – for example, an attack on an elected politician (see above).

The severity of any sanction imposed upon the journalist is considered particularly important here. A violation may be found purely on the basis of its gravity. Since criminal proceedings/sanctions are always regarded as severe interferences with expression, they will be almost (if not always) impossible to justify as a means of protecting reputation. Orders for large sums in compensation will also be held to be unlawful, not least of all because of the “chilling effect” they have on media expression generally.<sup>23</sup>

### **Court reporting**

Media reporting of court proceedings, particularly criminal cases, is an important aspect of public interest expression. However, the state may seek to limit such reporting to protect the interests of justice, relying on Article 10 (2) (maintaining ... the authority of the judiciary). In these cases the Court is more inclined to find violations of Article 10.<sup>24</sup> Issues may also arise as to whether the reporting infringes the Article 6 right of a party to the proceedings (to a fair

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22. *Özgür Gündem v. Turkey*, no. 23144/93, ECHR 2000-III.

23. *Tolstoy Miloslavsky v. the United Kingdom*, judgment of 13 July 1995, Series A no. 316-B.

24. E.g. *Sunday Times v. the United Kingdom* (above, p. 14); *Worm v. Austria*, judgment of 29 August 1997, *Reports of Judgments and Decisions* 1997-V; *News Verlags GmbH & Co.KG v. Austria*, no. 31457/96, ECHR 2000-I.

trial) or the Article 8 right (to privacy) of such a person, or even a third party (protecting *the rights of others*). In these cases involving “clashes of rights” the state has greater latitude to restrict reporting.<sup>25</sup>

### **Race hate speech**

Proportionate restrictions on such speech will be relatively easy to justify as necessary for the protection of the rights of others and, if considered likely to incite violence, hostility and hate, for the prevention of disorder.

### **Lawful interference in times of crisis**

It may be difficult for the state to respond appropriately when expression conflicts with the need to protect the state and public against those who advocate the overthrow of the democratic order – or who express other anti-democratic views, such as incitement to hatred, especially racial, and hostility. The Council of Europe and the Court recognise this.

The state may seek to justify limitations on expression as necessary because of a situation of “crisis” involving these elements. In these cases the state may seek to justify itself by saying that the expression in question, for example, encouraged separatism or terrorism/violent insurrection, or promoted race/religious hatred. Even though the speech may be political, the state can argue that the entitlement to protection is lost because it is irresponsible and anti-democratic.

In deciding such cases, the Court always re-emphasises the limited scope for lawful restraint on political speech in a democracy – even if the state invokes the aims of national security, territorial integrity and the prevention of disorder or crime. It will look very carefully at the whole of the publication or broadcast in question. It is not enough, for example, that the speech challenged the territorial integrity of the state (for example, by arguing for peaceful self-determination for a regional or ethnic grouping within it). Rather the Court will ask itself whether it *actually* contained support for or incitement to anti democratic views and action; and whether it was liable to *actually* encourage violence, armed resistance or insurrection? Did it constitute hate speech in the true sense, i.e. inciting hatred of others because of their regional or ethnic identity?

In deciding these questions the Court will look carefully at the context of the expression and all the other facts of the particular case. The same words could have less dramatic consequences according to the circumstances in which they are spoken or written. Words spoken in private may become more potent when

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25. See e.g. *Z v. Finland*, judgment of 25 February 1997, *Reports of Judgments and Decisions* 1997-I.

spoken in front of a crowd in a street demonstration. The size of the target audience and the medium of expression will be important here. The justification for limiting such speech may be stronger, the more people are being targeted – for example, through mass media. If the expression was in circumstances where violence or disorder was unlikely to result, any serious sanction would be difficult to justify.

There is no “formula” for deciding what words constitute incitement. Thus, words such as *resistance*, *struggle* or *liberation* or accusations of *terrorism* or even *genocide* by the state are insufficient on their own to constitute incitement. Where the state contends that words have a “hidden” meaning involving incitement to violence, this must be strictly proved.

Unless the speech did truly have these characteristics, serious measures against free speech such as prison sentences or seizure of publications and printing materials, will not be considered *necessary in a democratic society*. Specifically, the Court has emphasised that it is not sufficient justification that the “tone” of the material is “hostile”, or that it presents an “extremely negative picture” of the state. It must amount to some sort of “call to violence” or hostility before the interference can be justified.

