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COUR EUROPÉENNE DES DROITS DE L'HOMME

**DIVISION DE LA RECHERCHE  
RESEARCH DIVISION**

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*Internet: case-law of the European Court  
of Human Rights*



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## INTRODUCTION

At the request of the Council of Europe Task Force on Information Society and Internet Governance, the Registry's Research Division conducted a study on the Court's case-law in respect of issues relating to the Internet.

The aim was to provide a report for the Task Force for submission to the conference organised by the Federal Ministry for European and International Affairs of Austria and the Council of Europe on the theme "Our Internet – Our Rights, our Freedoms – Towards the Council of Europe strategy on Internet Governance 2012-2015" (Vienna, 24-25 November 2011).<sup>1</sup>

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1. Link to the Internet site of the Conference : <[www.coe.int/t/information/society/conf2011/](http://www.coe.int/t/information/society/conf2011/)>

## I. INTERNET GOVERNANCE – JURISDICTION ISSUES

The Research Division has been asked to explore the Court’s jurisprudence on jurisdictional issues in Internet-related cases. It should be noted at the outset that the term “*jurisdiction*” primarily means the power of a court to hear and decide a case or make a certain order. However, this term is also used to refer to the territorial limits within which the jurisdiction of a court may be exercised. In this regard, it is useful to bear in mind that jurisdiction is an aspect of a State’s sovereignty and for this reason, it is generally confined geographically.

It is further important to understand the sort of “jurisdictional issues” that arise in Internet-related cases. As noted above, jurisdiction has traditionally been based on territory. However, transactions or publications on the Internet generally span many borders. In other words, there is more often than not a cross-border element in Internet-related cases. That raises the question, *inter alia*, of the circumstances in which a court can exercise jurisdiction over a defendant located or domiciled in a country other than the country in which a complaint has been made about an alleged offence or civil wrong committed over the Internet.

That, however, is primarily a question to be answered by the *domestic courts* applying the relevant principles of private international law on jurisdiction. The Court is not directly concerned with this question. Indeed, this was confirmed in the recent case of *Preminyin v. Russia* (no. 44973/04, 10 February 2011). The applicants were two Russian nationals living in Russia. They were detained in Russia on suspicion of hacking into the online security system of an American bank, “*Green Point Bank*”, in 2001 and stealing its database of clients and extorting money in exchange for the promise not to publish that database on the Internet. The first applicant complained about being beaten while in pre-trial detention and the lack of effective review of his bail application. The case had been heard by the Russian courts, which had determined that they were competent to hear the case. There was no suggestion before the Court that the Russian courts were not an appropriate forum for examination of the case. The Court therefore simply examined the issues before it, namely the complaints about detention under Articles 3 and 5 of the Convention, without any further references to jurisdiction.

At this stage, it is important to remember that the Court will only exercise its own “*jurisdiction*” if it can be established that the alleged violation at issue is in some way attributable to one of the High Contracting parties to the Convention or if it can be established that the alleged violation took place within the jurisdiction of one of those States. If that is not the case, the complaint will be dismissed on *ratione personae* or *ratione loci* grounds. It is thus possible that the Court’s traditional case-law on *ratione loci* and *ratione personae* grounds of inadmissibility may be relevant to Internet-related cases in the future. In this regard, the Court’s decision in *Ben El Mahi v. Denmark* (no. 5853/06, ECHR 2006-XV) may be of particular relevance to future Internet-related cases. In *Ben El Mahi*, the Court found that there was no jurisdictional link between the applicants, who were a Moroccan national residing in Morocco and two Moroccan associations based in Morocco and the relevant Member State, Denmark. It could not be said that the applicants fell under the jurisdiction of Denmark on account of an extraterritorial act, which in the instant case would have been the publication of cartoons. Accordingly, the application was declared incompatible with the provisions of the Convention and, as such, inadmissible pursuant to Article 35 §§ 3 and 4 of the Convention.

Other than that, research reveals that there are very few Internet-related cases concerning “*jurisdictional issues*” at present. In particular, *Perrin v. the United Kingdom* (dec.) (no. 5446/03, ECHR 2005-XI) may be mentioned. The case concerned the applicant’s

conviction and sentence for publishing an obscene article on a website. The applicant was a French national living in the United Kingdom. The website was operated and controlled by a company based in the United States of America that complied with all the local laws and of which the applicant was a majority shareholder. The Court accepted the reasoning of the Court of Appeal, namely that, if the UK courts were only able to examine publication-related cases if the place of publication fell within the courts' jurisdiction that would encourage publishers to publish in countries in which prosecution was unlikely. The Court further found that as a resident in the UK, the applicant could not argue that the laws of the United Kingdom were not reasonably accessible to him. Moreover, he was carrying on a professional activity with his website and could therefore be reasonably expected to have proceeded with a high degree of caution when pursuing his occupation and to take legal advice. As regards the proportionality of the applicant's conviction, it is also interesting to note that the fact that the dissemination of the images in question may have been legal in other States, including non-Parties to the Convention such as the United States, did not mean, for the Court, that in proscribing such dissemination within its own territory and in prosecuting and convicting the applicant, the respondent State had exceeded the margin of appreciation afforded to it. The Court declared that the application was manifestly ill-founded within the meaning of Article 35 § 3 of the Convention.

## II. DATA-PROTECTION AND RETENTION ISSUES RELEVANT FOR THE INTERNET

### 1) *The scope of Article 8 and personal data*

According to the Council of Europe Convention of 1981 for the protection of individuals with regard to automatic processing of personal data "*personal data*" is defined as any information relating to an identified or identifiable individual.

The protection and retention of personal data clearly falls within the scope of private life as protected by Article 8 of the Convention. Article 8 encompasses a wide range of interests – namely private and family life, home and correspondence:

#### *Article 8 provides:*

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Indeed the Court has stated that the protection of personal data is of fundamental importance to a person's enjoyment of his right to respect for private and family life (*S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, § 41, 4 December 2008).

Private life includes the privacy of communications, which covers the security and privacy of mail, telephone, email and other forms of communication; and informational privacy, which presumably would include the privacy of access to the Internet.

The concept of private life moreover includes elements relating to a person's right to their image (*Sciacca v. Italy*, no. 50774/99, § 29, ECHR 2005-I). In other words, photographs or video-clips which contain a person's image will fall within the scope of Article 8. This is relevant for the storing of images on communal or social websites. The recording of a person's voice for further analysis also amounts to an interference with their right to respect for private life (see *P.G. and J.H. v. the United Kingdom*, no. 44787/98, §§ 59-60, ECHR 2001-IX).

The publication of material obtained in public places in a manner or degree beyond that normally foreseeable may also bring recorded data or material within the scope of Article 8 § 1 (see *Peck v. the United Kingdom*, no. 44647/98, §§ 60-63, ECHR 2003-I, concerning disclosure to the media for broadcast use of video footage of the applicant taken in a public place).

In *Uzun v. Germany* (no. 35623/05, 2 September 2010) the Court found that the monitoring of the applicant via GPS and the processing and use of the data obtained thereby amounted to an interference with his private life as protected by Article 8 § 1.

## 2) Basic principles in respect of data storage as set out in the Court's case-law

While the primary object of Article 8 is essentially to protect the individual against arbitrary interference by the public authorities, there may be *positive obligations* inherent in an effective respect for private or family life (see *Airey v. Ireland*, 9 October 1979, § 32, Series A no. 32).

These obligations may involve the adoption of measures by the State designed to secure respect for private life even in the sphere of relations of individuals between themselves, for example an Internet user and those who provide access to a particular website. In other words, there is a positive obligation on the State to ensure an effective deterrent against grave acts to a person's personal data sometimes by means of efficient criminal-law provisions (see *X and Y v. the Netherlands*, 26 March 1985, §§ 23-24 and 27, Series A no. 91; *August v. the United Kingdom* (dec.), no. 36505/02, 21 January 2003; and *M.C. v. Bulgaria*, no. 39272/98, § 150, ECHR 2003-XII). The most recent case of *K.U. v. Finland* (no. 2872/02, § 43, 2 December 2008), highlights this positive obligation in the context of an Internet related complaint.

As regards the Internet, a State could arguably be liable in respect of third parties who store data for individuals.

