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**Thematic debate on the “safety of journalists”**

**Discussion paper presented by the Secretary General**

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## **I. Introduction**

On 18 January 2012, the Deputies called on member states "to take all appropriate steps to ensure the protection of journalists, other media professionals and bloggers, both as regards preventive measures and effective investigation" and "tasked the CDMSI to examine possible initiatives [by] the Council of Europe to strengthen this protection."

A new Committee of Ministers thematic debate is now organised specifically on the safety of journalists. This is a matter that attracted considerable attention during the previous debate on freedom of the media. Indeed, the safety of journalists is an essential condition for freedom of the media and for people's enjoyment of the right to seek and receive information.

Threatening the safety of journalists because of their professional work endangers their ability to investigate and report on matters of public interest, in particular in so far as it encourages self-censorship. This, in turn, endangers the right of people to receive information and, ultimately, citizens' informed participation in democratic processes. Conversely, violence against journalists thrives where freedom of expression is absent.

This paper will address the following issues related to the safety of journalists bearing on freedom of expression and of the media:

- personal safety,
- freedom of movement (and related access to information),
- misuse of legislation (in particular on defamation) or administrative powers,
- protection of journalists' sources.

In addition, the effectiveness of means to guarantee the enjoyment of rights and freedoms, or seeking redress in case of alleged interference with the rights of journalists, will be addressed.

## II. Personal safety

UN agencies have reported “In recent years ... disquieting evidence of the scale and number of attacks against the physical safety of journalists and media workers”. The statistics “testify to the staggering number of journalists and media workers killed while performing their professional duties” and to the reported impunity “in nine out of ten cases” where “the perpetrators of these crimes are never prosecuted”.<sup>1</sup>

Europe is not spared by this problem.<sup>2</sup> Various institutions and bodies, in particular the OSCE Representative on Freedom of the Media and the Council of Europe Commissioner for Human Rights, have pointed to, sometimes very serious, attacks and threats against journalists’ safety. The European Court of Human Rights has found violations of the provisions of the European Convention on Human Rights (e.g. Article 2, right to life; Article 3, prohibition of torture; Article 5, right to liberty and security; Article 8, right to respect for private and family life; Article 10, freedom of expression) in cases where authorities were responsible for interferences with the safety and rights of journalists.<sup>3</sup>

The effective exercise of media freedom does not depend only on the state’s duty not to interfere, but may require measures of protection in relations or interactions not involving the state or its officials. Failure by the state in such cases may engage responsibility for its positive obligations (e.g. to protect or to investigate). However, positive obligations should not be interpreted as imposing disproportionate burdens on the authorities.

The European Court of Human Rights has held that the stigmatisation by authorities of journalists or media professionals can run contrary to a state’s obligation to create a favourable environment for participation in public debate and for the exercise of freedom of expression.

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<sup>1</sup> See “Final Draft – UN Plan of Action on the Safety of Journalists and the Issue of Impunity”.

<sup>2</sup> See December 2011 Research Report by the Registry of the Court on “Positive obligations on member States under Article 10 to protect journalists and prevent impunity”

<sup>3</sup> In a 2011 Issue Discussion Paper on “Protection of Journalists from Violence”, the Council of Europe Commissioner for Human Rights quotes the following “The Committee to Protect Journalists reports that since 1992 in the Council of Europe region more than one hundred journalists have been killed because of, or in the line of their work, and many, many more have been physically attacked or have received threats” see: <https://wcd.coe.int/ViewDoc.jsp?id=1899957>

The Committee of Ministers has adopted several texts underlining the importance of journalists' safety thereby calling upon the governments of member states to take effective measures to ensure their protection. This includes the 2007 Guidelines on protecting freedom of expression and information in times of crisis and a Declaration on the protection and promotion of investigative journalism, according to which member states should "assure to the maximum possible extent the safety of media professionals – both national and foreign" and encourage "safety training for media professionals".

Protection and training should, of course, also be provided by media organisations.

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

Restricting freedom of movement of journalists and media professionals may be tantamount to restricting access to information and related freedom of expression. As a consequence, the right of people to receive reliable and diverse information may be jeopardised.

In the abovementioned instruments, the Committee of Ministers has stated that "The need to guarantee 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". It has also underlined that "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."

Article 10 of the European Convention of Human Rights has been interpreted as extending its protection, not only to the freedom to publish, but also to journalistic research. This is an important, and sometimes dangerous, preceding stage for investigative journalism.<sup>4</sup>

More generally, public participation in democratic decision-making processes may require that public authorities supply information to journalists and the media, and thus to members of the public. Unless there are compelling reasons for withholding information, which stand the test of necessity in a democratic society, the rule should be one of disclosure.<sup>5</sup> In a democratic society, authorities can only act legitimately for and on behalf of the people and must be accountable to them.

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<sup>4</sup> Damann v. Switzerland (2006).