Moreover, “blanket” media bans, for example against a specific group or in respect of certain views, are unlikely to be justifiable because such bans are liable to also prevent expression which does not incite violence or hatred.

However, where it is shown that media expression was such as to incite violence or hatred, especially against particular individuals such as named members of the security service, the Court recognises that the state’s positive duty to protect life (see below) may require appropriate restraints to be imposed.

## **Other relevant Convention principles**

### **Article 2 – the right to life**

This is fundamental and no derogation from/suspension of the right is possible, except in time of war (see below). There is a negative obligation on the state to refrain from taking life. There is also a positive obligation to act to avoid a real and immediate risk to life. There is a procedural obligation properly to investigate the circumstances surrounding any death.<sup>26</sup> The investigation must be carried out publicly and by an independent body.

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26. *Ergi v. Turkey*, judgment of 28 July 1998, *Reports of Judgments and Decisions* 1998-IV.

## Article 14 – non-discrimination

Article 14 is a general prohibition on discrimination on grounds of “status”. However it can only be invoked in conjunction with another, substantive, Convention right. A contravention of Article 14 occurs if:

- first, the state fails to afford equal treatment in the delivery of the substantive right as between persons in relevantly similar positions on grounds of the victim’s “status”; and
- secondly, it cannot provide an “objective and reasonable” justification for the differential treatment.

“Status” may include differences in nationality or professional status.<sup>27</sup>

## Article 15 of the Convention

This provides that:

1. **In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this convention to the extent strictly required by the exigencies of the situation provided that such measures are not inconsistent with its obligations under international law.**
2. **No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (1) and 7 shall be made under this provision.**

This allows states to derogate from or suspend certain Convention rights, including Article 10 in times of emergency that threaten the life of the nation. However the derogation/suspension must be justified on similar principles to those mentioned above. There must actually be such a threat that requires the measure and the derogation/suspension must be proportionate. This means that it can only be maintained for as long as is strictly necessary.

## The Guidelines document

### I. Definitions

*Crisis*: A government may be able to describe a domestic situation as one of domestic “crisis” for a variety of reasons, most obviously where there have been terrorist attacks. However, interferences with freedom or expression are never justified simply by *describing* a domestic situation (however correctly) as one of crisis. As emphasised above, interferences can only ever be justified by the application of the well-established Article 10 principles to the facts of a particular case

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27. *Van der Musselle v. Belgium*, judgment of 23 November 1983, Series A no. 70.

– albeit that this may occur against a backdrop of crisis. This definition is important, therefore, not to be identified when particular interferences are justified but rather when governments come under extra pressure to impose them.

Only rarely does a time of crisis truly escalate into a *time of war or other public emergency threatening the life of the nation* within the meaning of Article 15 of the Convention. States should not mischaracterise a state of crisis as being one of *emergency* in order to limit free speech. Short of such an emergency only limitations which are justifiable under Article 10 (2) should be imposed.

*Media professionals:* The special protection which Article 10 gives to the media is given to everyone working in, or for, the media. A broad definition of such professionals is therefore important. The term “journalist” is used in this document as a way of referring to this broad group.

## **II. Working conditions of media professionals in crisis situations**

### *Personal safety*

Paragraph 2: The state’s positive obligation under Article 10 will be triggered whenever journalists are in peril in the course of their work. The state must therefore try to protect them so that they can perform their “watchdog” function and keep the public informed on all matters of public interest. This will involve, in particular, advising them of known risks. It also requires protection for media premises.

However, this positive obligation should not be misused as a “cover” to prevent media professionals from doing their job properly, for example, by excluding them from certain areas. Concerns about safety should only be used to restrict the works of journalists where strictly necessary.

Paragraph 3: This emphasises the particular importance of the procedural obligation under Article 2 where journalists are concerned – i.e. when combined with the positive obligation to promote free speech through the media. The killing of a media professional may be a reprisal for past disclosures and/or a warning to others not to investigate. If media professionals are to perform their watchdog function fearlessly and to report the activities of dangerous elements in society, the state must investigate the killings and bring those responsible to justice. Exposing and punishing the perpetrators would deter those who would do such things by way of reprisal or warning in the future. The importance of doing so is no less where the attack falls short of killing.