The compiling, storing, using and disclosing of personal information by the State, for example in respect of a police register, amounts to an interference with one's right to respect for private life as guaranteed by Article 8 § 1 of the Convention (*Leander v. Sweden*, 26 March 1987, § 48, Series A no. 116). The subsequent use of the stored information has no bearing on that finding (*Amann v. Switzerland* [GC], no. 27798/95, § 69, ECHR 2000-II). Such interference breaches Article 8 unless it is "*in accordance with the law*", pursues one or more of the legitimate aims referred to in paragraph 2 and, in addition, is "*necessary in a democratic society*" to achieve those aims. In the case of *Uzun* (cited above, § 77), the Court came to the conclusion that the applicant's surveillance via GPS, ordered by the Federal Public Prosecutor General in order to investigate several counts of attempted murder for which a terrorist movement had claimed responsibility and to prevent further bomb attacks, served the interests of national security and public safety, the prevention of crime and the protection of the rights of the victims. In the end the interference was proportionate to the legitimate aims pursued and thus "*necessary in a democratic society*" within the meaning of Article 8 § 2.

Where personal information is stored in the interests of national security, there should be adequate and effective guarantees against abuse by the State. Where such safeguards do exist,

the Court will not necessarily find a violation of Article 8. Telecommunications data is widely used by State authorities for surveillance purposes since it can be stored and accessed at hardly any cost.<sup>2</sup>

Where personal records relating to a person's childhood are kept by the State these undoubtedly fall within the scope of Article 8 (*Gaskin v. the United Kingdom*, 7 July 1989, § 37, Series A no. 160). The Court underlines that confidentiality of public records is of importance for receiving objective and reliable information, and that such confidentiality can also be necessary for the protection of third persons.

Similarly, information kept on a card index following secret surveillance measures also falls within the scope of Article 8 (*Amann*, cited above). The law in question, which permits the storing of such information, must indicate with sufficient clarity the scope and conditions of exercise of the authorities' discretionary power.

Professional or business activities are not excluded from the notion of private life (see *Niemietz v. Germany*, 16 December 1992, § 29, Series A no. 251-B; and *Halford v. the United Kingdom*, 25 June 1997, § 42, *Reports of Judgments and Decisions* 1997-III). When a business or profession is conducted from a person's private residence it will be covered by the concept of home (see for example, *Halford*, cited above). Therefore telephone calls from business premises are *prima facie* covered by the notions of private life and correspondence for the purposes of Article 8. It logically follows that e-mails sent from work should be similarly protected under Article 8, as should information derived from the monitoring of personal Internet usage (*Copland v. the United Kingdom*, no. 62617/00, § 30, ECHR 2007-IV).

### 3) Data retrieved following surveillance

Often data is retrieved following secret surveillance by the State (see *Rotaru v. Romania* [GC], no. 28341/95, ECHR 2000-V). As regards systems of secret surveillance, they must contain safeguards established by law which apply to the supervision of the relevant services' activities (see *Weber and Saravia v. Germany* (dec.), no. 54934/00, § 94, ECHR 2006-XI; and *Liberty and Others v. the United Kingdom*, no. 58243/00, § 62, 1 July 2008). This is because a system of secret surveillance designed to protect national security entails the risk of undermining or even destroying democracy on the ground of defending it (see *Klass and Others v. Germany*, 6 September 1978, §§ 49-50, Series A no. 28). The Court must therefore be satisfied that there are adequate and effective guarantees against abuse (see *Uzun*, cited above, § 63).

Questions of secret surveillance are all the more relevant in the context of the Internet, as the ongoing evolution of Internet technology has included the rapid development of equipment and techniques to monitor online communications. Telecommunications companies each year provide large quantities of communications data to government agencies in response to lawful requests.<sup>3</sup> The monitoring of Internet use and telephone calls by national authorities could well be the focus of further litigation brought before the European Court of Human Rights in the future.

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2. Telecommunications Data Retention and Human Rights: *The Compatibility of Blanket Traffic Data Retention with the ECHR*, Patrick Breyer, *European Law Journal*, Vol. 11, No. 3, May 2005, pp. 365-375.

3. *Communications Data Retention in an Evolving Internet*, by Ian Brown, *International Journal of Law and Information Technology*, Oxford University Press 2010.

4) *The taking and retention of fingerprint or cellular material and the storage of DNA profiles*

In *McVeigh, O'Neill and Evans v. the United Kingdom* (nos. 8022/77, 8025/77 and 8027/77, Commission's report of 18 March 1981, Decisions and Reports 25, p. 15, § 224), the Commission first examined the issue of the taking and retention of fingerprints as part of a series of investigative measures. It accepted that at least some of the measures disclosed an interference with the applicants' private life, while leaving open the question of whether the retention of fingerprints alone would amount to such interference.

In *Kinnunen v. Finland* (no. 24950/94, Commission decision of 15 May 1996), the Commission considered that fingerprints and photographs retained following the applicant's arrest did not constitute an interference with his private life as they did not contain any subjective appreciations which called for refutation. The Commission noted, however, that the data at issue had been destroyed nine years later at the applicant's request.

In *Van der Velden v. the Netherlands* (dec.) (no. 29514/05, ECHR 2006-XV (extracts)), the Court distinguished the situation from that of the Commission's decision in *Kinnunen v. Finland*. The Court considered that, given the use to which cellular material in particular could conceivably be put in the future, the systematic retention of that material went beyond the scope of neutral identifying features such as fingerprints, and was sufficiently intrusive to constitute an interference with the right to respect for private life set out in Article 8 § 1 of the Convention. However, in that particular case, the Court found the complaint manifestly ill-founded as the compilation and retention of the DNA profile served the legitimate aims of the prevention of crime and the protection of the rights and freedom of others and that in the circumstances the measure could be said to have been "*necessary in a democratic society*".

The Court followed the *Van der Velden* approach in *S. and Marper*, cited above. Bearing in mind the rapid pace of developments in the field of genetics and information technology, the Court could not discount the possibility that in the future private-life interests bound up with genetic information could be adversely affected in novel ways or in a manner not anticipated with precision today. Hence, the retention of both cellular samples and DNA profiles disclosed an interference with the applicants' right to respect for their private lives. In *S. and Marper* the Court accepted that the legitimate interest in the prevention of crime *could* outweigh the interests of the data subjects. However it appeared that England, Wales and Northern Ireland were the only jurisdictions within the Council of Europe to allow the indefinite retention of fingerprint and DNA material of any person of any age suspected of any recordable offence. The Court further considered that the retention of unconvicted persons' data might be especially harmful in the case of *minors* such as the first applicant, given their special situation and the importance of their development and integration in society. Finding a violation of Article 8, the Court held that the retention at issue constituted a disproportionate interference with the applicants' right to respect for their private life and could not be regarded as necessary in a democratic society.

Further cases on this issue have been communicated by the Court. In *Deceuninck v. France* (application no. 47447/08, communicated on 26 April 2010) the applicant complains that the order requiring DNA samples to be taken following his conviction for destruction of genetically modified beetroot plants was a disproportionate interference with his right to respect for private life. For further cases on the same issue, communicated on 8 February 2011 and 8 March 2011, respectively, see *Barreau and Others v. France* (no. 24697/09) and *Kedim v. France* (no. 19522/09).

### 5) Storage of other personal data on public databases

In *Bouchacourt v. France* (no. 5335/06, 17 December 2009) and *Gardel v. France* (no. 16428/05, 17 December 2009), the issue was whether inclusion on a national database of those who had committed sexual offences amounted to a violation of Article 8. This was in the context of the data being retained for 20-30 years depending on the seriousness of the offence committed. Finally, the Court came to the view that there was no violation of Article 8 in either case, given that a procedure existed for requesting the data to be removed from the database. The Court took into consideration the very serious nature of the offences committed and the public interest in the maintaining of such databases.

In *Dalea v. France* (dec.) (no. 964/07, 2 February 2010), the applicant complained that retention of data on him in the Schengen information system had the effect that he was not allowed to travel for personal or professional reasons within the Schengen area (he was refused the relevant visas). His application was declared inadmissible; under Article 8 the Court reasoned *inter alia* that he had had the opportunity of challenging the proportionality of this measure before various domestic bodies.

In *M.M. v. the United Kingdom* (application no. 24029/07, communicated on 6 October 2010), the applicant complains about the retention and disclosure of a police caution given for child abduction which was not removed from her police records. In *J.R. v. the United Kingdom* (application no. 27910/09, communicated on 7 October 2010), the applicant complains that although he was found not guilty in the context of previous criminal proceedings, he continues to be punished by the retention and disclosure of police data on his enhanced criminal record certificate.

Retention of data on national and European databases is an issue which arguably will arise more frequently in the future before the European Court of Human Rights, given the proliferation of such databases; at the European level one could cite SIS (the Schengen Information System), the CIS (Customs Information System), and VIS (Visa Information System). This is coupled with an increasing desire to share information and co-operate, together with increased concerns over security (following major terrorist attacks) and perceived immigration problems. According to the European Data Protection Supervisor “*the last decade also witnessed an increase in international police and judicial activities to fight terrorism and other forms of international organised crime, supported by an enormous exchange of information for law enforcement purposes*”.<sup>4</sup>

The most recent communicated cases show that the European Court of Human Rights is being faced with new concepts such as that of data portability and the right to be forgotten,<sup>5</sup> in other words, the right for the data subject to object to the further processing of his/her personal data, and an obligation for the data controller to delete information as soon as it is no longer necessary for the purpose of the processing.