<sup>5</sup> Minimum standards are set out in the Council of Europe Convention on Access to Official Documents. Guidance can also be found in the 2002 Committee of Ministers Recommendation on access to official documents and the 1981 Recommendation on the access to information held by public authorities.

#### **IV. Misuse of legislation, in particular on defamation, and of administrative powers**

A worrying trend has been reported on the misuse of lawsuits against media professionals who acquire or publish information of public interest the disclosure of which the authorities try to prevent without a legitimate reason.<sup>6</sup>

Defamation laws have been misused to silence media seeking to disclose information of public interest or information that will help people take informed decisions when participating in democratic processes or when otherwise holding to account those in posts of political authority.

Deprivation of liberty, disproportionate pecuniary sanctions, prohibition to exercise the journalistic profession, seizure of professional material or search of premises can be misused in a variety of ways to intimidate media professionals, in particular investigative journalists. Similarly, unjustified surveillance of journalists, including the monitoring of their communications, can have an adverse effect on freedom of the media, all the more when such measures result from misuse of legal provisions.

Allegations have also on occasion been made concerning the misuse of licensing or other administrative powers or even false accusations of tax fraud and other illegal activities to force media companies out of business or as a means of exerting pressure on them to influence their editorial decisions.

#### **V. Protection of journalists' sources**

Both the European Court of Human Rights and the Committee of Ministers have underlined that the protection of journalists' sources of information constitutes a basic condition for journalistic work and freedom of information in a democratic society.<sup>7</sup> While the right of journalists not to disclose information identifying a source is not absolute, such disclosure should only be possible when justified by an overriding public interest.

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<sup>6</sup> See comments by the Council of Europe Steering Committee on the Media and New Communication Services (CDMC) on Parliamentary Assembly Recommendation 1792 (2007) "Fair trial issues in criminal cases concerning espionage or divulging state secrets"

<sup>7</sup> Committee of Ministers Recommendation on the right of journalists not to disclose their sources of information (2000).

Despite this, there are cases where authorities have undermined the protection of sources of journalists, by resorting to legal provisions or through unlawful surveillance, monitoring communications or even through legislation seeking to limit the protection of "whistle blowers".

Media and journalists' professional organisations have criticised recent examples where private companies have agreed to turn over to the police considerable amounts of journalistic material in an indiscriminate manner to the detriment of confidentiality. This can ultimately undermine the trust and discretion that potential sources expect from journalists.

Failing to preserve journalists' professional confidentiality by, for example, removing legal protection in respect of their premises, equipment, recordings, notes, communications and other professional material can place them at great risk. Such an outcome would also be undesirable if it were the result of trying to make up for law enforcement authorities' inability to investigate effectively through other means.

## **VI. Effective remedies in connection with the safety of journalists**

Generally accepted standards which apply *mutatis mutandis* to the investigation of complaints of violence against journalists, include systematically recording allegations or complaints in writing and ensuring that investigations are:

- thorough (taking all reasonable steps to gather, secure and process evidence, including evidence by witnesses and on-site forensics),
- comprehensive (not unduly circumscribed),
- prompt (not delayed unjustifiably), and
- expeditious (without undue interruption or slowing down).

It is not acceptable that the vast majority of complaints of violence against journalists (upwards of 90% according to some reports) remain unsolved. Investigations should be adequate for the establishment of facts and attribution of responsibility and, given the considerable public interest dimension, there should also be sufficient public scrutiny of their conduct and the results.

## **VII. Proposals for further action**

Existing standards are plentiful. However, there is still scope to render them more effective in practice. Increased efforts could be made to:

- develop more detailed guidance to member states on how to discharge positive obligations related to the safety of journalists (protection and prevention, as well as investigation and effective remedies), in consultation with judicial and law enforcement authorities,
- support and promote the work of those working on the protection of journalists, and develop technical assistance programmes on the safety of journalists tailored for law enforcement and judicial authorities, lawyers, media professionals and human rights institutions (ombudspersons),
- in this context, explore ways to adapt existing models of journalists' protection to the European context<sup>8</sup>, and to use information and communication technologies to harness protection;
- co-operate with UNESCO and other UN agencies involved in the implementation of the UN Plan of Action on the Safety of Journalists and the Issue of Impunity<sup>9</sup>,
- develop technical assistance and training programmes on the provision of official information to the media by information officers serving in government departments and agencies (including law enforcement authorities) in member States,
- promote ratifications / accession to the Council of Europe Convention on Access to Official Documents and to assist States parties to the Convention in its implementation,
- promote the decriminalisation of defamation, and provide assistance to member States in both the alignment and implementation of related legislation with Council of Europe standards,
- promote the dissemination and implementation of Council of Europe standards regarding the protection of journalists' sources.

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<sup>8</sup> In Colombia, 5000 people have benefited from the "programme for the protection of journalists and social communicators" since its creation in 2000. Mexico, a Council of Europe observer state, is considering a similar approach in order to address its own critical situation in respect of the safety of journalists.

<sup>9</sup> See point 2.12 of the UN Action Plan.