Paragraphs 4 to 6 identify a number of practical measures that governments and media organisations should take to ensure responsible and effective journalism continues, insofar as possible, in times of crisis.

Paragraph 7 refers to the exceptional situation in which a media professional is *inciting violence or hatred in the content of news*. A proportionate measure against this type of expression may be the removal of the journalist from the area.

*Freedom of movement and access to information*

Paragraphs 8 to 10: Where a media professional is properly accredited by his/her own recognised media organisation (such as a broadcast or publishing company or professional organisation) this should facilitate entry to crisis areas. Authorities should not delay access by raising questions about the status of the journalist. Again this is part of the positive obligation to enable swift and effective reporting on matters of public interest.

By contrast media accreditation systems operated by the authorities themselves are generally to be avoided as they can be operated in a way that inhibits everyone in the media having equal and effective access to places and information. There is a risk that accreditation may be limited to journalists favoured by the authorities, or awarded in a way that discriminates contrary to Articles 10 and 14. Principle 11 of the Appendix to Council of Europe Recommendation No. R (96) 4 of the Committee of Ministers to member states on the protection of journalists in situations of conflict and tension emphasises these concerns. They also emphasise that accreditation should normally be granted straightforwardly to all media professionals who apply for it, without discrimination. Any limitation on freedom of expression by reason of non-accreditation must be strictly justified under Article 10 (2) like any other restriction on freedom of expression.

Paragraph 11: There is no right of access to information from the state under Article 10. However, the positive obligation to promote media expression in times of crisis requires authorities to provide assistance to journalists in performing their important “watchdog” functions. This paragraph gives some examples of the sort of assistance, including provision of information, which may be required depending on circumstances.

Paragraph 12 emphasises the importance of Article 14 where the authorities are dealing with media professionals in crisis situations. A particular concern is that “embedded” journalists are sometimes favoured on grounds of their status in getting access to information. This is in breach of Article 14, taken with Article 10, to the extent that the access results from the actions of the authorities (rather than merely as a result of their presence alongside military units).

### **III. Protection of journalists' sources of information and journalistic information**

Paragraph 13: Rec. No. R (2000) 7 of the Committee of Ministers to member states on the right of journalists not to disclose their sources of information builds on the principles established in the Article 10 case of *Goodwin v. the United Kingdom* (above, p. 19). It emphasises that journalists are presumptively protected against being required to disclose any information which may identify a source. A clear *overriding public interest* in disclosure is required before a disclosure order can be considered and, as ever, a pressing social need for the requirement must be established on the facts of the particular case. Journalists who refuse to comply with an order are entitled to a fair court hearing before any sanction is determined. These principles must be respected even in times of crisis.

Paragraph 14 deals with the problems that can arise when media professionals are required by courts or police to hand over evidence obtained in covering crisis situations (e.g. hostage-takings, demonstrations or political rallies) against their wishes. Any such requirement is an interference with the journalist's freedom of expression. Compliance may also expose the journalist to reprisals from/on behalf of those identified to the authorities as a result of any disclosure. Therefore, such requirements have to be strictly justified under Article 10(2) – for example as necessary to bring a serious criminal to justice. The dealings between the authorities (including the court) and the media professional may have to be confidential in order to conceal the identity of the journalist from those being identified.

### **IV. Guarantees against misuse of defamation legislation**

Paragraphs 15 and 16 emphasise the well-established risks to freedom of speech that can result from misuse of defamation proceedings (see above, p. 20). These are heightened where politicians and public officials are attacked in the media in times of crisis. At such times, there is a greater temptation on the part of the politicians and/or the authorities to resort to unjustified defamation proceedings.

### **V. Guarantees against undue limitations on freedom of expression and information and manipulation of public opinion**

Paragraphs 17, 18 and 21: These paragraphs emphasise that there are particularly strong public interest reasons for states to ensure a free flow of information to the public in times of crisis. Where the public interest invites disclosure of particular documents or information to the media, or they are sought by the media in the public interest, the state should assess whether it can strictly justify with-

holding them. Proportionate limitations with the aim of protecting national security, public safety and the prevention of crime are permitted. Sometimes the answer may be that parts of the relevant material should be disclosed whilst other, particularly sensitive, information be withheld.