### 6) Data protection and retention with specific reference in the Internet

In *Copland*, cited above, the issue of monitoring of telephone, e-mail, and Internet usage was discussed under Article 8. In this case, the Court found that it was irrelevant that the data held by the college where the applicant worked was not disclosed or used against her in disciplinary or other proceedings. Just storing the data amounted to an interference with private life. The Court would not exclude that the monitoring of an employee’s use of a telephone, e-mail or Internet at the place of work might be considered “*necessary in a*

4. Opinion of the Data Protection Supervisor, 14 January 2011.

[http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2011/1-01-14\\_Personal\\_Data\\_Protection\\_EN.pdf](http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2011/1-01-14_Personal_Data_Protection_EN.pdf).

5. See above.

*democratic society*” in certain situations in pursuit of a legitimate aim. However, in the instant case there was no domestic law regulating the monitoring at the relevant time.

In *K.U. v. Finland*, cited above, the Court commented that although freedom of expression and confidentiality of communications were primary considerations and users of telecommunications and Internet services must have a guarantee that their own privacy and freedom of expression would be respected, such guarantee *could not* be absolute and had to yield on occasion to other legitimate imperatives, such as the prevention of disorder or crime or the protection of the rights and freedoms of others.

### III. INTERNET AND FREEDOM OF EXPRESSION<sup>6</sup>

Freedom of expression is guaranteed by Article 10 of the Convention in the following terms:

“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.”

Internet publications fall within the scope of Article 10 and its general principles, but the particular form of that medium has led the Strasbourg Court to rule on certain particular restrictions that have been imposed on freedom of expression on the Internet.

#### 1) Court’s general principles concerning freedom of expression apply to Internet publications

Freedom of expression, as protected by Article 10 § 1 constitutes an essential basis of a democratic society (see, for example, *Handyside v. the United Kingdom*, 7 December 1976, Series A no. 24). Limitations on that freedom foreseen in Article 10 § 2 are interpreted strictly. Interference by States in the exercise of that freedom is possible, provided it is “*necessary in a democratic society*”, that is to say, according to the Court’s case-law, it must correspond to a “*pressing social need*”, be proportionate to the legitimate aim pursued within the meaning of the second paragraph of Article 10, and justified by judicial decisions that give relevant and sufficient reasoning. Whilst the national authorities have a certain margin of appreciation, it is not unlimited as it goes hand in hand with the Court’s European supervision (*Aleksey Ovchinnikov v. Russia*, no. 24061/04, § 51, 16 December 2010).

In the judgment *Editorial Board of Pravoye Delo and Shtekel v. Ukraine*, (no. 33014/05, 5 May 2011), the Court, for the first time, acknowledged that Article 10 of the Convention had to be interpreted as imposing on States a positive obligation to create an appropriate regulatory framework to ensure effective protection of journalists’ freedom of expression on the Internet. In that case the applicants had been ordered to pay damages for republishing an

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6. Based on information available at 21 March 2011.

anonymous text, which was objectively defamatory, that they had downloaded from the Internet (accompanying it with an editorial indicating the source and distancing themselves from the text). They had also been ordered to publish a retraction and an apology – even though the latter was not provided for by law.

Examining the case under Article 10 of the Convention, the Court found that the interference complained of had not been “*prescribed by law*”, as required by the second paragraph of that Article, because at the time, in Ukrainian law, there had been no statutory protection for journalists republishing content from the Internet. In addition, the domestic courts had refused to transpose to that situation the provisions that protected the print media. One can sense that the reasoning followed by the Court will be particularly important for the protection of the freedom of expression of journalists on the Internet.

The Court has already had occasion to indicate that Article 10 § 2 leaves little room for restrictions on freedom of expression in political speech or matters of public interest. Whilst an individual taking part in a public debate on a matter of general concern is required not to overstep certain limits as regards – in particular – respect for the rights of others, he or she is allowed to have recourse to a degree of exaggeration or even provocation, or in other words to make somewhat immoderate statements (*Willem v. France*, no. 10883/05, § 33, 16 July 2009).

In the case of *Sürek v. Turkey (no. 1)* [GC] (no. 26682/95, § 62, ECHR 1999-IV), the Court held with respect to political speech that:

...the limits of permissible criticism are wider with regard to the government than in relation to a private citizen or even a politician. In a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion. Moreover, the dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries. Nevertheless, it certainly remains open to the competent State authorities to adopt, in their capacity as guarantors of public order, measures, even of a criminal-law nature, intended to react appropriately and without excess to such remarks... Finally, where such remarks incite to violence [*sic*] against an individual or a public official or a sector of the population, the State authorities enjoy a wider margin of appreciation when examining the need for an interference with freedom of expression.

Indeed, hate speech does not benefit from the protection of Article 10 of the Convention (*Gündüz v. Turkey*, no. 35071/97, § 41, ECHR 2003-XI), and, under Article 17, speech that is incompatible with the values proclaimed and guaranteed by the Convention do not benefit from the protection of Article 10 (see the contribution on States’ positive obligations).

For the press, which has a significant presence on the Internet, freedom to impart and receive information, and the guarantees afforded to it are of particular importance. It has a duty to impart information and ideas on matters of public interest (see *Observer and Guardian v. the United Kingdom*, 26 November 1991, Series A no. 216). That freedom will be protected all the more if it contributes to the discussion of issues that have a legitimate public interest (*Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, ECHR 1999-III). Any measure limiting access to information that the public is entitled to receive must therefore be justified by particularly compelling reasons (see *Timpul Info-Magazin and Anghel v. Moldova*, no. 42864/05, 27 November 2007). The national authorities must thus be careful to respect the duty of journalists to disseminate information on questions of general interest, even if they have recourse to a degree of exaggeration or provocation. However, the protection of journalists is subject to the proviso that they act in good faith and provide reliable and precise information in accordance with responsible journalism (*Stoll v. Switzerland* [GC], no. 69698/01, § 104, ECHR 2007-V).

The Court has applied these general principles to cases concerning *on-line publication*: “*In light of its accessibility and its capacity to store and communicate vast amounts of*

*information, the Internet plays an important role in enhancing the public's access to news and facilitating the dissemination of information generally. The maintenance of Internet archives is a critical aspect of this role and the Court therefore considers that such archives fall within the ambit of the protection afforded by Article 10*". (see *Times Newspapers Ltd v. the United Kingdom* (nos. 1 and 2), nos. 3002/03 and 23676/03, § 27, 10 March 2009).

As regards *criticism or satire*, freedom of expression, subject to Article 10 § 2, also covers "information" or "ideas" that offend, shock or disturb the State or any section of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society" (*Perrin*, cited above). Journalistic freedom also includes possible recourse to a degree of exaggeration or even provocation. However, it is important to distinguish between criticism and insult.

Article 10, however, does not guarantee unlimited freedom of expression, especially when information published by *the press* is likely to have serious repercussions on the reputation and rights of individuals (defamation). But the national authorities must give due reasons for their decisions (*Fatullayev v. Azerbaijan*, no. 40984/07, § 100, 22 April 2010), to show the existence of a "pressing social need".

To justify a judgment finding that someone has committed defamation on the Internet, domestic courts must give relevant and sufficient reasons that the Court will have to verify.

As to sentencing, the Court finds that a prison sentence for press-related offences will only exceptionally be compatible with journalists' freedom of expression, especially in cases of serious breaches of fundamental rights, for example in cases of hate speech or incitement to violence. In addition, the Council of Europe has called upon Member States that still provide for prison sentences for defamation to abolish that sanction without further delay.<sup>7</sup>

The fear of a prison sentence will have a "chilling effect" on the exercise of the freedom of the press (*Fatullayev*, cited above, §§ 100-103).

On the other hand, the Court has indicated in the case of *Times Newspapers Ltd*, cited above,

46. ... the introduction of limitation periods for libel actions is intended to ensure that those who are defamed move quickly to protect their reputations in order that newspapers sued for libel are able to defend claims unhindered by the passage of time and the loss of notes and fading of memories that such passage of time inevitably entails. In determining the length of any limitation period, the protection of the right to freedom of expression enjoyed by the press should be balanced against the rights of individuals to protect their reputations and, where necessary, to have access to a court in order to do so. It is, in principle, for contracting States, in the exercise of their margin of appreciation, to set a limitation period which is appropriate and to provide for any cases in which an exception to the prescribed limitation period may be permitted. ...

