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Towards an effective framework of protection for the work of journalists and an end to impunity (Strasbourg 3 November 2014)

Positive Obligations and the role of interim measures in the area of media freedoms

Speaking notes

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To conceive of the Convention solely in terms of the prohibition its articles impose in various contexts on State action directed at individuals and organisations, including media professionals and their employers, is to overlook a raft of jurisprudential developments which have in many respects transformed the scope of the protection guaranteed by the Convention.

The Convention is no longer to be construed in terms of "don'ts". Specifically, and of relevance to the theme of today's Conference, Article 10 of the Convention cannot be confined to the simple, albeit fundamental, proposition that it only enjoins States not to interfere arbitrarily with the exercise of the right to freedom of expression.

This injunction on a State not to interfere with the exercise of journalistic rights and freedoms is of course of continuing and crucial relevance, as illustrated by the very many cases in which the Court has to adjudicate on whether the acts of State authorities in a given set of circumstances pass muster under the second paragraph of Article 10.

Whether, for example, a legal obligation on a journalist to disclose his or her sources or whether the decision of a domestic court finding a journalist or his employer liable at the close of civil or criminal

proceedings for things said or written, are Convention-compliant require the Strasbourg Court to inquire into:

- the existence of a lawful basis for the impugned measure and the presence of an underpinning legitimate aim for the adoption of that measure
- the proportionality of that measure in a given case before the Court

The Court's inquiry is back-lit by the need for the respondent State to provide relevant and sufficient reasons for the interference in question to a degree which is capable of establishing convincingly that the interference was justified in accordance with the State's own perception of the exigency of the situation which prompted recourse to the measure - in others words, the appeal to the doctrine of the margin of appreciation.

However, the Court had developed the scope of protection under Article 10 - and under various other provisions of the Convention - through the instrumentality of a progressive reading of the nature of the "don'ts" which initially shaped the relationship between public power and individuals and organisations. "Do's" are now a common feature of the case-law. Public authority is enjoined not only to refrain from encroaching on Convention rights and freedoms. In particular contexts public authority is required to take measures to protect those rights and freedoms and to act in a manner which secures the effective enjoyment of, say, the work of media professionals and their employers.

The positive obligations which devolve on States are perfectly in line with the terms of the very first Article of the Convention which commands States to secure to everyone within their jurisdiction the effective enjoyment of the rights and freedoms set out in the Convention. The construction of the doctrine of positive obligations through the case-law is also a reflection of the Court's wish to ensure,

within all necessary limits, that the Convention remains at all times relevant and capable of responding to new challenges to the level of protection envisaged by its authors.

Reading positive obligations into the negative obligations defined in the Convention enables the Court to address a range of risks and dangers which, from a purely literal analysis of a given Article, could be said to fall outside the Court's competence *ratione materiae/personae*, for example acts of violence committed by private individuals or groups against journalists or the disappearance of a pluralistic media landscape as a result of media concentration strategies pursued by private operators.

It must of course be accepted that positive obligations were inherent to the scope of certain articles of the Convention long before this expression began to be used with confidence in the case-law. It was always open to a media professional to require the authorities to demonstrate that they had provided for an effective domestic remedy enabling him or her to vindicate his claim that his Convention rights have been violated. Of relevance to today's discussions, the issue may be framed as follows: does a journalist have a meaningful opportunity at the domestic level to resist an order to disclose his sources of information or to contest with the benefit of procedural fair-trial guarantees the threat of civil or criminal sanctions because of what he has written or broadcast or to complain about the intimidatory acts of officials in response to publications or broadcasts which displease them?

That basic statement of a positive obligation finds expression in Articles 6 and 13 of the Convention. However, the range of positive obligations has been expanded and the questions which a respondent State may be required to answer when called upon to respond to an allegation that it has failed to secure the enjoyment of a Convention right have been considerably enlarged.

Articles 2 and 3 of the Convention have been a fertile source of case-law in this connection. Before turning to the specific issue of journalistic rights and freedoms, allow me to summarise the "do" factors which emerge from the case-law, drawing in particular on the cases of *Osman v. the United Kingdom*, and *Kılıç v. Turkey*. You will find many more authorities set out in the excellent compilation prepared for the Seminary by Sejal Parmar.

- The State must secure the right to life and the right to protection of one's physical integrity by putting in place effective criminal-law provisions to deter the commission of offences against individuals (read "journalists") backed up by law enforcement machinery for the prevention, suppression and breach of such provisions
- In certain well-defined circumstances the State is under a duty to take preventive operational measures to protect an individual (read "journalist") whose life is at risk from the criminal acts of a third party. For the Court such obligation will arise when "the authorities knew or ought to have known at the relevant time of a real and immediate risk to the life of an identified individual ("journalist") from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk."
- Where an individual (read "journalist") has died as a result of the use of lethal force by State Agents or where an individual ("journalist") had died in suspicious circumstances, irrespective of State involvement in the death, the State has a duty to conduct an effective, independent investigation capable both of elucidating the facts of the case and identifying and bringing the culprits to justice. This same obligation arises in respect of assaults and other forms of violence which, although not life-threatening, may be considered to amount to a form of ill-treatment within the meaning of Article 3 of the Convention.

These are complex principles, which can only be understood in their application to the specific facts of individual cases. The notion of what can be considered, for example, a Convention-compliant investigation must be seen in the light of the accumulated case-law under Articles 2 and 3 of the Convention. However, leaving aside the interpretation and application of these principles in concrete cases, it is plain that the Court's aim in teasing them out of the existing negative obligations was to ensure that the State has positive, procedural and operational duties to safeguard effectively the right to life and the right to physical and moral integrity and to avoid any appearance of official acquiescence in the commission or threat of crimes of violence against individuals.