Paragraph 19: States may pass laws prohibiting expression of the sort identified in the Court cases referred to above – i.e. which incites violence or disorder, or promotes racial/religious hatred. Such laws may be considered particularly important in times of crisis. However any measures taken against such speech under domestic laws must always be justifiable under Article 10(2). This paragraph stresses this critical point. In particular, the requirement of legal certainty imposed by the words *prescribed by law* is underlined. In the legislation the type of prohibited expression should be precisely identified in terms which reflect the Article 10 case-law. Public opinion may be more receptive to wider prohibitions in times of crisis (e.g. bans on particular political views). This fact does not permit states to be any less rigorous in their application of Article 10 principles.

Paragraph 20: A state may try to stifle court reporting claiming that the restrictions will help the justice system to operate more efficiently. As indicated above, however, the Court is generally unwilling to allow such restrictions save where a clear risk to the asserted fair trial or privacy rights of individuals is identified. Again there is a greater temptation on the part of public authorities to limit court reporting in this way in times of crisis. This is particularly true of criminal trials of terrorist defendants. This guideline emphasises that the right of the public to know, through the media, about court cases is particularly important in times of crisis. In particular, the reporting of the proceedings may reveal abuses of power by the state authorities. This consideration must always be balanced against the state's arguments for limited reporting in the interests of justice.

Paragraph 22: Since disclosure of information by the state is in the public interest and in the interests of transparency, it is implicit that disclosure of official information should never be used to manipulate public opinion. This is particularly important in times of crisis when the temptation to give partial or distorted (or even false) disclosure to this end may be greater.

## **VI. Responsibilities of media professionals**

Paragraph 23: The guidance in this paragraph emphasises the importance of both the media's watchdog function and their duty to act responsibly, in times of crisis. Media professionals can ensure that they act responsibly by adhering to recognised professional/ethical standards.

Paragraph 24 advises safeguards to ensure that reporting by "embedded" journalists is understood for what it is. The embedded journalist may be limited by his/

her circumstances in what he/she can print or broadcast. Similarly, he/she is more likely to be receiving information for dissemination directly from the military and other state authorities. The fact that the journalist is embedded and any consequence this has for his/her freedom to investigate/report should always be made clear. This ensures that the public has the ability to assess, and if appropriate question, the information being received from the media.

Paragraph 25: Public authorities should not need to interfere with the rights of media professionals where they are exercised in accordance with the principles described above. Effective self-regulation can help to ensure that they are. This is particularly important in times of crisis where there is extra pressure on governments to interfere. Self-regulatory bodies can identify and enforce appropriate professional/ethical standards consistent with Article 10 principles. Efforts should be made to co-ordinate these standards, and to apply them consistently, across Europe.

Paragraph 26: The Appendix to Council of Europe Recommendation No. R (97) 21 of the Committee of Ministers to member states on the media and the promotion of a culture of tolerance sets out the essentials of responsible reporting in multi-cultural/ethnic societies. These are especially important in times of crisis. The Appendix refers, in particular, to the importance of reporting accurately and sensitively where racism, intolerance or tension between communities is in issue, and in a way which alerts the public to “the evils of intolerance”. The extra responsibility on the broadcast media (see above) is reflected in the Appendix, which calls on broadcasters to create an atmosphere in which intolerance is identified and challenged.

## **VII. Dialogue and co-operation**

Paragraphs 27-30: Crisis situations need not involve unjustified interferences with the Article 10 rights of the media. Problems can be avoided by effective dialogue between media professionals and public authorities. Often an agreement can be reached in difficult situations, under which the media volunteer to report in a way which meets their own obligations yet respects the concerns of the authorities. The first stage in reaching such agreement is for each side to explain its objectives and concerns to the other. If possible, agreements should be reached through joint forums established during the time of crisis, as well as on an *ad hoc* basis (paragraph 28).

The positive effect of free, effective and responsible media in preventing/resolving crises is recognised in paragraph 31. This urges governments and non-governmental donor institutions to prioritise the development and support of the media before, during and after conflict.