Accordingly, libel proceedings brought against a newspaper after a significant lapse of time may, in the absence of exceptional circumstances, give rise to a disproportionate interference with press freedom.

In non-press cases, a prison sentence may sometimes be justified in the Internet context: "given that the applicant [who participated in the publication of an obscene website by a company of which he was the majority shareholder] stood to gain financially by putting obscene photographs on his preview page, it was reasonable for the domestic authorities to consider that a purely financial penalty would not have constituted sufficient punishment or deterrent." (*Perrin*, cited above).

Consequently, "... effective deterrence against grave acts, where fundamental values and essential aspects of private life are at stake, requires efficient criminal-law provisions" (*K.U.*

7. [Resolution 1577 \(2007\)](#) of the Parliamentary Assembly, *Towards decriminalisation of defamation*, to which the Strasbourg Court has referred on a number of occasions.

*v. Finland*, cited above, § 43 – case of a minor who had been made a target for paedophiles on the Internet).

Once private or personal information has been published on the Internet, such as a person's identity and name, the need to protect its confidentiality can no longer constitute an overriding requirement. The information is to a large extent no longer confidential in practice (*Editions Plon v. France*, no. 58148/00, § 53, ECHR 2004-IV). However, it is the protection of private life and reputation that comes into play and must be guaranteed (*Aleksey Ovchinnikov*, cited above, §§ 49-50).

The amplifying effect of the Internet has led the Court to establish a specific balance between the protection of freedom of expression and respect for other rights or requirements. The rights of *minors* or *youngsters* must be protected in all circumstances, in view of their physical and mental vulnerability, and especially as it is easy for them to access information that is freely available on the Internet or to become the target of sexual abuse by paedophiles on the Internet.

2) Interpretation of the Convention “in the light of present-day conditions” must take into account the specific nature of the Internet as a “modern means of imparting information”

Principles

The impact of information is multiplied when it can be found on the Internet, or even when it is displayed on a medium in a public place with a reference to the website address. Everyone, including minors, will be able to access the site in question.

These two elements strengthen the State's interest in taking measures to restrict the right to impart information. However, the restriction must remain proportionate, pursuant to the general principles of interpretation of Article 10 of the Convention. The restriction will be all the more justified when it does not prevent the expression of beliefs by other means of communication (*Mouvement Raëlien Suisse v. Switzerland*, no. 16354/06, §§ 54-58, 13 January 2011, referred to the Grand Chamber).

Limits

However, the Convention does not impose on the media a statutory obligation to give advance warning to individuals of their intention to publish reports concerning them, so that they can prevent the publication by seeking an injunction. That is the Court's conclusion in its judgment in *Mosley v. the United Kingdom*, no. 48009/08, 10 May 2011. A newspaper had published on its website images and video revealing in detail the sexual activities of a public figure. The complainant had not been able to prevent publication, although the breach of his private life was acknowledged and compensated for. In two days the video had been viewed over 1.4 million times and the on-line version of the article had received more than 400,000 hits.

3) Restrictions that might prove necessary in the Internet context (Article 10 § 2)

Principles

It is necessary to reconcile the various interests to be protected within the meaning of Article 10 § 2. Protection must be guaranteed for a person's reputation and confidential information or information of a private nature that any individual can legitimately expect not to see published without his or her consent.

The Court has held as follows in *K.U. v. Finland* and *Perrin*, both cited above:

Although freedom of expression and confidentiality of communications are primary considerations and users of telecommunications and Internet services must have a guarantee that their own privacy and freedom of expression will be respected, such guarantee cannot be absolute and must yield on occasion to other legitimate imperatives, such as the prevention of disorder or crime or the protection of the rights and freedoms of others. (*K.U. v. Finland*)

There is a clear difference between what is necessary to preserve the confidentiality of secret information, which is compromised after the very first publication of the information and what is necessary to protect morals, where harm can be caused at any time at which a person is confronted with the material.” (*Perrin v. the United Kingdom* (dec.)).

For the protection of morals, in view of the relative nature of moral concepts in the European legal area, the Court affords the States a certain margin of appreciation (*Akdaş v. Turkey*, no. 41056/04, § 29, 16 February 2010).

As regards the *protection of minors*, the Court has explained that an individual of a young age is vulnerable. This entails various consequences when it comes to the Internet:

An advertisement of a sexual nature on an Internet dating site concerning a 12 year old entails physical and moral risks and calls for protection. This may require States to adopt measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.

As regards the danger of child pornography on the Internet, the State must provide a framework allowing protection of the various interests. It is not justified to maintain an overriding requirement of confidentiality if this prevents an effective investigation, in a case where an Internet service should have been obliged to disclose the identity of a person who had placed a sexual advertisement concerning a minor (*K.U. v. Finland*, cited above, §§ 41-50).

The fact of a person being a minor may restrict freedom of the press. Where an offence has been committed by a minor against whom criminal proceedings cannot be brought,<sup>8</sup> a journalist’s right to impart information on a serious criminal offence – normally afforded to journalists so that they can inform the public about criminal proceedings – must yield to the minor’s right to the effective protection of his private life (*Aleksey Ovchinnikov*, cited above, § 51 – reporting of the identity of minors involved in a sexual incident).

### Examples

A criminal conviction for the publication of a free preview web-page (not containing any age checks), freely accessible to all users, showing seriously obscene pictures and likely to be found by young people, was justified by the need to protect morals and the rights of others (*Perrin*, cited above).

The repeated indication by the press of the identity of a minor involved in a violent incident is harmful for his moral and psychological development and his private life. This may justify a civil judgment against a journalist, following an action for defamation, even if the personal information was already in the public domain because it was on the Internet (*Aleksey Ovchinnikov*, cited above, § 52). A journalist was found responsible for defamation in civil proceedings opened against him on account of an article he had written on the subject of a child subjected to sexual abuse by other children during a summer camp, mentioning the identity of the offenders’ parents.

A ban imposed on the display of a poster on the public highway showing the website address of an association whose members were accused of sexual activities with minors and of promoting “*geniocracy*”, proposing cloning-related services and announcing the birth of

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8. Where the minor has not reached the statutory age of criminal responsibility.

cloned children, was considered proportionate and necessary to protect health and morals and to prevent crime (*Mouvement raelien suisse*, cited above, § 57).

#### 4) *Press publications on the Internet: reinforcement of journalists' "duties and responsibilities"*

##### Principles

The Court has stated in the case of *Stoll*, cited above, as follows:

104. (...) In a world in which the individual is confronted with vast quantities of information circulated via traditional and electronic media and involving an ever-growing number of players, monitoring compliance with journalistic ethics takes on added importance.

The duty of the press to observe the principles of responsible journalism by verifying the accuracy of the published information (good faith, ethics, reliable information) is even more strict as regards information concerning past events in respect of which there is no urgency – Internet archives constituting a major source for education and historical research – than news about current affairs, which is by definition perishable (*Times Newspapers Ltd*, cited above).

Freedom of the press ends where the intention is simply to satisfy the curiosity of certain readers at the expense of the right to respect for private and family life. Consequently, information already published on the Internet – and thus in the public domain – does not give the press an absolute right to reproduce it.

The press must not air details of an individual's private or family life which, although already on the Internet, do not come within the scope of any public or political debate on a matter of general importance.

A public figure must not be exposed to public censure on account of cases concerning a member of his family, even if personal data is accessible on the Internet. The identity of a minor involved in a violent incident, disclosed on the Internet, must not be aired further by the press (*Aleksey Ovchinnikov*, cited above, §§ 50-52).

In the case of *Times Newspapers Ltd*, cited above, § 47, the Court considers that:

(...) the requirement to publish an appropriate qualification to an article contained in an Internet archive, where it has been brought to the notice of a newspaper that a libel action has been initiated in respect of that same article published in the written press, constitutes a disproportionate interference with the right to freedom of expression.

The specific responsibilities of journalists in the exercise of their freedom of expression also apply when they publish information on the Internet in their own name, including outside their employer's website – for example on a public Internet forum (*Fatullayev*, cited above, § 94).

##### Examples

In a case concerning sexual abuse of a child, a civil judgment for defamation following the publication in a local newspaper of the identity of young offenders (minors), already appearing on the Internet, was found to be necessary for the protection of reputation: lack of contribution to a general society debate and damages of a non-excessive amount.

Even where a public figure is concerned, the public has no legitimate interest in knowing about a person's family affairs that are unrelated to his official function (*Aleksey Ovchinnikov*, cited above, §§ 51-57).

The national decision has to explain convincingly how the complainants have been the victims of defamation. Failing that, the judgment is unjustified, even if some of the remarks may have lacked a sufficient factual basis (*Fatullayev*, cited above, § 100).