The Court has transposed the above principles to the area of media freedom, thereby underscoring its firm attachment to the critical watchdog role played by independent media professionals and media organisations when it comes to securing the accountability of both public and private power for their acts and omissions and to promoting a plurality of different views and opinions.

To illustrate.

In the case of [Özgür Gündem v. Turkey](#), the applicants complained that the newspaper Özgür Gündem was forced to cease publication due to a campaign of attacks on journalists and others associated with it, and due to legal measures taken against the newspaper and its employees. The Court found a breach of Article 10 in relation to the attacks on the newspaper and its staff. The Court concluded that the authorities had failed to take effective steps to investigate and provide protection against acts of violence. They had failed to comply with their positive obligations to protect the newspaper in the exercise of its right to freedom of expression.

The case of *Gongadze v. Ukraine* was not pleaded under Article 10 of the Convention in terms of a failure to protect the rights and freedoms of a journalist found murdered. It was pleaded under Article 2, the allegation being that the authorities had failed to protect his life. The Court accepted that argument being persuaded that the authorities knew or ought to have known that the journalist's life was in danger but had failed to take the necessary steps to protect him. The Court also found on the facts that the authorities had failed to conduct an effective and independent investigation into the circumstances of his death.

In common with *Gongadze*, the case of *Dink v. Turkey*, involved the murder of a media professional by an extreme nationalist group. The Court found that the security forces could reasonably be considered to have been informed of the intense hostility towards the journalist, who was of Armenian origin. Two police departments and one gendarmerie department would have appeared to have been alerted to the likelihood of an attempt on his life and even of the identity of those planning the assassination. However, no measures were taken to avert a real and immediate threat to the journalist's life. The Court found a breach of Article 2 on account of the authorities' failure to discharge their positive obligations.

Constraints of time do not make it possible to explore further examples of the Court's case-law in this area. I would refer you to Sejal Parmar's very helpful review of relevant international and regional human law, which is to be found in your dossiers. Suffice it to say that the case-law is clear on the requirement on the part of the State to take steps to ensure that media professionals can perform their vital watchdog function without fear of reprisals, whether from officialdom or from private actors, simply because media professionals dare to offer a different perspective on a country's social, political and economic structure. That requirement is first and foremost to provide for a media-freedom sensitive framework which guarantees journalistic rights and freedoms and safeguards the

life and limb of the media professional in the exercise of his profession, bearing in mind the dangers which may accompany the dissemination of news, views and information in particular contexts.

Regrettably, the Court's jurisprudence in this area has been established in the wake of incidents in which journalists have been killed or injured or the viability of independent media enterprises has foundered as a result of hostile acts, be they State orchestrated or the product of private malevolence. Is it possible for a journalist whose physical integrity is at risk - whether from State agents or from private actors, with or without the State's tacit blessing, to petition the Court in order to require the State to take positive steps to avert the risk? Can a media enterprise invoke the assistance of the Court in order to avert an imminent and serious threat to its continuing viability as a result of the intimidation of its staff, the sudden withdrawal of a broadcasting frequency or the forced closure of its operations.

The Court is empowered under Rule 39 of its Rules of Court to indicate to a Government, at the request of an individual, that it should refrain from pursuing a course of action which exposes him to the risk of imminent and irreparable damage to his life and welfare, or to indicate to a Government that it take positive measures to prevent that risk from materialising. It falls to the individual requesting the grant of an interim measure to make out a plausible case that he is at risk of imminent and irreparable harm. The most common situation in which interim measures are sought and granted is that of expulsion or deportation of individuals to non-Contracting States where, it is alleged, they will be exposed to the risk of death or torture or others forms of ill-treatment on account of their ethnicity, religion, political views, or because they run the risk of being sentenced to death for the crime forming the subject matter of an extradition request.

The Court quite frequently receives requests for interim measures from journalists who have fled their countries on account of alleged persecution by the regime in power and who are facing removal

from a Contracting State to the Convention to their country of origin. Where the Court finds that a journalist has asserted on plausible grounds that his life or welfare would be at real risk if removed from the territory of the Contracting State, the Court may indicate to the State in question that it must not proceed with the removal until it has had an opportunity to consider further the reality of the risk in the light of the parties' observations. It may also require the Contracting State to seek assurances that the expulsion or the extradition of the individual will not expose him to, say, the imposition of the death penalty or ill-treatment in the receiving State.

If the request is not rejected the Court will initiate an adversarial procedure with a view to determining whether or not the risk is substantiated on the facts as alleged, having regard to the arguments and the materials which are submitted to it by the parties and, as appropriate, by intervening third parties - in particular, non-governmental organizations - as well as materials which it has obtained *proprio motu*, for example country specific reports on the repression of dissidence in the receiving country.

Contracting States are required to abide by the terms of an interim measure pending the Court's determination of the case. This is a conclusion which has emerged from the case-law, the rationale being that the Court should not be deprived of the opportunity to adjudicate on the merits of an applicant's complaint on account of his removal to a third country in defiance of the Court's injunction. The Convention enshrines the right of individual petition to the Court. That right assumes even greater importance when the subject matter of the petition concerns a threat of death or ill-treatment. Disrespect of an interim measure undermines the protection of the Convention's core rights, and undermines the authority of the Court and indeed the whole scheme of the Convention.

It is a matter of profound regret that certain Contracting States have on occasion chosen to disregard the interim measures which the Court has applied, with the result that they have been found to be in violation of the Convention.