5) Higher level of protection of freedom of expression in the area of political, militant and polemical expression on the Internet

Principles

Internet is subject to scrutiny and protection equivalent to those of other means of communication as regards respect for free contribution to political debate by an *elected representative of the people*. In terms of sanctions, restraint is called for in the use of criminal proceedings, especially if there are other means of responding to attacks and unjustified criticism by opponents (see *Féret v. Belgium*, no. 15615/07, § 80, 16 July 2009). The reprehensible nature of a message is aggravated by its publication on line.

Extent of admissible political criticism

In matters of political and militant expression within a public-interest debate, Article 10 requires a high level of protection of the right to freedom of expression on the Internet, as for other means of communication. That freedom thus enables an elected representative, in a context of political opposition, to use virulent critical remarks about political leaders concerning a matter of general interest (debate between an association and a municipal council about urban planning) and any written or verbal exaggeration concerning that subject can be tolerated (see *Renaud v. France*, no. 13290/07, § 38, 25 February 2010 – the criminal conviction of a webmaster for publicly insulting a mayor, on account of remarks published on the website of an association chaired by the webmaster, was regarded as excessive).

Limits to admissible criticism

Freedom of expression, whilst it is particularly precious in a democracy, does not allow speech advocating racial discrimination and hatred, regardless of the medium used. Slogans published on a political party's leaflets or website during an election campaign come under the same scrutiny in the light of Article 10 § 2. The conviction of a website owner – also a political leader – who had published xenophobic remarks met a pressing social need to protect the rights of the immigrant community (see *Féret*, cited above).

The incitement by an elected representative to commit an act of discrimination, reiterated on the municipality's website, does not participate in the free discussion of a subject of general interest. The discriminatory – and therefore reprehensible – nature of a political message is exacerbated by its publication on the Internet (see *Willem*, cited above, §§ 36-38).

6) A case on the subject currently pending before the European Court of Human Rights

*Delfi AS v. Estonia* (application no. 64569/09, communicated on 11 February 2011): a judgment was given against the operator of an Internet news portal for a defamatory comment posted by a reader using a pseudonym below an article. A disclaimer on the site indicated that such remarks did not reflect the views of the applicant company and that it was not liable for the posted comments, which were often anonymous. Comments were published automatically without systematic moderation. There was a system for deleting vulgar messages and the possibility of deleting comments at the readers' request or if there was a defamation complaint. The applicant company complains that it was found liable for comments by a third party containing personal threats and aggressive language – comments that it withdrew from the site on the very day of the request by the person concerned (Article 10).

## IV. INTERNET AND INTELLECTUAL PROPERTY<sup>9</sup>

### A. Presentation

The aim of intellectual property law is to protect intellectual works, regardless of their form. The Convention of 14 July 1967 creating the World Intellectual Property Organisation enumerates the rights covered by the notion of intellectual property: literary and artistic works, performances, inventions, scientific discoveries, industrial designs, trade marks, service marks, commercial names, etc. Not only are the ideas protected, but also the actual form in which they are conveyed.

The authors of such works have:

- first, a moral right, meaning that the author alone is entitled to communicate the work; a third party must obtain authorisation to use or reproduce it, etc.
- second, an economic right enabling him or her to profit from the work (by performance, reproduction, etc.).

In the area of information technology, software is an example of intellectual property, as is any work (articles, images, sounds, etc.) created by a computer. An item distributed via the Internet may also be, intrinsically, subject to protection (e.g. a book).

The case-law of the European Court of Human Rights in the area of intellectual property and the Internet is relatively scant. It is nevertheless possible to make a number of observations.

### B. Intellectual property falls under Article 1 of Protocol No. 1 to the Convention

#### 1) Property rights

As regards property rights, that is to say title to the physical medium of the right in question, the Court has recognised that Article 1 of Protocol No. 1 applies to:

#### Patents

- inadmissibility decision in *Smith Kline and French Laboratories Ltd. v. the Netherlands* (dec.) (no. 12633/87, 4 October 1990): the control of the use of property had struck a fair balance between the interests of the applicant company and the general interest, such that the application was regarded as manifestly ill-founded;
- decision in *Lenzing AG v. the United Kingdom* (dec.) (no. 38817/97, 9 September 1998).

#### Marks

In its Grand Chamber judgment in *Anheuser-Busch Inc. v. Portugal* ([GC], no. 73049/01, 11 January 2007, ECHR 2007-I), the Court indicated that Article 1 of Protocol No. 1 applied to intellectual property as such (see also the recapitulation of its case-law on the issue).

#### Application for registration of a trade mark

The owner of a set of proprietary rights – linked to an application for the registration of a trade mark – that were recognised under domestic law, even though they could be revoked under certain conditions, was protected by Article 1 of Protocol No. 1 (protection of property – *Anheuser-Busch Inc.*, cited above).

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9. Information up to date until 17 January 2011.

A licence for Internet access provision

This constitutes a “*possession*”: *Megadat.com SRL v. Moldova* (no. 21151/04, § 63, 8 April 2008).

In this case concerning a company that had been the biggest *Internet service provider* in Moldova, the applicant company complained about the *invalidation of its telecommunications licences* on the ground that it had not informed the competent supervisory authority of a change of address. It further argued that it had been the only one out of 91 companies to have been penalised by such a harsh sanction. As a result the company had had to discontinue its activity. The Court noted that the examination carried out by the Moldovan courts appeared to have been very formalistic. No balancing exercise had been carried out between the general issue at stake and the sanction applied to the applicant company. The Court thus found that the proceedings had been arbitrary and that a disproportionately harsh measure had been applied to the company. In addition, in view of the discriminatory treatment sustained by the company, the Court concluded that the authorities had not followed any consistent policy considerations when invalidating the licences of Megadat.com SRL. Consequently, there had been a violation of Article 1 of Protocol No. 1.

The exclusive right to use and dispose of registered Internet domain names

This constitutes a “*possession*” (*Paeffgen GmbH v. Germany* (dec.), nos. 25379/04, 21688/05, 21722/05 et 21770/05, 18 September 2007).

The Court ruled in this case on the registration and use of domain names and the potential interference with *third-party rights*. A judicial order prohibiting the use and requiring the cancellation of domain names registered in the applicant’s name, but interfering with the rights of third parties, served to further the legitimate general interest of maintaining a functioning system of protection for trademarks and/or names. The national authorities had a wide margin of appreciation. However, their decisions had to strike a fair balance between the protection due to the holder of an exclusive right to use domain names and the requirements of the general interest. The holder of such a “*possession*” should not have to bear an individual and excessive burden.

2) Moral rights

As regards moral rights, the case-law only partially covers this component of intellectual property law.

(a) **Article 1 of Protocol No. 1**

It has thus found that the *right to publish the translation of a novel* falls within the scope of Article 1 of Protocol No. 1. Moreover, the deprivation of that possession can be justified only in the public interest, subject to the conditions provided for by law, and in proportion to the aim pursued. Even though the State has a wide margin of appreciation, this cannot justify the deprivation of a possession that has been lawfully acquired (violation) (*SC Editura Orizonturi SRL v. Romania*, no. 15872/03, 13 May 2008).

In *A.D. v. the Netherlands* (dec.) (no. 21962/93, 11 January 1994), the fact that the public authorities, in a vice case, had intercepted *correspondence addressed to a third party* did not disclose any appearance of interference with the applicant’s intellectual property rights under Article 1 of Protocol No. 1; the application was thus manifestly inadmissible.

(b) **Other provisions**

Under *Article 10 of the Convention*, a publishing company disputed a ban on the distribution of a book. The applicant challenged the argument that partial censorship would infringe its author's right under the Code of Intellectual Property not to have his work distorted. The Court found that in view of the time that had elapsed since the events leading to the dispute, the maintaining of a ban on an unlawful disclosure of facts no longer met a pressing social need and was thus disproportionate (*Editions Plon*, cited above).

Those who promote works also have "*duties and responsibilities*", particularly in terms of protecting morals, depending on the situation and medium used. However, acknowledgment of the cultural, historical and religious particularities of the Council of Europe's member States could not go so far as to prevent public access in a particular language, in this instance Turkish, to a work that belonged to what the Court referred to as the "*European literary heritage*" (*Akdaş*, cited above).

The local and national publication of images by a third party showing an individual attempting to commit suicide, without his knowledge or consent, revealed a lack of sufficient safeguards to prevent disclosure inconsistent with the guarantees of respect for private life (see *Peck*, cited above – a violation of Articles 8 and 13 of the Convention).

The State must provide the legal framework for reconciling the various claims which compete for protection (*K.U. v. Finland*, cited above).

### **C. Pending cases**

Two pending cases (*Yildirim v. Turkey*, no. 3111/10; and *Akdeniz v. Turkey*, no. 20877/10), which have just been communicated, concern the right of access to certain websites. The applicants raise their complaints under Article 10 of the Convention; the issue of authors' rights is incidentally involved.

In the first case, a ban had the effect of preventing all access to the applicant's own website. In the second case, access to certain websites was prohibited on the ground that the sites in question disseminated musical works without respecting the rights of their authors; the applicant complains that the impugned measure rendered inaccessible the entire content of his sites, which provided access to other web pages.

### **D. Conclusion**

From this overview of the case-law in the area of intellectual property, it can be seen that, notwithstanding the importance of Internet use today, disputes related to it are few in number.

As regards, more specifically, those cases in which rights other than that of Article 1 of Protocol No. 1 were at stake, it is noteworthy that the Court's approach does not differ from that which it usually adopts; it examines and reconciles the various rights and assesses the necessity and proportionality of interference with the exercise of a particular right.

## **V. ACCESS TO INFORMATION AND THE INTERNET UNDER ARTICLE 10 OF THE CONVENTION**

### **1) Applicability of Article 10**

It is clear from the wording of Article 10 of the Convention that its scope includes the right to receive and impart information. In addition to the substance of information, Article 10 also applies to the various forms and means in which it is transmitted and received, since any

restriction imposed on the means necessarily interferes with the right to receive and impart information (See, for example, *Autronic AG v. Switzerland*, 22 May 1990, § 47, Series A no. 178; *De Haes and Gijssels v. Belgium*, 24 February 1997, § 48, *Reports of Judgments and Decisions* 1997-I; *News Verlags GmbH & Co.KG v. Austria*, no. 31457/96, § 39, ECHR 2000-I.). Certain enterprises essentially concerned with the means of transmission are expressly mentioned in the last sentence of its first paragraph. As a new and powerful information tool, the Internet falls undoubtedly within the scope of Article 10. Indeed, in view of its accessibility and its capacity to store and communicate vast amounts of information, the Court has recognised the important role played by the Internet in enhancing the public's access to news and facilitating the dissemination of information generally (*Times Newspapers Ltd*, cited above).

## 2) State obligations

Since Article 10 expressly imposes on the State a negative duty not to interfere with the freedom to receive and impart information, the Court has been reluctant to recognise that this provision guarantees a general right of access to information, including administrative data and documents (see *Loiseau v. France* (dec.), no. 46809/99, ECHR 2003-XII (extracts)). It has consistently held that the freedom to receive information prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart on him and that this freedom cannot be construed as imposing on a State a positive obligation to disseminate information of its own motion (*Roche v. the United Kingdom* [GC], no. 32555/96, § 172, ECHR 2005-X, with further references). The Government's primary duty is thus not to interfere with communication of information between individuals, be they legal or natural persons.

As Article 10 rights are enshrined "*regardless of frontiers*", States may only restrict information received from abroad within the confines of the justifications set out in Article 10 § 2 (*Cox v. Turkey*, no. 2933/03, § 31, 20 May 2010).

Complaints concerning a denial of access to information which is of importance for the applicant's personal situation have been generally examined under Article 8 of the Convention which guarantees the right to respect for private and family life. In a number of cases, the Court found that the authorities had a positive obligation to disclose to the applicant the relevant data. For example, this was the case where applicants sought access to information about risks to one's health and well-being resulting from environmental pollution (*Guerra and Others v. Italy*, 19 February 1998, § 60, *Reports of Judgments and Decisions* 1998-I), or information which would permit them to assess any risk resulting from their participation in nuclear tests (*McGinley and Egan v. the United Kingdom*, 9 June 1998, § 101, *Reports of Judgments and Decisions* 1998-III), or tests involving exposure to toxic chemicals (*Roche*, cited above). The Court held, in particular, that a positive obligation arose to provide an "*effective and accessible procedure*" enabling the applicants to have access to "*all relevant and appropriate information*" (*Roche*, cited above, § 162). Such a positive obligation was found to exist also where applicants sought access to social service records containing information about their childhood and personal history (*Gaskin*, cited above; and *M.G. v. the United Kingdom*, no. 39393/98, 24 September 2002), and where the applicants were prevented from obtaining copies of their medical records (*K.H. and Others v. Slovakia*, no. 32881/04, 28 April 2009).

In response to the applicants' complaint under Article 10 of the Convention in some of these cases, the Court has found that that provision is either inapplicable or that there had been no interference with the applicants' rights, as protected by Article 10 (i.e. freedom to

receive information from those who are willing to impart it – see *Roche; Gaskin; Guerra and Others*; and *Leander*, cited above).

Although the existence of positive obligations under Article 8 of the Convention is well established, the effective exercise of Article 10 rights may also require positive measures of protection, even in the sphere of relations between individuals. The responsibility of a State may be engaged as a result of not observing its obligation to enact appropriate domestic legislation (*Vgt Verein gegen Tierfabriken v. Switzerland*, no. 24699/94, § 45, ECHR 2001-VI). In private law disputes, a violation of the Convention can be established where a national court's interpretation of a legal act, be it a private contract, a public document, a statutory provision or an administrative practice appears unreasonable, arbitrary, discriminatory or, more broadly, inconsistent with the principles underlying the Convention (*Khurshid Mustafa and Tarzibachi v. Sweden*, no. 23883/06, § 33, 16 December 2008; *Pla and Puncernau v. Andorra*, no. 69498/01, § 59, ECHR 2004-VIII).

In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which is inherent throughout the Convention. The scope of this obligation will inevitably vary, having regard to the diversity of situations, the difficulties involved in policing modern societies and the choices which must be made in terms of priorities and resources. Nor must such an obligation be interpreted in such a way as to impose an impossible or disproportionate burden on the authorities (*Özgür Gündem v. Turkey*, no. 23144/93, § 43, ECHR 2000-III; *Appleby and Others v. the United Kingdom*, no. 44306/98, § 39, ECHR 2003-VI).

### 3) Recent developments

The Court has recently moved towards a broader interpretation of the notion of freedom to receive information and thereby towards the recognition of a right to information (*Társaság a Szabadságjogokért v. Hungary*, no. 37374/05, § 35, 14 April 2009). In contrast to its previous approach, it has found that a refusal of access to documents held by the authorities constituted an interference with the applicants' rights under Article 10 (*Sdružení Jihočeské Matky v. the Czech Republic* (dec.), no. 19101/03, 10 July 2001; *Társaság a Szabadságjogokért*, cited above). Although the public has a right to receive information of general interest, Article 10 does not guarantee an absolute right of access to all official documents (see, for example, *Sdružení Jihočeské Matky*, cited above, where the refusal of access, requested by an environmental association, to technical details of construction of a nuclear power plant was found to be justified by the Court). However, once a national court has granted access to documents, the authorities cannot obstruct the execution of the court order. In the context of historical research, the Court has found that access to original documentary sources in the State archives is an essential element of the exercise of Article 10 rights (*Kenedi v. Hungary*, no. 31475/05, § 43, 26 May 2009).

The Court has further emphasised the importance of the right to receive information also from private individuals and entities. While political and social news might be the most important information protected by Article 10, the freedom to receive information does not extend only to reports of events of public concern, but covers cultural expressions and entertainment as well (*Khurshid Mustafa and Tarzibachi*, cited above, where the applicants – an immigrant family of Iraqi origin – were evicted from their flat following their refusal to remove a satellite dish by which they received television programmes in Arabic and Farsi).

#### 4) Restrictions

Under the terms of paragraph 2 of Article 10, the exercise of the freedom to receive and impart information may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society in the pursuit of a legitimate aim. In the context of the freedom of the press, the Court has frequently underlined that not only does the press have the task of imparting information and ideas of public interest, the public also has the right to receive them. Therefore, particularly strong reasons must be provided for any measure limiting access by the public to such information (see, among many other authorities, *Times Newspapers Ltd*, cited above, §§ 40-41). Associations of civil society whose function is similar to the role of the press benefit equally from the strong protection of Article 10. The authorities cannot create obstacles and barriers to the gathering of information in matters of public importance, especially if they hold monopoly of the information (see *Társaság a Szabadságjogokért*, cited above, where the applicant association was denied access to the details of a parliamentarian's complaint before the Constitutional Court which contained information of public interest).

In the impugned restriction does not originate directly from the State, but from non-State actors, the Court's analysis focuses on the State's positive obligation to protect the exercise of the person's Article 10 rights from interference by others. It takes into account a number of factors in its assessment, including the nature of the right at stake and its importance to the applicant; the weight of competing interests; any public interest elements; the availability of alternative means of receiving or communicating information, and the nature and scope of restrictions (see *Khurshid Mustafa and Tarzibachi*, cited above, §§ 44-50; *Appleby and Others*, cited above, §§ 41-49).

#### 5) Access to Internet

The Court has not yet had the occasion to rule on a complaint concerning a denial or restriction of access to the Internet. Such complaints have however already been filed under Article 10. In September 2010, the Court communicated to the respondent Government a complaint by a Lithuanian prisoner have had been refused access to Internet in order to enrol at a university.<sup>10</sup> The same year several complaints were lodged against Turkey where the authorities had blocked access to certain Internet sites in order to fight crime and protect the rights of authors. In one case, the applicant's website was blocked due to a technical difficulty in separating it from a site which had been subject to a prohibition order by the authorities. In the other case, the applicant was a user of websites dedicated to music and social networking. These cases were communicated to the respondent Government in February 2011.<sup>11</sup>

#### 6) Conclusion

The above short overview demonstrates that the right to information has received increasing recognition by the Court. The impact of the development of Internet on this right has not yet been examined however. It is likely that the Court will face a growing number of complaints in this area.

State interference in the form of blocking, filtering or otherwise restricting access to Internet will be subject to strict scrutiny by the Court in accordance with its well established case-law. States also have a positive obligation to adopt appropriate legislation and provide

10. [Jankovskis v. Lithuania, no. 21575/08](#), for statement of facts and questions to the parties

11. [Yildirim and Akdeniz v. Turkey](#), nos. 3111/10 and 20877/10

accessible and effective procedures for the exercise of the right to receive and impart information. In this connection, issues may arise if a State provides public service exclusively through Internet which is not widely accessible or the service is financially onerous.<sup>12</sup>

## VI. OBLIGATION OF STATES TO COMBAT VIOLENCE AND OTHER CRIMINAL OR UNLAWFUL ACTIVITIES ON INTERNET<sup>13</sup>

### *A. Internet: Positive obligations of States and rights of individuals to be protected*

#### *1) Protection of the vulnerable, including children and minors*

##### (a) Paedophiles using the Internet

A twelve-year-old boy was the victim of an unknown individual who placed a sexual advertisement about him on an Internet dating site. His father had not been able to bring proceedings against anyone, because the legislation in Finland at the time did not allow police or the courts to require Internet service providers to identify the person who had posted the advertisement. The Court, after reiterating the principle that certain conduct called for criminal sanctions, found that the State had failed to fulfil its positive obligation to protect the child's right to respect for his private life, as the protection of the child from physical and mental harm had not taken precedence over the requirement of confidentiality. The concept of physical and mental integrity is protected as an aspect of private life under Article 8. In that context, anonymity and confidentiality on the Internet must not lead States to refuse to protect the rights of potential victims, especially where vulnerable persons are concerned. The protection of confidentiality cannot be absolute and must yield to other legitimate imperatives, such as the prevention of disorder or crime or the protection of the rights and freedoms of others. Appropriate and effective investigations and proceedings must therefore be provided for by the national authorities to deal with such offences, even if this entails interference in the relations of individuals between themselves.

The Court concluded as follows in its *K.U. v. Finland* judgment, cited above:

(...) Without prejudice to the question whether the conduct of the person who placed the offending advertisement on the Internet can attract the protection of Articles 8 and 10, having regard to its reprehensible nature, it is nonetheless the task of the legislator to provide the framework for reconciling the various claims which compete for protection in this context. Such framework was not however in place at the material time, with the result that Finland's positive obligation with respect to the applicant could not be discharged.

This judgement adapts to the issue of cybercrime the principles set out in *M.C. v. Bulgaria*, cited above, concerning positive obligations for member States in the protection of the vulnerable, such obligations being inherent in Articles 3 and 8 of the Convention.

##### (b) Pornography freely accessible on the Internet

As indicated by the Court in the case of *Perrin*, cited above, a criminal conviction for pornographic and scatological photographs on the Internet, accessible free of charge on a

12. For example, the notification of judicial decisions only through a paid subscription to a bulletin on the Internet may have implications for respecting the time-limits for appeal and thus for the right of access to a court under Article 6 of the Convention. See *Farcas and Others v. Romania*, no. 30502/05, for the facts and complaints

13. Information up to date until 22 March 2011.

preview page (without any age checks) may fall under the State's obligation to protect morals and the rights of others.

The State is at fault if it does not protect or seek to protect young people, a vulnerable category, in its legislation. According to the Court,

The fact that there may be other measures available to protect against the harm does not render it disproportionate for a Government to resort to criminal prosecution, particularly when those other measures have not been shown to be more effective.

## 2) On-line publication of photos showing sexual practices

In *Pay v. the United Kingdom* (dec.) (no. 32792/05, 16 November 2008), the applicant was a probation officer dealing with sex offenders who had just been released from prison. He was dismissed by his employer after the latter had found out that he chaired an association promoting sexual practices; its website advertised sadomasochistic equipment and included a link to another website which contained photographs of the applicant, hooded, taking part in performances. The Court found that this interference was justified as an employee owed to his employer a duty of loyalty, reserve and discretion, and in view of the sensitive nature of the applicant's work with sex offenders. The Court did not consider that the national authorities had exceeded the margin of appreciation available to them in adopting a cautious approach as regards the extent to which public knowledge of the applicant's sexual activities could impair his ability effectively to carry out his duties. It was important that he maintained the respect of the offenders placed under his supervision and also the confidence of the public in general and victims of sex crime in particular.

## 3) Protection of immigrants and foreigners – and accordingly of public order and of social harmony

### **(a) Racist or xenophobic discourse, discrimination and racial hatred using the Internet**

States might have a pressing social need to protect public order and the rights of others, for example, the rights of the immigrant community, against vexatious and humiliating remarks and attitudes. Such conduct is likely to cause social tension and undermine trust in democratic institutions. It is therefore justified for States to act in order to reduce the harmful impact of racist and xenophobic discourse.

In the *Féret* case, cited above, the Court considered that the language used had clearly incited discrimination and racial hatred, stating as follows:

... it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance (including religious intolerance), provided that any 'formalities', 'conditions', 'restrictions' or 'penalties' imposed are proportionate to the legitimate aim pursued ...

Offences against the person committed by insulting, making fun of or defaming certain parts of the population or specific groups, or incitement of discrimination, suffice for the authorities to ensure the repression of racist discourse in relation to a freedom of expression that is used irresponsibly to undermine the dignity, or even the safety, of such population groups. Political discourse which incites hatred based on religious, ethnical or cultural prejudices represents a danger for social peace and political stability in democratic States.

... it is crucial for politicians, when expressing themselves in public, to avoid comments that might foster intolerance (see *Erbakan v. Turkey*, no. 59405/00, 6 July 2006, § 64).

... politicians should be particularly attentive to the defence of democracy and its principles, as their ultimate objective is indeed to take power.

... to incite the exclusion of foreigners constitutes a fundamental violation of individuals' rights and should therefore warrant particular precautions by everyone, including politicians.

The Court reiterated how important it was for States to combat racial discrimination in all its forms and manifestations. The Court referred to the texts of the various resolutions of the Committee of Ministers of the Council of Europe concerning the ECRI's action to combat racism, xenophobia, anti-Semitism and intolerance. It added:

The Court attaches particular weight to the medium used and the context in which the impugned remarks were expressed in the present case, and consequently their potential impact on public order and social cohesion.

Finally, it emphasised the principle whereby it is “*necessary for [the authorities] to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of [their] adversaries*”.

**(b) Incitement to a boycott and discrimination against foreign produce on the Internet**

A mayor has duties and responsibilities. He must retain a certain neutrality and has a duty of reserve in his acts when they engage, as a whole, the local authority that he represents. He must not incite it to spend according to a discriminatory logic (*Willem*, cited above, §§ 35-41).

**4) *Internet and States' obligations in matters of corruption***

**(a) Importance of transparency of local policy**

In *Wytych v. Poland* (dec.) (no. 2428/05, 25 October 2005), a town councillor was obliged to disclose details concerning his financial situation and property portfolio. The declaration was to be subsequently published in a Bulletin available to the general public via the Internet, together with the declarations of all the councillors, failing which he would forfeit his monthly remuneration. The applicant complained that the publication might make him and his family a target for criminal acts.

Whilst the measure constituted interference with the applicant's private and family life the Court found that it was necessary in a democratic society for the “*prevention of crime*”, in this case corruption in politics. In this context, the use of the Internet for the publication of such information was a safeguard to ensure that the obligation to declare was subject to public scrutiny, since in the Court's view:

The general public has a legitimate interest in ascertaining that local politics are transparent and Internet access to the declarations makes access to such information effective and easy. Without such access, the obligation would have no practical importance or genuine incidence on the degree to which the public is informed about the political process.

**(b) Money laundering and defamation**

*The Times* published two articles alleging that a huge system of money-laundering had been set up by G.L., who was presented as a Russian mafia boss, and his name was given in full in the initial article. The two articles in question were posted on the Times website on the very day of their publication in the paper version of the newspaper. While a first set of libel proceedings was underway, the articles remained on the Times website, where they were accessible to Internet users as part of the archive of past issues. A second libel action was then brought in relation to the continuing Internet publication of the articles. The defendants then added to the on-line articles a preface to the effect that each article was subject to libel

litigation and should not be reproduced or relied on without reference to Times Newspapers Legal Department.

In its judgment *Times Newspapers Ltd*, cited above, the Court considered it significant that, although libel proceedings in respect of the two articles were initiated in December 1999, the applicant had not added any qualification to the articles in its Internet archive until December 2000. The Court observed that the Internet archive in question was managed by the applicant itself and the domestic court had not suggested that potentially defamatory articles should be removed from archives altogether. In the circumstances, the Court did not consider that the requirement to publish an appropriate qualification to an article contained in an Internet archive constituted a disproportionate interference with the right to freedom of expression.

The Court stated that the introduction of limitation periods for libel actions was intended to ensure that defendants sued for libel were able to defend claims effectively. It was for contracting States to set an appropriate limitation period.

While an aggrieved applicant must be afforded a real opportunity to vindicate his right to reputation, libel proceedings brought against a newspaper after a significant lapse of time may well, in the absence of exceptional circumstances, give rise to a disproportionate interference with press freedom under Article 10 of the Convention.

#### 5) Protection of Internet communications and State's obligations

##### **(a) State's obligation to provide for sufficiently accessible and clear legislation**

Monitoring by the employer of an employee's personal use of an Internet connection, together with the collection and storage of data (sites visited, dates and duration of visits), without the employee's knowledge, has been found to fall under Article 8. Moreover, the employer in this case being a public body, the question related to the negative obligation on the State not to interfere with the applicant's private life. As regards the lawfulness of this interference, the Court confirmed in *Copland*, cited above, §§ 45-46 and 48) that;

... it is well established in the case-law that the term 'in accordance with the law' implies – and this follows from the object and purpose of Article 8 – that there must be a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by Article 8 § 1. This is all the more so in areas such as the monitoring in question, in view of the lack of public scrutiny and the risk of misuse of power ...

This expression not only requires compliance with domestic law, but also relates to the quality of that law, requiring it to be compatible with the rule of law ... In order to fulfil the requirement of foreseeability, the law must be sufficiently clear in its terms to give individuals an adequate indication as to the circumstances in which and the conditions on which the authorities are empowered to resort to any such measures ...

... as there was no domestic law regulating monitoring at the relevant time, the interference in this case was not 'in accordance with the law' as required by Article 8 § 2 of the Convention. The Court would not exclude that the monitoring of an employee's use of a telephone, e-mail or internet at the place of work may be considered 'necessary in a democratic society' in certain situations in pursuit of a legitimate aim. However, having regard to its above conclusion, it is not necessary to pronounce on that matter in the instant case.

As regards the sufficiently accessible nature of the law, the Court considered in the case of *Perrin*, cited above, that if a person is operating a website as a professional activity, he can be reasonably expected to have proceeded with a high degree of caution when pursuing his occupation and to take legal advice.

##### **(b) Objective difficulties that technical resources are not always able to overcome**

In *Muscio v. Italy* (dec.) (no. 31358/03, 13 November 2007), the chairman of an association of Catholic parents, who had received spam e-mails of a pornographic nature, challenged a refusal to act on his complaint against persons unknown. The Court found that the reception of undesirable communications could be regarded as interference with private life. However, e-mail users, once connected to the Internet, could no longer enjoy effective protection of their private life and were exposed to the reception of undesirable messages that they could control by the use of computer “filters”. A number of countries and network operators encountered objective difficulties in combating the spam phenomenon and tracing the senders of such messages, and technical resources were not always able to help. In such circumstances the Court was not able to find that the State, to fulfil any positive obligations it might have had under Article 8, should have made additional efforts. In its view:

... IT network operators act in the framework of agreements with State authorities and under their supervision. Accordingly, if the applicant believed that negligence could be imputed to the State or the operator to whose service he subscribed, on account of a lack of supervision and/or of efficient protection against the dispatch of unsolicited e-mails, he could have brought an action for damages before the civil courts.

## ***B. General principles concerning States’ positive obligations to prevent criminal and unlawful activities***

### ***1) Positive obligation to protect individuals against slavery and human trafficking under Article 4***

In its judgment in the case of *Rantsev v. Cyprus and Russia*, no. 25965/04, §§ 289 and 307, 7 January 2010, the Court found that, in addition to the obligation to conduct a domestic investigation into events occurring on their own territories, member States are also subject to a duty in cross-border trafficking cases to cooperate effectively with the relevant authorities of other States concerned in the investigation of events which occurred outside their territories. Otherwise the traffickers can act with impunity. The need for a full and effective investigation covering all aspects of trafficking allegations from recruitment to exploitation is indisputable. States must take into consideration the entire trafficking network, involving the countries of origin and transit as well as the destination country.

### ***2) Positive obligations to protect individuals, including children, against physical harm and sexual abuse***

#### **Positive obligations to punish rape and other violence and sexual abuse under Articles 3 and 8**

The State’s positive obligations may involve the adoption of measures even in the sphere of the relations of individuals between themselves. In the case of *M.C. v. Bulgaria*, cited above, the Court found that:

... States have a positive obligation inherent in Articles 3 and 8 of the Convention to enact criminal-law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution.

Effective deterrence against grave acts such as rape, where fundamental values and essential aspects of private life are at stake, requires efficient criminal-law provisions. Children and other vulnerable individuals, in particular, are entitled to effective protection.

The positive obligation to conduct an official investigation cannot be considered in principle to be limited solely to cases of ill-treatment by State agents.

3) Positive obligations to combat racism, hate speech, discrimination, intolerance, and glorification of violence and terrorism

The Court has had a number of cases on this subject, including for example:

– *Jersild v. Denmark*, 23 September 1994, § 30, Series A no. 298

... [the Court] is particularly conscious of the vital importance of combating racial discrimination in all its forms and manifestations.

– *Gündüz*, cited above, § 40

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

– *Gündüz*, cited above, § 41

... there can be no doubt that concrete expressions constituting hate speech, which may be insulting to particular individuals or groups, are not protected by Article 10 of the Convention.

As regards hate speech and the glorification of violence, the Court deemed in *Sürek*, cited above, that a fine imposed on the applicant who had disseminated separatist propaganda as the owner of a review calling for bloody vengeance could reasonably be regarded as answering a “*pressing social need*”.

Similarly, an applicant’s conviction for complicity in glorification of terrorism after publishing a drawing concerning the attacks of 11 September 2001 was found to be compliant with Article 10 of the Convention (*Leroy v. France*, no. 36109/03, 2 October 2008). In view of the sensitive nature of the combat against terrorism, the conviction pursued a number of legitimate aims: maintaining of public safety, prevention of disorder and crime. The work had not simply criticised US imperialism but glorified its destruction by violence. The caption under the cartoon expressed moral solidarity with the terrorists. To praise an act of violence perpetrated against thousands of civilians offended the dignity of the victims.

4) Publications or remarks directed against the Convention’s underlying values

... like any other remark directed against the Convention’s underlying values ..., the justification of a pro-Nazi policy could not be allowed to enjoy the protection afforded by Article 10 .

[there is a ] category of clearly established historical facts – such as the Holocaust – whose negation or revision would be removed from the protection of Article 10 by Article 17.

These statements by the Court in *Lehideux and Isorni v. France*, 23 September 1998, §§ 53 and 47, *Reports of Judgments and Decisions* 1998-VII) demonstrate that acts incompatible with democracy and human rights unquestionably pursue the type of objective prohibited by Article 17 of the Convention and thus do not benefit from Article 10 (e.g. denial of crimes against humanity; see also *Garaudy v. France* (dec.), no. 65831/01, ECHR 2003-IX).

A general and virulent attack against a particular ethnic group is at odds with the values of tolerance, social peace and non-discrimination that underlie the Convention and do not benefit from the protection of Article 10 (*Pavel Ivanov v. Russia* (dec.), no. 35222/04, 20 February 2007). The same applies to remarks directed against the Convention’s underlying values:

racist and anti-Semitic (*Garaudy*, cited above) or islamophobic remarks (*Norwood v. the United Kingdom* (dec.), no. 23131/03, 15 November 2004).

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